

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F407232

DONNA GREENFIELD,
EMPLOYEE

CLAIMANT

CONAGRA FOODS, INC.,
SELF-INSURED EMPLOYER

RESPONDENT

OPINION FILED JUNE 3, 2005

Hearing conducted before ADMINISTRATIVE LAW JUDGE MARK CHURCHWELL, in Batesville, Independence County, Arkansas.

The claimant was represented by HONORABLE GARY DAVIS, Attorney at Law, Little Rock, Arkansas.

The respondent was represented by HONORABLE BILL H. WALMSLEY, Attorney at Law, Batesville, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on March 23, 2005 in Batesville, Arkansas. A prehearing order was entered in this case on January 10, 2005. 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 record.

The following stipulations were submitted by the parties and are hereby accepted:

1. Existence of employment relationship on February 23, 2004.

2. Claimant sustained a compensable injury on February 23, 2004.
3. Claimant's average weekly wage on February 23, 2004, was \$420.80.
4. Claimant continued working from February 23, 2004, through August 18, 2004.
5. Claimant has had previous surgery at L4-5 level on February 24, 2000, and at L5-S1 level on December 3, 2003, performed by Dr. Zachary Mason, as well as surgery on both feet in December, 2000, performed by Dr. Lipke.
6. Claimant made a request for a change of physician at the expense of respondent by letter dated July 21, 2004, and respondent denied the claimant was entitled to a change of physician by letter dated August 13, 2004.
7. The claimant went to Dr. Zachary Mason and he performed surgery on her cervical spine on August 19, 2004.
8. The Administrator of Medical Cost Containment Division of the Workers' Compensation Commission denied the request for the change of physician by correspondence dated September 15, 2004, and the

claimant appealed that decision by correspondence dated September 20, 2004.

9. In the event the respondent was found liable for the medical treatment at issue provided by Dr. Mason, the respondent has controverted the medical treatment provided by Dr. Mason.

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

Claimant:

1. Change of physician and/or appeal of the Medical Cost Containment Division's September 15, 2004 denial of a change of physician to Dr. Zachary Mason.
2. Authorization for medical treatment.
3. Controverted attorney's fee.

Respondent:

1. Whether the claimant is entitled to a retroactive change of physician to Dr. Zachary Mason at the expense of the respondent.
2. Whether Dr. Zachary Mason was authorized to perform surgery on the claimant on August 19, 2004.

3. Whether the surgery performed by Dr. Zachary Mason on August 19, 2004, was reasonable and necessary as a consequence of the injury of February 23, 2004, and further was causally related to such compensable injury.
4. Whether respondent had notice of the surgery performed on the claimant on August 19, 2004.
5. Whether the claimant's injury of February 23, 2004, was merely a transitory and temporary injury.
6. If compensable, whether the respondent is entitled to credit for group medical and indemnity benefits paid to the claimant.

The record consists of the three volume March 23, 2005 hearing transcript and the exhibits contained therein. In addition, I have made part of the record after the hearing Mr. Davis' March 23, 2005 letter and enclosed copy of Sandra Hawkins v. Jefferson Regional Medical Center, Full Workers' Compensation Commission, Opinion filed August 12, 2003 (E502382, E709020, F003389); Mr. Walmsley's March 24, 2005 letter and enclosed copy of Sharp v. Lewis Ford, Inc., 78 Ark. App. 164, 78 S.W.3d 746 (2002); and Mr. Walmsley's

March 29, 2005 letter advising me that the parties would not submit the testimony of Rita Garlin.

DISCUSSION

1. Evidentiary Objections

The Workers' Compensation Commission has broad discretion with reference to admission of evidence, and the Commission's admissibility finding will not be reversed absent a showing of abuse of discretion. Brown v. Alabama Elec. Co., 60 Ark. App. 138, 959 S.W.2d 753 (1998). Ark. Code Ann. § 11-9-705(a) (Repl. 2002) provides:

(1) In making an investigation or inquiry or conducting a hearing, the Workers' Compensation Commission shall not be bound by technical or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter, but may make such investigation or inquiry, or conduct the hearing, in a manner as will best ascertain the rights of the parties.

