

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F002633

SARA J. MICKEY,  
EMPLOYEE

CLAIMANT

ARKANSAS METHODIST HOSPITAL,  
EMPLOYER

RESPONDENT

RECIPROCAL OF AMERICA,  
INSURANCE CARRIER/TPA

RESPONDENT

OPINION FILED JULY 22, 2003

Upon review before the FULL COMMISSION in Little Rock,  
Pulaski County, Arkansas.

Claimant represented by HONORABLE R. THEODOR STRICKER,  
Attorney at Law, Jonesboro, Arkansas at the hearing and  
appeared PRO SE on appeal.

Respondents represented by HONORABLE MARK MAYFIELD, Attorney  
at Law, Jonesboro, Arkansas.

Decision of the Administrative Law Judge: Reversed.

OPINION AND ORDER

The respondents appeal an Administrative Law Judge's  
opinion filed March 21, 2002. The Administrative Law Judge  
found that the claimant was entitled to a change of  
physicians; that the respondents remained liable for  
reasonably necessary medical treatment; and that the  
claimant was entitled to a late-payment penalty for under-  
payment of installments. After reviewing the entire record  
*de novo*, the Full Commission reverses the opinion of the  
Administrative Law Judge.

I. HISTORY

The parties stipulated that Sara Mickey, age 48, sustained a compensable injury on February 29, 2000. Ms. Mickey testified that she was injured after a hospital patient "threw her arms around my neck and dropped her weight. I picked her up and turned to put her in the bed."

An emergency physician's impression on March 1, 2000 appears to have been "muscle strain/spasm." An x-ray of the claimant's lumbar spine on March 1, 2000 was normal. The claimant was treated with medication and physical therapy. The claimant testified that she was taken off work and that she did not benefit from physical therapy.

An MRI of the lumbar spine was taken on March 29, 2000, with the following impression:

1. Normal lumbar spine MRI.
2. No findings to explain patient's low back pain.

Dr. Terence P. Braden, III, D.O., examined the claimant on May 9, 2000 and assessed:

1. Left low-back pain.
2. Some evidence of non-physiological signs.
3. Left sacral pelvic dysfunction.

Dr. Braden recommended consideration "for injection down toward the posterior superior iliac spines toward to sacroiliac joint and follow this with osteopathic manipulation. This was all explained to Ms. Mickey, but she

wishes to wait before this intervention is instituted because she is not certain that she wishes to have an injection." Dr. Braden requested that the claimant remain off work. Dr. Braden reported on June 6, 2000:

Ms. Mickey has received treatment for her low-back area since 2/29/00. She has had outpatient physical therapy, medication adjustments and injections into the low-back SI joint which did not give her any relief or improvement.

The MRI scan of her lumbar spine is normal.

Ms. Mickey has not responded to the treatments that have been rendered. I have recommended an evaluation by pain management through Dr. Schnapp and Dr. Mays in Little Rock to ascertain if they can give any distinct improvement in her ongoing symptomatology.

There is little else I have to offer her from a Physical Medicine and Rehabilitation standpoint.

On June 26, 2000, Dr. Moacir Schnapp administered a "Left lumbar facet L4-5, L5-S1 block under fluoroscopic guidance, Left sacroiliac joint injection under fluoroscopic guidance." The claimant subsequently reported to Dr. Schnapp that she continued to have pain.

Dr. Stephen L. Gipson evaluated the claimant on July 20, 2000:

Sara Mickey comes by referral of Dr. Samuel Burchfield, and Mr. Mike Baker of Reciprocal in North Little Rock....

Ms. Mickey was told, as I understand by Mike Baker that she was not going to win approval for the extensive and costly Mays and Schnapp program....

I explained to her my diagnosis and what it represents. In my opinion, her back complaints are of minor structural injury, although they could be very painful and limiting as they most often area (sic). However, they usually respond to simple and accurate injections of the iliolumbar fascia and ligaments and also home stretching exercises which can be done. During this time it is reasonable for her to return to limited transitional duty as she recovers. She pointed out a number of psychosocial and psychological complaints and how she wanted this program of Dr. Schnapp's to help her deal with this as it appears that program has a rather intensive psychological component. My explanation to her was that although she may have many features which need addressing, particularly her need to control, and therefore obsessive-compulsive nature, as well as a number of fears that she has which is in keeping with panic disorder and mitral valve prolapse, that these problems were not in any way related to her injury, and although they may make it more difficult for her to recover, and her response to pain may be to express those complaints more frequently that there is no causal relationship.

