

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F401017

BRANDY WIGGINS	CLAIMANT
JOHNSON REGIONAL MEDICAL CENTER	RESPONDENT
RISK MANAGEMENT SERVICES, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED FEBRUARY 22, 2006

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Fort Smith, Sebastian County, Arkansas.

Claimant represented by LAURA MCKINNON, Attorney, Fayetteville, Arkansas.

Respondents represented by GUY WADE, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on November 29, 2005, in Fort Smith, Arkansas. A pre-hearing order was entered in this case on August 23, 2005. This pre-hearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. Immediately prior to the commencement of the hearing, the parties agreed on the appropriate weekly compensation rates. Also, immediately prior to the commencement of the hearing, the claimant altered her request for temporary total disability benefits to reflect that she was seeking such benefits for the period beginning October 11, 2004, and continuing through August 3, 2005. She further indicated that she was contending that she was entitled to benefits under Ark. Code Ann. §11-9-505(a) beginning on November 11, 2004. A copy of the pre-hearing order with these amendments noted thereon, was made Commission's Exhibit No. 1 to the hearing.

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

1. On November 17, 2003, the relationship of employee-self insured-employer-third party administrator existed between the parties.
2. The appropriate weekly compensation rates are \$231.00_for total disability and \$173.00 for permanent partial disability.
3. On November 17, 2003, the claimant sustained a compensable injury to her low back/hip.
4. There is no dispute over the payment of reasonable and necessary medical expenses incurred through August 9, 2004.
5. There is no dispute over the period of temporary total disability through August 9, 2004.

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 entitlement to the additional medical services after the claimant's initial evaluation by Dr. John Dunham.
2. The claimant's entitlement to additional temporary total disability benefits from October 11, 2004 through August 3, 2005.
3. The claimant's entitlement to benefits under Ark. Code Ann. §11-9-505(a), and after October 11, 2004.
4. Controversion and appropriate attorney's fees.

In regard to these issues, the claimant contends:

“It is claimant’s contention that the claimant sustained a compensable injury arising out of and in the course of employment with the respondent on or about 11/17/2003. Claimant contends entitlement to workers’ compensation benefits as set forth in the issues response in the prehearing memorandum and specifically, reasonable, necessary, and related medical expenses; temporary total disability benefits; A.C.A. §11-9-505 benefits; permanent partial/total disability benefits (reserved); and controverted attorney fees. All other benefits are reserved under the Act.”

In regard to these issues, the respondents contend:

“Respondents contend they accepted this claim as compensable and have paid all appropriate benefits. Claimant was released to return to work on August 9, 2004, with no limitations or disability.”

DISCUSSION

I. BENEFITS UNDER Ark. Code Ann. §11-9-505(a)

The first of the disputed issues to be discussed is the claimant’s entitlement to the benefits provided by Ark. Code Ann. §11-9-505(a), commencing on October 11, 2004. The applicable subsection of the Act states:

“Any employer who without reasonable cause refuses to return an employee who was injured in the course of the employment to work, where suitable employment is available within the employees’ physical and mental limitations, upon order of the workers’ Compensation Commission, and in addition to other benefits, shall be liable to pay to the employee the difference between the benefits received and the average weekly wages lost during the period of the refusal, for a period not to exceed one (1) year.”

The claimant’s request for benefits under Ark. Code Ann. §11-9-505(a) for the same period during which she is seeking temporary

total disability benefits is somewhat puzzling. It is clearly the claimant's current position and her testimony at the hearing that she has been totally unable to perform any form of regular gainful employment for which she was otherwise qualified since October 11, 2004. From the evidence presented, this appears to also have been her position in October of 2004, an opinion which she conveyed to the respondent at that time.

Clearly, the respondent cannot force the claimant to work, if she was of the opinion that she was physically unable to do so. However, the respondent appears to have offered her regular full time employment at that time. The claimant cannot refuse to work at the offered position and at the same time contend that the respondent should be penalized, under Ark. Code Ann. §11-9-505(a), for failing to make her to do.

The evidence presented undoubtedly shows that, when the claimant was released to return to full duty by her then treating physician (Dr. Barry Baskin), the respondent offered the claimant such a regular duty position. However, the claimant continued to work only sporadically following that date. Although she attributed the majority of her absences to her continued back difficulties, the evidence shows that a significant number of these absences were, in fact, due to other non job related causes. Many of the claimant's other absences were related to her injury only by her statements that her back difficulties were so severe on those dates that she could not work. These conclusions do not appear to have any real objective support.

The respondent's records, show that the claimant was ultimately terminated for excessive absenteeism on October 21, 2004. Based upon the evidence presented, I find that the respondent's actions in this regard were reasonable. Thus, the respondent's refusal to continue to provide the claimant with employment after October 21, 2004 was not without reasonable cause.

For the foregoing reasons, I find that Ark. Code Ann. §11-9-505(a) is inapplicable to the present claim. The claimant's request for benefits under this statute should be and hereby is denied.

II. ADDITIONAL MEDICAL SERVICES

The next issue to be addressed has been styled as the claimant's entitlement to additional medical services "after the claimant's initial evaluation by Dr. John Dunham." The medical evidence shows that the claimant was initially seen by Dr. Dunham for her low back and hip complaints on August 13, 2004. At that time, Dr. Dunham was simply the claimant's family physician. The claimant did not seek a change of physicians to Dr. Dunham until December of 2004, and was granted that change by this Commission until December 14, 2004.

It is well established that change of physicians cannot be granted retroactively. Thus, it would appear that the services, which were provided by and at Dr. Dunham's request prior to December 14, 2004 may be unauthorized under Ark. Code Ann. §11-9-514. However, I do not find this to be a controlling factor on the issue of liability for the expense of these services.

The respondents are only liable for the expense of “reasonable necessary medical services.” In order to represent “reasonably necessary medical services,” within the meaning of the Act, medical services must satisfy two criteria. First, the services must be necessitated by or have a purpose or goal that is connected with the compensable injury. Secondly, the medical services must have a reasonable expectation of accomplishing the purpose or goal for which they are intended.

The greater weight of the evidence presented provides that the medical services that were provided by and at the direction of Dr. Dunham, on and after August 13, 2004, were connected with the claimant’s continuing subjective complaints that involved her lower back, hip, and lower extremities. In his report of September 20, 2004, Dr. Dunham notes:

“While the etiology of the pain (with her low back and lower extremities) has eluded definition, she (the claimant) is still symptomatic and is unimproved.”

The evidence shows that the services provided by and at the direction of Dr. Dunham were intended to investigate the underlying etiology or cause for the claimant’s continued subjective complaints and to alleviate these subjective complaints. However, the evidence further shows that these additional medical services actually achieved neither of these purposes.

Clearly, a claimant is entitled to medical services reasonably necessary to accurately ascertain the nature and extent of the injury sustained. However, the medical evidence presented in this case shows that prior to the claimant’s initial visit with Dr.

Dunham, she had been evaluated by a number of physicians with varying specialities. Most of these physicians would appear to have far greater expertise in the area of medicine associated with the claimant's injury and complaints than that possessed by Dr. Dunham, who is a general practitioner. The record shows that the claimant had been seen and evaluated by Dr. Ted Honghiran (an orthopaedic surgeon), Dr. John L. Wilson (an orthopaedic surgeon), Dr. Barry Baskin (an orthopaedic surgeon), and Dr. Michael DuPriest (a chiropractic physician). At the request of these physicians, the claimant had undergone all of the various tests commonly recognized as being medically appropriate or necessary to accurately diagnose the nature and extent of the injuries producing the claimant's subjective symptoms and complaints involving her low back and lower extremities. These include plain x-rays of the claimant's lumbar spine, pelvis, and hip, two separate MRI's of the lumbar spine and, a nuclear enhanced full body bone scan. All of these tests were either negative or revealed only minimal degenerative arthritic changes or systemic conditions unrelated to trauma (such as the cyst involving one of the claimant's lumbar vertebra) that would not be compatible with the claimant's extensive subjective complaints. The claimant's numerous clinical examinations were also essentially normal, in regard to objective findings.