The Commission should be more liberal with the admission of evidence, rather than more stringent. Bryant v. Staffmark, Inc., 76 Ark. App. 64, 61 S.W.3d 856 (2001).

Mr. Walmsley objected on page 23 of the hearing transcript to Mr. Davis' proffer of Ms. Garlin's testimony regarding whether the claimant was honest and straightforward in the claimant's dealings with Ms. Garlin. Under Rule of Evidence 608, to which we are not bound, Mr.

Davis' question regarding truthfulness to Ms. Garlin would appear inappropriate when asked, since at that time the claimant had not yet testified and the claimant's character for truthfulness had not yet been called into question by Mr. Walmsley. However, I note that Mr. Walmsley did specifically raise the claimant's credibility or lack of credibility as a relevance justification for his own subsequent questioning of the claimant on page 71 of the hearing transcript. Therefore, in the interest of fairness, Ms. Garlin's disputed testimony on page 23 of the hearing transcript is admitted and will be considered in rendering a decision.

Mr. Walmsley objected on page 50 of the hearing transcript to Ms. Greenfield's hearsay testimony of her co-worker, Ronnie, and to Ms. Greenfield's hearsay testimony on page 54 of the hearing transcript as to what Dr. Bates told her. I find that this hearsay testimony should be accorded no weight, and the disputed testimony will not be considered in rendering an opinion in this case.

Likewise, Mr. Walmsley objected on page 67 of the hearing transcript to Ms. Greenfield's testimony that no lost time performance was more important to Con-Agra than the human being doing the job. I find that this testimony

is likewise speculation and will be accorded no weight in rendering a decision in this case.

Mr. Davis objected on page 71 of the hearing transcript to Mr. Walmsley's cross-examination regarding the claimant's testimony and her medical reports as to how many days elapsed between the time of her injury and the first time that she presented to Dr. Bates, I note that Mr. Walmsley's question goes to the veracity of the witness' testimony, and therefore the weight to be accorded her testimony. Consequently, Mr. Davis' objection is overruled. Finally, I find that the claimant's testimony elicited by Mr. Walmsley regarding what Dr. Schlesinger told Ms. Greenfield during her examination is hearsay testimony. Therefore, Ms. Greenfield's disputed testimony on page 86 of the hearing transcript will not be considered in rendering a decision in this case.

2. Change of Physician/Authorization Issues

A. Did the respondents controvert the claimant's entitlement to additional medical treatment at any point so that the change of physician rules no longer applied?

As a general rule, treatment or services furnished or prescribed by unauthorized physicians shall be at the claimant's expense. See Ark. Code Ann. § 11-9-514

(C) (3) (Repl. 2002). However, the change of physician rules do not apply absent proof that the claimant received a copy of the change of physician rules from the respondent either in person or by certified registered mail. Ark. Code Ann. § 11-9-514 (C) (1) & (2). See also, Stephenson v. Tyson Foods, Inc., 70 Ark. App. 265, 19 S.W.3d 36 (2000). In addition, if a preponderance of the evidence establishes that the claimant's authorized treating physicians refuse to see her again, and the respondents refuse to provide a new physician, than the change of physician rules do not apply after the claimant has been denied additional authorized medical treatment. See Sanyo Mfg. Corp. v. Farrell, 16 Ark. App. 59, 696 S.W.2d 779 (1985); Bennett v. Earth Grains of Little Rock, Full Workers' Compensation Commission, Opinion filed March 17, 1997 (E317764); Sharon Lybrand v. Saline Nursing Center, Full Workers' Compensation Commission, Opinion filed October 23, 2002 (E908946).

