

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NOS. F106809 and F103210

CHARLENE HENDERSON, EMPLOYEE	CLAIMANT
LENNOX INDUSTRIES, INC., EMPLOYER	RESPONDENT
AMERICAN MOTORISTS INSURANCE CO., INSURANCE CARRIER	RESPONDENT

OPINION FILED MAY 6, 2005

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

Claimant represented by the HONORABLE SHEILA CAMPBELL, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE BETTY DEMORY, Attorney at Law, Little Rock, Arkansas.

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

OPINION AND ORDER

The respondents appeal an administrative law judge's opinion filed June 23, 2004. The administrative law judge found that the respondents were liable for medical treatment provided by Dr. P.B. Simpson beginning in December 2003. The administrative law judge found that the claimant proved she was entitled to temporary total disability compensation from October 14, 2003 to March 8, 2004. After reviewing the entire record *de novo*, the Full Commission reverses the administrative law judge's finding that the respondents were

liable for medical treatment provided by Dr. Simpson. The Full Commission finds that Dr. Simpson's treatment beginning in December 2003 and following was unauthorized and not the responsibility of the respondent-employer. The Full Commission affirms the administrative law judge's finding that the claimant proved she was entitled to temporary total disability compensation from October 14, 2003 until March 8, 2004. We therefore reverse in part and affirm in part the decision of the administrative law judge.

I. HISTORY

The parties stipulated that Charlene Henderson, age 37, sustained a compensable back injury on August 16, 2000. Ms. Henderson testified that while setting down a fan, "a pain from the left side of my back came up down to my legs." The claimant signed a Form AR-N, Employee's Notice Of Injury, on August 31, 2000. The parties stipulated that the claimant sustained a compensable carpal tunnel syndrome injury on or about October 9, 2000, and the claimant signed another Form AR-N on October 9, 2000.

Dr. Noble B. Daniel informed Dr. John L. Wilson on October 30, 2000, "Her discomfort is principally in the left paravertebral area in and around the S-I joint region....X-

rays reveal a mild scoliosis and a little flattening of the lordotic curve." Dr. Wilson treated the claimant conservatively. The claimant testified that Dr. Wilson "didn't do anything," so "I went to P.B. Simpson, the doctor, to get some type of help on my back. You know, to treat me on my back, to find out what was going on. Workman Comp denied it."

An MRI of the lumbar spine was taken on March 30, 2001:

The L4-5 level is abnormal. There is disc desiccation in keeping with disc degeneration. There is a focal left sided disc herniation at L4-5. This does narrow the neural foramen and extends into the lateral recess on the left. This could be producing both a left L4 and L5 radiculopathy and clinical correlation is requested on this.

The remaining lumbar disc levels are unremarkable in appearance with no disc herniation or protrusion.

The impression was "Disc desiccation L4-5. Left sided disc herniation extending to the neural foramen and the left lateral recess. Otherwise normal MRI of the lumbar spine."

The record indicates that Dr. Michael M. Moore performed a right carpal tunnel release on or about April 11, 2001, and he assigned a 10% impairment to the claimant's right hand on August 29, 2001. The parties stipulated that

the respondents accepted a 10% permanent impairment rating to the claimant's right wrist.

A Change of Physician Order was entered by Pat Capps Hannah on January 8, 2002:

A change of physician is hereby approved by the Arkansas Workers' Compensation Commission for Charlene Henderson to change from Dr. Michael Moore to Dr. Andrew Markiewitz at the Center for Hand & Upper Extremity Surgery, UAMS ... An appointment has been scheduled for the claimant at 9:00 a.m. on Friday, February 1, 2002.

This approval of a change of physician represents claimant's one time only change of physician pursuant to Act 1167, Sec. 1(a)(3)(A)(ii) of 1999, effective July 30, 1999....

A pre-hearing order was filed on September 30, 2002. The parties agreed to litigate the issues of whether the claimant was entitled to medical benefits, and whether the claimant was entitled to temporary total disability compensation from March 5, 2001 to a date to be determined. A hearing before the Commission was held on December 4, 2002. The following discussion took place:

MS. CAMPBELL: We requested a change of physicians and the change of physicians was granted, except it was only granted for the wrist, as opposed to the wrist and the back. So we're asking that if you determine that she is entitled to treatment for her back, then that you would grant us a change of physicians to somebody who would treat it....

MS. DEMORY: It went to Pat Capps Hannah and she issued a Change Of Physician Order January 8, 2002.

JUDGE CURDIE: Was it requested for the back?

MS. CAMPBELL: It was requested for both the back and the hand....

JUDGE CURDIE: What do the respondents have to say about that?

MS. DEMORY: Well, I guess, Number 1, we would say that she petitioned the Commission appropriately and the Commission did not grant her, Pat Capps Hannah's office did not grant her a change of physician, so I guess it would be our position that additional treatment is not reasonable and necessary....

JUDGE CURDIE: Does respondent agree that she hasn't had the one time change?

MS. DEMORY: I guess technically for her back she has not, but she did receive a change of physician per the order of Pat Capps Hannah, which we complied with and paid for her visit to Dr. Markiewitz and she has not requested to go back to see him....He's an orthopedic specialist that he only treats, I understand, hands and upper extremities....

JUDGE CURDIE: Does she have somebody she wants to go see, as far as the back doctor?

MS. CAMPBELL: Well, your honor, when she went over to UAMS I thought they were going to make whatever referrals needed to be made in the change. But since the only thing they would work on was the hands, then we've never got the one time change -

JUDGE CURDIE: For the back....I'll make that part of the opinion, that she's entitled to a one time change and a visit, and unless you have somebody

that you want her to go see, I'll pick somebody.

MS. DEMORY: That would be respondents' position. We would request that you select.

The claimant testified at the December 4, 2002 hearing that her physical condition had worsened. Judge Curdie stated at the conclusion of the hearing, "I'll go ahead and issue an order concerning the change of physician and the selected physician that I've made for the back. Change of Physician. And that will allow her to have a change to a doctor of her choosing, and since she didn't have anybody specific I'll make a choice, and then she can go and visit that doctor one time and I'll ask that doctor to write a report, you and the respondents' attorney can talk and if their position is that it's not related, or whatever it is, we'll address that later."

In an Order entered December 4, 2002, Judge Curdie granted the claimant "a one time change of physicians to Dr. Jim J. Moore, neurosurgeon, Doctor's Building, 500 S. University, Little Rock, Arkansas. The claimant is also entitled to have respondents pay for a first visit to Dr. Jim Moore, and any diagnostic testing which he may determine is reasonably necessary to determined claimant's current condition....The cost for the visit and testing shall be

bourne (sic) by respondents...." Judge Curdie entered a similar Amended Order regarding change of physician on January 7, 2003.

Dr. Jim J. Moore saw the claimant on January 14, 2003:

The patient does not appear in any acute distress although she complains of constant pain in the left lower extremity....

The patient has signs that would be consistent with a disk compression at the L4 nerve root level and a lesion at L4/5 could account for this. I think the patient might be a candidate for an epidural steroid but clearance cardiologically would be appropriate to obtain before pursuing. In the interim I am giving her some Neurontin to see if this will offer her any resolution as far as her nerve pain is concerned. I am hopeful that a surgical recommendation will not be necessary to consider.

Dr. Moore diagnosed "Lumbar HNP."

An MRI of the lumbar spine was taken on January 31, 2003, with the following impression:

1. AT THE L4-5 LEVEL, THERE IS A LEFT PARACENTRAL DISC HERNIATION EXTENDING TO THE LATERAL ASPECT, DISPLACING THE LEFT L4 NERVE ROOT AND IMPINGING ON THE LEFT L5 NERVE ROOT. THERE IS ASSOCIATED LEFT NEURAL FORAMEN NARROWING.
2. AT THE L5-S1 LEVEL, THERE IS A LEFT LATERAL HERNIATED DISC, WHICH IS TOUCHING THE LEFT L5 NERVE ROOT AND IMPINGING ON THE LEFT S1 NERVE ROOT CAUSING NEURAL FORAMEN NARROWING.

On or about April 2, 2003, Dr. Moore diagnosed "1. Lumbar HNP L4/5 left. 2. Sacroiliac trigger." Dr. Moore

continued to treat the claimant conservatively. The claimant testified that Dr. Moore administered an injection; however, "the shot was supposed to make me better, you know, but what it did, it made me worse. It made me hurt more and made my legs just weaker. I had got to where I couldn't hardly walk....I had to have a cane to help me walk. I was just dragging real bad. The pain was so severe I just couldn't do anything."

The claimant testified that she began receiving temporary total disability compensation on April 15, 2003.

Dr. John L. Gustavus wrote on or about April 30, 2003, "This patient has a herniated disc, which, according to the patient, resulted from an injury to her back August of 2000, lifting heavy objects at work. An MRI of her back done on January 31, 2003 at UAMS documents a large herniated disc impinging on 2 nerve roots. This is very definitely causing her some back pain. She should not be required to lift anything larger than 5lbs. at work. And I recommend an orthopedic surgeon consult for necessary surgery to repair the disc."

Dr. Moore assigned the claimant a 15% permanent partial impairment rating on June 25, 2003.

The first treatment of record from Dr. P.B. Simpson, Jr. occurred on August 29, 2003:

Mrs. Henderson is seen in my office in consultation today at the request of Dr. Gustavus, who obtained an MRI of her lumbar area at UAMS on 1/31/03 and referred her to me for evaluation. This lady hurt her back while working at Lennox Industries about three years ago. She states she had been doing some lifting, but specifically bent over to put down a fan, and had pain in her back and noticed some pain into both legs now....She complains mainly of pain in her back and pain towards her left hip and left leg, but also to the right....

I have reviewed some pictures, but not the actual films, done at the University Hospital on 1/31/03. These show that she has a fairly significantly large disk at L4-5 on the left side. I want her to bring me the films. I will see her back. Whether this is the cause of her pain or not remains to be seen, but she has what looks like an abnormal study with her MRI....

Dr. Simpson's impression was "rule out HNP at L4-5 on the left side." Dr. Simpson noted that the claimant was off work.

Dr. Moore reported on September 3, 2003:

I have today reviewed the patient's two MRI's with Dr. Zatorek, one of the neuroradiologists at Radiology Associates. The initial study certainly does show evidence of the disk herniation at the L4/5 level but only at this level. I have reviewed also with Dr. Zatorek the second MRI done at UAMC and this does show evidence of a diskal component at the L5/S level as well as the L4/5 level. This would appear to be an interval change that was not

present on the initial study and, therefore, it would be my opinion that this would be a new finding and thus would not be related necessarily to the industrial injury.

Dr. Simpson stated on September 24, 2003, "I have looked at her films. They are really hard to decipher. They are of poor quality. I am going to arrange for her to have another MRI. I am not going to make a decision on the basis of the fairly poor study that she had at the University." Dr. Simpson planned to obtain another lumbar MRI.

The claimant testified that the respondents ceased paying temporary total disability on October 13, 2003.

An MRI of the lumbar spine without contrast was taken on October 15, 2003:

No bony abnormality is seen. Alignment is normal and disk spaces are maintained. Disk desiccation is seen at L4-L5. There is also a left lateral to foraminal disk protrusion at L4-L5. This displaces the left L4 exiting nerve root. The right neural foramen is unremarkable. No other disk abnormality is seen. The thecal sac is normal in appearance. Other neural foramina are unremarkable. No other abnormality is seen.

The impression was "Left lateral to foraminal disk protrusion at L4-L5."

Dr. Simpson reported on October 17, 2003, "If she has anything at all, it is at L4-5, and one can see this well on

the sagittal T2 weighted films....I have explained to Mrs. Henderson that is she is complaining only of left-sided radicular pain then I would consider exploring her at L4-5, and if she truly has a ruptured disk, removing this to see if I can relieve her symptoms. However, she has stated today that she does not think she is mentally able to undergo any operative intervention. It feels like she is under a good bit of emotional stress. She also has valvular heart disease, and does not want to undergo surgical intervention at this time. This, therefore, makes my decision fairly easy: I will do nothing, and see her back on an as-needed basis."

Dr. Simpson noted on December 8, 2003, "She is going to have surgery on 12/16/03 and will continue to remain off of work for an undetermined length of time pending recovery from surgery." Dr. Simpson performed a "lumbar hemilaminotomy L4-5 left side with excision of herniated nucleus pulposus," and provided a discharge summary on December 17, 2003:

This 35 year old African American female came in complaining of pain in her back going down into her left foot and left toe. She had been worked up and had an MRI on January 31, 2003. She continued to have pain in her back. She had a further study here, which showed, in my

estimation, she had a herniated disk at L4-5 on the left side. She did not think that she could get by without surgical intervention and continued to have radicular pain down into her left leg....

This lady underwent a lumbar hemilaminotomy at L4-5 on the left side. At the time of surgery, she was indeed found to have a very large subcapsular extrusion of disk material right under the takeoff of the L5 nerve root. Postoperatively, she has done well. Her leg is not hurting her. She has excellent strength in all muscle functions of the left foot....

Dr. Simpson's final diagnosis was "herniated nucleus pulposus at L4-5 on the right side." The claimant testified that her group health insurance paid for Dr. Simpson's treatment.

A pre-hearing order was filed on January 21, 2004. The claimant contended that "her back remained symptomatic and she returned to Dr. P.B. Simpson who performed surgery." The claimant contended that she was entitled to reasonably necessary medical treatment, and temporary total disability compensation from October 13, 2003 until March 8, 2004. The respondents contended that treatment from Dr. Simpson was not authorized, and "they are not liable for any expenses." The respondents alternately contended that Dr. Simpson's treatment was not reasonably necessary.

The parties agreed to litigate the issues of "Authorization of Dr. P.B. Simpson; medical expenses; additional temporary total disability benefits; controversion and attorney's fees."

Dr. Simpson reported on February 2, 2004:

Mrs. Henderson was seen in my office today. She has reached maximum medical benefits and has been released from my care. She may return to work on February 3, 2004 with the restriction of lifting no more than 20 lbs for the next 7 weeks....

Hearing before the Commission was held on March 26, 2004. The claimant testified on direct:

Q. And what, if anything, did you notice about your symptoms after your surgery to your back?

A. I feel a whole lot better. I'm able to work now.

Q. And are you still having to drag your leg?

A. No, ma'am, I walk fine.

Q. And you returned to work on March 8, 2004?

A. Yes, ma'am.

The administrative law judge found, in pertinent part:

2. The claimant was granted a change of physician to Dr. Jim Moore in an order filed December 4, 2002. In 2003, Dr. Moore began treating the claimant's back at another level, L5-S1, and opined that this condition was unrelated to the compensable injury. Respondents stopped the claimant's benefits on October 13, 2003.

3. The claimant filed a prehearing questionnaire on December 9, 2003 with the Commission requesting payment of surgery as recommended by Dr. P.B. Simpson. She remained symptomatic, and on December 16, 2003, Dr. P.B. Simpson performed surgery on the claimant for a herniated disc at L4-L5 which improved her symptoms. The claimant returned to work on March 8, 2004.

4. The claimant did not obtain permission from either the insurance carrier or the Commission before she began treating with Dr. P.B. Simpson, however, the claim was controverted on October 13, 2003 before Dr. Simpson performed surgery on December 16, 2003. The change of physician rules do not apply to controverted claims.

5. The respondents are liable for expenses associated with Dr. Simpson's treatment beginning in December, 2003. The surgery was reasonable, necessary, and causally related to the compensable injury at L4-L5 of the lumbar spine.

7. Respondents remain liable for disability benefits regardless of Dr. Simpson's authorization. The claimant is entitled to temporary total disability benefits as she remained in her healing period, incapacitated from working from October 14, 2003 to March 8, 2004.

The respondents appeal to the Full Commission.

II. ADJUDICATION

A. Change Of Physician/Unauthorized Medical Expense

When a claimant desires a change of physician, she must petition the Commission for approval. Sharp v. Lewis Ford, Inc., 78 Ark. App. 164, 78 S.W.3d 746 (2002). Pursuant to the provisions of Act 796 of 1993, there is 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). Treatment or services furnished or prescribed by any physician other than the ones selected according to the provisions of Ark. Code Ann. §11-9-514(a)(3), except emergency treatment, shall be at the claimant's expense. See, Ark. Code Ann. §11-9-514(b).

In the present matter, the parties stipulated that the claimant sustained a compensable back injury on August 16, 2000. The claimant signed a Form AR-N, Employee's Notice Of Injury, on August 31, 2000, so she was therefore notified of her rights and responsibilities with regard to change of physician. See, Sharp, supra. In orders entered in December 2002 and January 2003, an administrative law judge granted the claimant her one-time change of physician, and the administrative law judge explicitly found that the claimant was entitled to treat with Dr. Moore pursuant to the claimant's one-time change of physician.

The claimant subsequently began treating with Dr. Moore. Nevertheless, the claimant began treating on her own with Dr. Simpson in August 2003. Dr. Moore, the authorized treating physician, did not refer the claimant to Dr. Simpson. There is no evidence before the Commission

indicating that Dr. Simpson's treatment was "emergency treatment" pursuant to Ark. Code Ann. §11-9-514(b).

Treatment provided by Dr. Simpson beginning in August 2003 and following was therefore unauthorized and shall not be the responsibility of the respondent-employer. See, Ark. Code Ann. §11-9-514(c)(3). The Full Commission therefore reverses the administrative law judge's finding that the respondents are liable for expenses associated with treatment provided by Dr. Simpson.

B. Temporary Disability

Temporary total disability is that period within the healing period in which the employee suffers a total incapacity to earn wages. Ark. State Hwy. Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). "Healing period" means "that period for healing of an injury resulting from an accident." Ark. Code Ann. §11-9-102(12).

In the present matter, the parties stipulated that the claimant sustained a compensable back injury in August 2000. An MRI in March 2001 showed a disc herniation at L4-5. Dr. Moore, an authorized physician, diagnosed "lumbar HNP" in January 2003. The claimant testified that she began receiving temporary total disability compensation on April

15, 2003. The claimant began receiving unauthorized medical treatment with Dr. Simpson in August 2003. The claimant testified that the respondents stopped paying temporary total disability on October 13, 2003. On October 17, 2003, Dr. Simpson noted the possibility of surgery, and Dr. Simpson performed surgery at L4-5 on or about December 16, 2003. The claimant credibly testified that she was able to return to work on March 8, 2004.

The Full Commission affirms the administrative law judge's finding that the claimant proved she was entitled to temporary total disability compensation from October 14, 2003 until March 8, 2004. The preponderance of evidence indicates that the claimant remained within her healing period and was totally incapacitated from earning wages from October 14, 2003 until she returned to work on March 8, 2004. The Full Commission recognizes our finding that the surgery performed by Dr. Simpson was unauthorized medical treatment and was not the responsibility of the respondents. Nevertheless, we are unaware of any statutory authority or case law which holds that unauthorized medical treatment cannot extend a claimant's healing period.

Based on our *de novo* review of the entire record, the Full Commission reverses the administrative law judge's finding that the respondents are liable for expenses associated with Dr. Simpson's treatment. The Full Commission finds that Dr. Simpson's treatment beginning in August 2003 and following was unauthorized and shall not be the responsibility of the respondent-employer. The Full Commission affirms the administrative law judge's finding that the claimant proved she was entitled to temporary total disability compensation from October 14, 2003 until March 8, 2004. The Full Commission therefore affirms in part and reverses in part the opinion of the administrative law judge. The claimant's attorney is entitled to fees for legal services pursuant to Ark. Code Ann. §11-9-715(Repl. 1996). For prevailing in part on the respondents' appeal to the Full Commission, the claimant's attorney is entitled to an additional fee of two-hundred fifty dollars (\$250), pursuant to Ark .Code Ann. §11-9-715(Repl. 1996).

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 with the Majority's opinion awarding the claimant temporary total disability benefits from October 14, 2003 to March 8, 2004. However, I must respectfully dissent from the Majority's opinion denying the claimant additional medical treatment and expenses from the time period beginning October 13, 2003. The Majority's opinion is based on the finding that the claimant should be denied benefits due to receiving unauthorized treatment; however, the Majority fails to consider that the employer controverted the claim; thereby making the change of physician rules non-applicable. For this reason, I respectfully dissent.

The Administrative Law Judge awarded benefits based on the premise that the employer controverted the claim and that as a result, the rules for the change of physician would not apply. This would, in effect, mean the claimant was allowed to seek additional medical treatment from Dr. Simpson without formally requesting a change of physician. The failure to address that issue is critical as the outcome of the case with regards to the claimant's

entitlement to medical benefits could be determined by that issue.

Generally, once a claim has been controverted, the change of physician rules become non-applicable. Sanyo Mfg. Corp. v. Farrell, 16 Ark. App. 59; 696 S.W.2d 779 (1985). In this instance, it is evident that the respondent did controvert the claim in October 2003. The respondent argues in its brief that it did not controvert the claim in its entirety, but also argues that it stopped paying for medical services because the treatment and surgery were not reasonably necessary or causally related to the compensable injury. The evidence is clear that the respondent intended to controvert all benefits and treatment provided after the September 3, 2003 report rather than just treatment provided by Dr Simpson. This is evidenced by the fact that the controversion was promulgated by the report from Dr. Moore and that when the claim was controverted, the respondent did not have knowledge the claimant was being treated by Dr. Simpson. It is further supported by the respondent's reliance on Dr. Moore's September 3, 2003 report to support its argument that additional treatment was not causally related to the compensable injury. Additionally, if the

employer only intended to controvert treatment by Dr. Simpson, it would have indicated, in advance of the hearing, that it only intended to deny treatment by Dr. Simpson on the allegation that his treatment was unauthorized treatment rather than arguing the claimant should be denied temporary total disability benefits or arguing that the additional treatment was not reasonably necessary or causally related to the admittedly compensable injury. For these reasons, I respectfully dissent.

SHELBY W. TURNER, Commissioner