

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F209180

FRANCES MANN, EMPLOYEE	CLAIMANT
RANDOLPH COUNTY MEDICAL CENTER, EMPLOYER	RESPONDENT
ROYAL INDEMNITY COMPANY, INSURANCE CARRIER	RESPONDENT

OPINION FILED APRIL 21, 2005

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

Claimant represented by the HONORABLE FREDERICK SPENCER, Attorney at Law, Mountain Home, Arkansas.

Respondents represented by the HONORABLE RANDY MURPHY, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of the Administrative Law Judge filed October 12, 2004. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. On August 1, 2002, the relationship of employee-employer-carrier existed among the parties.
3. On August 1, 2002, the claimant sustained an injury arising out of and in the course of her employment.

4. The respondents shall pay all reasonable hospital and medical expenses arising out of the injury of August 1, 2002.
5. Pursuant to Ark. Code Ann. §11-9-514(c) (A) (ii) claimant is entitled to one-time change of treating physician. Dr. Andrew Jensen is herein designated the claimant's treating physician relative to her August 1, 2002, compensable injury.
6. Respondents have controverted the claimant's entitlement to a change of physician pursuant to Ark. Code Ann. §11-9-514(a) (3) (A) (ii).

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 made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

We therefore affirm the October 12, 2004 decision of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the opinion as the decision of the Full Commission on appeal.

All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the

lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002).

Since the claimant's injury occurred after July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as amended by Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$500.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

Commissioner Turner concurs.

CONCURRING OPINION

I concur in the majority opinion affirming and adopting the Administrative Law Judge's opinion granting claimant's request for a one-time change of physician pursuant to Ark. Code Ann. § 11-9-514. I write separately to address the dissenting opinion's argument

that the change of physician rules do not apply because claimant was never provided with Form AR-N.

The facts are not in dispute. Claimant was injured in a motor vehicle accident on August 1, 2002, and received treatment from the Randolph County Medical Center Emergency Room. She subsequently sought treatment from her family doctor, Dr. Andrew Jensen, for headaches resulting from the accident. Respondents later arranged for claimant to be evaluated by Dr. Reginald Rutherford, a neurologist, on August 26, 2002. Claimant was under his care until October 28, 2002. After being released by Dr. Rutherford, claimant contacted respondent's case manager, April O'Neil, and stated that she did not feel that she was capable of returning to work. Claimant also expressed an interest in obtaining a second opinion. Respondents then arranged for claimant to be evaluated by Dr. Wayne Bruffett, an orthopedist. Dr. Bruffett referred claimant to Dr. Bruce Safman, a pain management specialist. Dr. Safman released claimant on April 11, 2003. Claimant continued to experience headaches, back pain and left leg numbness. Claimant attempted to return to Dr. Safman, but respondents refused to authorize the treatment. Claimant, therefore, sought treatment from Dr. Jensen. Claimant has now petitioned

the Commission and seeks a change of physician pursuant to § 514 from Dr. Safman to Dr. Jensen. Respondents' argue that claimant exercised her statutory one-time right to a change of physician when respondents permitted her to seek treatment from Dr. Bruffett. The dissenting opinion argues that the change of physician rules do not apply because claimant was never provided with Form AR-N.

In William Johnson v. Ranch Properties, Inc., Full Commission Opinion filed December 21, 1993 (E111447), the Full Commission addressed the argument regarding the application of the change of physician rules when a claimant, who has not been given notice by a respondent, petitions the Commission for a change of physician:

Where the claimant petitions the Commission seeking permission to change physicians, delivery of the notice is not an issue, and the administrative law judge has a duty to determine whether the claimant is entitled to a change of physician and, if so, to select a physician regardless of whether the required notice was furnished.

Here, claimant is now exercising her statutory one-time right to a change of physician under § 514 and compiling with the change of physician rules. Respondents' previous consent to allow claimant to seek

a second opinion and arrangement for claimant to seek treatment from Dr. Bruffett does not forfeit claimant's right pursuant to § 514. Claimant is now invoking her right under § 514. Accordingly, I find that the change of physician rules are properly applied here regardless of whether claimant was given a copy of respondent's Form AR-N.

