

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F711999

TABALINA CORDERO, Employee	CLAIMANT
ROGERS SCHOOL DISTRICT, Employer	RESPONDENT
RISK MANAGEMENT RESOURCES, Carrier	RESPONDENT

OPINION FILED MAY 13, 2008

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by JASON HATFIELD, Attorney, Rogers, Arkansas.

Respondents represented by CURTIS NEBBEN, Attorney, Fayetteville, Arkansas.

STATEMENT OF THE CASE

On April 17, 2008, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on January 30, 2008, and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The employee/employer relationship existed between the parties at all relevant times.
3. The claimant sustained a compensable injury to her back on October 4, 1007.

At the time of the hearing the parties agreed to stipulate that claimant earned sufficient wages to entitle her to compensation at the rate of \$203.00 for total disability benefits and \$153.00 for permanent partial disability benefits.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Claimant's entitlement to additional medical treatment.

2. Temporary total disability benefits from October 9, 2007 through a date yet to be determined.

3. Attorney fee.

At the time of the hearing the parties agreed that claimant is currently receiving medical treatment from Dr. Knox which respondent has accepted. The issue with respect to unpaid medical treatment involves treatment claimant received from Dr. Rhodes, a chiropractic physician.

The claimant contends that respondent is liable for payment of medical treatment she received from Dr. Rhodes and also that she is entitled to temporary total disability benefits beginning October 9, 2007 and continuing through a date yet to be determined.

Respondent contends that medical treatment from Dr. Rhodes was unauthorized; therefore, they are not liable for payment. With respect to claimant's request for temporary total disability benefits, respondent contends that it made work available to the claimant within her restrictions which she refused; therefore, claimant is not entitled to temporary total disability benefits.

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on January 30, 2008, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.

2. The parties' stipulation that claimant earned sufficient wages to entitle her to compensation at the rate of \$203.00 for total disability benefits and \$153.00 for permanent

partial disability benefits is also hereby accepted as fact.

3. Claimant has failed to prove by a preponderance of the evidence that respondent is liable for medical treatment received from Dr. Rhodes. Dr. Rhodes' medical treatment was unauthorized.

4. Claimant has met her burden of proving by a preponderance of the evidence that she is entitled to temporary total disability benefits beginning February 14, 2008, and continuing through June 3, 2008.

5. Respondent has controverted claimant's entitlement to temporary total disability benefits from February 14, 2008 through June 3, 2008.

FACTUAL BACKGROUND

_____The claimant began working for the respondent in an elementary school cafeteria beginning in 2005. Claimant suffered a compensable injury on October 4, 2007 when she slipped on a wet floor and fell, landing on her buttocks and scraping the shin on her leg. Claimant reported the injury to her supervisor and she was referred by respondent to Dr. Vandergriff.

Claimant was initially evaluated by Dr. Vandergriff on October 5, 2007. Dr. Vandergriff diagnosed claimant's condition as back pain extending from her cervical spine to her lumbar spine. She prescribed claimant exercises, medication, and work restrictions of lifting no more than 10 pounds.

Claimant returned to work for respondent the next week and was informed by her supervisor, Shannon Carr, that she would primarily be performing salad preparation in the kitchen. Carr testified that this job involves chopping up vegetables and filling up four-ounce plastic containers. Carr testified that claimant also washed a few sheet pans that day. At some point during that day Carr did notice the claimant crying and claimant indicated that her hands were tingling. As a result, respondent made claimant another

appointment with Dr. Vandergriff on October 8, 2007. Dr. Vandergriff's notes of that date indicates that claimant's condition was worse. She again diagnosed claimant as suffering from back pain from her cervical spine to her lumbar spine. She also notes that claimant is complaining of left hand paresthesia. Dr. Vandergriff ordered physical therapy and again released claimant to return to work with the same restrictions.

