

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F101151

EDDIE BRAY, EMPLOYEE	CLAIMANT
INTERNATIONAL WIRE GROUP, INC., EMPLOYER	RESPONDENT
GENERAL ACCIDENT OF AMERICA, CARRIER	RESPONDENT

OPINION FILED AUGUST 1, 2005

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

Claimant represented by HONORABLE MICHAEL W. BOYD, Attorney at Law, Pine Bluff, Arkansas.

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

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals from a decision of the Administrative Law Judge filed September 16, 2004.

The Administrative Law Judge entered the following findings of fact and conclusions of law:

1. The Workers' Compensation Commission has jurisdiction of this claim in which the relationship of employer-employee-carrier existed among the parties on January 4, 2001 at which time the claimant sustained a compensable back injury at a compensation rate of \$299.00/\$224.00. Medical expenses, temporary total disability benefits (from January 4,

2001 to August 15, 2001 and from October 17, 2001 to February 7, 2002) and a 15% rating assessed by Dr. P. B. Simpson on March 7, 2002 have been paid.

2. The claimant has failed to prove by a preponderance of the evidence that he received permission to change physicians. The change could not be verified by the adjuster, their files, Dr. Simpson or Dr. Middleton. Dr. Middleton was an unauthorized physician and respondents are not liable for expenses associated with her treatment including mileage, prescriptions, office visits, and medical records.

3. The claimant's healing period ended with his release from Dr. Simpson. His injury had stabilized and there was no further treatment to improve his condition. Dr. Middleton's treatment was designed for pain management. Her notes, excusing the claimant from work when he was unemployed, do not extend the healing period. The respondents have paid all appropriate temporary total disability benefits.

4. There is no proof Dr. Simpson refused to see the claimant after his release in March 2002. There is no proof that Dr. Simpson referred the claimant to his general practitioner until February, 2003, after the claim was controverted.

5. There is no authority for an award of attorney's fees on a discovery matter.

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

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

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

_____Compensability of this claim has previously been litigated. In a decision dated June 3, 2002, an Administrative Law Judge held that the claimant had sustained a compensable injury in the course and scope of his employment, and directed the respondent to pay to him reasonable medical expenses, certain periods of temporary disability, and anatomical impairment based upon 15% impairment to his body as a whole.

In the present decision, the Majority finds that the claimant is not entitled to additional medical expenses or to additional temporary disability benefits. The Majority further finds that the claimant's treatment was unauthorized. I find that the claimant's treatment was authorized and that he should be entitled to receive additional medical treatment and additional temporary total disability benefits. For these reasons, I respectfully dissent.

The claimant was originally injured on January 4, 2001. The claimant was originally treated in a local

emergency room and then by the respondent's company physician. However, the respondent later controverted the claim in its entirety and the claimant sought medical treatment on his own. He was initially seen by Dr. Toni Middleton who referred the claimant to Dr. P. B. Simpson, a neurosurgeon in Pine Bluff, Arkansas. Dr. Simpson performed surgery on the claimant in May 2001 and opined in 2002 that the claimant sustained a 15% anatomical impairment to his body as whole as a result of his injury.

This dispute arose after the claimant had reached the end of his healing period. As set out in a letter dated March 7, 2002, Dr. Simpson stated that the claimant had reached the point of maximum medical benefit and had sustained a 15% impairment. In that letter, Dr. Simpson states that the claimant was released "on an as-needed basis." After being released from Dr. Simpson, the claimant continued to suffer from back pain and related problems, and once again sought treatment from Dr. Toni Middleton, the physician who had been treating him for his injury after the respondent controverted it and who had originally referred him to Dr. Simpson.

At the hearing, the claimant was the only witness. However, depositions from Donna Criswell and Diane Hicks, both adjusters with the respondent insurance carrier, were made part of the record. According to the claimant, after being released from Dr. Simpson, he called the respondent to find out if he was authorized to return to Dr. Middleton and to make arrangements for payment of her treatment as well as for any prescription medication. The claimant testified that when he called the respondent carrier in the summer of 2002, he spoke with an adjuster who identified herself as "Tuttie" Criswell. In her deposition, Ms. Criswell acknowledged that her nickname was "Tuttie" and that was generally how people referred to her and how she introduced herself on the telephone.

According to the claimant, Ms. Criswell gave him a claim number to provide to Dr. Middleton and a Wal-Mart pharmacy so that he could obtain medication. The claimant saw Dr. Middleton on several occasions and she prescribed him various medications. The record contains a number of bills from a Wal-Mart pharmacy which reflects that the claimant did not pay for any of these costs. However, these receipts do not reflect who the payor was.

The claimant further testified that after receiving treatment and medications, apparently at the respondent's expense, he was advised by the Wal-Mart pharmacist that an authorization of payment for further medication was being denied. The claimant stated that he called the respondent carrier again and at this time was advised that the new adjuster on the claim was Diane Hicks. He stated that after discussing the matter with her, he was advised that the respondent would no longer pay for medical treatment from Dr. Middleton, or for any medications she prescribed.

In their depositions, Ms. Criswell stated that she could not remember specifically speaking with the claimant. She acknowledged that she kept computerized phone logs to detail conversations with claimants and that after "breezing through them" she was not able to find any record of having spoken with the claimant. Ms. Criswell also stated that she had only handled the claimant's file for a short period of time until the file was transferred to Ms. Hicks.

Ms. Hicks testified that she did recall speaking with the claimant, and that at least one conversation with him was documented in their phone records. However, she

stated that it did not appear to her that Dr. Middleton had been previously authorized to treat the claimant and she was not willing to authorize such treatment in the future. Further, Ms. Hicks testified that she advised the claimant that since he had already reached the end of his healing period, she could not accept Dr. Middleton's finding that the claimant had reentered a healing period and she was not going to authorize further disability benefits.

The Majority, by affirming and adopting the decision of the Administrative Law Judge, discounted the claimant's testimony and noted that there was no evidence to support the claimant's contention that Dr. Middleton was authorized by Ms. Criswell. They also conclude that, since Dr. Simpson had previously found the claimant to be at the end of his healing period, he was not entitled to any additional temporary disability benefits.

In my opinion, the claimant has established his entitlement to treatment from Dr. Middleton at the respondent's expense. I reach that conclusion based upon two points. Initially, I disagree that there is no evidence supporting the claimant's contention that he spoke with Ms. Criswell and obtained authorization to see Dr. Middleton.

Despite Ms. Criswell's assertions that she had not spoken with the claimant because there were no entries in their computer system, it appears to me that the claimant must have been in contact with her at some point. First, he would not have known that her nickname was "Tuttie" if he had not spoken with her. Further, as Ms. Criswell testified, she was only assigned the claimant's file for a very short period of time. Had the claimant not called during the time she was the adjuster on his claim, he would not have ever known of her assignment to this case. It also seems that if he had not been given some type of authorization, neither Dr. Middleton nor Wal-Mart pharmacy would have provided him treatment and medication at no cost. Someone was obviously paying for those services. Since the claimant had no other sources to pay for this treatment, it seems that the respondent would have been the most likely source of such payments.

I also disagree with the finding that Dr. Middleton was unauthorized for a much stronger reason. As indicated above, the respondent initially controverted this claim. After the controversion, the claimant sought treatment from Dr. Middleton. The treatment the claimant

received from Dr. Middleton in 2001 was specifically discussed in the Administrative Law Judge's Opinion of June 2, 2002, and was part of the medical treatment the respondent was ordered to pay for. Dr. Middleton is also the physician who referred the claimant to Dr. Simpson.

I find that Dr. Middleton was the claimant's original treating physician. Further, since he saw her after the respondent's controversion of this claim, and since the Administrative Law Judge, in her first decision, found the claim to be compensable and ordered the respondent to pay the claimant's medical expenses, I find that Dr. Middleton was, and remains, an authorized physician.

It has been held by both this Commission and the Court of Appeals before, that once a physician is authorized to provide treatment, a respondent cannot un-authorize the doctor or unilaterally change the treating physician. A case on point is Welch v. Tri-County Shirt Company, 49 Ark. App. 112, 897 S. W. 2d 575 (1995). In that case, the claimant initially sought treatment from her personal physician before realizing that her hand injury was job related. Subsequently, when the claimant did report the injury to the respondent as being job related, they directed her to

receive treatment from the company physician. The claimant did so but later returned to her original doctor for further treatment. The respondent refused to pay for this subsequent treatment or the original doctor's referral on their contention that the treatment was unauthorized. The Court of Appeals rejected that reasoning, noting that the claimant's original doctor was also authorized and held that the respondent was liable for providing that treatment.

In Quinones v. Coca-Cola Bottling Company, Full Commission Opinion, June 24, 1992 (E104355), the respondent had objected to a specialist to which the claimant was referred by a previously authorized physician. The respondent then authorized the claimant to receive treatment from another physician. In reaching their decision, the Commission made the following conclusion:

Therefore, either Dr. Shock or Dr. Peoples could have been the claimant's authorized treating physician. However, it is clear neither Dr. Whorton, the respondent, nor the claimant felt that the claimant needed treatment from two orthopedic specialists; instead all parties merely felt the claimant needed evaluation and treatment by an orthopedic specialist. Therefore, the claimant could have opted to obtain treatment from Dr. Shock and the respondent would have been liable

for that treatment based upon Dr. Whorton's referral. Alternatively, the claimant was free to choose treatment by Dr. Peeples for the respondent expressly authorized Dr. Peeples.

The case most on point with the present situation is Barnard v. Wal-Mart Stores, Inc., Full Commission Opinion, April 3, 1998 (E607182 and E614185). In that case, the claimant had been authorized to see a particular doctor who later referred the claimant for treatment to a specialist. Later, the claimant, without obtaining prior consent from the respondent, returned to see the original treating physician. The respondent controverted this treatment contending that the original doctor was no longer authorized. The Commission rejected that reasoning and held that once a doctor had been authorized to provide treatment, that doctor remained an authorized physician even if he had referred the claimant to another physician for treatment.

Another case which dealt with multiple authorized physicians was Kenney v. Siloam Springs School District, Full Commission Opinion, August 31, 2001, (E907076). In that case, the claimant suffered an admittedly compensable injury in a fall at work. He then requested permission from his

employer to seek treatment from his personal physician. The employer specifically authorized that treatment. Later, the workers' compensation administration company advised the claimant that they were no longer authorizing his personal physician and told him that he would have to go to a different physician. However, the claimant continued treatment from his personal doctor and the respondent controverted his entitlement to treatment from him on the basis that it was not authorized. The Commission held that the respondent was liable for providing treatment from the original doctor because this physician had been authorized by the employer. Once again, it was held that the respondent could not un-authorize a previously authorized physician.

The claimant first saw Dr. Middleton after the respondent had controverted this claim in 2001. The Administrative Law Judge in her decision finding the claim to be compensable specifically listed the treatment the claimant received from Dr. Middleton and noted that Dr. Middleton had referred the claimant to Dr. Simpson who performed surgery on the claimant's back. I find that the Administrative Law Judge's designation of Dr. Middleton's treatment in her earlier opinion made Dr. Middleton an

authorized physician. I further find, that pursuant to the clear holdings of this Commission and the Court of Appeals in past cases, that once Dr. Middleton became authorized, the respondent was obligated to pay all reasonable and necessary medical treatment rendered by her to the claimant.

While the respondent did not question the reasonableness and necessity of Dr. Middleton's treatment, I note, for the record, that the treatment clearly was related to the claimant's compensable injury and is certainly reasonable given his condition. As indicated above, the claimant underwent extensive surgery for treatment of his back injury and sustained a 15% anatomical impairment. It is not surprising that the claimant would be suffering from a certain degree of pain and related symptoms as a result of his injury and treatment. Dr. Middleton, who is a general practitioner, is well suited to provide the maintenance treatment the claimant will need, including providing him prescription medication. In fact, this situation is endorsed by Dr. Simpson in his treatment note of January 31, 2003, wherein he directs the claimant to return to his personal physician to obtain medication. I therefore find that the treatment the claimant received from Dr. Middleton was

reasonable and necessary and related to his compensable injury.

The final issue is the claimant's entitlement to additional temporary disability benefits based upon the findings of Dr. Middleton. The respondent has objected to paying further temporary disability benefits but have never clearly explained their reasons for doing so. The only argument advanced by them is that since Dr. Simpson had released the claimant to return to work, he was not entitled to any further temporary disability benefits. However, the allegation made by the claimant is that he had reentered a new healing period following his resumption of treatment by Dr. Middleton. Neither the respondent nor the Majority address this argument. Both have simply concluded that, since Dr. Simpson released the claimant to return to work and he was at the end of his healing period, he was not entitled to further benefits. However, in Dr. Middleton's report of June 15, 2004, she discusses her treatment of the claimant and outlines his health problems. In this report, she states as follows:

Patient made several visits to office with back pain and eventually underwent testing that determined that he had a

herniated disc at L5-S1. He was referred to Dr. Simpson and subsequently underwent surgery. He continued to follow up with Dr. Simpson for quite a while but was referred back to me in June 2002 since he continued to have back pain which he alleged was due to surgical scarring. Mr. Bray followed up personally and had his medicines adjusted several times. Eventually Mr. Bray was unable to afford medicines and required health and prescription assistance to get his medications. Mr. Bray eventually developed some depression and began seeking mental health for medication also. My diagnoses on Mr. Bray includes lumbar strain, chronic back pain, herniated disc, depression, and neuropathy.

Dr. Middleton goes on to comment that the claimant's current problems are due to his accident and subsequent surgery and she was not aware of any prior conditions which would have caused these problems. Obviously, Dr. Middleton was concerned about the level of the claimant's depression and the effects his medications were having on him. In my opinion, this was clearly justification for her decision to advise him to stop seeking further employment and to remain home during the periods indicated in her off-work statements dated September 6,

2002, September 23, 2002, October 14, 2002, and November 5, 2002.

I find that the onset of the claimant's chronic depression, the adjusting of his medications, and seeking mental health care, creates a change in circumstances which warrants a finding that the claimant reentered a healing period. Once those adjustments had been made and the claimant's condition stabilized, the new healing period closed, and Dr. Middleton ended her restrictions on the claimant's activity. In my opinion, the respondent should be ordered and directed to pay to the claimant temporary disability benefits during the periods he was directed to avoid physical activity by Dr. Middleton.

For the reasons set out above, I find that Dr. Middleton was an authorized treating physician and that the respondent cannot change their position and un-authorize Dr. Middleton. Therefore, I find that they should be liable for the medical expenses the claimant has incurred from his treatment by Dr. Middleton. I further find that the claimant should be entitled to receive temporary total disability benefits from the respondent for the periods he was directed

to remain off work and to limit his activity by
Dr. Middleton.

For these reasons, I respectfully dissent.

SHELBY W. TURNER, Commissioner