

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F205638

GENEVA RAULSTON,
EMPLOYEE

CLAIMANT

AMTRAN,
EMPLOYER

RESPONDENT

AMERICAN TRANSPORTATION CORPORATION,
INSURANCE CARRIER

RESPONDENT

OPINION FILED AUGUST 7, 2003

Hearing conducted before ADMINISTRATIVE LAW JUDGE MARK CHURCHWELL at Little Rock, Pulaski County, Arkansas.

The claimant was represented by HONORABLE MICHAEL KNOLLMEYER, Attorney at Law, Jacksonville, Arkansas.

The respondents were represented by HONORABLE BRUCE D. ANIBLE, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on the above-styled claim on July 1, 2003 in Little Rock, Arkansas. A prehearing order was entered in this case on or about May 29, 2003. A copy of this prehearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. A copy of this prehearing order was made Commission's Exhibit No. 1 to the hearing. The following stipulations were submitted by the parties and are hereby accepted:

1. The claimant sustained a compensable injury on May 1, 1997.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited to the following:

1. The claimant's request for continuing medical treatment and a change of physician.

The record consists of the transcript of the July 1, 2003 hearing, with exhibits contained therein, the respondents' post-hearing brief received on July 16, 2003, the claimant's post-hearing brief received on August 4, 2003, and various documentation of correspondence between myself and Pat Hannah and between myself and Christy at Searcy Medical Center regarding whether Dr. Blickenstaff is appropriate for the change of physician requested in this case. I have "blue backed" the briefs and the correspondence.

DISCUSSION

The parties agree that the change of physician issue presented in this case is governed by the provisions of Ark. Code Ann. § 11-9-514(a) (Repl. 2002), which states in relevant part:

(3) Following establishment of an Arkansas managed care system as provided in § 11-9-508, subdivisions (a) (1) and (2) of this section shall become null and void, and thereafter:

(A) (i) The employer shall have the right to select the initial primary care physician from among those associated with managed care entities certified by the commission as provided in § 11-9-508.

(ii) Where the employer has contracted with a managed care organization certified by the commission, the claimant employee, however, shall be allowed to change physicians by petitioning the commission one (1) time only for a change of physician to a physician who must either be associated with the managed care entity chosen by the employer or be the regular treating physician of the employee who maintains the employee's medical records and with whom the employee has a bona fide doctor-patient relationship demonstrated by a history of regular treatment prior to the onset of the compensable injury, but only if the primary care physician agrees to refer the employee to the managed care entity chosen by the employer for any specialized treatment, including physical therapy, and only if such primary care physician agrees to comply with all the rules, terms, and conditions regarding services performed by the managed care entity chosen by the employer.

In Collins v. Lennox Ind., Inc., 77 Ark. App. 303, 75 S.W.3d 204 (2002), the Arkansas Court of Appeals interpreted Section 514(a) (3) (A) (ii) such that, if the employer has contracted with a managed care organization, the claimant has an absolute right to a change of physician. The Court interpreted that the employer has not fulfilled its obligation of providing adequate medical treatment without

allowing the mandatory change of physician discussed in the statute. In Wal-Mart Stores, Inc. v. Brown, ___ Ark. App. ___, ___ S.W.3d ___ (June 25, 2003), the Arkansas Court of Appeals further interpreted Section 514(a)(3)(A)(ii) such that the employer must pay for the initial visit to the new physician in order to fulfill the employer's obligation to provide adequate medical services under Ark. Code Ann. § 11-9-508.

For their part, the respondents contend that additional medical treatment provided by Dr. Long, the claimant's authorized treating physician, or by any other physician, would not be reasonable and necessary. Furthermore, the respondents intend to challenge the statutory interpretation of the Arkansas Court of Appeals in Collins, supra and in Brown, supra. As I understand the respondents' argument, the respondents assert that a claimant cannot receive a change of physician without first establishing that the additional treatment at issue is reasonably necessary for the work related injury.