Despite having been released by Dr. Vandergriff claimant did not return to work for the next two days. She did return to work for the respondent for one other day and contends that on that date she was given a job taking pans filled with chicken or fish nuggets which weighed some 13 to 18 pounds and placing them in and out of the oven. Claimant left work approximately 30 minutes early that day and has not returned to work for the respondent or any other employer since then. Claimant subsequently sought medical treatment from Dr. Rhodes, chiropractic physician, on multiple occasions in October and November 2007. Claimant was granted a change of physician request to Dr. Knox, orthopaedic surgeon, and she was initially evaluated by him on February 14, 2008. On that date, Dr. Knox ordered an MRI scan of the claimant's cervical spine and took claimant off work. In a report dated March 26, 2008, Dr. Knox noted that the MRI scan had been read as normal by Dr. Moon. Dr. Knox agreed with Dr. Moon's assessment and noted that there were mild degenerative changes at C5-6, but no evidence of compressive pathology that would warrant a surgical intervention. Instead, Dr. Knox recommended an aggressive physical therapy strengthening program. He also took claimant off work until June 3, 2008.

Claimant has filed this claim contending that respondent is liable for payment of medical treatment received from Dr. Rhodes. She also requests temporary total disability benefits beginning October 9, 2007 and continuing through a date yet to be determined.

ADJUDICATION

_____The initial issue for consideration involves respondent's liability for medical treatment provided by Dr. Rhodes. A.C.A. §11-9-514 provides the procedure to be followed in order to change physicians. If claimant is provided a notice of the change of physician procedures then any treatment provided other than according to the statute, except for emergency treatment, shall be at the claimant's expense. Here, claimant was provided a copy of Commission Form AR-N on October 4, 2007 notifying her of the procedures to be followed in order to change physicians. While claimant talked to someone in the respondent's office and also with the carrier, no change of physician order was entered by the Commission approving a change of physician to Dr. Rhodes. Despite that fact, claimant nevertheless sought medical treatment from Dr. Rhodes on her own. The Commission did subsequently approve a change of physician request to Dr. Knox.

Having been provided a copy of Form AR-N notifying claimant of the procedure to be followed in order to change physicians, I find that the medical treatment provided to claimant by Dr. Rhodes was unauthorized. Claimant did not receive an order from the Commission authorizing a change of physician to Dr. Rhodes either before or even after she began receiving treatment. Accordingly, respondent is not liable for payment of Dr. Rhodes' treatment.

The next issue for consideration involves claimant's request for temporary total disability benefits beginning October 9, 2007 and continuing through a date yet to be determined. In order to be entitled to temporary total disability benefits claimant has the burden of proving by a preponderance of the evidence that she remained within her healing period and that she suffered a total incapacity to earn wages. *Arkansas State Highway & Transportation Department v. Breshears*, 272 Ark. 244, 613 S.W. 2d 392 (1981). After reviewing the evidence in this case, I find that claimant has remained within her healing period since the date of her compensable injury. However, I do not find that claimant

suffered a total incapacity to earn wages until she was taken off work by Dr. Knox on February 14, 2008.

After her accident the claimant was referred by respondent to Dr. Vandergriff for medical treatment. On October 5, 2007, Dr. Vandergriff opined that claimant could return to work with restrictions of lifting no more than 10 pounds. Claimant did return to work for the respondent where on the first day she primarily performed a job preparing salads. There is also some indication that claimant performed some work washing sheet pans. However, claimant acknowledges that she did not lift anything over 10 pounds on that first day.

Because claimant was crying and complaining of her hands tingling on that day another appointment was made for claimant to be evaluated by Dr. Vandergriff. Claimant was again evaluated by Dr. Vandergriff on October 8, 2007, at which time she complained not only of back pain but also of the tingling in her left hand. Despite claimant's complaints Dr. Vandergriff again released claimant to return to work with the same 10-pound lifting restriction. Dr. Vandergriff also noted the following:

She may return to work today with the same restrictions. Of note: She was not happy with this plan of care as she notes she is unable to work. She was moving slowly and groaning during the office visit but after she was told I was not going to change the restrictions, she left the building and walked easily, quickly and normally through the parking lot and opened the door of a truck and got in easily without noticed discomfort of (sic) hesitation.

