

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F002583

LAVONDA ICENHOWER, EMPLOYEE	CLAIMANT
DEQUEEN SCHOOL DISTRICT, EMPLOYER	RESPONDENT
RISK MANAGEMENT RESOURCES, CARRIER	RESPONDENT

OPINION FILED JUNE 14, 2004

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

Claimant represented by HONORABLE GREG R. GILES, Attorney at Law, Texarkana, Arkansas.

Respondent represented by HONORABLE MICHAEL J. DENNIS, Attorney at Law, Pine Bluff, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The respondent appeals a decision by the Administrative Law Judge finding that the claimant was entitled to additional medical treatment and a second change of physician. Based upon our de novo review of the record, we reverse the decision of the Administrative Law Judge.

The claimant sustained an admittedly compensable injury to her lower back on February 10, 2000. The claimant initially treated with Dr. Keith Mitchell. While under Dr. Mitchell's care, the claimant was referred to a

chiropractic physician, Dr. Wolf, for physical therapy. Dr. Mitchell referred the claimant to Dr. Joe Patterson, a neurosurgeon. However, due to a delay in scheduling, the claimant was examined by Dr. Robert Dickens instead of Dr. Patterson. The claimant was not satisfied with Dr. Dickens's treatment and requested a change of physician to Dr. Richard M. Hilborn, an orthopedic physician. The change of physician was granted by the Medical Cost Containment Division of the Workers' Compensation Commission and the claimant began treatment with Dr. Hilborn in May of 2000.

Dr. Hilborn had the claimant undergo an MRI of the lumbar spine. The claimant treated with Dr. Hilborn through July of 2000. On July 18, 2000, Dr. Hilborn referred the claimant to Dr. Barry Green for a functional capacity evaluation and an evaluation for permanent impairment. Dr. Hilborn's office notes of that date stated that "at the present time I think the patient has reached maximum medical improvement and I'm going to have the patient seen by Dr. Barry Green for a functional capacity evaluation and impairment rating." The claimant then requested additional treatment from the respondents. The nurse case manager

assisted the claimant in being seen by Dr. Bruce Safman, who treated the claimant for approximately two years before releasing her from his care in August 2002. While under Dr. Safman's care, the claimant underwent another MRI of her lumbar spine on January 30, 2002, which disclosed a small central disk protrusion and a small tear of the annulus at L5-S1.

On August 20, 2002, the claimant sought treatment from Dr. Jim J. Moore at her own expense. During his physical examination of the claimant, Dr. Moore noted the presence of some spasms in her lumbar paraspinous muscles. Dr. Moore diagnosed the claimant as having lumbar radiculitis and lumbosacral sprain/strain. Dr. Moore recommended that the claimant undergo some EMG/NCV nerve testing of her back and right lower extremity. He also indicated that she might be a candidate for an LESI or a nerve block. At this time, the claimant is requesting a change of physician to Dr. Moore and the additional medical treatment that Dr. Moore has recommended. Based upon our de novo review of the record, we find that the claimant is not entitled to any additional medical treatment. Further,

we find that the claimant is not entitled to a change of physician to Dr. Moore.

The claimant requested additional medical treatment from Dr. Moore. We find that the claimant is not entitled to additional medical treatment. Employers must promptly provide medical services which are reasonably necessary for treatment of compensable injuries. Ark. Code Ann. § 11-9-508(a) (Repl. 2002). However, injured employees have the burden of proving by a preponderance of the evidence that the medical treatment is reasonably necessary for the treatment of the compensable injury. Norma Beatty v. Ben Pearson, Inc., Full Workers' Compensation Commission Opinion filed February 17, 1989 (Claim No. D612291). When assessing whether medical treatment is reasonably necessary for the treatment of a compensable injury, we must analyze both the proposed procedure and the condition it is sought to remedy. Deborah Jones v. Seba, Inc., Full Workers' Compensation Commission Opinion filed December 13, 1989 (Claim No. D512553). Also, the respondent is only responsible for medical services which are causally related to the compensable injury.

A review of the evidence demonstrates that the claimant is not entitled to any additional medical treatment. The claimant has been seen by a number of physicians, including a neurosurgeon, an orthopedic physician, and a pain management specialist. The claimant has been diagnosed with a lower back strain for which she has managed to continuously seek medical treatment for approximately three years. The orthopedic surgeon and the pain management specialist have both declared the claimant to be at maximum medical improvement. The neurosurgeon offered no additional treatment for the claimant and found that she was not an operative candidate. The claimant has undergone two diagnostic MRIs to the lower back, a functional capacity evaluation, physical therapy, trigger-point injections, and significant periods of medication to treat her back condition. Although Dr. Moore found some muscle spasms when he evaluated the claimant on August 20, 2002, Dr. Safman's notes from 2002 indicate the absence of muscle spasms or other objective clinical findings that substantiated the claimant's ongoing complaints of pain. Dr. Safman's notes are indicative that the claimant was not suffering from any muscle spasms when he released her.

Simply put, we can not find that the claimant is entitled to any additional medical treatment.

With respect to the issue of the claimant's change of physician, the Administrative Law Judge found that the respondents were estopped from asserting a defense that the claimant can only have one change of physician at her request. The elements of equitable estoppel, as set out in Snow v. Alcoa, 15 Ark. App. 205, 691 S.W.2d 194 (1985), are follows:

- (1) The party to be estopped must know the facts;
- (2) he or she must intend to his or her conduct shall be acted upon or must act so that the party asserting the estoppel has the right to believe the other part [party] so intended;
- (3) the party asserting the estoppel must be ignorant of the true facts; and
- (4) the party asserting the estoppel must rely on the other party's conduct to his or her injury.

We find that estoppel does not apply to the facts of this case.

The dissent argues that since the respondents re-directed the claimant's care from Dr. Hilborn/Dr. Green to

Dr. Safman, the respondents controverted the claimant's entitlement to additional benefits and that the change of physician rules do not apply. We simply can not find that this case was controverted. Whether a claim is controverted is a fact question that must be determined from the circumstances of each particular case. Masonite Corporation v. Mitchell, 16 Ark. App. 209, 699 S.W.2d 409 (1985); Climer v. Drake's Backhoe, 7 Ark. App. 148, 644 S.W.2d 637 (1983); Walter v. Southwestern Bell Telephone Co., 17 Ark. App. 43, 702 S.W.2d 822 (1986). The mere failure to pay compensation benefits does not amount to controversion, in and of itself. Revere Copper & Brass, Inc. v. Talley, 7 Ark. App. 234, 647 S.W.2d 477 (1983). Likewise, controversion may not be found where the respondent accepts its compensability but delays payment in a reasonable attempt to investigate the extent of the claimant's disability. Horseshoe Bend v. Sosa, 259 Ark. 267, 532 S.W.2d 182 (1976); Hamrick v. The Colson Company, 271 Ark. 740, 610 S.W.2d 281 (Ark. App. 1981). However, assuming a position which requires the claimant to retain the services of an attorney to take the actions necessary to assure that the employee's rights are protected may constitute controversion. New Hampshire Insurance Co. v.

Logan, 13 Ark. App. 116, 680 S.W.2d 720 (1984); Turner v. Trade Winds Inn, 267 Ark. 861, 592 S.W.2d 454 (1980).

The claimant was granted a one-time change of physician by the Medical Cost Containment Division of the Commission. The dissent argues that the respondents directed treatment away from the Commission-ordered physicians, that the respondents disregarded the Commission's change of physician to Dr. Hilborn and his referral to Dr. Green and therefore unilaterally changed the claimant's treating physician to Dr. Safman. The dissent finds that this was controversion. However, in our review of the evidence in this case, we can not find that the respondents either unilaterally changed claimant's physician or controverted the claimant's care at any point. The respondents agreed to allow the claimant her one-time change of physician to Dr. Hilborn. Dr. Hilborn treated the claimant for approximately three months. He found the claimant had reached maximum medical improvement and referred her to Dr. Green for a functional capacity evaluation and an assessment of permanent impairment. The claimant, being unsatisfied with this treatment, through the respondent's nurse case manager got an appointment with Dr. Safman who

treated the claimant for approximately two years. The respondents have gone above and beyond what was required of them. Dr. Hilborn had already declared the claimant to be at maximum medical improvement and was referring her to a physician to have an impairment rating assessed. The respondents would, in essence, be punished for providing additional treatment to the claimant over and above what is minimally required by statute. The respondents paid for Dr. Safman's treatment for the claimant for two years. The respondents did not unilaterally redirect the claimant away from her authorized treating physician and such a finding is not only contrary to the facts, it goes against the claimant's desire for additional treatment.

The claimant is entitled to petition the Commission one time only for a change, and the Commission may approve the change with or without a hearing. Id. In the case of Wal-Mart Stores, Inc. v. Brown, ___ Ark. App. ___, ___ S.W.3d ___ (June 25, 2003), the Court of Appeals held that where the claimant has exercised her absolute, statutory right to a one-time change of physician pursuant to Ark. Code Ann. §11-9-514(a)(3)(A)(ii), the respondents 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.

The respondents have fulfilled their obligation under the statute to the claimant. She was granted her one-time change of physician. When considering the facts of this case, the claimant's treatment by Dr. Safman can be treated as a change of physician, which was voluntarily accepted by respondents. "Whether treatment is the result of a 'referral' rather than a 'change of physician' is a factual determination to be made by the Commission." Pennington v. Gene Cosby Floor and Carpet, 51 Ark. App. 128, 911 S.W.2d 600 (1995). The Commission's authority to characterize a change of physician as a referral has its origin in our Rule 23, which authorizes the Commission to permit deviation from the Commission's rules when compliance is impossible or impractical. Id. In Patrick v. Arkansas Oak Floor, 39 Ark. App. 34, 833 S.W.2d 790 (1992), the claimant's treating physician advised the claimant that he had done all he could do for the claimant and stated that if the claimant wanted to see another physician he would be glad to make a referral. The doctor's notes in Patrick specifically stated, "Perhaps a referral to another orthopedic surgeon would be

appropriate." The claimant in Patrick advised his treating physician that he would like to a neurological specialist. The Arkansas Court of Appeals held that a referral made based upon a request by claimant is not a valid referral, but rather, is in the nature of a change of physician. Id. The facts of this case are strikingly similar to Patrick.

In addition, Ark. Code Ann. § 11-9-1001, provides that the Commission is not to liberalize, broaden, or narrow the workers' compensation statutes. The statute is clear that the claimant is entitled to only a one-time change of physician. Ark. Code Ann. § 11-9-704(c)(3) provides that the law is to be strictly construed. Under the mandates of strict construction, there is no other interpretation but that the claimant is only entitled to a one-time change of physician. It is clear from the evidence presented in this case that the claimant was granted that one-time change of physician to Dr. Hilborn and received treatment. The argument that she did not receive treatment and the respondents disregarded the change of physician is completely without merit.

Further, when we consider the Court's findings in Patrick, in light of the claimant's position that she was

not satisfied with Dr. Hilborn's treatment and wanted to see someone else and the respondents directing her to Dr. Safman, this could be construed as a second change of physician. In short, the claimant is simply not entitled to another change of physician. We simply can not find that there was a controversion by the respondents in directing the claimant to Dr. Safman. The claimant was directed to Dr. Safman after contacting the nurse case manager when she was not happy about being released by Dr. Hilborn and directed to Dr. Green for a functional capacity evaluation and permanent impairment.

Therefore, for those reasons stated herein, we find that the decision of the Administrative Law Judge should be reversed and this claim for benefits denied and dismissed.

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 finding that claimant is not entitled to any additional medical treatment for her compensable injury. By denying further treatment, the majority has rendered moot any issues involving change of physician or authorized treating physician. However, since I find that claimant has proven entitlement to additional medical treatment, I will also discuss from whom claimant can receive this treatment.

Shortly after Dr. Safman noted, not surprisingly, an absence of muscle spasms, Dr. Jim Moore, a neurosurgeon who conducts many independent medical evaluations of injured workers, indicated in his August 20, 2002 report that he did in fact detect lumbar paraspinous muscle spasms on the right. Dr. Moore's observation of objective muscle spasms therefore substantiates not only claimant's persistent pain complaints, but also the unresolved nature of her prolonged compensable low back injury. Claimant should be applauded for having returned to work with new school contracts each year despite the unresolved nature of her admittedly compensable 2000 low back injury.

Dr. Moore has proposed a relatively non-invasive diagnostic test which claimant has not yet received for her injury (EMG/NCV of the back and right lower extremity), and Dr. Moore has suggested relatively non-invasive additional treatment that she has not yet received (an LESI or possibly a selected nerve block). Finally, although respondent's attorney suggested at the hearing that all physicians have diagnosed claimant with a lumbar strain or sprain, I note that Dr. Moore's report also contains a diagnosis of lumbar radiculitis.

After considering the relatively non-invasive nature of the proposed treatment, the fact that claimant has not previously received the treatment proposed by Dr. Moore, and in light of the objectively documented persistent nature of claimant's low back problems, I find that the additional medical treatment proposed by Dr. Moore is reasonably necessary for treatment of claimant's compensable and persistent low back injury. The evidence certainly will not support the majority's denial of any and all additional treatment.

As is readily apparent, the majority's finding that the neurosurgeon (Dr. Moore) offered no additional

treatment for claimant is just not accurate. Further, there is no proof that claimant's compensable injury does not warrant any further treatment. The Court of Appeals will not hesitate to reverse the Commission's denial of all additional treatment, when the Commission arbitrarily disregards the medical evidence. See Patchell v. Wal-Mart Stores, Inc., ___ Ark. App. ___, ___ S.W.3d ___ (May 19, 2004) (CA03-1087).

The Commission's Medical Cost Containment Department issued a change of physician order for claimant from Dr. Robert D. Dickens to Dr. Richard M. Hilborn on June 8, 2002. Since claimant is entitled to further treatment, claimant could return to Dr. Hilborn, who is an authorized treating physician, for any additional medical treatment which is reasonably necessary for her compensable injury without requiring a change of physician. See Mickey v. Arkansas Methodist Hospital, Full Commission Opinion filed July 22, 2003 (F002633); Porter v. Aalf's Manufacturing Company, Full Commission Opinion filed May 8, 2003 (E902622).

I have been unable to locate any precedent addressing the issue as to whether an injured worker is

entitled to a second change of physician under circumstances where (1) the Commission orders a change of physician, (2) the injured worker receives treatment from the new physician for approximately one month until respondent unilaterally redirects the injured worker's medical treatment to a new physician, and (3) the injured worker thereafter acquiesces to the new physician's treatment until the new physician releases the injured worker with no proposed follow-up.

Initially, I must point out that there is no evidence in the record to support the majority's dance around the fact that respondent unilaterally and wrongfully interfered with the relationship between claimant, her treating physician, and valid referrals, and then directed claimant to a physician more to its liking.

Debbie Ledbetter, the nurse case manager, did not appear at the hearing to testify. Claimant's treating physician had referred claimant to Dr. Green for a functional capacity evaluation and possible rating for permanent anatomical impairment. Respondent was desperate to get claimant under the care of Dr. Safman, who rarely assigns injured workers a rating for permanent anatomical

impairment and who I have disparaged on many occasions. Respondent cancelled the appointment with Dr. Green and ordered claimant to present to Dr. Safman. Granted, claimant acquiesced to seeing Dr. Safman for a period of time, but she just wanted anyone to find out what was wrong with her and to provide appropriate treatment for the condition. As is typical in cases involving Dr. Safman, claimant's acquiescence was to her obvious detriment.

Clearly, if a respondent can get away with the course of action that occurred in this case, and then successfully argue that a claimant is not entitled to an additional change of physician after respondent has unilaterally taken the injured worker's treatment away from the direction of the Commission-authorized physician, then respondent can essentially render null and void the change of physician rules of Ark. Code Ann. § 11-9-514 (Repl. 2002) by simply (1) not appealing a change of physician ordered by the Commission and then simply (2) redirecting the injured worker's medical care to respondent's chosen physician shortly thereafter. I can think of two potential alternative legal grounds to prevent this from happening.

First, the Commission could find that when respondent redirected claimant's care from Dr. Hilborn/Dr. Green to its own choice of physician (Dr. Safman), respondent rendered null and void the Commission's attempt to provide claimant her statutory one-time change of physician. By negating claimant's first Commission-approved change of physician, and asserting a right to select once again claimant's authorized treating physician, the Commission could interpret the law such that claimant must again be permitted a one-time change of physician pursuant to Section 514(a) (3) (A) (ii).

Another way to discourage such egregious conduct would be to find that, once respondent disregarded the Commission's change of physician to Dr. Hilborn, and Dr. Hilborn's referral to Dr. Green, and thereafter unilaterally changed claimant's treating physician to Dr. Safman, respondent controverted claimant's entitlement to additional treatment from her Commission-authorized treating physicians (Dr. Hilborn and Dr. Green). The change of physician rules do not apply during a controverted period. See Hawkins v. Jefferson Regional Medical Center, Full Commission Opinion filed August 12, 2003 (E502382,

E709020, F003389); Kenney v. Siloam Springs School District, Full Commission Opinion filed August 31, 2001 (E907076); Barnett v. Daniel, Full Commission Opinion filed May 25, 2001 (E600078); Clements v. Shoney's, Full Commission Opinion filed February 12, 1998 (E604632).

A finding of controversion appears particularly appropriate in the present case where respondent's contention in its Response To Pre-hearing Questionnaire was that "Claimant has received all reasonable and necessary medical treatment to which she is entitled." This is a clear statement that respondent was in fact controverting claimant's entitlement to any additional treatment. Therefore, respondent's prehearing contentions also independently support a conclusion that the change of physician rules do not apply. Sanyo Mfg. Corp. v. Farrell, 16 Ark. App. 59, 696 S.W.2d 779 (1985).

Since respondent has controverted claimant's entitlement to additional treatment, claimant in the present case should be free to seek the treatment proposed by Dr. Moore from either Dr. Moore or from Dr. Hilborn or from any other competent physician she chooses.

For the foregoing reasons, I must respectfully
dissent.

SHELBY W. TURNER, Commissioner