BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM F311250

DONNA L. HAMAKER, EMPLOYEE	**CLAIMANT**
BAPTIST HEALTH, SELF-INSURED EMPLOYER	**RESPONDENT**
REBSAMEN INSURANCE, INC., D/B/A CROCKETT ADJUSTMENT, BENEFITS ADMINISTRATOR	**RESPONDENT**

OPINION FILED JUNE 25, 2004

Hearing conducted April 22, 2004, before Administrative Law Judge Richard B. Calaway in Little Rock, Pulaski County, Arkansas, with

The Claimant proceeding pro se, and

Ms. Gail Ponder Gaines, Attorney at Law, Little Rock, Arkansas, appearing for the respondents.

STATEMENT OF THE CASE

This is a dispute over whether there has been a statutory one-time change of physician pursuant to the Commission's Change of Physician Order or merely a change by mutual agreement; whether the respondents are liable for the claimant's treatment by Dr. Scott Schlesinger; and the amount of the claimant's average weekly wage at the time of her admittedly compensable low back injury.

The claimant contended, in effect, that the Change of Physician Order of December 23, 2003, should be vacated and that she should be permitted to receive neurosurgical treatment at the expense of the respondents from either Dr. James Adametz or Dr. Scott Schlesinger, without the necessity of using her statutory one-time change of physician. She also contended that she should be reimbursed in the amount of $1,259.65 for the expenses of her previous treatment by

Dr. Schlesinger. She further contended that her average weekly wage was $946.86, but was underestimated by the respondents as $471.04, resulting in an underpayment of benefits for disability. Other possible issues, including sanctions and additional benefits for disability, were reserved.

The respondents contended that the claimant's average weekly wage was $471.04 based upon the contract of hire in effect at the time of her injury, which provided that she would work as needed, which sometimes meant she would not work at all. They further contended that the claimant's theory would allow her to receive more by way of temporary total disability benefits than she would have earned in wages had she not be injured.

They also contended that the claimant was timely provided with a copy of Form N explaining her change of physician rights; that the Change of Physician Order should be affirmed; that the claimant is entitled to seek treatment with Dr. Adametz pursuant to the Order; and the treatment Dr. Schlesinger is unauthorized and, thus, not compensable. They further contended that they stand ready to furnish reasonably necessary medical care pursuant to valid referrals and the Change of Physician Order to Dr. Adametz.

They reserved the right to plead further and to seek Rule 11 Sanctions if the claimant continues to pursue frivolous claims against them.

Based upon the record as a whole, and without giving the benefit of the doubt to any party, as required by the Act, the following findings of fact and conclusions of law are hereby made:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of the parties and subject matter of this claim.

2. Pursuant to the stipulations of the parties and the record, the employment relationship existed at all pertinent times; on March 16, 2003, the claimant sustained a compensable low back injury, arising out of and in the course of her employment; and the respondents have accepted the claim as compensable and have undertaken to pay various benefits, including temporary total disability benefits from July 28, 2003, through January 7, 2004, as well as benefits based upon an impairment rating of 5% to the body as a whole, assigned by Dr. John L. Wilson.

3. The Change of Physician Order of December 23, 2003, should be vacated and the claimant is entitled to seek reasonably necessary medical care from Dr. James Adametz pursuant to the agreement of the parties.

4. The claimant's treatment by Dr. Scott Schlesinger was unauthorized and is not the responsibility of the respondents.

5. Pursuant to Ark. Code Ann. §11-9-518, the claimant's average weekly wage at the time of her injury is properly calculated at $471.04.

DISCUSSION

On March 16, 2003, the claimant suffered a low back injury during her employment as a registered nurse for the respondent employer when she caught a patient, who was falling out of bed, and felt immediate pain in her back while straining to hold and lower the patient to the floor. She eventually sought medical care and was sent to Baptist Medical Center Fast Track Emergency Room on the evening of March 18 where she was treated by Dr. Young. Thereafter, she went to the Baptist Medical Center Work Injury Clinic and saw Dr. Kennedy.

The claimant notified that the respondents that in spite of her medical care she was continuing to have problems and, consequently, she was directed by nurse case manager JoAnn

Crowe to consult Dr. Bruce Safman. Dr. Safman had the claimant undergo an MRI scan, whereupon Ms. Crowe advised the claimant that she needed to see someone such as Dr. John L. Wilson, which was agreed to by the claimant since Dr. Wilson was an orthopedic surgeon she had heard of.

Dr. Wilson saw the claimant in July, 2003, took her off work, and recommended physical therapy and epidural steroid injection therapy. After the claimant underwent a functional capacity assessment, Dr. Wilson on January 8, 2004, wrote that she had sustained a bulging disc at L4-5 and impairment of 5% to the body, which he did not feel could be substantially reduced by further therapy or surgical procedure.

The claimant felt that her condition was gradually getting worse and that she needed to get approval from the employer or carrier to see a neurologist. On December 8, 2003, she contact Ms. Crowe, advised her of her symptoms and told her that she felt she needed to see a neurologist. The claimant stated that Ms. Crowe said her condition merited evaluation by a neurosurgeon and felt confident that the carrier would approve. The claimant testified that, although the parties agreed on Dr. Adametz, the claimant made it clear that she was open to see any neurosurgeon that Ms. Crowe and Rudy Bischof would agree to. The claimant also stated that Ms. Crowe indicated that she was confident that Mr. Bischof would agree, but told her that she would need something in writing from the claimant to take to Mr. Bischof for his approval and further advised the claimant to mention Dr. Adametz by name and to address the letter "To Whom It May Concern," because Mr. Bischof would need to send a copy to others to keep them informed. The claimant stated that Ms. Crowe also told her it was okay to go ahead and make the appointment and that she would contact the claimant if for some reason Mr. Bischof did not approve. The claimant stated there was never any discussion about petitioning the Commission for any reason, including a one-time change of physician. The

claimant further testified that Ms. Crowe sent the petition to the Commission by facsimile transmission December 8 without the claimant's knowledge, approval, or consent, and that this eventually resulted in the issuance of the Change of Physician Order.

On this issue, Ms. Crowe's testimony was not substantially inconsistent with the claimant's. For example, she stated that she, not the claimant, initiated the idea of the first two changes of physician, first to Dr. Bruce Safman and then to Dr. John L. Wilson, and that she suggested both doctors by name. She further testified that it was the claimant's idea to see somebody else in December, 2003, when her treatment with Dr. Wilson was winding up. She stated that she explained to the claimant that that was indeed possible and that there was a process that was necessary for her to go through, and that included a request in writing. She said she told the claimant that she should say if she had anybody in mind and the claimant mentioned Dr. Redding and Dr. Adametz. Ms. Crowe said that her experience with that group indicated that they were excellent physicians and she did not see that there should be a problem with them. She further testified that she told the claimant to request in writing a change of physician, that it would expedite the process if she identified Dr. Adametz and to send it to her, Ms. Crowe, and she would forward it to the necessary parties, but did not indicate who the parties were, other than Mr. Bischof. She confirmed that she faxed to the Commission the claimant's request to change to Dr. Adametz.

However, on cross-examination, she admitted that the claimant did not give her permission to petition the Commission to change physicians. Indeed, the testimony of Ms. Crowe is consistent with the claimant's theory that, given their two previous amicable discussions and mutual agreements to change physicians to Dr. Safman and then to Dr. Wilson, there was insufficient indication that the agreement to change to Dr. Adametz would be something different and would

actually constitute the claimant's statutory one-time change of physician, which had to be approved by the Commission. Simply put, in the context of their previous dealings, their discussion of Dr. Adametz is more consistent with another mutually agreed change of physician or referral. The claimant stoutly denies that she wished to present the Commission with a petition to change physicians and, further, asserts that she understood the parties were merely, once again, agreeing to change doctors. The fact that the question of another physician was brought up by the claimant, while the first two changes were suggested by the respondents, is not a determining factor under the circumstances.

After the claimant had appealed the Change of Physician Order, she was reluctant to see Dr. Adametz, even though his services were available either pursuant to the one-time Change of Physician Order or as the result of a mutually agreed change. Accordingly, she consulted Dr. Schlesinger, on her own, on one occasion and incurred expenses which were not authorized and are not the responsibility of the respondents under the circumstances.

On the other hand, the claimant's testimony tending to show that, around the time of the injury, she was presented a defective Form N, with only one side, and not the usual two-sided Form N with the change of physician advice on the back is not credible and is not supported by other evidence of record. It is simply more likely that the claimant either failed to examine the back of the form or only briefly looked at the back of the form and did not carefully review the change of physician advice at the time it was presented to her. Because she received the form, the rules apply in this case. See, Ark. Code Ann. §11-9-514.

Ark. Code Ann. §11-9-518 provides that the rate of compensation shall be computed on the average weekly wage earned by the employee under the contract of hire in force <u>at the time of the</u>

accident and in no case shall be computed on less than a full-time workweek in the employment. This section goes on to provide guidance for computing the average weekly wage for those are paid on a piece basis and also addresses the issue of overtime earnings. Finally, the section states that the Commission is to determine the average weekly wage by a method that is just and fair to all parties concerned, an indication of how the provision should ultimately be applied.

Here, the claimant testified that in the 52 weeks prior to the injury, she earned $13,684.93, but should be thought to have an average weekly wage of $946.86. However, the evidence shows that the claimant was not required to work a full-time workweek and was able to work, when work was offered, if the claimant chose to do so. It was her testimony that she had entered into various contracts from time to time, but at the time of the injury was not under any obligation to work a full-time workweek for the respondent employer. This was an arrangement primarily of her choosing and for her convenience, since she had two small children at home at the time.

The respondents calculated the claimant's average weekly wage as $471.04 by dividing $14,131.33, the total gross wages paid over a 52-week period, by 30, the number of weeks actually worked during that time.

Both methods could arguably be seen as overstating the claimant's average weekly wage for the period of the preceding 52 weeks, since the claimant was not obligated to work a full-time workweek at the time of the injury and the level of her wages was determined primarily by her willingness to take advantage of the work offered to her. Under the circumstances, since the respondents have accepted the figure of $471.04 as the average weekly wage, this figure is just and fair to all parties concerned and should be accepted as the claimant's average weekly wage. When considering the issue of fairness, it is of some concern that a similarly injured co-worker for the same

employer who earned over $24,000.00 during the same 52-week period would be compensated based upon the same average weekly wage as this claimant's, even though more had been paid in wages over the same period. On the other hand, the claimant's theory is consistent with an average weekly wage of approximately $49,000.00 earned over the same 52-week period and does not approach the concept of being fair and just to the parties.

AWARD AND ORDER

Pursuant to the foregoing opinion and the law, the respondents are ordered and directed to pay benefits on behalf of the claimant, specifically including reasonably necessary medical and related expenses incurred as a result of her treatment by Dr. James Adametz.

The claimant's post-hearing motions are wholly without merit, have been rendered moot by this decision, and should be, and they are hereby, respectfully denied and dismissed.

IT IS SO ORDERED.

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RICHARD B. CALAWAY
Administrative Law Judge