Despite having been released to return to work by Dr. Vandergriff with the same restrictions, claimant did not work the next two days. Claimant did return to work on the third day after her visit with Dr. Vandergriff on October 8. It is claimant's testimony that on that date she was required to place pans of chicken or fish nuggets which weighed 13 to 18 pounds into an oven in violation of her work restrictions.

I do not find claimant's testimony with respect to these job activities credible. According to claimant's testimony she was told to perform this job by her supervisor, Shannon Carr. However, Carr testified that after the claimant returned to work she was aware of the claimant's 10-pound lifting restriction and that claimant was not required to get food in and out of the oven. Carr further testified that she never saw the claimant performing any activity that required her to lift more than 10 pounds and claimant did not come to her and complain that she was having to lift more than 10 pounds. While claimant testified that she informed Carr that her job activities were causing her problems, she admittedly did not inform Carr that she was performing a job which required her to lift more than 10 pounds. Given the testimony of Carr, which I find to be credible, as well as Dr. Vandergriff's notation in her office note of October 8, 2007 that claimant was not happy with her release to return to work, I find insufficient credible evidence indicating that claimant was totally incapacitated from working because the job offered to her by the respondent required her to lift more than 10 pounds.

Subsequent to October 8, 2007, claimant sought medical treatment from Dr. Rhodes, the chiropractic physician. The medical records from Dr. Rhodes reflect that she took the claimant off work on a number of occasions subsequent to that date. These dates included the latter days of October 2007. During this period of time the claimant again returned to Dr. Vandergriff on October 29. Dr. Vandergriff ordered physical therapy and again released claimant to return to work with a 10-pound lifting restriction.

I find that claimant has failed to prove by a preponderance of the evidence that she suffered a total incapacity to earn wages prior to February 14, 2008. First, I find that the opinion of Dr. Vandergriff with respect to claimant's ability to return to work is entitled to greater weight than that of Dr. Rhodes. This finding is based in part upon Dr. Vandergriff's observation of the claimant's movements during the office visit as compared to her walk through the parking lot. It should also be noted that two witnesses for the respondent

testified to similar incidents during their observations of the claimant. Finally, I note that claimant was even released to return to work by Dr. Rhodes on light duty as of November 8, 2007. Nevertheless, claimant made no effort to return to work subsequent to that date.

I do find that claimant suffered a total incapacity to earn wages beginning February 14, 2008, the date she was initially evaluated by Dr. Knox. On that date Dr. Knox opined that claimant should remain off work until March 13, 2008. Subsequently, on March 26, 2008, Dr. Knox recommended an aggressive physical therapy strengthening program and indicated that claimant should remain off work until June 3, 2008. Based upon the opinion of Dr. Knox which I find to be credible and entitled to great weight, I find that claimant remained within her healing period and that she suffered a total incapacity to earn wages beginning February 14, 2008 and continuing through June 3, 2008.

Because claimant's compensable injury occurred after July 1, 2001, the claimant's attorney fee is governed by the amendments made by the Arkansas General Assembly in 2001. Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the indemnity benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant.

AWARD

Claimant has failed to prove by a preponderance of the evidence that respondent is liable for payment of medical treatment received from Dr. Rhodes. Dr. Rhodes' medical treatment was unauthorized; therefore, respondent is not liable for payment. Claimant is entitled to temporary total disability benefits beginning February 14, 2008 through June 3, 2008. Respondent has controverted claimant's entitlement to unpaid indemnity benefits.

Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney

fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the indemnity benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant.

The respondents are ordered to pay the court reporter's charges for preparing the hearing transcript in the amount of \$609.75.

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE