

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E907878

BARBARA BINGLE,
EMPLOYEE

CLAIMANT

QUALITY INN,
EMPLOYER

RESPONDENT

UNION STANDARD INSURANCE COMPANY,
INSURANCE CARRIER

RESPONDENT

OPINION FILED JULY 20, 2004

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

Claimant represented by HONORABLE CLAUDELL WOODS, Attorney
at Law, Magnolia, Arkansas.

Respondents represented by HONORABLE WILLIAM C. FRYE,
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 an administrative law judge's
opinion filed August 29, 2003. The administrative law judge
found that the claimant was temporarily totally disabled
from April 29, 2001 through April 15, 2003. The
administrative law judge found that the respondents
willfully and intentionally failed to timely pay medical
bills subsequent to April 28, 2001, so that the respondents
were liable for a 36% penalty. The administrative law judge
also found that the respondents were in contempt of the
Commission and liable for a \$5,000 fine. After reviewing

the entire record *de novo*, the Full Commission finds that the claimant proved she was entitled to temporary total disability compensation through August 14, 2001. The Full Commission reverses the administrative law judge's finding that the respondents are liable for a 36% penalty. In addition, we find that the respondents are not in contempt of the Commission and are not liable for a fine.

I. HISTORY

The parties stipulated that an employment relationship existed on May 30, 1999. Barbara Joyce Bingle, age 44, contended that she sustained an accidental injury to her right knee on that date. The impression of Dr. D. Bud Dickson on August 12, 1999 was "traumatic pre-patellar bursitis, right knee." Dr. Dickson performed an "excision, pre-patella bursitis, right knee" on August 12, 1999. The claimant testified that she returned to light-duty work on or about August 25, 1999.

In an opinion filed February 2, 2000, an administrative law judge found that the claimant proved she sustained a compensable injury to her right knee on May 30, 1999. The administrative law judge (ALJ) found that the claimant proved she was entitled to temporary total disability compensation from August 12, 1999 through September 13,

1999, and that the claimant proved she was entitled to medical treatment and referrals from Dr. Bud Dickson.

No appeal was taken from the administrative law judge's opinion filed February 2, 2000.

The claimant continued to follow up with Dr. Dickson. Dr. James S. Mulhollan indicated that he performed arthroscopic surgery on the claimant's right knee on April 11, 2001. Dr. Mulhollan indicated that the claimant could return to restricted work on April 16, 2001 and then full work duties on April 23, 2001. Dr. Mulhollan wrote to the respondent-carrier on April 26, 2001:

Barbara Bingle returned to my office on April 26. She saw the video tape of her knee. I showed her how the anterior part of the joint was worn down to bare bone. I explained that pathology of this extent in the patellofemoral articulation caused weakness and that weakness, in turn, increased the load on the knee. She has been doing everything possible to stimulate her strength.

Unfortunately, the patient's job involves some stairclimbing. Her knees are not very good for stairs. She also has to walk to work, and she has to climb some hills. That is also irritating. She has been back on the job, however, and has tolerated it with some difficulty. She can certainly continue to work as time passes.

As her strength increases some, I hope she will do better. Not much else can be done for this patient. Swimming would be helpful, but she does not swim.

I plan to see her again in about four months. Of course, I will see her any time she needs my help.

The claimant testified that she sought emergency medical treatment on April 28, 2001. The record indicates that an emergency physician took the claimant off work that date "until seen by Dr. Mulhollan." The claimant testified that her last day of work was April 28, 2001.

A pre-hearing order was filed with the Commission on June 26, 2001. The claimant contended that she continued to require medical treatment; that "her authorized treating physician has declined to further provide treatment and that she is entitled to a change of treating physician in close proximity to her residence; that she has been rendered totally disabled since an April 28, 2001, emergency room visit; that respondents are liable for emergency room visits as well as temporary total disability benefits and change of treating physician all of which has been controverted."

The respondents contended that they were providing reasonably necessary medical treatment through Dr. Mulhollan.

The record indicates that the claimant presented on her own to Dr. D'Orsay D. Bryant, III, Tri-State Orthopaedic and Sports Medicine Center, on July 10, 2001:

The patient is a 41 year old female with a complaint of severe right knee pain. The patient originally fell down the stairs in May of 1999 and injured her knee. The patient has had excision of the bursa by Dr. Dickson and a scope by Dr. Mulhollan. She formerly worked as a housekeeper for Quality Inn hotel cleaning rooms, but when she went back to work, she had severe right knee pain and could not tolerate the work. She has had catching and locking in the knee since that time. She walks on her tiptoe because she cannot fully extend the knee....

Dr. Bryant's impression was "Right knee PFC with possible meniscal injuries." On July 13, 2001, Dr. Bryant performed right knee arthroscopic "partial medial and lateral meniscectomy," "chondroplasty and debridement," and "excision of inflamed synovium." Dr. Bryant performed surgery at Medical Center of South Arkansas. Dr. Bryant wrote on August 14, 2001, "The patient is doing well, no complaints. The knee is nontender. She has minimal STS in the fat pad region. Given a knee brace. FOLLOW-UP: As needed."

The respondents state that they paid indemnity benefits until August 14, 2001.

The administrative law judge filed an opinion on October 30, 2001. The ALJ found, "The claimant was temporarily totally disabled for the period beginning April 29, 2001, and continuing through the end of her healing

period or until she has returned to work, whichever occurs first." The ALJ found that medical treatment provided by Dr. D'Orsay Bryant was reasonably necessary, and that the respondents "shall pay all reasonable hospital and medical expenses arising out of the injury of May 30, 1999." The respondents appealed to the Full Commission.

According to testimony from Dr. Bryant, the claimant did not attempt to see him again until February 4, 2002. The claimant testified on cross-examination:

Q. Did you have any appointments in September of 2001?

A. Nobody made an appointment the last time I seen him because he wouldn't see me again.

Q. Because he had released you to come back on an as-needed basis, isn't that correct?

A. He never gave me nothing to release me. I never received nothing.

Q. Tell me why from September to February of 2002 that, first of all, you didn't have any appointments with Dr. Bryant?

A. Do what?

Q. Could you tell me, between September of 2001 and February of 2002, why you did not have any appointments with Dr. Bryant?

A. I was told he wouldn't see me anymore because none of the bills had been paid....

Q. We took Dr. Bryant's deposition, and his office records indicate the last time that you had

contacted them was February of 2002, and what I am asking you is, do you agree with that statement?

A. I don't remember when I contacted him. The last time I contacted him they told me absolutely not until that bill is paid.

Q. Do you have any reason to disagree with Dr. Bryant that that would have been around February of 2002?

A. I can't say what date it was....

In an opinion filed August 6, 2002, meanwhile, the Full Commission affirmed "the Administrative Law Judge's award of additional benefits and his designation of Dr. Bryant as the claimant's authorized treating physician." The Full Commission found that the respondents were liable for emergency treatment provided the claimant on April 28, 2001. The Full Commission found that "Dr. Bryant's surgery and treatment have been reasonably necessary to treat the claimant's compensable knee injury." The Full Commission also found no error in the ALJ's award of temporary total disability compensation.

Another pre-hearing order was filed with the Commission on February 11, 2003. The claimant contended that she remained within her healing period and was entitled to continued temporary total disability compensation. The claimant contended that the respondents had failed and

refused to pay for the claimant's reasonably necessary medical treatment. The claimant contended that because the respondents had not complied with previous orders of the Commission, the claimant had been denied access to reasonably necessary medical treatment as provided by her authorized physician. The claimant contended that the respondents were in contempt of the Commission. The claimant contended that penalties should be assessed against the respondents pursuant to Ark. Code Ann. §11-9-802.

The respondents contended that the claimant reached the end of her healing period by August 14, 2001, and that the claimant was not entitled to temporary total disability after that date. The respondents contended that they had paid the medical bills listed in their February 11, 2003 pre-hearing filing. The respondents acknowledged that two bills had not been paid, but that those bills had been placed in line for payment along with a 20% penalty and attorney's fee. The respondents asserted that their failure to pay these bills was a result of a serious illness by the adjuster handling the claim. The respondents asserted that they had complied with the rulings of the Commission, except for the two overlooked medical bills.

The administrative law judge scheduled a hearing on the following issues:

- (1) The claimant's entitlement to temporary total disability compensation subsequent to August 14, 2001;
- (2) Reasonably necessary medical treatment;
- (3) Penalty for unpaid medical bills pursuant to Ark. Code Ann. §11-9-802;
- (4) Contempt pursuant to Ark. Code Ann. §11-9-706; and
- (5) Attorney's fees.

The parties deposed Dr. Bryant on April 9, 2003. Dr. Bryant agreed that he performed surgery on July 13, 2001.

The respondents' attorney examined Dr. Bryant:

Q. What did you find in the surgery?

A. The patient's knee was very reddened and inflamed, which is indicative of a very inflamed knee, very painful knee....

Q. And did you find both medial and lateral meniscus tears?

A. That is correct.

Q. Did you completely remove the meniscus or just partially?

A. No, just a partial meniscectomy, leaving the remainder of the meniscus intact, but only the torn was removed....

Q. Is there a period of time that you expect for someone to take to recover from that type of surgery?

A. Yes, there is.

Q. And what is that normally?

A. Usually I see them a week after, and they're doing, on a postoperative visit maybe four to five days afterwards, they're doing fine. But the normal recuperative time would be about four to six weeks, but I do have an immediate weightbearing program in that they're not on crutches for four to six weeks, but I would imagine, you know, the healing period would be in that range....

Q. Then I've got you seeing her again August 14, 2001. Is that the last time you saw her?

A. That is correct.

Q. Again, how is she doing?

A. She's doing well. She didn't complain of anything at that time. At that time I did do a physical examination, you know, especially now that the swelling and the inflammation has resolved, and it was nontender. She had just mild swelling in what we call the fat pad region, which is the area underneath the patella, which I would expect with her having, you know, exposed bone.

Q. Did you go ahead and tell her that, if she needed to, she could come back?

A. Yes. She was also given a knee brace at that time for added support.

Q. Do you have any indication of her attempting to come back?

A. She did not come back at that time....

Dr. Bryant testified that the claimant did not attempt to return to him until February 4, 2002. The claimant was not seen on that date, because "her bill was completely unpaid from the surgery, and there needed to be a payment on

the bill." Upon questioning from the claimant's attorney, Dr. Bryant testified that a portion of his bill was not paid until February 20, 2003.

On April 15, 2003, Dr. Bryant assigned a permanent impairment rating and opined that the claimant had reached maximum medical improvement.

Hearing before the Commission was held on April 17, 2003. Darneshia Renee Hill, an adjuster for the respondent-carrier, testified that she inherited the claimant's file in about December 2002. Ms. Hill testified, "I inherited this file after Patsy Woodson took ill, and so the file was transferred to me." Ms. Hill testified with regard to a number of medical bills submitted on the claimant's behalf. Following is an example of Ms. Hill's testimony upon examination by the claimant's attorney:

Q. Can you tell me - Medical Center of South Arkansas, a bill was submitted on their behalf concerning Ms. Bingle, do you have that?

A. Yes, sir, I do.

Q. Do you know when that bill was submitted?

A. We received it September 4, 2001.

Q. Was the bill paid?

A. The bill was paid February 12th, 2003....

Q. Do you know why it wasn't paid until February 12th, 2003?

A. Sir, I actually don't. I don't. Upon receiving this file, I reviewed it, and after talking with Attorney Frye, the bill was actually paid, and I don't know why she didn't pay it at the time she had it, because we have our separate files....

Q. Tri-State Orthopedics, do you have a bill from them? Or Dr. Bryant? It may be in either one of those names.

A. Yes, Tri-State Orthopedic, I do show we received that July 24, 2001....

Q. When was that bill paid?

A. February the 12th, 2003, also, in the amount of \$2,717.02....

Ms. Hill testified on cross-examination:

Q. Darneshia, first of all, there were you and Patsy as far as adjusters, and then y'all added another one, is that correct?

A. Correct.

Q. And you mentioned that Ms. Woodson was ill. What did she have?

A. She had cancer.

Q. And she was out quite a bit for chemotherapy, is that correct?

A. Correct.

Q. One of the reasons that you were hired, and also Ann Goodbar was hired was because she was ill, is that correct?

A. That is correct.

Q. And then in December, what started happening to Ms. Woodson that she had to leave?

A. She became forgetful, she was falling asleep, she was having dizzy spells, she even got to the point where she went for a doctor's appointment and couldn't find her way back to work, and then after she left for her break, she didn't come back.