For her part, the claimant contends that the preponderance of the evidence will establish that she is entitled to additional medical treatment, and the claimant seeks a finding that additional medical treatment provided

by Dr. Blickenstaff, a Searcy orthopedic surgeon, is reasonably necessary for treatment of her compensable injury. In the alternative, if I am unable to find on the existing record that additional treatment by Dr. Blickenstaff is reasonably necessary for the claimant's compensable shoulder injury, the claimant seeks a one-time change of physician to Dr. Blickenstaff and requests that I find the respondents liable for the payment of at least a one-time evaluation by Dr. Blickenstaff, consistent with the statutory interpretation of the Arkansas Court of Appeals in Brown, supra.

As a threshold matter, I note that the respondents' post-hearing brief received on July 16, 2003 explains why the respondents feel that the Collins and Brown decisions are inconsistent with the respondents' interpretation of Ark. Code Ann. § 11-9-508 and 514. However, I also note that after contending in the prehearing conference and at the hearing that no additional medical treatment is reasonably necessary for the claimant in the present case, the respondents' post-hearing brief contains no discussion of the evidence in the record or argument to support their contention that no additional treatment is reasonably necessary for the claimant in the present case. For my

part, after reviewing the entire record, and for the reasons discussed below, I find that the claimant has established by a preponderance of the credible evidence in the record before me that further evaluation of her 1997 shoulder injury by Dr. Kyle Blickenstaff is reasonably necessary for treatment of that injury. Under these circumstances, it would appear to me that the respondents' challenge to the decision of the Court of Appeals in Collins and Brown is therefore moot.

In concluding that the claimant has established by a preponderance of the evidence that further evaluation by orthopedic surgeon Kyle Blickenstaff in Searcy is reasonably necessary for treatment of her 1997 shoulder injury, I note that a preponderance of the evidence in the record including both voluminous medical reports and the claimant's credible testimony, persuades me that the claimant sustained a severe and persistent right shoulder injury on May 1, 1997. Following a significant period of conservative medical treatment for that injury, the claimant ultimately underwent a rotator cuff repair, achromioplasty, and distal clavicle resection surgery sometime in the summer of 2000. The medical reports in evidence indicate that the claimant still experienced persistent right shoulder pain, in addition to

other upper extremity problems, after the 2000 shoulder surgery. The claimant was ultimately placed on permanent work restrictions, including no overhead work with her right upper extremity, no repetitive pushing or pulling with her right upper extremity, and no lifting over 20 pounds with her right upper extremity.

The claimant ultimately underwent an independent medical evaluation by Dr. Jim Moore, a neurosurgeon, for her right shoulder problems on January 29, 2003. In his evaluation report that date, Dr. Moore chronicles and summarizes the claimant's treatment. Dr. Moore discussed his determination of a restriction of motion within the claimant's shoulder, the degree of permanent partial impairment she sustained as a result of her injury and surgery, which was apparently never rated by her operating surgeon, Dr. Dodge, and Dr. Moore summarized his recommendations as follows:

I think the patient would benefit from a post-op MRI of the shoulder to see if there is anything else that would be appropriate to recommend and perhaps a follow-up visit with her operating surgeon would be worthwhile. I do not see any evidence of any neurologic component in this patient's complaints. I would agree that the ongoing use of medication will be required. Close follow will be necessary, of course.

The medical record also contains a post-evaluation MRI performed on April 4, 2003 indicating post-surgical abnormality that the reporting radiologist described as "difficult to identify without the previous study for comparison." The record also contains an EMG assessment, apparently performed on April 14, 2003, which indicates compromise at the level of the mid-cervical nerve roots on the right. The claimant testified that since the time of Dr. Moore's evaluation, she has only received follow-up medication from Dr. Long, and as discussed above, the respondents are no longer willing to accept liability for treatment from Dr. Long or any other physician.

