

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F213693

KAREN BASKIN,  
EMPLOYEE

CLAIMANT

WALDRON NURSING CENTER,  
EMPLOYER

RESPONDENT

ROYAL & SUN ALLIANCE,  
INSURANCE CARRIER

RESPONDENT

OPINION FILED FEBRUARY 9, 2005

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

Claimant represented by the HONORABLE EDDIE H. WALKER, JR.,  
Attorney at Law, Fort Smith, Arkansas.

Respondents represented by the HONORABLE CHRISTINE A. CRYER,  
Attorney at Law, Little Rock, Arkansas.

Decision of administrative law judge: Affirmed as modified  
in part and reversed in part.

OPINION AND ORDER

The respondents appeal and the claimant cross-appeals  
an administrative law judge's opinion filed February 19,  
2004. The administrative law judge (ALJ) found that the  
claimant was "entitled to her change of physician to Dr.  
Isley and Dr. Ploetz, his partner. The claimant was  
referred to her family physician by Dr. Holder and the  
respondents have refused to pay for this treatment,  
therefore, we find that Dr. Isley and his partner are

authorized to treat the claimant for her compensable injury." The ALJ found that the claimant proved she was entitled to additional medical treatment "as recommended by Dr. Holder as well as her authorized treating physicians for the treatment of her compensable injury." The ALJ found that the claimant was "entitled to one day of temporary total disability....the claimant has failed to prove her entitlement to temporary total disability subsequent to July 2, 2003, since her authorized treating (sic) has released her to light duty work and the respondents have indicated in their testimony that light duty work within her restrictions would be provided for the her (sic) if she would present herself for work."

After reviewing the entire record *de novo*, the Full Commission finds that the claimant has received her one-time change of physician pursuant to Ark. Code Ann. §11-9-514. The Full Commission finds that the claimant did not prove she was entitled to additional medical treatment after her visit with Dr. Ploetz on June 25, 2003. The Full Commission finds that the claimant did not prove she was entitled to temporary total disability compensation after March 21,

2003. The Full Commission therefore affirms in part and reverses in part the ALJ's opinion.

I. HISTORY

The first medical treatment of record was in June 1996, when the claimant stated that she had been hit in the back at work with a cart. In June 2001, the claimant complained of a pulled muscle in her lower back. A physician's impression was "R lumbar strain," and the claimant began receiving regular treatment for her back.

The parties stipulated that the claimant sustained a compensable injury to her back on November 15, 2002. The claimant testified, "Me and another CNA was going to put one of the residents to bed and we had him up and was going to set him on the side of the bed and put him in there and she - we had him up and I told her that he was falling and before I could get it out of my mouth he fell on me, I caught him with my right leg and on my right side, which I hit part of the bed rail when I went down, too, and I ended up getting hurt in the process."

The impression from an x-ray of the lumbar spine on November 15, 2002 was "normal spine."

Dr. Nathan Bennett's examination on November 18, 2002 revealed tenderness and "muscle tightness across the lower back." Dr. Bennett's assessment included "contusion and sprain of low back." Dr. Bennett planned conservative treatment, additional diagnostic testing, and "light duty at work with no pushing, pulling, lifting, or tugging." The claimant reported some improvement in her condition after physical therapy.

The claimant agreed on cross-examination that she was returned to work on November 18, 2002, and that the respondent-employer accommodated her physical restrictions.

An MRI of the lumbar spine was taken on November 27, 2002:

There presumes to be five lumbar type vertebral bodies. The vertebral bodies are normal in height, alignment and signal. There is narrowing and desiccation at the L5-S1 level with a mild broad based disc bulge with an associated annular tear which is central and right sided. Conus medullaris is normal in position at the L1 level and the cauda equine is normal in distribution. There is a small focal disc protrusion which is right parasagittal at the L3-4 level. There is some associated degenerative disc disease at this level as well.

**IMPRESSION:**

1. Small right parasagittal protrusion at L3-4.
2. Mild broad based disc bulge which again is predominantly right sided at the L5-S1 level which has an associated annular tear.

The claimant agreed that she was returned to work on January 3, 2003, and that the respondents accommodated her restrictions.

Dr. Larry G. Armstrong examined the claimant on January 27, 2003 and reported, "There is muscle spasm tenderness noted over the paraspinal muscles in the low back. In addition, tissue texture changes are appreciated in that region and associated with spasm. There is some flattening of the lumbar spine noted....Lumbar spine x-rays with flexion and extension views were reviewed in detail and reveal no subluxation, instability or spondylolisthesis. There are some very mild degenerative changes noted. A lumbar spine MRI scan from St. Edward Mercy Medical Center does reveal a very small disc herniation at L3-4 slightly accentuated to the right without any frank nerve root impingement. There is very mild indentation on the thecal sac. There is disc degeneration present at L3-4 and at L5-S1. There is no other disc herniation. There is no neuroforaminal stenosis and no other nerve root compression noted. No spinal stenosis is seen."

Dr. Armstrong's impression was "1. Lumbosacral myofascial neuralgia. 2. Lumbar strain/sprain." Dr.

Armstrong recommended continued conservative care management with no neurosurgical intervention.

The impression of Dr. Keith F. Holder on January 28, 2003 was "lumbar strain with report of disc protrusions." Dr. Holder's plan included additional diagnostic testing, and he stated that the claimant "may return to work. No lifting over 20 pounds, limit repetitive back motions."

An EMG nerve conduction study of the right leg on February 7, 2003 was normal.

Dr. Holder reported on February 11, 2003, "Today, records were made available. MRI report reveals the radiologist calling it an annular tear at L5-S1 with bulging disc somewhat off to the right for the annular tear. Dr. Armstrong's note was reviewed. He called this degenerative disc disease and at L3-4 there is a disc protrusion, again off to the right. This is not impinging on the nerve roots." Dr. Holder's impression was "1. Lumbar strain. 2. Annular tear at L5-S1 to the right. 3. Illness behavior with her subjective complaints outweighing the objective findings to date." Dr. Holder continued conservative treatment.

Dr. Holder's impression on February 21, 2003 was "lumbar strain with inner tear noted on MRI at L5-S1 to the right. The patient's subjective complaints currently outweigh objective findings."

An occupational therapist performed a work evaluation on the claimant on March 4, 2003, and summarized his findings: "Overall test findings, in combination with clinical observation, suggest the presence of sub-maximal effort on Mrs. Baskin's behalf. In describing sub-maximal effort, this evaluator is by no means implying intent. Rather, it is simply stated that Mrs. Baskin can do more physically at times than was demonstrated during this testing day. Any final vocational or rehabilitation decisions for Mrs. Baskin should be made with this in mind."

Dr. Holder provided a Final Narrative Summary on March 21, 2003:

The patient is here to check her lower back. She continues on her medications, Vioxx, Neurontin, topical lidocaine, Indocin, and Ultram. She reports continued right total leg pain that makes it unable for her to walk. I again discussed the patient with her case manager nurse present that I could not explain her level of symptoms based on the objective evidence at this time. MRI showed a mild right-sided disc protrusion in L3-4 with no mention of indentation upon the nerve root and annular tear at L5-S1. On her pain diagram, she shows total leg pain and numbness both anterior

and posterior in addition to sacral type pain. She had a positive Oswestry questionnaire at 82%. The patient perceived herself to be totally disabled. Her nerve study was totally normal. Her lifting profile showed ability to lift up to 20 pounds, however in her Jamar grip strength done on her testing she was above only coefficient variation testing, showing submaximal effort. Waddel pain questionnaire also was positive for symptom magnification.

Dr. Holder's impression was "1. Lumbar strain. 2. Annular tear at L5-S1, small right parasagittal disc protrusion at L3-4." Dr. Holder stated, "1. The patient has reached maximum medical improvement. 2. Work restrictions include no lifting over 20 pounds, limit repetitive back motions. 3. She is rated today at 5% whole person. This corresponds to DRE category II for the lumbar spine according to the 4<sup>th</sup> Edition of the AMA Guides. 4. She is referred to her personal physician in the Waldron area for continued maintenance of her needs. 5. She may follow up here as needed."

The parties stipulated that the respondents accepted a five percent impairment.

The claimant testified that she returned to work for the respondent-employer following Dr. Holder's release. "I was putting laundry - helping fold clothes until later," the claimant testified.

The claimant testified that "originally my family doctor is Dr. Isely at Danville." The claimant testified that she had treated with Dr. Isely subsequent to Dr. Holder's release, and that Dr. Isely practiced with Dr. Ploetz. The claimant testified that she had also treated with Dr. Ploetz.

The claimant agreed that she did not renew her CNA license in May 2003, "Because I was told I would never be able to lift over 20 pounds."

Dr. Carina Ploetz signed a Certificate For Return To Work on June 25, 2003, indicating that the claimant needed "total bed rest" beginning June 25, 2003. Dr. Ploetz wrote that the claimant could return to work on June 30, 2003. Dr. Ploetz diagnosed "lower back pain with Rt sided radiculopathy annular tear and disc desiccation" and bulging in the lumbar spine.

On July 2, 2003, Dr. Ploetz wrote that the claimant was not allowed to push, pull, lift, or stand for a prolonged time at work. Dr. Ploetz appears to have written that the claimant could read to patients while sitting down or fold laundry while sitting down. Dr. Ploetz again wrote that the claimant needed "strict bed rest to avoid surgery. Actually

she is not allowed drive a car, as a matter of fact get into and out of a car."

An administrator for the respondent-employer wrote on July 7, 2003, "Ms. Baskin was placed on medical leave, effective July 7, 2003, on the grounds that Dr. Ploetz's recommendation for Ms. Baskin was to stay on bed rest to avoid surgery to her back. Dr. Ploetz also recommended that Ms. Baskin not be allowed to drive or get in or out of a car. Ms. Baskin is eligible for her vacation hours she has earned and will be paid these wages at her request until her hours are depleted. Ms. Baskin may return to work when Dr. Ploetz releases her to regular duty."

Pat Capps Hannah, Administrator for the Commission's Medical Cost Containment Division, wrote to the claimant's attorney on July 9, 2003:

You requested on Ms. Baskin's behalf that she be granted a change of physician to Dr. William Arthur Isley, Jr. After receiving a copy of Ms. Baskin's medical records, we have discovered that she was referred to Dr. Isley by Dr. Keith F. Holder. This is reflected in a "Final Narrative Summary" from Dr. Holder dated March 21, 2003. Since Ms. Baskin was referred to Dr. Isley, she does not need a change of physician. Because she was referred to him, Dr. Isley is in the chain of her authorized treating physicians. For this reason, the Medical Cost Containment Division does not issue Change of Physician Orders for referrals. Therefore, we are returning her claim

to open general files here at the Commission and will not further process her change of physician request at this time.

A pre-hearing order was filed on September 15, 2003.

The claimant contended that she was entitled to "reinstatement of temporary total disability benefits as of June 25, 2003, and that those benefits should continue until a date yet to be determined." The claimant contended that she was entitled to treatment "by or at the direction of Dr. Art Isely and his associates." The respondents contended that they were "investigating" the claimant's entitlement to additional medical treatment. The respondents contended that they had "proposed sending claimant for an IME, and respondents currently await claimant's response." The respondents contended that the claimant could not prove she was entitled to additional temporary disability.

The parties agreed to litigate the following issues:

1. Change of physician.
2. Additional related medical.
3. Additional temporary total disability from June 25, 2003, to a date to be determined; and
4. Attorney's fees.

The administrative law judge found, in pertinent part:

7. The claimant is entitled to her change of physician to Dr. Isley and Dr. Ploetz, his partner. The claimant was referred to her family physician by Dr. Holder and the respondents have

refused to pay for this treatment, therefore, I find that Dr. Isley and his partner are authorized to treat the claimant for her compensable injury.

8. The claimant has proven by a preponderance of the evidence that she is entitled to additional medical treatment as recommended by Dr. Holder as well as her authorized treating physicians for the treatment of her compensable injury.

9. The claimant is entitled to one day of temporary total disability. Dr. Ploetz took the claimant off work on June 25, 2003, and released her to return to light duty work on July 2, 2003. In accordance with Arkansas law the claimant would be entitled to one day of temporary total disability as a result of her compensable injury.

10. I find that the claimant has failed to prove her entitlement to temporary total disability subsequent to July 2, 2003, since her authorized treating (sic) has released her to light duty work and the respondents have indicated in their testimony that light duty work within her restrictions would be provided for the her (sic) if she would present herself for work.

The respondents appeal the administrative law judge's finding that the claimant was entitled to a change of physician, and they appeal the ALJ's finding that the claimant was entitled to additional medical treatment. The claimant cross-appeals the ALJ's finding with regard to temporary total disability.

## II. ADJUDICATION

### A. Temporary disability

"Disability" means incapacity because of compensable injury to earn, in the same or any other employment, the

wages the employee was receiving at the time of the compensable injury. Ark. Code Ann. §11-9-102(8). "Healing period" means that period for healing of an injury resulting from an accident. Ark. Code Ann. §11-9-102(12). Temporary disability is determined by the extent to which a compensable injury has affected the claimant's ability to earn a livelihood based on medical evidence, age, education, experience, and other matters reasonably expected to affect the claimant's earning power. Ark. State Hwy. Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981), citing Rooney & Travelers Insurance Co. v. Charles, 262 Ark. 695, 560 S.W.2d 797 (1978). Temporary total disability is that period within the healing period in which the employee suffers a total incapacity to earn wages. Breshears, *supra*. Temporary disability cannot be awarded after the claimant's healing period has ended. Elk Roofing Co. v. Pinson, 22 Ark. App. 191, 737 S.W.2d 661 (1987).

In the present matter, the claimant sustained a compensable injury to her back on November 15, 2002. A subsequent x-ray of the lumbar spine was normal, and Dr. Bennett assessed "contusion and sprain of low back." The claimant was treated conservatively and was returned to

restricted work on November 18, 2002. A lumbar MRI on November 27, 2002 revealed a degenerative condition at L3-4 and L5-S1. Associated with this degeneration in the claimant's spine, the MRI showed a small protrusion at L3-4 and a broad-based disc bulge at L5-S1. Dr. Armstrong examined the claimant, reviewed the diagnostic testing, and recommended conservative treatment without surgical intervention. The claimant began treating with Dr. Holder in January 2003. Dr. Holder's impression was "lumbar strain with report of disc protrusions." Dr. Holder, like the other physicians, treated the claimant conservatively.

On March 21, 2003, Dr. Holder expressly pronounced "maximum medical improvement." The determination of when the healing period ends is a question of fact for the Commission. Carroll General Hospital v. Green, 54 Ark. App. 102, 923 S.W.2d 878 (1996). Based on Dr. Holder's finding of maximum medical improvement on March 21, 2003, the Full Commission finds that the present claimant reached the end of her healing period no later than March 21, 2003. Further, Dr. Holder assigned a permanent impairment rating on March 21, 2003, which rating the respondents accepted. Permanent impairment, which is a medical condition, is any

permanent functional or anatomical loss remaining after the employee's healing period has ended. Johnson v. General Dynamics, 46 Ark. App. 188, 878 S.W.2d 411 (1994).

Temporary total disability cannot be awarded after the claimant's healing period has ended. Pinson, supra. The Full Commission therefore finds that the claimant reached the end of her healing period no later than March 21, 2003, and that the claimant did not prove she was entitled to temporary total disability compensation after that date.

B. Medical treatment

The employer shall 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). What constitutes reasonably necessary medical treatment is a question of fact for the Commission. Wright Contracting Co. v. Randall, 12 Ark. App. 358, 676 S.W.2d 750 (1984). The claimant must prove by a preponderance of the evidence that she is entitled to additional medical treatment. GEO Specialty Chemical v. Clingan, 69 Ark. App. 369, 13 S.W.3d 218 (2000).

Initially, the Full Commission notes the respondents' argument in the present matter that the administrative law

judge erred in finding, "The claimant is entitled to her change of physician to Dr. Isley and Dr. Ploetz, his partner." The claimant has an absolute, statutory right to a one-time change of physician. See, Ark. Code Ann. §11-9-514(a)(3); Collins v. Lennox Industries, Inc., 77 Ark. App. 303, 75 S.W.3d 204 (2002). The respondents assert that "Dr. Holder had referred claimant to her personal physician for continued maintenance on March 21, 2003." We recognize that the change of physician statute does not apply if an authorized treating physician refers the claimant to another doctor for examination or treatment. Byars Construction Co. v. Byars, 72 Ark. App. 158, 34 S.W.3d 797 (2000), citing Amer. Greetings Corp. v. Garey, 61 Ark. App. 18, 963 S.W.2d 613 (1998).

In the present matter, however, Dr. Holder did not explicitly refer the claimant to any particular physician. The claimant contends that she is entitled to a change of physician to Dr. Isely. As we have noted, the claimant has an absolute, statutory right to a one-time change of physician. Collins, *supra*. Nevertheless, the Full Commission finds from the record that the claimant has exercised her one-time right to see Dr. Isely. The claimant

testified that she had seen Dr. Isely following her release from Dr. Holder. Upon the facts of this case, the claimant's treatment with Dr. Isely constituted the claimant's one-time visit pursuant to the change of physician statute. See, Wal-Mart Stores, Inc. v. Brown, 82 Ark. App. 600, 120 S.W.3d 153 (2003). We therefore affirm as modified the administrative law judge's finding that the claimant was entitled to a change of physician to Dr. Isely.

Based on the preponderance of the evidence, however, the Full Commission finds that the claimant did not prove she was entitled to additional medical treatment after her initial visit with Dr. Isely. The claimant sustained a compensable injury on November 15, 2002, initially diagnosed as a "sprain" of the low back. Diagnostic testing revealed a degenerative condition of the lumbar spine, including an annular tear associated with the claimant's degenerative condition at L5-S1. Dr. Armstrong, a physician with the Cooper Clinic Department of Neurosurgery, recommended conservative management without neurosurgical intervention. Dr. Holder began treating the claimant for her lumbar strain in January 2003. Dr. Armstrong also treated the claimant conservatively. Dr. Holder wrote on March 21, 2003, "I

could not explain her level of symptoms based on the objective evidence at this time." Dr. Holder therefore pronounced maximum medical improvement. The Commission recognizes that the claimant does not have to prove a need for continuing medical treatment with objective findings. Chamber Door Industries, Inc. v. Graham, 59 Ark. App. 224, 956 S.W.2d 196 (1997). Nevertheless, we determine from Dr. Holder's March 21, 2003 report that the claimant's lumbar strain resulting from her compensable injury had resolved. We also recognize that Dr. Holder referred the claimant "to her personal physician in the Waldron area for continued maintenance of her needs." Dr. Holder did not indicate, however, that "continued maintenance" was causally related to the claimant's compensable injury. Nor does the record otherwise indicate that additional medical treatment after March 21, 2003, other than the claimant's one-time visit with Dr. Isely, would be reasonably necessary in connection with the claimant's compensable injury.

Based on our *de novo* review of the entire record, the Full Commission affirms as modified the administrative law judge's finding that the claimant was entitled to a change of physician to Dr. Isely. The Full Commission reverses the

administrative law judge's finding that the claimant proved she was entitled to additional medical treatment after her one-time visit with Dr. Isely. The Full Commission reverses the administrative law judge's finding that the claimant proved she was entitled to "one day of temporary total disability." We find that the claimant did not prove she was entitled to temporary total disability compensation after March 21, 2003. For prevailing in part on appeal to the Full Commission, the claimant's attorney is entitled to a fee of five hundred dollars (\$500), pursuant to Ark. Code Ann. §11-9-715(b) (2) (Repl. 2002).

\_\_\_\_\_IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

**DISSENTING OPINION**

I dissent from the majority opinion and find that claimant is entitled to additional medical treatment and temporary total disability benefits.

I find that the ALJ's decision awarding

additional medical treatment is well-reasoned, consistent with the law, and should be affirmed. The parties stipulated that claimant incurred a compensable injury to her back on November 15, 2002, when she fell while trying to lift a patient. An abnormal MRI taken on November 27, 2002, showed a disc protrusion at L4-3 and an annular tear at L5-S1. Contrary to the majority's conclusion that the tear was related to a degenerative condition, I find no such evidence. The only degenerative condition noted in the MRI report is related to an L3-4 disc protrusion, not the L5-S1 disc. I also find that Dr. Holder, in his report of February 11, 2003, mischaracterized the MRI results and Dr. Armstrong's report by stating that Dr. Armstrong classified the L5-S1 abnormality and tear as "degenerative."

At the hearing, Claimant described her current physical problems that she is experiencing as a result of the work injury. She stated that she has "a knot come up in the lower part of my back which causes me to have severe headaches. The pain radiates down my right leg into my foot and makes my foot draw upward."

Sometimes my leg goes numb. There has been times that I have fell because of my leg going numb and not having no feelings in them."

I find that Claimant is entitled to additional and continuing medical treatment and temporary total disability benefits for her back injury. Dr. Holder opined that Claimant has a five percent impairment rating and has referred Claimant to her personal physician for continuing treatment related to her compensable injury. Soon after Dr. Holder's March 21, 2003, release, Dr. Alberty observed muscle spasms in the L-3 to L-5 area of claimant's spine on April 3, 2003. Claimant is entitled to continuing treatment to reduce or enable her to cope with the chronic pain she is experiencing, which has been objectively documented by the observance of muscle spasms by several physicians. I further find that Dr. Holder's recommendation of "continued maintenance" is related to claimant's compensable injury in light of the fact that she received permanent disability benefits, in the form of a five percent impairment rating that respondents have

paid, and that she has had debilitating symptoms since the injury.

For these reasons, I dissent from the majority opinion and find that Claimant is entitled to additional medical treatment and temporary total disability benefits.

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SHELBY W. TURNER, Commissioner