Q. And she has passed away?

A. She has passed away.

Q. And then you got involved in this file. Did you have a difficult time in determining what bills had and had not been paid?

A. Yes....

Ms. Hill agreed that the carrier had paid all the bills submitted to it, which payment included a penalty. She testified on examination by the administrative law judge:

Q. In inheriting the file, what action did you take in the file?

A. When the files were assigned to me, it was not just one file, it was a load of files, and after I received the files, I was reviewing the files, and I can't say exactly what date I got to this file because I had a lot of files that I had to review on top of my files that I had to review, but after reviewing the file and maintained contact with Attorney Frye and we had to go through tons of bills that were duplicate bills and bills that were not authorized, but then we showed that we had paid \$13,000 in medical bills, so I had to determine what bills weren't paid, what bills were paid, making calls to physicians' offices to determine what balances we owed, and then after speaking with Attorney Frye again, realized those

two bills were not paid and that we owed penalties on them.

The claimant testified on cross-examination:

Q. Did you ever contact anybody with Quality Inn after August 14th?

A. Not about work....

The administrative law judge found, "The claimant was temporarily totally disabled for the period beginning April 29, 2001 and continuing through April 15, 2003." The ALJ found that the respondents' failure to pay medical bills was willful and intentional, so that a 36% penalty was owed. The ALJ determined, "Pursuant to Ark. Code Ann. §11-9-706(b), I find that respondents are in contempt of the August 6, 2002, Opinion and Order of the Full Commission. Accordingly, respondents are direct (sic) to pay a fine in the amount of five thousand dollars (\$5,000)."

The respondents appeal to the Full Commission.

II. ADJUDICATION

A. Temporary Disability

For a scheduled injury, the claimant is entitled to temporary total disability compensation during the time that she (1) remains within her healing period and (2) has not returned to work. Wheeler Constr. Co. v. Armstrong, 73 Ark. App. 146, 41 S.W.3d 822 (2001). The administrative law

judge found in the present matter, "The claimant was temporarily totally disabled for the period beginning April 29, 2001 and continuing through April 15, 2003." The Full Commission finds that the claimant proved she was entitled to temporary total disability compensation from April 29, 2001 through August 14, 2001.

The Commission has determined that the claimant sustained a compensable injury to her right knee on May 30, 1999. The claimant was awarded temporary total disability compensation from August 12, 1999 through September 13, 1999. The claimant testified that she did not work after April 28, 2001. The claimant contended in June 2001 that she was entitled to additional temporary disability.

Dr. Bryant performed surgery on July 13, 2001. Dr. Bryant wrote on August 14, 2001, "The patient is doing well, no complaints. The knee is nontender. She has minimal STS in the fat pad region. Given a knee brace. Follow-up as needed." The respondents implicitly contend that the claimant reached the end of her healing period at this time. The Full Commission notes Dr. Bryant's testimony that the healing time for surgery would be 4-6 weeks. This closely corresponds with the time period of July 13, 2001 through August 14, 2001. We also note that the claimant did not

attempt to follow up with Dr. Bryant until February 2002. The record does not support the claimant's assertion that she was unable to timely return to Dr. Bryant because of the respondents' supposed intransigence. The evidence instead shows that the claimant just did not return to her treating physician (until February 2002) and did not attempt to return to work. The Full Commission finds that the claimant reached the end of her healing period no later than August 14, 2001, so that she is not entitled to temporary total disability after that date.

B. Penalty

Ark. Code Ann. §11-9-802 provides:

(c) If any installment payable under the terms of an award is not paid within fifteen (15) days after it becomes due, there shall be added to such unpaid installment an amount equal to twenty percent (20%) thereof, which shall be paid at the same time as, but in addition to, the installment unless review of the compensation order making the award is had as provided in §§ 11-9-711 and 11-9-712.

(d) Medical bills are payable within thirty (30) days after receipt by the respondent unless disputed as to compensability or amount.

(e) In the event that the commission finds the failure to pay any benefit is willful and intentional, the penalty shall be up to thirty-six percent (36%), payable to the claimant.

In the present matter, the administrative law judge found that the respondents' failure to timely pay medical

bills after April 28, 2001 was willful and intentional, so that the respondents owed a 36% penalty pursuant to Ark. Code Ann. §11-9-802(e). The Full Commission reverses this finding. The claimant sustained a compensable injury in May 1999. She was awarded reasonably necessary medical treatment, and temporary total disability from August 12, 1999 through September 13, 1999. The respondents paid temporary disability through August 14, 2001. In October 2001, the administrative law judge found that the claimant was entitled to temporary disability from April 29, 2001 "and continuing through the end of her healing period or until she has returned to work, whichever occurs first." The ALJ also awarded reasonably necessary medical treatment. The respondents appealed to the Full Commission. The time periods provided in the statute were not yet running against the respondents, because they asked for review of the ALJ's award pursuant to §11-9-802(c).

The Full Commission affirmed the administrative law judge on August 6, 2002. No appeal was taken from the Full Commission's opinion, which therefore became final on or about September 6, 2002. See, Ark. Code Ann. §11-9-711(b). Pursuant to Ark. Code Ann. §11-9-802(c), the respondents now had fifteen (15) days to pay the ALJ's award of temporary

total disability from April 29, 2001 until August 14, 2001. They did not do so, and the record indicates they have paid a 20% penalty pursuant to the statute.

With regard to the claimant's medical treatment, the respondents were required to pay medical bills submitted to them within thirty (30) days after receipt. Ms. Hill for the respondents testified regarding a number of bills submitted to the respondents on September 4, 2001. These bills were not paid until February 12, 2003. Nevertheless, this time period does not indicate a willful disregard of the Commission's order, because the bills submitted in September 2001 were legitimately being appealed to the Full Commission. The respondents have paid a penalty on each medical bill submitted to them by the claimant. Although reasonable minds could find that the respondents' actions in this case were negligent, the record does not show that the respondents acted willfully and intentionally not to pay the medical bills submitted to them. The Full Commission therefore reverses the administrative law judge's assessment of a 36% penalty.

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant proved she was entitled to temporary total disability compensation from

April 29, 2001 through August 14, 2001. The Full Commission reverses the administrative law judge's finding that the claimant was entitled to temporary total disability until April 15, 2003. The Full Commission reverses the administrative law judge's finding that the respondents are liable for a 36% penalty, because the record does not show that the respondents' tardiness in paying medical bills was willful and intentional. The Full Commission reverses the administrative law judge's finding that the respondents are in contempt of the Commission, and we vacate the \$5,000 fine imposed by the administrative law judge. The claimant's attorney is entitled to fees for legal services as provided by Ark. Code Ann. §11-9-715(a) (Repl. 1996).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

_____ I must respectfully dissent from the opinion of the majority ending claimant's entitlement to benefits for temporary total disability on August 14, 2001, finding that

respondent is not liable for a penalty for its willful and intentional refusal to pay benefits in a timely manner, and finding that respondent is not in contempt of the Commission.

Initially, I find that claimant's healing period did not end on August 14, 2001. As noted by Dr. Bryant, claimant still had some swelling in the knee. Dr. Bryant gave claimant a knee brace and admittedly released her to return to the clinic as needed. However, contrary to the findings of the majority, claimant did in fact try to return to see Dr. Bryant but could not get an appointment because respondent had not paid past due bills for medical treatment. Even the majority notes that it was not until April 15, 2003 that Dr. Bryant assigned a permanent anatomical impairment rating and opined that claimant had reached maximum medical improvement. In my opinion, claimant remained in her healing period for an extended time because respondent failed to promptly provide medical care as required by Ark. Code Ann. § 11-9-508(a) (Supp. 2003).

While I am certainly sympathetic with the obstacles facing the employer as a result of the illness suffered by the first adjuster in this case, I agree with the Administrative Law Judge's finding that respondent's

overall behavior in this case is egregious and contemptible. Respondent's cavalier attitude towards its obligation to promptly and timely pay appropriate benefits to legitimately injured workers is irresponsible and offensive. The majority's leniency in this case is misplaced.

Accordingly, I find that the opinion of the Administrative Law Judge should be affirmed in its entirety. Therefore, I must respectfully dissent.

SHELBY W. TURNER, Commissioner