In light of the persistent nature of the claimant's shoulder problems, Dr. Moore's recommendation of a post-op MRI, Dr. Moore's indication that a follow-up visit with her surgeon would be worthwhile, the abnormalities indicated on the subsequent MRI, and the abnormalities indicated in a subsequent EMG, I find that the claimant has established by a preponderance of the credible evidence in the record that an additional evaluation by a shoulder specialist for her persistent right shoulder work-related injury is reasonably necessary at this time.

While I recognize that Dr. Moore suggested a follow-up with the claimant's prior operating surgeon (Dr. Dodge), I also note that the respondents are no longer willing to accept liability for Dr. Dodge's treatment, that the claimant would prefer a specialist in Searcy closer to her hometown, and I note that Dr. Blickenstaff can provide a fresh perspective on this persistent injury, if he is willing to provide the evaluation that the claimant seeks.

Furthermore, the respondents' attorney advised me in a letter dated July 2, 2003 that the respondents' MCO is First Source, and pursuant to a prior Commission directive to Administrative Law Judges, I have contacted the Medical Cost Containment Division of the Commission and have been advised by Ms. Pat Hannah that Dr. Blickenstaff in Searcy is on the MCO provider list for First Source. I have also contacted Searcy Medical Center and determined that Dr. Blickenstaff continues to accept workers' compensation patients.

Therefore, for all of the reasons discussed above, it appears to me that the claimant has satisfied all of the requirements necessary to establish that she is entitled to a change of physician to Dr. Blickenstaff under either the respondents' statutory interpretation of Ark. Code Ann. §

11-9-514(a) (3) (A) (ii) or under the statutory interpretation of the Court of Appeals in Collins and Brown.

On the other hand, I also note that since the respondents concede that they are unwilling to provide the claimant any additional medical treatment from any physician, the claimant would not appear to be bound by the change of physician rules at all. See generally Sanyo Mfg. Corp. v. Farrell, 16 Ark. App. 59, 696 S.W.2d 779 (1985); Le v. Simmons Foods, Full Workers' Compensation, Opinion filed January 28, 2003 (W.C.C. E815277); Lybrand v. Saline Nursing Center, Full Workers' Compensation Commission, Opinion filed October 23, 2002 (W.C.C. E908946); Bennett v. Earth Grains of Little Rock, Full Workers' Compensation Commission, Opinion filed March 17, 1997 (W.C.C. E317764); Setser v. Bechtel Construction Corporation, Full Workers' Compensation Commission, Opinion filed June 18, 1997 (W.C.C. E102964).

Finally, I note in passing that if Dr. Blickenstaff performs his evaluation and determines that the claimant will not require any additional specialized treatment for her admittedly compensable shoulder injury, then Dr. Blickenstaff may very well determine that it is appropriate to refer the claimant to a local non-specialist for the continued follow-up which Dr. Moore anticipates, should Dr.

Blickenstaff likewise determine that the claimant will require additional medication and associated follow-up care.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.

2. The claimant sustained a compensable shoulder injury on May 1, 1997.

3. The claimant has established by a preponderance of the credible evidence that additional medical treatment provided by Dr. Kyle Blickenstaff is reasonably necessary for treatment of her 1997 work-related shoulder injury.

4. The claimant has established that she is entitled to a change of physician to Dr. Kyle Blickenstaff.

5. Since the respondents challenge the claimant's entitlement to any additional medical treatment from any physician, the claimant is not bound by the change of physician rules according to prior precedent of the Arkansas Court of Appeals and the Arkansas Workers' Compensation Commission.

AWARD

The respondents are directed to provide additional medical treatment in accordance with the findings of facts set forth herein.

The claimant's attorney is entitled to a \$200 attorney's fee for the change of physician awarded herein, in accordance with Ark. Code Ann. § 11-9-715(c)(1) to be paid in accordance with the provisions of Ark. Code Ann. § 11-9-715(a)(2)(B)(i).

IT IS SO ORDERED.

MARK CHURCHWELL
Administrative Law Judge