

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F206803

STAN WEST,
EMPLOYEE

CLAIMANT

ARKANSAS TECHNICAL CONTRACTORS,
EMPLOYER

Respondent

FAIRFIELD INSURANCE COMPANY,
INSURANCE CARRIER

Respondent

OPINION FILED FEBRUARY 6, 2004

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

Claimant represented by HONORABLE THOMAS MICKEL, Attorney at
Law, Conway, Arkansas.

Respondents represented by HONORABLE MICHAEL RYBURN,
Attorney at Law, Little Rock, Arkansas.

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

OPINION AND ORDER

The Respondents appeal an opinion by the Administrative
Law Judge filed June 4, 2003, where the Claimant was awarded
temporary total disability benefits, medical mileage
reimbursement and a one-time change of physician to a doctor
in Arizona.

After a de novo review of the case, the Full Commission
orders that the Claimant be allowed to a change of physician
to an Arizona doctor of his choice, provided that the
Arizona doctor agrees to comply with Rule 30 of the Arkansas
Workers' Compensation Commission. Specifically, the Arizona

physician will have to agree to the fee schedule of the Arkansas Workers' Compensation Commission. Further, the Commission denies the medical mileage reimbursement from Arizona to Arkansas, in that it was not reasonable under Arkansas Workers' Compensation Commission Advisory 89-2. Finally, the Commission vacates that portion of the Administrative Law Judge's opinion that grants the Claimant temporary total disability benefits because that issue was not stipulated by the parties to be an issue at the hearing.

The Claimant injured his left shoulder on April 29, 2002. The injury was occasioned by a fall from a ladder while working for the Respondents as an industrial electrician. The injury was admittedly compensable. The Claimant reported the injury and was sent by the Respondent to the University of Arkansas for Medical Sciences emergency room. The UAMS emergency room physician referred the Claimant to Dr. Johannes Gruenwald, who subsequently treated the Claimant's shoulder injury. The Claimant has since moved from Arkansas to the Scottsdale/Phoenix, Arizona area in order to seek work. The Claimant also testified that he owns some horses in Arizona. The Claimant testified that he has not worked since his injury.

According to the Prehearing Order filed in the case, both parties submitted their stipulations as to what issues would be agreed upon to be heard at the hearing. While the record contains no prehearing filing from the Respondents listing the issues that they agreed would be the ones to be litigated at the hearing, it was made clear at the hearing that the only issues that the parties agreed to litigate were (1) whether the Claimant was entitled to a change of physician to an Arizona physician of his own choosing, and (2) whether the Claimant was entitled to medical mileage reimbursement for his trip from Arizona to Arkansas to visit Dr. Gruenwald. This doctor's visit occurred some time within this same time period as the hearing before the Administrative Law Judge on February 18, 2003. The record is devoid of any notes or progress reports from Dr. Gruenwald with respect to that February 2003 office visit. It was not an issue prior to the hearing that temporary total disability benefits should be awarded. However, the Administrative Law Judge made such an award to the Claimant.

Following the hearing, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.

2. On April 29, 2002, the relationship of employee-employer-carrier existed among the parties.
3. On April 29, 2002, the Claimant earned wages sufficient to entitle him to weekly compensation benefits of \$425/\$319 for TTD/PPD benefits.
4. On April 29, 2002, the Claimant sustained an injury arising out of and in the course of his employment.
5. The Claimant was temporarily totally disabled for the period beginning June 13, 2002 and continuing through the end of his healing period, a date yet to be determined. Pursuant to Ark. Code Ann. § 11-9-506, the Claimant is entitled to the difference between his TTD rate and his unemployment compensation benefits rate covering the time period the benefits were received while within his healing period and totally incapacitated to earn wages.
6. Pursuant to Ark. Code Ann. § 11-9-514(a)(3)(ii), and in accordance with Collins v. Lennox Industries, 77 Ark. App. 303 (2002), Claimant is entitled to a one-time change of treating physician relative to his April 29, 2002 compensable injury. Respondent shall pay the cost of Claimant's medical treatment.
7. Respondents shall pay all reasonable hospital and medical expenses arising out of the injury of April 29, 2002.
8. The Respondents have controverted the payment of temporary total disability benefits to the Claimant and Claimant's entitlement to a change of treating physician, as well as medical mileage to the February 13, 2003 visit to Claimant's treating physician.

The three issues involved in this appeal are (1) the Claimant's entitlement to a one-time change of physician; (2) the Claimant's entitlement to medical mileage reimbursement for his trip from Arizona to Arkansas for his February 13, 2003 visit to Dr. Gruenwald; and (3) Claimant's entitlement to an award of temporary total disability benefits. We will address these in order.

(A) Claimant's entitlement to a one-time change of physician.

There can be little question that the Claimant is entitled to a one-time change of physician pursuant to Ark. Code Ann. § 11-9-514(a)(3)(ii) (Repl. 2002). It is beyond question that Claimants have the right to a one-time change of physician during the administration of their claim both under Ark. Code Ann. § 11-9-514(a)(3)(A) (Repl. 2002) and interpreting court cases. The Arkansas Court of Appeals, in interpreting the statute, has stated that the change-of-physician statute is mandatory, not discretionary, upon the Commission. In Collins v. Lennox Indus., Inc., 77 Ark. App. 303, 75 S.W.3d 204 (2002), the appeals court stated: "The currently applicable subsection, (a)(3), contains no discretionary phrase regarding approval of the change, but simply states that the right to a one-time change 'shall be

allowed, by petitioning the commission.' Therefore, there is no discretion left to the Commission." Collins, supra, at 309. In light of the statute and the court's interpretation of it, we can find no reason to deny the Claimant his one-time change of physician.

However, Rule 30(R) of the Arkansas Workers' Compensation Commission regarding out of state providers states in pertinent part:

All services and requests for change-of-physician to out-of-state providers must be made to providers who agree to abide by the AWCC Medical Fee Schedule. Providers shall sign an agreement stating they shall comply with AWCC Rule 30. Carriers/self-insured employers which are not contracted with a certified Managed Care Organization shall be responsible for obtaining this agreement.

So long as the Claimant's choice of physician in Arizona, specifically Dr. Terry McLean, agrees to abide by the Commission's fee schedule for out-of-state providers, and is willing to agree in writing to abide by the Commission's Rule 30, we can see no reason to deny the Claimant a change of physician to Dr. McLean. However, if Dr. McLean is not willing to abide by the fee schedule and is not willing to abide by Rule 30, then the Claimant must either choose an Arizona physician who will so comply or

else the Commission will choose a physician for him that will comply with the Rule.

(B) Is the Claimant entitled to medical mileage reimbursement for his trip back from Arizona to Arkansas for a February 13, 2003 visit to Dr. Gruenwald?

The facts adduced at the hearing show that the Claimant moved to Arizona not because he had a job in hand, but to enable him to take a job once he was physically able. The Claimant testified that his primary speciality in construction is in hospitals and stadia and that the work conditions were more favorable at the time in Arizona than in Arkansas. The evidence shows that the Claimant made the appointment with Dr. Gruenwald for February 13, 2003, after he was notified of the time and date of the hearing before the Administrative Law Judge. (Tr. at 19) In his testimony before the Administrative Law Judge, counsel for the Respondent asked:

Q. Now we had this hearing scheduled some time ago, and you knew you were going to be here for the hearing scheduled several months ago, is that correct?

A. Not several months ago. I was just notified like two months.

Q. Okay, two months ago. And did you make an appointment with Dr. Gruenwald after you found out that the hearing was scheduled and you were going to be here anyway?

A. Yes, sir.

We can find no evidence in the record that this appointment with Dr. Gruenwald was medically necessary. We find no progress reports from Dr. Gruenwald noting this February 13, 2003, appointment or any notes from Dr. Gruenwald relating to this appointment. The facts adduced at the hearing and the evidence in the record seem to show that it was more likely that the Claimant made the appointment with Dr. Gruenwald as a follow-up to have his shoulder checked at a time when he knew that he was going to have to be in Arkansas anyway, that is to attend the hearing, as a more efficient use of his time and in order to save travel expenses.

In our opinion, this does not meet the reasonableness requirement as established under Arkansas Workers' Compensation Commission Advisory 89-2. That advisory revised August 9, 2003, states in pertinent part:

The Arkansas Workers' Compensation Commission approves mileage reimbursement rates for Claimants as part of the medical expenses related to an injury or illness arising out of and in the course of employment.... Travel must be incurred as a result of job-related injuries and meet all other reasonableness requirements established by the law, the Commission, and the Courts." (Emphasis supplied.)

We do not view the Claimant's request for reimbursement for travel from Arizona to Arkansas for a physician's visit, of which we have no evidence regarding its medical necessity, at a time when the Claimant would have to be in Arkansas for his hearing, travel for which certainly is not reimbursable, as rising to the level of reasonableness under the advisory. Accordingly, we deny the Claimant's right to medical mileage reimbursement for his trip from Arizona to Arkansas for the February 13, 2003, office visit with Dr. Gruenwald.

(C) Is the Claimant entitled to an award of temporary total disability benefits?

The evidence in the record makes it clear that temporary total disability benefits was not an issue that the parties agreed or stipulated would be litigated at the hearing. The Administrative Law Judge's Prehearing Order of January 16, 2003, only listed as issues those issues listed in the Claimant's prehearing filing of December 20, 2002. This filing listed the issues as the change of physician and controversion. The Prehearing Order also listed as issues those issues listed on the Respondents' prehearing filing of December 11, 2002. This filing, however, is not in the record. Moreover, prior to the

hearing, the Claimant also asked that the issue of medical mileage reimbursement be included as one of the issues to be litigated, and this was not objected to by the Respondents. At the end of the hearing, counsel for the Respondents asked the Administrative Law Judge whether the scope of the hearing was restricted to change of physician and the medical mileage reimbursement claim. The Administrative Law Judge stated that that was correct. It seems clear that only those two issues were the issues agreed upon to be litigated at the hearing.

Even though the issue of temporary total disability was not one of the issues stipulated by the parties to be litigated at the hearing, the Claimant asserts that the Administrative Law Judge felt that the issue of TTD had been fully developed at the hearing. The Claimant cites Ark. Code Ann. § 11-9-705(a)(1), which states that Administrative Law Judges are "not to be bound by technical or statutory rules of evidence or by technical or formal rules of procedure except as provided by this chapter, but may make such investigation or inquiry, or conduct the hearing, in a manner as will best ascertain the rights of the parties." Moreover, the Claimant asserts the Commission has stated

that Administrative Law Judges sometimes may disregard the stipulations of the parties in the interest of justice.

Stipulations are entered into as a matter of good faith by both parties. It is the opinion of the Commission that stipulations, to the extent possible and practicable, should be followed by both the parties and the Commission. There are some cases in which the interests of justice should override the stipulations. This is not one of those cases.

Vacating the Administrative Law Judge's award of temporary total disability benefits would not preclude the Claimant from further litigating that issue. Indeed, the Claimant asserts in his brief that if the Commission vacates the Administrative Law Judge's award of temporary total disability, he will certainly litigate it in the future. Doing so would have the effect of putting both parties on an equal footing in terms of the preparation needed to prosecute and defend such a claim.

After looking at the evidence in the record, we are of the opinion that the issue of temporary total disability benefits was not sufficiently developed either in the evidence or at the hearing. Therefore, we vacate that portion of the Administrative Law Judge's opinion and remand that issue for any further proceedings that the Claimant may wish to prosecute.

In light of the foregoing, the Commission directs that the Claimant's request for a one-time change of physician to Dr. McLean of Arizona be approved, provided that Dr. McLean agrees to comply with Rule 30 and the out-of-state medical provider's fee provisions. Additionally, the Commission denies and dismisses the Claimant's claim for medical mileage reimbursement from Arizona to Arkansas for the February 13, 2003, visit to Dr. Gruenwald. Finally, the Commission vacates that portion of the Administrative Law Judge's opinion awarding temporary total disability benefits to the Claimant. All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002).

Since the claimant's injury occurred after July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as amended by Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). For prevailing on the issue of change of physician, claimant's attorney is hereby awarded a fee of \$200.00 pursuant to Ark. Code Ann. § 11-9-715(c) (1). 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 \$500.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner concurs in part and dissents in part.

CONCURRING AND DISSENTING OPINION

_____I concur in part and dissent in part from the findings of the majority opinion. Specifically, I concur with the majority finding that the claimant is allowed a change of physician to an Arizona doctor of his choice. I dissent from the majority's finding that medical mileage reimbursement from Arizona to Arkansas is not reasonable under Arkansas Workers' Compensation Commission Advisory 89-2. I likewise dissent from the majority's finding that the Administrative Law Judge's award of temporary total disability benefits must be vacated.

With regard to the medical mileage reimbursement issue, I note that The Administrative Law Judge awarded the claimant mileage for his trip back to Arkansas from Arizona. The evidence indicated that the claimant's trip was both for

the purpose of attending the hearing, and to visit Dr. Gruenwald, the only doctor to whom the respondents have agreed to send the claimant.

The respondents seemingly take inconsistent positions on the claimant's right to medical mileage reimbursement and his entitlement to a change to an Arizona physician. On the one hand, they argue that the claimant is not entitled to change to an Arizona physician. On the other hand, they argue that claimant should not be reimbursed for mileage when he is required to travel back to Arkansas to visit an Arkansas physician. Given that his trip back to Arkansas was necessitated both by his need to visit the only doctor whom the respondents would pay for, and the respondents' forcing him into court to obtain a change to the state in which he now lives, I find that reimbursement for the claimant's trip back to Arkansas from Arizona constitutes reasonable medical mileage and thus is the responsibility of the respondents.

The Administrative Law Judge also awarded temporary total disability although the parties did not make entitlement to temporary total disability an issue to be litigated. However, I find that the claimant proved his entitlement to temporary total disability, and that the respondents were not prejudiced by the claimant's failure to

specifically make it an issue to be litigated. The Commission is not bound by technical or formal rules of procedure. Ark. Code Ann. § 11-9-705(a). I find that the Administrative Law Judge's award of temporary total disability benefits should be affirmed.

Therefore, for the reasons discussed herein, I concur in part and dissent in part from the findings of the majority opinion.

SHELBY W. TURNER, Commissioner