

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E911137

DOROTHY F. TINER,
EMPLOYEE

CLAIMANT

ROSE CARE CENTER OF BENTON II,
SELF-INSURED EMPLOYER

RESPONDENT

CROCKETT ADJUSTMENT,
BENEFITS ADMINISTRATOR

RESPONDENT

OPINION FILED DECEMBER 30, 2003

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

Claimant represented by HONORABLE DALE GRADY, Attorney at
Law, Bryant, Arkansas.

Respondents represented by HONORABLE GAIL O. MATTHEWS,
Attorney at Law, Little Rock, Arkansas.

Decision of the Administrative Law Judge: Affirmed in part
and reversed in part.

OPINION AND ORDER

The respondents appeal and the claimant cross-appeals
an Administrative Law Judge's opinion filed January 31,
2003. The Administrative Law Judge found, "The claimant's
care by Dr. Lorio in November, 2001 was authorized and
reasonably necessary in connection with her compensable
injury and has been controverted by the respondents." The
Administrative Law Judge also found, "The respondents
controverted the change of physician to Dr. Wilson but have
not otherwise controverted the expenses of his care, except
as previously noted above, and the claimant is entitled to

an attorney's fee in the amount of \$200.00. Ark. Code Ann. §11-9-715(c)." The Administrative Law Judge found, "The preponderance of the evidence shows that the respondents did not controvert payment of permanent partial disability benefits based upon the claimant's anatomical impairment rating of 20% to the body as a whole but did controvert payment of additional benefits for permanent total disability. Benefits for permanent total disability shall be paid in lump sum, discounted to present value." In addition, the Administrative Law Judge found that the claimant was not entitled to a sanction pursuant to Ark. Code Ann. § 11-9-717(a) (4) (the claimant does not appeal this finding).

After reviewing the entire record *de novo*, the Full Commission affirms the Administrative Law Judge's finding that Dr. Lorio's treatment in November 2001 was reasonably necessary and controverted by the respondents, but we reverse the Administrative Law Judge's finding that the respondents controverted the change of physician to Dr. Wilson. The Full Commission reverses the Administrative Law Judge's finding that the respondents controverted payment of additional benefits for permanent total disability. We also reverse the Administrative Law Judge's finding that the respondents shall pay permanent total disability in lump

sum. The Full Commission therefore affirms in part and reverses in part the opinion of the Administrative Law Judge.

I. HISTORY

The parties stipulated that Dorothy Fay Tiner, age 74, sustained a compensable injury on September 16, 1999. After diagnosing "Left femoral neck fracture," Dr. Jerry Lorio performed surgery on September 16, 1999. The parties stipulated that the respondents accepted compensability of the claimant's injury. The claimant periodically followed up with Dr. Lorio following surgery.

The claimant and her attorney signed a Form AR-C, Claim For Compensation, on November 15, 1999. The claimant indicated that her claim was for "initial" and "additional" benefits, including "medical travel mileage," "AWW and comp. rates," "controversion," "IME," "nursing care services," "safety violation," "psychological/psychiatric," "temp. partial disability," "wage loss disability," "permanent partial disability," and "permanent total disability."

The record indicates that the respondent-carrier began paying indemnity benefits on November 22, 1999. The parties deposed the claimant on January 12, 2000. The claimant indicated at that time that she wished to return to work for the respondent-employer, if she was physically able to do

so. The claimant stated that the respondents had paid all of her medical bills, including prescription medication.

Dr. Lorio wrote to the respondent-carrier on April 5, 2000:

Ms. Tiner has been under my care for her hip fracture. We now have this healed, and she is getting around well. I do think she can do the modified duties that have been discussed, such as grooming the patients. I think she could work with the lighter duties in the nursing home. I don't know if she would be able to really turn patients, and move the patients, but she could help with the dental care, feedings, nail care, and very light housekeeping. Obviously, with her hip, she can't do any real heavy labor.

Dale Bennett, a representative of Insurisk Management Services, replied to Dr. Lorio on May 2, 2000, stating, "Ms. Tiner's employer has now placed her back into a job where not only has she been able to work, but she is performing valuable service for the employer. I have been informed she is doing well and is happy to be back at work. Therefore at this time, we are requesting that you provide us with an impairment rating letting me know what level of disability Ms. Tiner has sustained through her injury on 9-16-99."