Clearly, the claimant would also be entitled to any medical services that had a reasonable expectation of improving the physical damage occasioned by her compensable injury or reducing the symptoms and complaints that such an injury was causing. In

this regard, the evidence shows that prior to the claimant's initial evaluation by Dr. Dunham, she had received substantial periods of every type of conservative treatment modality commonly employed in the treatment of injuries such as that experienced by the claimant. This treatment included extensive periods of rest or limited activity, the use of oral medication (in the form of anti-inflammatories and various types of narcotic pain medication), periods of physical therapy (including electrostimulation and ultrasound). She also received periodic treatment by use of injected medication directly into the affected areas. Finally, she had received a period of chiropractic manipulation. At this point, it must be noted that all of various physicians, who evaluated the claimant, are in agreement that, in light of based upon the claimant's examinations and test results, surgery was and is not medically appropriate.

It was clearly the expert medical opinion of Dr. Baskin that, by August 9, 2004, the claimant had been provided with all appropriate testing and evaluation necessary to reasonably insure an accurate diagnosis of the nature and etiology of her complaints. In this regard, it was Dr. Baskin's diagnosis that the claimant's compensable injury of November 17, 2003, was in the form of a simple tissue muscle strain or sprain. It was also the expert medical opinion of Dr. Baskin that the claimant had also achieved the maximum benefit of time and medical treatment by that date. In his report of August 9, 2004, Dr. Baskin clearly indicated that in his opinion no further medical services were reasonably necessary

to either accurately diagnose the nature and extent of the claimant's injury or to improve or resolve the claimant's continued subjective symptoms. After consideration of all the evidence presented, it was my finding that Dr. Baskin's opinion is supported by the evidence presented and is persuasive in regard to the claimant's entitlement to the additional medical services provided and recommended by Dr. Dunham.

The evidence shows that Dr. Dunham only recommended these additional services because the claimant continued to voice extensive subjective complaints. However, these subjective complaints far exceed any objective evidence of a continuing physical injury.

I would note that even the additional testing that was subsequently performed at Dr. Dunham's request only further supports the opinion of Dr. Baskin. The neurological evaluation and testing conducted by Dr. William Griggs again showed no neurological or radicular basis for the claimant's continued extensive subjective complaints in her lower back and lower extremities. It was clearly Dr. Griggs' opinion that the claimant's subjective complaints far outweighed any objective evidence of continuing injury. In his report, he expressly recommended the discontinuation of narcotic pain medication, a recommendation that has apparently been disregarded by Dr. Dunham.

Finally, it must be noted that the subsequent treatment provided the claimant by and at the direction of Dr. Dunham was similar to the claimant's previous treatment modalities. This

subsequent treatment has also achieved the same result as the prior treatment in that it has been unsuccessful in alleviating or even substantially reducing the claimant's extensive subjective complaints.

Under the Appellate Court's interpretation of Ark. Code Ann. §11-9-514, the respondents are liable for the initial evaluation by Dr. Dunham, after the claimant had been granted her request for a change of physicians to Dr. Dunham. However, the claimant has failed to show by the greater weight of the credible evidence that any other services provided her by and at the direction of Dr. Dunham, either before or after this one time evaluation, represented "reasonably necessary medical services" for her compensable injury, under Ark. Code Ann. §11-9-508. Specifically, the greater weight of the credible evidence fails to show that such medical services had a reasonable expectation of accomplishing the purpose or goal connected with the claimant's compensable injury or were medically necessary or appropriate for her compensable injury. Therefore, the respondents are not liable for the expense of these services.

III. ADDITIONAL TEMPORARY TOTAL DISABILITY BENEFITS FROM OCTOBER 11, 2004 THROUGH AUGUST 3, 2005

The final issue concerns the claimant's entitlement to additional temporary total disability benefits for the period beginning October 11, 2004 and continuing through August 3, 2005. The burden rests upon the claimant to prove her entitlement to these benefits. In order to meet this burden, the claimant must

show that she continued within her healing period from the effects of her compensable injury and that she continued to be rendered totally disabled as a result of the effects of this compensable injury during this period.

