

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NUMBER F201548

IRENE MITCHELL, EMPLOYEE

CLAIMANT

FEDERAL MOGUL CORPORATION, EMPLOYER

RESPONDENT

TRAVELERS INSURANCE COMPANY, CARRIER

RESPONDENT

OPINION FILED SEPTEMBER 8, 2003

The hearing was conducted on August 7, 2003, before ADMINISTRATIVE LAW JUDGE DON N. CURDIE, at Pine Bluff, Jefferson County, Arkansas.

The claimant was represented by Everett O. Martindale, Attorney at Law, Little Rock, Arkansas.

The respondent was represented by Phillip Cuffman, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on August 7, 2003, in Pine Bluff, Arkansas. It was stipulated as follows:

1. The employee-employer-carrier relationship existed at all relevant times.
2. The temporary total disability rate is \$276.00, and the permanent partial disability rate is \$207.00.
3. The claimant sustained a compensable injury to her left upper extremity on January 16, 2002.

The issues to be litigated at the hearing were as follows:

1. Is claimant entitled to temporary partial disability from February 4,

2002, to March 6, 2002?

2. Is claimant entitled to temporary total disability from March 7, 2002, to May 1, 2002, and from May 16, 2002, through June 19, 2002?

3. Is claimant entitled to payment of medical bills by respondent?

4. The respondents allege that much of claimant's medical treatment was from unauthorized treating physicians. Respondents also request credit for unemployment compensation that was received.

The claimant testified that she was injured on January 16, 2002. The claimant was a custodian (janitorial services), and testified that she worked approximately ten to twelve hours a day, and averaged fifty to sixty hours per week.

The claimant testified regarding her work related injury:

"A. I was mopping the men's bathroom and I lost my balance and I fell and my elbow hit the drainage in the men's bathroom there.

Q. Which elbow?

A. My left one.

Q. All right, you hit the drain and did you know immediately that you had hurt it?

A. Yes, I fell in a puddle of water and I couldn't get up for a minute there, so I crawled to the door and I saw a guy working there and I asked him to come here and he come to the door, up close enough to hear what I was saying and he went and got Ms. Hilson, and Ms. Madden, I believe, came to the door and rolled me out in a chair.

Q. Okay. So your employer also knew, pretty quickly, that you were injured?

A. Yes."
(T-11)

The claimant was taken to see a general practitioner, Dr. Asemota, who

was selected by the respondents. X-rays were taken and the claimant returned to work the next day. The claimant testified that she worked in a light duty capacity, but did not actually perform many work related duties. The claimant was paid the same rate of pay for eight hours.

From February 4, 2002, to March 6, 2002, claimant's number of hours were reduced to six hours per day.

On February 18, 2002, the claimant returned to see Dr. Asemota. According to the claimant's testimony, she asked Mary Madden, in the Human Resource Office of respondent/employer, to send her to a specialist. The claimant testified that Ms. Madden told her she could go to a specialist, but she would be responsible for the charges because she was supposed to go see the company doctor (Asemota) first.

The claimant, on her own, went to see Dr. Peter Go, a surgeon, after respondent/employer did not give permission to see him as an authorized treating physician. According to the claimant, when Ms. Madden did not make the appointment, the claimant made the appointment with Dr. Go.

According to the claimant, on January 28, Dr. Go took x-rays because the claimant's left elbow was still swollen. According to the claimant, Dr. Go wanted to send her to a specialist, and the claimant wanted to see Dr. Charles Clark, an orthopaedic surgeon in Little Rock, AR. According to the claimant, Dr. Go made the appointment for claimant to see Dr. Clark. On or about February 26, Dr. Clark took an MRI of the claimant's elbow and discovered a fracture. According to the MRI of the elbow dated March 4, 2002, Dr. Clark prescribed physical therapy for the claimant, who

testified that she continued to work. However, on March 6, 2002, the claimant took a voluntary lay-off in the department to which she had been transferred. According to the claimant, she expected to be asked to return to work on April 8, 2002.

The claimant testified that she received unemployment compensation from on or about March 8 to on or about April 19, 2002, at the rate of \$242.00 per week. According to the claimant, she has been required to repay one week of that unemployment compensation.

The claimant testified that on May 1, 2002, she returned to work making \$8.74 per hour. She worked two weeks, and she testified that she was unable to perform her regular job. She returned to Dr. Clark, according to the claimant, and Dr. Clark removed the claimant from work, ordering more physical therapy. The claimant was off work from May 16 through June 19, 2002.

When claimant returned to work, the respondent needed detailed excuses for her alleged medically-related absence. The claimant testified that she telephoned Dr. Clark, asking him to mail records to the respondent/employer showing that she was removed from work by the doctor for this June, 2002 period of time. Apparently, Dr. Clark's office did not get the records to respondent/employer, and on June 21, 2002, the claimant was terminated by respondent.

The claimant had obtained a job with another employer by June 26, 2002, making \$7.00 per hour. According to the claimant, she wants all of her medical bills paid for, subsequent to Dr. Asemota. The claimant also testified that she wants medical mileage for all travel to and from the doctors, for physical therapy and for other medically related reasons. She testified that she lost 96 hours due to having to leave work to go

to the doctor. The claimant admitted that at no time did she ever receive an order from the Arkansas Workers' Compensation Commission authorizing a change of physician.

The claimant testified that at the time of the hearing, her elbow was still stiff. She uses a heating pad and pain medications daily. She experiences tingling and numbness from her elbow to her wrist. She testified that her left arm is weak.

Ms. Pearlie Hilson, human resources manager with respondent/employer, testified regarding the claimant's work history. She testified that the claimant was injured on January 16, 2002. Her records and testimony reflect that the claimant worked a reduced number of hours at her regular rate of pay through February 17. From February 18 through April 8, the claimant was on voluntary lay-off. According to Ms. Hilson, it was not a mandatory lay-off, but was offered to the claimant, who agreed to take it. The claimant received no work-related pay during that period of time.

According to Ms. Hilson, the claimant returned to work from the lay-off on April 8, 2002. Ms. Hilson related that the claimant was aware of the date that she would be allowed to return to work when she left on the voluntary lay-off in February, 2002. She returned to her old job that she had prior to her injury at the same rate of pay. According to Ms. Hilson, the claimant worked until May 28, 2002. Beginning May 29, and extending through June 17, the claimant was on medical leave and had excuses for her leave of absence from May 23 through June 10, and from June 13 through June 17. According to Ms. Hilson, when the claimant returned to work, there were no work related restrictions, and she performed her old job. After she returned, she worked until June 27, and then was terminated due to un-excused absences. The termination, according to Ms. Hilson, was related to the un-excused days from the

medical leave of absence in June, 2002.

_____ **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. The employee-employer-carrier relationship existed at all relevant times.

2. The temporary total disability rate is \$276.00, and the permanent partial disability rate is \$207.00.

3. The claimant sustained a compensable injury to her left upper extremity on January 16, 2002.

4. The preponderance of the evidence reflects that the claimant is entitled to temporary partial disability benefits from February 4, 2002 to March 6, 2002.

5. The preponderance of the evidence reflects that the claimant is not entitled to temporary total disability benefits from March 6, 2002 through May 1, 2002. The preponderance of the evidence reflects that the claimant is entitled to temporary total disability from May 23, 2002 to June 10, 2002, and from June 13, 2002 to June 17, 2002.

6. The preponderance of the evidence reflects that since the Form AR-N (regarding the rules for changing physicians) was not delivered to claimant, she was not required to follow the change of physicians rules. The preponderance of the evidence reflects that the medical treatment rendered to the claimant was reasonably necessary medical treatment and related to claimant's compensable injury, and is the responsibility of the respondents.

7. The preponderance of the evidence reflects that the respondents shall have a credit (according to the statute) for unemployment compensation paid to

the claimant during the period which claimant is entitled to temporary disability.

8. The preponderance of the evidence reflects that the claimant is entitled to medical mileage for medically-related travel from January 16, 2002 through June 13, 2002.

9. The claimant's authorized treating physician is Dr. Charles Clark.

10. The preponderance of the evidence reflects that the claimant is entitled to temporary partial or temporary total disability during the previously mentioned appropriate time periods for the hours she was away from work attending doctors appointments, and did not receive wages for the hours she was away from work. The parties shall determine the hours according to the records maintained by the employer's human resources office.

11. The preponderance of the evidence reflects that the claimant is entitled to an attorney's fee.

DISCUSSION

1. TEMPORARY PARTIAL DISABILITY FROM FEBRUARY 4, 2002 TO MARCH 6, 2002

The claimant alleges that she is entitled to temporary partial disability from February 4, 2002, to March 6, 2002. Temporary disability is determined by the extent to which a compensable injury has affected the claimant's ability to earn a livelihood. An injured employee is entitled to temporary total disability compensation (for a scheduled injury) during the period of time that she is within her healing period and has not returned to work. Wheeler ConstructionCo. V. Armstrong, 73 Ark. App. 146, 41 S.W. 3rd

822 (2001.). An injured employee is entitled to temporary partial disability compensation during the period that she is within her healing period and suffers only a decrease in her capacity to earn the wages that she was receiving at the time of the injury. In the present matter, the claimant sustained a compensable left upper extremity injury on January 16, 2002. She immediately sought medical attention from the authorized treating physician, Dr. Asemota. According to the claimant, she returned to work the next day, but did not perform her regular duties. According to the testimony, on February 4, 2002 she started working six hours per day instead of her usual ten to twelve hours per day. According to the claimant, the respondent/employer deducted the hours spent traveling to and from medical treatment and physical therapy. The claimant, ultimately, had an MRI on March 4, 2002, which showed a fractured elbow. Dr. Clark sent the claimant to physical therapy. On March 6, the claimant accepted a voluntary lay-off. The preponderance of the evidence reflects that the claimant was rendered temporarily partially disabled from February 4, 2002, through March 6, 2002. During that time she was certainly in a healing period (fractured elbow) and was being paid at a reduced rate of pay.

2. TEMPORARY TOTAL DISABILITY FROM MARCH 6, 2002, THROUGH MAY 1, 2002, AND FROM MAY 16, 2002, THROUGH JUNE 19, 2002

The claimant is entitled to temporary total disability if she is within her healing period and has not returned to work. The claimant stated that she received unemployment compensation at \$242.00 per week for five or six weeks. According to the claimant, she returned to work on or about May 1, 2002. The claimant and respondent's witness seemed to agree that she accepted a voluntary lay-off. According

to the respondent's witness, the claimant was offered the voluntary lay-off and she accepted it. Claimant received unemployment compensation, thereby making herself available for work. The witness for the respondent indicated that the claimant returned to work on or about April 8 from the voluntary lay-off. The preponderance of the evidence reflects that the claimant was in a healing period, but did not return to work due to a work related injury, but because she took a voluntary layoff. She apparently returned to work on or about April 8, 2002. She is not entitled to temporary total disability for the period in question.

The claimant requests temporary total disability from May 16, 2002, through June 19, 2002. According to the witness for the respondents, claimant returned to work from the voluntary lay-off on April 8, 2002. According to the respondent's witness, the claimant earned the same rate of pay as she earned in her old job and returned to work performing those duties. The preponderance of the evidence reflects that the claimant returned to work after she was voluntarily laid off. According to the claimant, she was earning \$8.74 per hour. The claimant worked for a period of time, but she testified that she was not able to perform her regular job. She returned to see Dr. Clark, who, according to claimant, removed her from work. Respondent's Exhibit 2 is an off-work slip showing that claimant was removed from work from May 23, 2002, to June 10, 2002. Respondent's Exhibit 1, indicates that Dr. Charles Clark removed the claimant from work on June 13, 2002, with a note to return to work with no restrictions on June 17, 2002. The claimant alleges that she is entitled to temporary total disability from May 16, 2002, through June 19, 2002. According to the respondent's witness, the claimant (according to the records), had an excuse from

work for medical leave from May 23, 2002, through June 10, 2002, and from June 13, 2002, until June 17, 2002. The respondent's witness indicated that the claimant did not have a doctor's excuse for the days June 11 and 12, 2002. Ms. Hilson testified that since the claimant could provide no excuse for why she missed the above mentioned days in June, she was terminated for the un-excused days. As stated earlier, the claimant is entitled to temporary total disability for the time within which she is in a healing period and has not returned to work. According to Ms. Hilson, the claimant had excused medical absences from May 23, 2002, through June 10, 2002, and from June 13, 2002, through June 17, 2002. The claimant testified that during the period of late May and early June, she was not able to perform the regular duty job that she had. The preponderance of the evidence reflects that the claimant is entitled to temporary total disability from May 23, 2002, to June 10, 2002, and from June 13, 2002, until June 17, 2002. The claimant was still being treated by Dr. Clark during that time and was removed from work by Dr. Clark.

3. PREVIOUS MEDICAL TREATMENT

According to the claimant, she was taken by the respondent/employer to see Dr. Asemota on the date of her injury. Even though she returned to work the next day at light duty, her elbow continued to severely swell. She was given light duty for a period of time. According to the claimant she asked the human resources manager for the respondent/employer, Mary Madden, to be able to see a specialist. Ms. Madden told her that she would have to pay for it because the claimant was supposed to go see Dr. Asemota. The claimant, on her own, went to see Dr. Go, who referred her to Dr. Clark. Dr. Clark took an MRI and sent the claimant for extensive physical therapy.

Apparently, the respondent did not controvert the claimant's compensability. However, the respondent controverts paying for medical treatment from an unauthorized treating physician. The physicians that treated the claimant reported that she fractured her elbow. According to the claimant's testimony, she obtained another job with a different employer on June 26, 2002. The respondents argue that the claimant's treatment subsequent to Dr. Asemota was not authorized pursuant to the change of physician statutes. However, since the record does not indicate that the claimant was provided a Form AR-N, I cannot find that the claimant failed to follow the change of physician rules. The rules are inapplicable in that situation. See: A.C.A. § 11-9-514(c)(2); Goad-Lovett v. Tyson Shared Services, Inc., WCC # E911941 (February 12, 2001). Claimant's physicians subsequent to Dr. Asemota were appropriate.

The respondent's have failed to meet the threshold requirement to establish that the claimant should have, but failed to, properly follow the change of physician rules. The respondent's argument that the above mentioned treatment was unauthorized must fail. Therefore, since WCC Form AR-N was not delivered to the claimant, the change of physician rules are inapplicable. Verbal notice of the change of physician rules is insufficient. Stephenson v. Tyson Foods, Inc., 70 Ark. App. 265 19 S.W.3d 36 (2000). Therefore respondent's argument that medical treatment subsequent to Dr. Asemota was unauthorized is erroneous.

Employers must promptly provided medical services which are reasonably necessary for treatment of compensable injuries. A.C.A. § 11-9-508(a) (Supp. 1997). However, injured employees have the burden of proving by a preponderance of the evidence that medical treatment is reasonably necessary for the treatment of the

compensable injury. In assessing whether a given medical procedure is reasonably necessary for treatment of a compensable injury, we analyze both the proposed procedure and the condition it is sought to remedy. What constitutes reasonable and necessary medical treatment is a question of fact for the Workers' Compensation Commission. The issue remains as to whether the claimant's medical treatment subsequent to Dr. Asemota is reasonably necessary. The claimant testified that her elbow is often stiff. She uses a heating pad and pain medication daily. She experiences tingling and numbness from her elbow to her wrist. An MRI on March 4, 2002, reflected a fracture of claimant's left elbow, as well as swelling. As late as June 13, 2002, the claimant received injections into her elbow. She also received a prescription for Bextra. On June 13, 2002, she was returned to full and active duty without limitations. Dr. Clark stated to return as needed. There are no subsequent medical records regarding her elbow from that date. The claimant testified that she expects to go back to Dr. Clark for an impairment rating.

The preponderance of the evidence in this case reflects that the medical treatment subsequent to Dr. Asemota was reasonably necessary and related to claimant's compensable injury to her left upper extremity on January 16, 2002. Therefore, the claimant is entitled to the medical treatment she received from January 16, 2002, through June 13, 2002, as reasonably necessary medical treatment to be paid for by respondent/carrier.

The preponderance of the evidence reflects that the respondents should receive a credit for unemployment compensation received by claimant for this work related injury in the statutory amounts. The preponderance of the evidence reflects that

the claimant is entitled to medical mileage for medical treatment from January 16, 2002, through June 13, 2002. Dr. Charles Clark is appointed the authorized treating physician for the claimant.

The claimant testified that during the time that she was working, subsequent to her compensable injury, she had to leave work to go to doctor appointments and then return to work. According to the claimant, she was not paid for hours away from work at the doctor's office. For a scheduled injury, temporary total disability is applicable during a period when claimant was within a healing period and has not returned to work. The time within which the claimant was within a healing period was stated previously in this Opinion. The preponderance of the evidence in this case reflects that the claimant is entitled to temporary partial or total disability (depending on when the time off work was taken) for those hours which claimant used for doctor's appointments and then returned to work. These benefits are only applicable during the specific time periods between January 16, 2002, and June 13, 2002 when claimant was within a healing period (as discussed earlier.)

The claimant is entitled to an attorney's fee for controversion of the above- mentioned benefits.

AWARD

The claimant is awarded the disability and medical benefits described above, along with a statutory attorney's fee pursuant to the Arkansas Workers'

Compensation Law. This award shall bear interest at the legal rate until paid.

IT IS SO ORDERED.

DON N. CURDIE,
Administrative Law Judge

DC