Therefore, no duty on part of the carrier to cover these matters. I would encourage her to seek psychological counseling either through a licensed therapist or psychologist, and pursue matters of sorting out her anxieties on her own accord. I do not believe that bundling this matter with her injury has any merit whatsoever and would discourage any such future reference....

Meanwhile, Dr. Schnapp performed another joint block and facet injection on July 21, 2000. The claimant again sought emergency treatment for back pain on August 2, 2000.

Dr. Bennie E. Mitchell opined on August 14, 2000 that the claimant "would best be served by continuing under Dr. Schnapp's care for the foreseeable future and hopefully he will be able to resolve this to the point of her being able to return to work as a nurse at AMH."

The Administrative Law Judge examined Mike Baker at hearing:

Q. And have Respondents selected all of the Claimant's treating physicians to date?

A. To a degree, I guess. I had objected to Dr. Mays and Schnapps (sic), and Ms. Mickey requested a change of physicians from the Workers' Comp Commission. And I received a call from Ms. Hannah after I had objected, and she said, "Mike" - because they're not on our MCO list, and Ms. Hannah called me and said, "Well, they're in the Corvel's Tennessee MCO list, so you might" - said, "We're going to grant it, so you might as well go ahead and do it." So then we relented and agreed to let her see Mays and Schnapps.

The record contains the following Commission correspondence to the claimant from Pat Capps Hannah dated August 31, 2000:

This letter is to confirm that we received your recent fax. We understand that you do not want to pursue your request for a change of physician at this time. Therefore, we will not process your request further and will return your claim folder to open general files here at the Commission. If you decide to change physicians in the future, you will again need to request a change in writing.

Dr. Schnapp arranged a bone scan, which was taken on September 8, 2000. The resulting opinion was "Normal bone scan." Dr. Schnapp performed additional lumbar facet blocks and sacroiliac joint injections on September 15, 2000 and September 21, 2000. Dr. Kit S. Mays wrote on September 26, 2000, "We are going to start her back hopefully on an 8 hour day if that is possible with her job." On September 28, 2000, Dr. Schnapp planned to "proceed with a trial of trigger point injections." Also on September 28, 2000, Dr. Schnapp planned to return the claimant to part-time work, gradually increasing her hours.

Dr. Schnapp reported on October 10, 2000, "Ms. Mickey returns stating that she has returned to work but she has had some difficulty with what she perceives to be some harassment. She is however working back as a nurse and she seems to be enjoying it. The pain has however recurred mostly in her low back, radiating to the hip and buttock." Dr. Schnapp diagnosed "Degenerative disc and joint disease with lumbar facet arthropathy-sacroiliitis." Dr. Schnapp performed another lumbar facet block and sacroiliac joint injection.

The claimant returned to the emergency room with complaints of back pain on November 2, 2000. Dr. Schnapp

kept the claimant on part-time work duty on November 6, 2000, on which date he also performed a "caudal epidural block with image intensification."

The claimant returned to the emergency room on December 4, 2000 and December 5, 2000. The claimant also continued to treat with Dr. Schnapp. However, Mr. Baker testified that the respondent-carrier eventually disallowed treatment with Dr. Schnapp, and referred the claimant to an orthopaedist, Dr. Riley Jones. Dr. Jones independently examined the claimant on February 1, 2001, and diagnosed "(1) Sacroiliitis (2) Rule out nonphysiologic causes of pain (3) Facet syndrome." Dr. Jones assigned light work duty. Electrodiagnostic testing carried out on February 6, 2001 revealed "Normal EMG and Nerve Conduction Velocities." An MRI of the lumbar spine on February 7, 2001 was normal.

Dr. Jones reported on February 20, 2001:

At this point unless there is something neurologic that we can't pick up, I find nothing orthopaedically to support all of this lady's complaints. I suggest that probably she be seen for another consultation by someone in pain management to see if there is something else that can be done. But from an orthopaedic standpoint, I find nothing objective.

Dr. Jones kept the claimant on light duty, no patient contact.

Dr. Jones referred the claimant to another pain manager, Dr. Phillip E. Green, who stated on April 19, 2001 that the claimant "appears to have functional overlay." Dr. Green indicated that he would change the claimant's medication slightly. Dr. Jones reported on July 3, 2001:

I have explained to her that orthopaedically I don't find anything. She has been worked up very thoroughly with bone scan, MRI, EMG and she has had an MMPI which suggests that there are some other things going on. Her work up, other than the MMPI, have (sic) been negative. At this point I have suggested that maybe she on her own see a psychologist or psychiatrist or talk to her pain management person. From a real standpoint I think a functional capacities evaluation is going to give a submaximal effort and that is probably what we need to do to bring this to an end. I have explained to her that I can't say that she doesn't have pain, but I don't find anything to support all the pain that this lady is complaining about. She walks well and sits easily and moves well. She has no fascias of pain and appears to be very earnest, but she still has multiple red flags.

A Functional Capacity Evaluation was administered on July 31, 2001:

Ms. Mickey is considered to have provided an invalid functional capacities evaluation as a result of her submaximal and self-limiting tendencies....

From a musculoskeletal standpoint, Ms. Mickey does not present with any significant finding relative to palpation of the entire posterior spine. She does not present with any trigger points, swelling, and/or increased muscle tension....

In summary, we are unable to quantify any extent of impairment and/or restrictions relative to Ms. Mickey's overall functions as a result of her submaximal and self-limiting tendencies during this evaluation. We are uncertain of her overall motives and desires to hold onto her perceived disability. Ms. Mickey's results are considered invalid due to her self-limiting behaviors. She self-terminated activities to the extent that the data recorded from subjective and objective measures cannot be used to conclude her true level of physical capabilities. However, it is this therapist's opinion that Ms. Mickey does not present with any form of restrictions/limitations that would impede upon her to the degree that she could not return to some form of gainful employment if willing to do so. At this time, we do not foresee that additional therapeutic efforts would be of any greater impact or benefit to Ms. Mickey as a result of her high pain focused behaviors and self-limiting tendencies.

The claimant testified that she was "in bed for a week" after the functional capacity evaluation. Dr. Jones noted on August 16, 2001, "I can not find any reason to restrict this lady from returning to her full unrestricted duties without impairment." The respondents apparently paid some temporary partial disability compensation through August 24, 2001.

The claimant returned to the emergency room on September 20, 2001, complaining of pain which began after lifting the previous night. The claimant appeared to refer to this alleged incident in her testimony, "I went to help a man who was about six foot at least off the bedside commode,

and, fortunately, his son was there, because we both would have fallen. I felt everything in my back pulling, and had his son not been there, we both would have been in the floor." The emergency physician's impression was "low back strain," medication was prescribed, and the claimant was taken off work "until (illegible)."

The claimant testified that the respondents denied liability for this alleged incident. Mr. Baker could not recall whether or not the claimant reported the incident to the respondent-carrier. The claimant testified that she had been placed on a leave of absence until she could see a neurologist, Dr. Demetrius S. Spanos. However, the claimant testified that the respondent-employer deemed her to be a "voluntary terminator," and that she was let go from her job. At any rate, the claimant presented to Dr. Spanos on October 23, 2001:

I informed the patient that from my point of view she has had extensive workup and I will be unable to add much to this except to eliminate certain possibilities, namely nerve damage and radiculopathy. EMG and nerve conduction studies have been ordered to evaluate for this.

I am uncertain why the patient was told she could no longer be seen at Mays and Schnapp's Clinic. I have always found them to be excellent in their abilities, and in fact given all the doctors the patient has already seen, they have been the only people able to offer her any relief, and from what

the patient tells me this was done with minimal narcotic use. I would strongly recommend from a neurologic standpoint that her worker's comp allow her to continue therapy at the Mays and Schnapp's Clinic.

Mr. Baker testified that he recommended for the claimant "to go hire an attorney and pursue this, because you and I have come to loggerheads, and we're just not going to agree any further."

Ms. Mickey claimed entitlement to additional worker's compensation, and a pre-hearing conference was held on November 28, 2001. According to the Administrative Law Judge's pre-hearing order filed November 29, 2001, the claimant contended that she was entitled to additional medical treatment. The claimant contended that she was entitled to a change of physicians "to a neurologist or neurosurgeon, preferably Dr. Spanos." The claimant contended that she remained within her healing period and was entitled to additional temporary total disability compensation.

The respondents contended that they had paid all appropriate benefits. The respondents contended that further medical treatment was not reasonably necessary, and that the claimant was not entitled to a change of physicians. The respondents contended that they had a

managed care contract with Corvel at the time of the claimant's injury, and that the claimant had received a Form AR-N. The Administrative Law Judge stated in the order, "A copy of the contract, as well as the signed AR-N should be submitted forthwith." (The record includes a WCC Form N signed by the claimant on March 2, 2000.)

At the November 2001 pre-hearing conference, the parties agreed to litigate the following issues:

- (1) The end of the claimant's healing period, and the claimant's entitlement to additional temporary total disability compensation;
- (2) Reasonably necessary medical treatment; and
- (3) Change of physicians.

Hearing before the Commission was held on December 14, 2001. The claimant testified that she had never been released to full duty. The claimant testified that sitting for long periods was very difficult, and that standing or walking was "almost impossible." The claimant testified that her condition was worsening.

The Administrative Law Judge corresponded with the parties on January 9, 2002. The Administrative Law Judge requested, among other things, "that the record be supplemented either by stipulation or documentary evidence, showing the indemnity benefits paid, to date, as well as the dates that the claimant worked after June, 2001." The

respondents' attorney subsequently provided the Administrative Law Judge with several dates of employment for the claimant, and stated that the claimant had received disability through August 24, 2001.

On February 13, 2002, the Commission received a request for "sanctions" by the claimant against her attorney. The Administrative Law Judge subsequently granted a motion by Mr. Stricker to withdraw as counsel. The *pro se* claimant and the respondents entered the following stipulation on February 22, 2002:

2. Ms. Mickey has recently raised the issue of underpayment of benefits. This underpayment appears to be a clerical difference but the respondents have underpaid some 31 weeks consisting of a period between July 19, 2000 through October 1, 2000 and January 6, 2001 through June 12, 2001. The amount of the underpayment was \$30.00 per week for a total of \$930.00

The Administrative Law Judge filed an opinion on March 21, 2002. The Administrative Law Judge found, among other things, that "The claimant's healing period ended on or before August 16, 2001." The Administrative Law Judge found, "The claimant is entitled to a one-time only change of treating physicians to a physician of her own choosing so long as that physician is associated with the employer's managed care entity, Corvel, or the claimant may change

physicians to her regular or family physician to manage her medical treatment, but only if her primary care physician agrees that any referrals made for any specialized treatment be to a provider within the managed care organization's approved group, and only if such primary care physician agrees to comply with all the rules, terms, and conditions regarding services performed pursuant to A.C.A. § 11-9-514(a)(3)(A)(iii)." The Administrative Law Judge found that the respondents remained responsible for continued reasonably necessary medical treatment. The Administrative Law Judge found that the claimant was entitled to a late-payment penalty of 18% because of "underpayment of installments which the respondent failed to timely pay pursuant to A.C.A. §11-9-802(b) (Repl. 1996)." The respondents appeal to the Full Commission.

## II. ADJUDICATION

### A. Medical Treatment

An 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 bears the burden of proving by a preponderance of the evidence that she is entitled to additional medical treatment.

Dalton v. Allen Eng'g Co., 66 Ark. App. 201, 989 S.W.2d 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).

