

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F103000

TOBY MARKHAM,
EMPLOYEE

CLAIMANT

SUTTON LUMBER, INC.,
EMPLOYER

RESPONDENT

BITUMINOUS CASUALTY CORPORATION,
INSURANCE CARRIER

RESPONDENT

OPINION FILED NOVEMBER 3, 2003

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

Claimant represented by HONORABLE SHANNON MUSE CARROLL,
Attorney at Law, Hot Springs, Arkansas.

Respondents represented by HONORABLE RANDY MURPHY, Attorney
at Law, Little Rock, Arkansas.

Decision of the Administrative Law Judge: Affirmed and
adopted.

OPINION AND ORDER

The claimant appeals from a decision of the
Administrative Law Judge filed March 3, 2003. The
Administrative Law Judge entered the following findings of
fact and conclusions of law:

1. The claimant does not meet his burden of demonstrating, by a preponderance of the evidence of record, that he is entitled to additional medical treatment by Dr. John Pace, a neurosurgeon.
2. Based on a review of all the medical evidence in this case, further diagnostic testing and

treatment by a specialist would constitute unreasonable and unnecessary medical treatment.

We have carefully conducted a de novo review of the entire record herein, and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings of fact made by the Administrative Law Judge are correct, and they are, therefore, adopted by the Full Commission.

Thus, we affirm and adopt the decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

_____ For the following reasons, I respectfully dissent from the Majority Opinion, which affirms and adopts the

decision of the Administrative Law Judge that the claimant is not entitled to receive additional medical care from Dr. John Pace, on the ground that such care is not reasonably necessary treatment for the claimant's compensable injury. My review of applicable case law indicates that the claimant is entitled to a one-time change of physician, and is entitled to at least one visit to the new treating physician at respondents' expense, irrespective of whether additional treatment for the compensable injury is reasonably necessary. Therefore, it is my opinion that the Full Commission should grant the claimant his statutory right to a one-time change of physician to Dr. Pace.

The respondents initially accepted the claimant's injury as compensable and sent him to Dr. Jeff Bearden. Dr. Bearden referred the claimant to Dr. Ross Hardy, who in turn referred the claimant to either Dr. John Pace or Dr. James Arthur. The respondents refused to send the claimant to either Dr. Pace or Dr. Arthur. Instead, they sent the claimant to Dr. Kenneth Rosenzweig. Dr. Rosenzweig then referred the claimant to Dr. William Ackerman. Upon being released from care by Dr. Ackerman the claimant filed the present claim.

At the beginning of the hearing, the Administrative Law Judge stated the issues to be litigated. The relevant colloquy was as follows:

JUDGE STILES: Ms. Carrol, you advised, on behalf of the claimant, that he claims - Well, we're not going to deal with a temporary total disability claim, although that's there and that will just be held in abeyance. *I think the narrow issue that we're going to talk about here this morning is a referral by a physician and the authorized change of treating physicians to Dr. Pace.*

MS. Carroll: Yes, sir; yes, sir. We would like to reserve our right to come back on TTD.

T. at 3-4 (emphasis added). I find this statement by the Administrative Law Judge, to which the claimant's attorney expressed assent, to unequivocally indicate that the claimant's claim was for a change of physician to Dr. Pace.

In his opinion, which the majority has affirmed and adopted, the Administrative Law Judge did not address the issue of whether the claimant is entitled to a change of physician to Dr. Pace. Instead, the Administrative Law Judge held that the claimant was not entitled to any treatment from Dr. Pace, since the evidence indicated that such treatment would not be reasonably necessary. In light of case law, I find that the Administrative Law Judge erred

as a matter of law in not granting the claimant a change of physician to Dr. Pace, and in not ordering the respondents to pay for at least one visit to Dr. Pace.

Arkansas Code Annotated § 11-9-514(a)(3)(A)(ii) grants the claimant the right to a one-time change of physician. The Arkansas Court of Appeals has held that this statutory right is absolute, and that the Commission has no discretion to deny the claimant's request. Collins v. Lennox Industries, Inc., 77 Ark. App. 303, 75 S.W.3d 204 (2002). The Court of Appeals has further held that prior to the claimant's being granted the statutory one-time change of physician, the issue of whether further medical treatment from that physician is reasonably necessary is not ripe for decision. Wal-Mart Stores, Inc. v. Brown, ___ Ark. App. ___, ___ S.W.3d ___ (2003). In the Brown case, the Court of Appeals unequivocally held that prior to deciding whether additional treatment is reasonably necessary, the Commission must grant the claimant's request for a change of physician, and order the respondents to pay for at least one visit to the new doctor. The court's opinion stated as follows:

The holding in *Collins* allows both statutory provisions to be read in harmony. Without an initial visit and report from appellee's one-time-change-of-physician doctor, there is simply no

way to determine whether any additional treatment proposed by that physician would be reasonably necessary. It would be inconsistent for the legislature to make a one-time change of physician mandatory without allowing an individual to see that doctor, at least for the initial visit, at the employer's expense.

We hold that in this situation, where appellee has exercise her absolute, statutory right to a one-time change of physician pursuant to Ark. Code Ann. §11-9-514(a)(3)(A)(ii), appellants must pay for the initial visit to the new physician in order to fulfill their obligation to provide adequate medical services under the provisions of Ark. Code Ann. §11-9-508.

Id.

Thus, it is clear that the claimant is entitled to a one-time change of physician, and that the claimant is entitled to at least one visit to that new physician, at the respondents' expense, regardless of whether additional treatment from that physician is reasonably necessary. Therefore, in my opinion, the Administrative Law Judge erred as a matter of law in addressing the issue of whether additional treatment from Dr. Pace was reasonably necessary. In light of the holding of the Brown case, this issue is not ripe until after the claimant has visited Dr. Pace at least one time, pursuant to her change of physician request. Therefore, in my opinion, a change of physician to Dr. Pace

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should have been granted, and the respondents should have been ordered to pay for at least one visit to Dr. Pace.

For these reasons, I respectfully dissent.

SHELBY W. TURNER, Commissioner