

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F205667

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| HAROLD R. LEPEL, EMPLOYEE | CLAIMANT |
| ST. VINCENT HEALTH SERVICES, INC., EMPLOYER | RESPONDENT |
| PREFERRED PROFESSIONAL INSURANCE CO., ALTERNATIVE INSURANCE MANAGEMENT SERVICES, CARRIER | RESPONDENT |

OPINION FILED AUGUST 12, 2005

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

Claimant represented by HONORABLE SILAS H. BREWER, JR., Attorney at Law, Little Rock, Arkansas.

Respondent represented by HONORABLE WALTER A. MURRAY, 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 July 30, 2004.

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

1. The Arkansas Workers' Compensation Commission has jurisdiction of the parties and subject matter of this claim.
2. Pursuant to the stipulations of the parties and the record, the employment relationship existed at all pertinent

times; the claimant sustained a compensable neck injury March 11, 2002; he is entitled to the maximum benefit rates for that date of injury; and payment of benefits was initiated by the respondents and then terminated on or about May 19, 2003.

3. The claimant received and signed a form AR-N March 15, 2002, and, because the record fails to show that he was referred to Dr. Anthony E. Russell, Dr. Russell's treatment was unauthorized and not the responsibility of the respondents.

4. The preponderance of the evidence shows that the respondents took reasonable steps to provide employment to the claimant, but the claimant declined to take advantage of these opportunities so that he is not entitled to additional benefits for temporary total disability or benefits under Ark. Code Ann. §11-9-505(a).

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

_____The Majority is affirming and adopting an Administrative Law Judge's decision which denied this claim. For the reasons set out below, I respectfully dissent from that decision.

The claimant sustained an admittedly compensable injury to his neck on March 11, 2002. As a result of that injury, the respondent paid the claimant certain disability benefits and paid for some medical treatment of that condition. Later, the respondent employer terminated the

claimant's employment because of a staff reduction. The respondent did not offer the claimant alternate employment.

The claimant filed the present claim, requesting that the respondent be ordered to pay for certain medical expenses incurred as a result of the claimant's treatment by, and at the direction of, Dr. Anthony Russell, a Little Rock neurosurgeon. The claimant also alleges he is entitled to additional temporary total disability benefits and, because of the respondent's unreasonable refusal to return him to employment, he further requests benefits under A.C.A. §11-9-505 (A). After a hearing, an Administrative Law Judge found that the claimant did not establish his entitlement to additional medical or disability benefits, specifically including those provided for by A.C.A. §11-9-505 (A). From that decision, the claimant filed the present appeal. The Majority, in adopting the ALJ's decision, is not considering all of the facts developed in the record and is not correctly applying the law. My de novo review of the record convinces me that the Judge's decision should be reversed and the claimant should have been awarded the requested benefits.

At the time of his injury, the claimant was employed as a nuclear medicine technician at St. Vincent Doctors Hospital in Little Rock, Arkansas. On March 11, 2002, the claimant was attempting to move a patient on a stretcher when he felt a sudden pain between his neck and his shoulders. He promptly advised his employer of this condition and received medical treatment from the emergency room in the Doctors Hospital. The emergency room diagnosed him as suffering from a neck strain and released him to return to work under restrictions. When the claimant's condition did not resolve, he sought treatment from Dr. Charles Barg, his regular treating physician. After initially allowing the claimant to work with restrictions, Dr. Barg later directed that the claimant remain off work for a two week period beginning May 16, 2002. The claimant received temporary disability benefits during this period. The claimant was later seen by Dr. Wilbur Giles, a Little Rock neurosurgeon who provided him additional treatment, including medications and, in a note dated July 17, 2002, stated that the claimant was to work with a 20 pound lifting restriction until October 1, 2002.

The claimant continued to work, but from time-to-time would have recurring symptoms of neck and arm pain. In a report dated December 12, 2002 from Dr. Reza Shahim, the following was stated:

He presents today, after having had another injury approximately three weeks ago that occurred while lifting a very heavy gentleman. He stated that he felt a strain in his neck. He had some neck swelling. He had some recurrent arm numbness at that time as well.

At the hearing, the claimant also testified of another incident involving a patient in April 2003, which caused him to miss work beginning April 17, 2003 until May 22, 2003. During that period, the claimant did not receive any disability benefits. Upon his return to work on May 22, 2003, the claimant was advised that St. Vincent's was abolishing his department and that he was being terminated from further employment.

The first issue is the claimant's entitlement to additional medical benefits. The claimant contends that the respondent failed to designate him a treating physician when Dr. Barg, his authorized treating physician, directed that he seek additional treatment from a neurosurgeon in

April 2003. Since Dr. Wilbur Giles, the neurosurgeon who had previously seen the claimant, had retired from his practice by this time, the claimant sought treatment from Dr. Anthony Russell, another Little Rock neurosurgeon. The respondent has refused to pay for this treatment and contends that the treatment is unauthorized. However, the claimant asserts that the respondent's failure to designate a doctor in this specialty area, even though they were aware of Dr. Barg's referral, is tantamount to a controversion, which entitles the claimant to seek medical treatment on his own, at the expense of the respondent.

The Administrative Law Judge, whose finding and conclusions the Majority is adopting, did not discuss the claimant's entitlement to additional medical benefits other than to state that since the claimant had not received a bonafide referral from another physician to see Dr. Russell, and since the respondent had not authorized Dr. Russell to provide treatment, this treatment was unauthorized and is not their responsibility. In my opinion, this analysis is not responsive to the claimant's specific request and is clearly in error.

A.C.A. §11-9-508 provides that an employer shall promptly provide such medical treatment as is reasonably necessary in connection with the injury. As indicated above, Dr. Barg, the claimant's authorized treating physician, directed him to go to a neurosurgeon on April 17, 2003. This referral was the direct result of the recurrence of symptoms the claimant had on April 16, 2003. Given the claimant's history of having injured his neck and having recurring radicular symptoms, Dr. Barg's direction that the claimant seek treatment from a neurosurgeon was clearly justified. However, the respondent took no action to provide this treatment to the claimant. The failure of the respondent to meet their statutory obligation to provide prompt medical attention to the claimant obviated the change of physician rules and entitled the claimant to seek treatment on his own.

The respondent also contends that the treatment the claimant is seeking is the result of a pre-existing condition and that they are therefore not liable to pay for the medical expenses incurred by the claimant. However, the medical records in this case do not support this contention.

It is true that the claimant suffered an injury to his neck in 1977, which eventually required him to undergo a cervical fusion at C5-C6 in 1983. That surgery was performed by Dr. Wilbur Giles. Significantly, the claimant had no history of continuing or ongoing symptoms or problems from this original neck injury following his recovery from the cervical fusion. Since his accident in March 2002, the claimant has undergone at least three cervical MRIs and none of them indicated that any of the claimant's problems were resulting from the fused section of his neck. In fact, all of those MRIs indicated that the fusion was stable and not causing any problems.

The claimant's recent MRIs indicate that the claimant's cervical spine has not only suffered traumatic injury as a result of the claimant's job related accident but has degenerated rapidly since his first injury. The MRI from May 2002 does not reflect the significant degenerative changes that had developed by January 2003. These changes, along with the symptoms described by the claimant as including radiating pain, numbness, and other similar complaints were the basis for directing the claimant to seek neurosurgical treatment. The failure of the respondent to

take appropriate action to provide this treatment not only justified his seeking such treatment on his own, but also demonstrates that the treatment the claimant did receive from Dr. Russell was reasonable and necessary. Further, the Commission has the duty pursuant to A.C.A. §11-9-508 to designate a doctor for the claimant to see. For that reason, I would find that this case should be remanded back to the Administrative Law Judge to determine an appropriate physician to see and treat the claimant.

The next issue which must be discussed is the claimant's request for additional temporary total disability benefits. Once again, this issue is not discussed or ruled upon by the Majority. I also note that neither the Prehearing Order nor the dialogue between the Administrative Law Judge and the attorneys prior to the hearing clearly specified the periods of time in which the claimant was alleging that he was temporarily disabled from the injury. However, during his testimony, the claimant testified that he was disabled from April 17, 2003 through May 22, 2003. The beginning of this disability is corroborated by the statement from Dr. Charles Barg dated April 17, 2003. The claimant was not returned to work until Dr. Russell released

him to do so on May 20, 2003. I therefore find that the claimant is entitled to receive temporary disability benefits during this period.

The final issue is benefits requested by the claimant because of the respondent's refusal to return him to work after being released by Dr. Russell. There is no dispute that the respondent employer made a decision to terminate the claimant's employment with them because of their decision to eliminate the outpatient Nuclear Medicine Department at St. Vincent Doctors Hospital. Since the claimant was the only employee in that department, his job was eliminated. The claimant was advised of this decision upon his return to work on May 22, 2003. According to Mr. Dent Smith, who is the Director of the Radiology and Nuclear Medicine Departments for the Health Systems, the decision to eliminate the claimant's employment was made purely for economic reasons. He stated that he summoned the claimant to his office where he was advised that his employment was terminated. When asked during his testimony as to whether there was any other jobs in the St. Vincent Health Systems that were available to the claimant, Mr. Smith made the following statement:

Nothing specific, other than to tell him that as far I was concerned, he could apply for anything that was open and he would have further discussions with Mr. Walker about that.

The "Mr. Walker" referred to in the above quotation is, Leroy Walker, the Personnel Manager of the respondent employer. After the meeting with Mr. Smith, the claimant went to Mr. Walker's office and advised him of the termination. Apparently, Mr. Walker provided the claimant with a list of some 300 jobs for which he could apply. In his deposition Mr. Walker explained that even though the claimant, who had been employed by St. Vincent Health Systems for approximately 19 years, had greater seniority than many of the other employees in the system, their policy was that they did not "bump" other employees within the organization.

The list provided to the claimant was apparently that of jobs within the St. Vincent system and not necessarily job vacancies for which the claimant was being offered employment. The claimant testified that, since he had already been terminated by St. Vincent, and was not being offered any comparable positions in their Radiology or

Nuclear Medicine Departments, the two areas for which the claimant was trained and educated, he did not see any point in applying for other jobs. However, the claimant testified regarding numerous applications he had made following his termination. These job applications were made to medical facilities and hospitals in both Arkansas and Oklahoma as well as to certain non-medical related employers.

The Administrative Law Judge, in a very cursory manner, noted that after being terminated, the claimant had failed to ask about any possible job opportunities. The Judge then made the following statement:

Under these circumstances, the employer attempted to start the process of returning the employee to work but the employee refused to participate so the employer is not required to pay temporary total disability benefits or benefits under A.C.A. §11-9-505 (A).

The above statements are incorrect both factually and legally. In the first place, none of the testimony offered by the respondent's witnesses indicates that they made any offer to the claimant to return to work. In fact, Mr. Smith specifically stated that he was not aware of any job openings nor did he make any such offers to the claimant.

Mr. Walker stated that he had merely provided a list of jobs to the claimant. As testified to by the claimant, this list was not necessarily of job vacancies but merely jobs within the system. According to Mr. Walker, the policy of the respondent employer was that persons such as the claimant would not be moved into other positions. No job offer was made to the claimant. He was merely told that he could apply for any job opening which might exist in the St. Vincent's system.

An employer's obligation to provide employment to a claimant is set out in A.C.A. §11-9-505 (A) (1) and (2).

The relevant section provides as follows:

(a) (1) Any employer, who without reasonable cause refuses to return an employee who is injured in the course of employment to work, where suitable employment is available within the employee's physical and mental limitation, upon order of the Workers' Compensation Commission, and in addition to other benefits, shall be liable to pay to the employee the difference between benefits received and the average weekly wages lost during the period of such refusal, for a period not exceeding one year.

(2) In determining the availability of employment, the continuance in business of the employer shall be considered, and a written rule promulgated by the

employer with respect to the seniority or provisions of any collective bargaining agreement with respect to seniority shall control.

The applicability of that statutory section has been considered by this Commission and the Appellate Courts on many occasions. In fact, this Commission has held in the past that actions similar to those of this respondent, do not satisfy an employer's obligation under A.C.A. §11-9-505 (A) (1). In Cox v. Baptist Health, 202 AWCC 89 (E709351), April 25, 2002, the Commission held an employer does not fulfill their statutory obligation simply by making the employee aware of other job openings paying substantially less money than he or she was making at the time of the injury, and where the employer makes no attempt to return the employee to work in other job openings within the employee's mental and physical limitation that do pay a comparable salary. Likewise, in Canada v. Tankersley Food Service, 203 AWCC 92 (F112473), January 5, 2004, it was held that where an employer terminated an employee but did not offer re-employment, the employer had violated the claimant's rights under A.C.A. §11-9-505 (A).

In this case, it is obvious that the respondent has not satisfied their statutory obligation. In past cases, similar to this one, this Commission, as well as the Court of Appeals has held that employers must take more affirmative action to return a claimant to work than merely providing them a list of jobs to which they can apply. Accordingly, I find that the claimant has satisfied his entitlement to benefits under A.C.A. §11-9-505 (A).

I find that the evidence provided by the claimant is more than sufficient to establish his entitlement to the benefits he has requested. For that reason, I respectfully dissent from the Majority's decision.

SHELBY W. TURNER, Commissioner