In the present case, the record establishes that the claimant signed a Form-N essentially contemporaneous with her injury, and began a course of treatment with her authorized treating physician in Batesville, Dr. Bates. The claimant received a neurosurgical referral to Dr. Schlesinger. Dr. Schlesinger released Ms. Greenfield on

June 7, 2004. Ms. Greenfield returned to Dr. Bates on June 10, 2004, and Dr. Bates likewise released Ms. Greenfield from his care with a one week prescription for physical therapy. Physical therapy was completed on June 18, 2004.

Ms. Greenfield presented to Dr. Zachary Mason for a second neurosurgical opinion on June 29, 2004. Dr. Mason recommended surgery. Ms. Greenfield returned to Con-Agra on June 30, 2004 and advised Anita Vanravensway of her need for additional medical treatment and Dr. Mason's recommendation for surgery. The preponderance of the credible evidence established that on June 30, 2004, Ms. Vanravensway advised Ms. Greenfield that she could see whatever physician that she wanted to, but that she would need to put the treatment on her group health insurance. (T. 59, 72-73, 105). On these facts, I find that the respondents controverted Ms. Greenfield's entitlement to additional medical treatment on June 30, 2004, when the claimant advised Ms. Vanravensway that she needed additional treatment (after her prior release by both authorized physicians), and Ms. Vanravensway did not arrange for any additional authorized treatment to be provided by the respondent. I therefore find that the change of physician rules no longer applied in this case after June 30, 2004, and Ms. Greenfield was therefore free

to seek additional reasonably necessary medical treatment after that date from any physician of her own choosing.

Farrell, supra.

Consequently, with regard to respondent's hearing issue no. 2, I find that Dr. Mason was not authorized by the respondent to treat the claimant or to perform surgery on August 19, 2004. However, as I understand the law, in light of the respondent's June 30, 2004 controversion, no authorization was required since the claimant was free to seek reasonably necessary treatment from any physician of her own choosing. With regard to respondent's hearing issue no. 8, I find that the respondent became aware of Dr. Mason's proposal for surgery on June 30, 2004. (T. 104).

B. Even if the respondent had not controverted the claimant's entitlement to additional medical treatment on June 30, 2004, would the claimant still be entitled to a one time change of physician to Dr. Zachary Mason for her compensable neck injury?

An injured worker with an admittedly compensable injury has an absolute statutory right to a one time change of physician pursuant to Ark. Code Ann. § 11-9-514 (Repl. 2002). A change of physician is mandatory, and a respondent's assertion that further medical treatment is not reasonably necessary is not a defense to a requested change

of physician. Wal-Mart Stores, Inc. v. Brown, 82 Ark. App. 600, 120 S.W.3d 153 (2003). When a claimant petitions for his or her one time change of physician, the Administrative Law Judge and the Medical Cost Containment Division cannot ignore the claimant's choice of physician. If the claimant's choice is not selected, the decision maker must set forth the reasons for choosing a physician other than the one favored by the claimant. Johnny Rogers v. Chrisman Ready Mix, Inc., Full Workers' Compensation Commission, Opinion filed November 20, 2002 (F100985).

The undisputed facts in the present case are that claimant filed a request for a change of physician with the Commission by letter dated July 21, 2004. Respondent denied that the claimant was entitled to a change of physician by letter dated August 13, 2004. Dr. Mason performed surgery on August 19, 2004. The Medical Cost Containment Division's September 15, 2004 explanation for refusing Ms. Greenfield a change of physician to Dr. Zachary Mason reads in relevant part as follows:

When we called Dr. Zachary Mason's office to schedule an appointment for Ms. Greenfield, we were informed that he is already treating her and performed surgery on her in June [sic] 2004. Since she has already been treating with him for some time, it is not possible to grant her a change to Dr. Mason.

Thus, it appears that the Medical Cost Containment Division initially intended to order for the claimant her one time change of physician to Dr. Mason. For my part, I do not detect any legal authority in the Medical Cost Containment Division's letter, nor am I aware of any authority, which would support the Medical Cost Containment Division's decision to refuse the claimant a change of physician to Dr. Mason simply because the claimant was already treating with Dr. Mason at the time the Medical Cost Containment Division contacted Dr. Mason's office. In this regard, I note that the Courts and the Commission have long held that the Commission has discretion to impose liability on a respondent for services and treatment rendered by a new physician between the time the claimant files a petition for a change of physician and the date that the Commission actually enters an order authorizing the change. American Transportation Co. v. Payne, 10 Ark. App. 56, 661 S.W.2d 418 (1983); Wright Contracting Co. v. Randall, 10 Ark. App. 358, 676 S.W.2d 750 (1984); Paula Reed v. Jefferson Regional Medical Center, Full Workers' Compensation Commission, Opinion filed August 12, 1991 (E018666); Sandra Tatman v. A-1 Insulation, Inc., Full Workers' Compensation Commission, Opinion filed December 2, 1997 (E514658).

I note that the respondents have not suggested an alternative to Dr. Zachary Mason for the claimant's change of physician. I note that the claimant's symptoms, for what Dr. Schlesinger diagnosed as a musculoskeletal injury, did not resolve as all parties might have hoped, and I therefore find that a neurosurgeon to further evaluate the claimant's ongoing neck symptoms was an appropriate medical specialty for claimant's one time change of physician. Dr. Zachary Mason appears especially appropriate under the circumstances in light of his prior relationship with the claimant as the treating neurosurgeon for a previous lumbar spine condition.

Therefore, even if the preponderance of the evidence had not established that the respondent controverted the claimant's entitlement to additional medical treatment beginning on June 30, 2004, I would nevertheless find that the claimant has established by a preponderance of the evidence that she is entitled to a change of physician to Dr. Zachary Mason effective for treatment provided by Dr. Mason as of July 21, 2004, when her attorney filed a request for a change of physician with the Commission.

3. Has Dr. Mason's Surgery and Treatment Been Reasonably Necessary?

The employer must promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. Ark. Code Ann. § 11-9-508(a). The claimant must prove by a preponderance of the evidence that she is entitled to medical treatment. Dalton v. Allen Eng'g Co., 66 Ark. App. 201, 989 S.W.3d 543 (1999). What constitutes reasonably necessary medical treatment is a question of fact for the Commission. Wright Contracting Co. v. Randall, 12 Ark. App. 358, 676 S.W.2d 750 (1984).

I find that the claimant has proven by a preponderance of the evidence that Dr. Mason's surgery performed on August 19, 2004 and his post-surgical treatment was reasonably necessary for her compensable cervical injury for the following reasons. First, I note that although Dr. Schlesinger ascertained that Ms. Greenfield's cervical problems were musculoskeletal in nature, Dr. Mason clearly disagreed. In fact, I note from Dr. Mason's surgical notes that Dr. Mason surgically observed and treated posterior osteophyte abnormalities during surgery which were causing bilateral cord compression and which were removed during the

course of fusion surgery. Therefore, Dr. Mason's surgical observations persuade me that the claimant's medical condition was much more severe than what Dr. Schlesinger was able to ascertain by reviewing an MRI and performing his clinical examination previously.

Second, the preponderance of the credible evidence also persuades me that Ms. Greenfield achieved the intended benefit from Dr. Mason's surgery. In this regard, I note that Ms. Greenfield admirably continued to work both before surgery and after her surgical release. However, I note that Ms. Greenfield required routine doctor visits before surgery, but presented to Dr. Mason after surgery on only approximately three occasions prior to the hearing held on March 23, 2005. Dr. Mason's office notes indicate to me that Ms. Greenfield achieved an acceptable result from surgery, although she is apparently still within the healing stage for post-surgical bone fusion development, which in her case has required a bone growth stimulator.

In short, the medical record indicates that the claimant's fall at work aggravated previously asymptomatic abnormalities in her neck, that the cervical abnormalities caused spinal cord compression and related symptoms as a result of the injury, that surgery was required to treat the

spinal cord compression, that Dr. Mason's surgery was appropriate for the condition to be treated, and that Ms. Greenfield has had a reasonably successful result. Under these circumstances, I find that Dr. Mason's surgery and post-surgical treatment to promote bone fusion has been reasonably necessary to treat Ms. Greenfield's aggravation type injury.

The preponderance of the evidence does not support a conclusion that Ms. Greenfield's work related neck injury sustained on February 23, 2004 was merely a transitory and temporary injury, which resolved prior to Dr. Mason's surgery. Instead, I find, based on the persistent nature of Ms. Greenfield's reports of symptoms to her physicians and the testimony of co-workers regarding her persistent complaints, that the injury was not transitory or temporary, but was instead apparent to Dr. Mason at the time of surgery and appropriately treated by Dr. Mason during the course of surgery.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Existence of employment relationship on February 23, 2004.
2. Claimant sustained a compensable injury on February 23, 2004.

3. Claimant's average weekly wage on February 23, 2004, was \$420.80.

4. Claimant continued working from February 23, 2004, through August 18, 2004.

5. Claimant has had previous surgery at L4-5 level on February 24, 2000, and at L5-S1 level on December 3, 2003, performed by Dr. Zachary Mason, as well as surgery on both feet in December, 2000, performed by Dr. Lipke.

6. Claimant made a request for a change of physician at the expense of respondent by letter dated July 21, 2004, and respondent denied the claimant was entitled to a change of physician by letter dated August 13, 2004.

7. The claimant went to Dr. Zachary Mason and he performed surgery on her cervical spine on August 19, 2004.

8. The Administrator of Medical Cost Containment Division of the Workers' Compensation Commission denied the request for the change of physician by correspondence dated September 15, 2004, and the claimant appealed that decision by correspondence dated September 20, 2004.

9. In the event the respondent was found liable for the medical treatment at issue provided by Dr. Mason, the respondent has controverted the medical treatment provided by Dr. Mason.

10. The respondent controverted the claimant's entitlement to additional medical treatment on and after June 30, 2004.

11. The change of physician rules therefore no longer applied on or after June 30, 2004, and the claimant was free to seek reasonably and necessary medical treatment at the respondent's expense from any physician of her own choosing.

12. Even if a preponderance of the evidence had not established that the respondent controverted additional medical treatment on and after June 30, 2004, the claimant is entitled to a change of physician to Dr. Zachary Mason, as she has requested, effective on July 21, 2004, when she filed her request for a change of physician with the Commission.

13. The claimant has established by a preponderance of the credible evidence that the surgery and other medical treatment provided by Dr. Zachary Mason beginning on August 19, 2004 is reasonably necessary for treatment of her compensable cervical injury. Since the respondents did not controvert the claimant's entitlement to additional medical treatment until June 30, 2004, and since the claimant did not otherwise establish her entitlement to a change of physician for any treatment received prior to July 21, 2004,

the respondents are not liable for the treatment that Ms. Greenfield received from Dr. Mason on June 29, 2004.

14. To whatever extent that any group health care service plan or self-insured employee health plan may have previously paid for any of the medical services at issue in this claim for which I have found the respondents liable, I find that Con-Agra is entitled to a dollar-for-dollar offset equal to the amount of benefits that Ms. Greenfield has previously received for those same medical services paid under a group health care service plan for a self-insured employee health plan.

15. The claimant's attorney is entitled to a 25% attorney's fee on any indemnity benefits to which the claimant may become entitled as a result of the controverted medical treatment awarded herein.

ORDER

The respondents are directed to pay benefits in accordance with the findings of fact set forth herein.

IT IS SO ORDERED.

MARK CHURCHWELL
Administrative Law Judge