The Administrative Law Judge found that the present claimant's healing period "ended on or before August 16, 2001." However, the Administrative Law Judge found that the respondents remained responsible for continued reasonably necessary medical treatment. The claimant indicates in her brief to the Full Commission that she wishes to return to Dr. Schnapp for continued treatment. Based on our review of the record, the claimant has failed to prove by a preponderance of the evidence that she is entitled to additional medical treatment. The parties stipulated that the claimant sustained a compensable injury on February 29, 2000. The patient stated that she hurt her back while struggling to move a hospital patient. An x-ray of the lumbar spine on March 1, 2000 was normal, and the claimant was treated conservatively. An MRI on March 29, 2000 was normal. Dr. Braden was the first to note "evidence of non-physiological signs" in May 2000. Dr. Braden referred the claimant to Dr. Schnapp for pain management, and Dr. Schnapp

began his injections and facet blocks. Dr. Gipson recommended in July 2000 that the carrier not cover Dr. Schnapp's treatment. The carrier appears to have initially decided to controvert Dr. Schnapp's treatment but then relented.

Dr. Schnapp arranged a bone scan in September 2000, which was normal. In October 2000, Dr. Schnapp diagnosed "Degenerative disc and joint disease with lumbar facet arthropathy-sacroilitis." We fail to see how Dr. Schnapp could find lumbar degeneration with a normal x-ray, MRI, and bone scan performed on the claimant. But even if the claimant did have degenerative disease, the evidence does not show that this condition was causally related to the February 2000 specific incident. In any event, Dr. Schnapp continued his treatment, and the claimant continued her regular visits to the emergency room.

An orthopaedist, Dr. Jones, began seeing the claimant in February 2001, and Dr. Jones did diagnose "sacroilitis," which would somewhat comport with Dr. Schapp's finding of "degeneration." However, electrodiagnostic testing in February 2001 was normal. Another MRI, taken in February 2001, was normal. Dr. Jones reported that he could find no orthopaedic standpoint to continue treating the claimant.

At this point the claimant was one year out from her compensable injury with no objective findings. We recognize that the claimant does not have to prove a continuing need for medical treatment with objective findings. Chamber Door Industries v. Graham, 59 Ark. App. 224, 956 S.W.2d 196 (1997). Nevertheless, the respondents must provide only that medical treatment which is reasonably necessary in connection with the compensable injury. GEO Specialty Chemical v. Clingan, 69 Ark. App. 369, 13 S.W.3d 218 (2000).

Dr. Jones referred the claimant to another pain manager, Dr. Green, who described "functional overlay." A functional capacity evaluation in July 2001 indicated, "Ms. Mickey does not present with any significant finding relative to palpation of the entire posterior spine." The claimant eventually ended up before Dr. Spanos, a neurologist, who incorrectly stated that Dr. Schnapp's clinic had "been the only people to offer her any relief." If the claimant ever experienced temporary relief from Dr. Schnapp's injections, the claimant's pain always recurred and she continued to present for emergency treatment.

The Full Commission finds that the claimant failed to prove by a preponderance of the evidence that additional medical treatment was reasonably necessary in connection

with her compensable injury. We therefore reverse the Administrative Law Judge's finding that the respondent remains responsible for any continued medical treatment.

B. Change of Physician

It has been held that Act 796 of 1993, as codified at Ark. Code Ann. §11-9-514(a)(3)(A)(ii), established an absolute, statutory right to a one-time change of physician where the employer has contracted with a managed care organization and has exercised the right to select the initial primary-care physician. Collins v. Lennox Industries, Inc., 77 Ark. App. 303, 75 S.W.3d 204 (2002). The Commission may approve a change of physician with or without a hearing. Sharp v. Lewis Ford, Inc., 78 Ark. App. 164, 78 S.W.3d 746 (2002).

In the present matter, the Administrative Law Judge found that the claimant was "entitled to a one-time only change of treating physicians to a physician of her own choosing so long as that physician is associated with the employer's managed care entity, Corvel, or the claimant may change physicians to her regular or family physician to manage her medical treatment, but only if her primary care physician agrees that any referrals made for any specialized treatment be to a provider within the managed care

organization's approved group, and only if such primary care physician agrees to comply with all the rules, terms, and conditions regarding services performed pursuant to A.C.A. §11-9-514(a)(3)(A)(ii)." The ALJ also found, though, that "Respondent is not responsible for any unauthorized medical treatment which was incurred by the claimant before the approval of her change of physician request herein, including, but not limited to previous treatment by Dr. Burchfield and/or Dr. Spanos. The claimant was not referred to Dr. Spanos by an authorized treating physician."

The claimant contends on appeal that she is entitled to a "change of physician" back to Dr. Schnapp. The record shows that the claimant first presented to Dr. Schnapp through the referral of Dr. Braden, an authorized treating physician. The change of physician statute is inapplicable if an authorized treating physician refers the claimant to another doctor for examination or treatment. Byars Construction Co. v. Byars, 72 Ark. App. 158, 34 S.W.3d 797 (2000), citing Amer. Greetings Corp. v. Garey, 61 Ark. App. 18, 963 S.W.2d 613 (1998). In addition, Mike Baker for the respondent-carrier testified that the respondents initially controverted treatment from Dr. Schnapp. Mr. Baker testified that an employee of the Commission told him "We're

going to grant it," "it" presumably being a change of physician. Since the respondents expressly "relented" with regard to Dr. Schnapp, the evidence therefore indicates that the claimant has already received her one-time change of physician.

The Full Commission therefore reverses the Administrative Law Judge's finding that the claimant is entitled to additional medical treatment and a change of physician. We find that the claimant failed to prove by a preponderance of the evidence that additional medical treatment would be reasonably necessary in connection with the claimant's compensable injury. We again note that the claimant wishes to resume treatment with Dr. Schnapp. However, the change of physician statute is not applicable to Dr. Schnapp's treatment, because he already formerly treated the claimant within her "chain of referral." The Full Commission finds that the claimant was not a credible witness, and that she is not entitled to any additional treatment at the respondents' expense.

C. Penalty

Ark. Code Ann. §11-9-802 provides:

(b) If any installment of compensation payable without an award is not paid within fifteen (15) days after it becomes due, as provided in

subsection (a) of this section, there shall be added to the unpaid installment an amount equal to eighteen percent (18%) thereof, which shall be paid at the same time as, but in addition to, the installment unless notice of controversion is filed or an extension is granted the employer under § 11-9-803 or unless such nonpayment is excused by the commission after a showing by the employer that, owing to conditions over which he had no control, the installment could not be paid within the period prescribed.

In the present matter, the claimant sustained an admittedly compensable injury in February 2000, and the respondents paid temporary total and/or temporary partial disability compensation through August 24, 2001. Following the December 2001 hearing on the claimant's claim for additional benefits, and after various motions by the parties, the parties stipulated in February 2002:

2. Ms. Mickey has recently raised the issue of underpayment of benefits. This underpayment appears to be a clerical difference but the respondents have underpaid some 31 weeks consisting of a period between July 19, 2000 through October 1, 2000 and January 6, 2001 through June 12, 2001. The amount of the underpayment was \$30.00 per week for a total of \$930.00.

The Administrative Law Judge found that the respondents had paid an "erroneous" compensation rate for temporary total disability. Therefore, "The claimant is entitled to a late payment penalty of eighteen percent (18%) because of the aforementioned under-payment of installments which the

respondent failed to timely pay pursuant to A.C.A. §11-9-802(b) (Repl. 1996).” The Full Commission reverses this finding.

The respondents correctly point out that the issue of under-payment was never raised by the claimant until the post-hearing deliberations. All legal and factual issues should be developed at the hearing before the Administrative Law Judge. Ester v. National Home Centers, Inc., 61 Ark. App. 91, 967 S.W.2d 565 (1998). The Full Commission has refused to consider issues not timely raised before an Administrative Law Judge. Story v. Highland Resources, Workers’ Compensation Commission E416465 & E407572 (Aug. 4, 1998). The Full Commission therefore reverses the Administrative Law Judge’s finding that the respondents owe an 18% penalty.

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant failed to prove she was entitled to another change of physicians. We find that the claimant failed to prove she was entitled to additional medical treatment at the respondents’ expense. We find that the claimant failed to prove she was entitled to a late-payment penalty pursuant to Ark. Code Ann. §11-9-802(b), because the claimant did not timely raise this issue. The

Full Commission therefore reverses the Administrative Law Judge's finding that the claimant is entitled to additional benefits, and we dismiss this claim.

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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JOE E. YATES, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

\_\_\_\_\_ I must respectfully dissent from the opinion of the Commission finding that claimant is not entitled to a change of physician; that claimant is not entitled to additional medical treatment for her compensable injury; and that claimant is not entitled to a penalty for the late payment of benefits because she did not raise the issue before the Administrative Law Judge. The opinion of the Administrative Law Judge should be affirmed.

Initially, and incidentally, I note respondent's argument that the Commission cannot retroactively approve a change of physician, and that the change will not be effective until the date it is ordered by the Commission. This is not the law in Arkansas. The Commission does have

the discretion to impose liability on respondent for services and treatment rendered between the time claimant files a petition for a change of physician and the date 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, 12 Ark. App. 358, 676 S.W.2d 750 (1984); Paula Reed v. Jefferson Regional Medical Center, Full Commission Opinion filed August 12, 1991 (E018666); Sandra Tatman v. A-1 Insulation, Inc., Full Commission Opinion filed December 2, 1997 (E514658).

On October 1, 2001, claimant filed a petition for a change of physician to Dr. Spanos. Claimant did not present to Dr. Spanos until October 23, 2001. Therefore, it would not be a retroactive approval of a change of physician to grant the change to Dr. Spanos and impose liability on respondents for the October 23, 2001 examination.

Claimant has an absolute statutory right to a one-time change of physician pursuant to Ark. Code Ann. § 11-9-514(Repl. 2002). Thus, the change of physician is mandatory and respondent's assertion, (and the Commission's finding), that further medical treatment is not reasonable and necessary is not a defense to the requested change of

physician. Collins v. Lennox Industries, Inc., 77 Ark. App. 303, 75 S.W.3d 204 (2002); Wal-Mart Stores, Inc. v. Brown, \_\_\_ Ark. App. \_\_\_, \_\_\_ S.W.3d \_\_\_ (June 25, 2003) (CA03-81). Accordingly, the Commission should grant claimant's petition for a change of physician and affirm the opinion of the Administrative Law Judge in this regard.

Finally, with regard to the change of physician issue, I note the Commission's statement that "[s]ince the respondents expressly "relented" with regard to Dr. Schnapp, the evidence therefore indicates that the claimant has already received her one-time change of physician." This finding is erroneous as a matter of law. A mutually agreed upon change of physician does not constitute claimant's one-time change of physician. Magic Mart, Inc. v. Little, 12 Ark. App. 325, 676 S.W.2d 756 (1984). Further, respondent contravened this so-called change of physician by subsequently, and unilaterally, withdrawing their approval and forcing claimant to submit to treatment by a physician more to its liking. Claimant's choice of physician was rendered meaningless by respondent's subsequent and unjustified interference with the doctor/patient relationship.

I also strongly disagree with this Commission's reversal of the Administrative Law Judge's award of an 18% penalty for the late payment of benefits on a finding that the issue was not timely raised before the Administrative Law Judge. Respondent certainly knew there was a possibility that the penalty would be imposed and only objected once it received an adverse opinion by the Administrative Law Judge.

The hearing was held on December 14, 2001. Several issues arose after the hearing, and the parties and the Administrative Law Judge participated in a post-hearing teleconference in February 2002. This resulted in various additional written stipulations between the parties. On February 6, 2002, claimant, appearing pro se at this point in time, filed additional pleadings with the Administrative Law Judge. As a result of these pleadings, a prehearing conference was conducted on February 22, 2002. Claimant argued, among other things, that respondent had paid disability benefits at an incorrect weekly benefit rate. Even respondent admits that there was a discussion about the possibility of imposing the penalty. I can find no indication whatsoever that respondent asserted before the Administrative Law Judge that the issue of whether a penalty

should be imposed was not timely raised. The parties decided that a second hearing would not be necessary; that the record would be supplemented with documents and issues raised subsequent to the hearing; and that the opinion of the Administrative Law Judge would encompass issues discussed before, during, and after the hearing. Therefore, the issue of whether to impose a penalty for the late payment of benefits was, in fact, properly and timely raised before the Administrative Law Judge.

For the foregoing reasons, I must respectfully dissent. The opinion of the Administrative Law Judge should be affirmed in its entirety.

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SHELBY W. TURNER, Commissioner