

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F207885

EDWARD GASTON,
EMPLOYEE

CLAIMANT

WATSON CHAPEL SCHOOL DISTRICT,
EMPLOYER

RESPONDENT

RISK MANAGEMENT RESOURCES,
INSURANCE CARRIER

RESPONDENT

OPINION FILED FEBRUARY 16, 2005

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

Claimant represented by the HONORABLE ZAN DAVIS, Attorney at
Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE DAVID C. JONES,
Attorney at Law, Little Rock, Arkansas.

Decision of administrative law judge: Reversed.

OPINION AND ORDER

The respondents appeal an administrative law judge's
opinion filed October 17, 2003. The administrative law
judge found, among other things, that "The respondents
objected to a change of physician and additional medical
treatment, thereby controverting the claim on June 19, 2002.
The change of physician rules do not apply during
controversion." After reviewing the entire record *de novo*,

the Full Commission reverses the opinion of the administrative law judge. The Full Commission finds that the respondents did not controvert the claim on June 19, 2002. We further find that treatment from Dr. Armstrong and Dr. Adametz after June 19, 2002 was unauthorized pursuant to the change of physician provisions of Act 796 of 1993, so that treatment provided by Dr. Adametz shall be at the claimant's expense.

I. HISTORY

The parties stipulated that the claimant sustained a compensable back injury on February 4, 2002. The claimant signed a Form AR-N, Employee's Notice Of Injury, on February 11, 2002. The parties apparently stipulated that the claimant "first sought treatment with Dr. Armstrong on 2-11-02." Dr. Armstrong planned, "Have Dr. Simpson evaluate him for lower back region." The record contains a First Report Of Injury Or Illness dated February 25, 2002. It was noted on the First Report, "Employee declined treatment with his Worker's Comp physician until today. Employee went to his own physician. We are sending him to Healthcare+ today."

Dr. Arthur Levy of Health Care Plus reported on February 25, 2002, "This patient is a 50-year-old male who

presents as an initial Workman's Comp injury from Watson Chapel School District who requests a release for ortho referral as previously recommended by his PCP when he developed back pain after lifting a 55 gallon drum on 02/04/02 as he was dumping trash in a dumpster....Patient states he had an MRI via Dr. Armstrong who allegedly told the patient that this was a herniated disc and that he should have a referral to Dr. Simpson for further eval after released from occupational medicine clinic." Dr. Levy assessed "lumbar strain with radiculopathy" and planned, "Patient is released to previously scheduled ortho referral as scheduled....Patient's care will be followed by ortho from this point forward."

The impression of Dr. P.B. Simpson, Jr. on March 4, 2002 was "Large HNP, L5-S1, confirmed by MRI." Dr. Simpson planned a lumbar laminectomy, pending clearance from treating cardiologist Dr. Ayman Alshami. On March 7, 2002, Dr. Alshami performed a "left heart catheterization, coronary angiography, left ventriculogram. Perclose of the left common femoral artery."

A claims specialist with the respondent-carrier informed Dr. Simpson on March 27, 2002, "With regard to the

above captioned workers' compensation patient, authorization is hereby granted for treatment with regard to Mr. Gaston's work related injury to his back (lumbar). Authorization is given for surgery subject to the meeting of the pre-cert criteria."

Dr. Alshami stated on May 14, 2002, "He can go back to Dr. Simpson for evaluation and probable surgery of his lower back. He is at low to moderate risk of any cardiac complications from non cardiac surgery."

The claimant returned to Dr. Simpson on May 17, 2002:

He had a large herniated disk at L5-S1 on the right side. This was found on a study done on 2-18-02. This gentleman, since I last saw him, has had four stints. He is actually doing fairly at this point. He is not having any radicular pain down his leg. He can toe walk, but has an absent Achilles reflex on the right side....I'm not going subject (sic) this gentleman to surgical intervention. He said he could return to work, and I'm going to let him try to do so. He ought to have about a 25-pound weight limitation for about the next month or so.

Dr. Simpson pronounced "maximum medical benefit" and released the claimant on May 17, 2002.