The claimant testified regarding her ability to perform light-duty work, "some of it, I was, and some of it, I wasn't. And I kept, the more I done, the worse I hurt." The parties stipulated that the respondents again began paying temporary total disability on June 20, 2000.

The Administrative Law Judge entered an Order on July 28, 2000. The Administrative Law Judge indicated, among other things, that "the parties have agreed for an independent medical examination of the claimant to be performed by Dr. John Wilson at the expense of the respondents."

Dr. John L. Wilson examined the claimant and wrote to the Administrative Law Judge on September 7, 2000:

Ms. Tiner has not reached the end of her healing period, therefore, it would be inappropriate to rate her at this time. I suspect that this hip is going to deteriorate and she will probably have to have the hardware removed and a total hip procedure done at a later date if, indeed, this scenario plays out as I anticipate.

I do not feel Ms. Tiner can return to gainful employment even if in a few months she requires a total hip and has a good result from this.

It is my opinion that Dr. Jerry Lorio has done an excellent job with this lady....

The respondents' attorney wrote to Mr. Grady on January 2, 2001, stating, "What will it take to Joint Petition this case? Please advise." However, the respondents' attorney wrote on June 11, 2001, "I did not respond to your April 19, 2001 letter because your demand was so high that my client felt there was no need to respond."

The Administrative Law Judge entered an Order on October 22, 2001, indicating that "The parties agreed to change treating physicians to Dr. John Wilson." The

respondents' attorney wrote to Dr. Wilson on October 22, 2001, stating, among other things, "Subject to your agreement to do so, all parties and attorneys request that you assume the treatment of Ms. Tiner."

The claimant's attorney wrote to the respondents' counsel on November 11, 2001, indicating that he had told the claimant to present to Dr. Lorio on November 12, 2001. The claimant testified, "Dr. Lorio said I was not ready for surgery....And it was after that that I got the letter from workers' comp. that they would not pay for that trip to Dr. Lorio." The record contains a Health Insurance Claim Form directing the claimant to "remit payment" to Dr. Jerry J. Lorio for service rendered on November 12, 2001. Mr. Matthews again wrote to Dr. Wilson on November 12, 2001, stating, "Ms. Tiner and her attorney have specifically requested that you take over her treatment and the employer and I, their attorney are agreeable."

The claimant's attorney wrote to the respondents' attorney on December 14, 2001, indicating, among other things, that Dr. Wilson had not accepted treatment of the claimant. The respondents' attorney informed counsel for the claimant on December 14, 2001, "We are not going to voluntarily pay for the last visit your client made to Dr. Lorio."

Following additional correspondence from the claimant's attorney, the respondents' attorney indicated on December 20, 2001 that he had scheduled an appointment for the claimant with Dr. Wilson. Dr. Lorio wrote to the claimant on December 26, 2001 and indicated that he did not object to transfer of orthopedic care to Dr. Wilson.

Dr. Wilson wrote to the parties and the Administrative Law Judge on December 31, 2001:

This nice lady returned to our office on December 31, 2001. Ms. Tiner has considerable pain in her left hip and wants something done. She asked me to take over management. Apparently there has been some communication difficulty with her current treating physician and she wants to make a change. My problem in the past has been that it was not clear whether or not this was pressure from the insurance carrier, which would not be an acceptable way to make this kind of change. At any rate, I am happy to take over management.

Ms. Tiner will be scheduled for total hip replacement on the left....

The record indicates that the claimant underwent surgery on January 21, 2002. Dr. Wilson reported on July 8, 2002:

This nice lady returns today for a final visit following total hip replacement on the left. Ms. Tiner walks with a cane and still have (sic) a mild gluteus medius limp. Since her last visit she has had a thoracotomy with the upper tip of her left lung removed for carcinoma.

Examination of her left hip today reveals some tenderness at the extremes of motion with a good range of motion.

X-rays revealed good position of her hardware.

Ms. Tiner is released from our care. Her permanent impairment is 20% to the body as a whole; this rating is taken from AMA Guidelines, page 8, table 64, with a fair result. I do not feel this impairment could be substantially reduced by further therapy or any surgical procedure. I do not anticipate Ms. Tiner being able to return to work. She has been off work and has completely lost her work conditioning, particularly with the use of a cane. This would be with or without the problem with her lung.

The claimant's attorney wrote to the respondents' attorney on July 24, 2002:

Dr. John L. Wilson has now rated Ms. Tiner. His clinic date of 7/8/02 shows copy to Crockett Adj. Co., however I am faxing it along with this letter. You can read it.

If your client is serious about JP ing this claim without additional litigation, please let me know.

If you like, when I have time, I will outline a short basis for an offer to forward to you. Feel free to propose an initial offer....

The respondents' attorney replied on July 29, 2002, "The Respondents will pay the 20% PPD rating by Dr. Wilson in installments as dictated by the statute."

The record contains a pre-hearing filing by the claimant served on the respondents on August 28, 2002. The claimant contended, among other things, that she was entitled to permanent total disability benefits. Mackie Tiner, an employee of the respondent-carrier, testified at hearing:

Q. When is the first demand that you ever received for total permanent? Or when did you ever know, when did you first know she was claiming to be total permanent?

A. Around August, the end of August, August 28th.

Q. When I wrote you a letter?

A. Yes.

Q. After filing their Prehearing Conference?

A. Yes

Q. Or prehearing filing. And was that, in fact, accepted within six days?

A. Yes, it was.

The record indicates that the respondents began issuing checks to the claimant for "permanent total disability" benefits on or about September 3, 2002. A pre-hearing order was filed with the Commission on September 23, 2002. In the pre-hearing order, the parties stipulated, "the compensable injuries rendered the claimant permanently totally disabled." The claimant contended, among other things, that treatment rendered by Dr. Lorio and at St. Vincent Infirmary was reasonably necessary. The claimant contended that an attorney's fee and benefits for permanent total disability should be paid in lump. The claimant contended that she was entitled to an additional attorney's fee, pursuant to Ark. Code Ann. § 11-9-717(a)(4).

The respondents contended that "the claimant's treatment by Dr. Lorio was not authorized since the parties had changed the claimant's treating physician to another physician and, further, that the claimant's treatment at St. Vincent Infirmary was related to lung cancer and not her compensable injury." The respondents "denied that they had controverted payment of benefits for permanent total disability but accepted the claim shortly after the claimant's impairment rating had been given and the claimant's response to the prehearing filing had been received."

Hearing before the Commission was held on November 5, 2002. At that time, the respondents' attorney stipulated that the respondents owed \$1,254 for the claimant's treatment at St. Vincent Infirmary. The claimant testified:

Q. Did you tell Mr. Grady that you wanted a lump sum settlement on your life expectancy?

A. Yes, sir, I would because I've got work I need to get done on my house, and if I'm not able to go back to work, I need it.

Q. Such as what kind of work on your house?

A. I've got to have, somebody knocked a hole in my wall, and I've got to get it fixed. It's got to be done over, and I've got to have more furniture, because I haven't been able to work and buy any.

The Administrative Law Judge filed an opinion on January 31, 2003. On appeal, the respondents argue that the

Administrative Law Judge erred in finding that the respondents controverted permanent total disability. The respondents argue that the Administrative Law Judge erred in granting the claimant's petition for a lump-sum settlement. The respondents also argue that the Administrative Law Judge erred in finding that Dr. Lorio's treatment in November 2001 was authorized. Finally, the respondents argue that the Administrative Law Judge erred in finding that the respondents controverted the change of physician to Dr. Wilson. The claimant states in her notice of cross-appeal, "the ALJ should have found several other benefits controverted and for attorney fees, and all contrary to the evidence and the law."

II. ADJUDICATION

A. Authorization/Reasonably necessary 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 Administrative Law Judge found in the present matter, "The claimant's care by Dr. Lorio in November, 2001, was authorized and reasonably necessary in connection with her compensable injury and has been controverted by the respondents."

Although it is not consistent to find that specified medical treatment was both "authorized" and "controverted" by the respondents, the Full Commission nevertheless affirms the Administrative Law Judge's finding that Dr. Lorio's treatment was reasonably necessary. Dr. Lorio, an orthopedic surgeon, was the claimant's initial primary treating physician. Dr. Lorio performed hip surgery on the date of the claimant's compensable injury.

Dr. Lorio's treatment in November 2001 was clearly not authorized, in that the parties mutually had agreed in October 2001 to change physicians to Dr. Wilson. However, the record indicates that the claimant remained within her healing period as of November 2001, and the respondents did controvert a medical bill from Dr. Lorio dated November 12, 2001. The preponderance of evidence before us shows that Dr. Lorio's treatment of the claimant in November 2001 was reasonably necessary in connection with the claimant's compensable injury. Because Dr. Wilson refused to treat the claimant after an agreed change of physician, the claimant sought and received treatment from her prior treating physician, Dr. Lorio.

The Full Commission finds that the claimant's treatment from Dr. Lorio on its face was not authorized, but that because of Dr. Wilson's actions even after the agreed change

of physician order was entered, we find claimant's return to Dr. Lorio was reasonable and warranted under the circumstances. The Full Commission affirms the Administrative Law Judge's finding that Dr. Lorio's treatment was reasonably necessary in connection with the claimant's compensable injury, and is the responsibility of the respondents.

B. Controversion of Change of Physician

The Administrative Law Judge found, "The respondents controverted the change of physician to Dr. Wilson but have not otherwise controverted the expenses of his care, except as previously noted above, and the claimant is entitled to an attorney's fee in the amount of \$200.00." The Full Commission reverses this finding. The respondents did not controvert a change of physician to Dr. Wilson. By an order entered by the Administrative Law Judge in July 2000, the parties agreed to an independent medical examination by Dr. Wilson at the respondents' expense. The Administrative Law Judge entered another order in October 2001, stating, "The parties agreed to change treating physicians to Dr. John Wilson." The respondents subsequently wrote to Dr. Wilson, stating, "Subject to your agreement to do so, all parties and attorneys request that you assume the treatment of Ms. Tiner." There was not a hint of controversion with regard

to change of physician. The claimant did have trouble getting to Dr. Wilson for various reasons, but none of those reasons were related to any action by the respondents. Since there is no evidence before the Commission that the respondents controverted the change of physician to Dr. Wilson, we reverse this finding by the Administrative Law Judge.

C. Controversion

Ark. Code Ann. § 11-9-715(a)(2)(B) (Repl. 1996) provides that whenever the Commission finds that a claim has been controverted, in whole or in part, the Commission shall direct that fees for legal services be paid to the claimant's attorney. Whether or not a particular claim is controverted is a question of fact for the Commission. Aluminum Co. of America v. Henning, 260 Ark. 699, 543 S.W.2d 480 (1976). The Commission's finding on the issue of controversion will not be reversed absent a lack of substantial evidence to support the finding or a gross abuse of discretion by the Commission. New Hampshire Ins. Co. v. Logan, 13 Ark. App. 116, 680 S.W.2d 720 (1984).

In the present matter, the Administrative Law Judge found that the respondents controverted "payment of additional benefits for permanent total disability." The Full Commission reverses this finding. The parties

stipulated that the claimant sustained a compensable injury in September 1999. The claimant submitted a Form AR-C, Claim For Compensation, in November 1999. The Form AR-C included what the Administrative Law Judge described as "a welter of requested benefits," including both permanent partial and permanent total disability. The record indicates that the claimant was still well within her healing period when she filed the Form AR-C, and the claimant had not been assigned a permanent impairment rating. At a deposition taken in January 2000, the claimant did not contend that she was entitled to permanent partial or permanent total disability. The claimant in fact testified at that time that she wished to return to work if physically able. The claimant also testified that the respondents were providing all reasonably necessary medical treatment and related benefits.

Dr. Wilson performed hip-replacement surgery on the claimant on January 21, 2002. On July 8, 2002, Dr. Wilson assigned the claimant a 20% permanent impairment rating. The claimant's attorney wrote to the respondents on July 24, 2002, stating, "If your client is serious about JP ing this claim without additional litigation, please let me know." The respondents shortly thereafter informed the claimant's attorney that they would pay the 20% rating assigned by Dr.

Wilson. For the first time since the assessment of any permanent anatomical impairment, the claimant on August 28, 2002 contended that she was entitled to permanent total disability. Mackie Tiner testified that the respondent-carrier accepted permanent total disability within six days of the claimant's request for permanent total disability. The respondents began issuing checks for permanent total disability benefits on September 3, 2002.

The Full Commission finds that the respondents' actions with regard to the claimant's claim for permanent total disability did not constitute controversion. One of the purposes of the attorney's fee statute is to put the economic burden of litigation on the party that makes litigation necessary. Brass v. Weller, 23 Ark. App. 193, 745 S.W.2d 647 (1988). The mere fact that a respondent investigates a claim prior to admitting liability does not require a finding of controversion. Stucco, Inc. v. Rose, 52 Ark. App. 42, 914 S.W.2d 767 (1996). In the present matter, the respondents were not obligated to begin providing permanent total disability benefits when the claimant filed a Form AR-C in November 1999. The claimant at that time had not been assigned any level of permanent impairment or disability, and the claimant in fact testified in January 2000 that she wished to return to work. The

respondents even asked Dr. Lorio in May 2000 to provide them with an impairment rating for the claimant, but the record does not show that Dr. Lorio provided such a rating.

The record shows that the respondents began providing permanent total disability benefits to the claimant within one week of the time that she contended entitlement to permanent total disability. The Full Commission finds that the respondents' actions in the present matter with regard to permanent total disability did not constitute controversion. We therefore reverse the Administrative Law Judge's finding that the respondents controverted "payment of additional benefits for permanent total disability."

D. Lump-sum settlement

Ark. Code Ann. § 11-9-804(a) (Repl. 1996) provides:

(1) Whenever the Workers' Compensation Commission determines that it is for the best interest of the parties entitled to compensation, and after due notice to all parties in interest of a hearing, the liability of the employer for compensation may be discharged by the payment of a lump sum equal to the present value of all future payments of compensation computed at ten percent (10%) discount, compounded annually.

A lump-sum settlement is an extraordinary remedy that must be used sparingly. Gill v. Ozark Forest Products Et Al, 255 Ark. 951, 504 S.W.2d 357 (1974). The instant claimant testified that she wanted a lump-sum settlement in order to repair a wall in her home and to purchase

furniture. The Commission is granted broad discretionary powers in approving a lump-sum settlement. Stiles v. Reynolds Metal Company, 263 Ark. 321, 564 S.W.2d. 520 (1978). In considering these discretionary powers, we find that the present claimant's desire to purchase furniture and repair a wall does not give rise to the extraordinary remedy of a lump-sum settlement. The Full Commission therefore reverses the Administrative Law Judge's finding that "Benefits for permanent total disability and the related attorney's fee shall be paid in lump sum, discounted to present value."

Based on our *de novo* review of the entire record, the Full Commission affirms the Administrative Law Judge's finding that Dr. Lorio's treatment in November 2001 was reasonably necessary and was controverted by the respondents. We reverse the Administrative Law Judge's finding that the respondents controverted the change of physician to Dr. Wilson. The Full Commission reverses the Administrative Law Judge's finding that the respondents controverted payment of additional benefits for permanent total disability. We also reverse the Administrative Law Judge's finding that the respondents shall pay permanent total disability in lump sum. The Full Commission therefore

affirms in part and reverses in part the opinion of the Administrative Law Judge.

Since the claimant's injury occurred prior to July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as it existed prior to the amendments of Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715(Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). For prevailing in part on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$250.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 1996).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

Commissioner Turner concurs in part and dissents in part.

CONCURRING AND DISSENTING OPINION

_____I concur with the principal opinion's ultimate finding that respondent is liable for the expenses of Dr. Lorio's treatment in November 2001. Under the particular circumstances of this case, Dr. Lorio remained claimant's authorized treating physician until Dr. Wilson accepted her as a patient. Thus, since Dr. Lorio's treatment was obviously reasonably necessary, it was also authorized. In

other words, Dr. Lorio was the authorized physician who provided authorized and reasonably necessary treatment.

I must respectfully dissent from the finding that claimant is not entitled to a lump sum settlement of her permanent total disability benefits. Claimant will not receive permanent total disability benefits for life. She was already over the age of 60 when she sustained the work-related injury. Her entitlement to permanent and total disability benefits is limited significantly by Ark. Code Ann. § 11-9-522(f)(1) (Repl. 2002). I believe a lump sum payment of permanent total disability benefits would be in claimant's best interests. Accordingly, the opinion of the Administrative Law Judge should be affirmed in this regard.

I also dissent from the reversal of the opinion of the Administrative Law Judge finding that respondent controverted claimant's entitlement to permanent total disability benefits. A close and impartial review of the evidence indicates that respondent would not have voluntarily accepted any liability for wage-loss disability benefits without the efforts of claimant's attorney.

Respondent knew by September 2000 that Dr. Wilson believed claimant would be permanently and totally disabled. In a report dated September 7, 2000, Dr. Wilson stated that he did not believe claimant "can return to gainful

employment," even if she eventually underwent total hip replacement and experienced a good result from the procedure. This procedure was performed in January 2002. Thereafter, respondent stringently contended that claimant's permanent disability was entirely due to her lung cancer. As a result of this position, claimant's attorney asked Dr. Wilson for his opinion. In a report dated July 8, 2002, Dr. Wilson released claimant from his care and assigned a permanent anatomical impairment of 20% to the body as a whole. Dr. Wilson added that "I do not anticipate Ms. Tiner being able to return to work....This would be with or without the problem with her lung." After receiving this letter, respondent informed claimant's attorney that it would accept the 20% rating and pay it in installments. In other words, respondent was still resisting liability for any benefits for wage-loss disability. Thereafter, claimant had to specifically petition the Commission for a hearing on the extent of her permanent disability before respondent accepted its obligation to provide appropriate benefits to a legitimately injured worker.

The above evidence clearly supports a finding of controversion and an award of attorney's fees to claimant's attorney. The opinion of the Administrative Law Judge should be affirmed on this issue as well.

For the foregoing reasons, I concur in part and respectfully dissent in part.

SHELBY W. TURNER, Commissioner

Commissioner McKinney concurs in part and dissents in part.

CONCURRING AND DISSENTING OPINION

I respectfully concur in part and dissent in part from the majority opinion. Specifically, I concur in the finding that the respondents did not controvert the change of physician to Dr. Wilson; the finding that the respondents were required to make a lump sum payment of permanent and total disability benefits; the finding that the respondents did not controvert payment of permanent and total disability; and the finding that the claimant was not entitled to a sanction pursuant to Ark. Code Ann. § 11-9-717(a)(4). However, I must respectfully dissent from the finding that Dr. Lorio's treatment in November of 2001 was reasonable and necessary medical treatment.

The majority found that the claimant's treatment by Dr. Lorio in November, 2001, was authorized medical treatment. The evidence in the record indicates that the claimant's treating physician was changed from Dr. Jerry L. Lorio to Dr. John L. Wilson by Order dated October 22, 2001.

This Order specifically states: "The parties agree to change treating physicians to Dr. John Wilson." The respondents' attorney sent a letter to Dr. Wilson dated October 22, 2001, which states as follows:

I represent the workers' compensation carrier, Dale Grady represents the claimant and Mackie Tiner at Crockett Adjustment is now the adjuster handling the case. Subject to your agreement to do so, all parties and attorneys request that you assume the treatment of Ms. Tiner. You performed an IME on her on 9/7/00. A copy of her records were sent to you at that time. I enclose with this letter office notes of Dr. Lorio dated 3/13/01 and 9/18/01 which are the latest records that we have. Your bills and office notes should be sent to Mackie Tiner with a copy of the notes to me and Dale. If you are not agreeable to assuming treatment of Ms. Tiner, please let me know.

A copy of this letter was mailed to Dale Grady. The record fails to contain any evidence that the claimant or her attorney telephoned Dr. Wilson's office to set up an appointment. Had they done so, they would have learned early on, that Dr. Wilson required the claimant to terminate her relationship with Dr. Lorio before he would assume her treatment. On 11/6/01. Dr. Wilson responded to the respondents' attorney's 10/22 letter as follows:

As long as Ms. Tiner has a relationship with her current physician I cannot be involved, in that I saw her strictly as a second opinion. If, indeed, she has

for reasons of her own chose (sic) to terminate her relationship with her treating physicians I would be most happy to assume treatment.

There is a dispute as to whether or not the claimant's attorney received Dr. Wilson's follow-up letter. It is interesting to note, however, that this letter was one of the claimant's exhibits. The respondents sent another letter dated 11/12/01 to Dr. Wilson stating the following:

Ms. Tiner and her attorney have specifically requested that you take over her treatment and the employer and I, their attorney are agreeable.

A copy of this letter was mailed to Dale Grady and to the Administrative Law Judge. The record clearly supports that the respondents exhausted all efforts to transition the claimant's treatment from Dr. Lorio to Dr. Wilson. It is further clear that the claimant's attorney made no effort, whatsoever, in this regard. Rather, the evidence shows that the claimant's attorney's efforts were made only after he learned that charges incurred in November with Dr. Lorio would not be paid. All that would have been required is that the claimant or her attorney contact Dr. Wilson's office for an appointment. If they had done so, they would have discovered early on what the claimant would need to do in order to begin treatment, that is, contact Dr. Lorio and terminated the physician-client relationship. Neither the

claimant nor her attorney chose to do so. The claimant's attorney knew that there might be a problem with Dr. Wilson accepting her as a patient. Yet, the only direct communication from the claimant's attorney to Dr. Wilson's office came two months past the agreed order. Specifically, on December 11, 2001, Vicki at Dr. Wilson's office left a message for Mr. Grady that Dr. Wilson did not want to take over treatment if the claimant was still treating with Dr. Lorio. This information could have been relayed much earlier had the claimant's attorney simply made this call months earlier. Apparently, Mr. Grady did not respond to that phone call, as evidenced by another transcribed message from Dr. Wilson's office indicating they were "again calling" him back regarding Dorothy Tiner. The respondents contend that the claimant and her attorney could have easily remedied the situation in an expeditious manner by calling Dr. Wilson's office in October, after the Order was issued. I agree.

Arkansas Code Annotated § 11-9-508 provides that the respondents are to pay for reasonable and necessary medical treatment. While the principle opinion finds that the claimant's treatment with Dr. Lorio was reasonable and necessary, I find that pursuant to Arkansas Code Ann. § 11-9-514 the treatment was not authorized. The parties agreed

to a change of physician under § 11-9-514 and an order granting the change of physician was entered on October 22, 2001. Ark. Code Ann. § 11-9-514 provides that treatment or services furnished or prescribed by any physician other than the one selected according to the statute, except for emergency treatment, shall be at the claimant's expense. When there is no authorized treating physician by the respondent there can be no unauthorized medical treating within the meaning of Ark. Code Ann. § 11-9-514. See, Holm v. Superior Industries, Full Commission Opinion filed June 1, 1998 (Claim No. E115559). Further, the Commission has previously found that respondents should not be held liable for representations made to claimants by third parties with regard to the authorization of medical treatment. O. V. Davis v. Planter's Cotton Oil Mill, Inc., Full Commission Opinion filed October 6, 1997 (Claim No. E418762). It is axiomatic that even if treatment is reasonable and necessary, the respondents are not liable for the treatment if it is not authorized under § 11-9-514. (See, Byars v. Byars Construction, Full Commission Opinion November 9, 1999 (Claim No. E605910; affirmed in part and reversed and remanded in part in Byars Construction Co. v. Byars, 72 Ark. App. 158, 34 S.W.3d 797 (2000); Byars v. Byars Construction, Full Commission Opinion filed February 6, 2001 (Claim

No. E605910); and Tart v. Dept. of Corrections, Full Commission Opinion filed July 24, 1997 (Claim No. E505521).) Consequently, I cannot agree with the principle opinion finding that respondents are liable for the November 12, 2001, treatment of Dr. Lorio.

Accordingly, for all the reasons set forth herein, I must respectfully concur in part and dissent in part from the majority opinion.

KAREN H. MCKINNEY, Commissioner