The issue of the duration of the healing period is a medical question, which must be resolved on the basis of the greater weight of the medical evidence presented. The healing period continues until the claimant has achieved the maximum benefit of time and medical treatment, in regard to the resolution or stabilization of the actual physical injury sustained. Once this underlying physical damage has resolved or stabilized, at a level where nothing further in the way of time or medical treatment offers a reasonable expectation of improvement, then the healing period has ended.

After consideration of all the evidence presented, it is my opinion that the greater weight of the medical evidence establishes that the claimant's healing period from the effects of her compensable injury of November 17, 2003 had ended by August 9, 2004, as opined by Dr. Baskin. Dr. Baskin's opinion is amply supported by the other evidence presented.

This evidence shows the employment-related accident of November 17, 2003 resulted only in a soft tissue strain or sprain. Such an injury would reasonably be expected to have resolved by August 9, 2004. The only evidence presented by the claimant to show otherwise, is her own self-serving testimony concerning the continuation of significant subjective complaints. I simply do not find this testimony to be credible. One would reasonably expect

some objective findings of continuing physical injury to support these extensive, severe, and debilitating complaints. However, no such evidence is present. Further doubt is cast on the actual existence of these continuing subjective complaints by the claimant's denial of any actual benefit or relief of her subjective symptoms by the extensive and varied treatment she has received, both before and after August 9, 2004. Clearly, one or more of these treatment modalities should reasonably have had some effect on any actual physical injury and should have resolved any soft tissue strain or sprain.

The claimant's failure to show that she continued within her healing period from the effects of her compensable injury, after August 9, 2004, prevents an award of the additional temporary total disability benefits she now seeks. Thus, her request for such benefits must be denied.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On November 17, 2003, the relationship of employee-employer-third party administrator existed between the parties.
3. On November 17, 2003, the claimant earned wages sufficient to entitle her to weekly compensation benefits of \$231.00 for total disability and \$173.00 for permanent partial disability.
4. On November 17, 2003, the claimant sustained a

compensable injury to her low back/hip.

5. There is no dispute over the payment of medical expenses incurred through August 9, 2004, or the initial evaluation by Dr. Dunham (pursuant to the change of physicians approved by this Commission).
6. The claimant has failed to prove that the additional medical services provided her by and upon referral of Dr. John Dunham, except for her initial evaluation by Dr. Dunham upon the granting of a change of physicians by this Commission, represent "reasonably necessary medical expenses" for her compensable injury of November 17, 2003. Specifically, she has failed to prove that these medical services had or have a reasonable expectation of accomplishing any purpose or goal that is related to or connected with her compensable injury.
7. There is no dispute over temporary total disability benefits accruing through August 9, 2004.
8. The claimant has failed to prove that she is entitled to additional temporary total disability benefits for the period of October 11, 2004 through August 3, 2005. Specifically, she has failed to prove by the greater weight of the credible evidence that she continued within her healing period from the effects of her compensable injury during time.
9. The claimant has failed to prove that the provisions of Ark. Code Ann. §11-9-505(a) are applicable to the present

claim. Specifically, the claimant has failed to prove that the respondent refused, without reasonable cause, to return her to work at a suitable available employment, at any time after October 11, 2004.

10. The respondents have controverted the claimant's entitlement to the payment of any medical services provided her by and at the direction of Dr. John Dunham, with the exception of his additional evaluation following the ordered change of physicians, the payment of additional temporary total disability benefits for the period of October 11, 2004 through August 3, 2005, and the payment of any benefits under Ark. Code Ann. §11-9-505(a).

ORDER

For the reasons heretofore set out in this Opinion, the claimant's request for additional benefits, in the form of payment for medical services provided her by and at the direction on Dr. John Dunham (excluding his initial evaluation following the authorized change of physicians), for additional temporary total disability benefits for the period of October 11, 2004 through August 3, 2005, and her entitlement to benefits under Ark. Code Ann. §11-9-505(a) on and after October 11, 2004, must be and hereby is denied.

IT IS SO ORDERED.

MICHAEL L. ELLIG
Administrative Law Judge