The respondents' exhibits contain a letter from the claimant to the Workers' Compensation Commission signed June 17, 2002. The claimant wrote that his back still hurt, and

that Dr. Simpson would not explain to him why he would not perform surgery. The claimant asked for "a change of Doctor." The claimant's letter indicated that he requested to be seen by Dr. Scott Schlesinger.

The respondent-carrier's claims specialist wrote to the Commission on June 19, 2002:

Enclosed is a copy of the correspondence received from Mr. Gaston requesting a change of physician. I've also enclosed copies of the Form 1 and medical records contained in our file as this claim is currently a medical only.

Mr. Gaston sustained a compensable work injury for which all recommended medical treatment has been authorized. Initially, Dr. Simpson indicated surgery would be necessary for the diagnosed herniated lumbar disc but the treatment was interrupted and then post-phoned (sic) due to Mr. Gaston's intervening cardiac problems. Dr. Simpson last saw Mr. Gaston on May 17th and indicated that the claimant had improved somewhat and that he would not consider surgical repair of the lumbar HNP due to the claimant's recent cardiac history.

The claimant has been provided with an explanation by Dr. Simpson but does not appear to agree with the physician's opinion.

The parties stipulated that Dr. Armstrong referred the claimant to Dr. James R. Adametz. Dr. Adametz performed surgery on July 22, 2002. The claimant filed a Form AR-C, Claim For Compensation, on July 22, 2002. The respondents

replied on August 5, 2002, "The Respondents acknowledge receipt of the form AR-C filed by Attorney Zan Davis on behalf of the claimant. The Respondents have accepted this claim as a compensable injury and have paid all appropriate benefits."

A pre-hearing order was filed with the Commission on October 18, 2002. The claimant contended that "although he reported an injury his employer did not offer medical care until after the claimant saw his family physician, Dr. Armstrong. He was then directed to the company physicians at Health Care Plus before being referred to neurosurgeon, Dr. P.B. Simpson. Although surgery was recommended in a report dated March 4, 2002, Dr. Simpson refused to treat the claimant because of his preexisting cardiac condition. The claimant returned to Dr. Armstrong on June 20, 2002 and he referred him to Dr. Adametz. Surgery was performed on July 22, 2002."

The respondents contended that the claimant "initially refused to go to the company physician, preferring instead to be treated by his friend, Dr. Armstrong. Treatment by Drs. Armstrong and Adametz in June and July, 2002, is unauthorized."

After a hearing before the Commission, the administrative law judge found, "The claimant requested a change of physician when Dr. Simpson reversed his decision to operate on the claimant's herniated disc. The respondents objected to a change of physician and additional medical treatment, thereby controverting the claim on June 19, 2002. The change of physician rules do not apply during controversion." The ALJ found that treatment from Dr. Armstrong and Dr. Adametz was reasonably necessary. The respondents appeal to the Full Commission.

II. ADJUDICATION

Act 796 of 1993, as codified at Ark. Code Ann. §11-9-514(a) (3) (A), provides:

(i) The employer shall have the right to select the initial primary care physician from among those associated with managed care entities certified by the commission as provided in §11-9-508.

(ii) Where the employer has contracted with a managed care organization certified by the commission, the claimant employee, however, shall be allowed to change physicians by petitioning the commission one (1) time only for a change of physician to a physician who must either be associated with a managed care entity chosen by the employer or be the regular treating physician of the employee who maintains the employee's medical records and with whom the employee has a bona fide doctor-patient relationship demonstrated

by a history of regular treatment prior to the onset of the compensable injury but only if the primary care physician agrees to refer the employee to the managed care entity chosen by the employer for any specialized treatment, including physical therapy, and only if the primary care physician agrees to comply with all the rules, terms, and conditions regarding services performed by the managed care entity chosen by the employer.

(b) Treatment or services furnished or prescribed by any physician other than the ones selected according to the foregoing, except emergency treatment, shall be at the claimant's expense.

In the present matter, the Full Commission reverses the administrative law judge's finding that the change of physician rules did not apply, and that the claimant was entitled to additional treatment from Dr. Armstrong and Dr. Adametz. The parties stipulated that the claimant sustained a compensable injury on February 4, 2002, and the respondents correctly note that the claimant was provided the proper written and verbal notice with regard to his change of physician rights and responsibilities. The claimant was eventually referred to Dr. Simpson. Dr. Simpson initially planned to perform surgery, and the respondents authorized that treatment. However, Dr. Simpson indicated on May 17, 2002 that he no longer planned to perform surgery. Therefore, on June 17, 2002, the claimant

requested "a change of doctor" to Dr. Schlesinger. On June 19, 2002, the respondents forwarded to the Commission a copy of the claimant's request for a change of physician. The respondents also reiterated that they had authorized all of the medical treatment which had been recommended for the claimant. There was no language in the respondents' June 19, 2002 correspondence indicating that they controverted additional medical treatment or the claimant's request for a change of physician.

Nevertheless, even though the claimant had requested a change of physician to Dr. Schlesinger, the claimant subsequently began treating with another physician, Dr. Adametz, through a referral from Dr. Armstrong. The claimant's treatment with Dr. Armstrong and Dr. Adametz after June 19, 2002 was unauthorized. The claimant did not comply with the change of physician provisions of Ark. Code Ann. §11-9-514(a)(3)(A). Therefore, the treatment provided by Dr. Armstrong and Dr. Adametz after June 19, 2002 shall be at the claimant's expense. See, Ark. Code Ann. §11-9-514(b), *supra*.

Based on our *de novo* review of the entire record, the Full Commission finds that the treatment provided the

claimant by Dr. Armstrong and Dr. Adametz after June 19, 2002 was unauthorized and shall be at the claimant's expense. We therefore reverse the opinion of the administrative law judge, and this claim is denied and dismissed.

_____IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

_____I respectfully dissent from the Majority opinion. The Majority finds that the Respondents did not controvert Claimant's claim for benefits on June 19, 2002 and that the treatment from Dr. Simmie Armstrong and Dr. James Adametz was unauthorized pursuant to the provisions of Act 796 of 1993. I find that the Respondent controverted the Claimant's claim for compensation on June 19, 2002 when it objected to Claimant's change of physician request. I also find that the change of

physician rules did not apply because the Respondent controverted Claimant's right to additional medical services.

Claimant and Respondent stipulated that Claimant sustained a compensable back injury on February 4, 2002. Claimant contends, and there is no reason to doubt his testimony, that he reported his injury, but his employer did not offer medical treatment until after he saw his family physician, Dr. Armstrong. The Respondent contends that Claimant refused to go to the company physician, however, once he received the First Report of Injury or Illness form dated February 25, 2002, he immediately saw Dr. Arthur Levy, the authorized Health Care Plus physician. Dr. Levy noted that Claimant sustained an employment related injury when he developed back pain after lifting a 55-gallon drum on February 4, 2002. Dr. Levy assessed Claimant with "lumbar strain and radiculopathy" and referred him to Dr. P.B. Simpson, Jr. for further evaluation. Dr. Simpson diagnosed the Claimant with "Large HNP, L5-S1, confirmed by MRI." Dr. Simpson planned on performing a lumbar laminectomy when Claimant was cleared from his cardiologist, Dr. Ayman

Alshami. On March 7, 2002, Claimant underwent a "left heart catheterization, coronary angiography, left ventriculogram. Perclose of the left common femoral artery." Respondent's claim specialist informed Dr. Simpson on March 27, 2002, "With regard to the above captioned workers' compensation patient, authorization is hereby granted for treatment with regard to Mr. Gaston's work related injury to his back (lumbar). Authorization is given for surgery subject to the meeting of the pre-cert criteria."

Dr. Alshami cleared the Claimant for lumbar surgery on May 14, 2002 stating that Claimant was at low to moderate risk of cardiac complications. The Claimant returned to Dr. Simpson on May 17, 2002 and at that time Dr. Simpson refused to perform surgery. Claimant was pronounced "maximum medical benefit" and released to return to work on May 17, 2002.

Claimant's back pain did not subside and less than one month later, on June 5, 2002, Dr. Scott Schlesinger's office contacted Brenda Sellers, a claims adjuster for Respondent, for authorization to treat the

Claimant and to perform the necessary surgery. The authorization was declined by Ms. Sellers.

The Majority alleges that Claimant did not comply with the provisions of § 11-9-514 (a) (3) (A). This allegation is simply untrue. Ms. Sellers testified that she contacted the Claimant and told him he could petition the Commission for a change of physician if he disagreed with her position. Claimant then wrote a letter to the Workers' Compensation Commission on June 17, 2002, in compliance with Ark. Code Ann. § 11-9-514(a) (3) (A), stating that his back still hurt and asked for a change of physician to Dr. Scott Schlesinger. Ms. Sellers filed an objection to this request on June 19, 2002 and it does not appear that the file was assigned to anyone at the Commission. Therefore, Claimant did not receive his statutory right to a one time change of physician. At that point, the Claimant returned to his family physician, Dr. Armstrong, who referred him to Dr. Adametz, a neurosurgeon. Dr. Adametz performed surgery on July 22, 2002 and Claimant filed a Form AR-C, Claim for Compensation, on July 22, 2002.

The evidence shows that the Respondent originally accepted Claimant's claim as compensable and paid for his treatment with Dr. Simpson. Dr. Simpson diagnosed the Claimant with a herniated disc that required surgery. However, Dr. Simpson refused to offer Claimant the surgical intervention that he required and returned him to work, even after the Claimant's cardiologist cleared him for surgery. At this point, the Claimant requested a change of physician, which the Respondent's carrier refused. Based on Respondent's refusal to provide further medical treatment by objecting to his request for a change of physician, Claimant's claim for medical treatment was controverted. Therefore, Claimant was free to see the physician of his choice.

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).

It is beyond dispute that although the Respondent may have initially accepted the Claimant's claim as compensable and paid benefits, the claim became controverted when the Respondent refused to authorize surgery by a different physician or pay further benefits on the claim.

In light of these observations, the only reasonable conclusion to be drawn from the evidence in the record is that as of the date that claimant first visited Dr. Armstrong or Dr. Adametz, after being denied a change of physician, the Respondents had controverted the Claimant's entitlement to further medical benefits. Therefore, the contention by Respondent that the Claimant's treatment received from Drs. Armstrong and Adametz was unauthorized is without merit. After the Respondent controverted the Claimant's entitlement to additional medical benefits, the change of physician rules did not apply, and claimant was free to visit any doctor he chose.

In addition, the change of physician rules do not apply where the employer refuses to provide reasonably necessary medical treatment as required by Ark. Code Ann. § 11-9-508 (1987). In this regard, the controversion of a claim in its entirety may be tantamount to a refusal to provide medical care. Dorothy Hamilton v. Gravette Medical Center, Full Workers' Compensation Commission, May 10, 1993 (claim No. E002338); Paula Mitchell v. St. Michael Hospital, Full Workers' Compensation Commission, July 31, 1990 (Claim No. D801630).

The Respondent has not disputed that Claimant's lumbar laminectomy was reasonable and necessary medical treatment. In fact, on March 27, 2002, Respondent's claims specialist specifically authorized surgery for Claimant's work related injury. When Dr. Simpson refused to perform Claimant's surgery, Claimant was still in need of medical treatment. It appears that Respondent has successfully found a loophole by which to relinquish its duty of paying for Claimant's necessary medical treatment by arguing, erroneously, that Claimant did not follow the change of physician rules. The Respondent's refusal to designate Dr. Schlesinger or any other physician to

perform Claimant's much needed surgery had the same effect as a denial of benefits.

Based on the foregoing, I find that the Administrative Law Judge was correct when she found that Respondent controverted Claimant's claim for benefits and that the change of physician rules should not apply to bar this Claimant from receiving the benefits to which he is entitled.

SHELBY W. TURNER, Commissioner