I also reject respondents' argument and concur that claimant is entitled to exercise her right to a change of physician pursuant to § 514. Precedent is clear that an "agreed to" change to another physician between an employer and claimant "without intervention from the Commission" does not negate claimant's one-time right to later petition the Commission for a change of physician pursuant to § 514. See, Magic Mart, Inc. v. Little, 12 Ark. App. 325, 676 S.W.2d 756 (1984); Maples v. Accurate Plastic Molding, Full Commission Opinion filed June 26, 1996 (E504344).

For these reasons, I concur that claimant is entitled to a change of physician pursuant to § 514. Accordingly, I also reject the argument that she is required to show that her requested treatment is reasonable and necessary.

SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I respectfully dissent from the majority opinion finding that the claimant is entitled to additional medical treatment commensurate with her compensable injury under the direction of Dr. Jansen, her family physician.

A carefully conducted de novo review of this claim in its entirety reveals that the change of physician rules do not apply to this claim as the claimant was never provided with Form AR-N. Accordingly, the issue, then, is whether the treatment sought by the claimant is reasonable and necessary. Based upon my de novo review, I find that said treatment is not reasonable and necessary in connection with the claimant's compensable injury.

The claimant sustained a compensable work related injury on August 1, 2002, as a result of a motor vehicle accident. The claimant was initially treated for her injury at the emergency room of Randolph County Medical Center under the direction of emergency physician, Dr. Francis L. Duke. The claimant was diagnosed with a concussion, and released from the ER with medications. On August 5, 2002, the claimant sought treatment with her family physician, Dr. Andrew Jansen,

due to progressively worsening symptoms. On August 26, 2002, the respondents arranged for the claimant to be seen by Dr. Reginald Rutherford, a neurologist. Thereafter, Dr. Rutherford treated the claimant conservatively for neck and low back complaints "attributable to whiplash with soft tissue injury." Dr. Rutherford released the claimant on October 28, 2002, with medications and a twenty-five pound lifting restriction.

After her release from Dr. Rutherford, the claimant sought approval from her nurse case manager, namely Ms. April O'Neil, to seek a second medical opinion. The respondent arranged for the claimant to be seen by orthopedic physician, Dr. Wayne Bruffett. In turn, Dr. Bruffett referred the claimant to pain specialist, Dr. Bruce Safman. Dr. Safman's treatment included trigger point injections, which were reportedly effective in alleviating the claimant's complaints, including her headaches. In his clinic report dated February 14, 2003, Dr. Safman reported:

She has headaches, but she has had them before. This has been a chronic problem not related to her injury.

Dr. Safman increased the claimant's lifting restriction to thirty-five pounds and continued her on medications. On April 11, 2003, Dr. Safman declared the

claimant to be at MMI, he assigned the claimant with a zero percent disability rating, and he released her from his care and back to regular work duty. Thereafter, the claimant returned to her family practitioner, Dr. Jansen, for continuing treatment of her headaches.

It has been held that Act 1167 of 1999, as codified at Ark. Code Ann. §11-9-514(a)(3)(A)(ii), established an absolute, statutory right to a one-time change of physician where the employer has contracted with a managed care organization and has exercised the right to select the primary-care physician. Collins v. Lennox Industries, Inc., 77 Ark. App. 303, 75 S.W.3d 204 (2002). Moreover, the Commission may approve a change of physician with or without a hearing. Sharp v. Lewis Ford, Inc., 78 Ark. App. 164, 78 S.W.3d 746 (2002). An injured worker and her employer can mutually agree to a change of physician without intervention from the Commission. Hood v. Southwest Airlines Co., Full Commission Opinion filed March 6, 2003 (F011021); see also, Welch v. Tri-County Shirt Co., 49 Ark. App. 112, 897 S.W.2d 575 (1995). In order to invoke the provisions of Ark. Code Ann. §11-9-514, the respondent must prove that the claimant received the appropriate Commission forms which advise her of her rights and duties relating to a change of physician. Stephenson v. Tyson Foods, Inc., Full Commission Opinion filed June 14, 1999 (E709782): citing,

Homes v. Superior Industries, Full Commission Opinion filed June 1, 1998 (E115559). Moreover, it is sufficient for the AR-N form to be provided to the claimant in order to bring the change of physician rules into play. Decker v. Lowe's, Full Commission Opinion filed June 5, 1992 (E102455).

Conversely, if an AR-N form is not provided to the claimant, then it would seem logical that the change of physician rules do not come into play.

The record is devoid of evidence that the claimant was ever provided with an AR-N form by the respondent. Therefore, the "change of physician rules" were not brought into play in this matter and they do not apply. The record reveals that the claimant was granted a "second opinion" by Dr. Bruffett after her release from Dr. Rutherford. Thereafter, the claimant was treated for a period of several months by Dr. Safman, until he released her in April of 2003. The claimant was a willing participant in her treatment under the care of Dr. Safman, during which time she did not request to be seen by another physician. Therefore, because the rules of change of physician do not apply here, the claimant, by her own actions, has established that she and her employer "agree[d] to a change of physician without intervention from the Commission." Because the provisions of Ark. Code Ann. §11-9-514 were not invoked in this claim, the remaining question is whether the

treatment that the claimant has received after she was released by Dr. Safman and under the direction of Dr. Jansen, is reasonable and necessary in relation to her compensable injury. The preponderance of the evidence shows that it is not.

Employers must promptly provide medical services which are reasonably necessary for treatment of compensable injuries. Ark. Code Ann. § 11-9-508(a) (Repl. 2002). However, injured employees have the burden of proving by a preponderance of the evidence that the medical treatment is reasonably necessary for the treatment of the compensable injury. Norma Beatty v. Ben Pearson, Inc., Full Workers' Compensation Commission Opinion filed February 17, 1989 (Claim No. D612291). When assessing whether medical treatment is reasonably necessary for the treatment of a compensable injury, we must analyze both the proposed procedure and the condition it is sought to remedy. Deborah Jones v. Seba, Inc., Full Workers' Compensation Commission Opinion filed December 13, 1989 (Claim No. D512553). Also, the respondent is only responsible for medical services which are causally related to the compensable injury.

The claimant was treated by Dr. Rutherford for a period of two months for complaints associated with her compensable injury of August 1, 2002. In a clinic note dated October 28, 2002, Dr. Rutherford wrote:

[The claimant] has undergone electrodiagnostic testing as outlined in prior correspondence reported under separate cover which has proven normal. This serves to rule out cervical or lumbar radiculopathy or other dysfunction of the peripheral nervous system. Test results were reviewed with Ms. Mann. At present, her complaints are felt fully attributable to whiplash with soft tissue injuries.

Dr. Rutherford concluded by stating that the claimant required no further spinal injections or cervical traction. Dr. Rutherford returned the claimant to work with lifting restrictions of twenty-five pounds. Upon seeing Dr. Bruffett in January of 2003, the claimant complained primarily of residual low back pain. In a clinic note dated February 28, 2003, Dr. Safman stated:

Ms. Mann reports that she is doing better. She reports that she is improving everyday. She has headaches, but she has had them before. This is a chronic problem not related to her injury. (Emphasis added).

Although the record reveals that the claimant experienced headaches following her MVA, by February of 2003, Dr. Safman obviously believed that the claimant's current headaches were not injury related. Based upon the belief that the claimant had reached MMI for her work related injury, Dr. Safman released the claimant in April with no permanent physical impairment.

The claimant currently maintains that her headaches are so frequent and severe that she cannot work. Moreover, the claimant is currently drawing social security disability benefits. However, the record is devoid of any medical documentation, specifically records from her current treating physician, by which we may determine the nature, origin, and extent of the claimant's current physical complaints.

For the above stated reasons, the claimant has failed to establish that she is entitled to additional medical treatment for her headaches as she has failed to prove by a preponderance of the evidence that such treatment is reasonable and necessary medical treatment in connection with her compensable injury. Moreover, the preponderance of the evidence reveals that the claimant has been provided with any and all medial treatment reasonably necessary in connection with her compensable injury. Therefore, additional medical treatment under the direction of Dr. Jansen should be denied.

Therefore, I respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner