

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F505225

LATARSHA ALSUP,
EMPLOYEE

CLAIMANT

WAL-MART ASSOCIATES, INC.,
EMPLOYER

RESPONDENT

CLAIMS MANAGEMENT, INC.,
INSURANCE CARRIER

RESPONDENT

OPINION FILED NOVEMBER 17, 2006

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

Claimant represented by the HONORABLE KENNETH OSBORNE,
Attorney at Law, Fayetteville, Arkansas.

Respondents represented by the HONORABLE CURTIS NEBBEN,
Attorney at Law, Fayetteville, Arkansas.

Decision of Administrative Law Judge: Affirmed.

OPINION AND ORDER

The respondents appeal an administrative law judge's opinion filed June 5, 2006. The administrative law judge found that the claimant proved she was entitled to additional medical treatment, "specifically the medical treatment which she received from May 4, 2005, through May 26, 2005." After reviewing the entire record *de novo*, the Full Commission affirms the opinion of the administrative law judge.

I. HISTORY

The parties stipulated that the employment relationship existed on May 4, 2005. The claimant testified that she was struck by a vehicle on that day. "He was probably going 15 to 20 miles per hour in that space," the claimant testified, "and he bumped me and knocked me up and out a little bit, not very far at all, and I landed on my back."

The parties stipulated that the claimant "sustained compensable injuries to multiple body parts." An emergency physician's clinical impression on May 4, 2005 was contusion to the right wrist, right hip, and right knee.

Dr. Konstantin V. Berestnev reported on May 6, 2005:

At the request of and authorization by CMI, we are seeing Ms. Latarsha Alsup....On physical examination, she has prepatellar bruising of the right knee....She has no evidence of knee instability....The rest of the physical examination is significant for full range of motion in her neck....The examination of her right wrist reveals no significant swelling, bruising or discoloration....We did an additional x-ray of her right knee and it reveals no fractures or dislocations.

Dr. Berestnev assessed, "Right knee prepatellar bruising, right knee MCL strain and multiple soft tissue contusions of the neck and right wrist." Dr. Berestnev planned conservative treatment.

On May 9, 2005, Dr. Berestnev assessed "Right knee prepatellar bruising, right knee MCL strain, healing. Lumbar strain still symptomatic." Dr. Berestnev continued conservative treatment.

The claimant continued to follow up with Dr. Berestnev, and Dr. Berestnev scheduled physical therapy. The claimant began treating with a physical therapist on May 23, 2005.

The claimant sought emergency medical treatment on May 24, 2005. The claimant testified that she sought emergency treatment because of extreme back pain. It was noted on a Patient Admission Record, "Pt in obvious pain in lower back. Pt says pain shoots up and down her back to her neck. Pt says pain was caused when she was hit by a truck in a parking lot." The clinical impression was acute low back pain with sensory deficit in the lower extremities.

Dr. Shannon L. Wipf gave the following history on May 25, 2005:

This is a 31-year-old black female with a history of being hit by a rolling truck while walking in a parking lot of 5/04/05....

She states that since the accident, she has had tingling in her posterior upper arms with low back pain that is sharp in nature and a little worse on the left than the right. Sometimes the pain extends up to her shoulder blades. Yesterday she felt pretty good except she was unable to stand up

straight due to the pain in the low back. She states that while she was eating lunch, her muscles stiffened and "my whole body". Specifically, she refers to the back, neck, shoulders and right knee....Last night, she developed nausea and tried to rest to make the pain go away. She developed numbness at the left hand and left leg posteriorly at the calf yesterday evening, so she came to the emergency room....

Dr. Wipf assessed, "Thoracic and lumbosacral back pain with subjective left lower extremity numbness and bilateral upper extremity numbness status post MVA, pedestrian versus truck. The patient's pain has been persistent. MRI of the C-spine and thoracic spine and lumbosacral spine will be done....Dr. Greenburg, neurosurgeon, has been consulted."

An MR of the claimant's lumbar spine on May 25, 2005 was negative; an MR of the cervical spine and thoracic spine on May 25, 2005 was normal.

The claimant returned to physical therapy on May 26, 2005 and dates following.

Dr. Berestnev assessed the following on June 20, 2005: "Low back pain, healing. Right knee prepatellar bruising, healing. Right knee MCL strain, healing....The patient is released to regular duties."

A pre-hearing order was filed on January 27, 2006. The claimant contended, among other things, that the respondents

refused to pay benefits for all of the claimant's medical expenses. The respondents contended that they had paid all benefits to which the claimant was entitled.

The parties agreed to litigate the following issue: "1. Additional medical."

A hearing was held on March 28, 2006. The claimant asked the Commission to award medical treatment from May 24-26, 2005.

The administrative law judge found, in pertinent part: "5. The claimant has proven by a preponderance of the evidence that she is entitled to additional medical treatment for her compensable injuries, specifically the medical treatment which she received from May 4, 2005, through May 26, 2005."

The administrative law judge ordered that the respondents should pay for additional medical treatment the claimant received "from May 24, 2005, through May 26, 2005."

The respondents appeal to the Full Commission.

II. ADJUDICATION

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). The claimant must prove by a preponderance of the evidence that she is entitled to additional medical treatment. *Wal-Mart Stores, Inc. v. Brown*, 82 Ark. App. 600, 120 S.W.3d 153 (2003).

What constitutes reasonably necessary medical treatment is a question of fact for the Commission. *Dalton v. Allen Eng'g Co.*, 66 Ark. App. 201, 989 S.W.2d 543 (1999).

The administrative law judge found in the present matter, "5. The claimant has proven by a preponderance of the evidence that she is entitled to additional medical treatment for her compensable injuries, specifically the medical treatment which she received from May 4, 2005, through May 26, 2005." This finding is apparently a typographical error. We note the administrative law judge's Order, where the claimant was awarded medical treatment from May 24-26, 2005.

The Full Commission affirms the administrative law judge's award of medical treatment for the period May 24-26, 2005. The Full Commission finds that this treatment was reasonably necessary in connection with the claimant's compensable injuries. The claimant was struck by a vehicle at work, and the parties stipulated that the claimant

injured "multiple body parts." We find that the claimant was a credible witness. Dr. Berestnev noted in May 2005, post-compensable injury, that the claimant was suffering from lumbar strain. The claimant underwent conservative treatment which included physical therapy.

The claimant sought emergency medical treatment on May 24, 2005. The claimant testified that her back pain was "extreme," and that her son transported her to the emergency room. A physical examination of the claimant's back revealed muscle spasm, and the claimant was admitted to the hospital for two days. The Full Commission finds that the medical treatment provided the claimant on May 24-26, 2005 was reasonably necessary in connection with the claimant's compensable injuries, including the lumbar strain first diagnosed by Dr. Berestnev.

The respondents argue that the claimant went "outside the change of physician rules" in seeking emergency medical treatment. The Full Commission finds that the change of physician rules do not apply in this case. There is no indication of record that the claimant was given a Form AR-N, Employee's Notice of Injury. There is no Form AR-N of record, there was no testimony on this issue, and the

parties do not discuss on appeal whether the claimant received notice of the change of physician rules. Without evidence of a Form AR-N being given to the claimant, the respondents cannot rely on any provision of the change of physician statute to controvert medical treatment. See, *Sharp v. Lewis Ford, Inc.*, 78 Ark. App. 164, 78 S.W.3d 746 (2002).

Based on our *de novo* review of the entire record, the Full Commission affirms the administrative law judge's award of medical treatment from May 24, 2005 through May 26, 2005. We find that the claimant proved this treatment was reasonably necessary in connection with the claimant's compensable injuries. For prevailing on appeal, 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.

OLAN W. REEVES, Chairman

SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion. The respondents bring this appeal to the Full Commission from an Opinion filed by an Administrative Law Judge on June 5, 2006. The sole issue on appeal is the claimant's entitlement to additional medical treatment. More specifically, the respondents appeal the award of benefits for medical treatment rendered to the claimant on May 24, 2005, through May 26, 2005.

A carefully conducted de novo review of this claim in its entirety reveals that the claimant has failed to prove by a preponderance of the evidence that the medical treatment she received from May 24, 2005, through May 26, 2005, was reasonable and necessary for the treatment of her compensable injuries. Therefore, I find that the decision of the Administrative Law Judge should be reversed and these benefits denied.

On May 4, 2005, the claimant was injured when she was bumped by a rolling vehicle on the parking lot of the respondent employer's corporate offices. The claimant was transported by ambulance to the emergency room of Northwest

Medical Center, where x-rays showed that she had sustained no fractures or dislocations as a result of the incident. The claimant's attending physician was Dr. Brad Johnson.

The claimant was seen in follow-up by Dr. Konstantin Berestnev. On May 6, 2005, Dr. Berestnev assessed the claimant with right knee patellar bruising, right knee MCL strain, and multiple soft tissue contusions of the neck and right wrist. Dr. Berestnev recommended stretching exercises for the claimant's knee, prescribed her Lodine, and imposed a five pound lifting restriction.

In his narrative report dated May 9, 2005, Dr. Berestnev noted that the claimant's chief complaint was her back. Further, Dr. Berestnev stated, "She thinks by this time she shouldn't have pain anymore. I explained to her that, unfortunately, musculoskeletal injury takes time to recover." On physical examination, Dr. Berestnev reported that the claimant could walk on her tip toes and heels, she could bend to knee level, and she displayed brisk and symmetric reflexes bilaterally. In addition, Dr. Berestnev noted no sensory deficit to pin prick, negative straight leg raising, full range of motion in her hips on extension and complete flexion, and full range of motion in her neck. Dr.

Berestnev reported no pain to palpitation of her neck and thoracic spine, but pain with palpitation of her lumbar spine, and more pain to palpitation of her parispinous muscles. The claimant's right knee showed signs of improvement. Based on the these findings, Dr. Berestnev continued the claimant on a conservative course of treatment.

On May 16, 2005, Dr. Berestnev noted non-compliance with regard to the claimant's knee exercises. Although the claimant's physical condition showed no regression, the claimant reported no decrease in her level of pain. Dr. Berestnev scheduled physical therapy to address the claimant's lumbar strain, and he increased her lifting restriction to twenty pounds.

As of her initial physical therapy appointment and evaluation on May 23, 2005, the claimant showed no objective signs of apparent distress. Physical therapist, Jon Lee, reported that the claimant stated she was improving in terms of her wrist and knee, but that she continued to have discomfort in her back. The claimant informed Mr. Lee that she usually experienced dull pain in her lower back with occasional sharp pain. Moreover, she reported tingling and

numbness in her bilateral arms and legs, with intermittent numbness in the medial four fingers of her left hand. The claimant described her pain as 6 out of 10. Based upon his physical examination of the claimant, Mr. Lee assessed her with a facet injury at L2 through L4, and stated that continued physical therapy would be beneficial to improve her function and decrease her symptoms.

The following day, May 24, 2005, the claimant reported to the emergency room of Northwest Medical Center. According to the claimant's testimony, she had been crying from intense pain, which apparently alarmed her children. Therefore, her oldest son recommended that she seek emergency treatment, which she did. The claimant further testified that she was unable to seek authorization for this treatment because it was after regular business hours and she did not have her case manager's home phone number.

Once at the hospital, the claimant was examined by Dr. Shannon Wipf. The claimant testified that she had faxed a letter from work earlier that day to the Commission requesting a change of physician to Dr. Wipf. This request was ultimately denied because Dr. Wipf does not participate in the respondent employer's MCO. At any rate, Dr. Wipf

admitted the claimant into the hospital subsequent to her arrival at the emergency room, and she ordered additional diagnostic studies, including MRI's and x-rays. In her initial report dated May 24, 2005, Dr. Wipf stated as follows:

She was ... seen by a Dr. Berestnev who did x-rays of her neck and back and told her they were normal. She was able to walk, but could not stand upright. She received Lodine and a pain medication and was sent home. She saw him again on 05/09/05 and he gave her Celebrex and got her started with physical therapy. She expressed that she was concerned there was more going on, and she requested with Wal-Mart workman's (sic) comp to see a different physician because she wanted an MRI done.

After describing the claimant's current physical complaints, Dr. Wipf continued her report as follows:

Yesterday she felt pretty good except she was unable to stand up straight due to the pain in the low back. She states that while she was eating lunch, her muscles stiffened and (sic) "my whole body". Specifically, she refers to the back, neck, shoulders, and right knee. ... She developed numbness in the left hand and left leg posteriorly at the calf yesterday evening, so she came to the emergency room.

The claimant's lumbar, cervical, and thoracic MRI's, which were performed on May 25, 2005, revealed normal

findings. Additional x-rays were also normal, with no fractures, dislocations, or destructive processes revealed. Dr. Wipf released the claimant from the hospital on May 26, 2005, with a prescription for Percocet and Flexeril, and she recommended that the claimant continue with physical therapy. After her release from the hospital, the claimant continued under the care of Dr. Berestnev, who released her to full duty on June 20, 2005.

It is well settled that employers must provide such medical treatment as is reasonable and necessary for the treatment of a claimant's compensable injury. See, Ark. Code Ann. §11-9-508(a); See also, Wal Mart Stores, Inc. v. Brown, 82 Ark. App. 600, 120 S.W.3d 153 (2003). The employee has the burden of proving by a preponderance of the evidence that medical treatment is reasonable and necessary for the treatment of the compensable injury. Wal Mart Stores, Inc. v. Brown, *supra*; Specialty Chem. v. Clingan, 69 Ark. App. 369, 13 S.W.3d 218 (2000); Dalton v. Allen Eng'g Co., 66 Ark. App. 201, 989 S.W.2d 543 (1999). What constitutes reasonable and necessary medical treatment is a question of fact for the Commission. Wackenhut Corp. v. Jones, 73 Ark. App. 158, 40 S.W.3d 333 (2001); White Consolidated Indus. v.

Galloway, 74 Ark. App. 13, 45 S.W.3d 396 (2001); Air Compressor Equip. v. Sword, 69 Ark. App. 162, 11 S.W.3d 1 (2000); Gansky v. Hi-Tech Engineering, 325 Ark. 163, 924 S.W.2d 790 (1996). In defense of having sought unauthorized emergency medical treatment for her compensable injuries, the claimant correctly asserts the provisions set forth in Ark. Code Ann. §11-9-508(b). This section states that "any emergency treatment afforded the injured employee shall be at the expense of the employer." While true that we must interpret our statutes strictly, that is not to say that each should be considered in a vacuum. On the contrary, section 11-9-508(a)&(b), considered together, requires us to determine the reasonableness and necessity of any medical treatment rendered to an injured employee. See, generally, Baker v. Quebecor World, Full Commission Opinion filed May 4, 2005 (Claim No.F304342). In addition, Ark. Code Ann. §11-9-514(a)(3)(A)(ii)&(ii), provide that a claimant is entitled to a one-time change-of-physician by petitioning the Commission for a change to a physician who is either associated with a managed care entity chosen by the employer or certified by the Commission, or who is the claimant's regular treating physician. Section 11-9-514(a)(3)(B)(b),

provides an exception to this rule, however, with regard to emergency medical treatment. This exception states that treatment or services furnished or prescribed by any physician other than the ones selected according to statutory provisions set forth generally in section 11-9-514, *except emergency treatment*, shall be at the claimant's expense.

The court has refused to adopt a strict construction of the term "emergency treatment" that would require that an emergency situation exists only where life is threatened. Universal Underwriters Ins. Co. v. Bussey, 17 Ark. App. 47, 703 S.W.2d 459 (1986). Accordingly, what constitutes an "emergency", with regard to our Statute, is a question of fact for the Commission. However, since the word "emergency" is defined neither by our statute or precedent, we must turn to another authority for the definition. Webster's New World Compact Desk Dictionary and Style Guide, Second Edition, defines "emergency" as:

A sudden, generally unexpected occurrence demanding immediate action.

In the present claim, the claimant was under active treatment by her authorized physician, Dr. Berestnev.

The claimant contends that she could not seek authorization for her emergency treatment on the night of May 24, 2005, because she had no way of contacting her case manager. However, this does not excuse the claimant from seeking to contact Dr. Berestnev prior to going to the emergency room for treatment. Nor does it explain why Dr. Berestnev, as her treating physician, was not contacted upon her arrival there. Moreover, the medical records give no indication that Dr. Berestnev was ever informed of the claimant's trip to the emergency room on May 24, 2005, or her subsequent admittance to the hospital and additional diagnostic testing. For example, the claimant's physical therapy notes from May 26, 2005, which was the day she was released from the hospital, through June 20, 2005, which was when she was released by Dr. Berestnev, fail to make reference to the claimant's hospital stay or additional diagnostic testing. In addition, the claimant has presented no evidence that her condition had suddenly and unexpectedly changed in such a manner as to warrant immediate action. The claimant assessed her own pain at the emergency room as a 6 out of 10, which was the same rating she had given her physical therapist on May 23, 2005. Further, muscle spasms in the claimant's back

were observed at the emergency room. However, this was the only objective change in the claimant's condition that was observable as compared to her previous physical examinations. Moreover, the claimant's x-rays and MRI's taken on May 24, and 25, 2005, respectively, returned with normal results. Therefore, there was no appreciable physiological change in the claimant's condition from the time of her injury to the time these additional studies were conducted. Finally, it is of critical importance that the claimant, who had earlier that day faxed to the Commission a request for a change of physician to Dr. Wipf, conveyed to Dr. Wipf at the emergency room that she had sought this change in order to obtain an MRI. Subsequently, Dr. Wipf ordered additional diagnostics without first consulting the claimant's treating physician, Dr. Berestnev, whom she knew to be treating the claimant at that time. Thus, the claimant achieved her stated goal, which was to obtain an MRI under the direction of Dr. Wipf. This was accomplished, however, without the claimant or Dr. Wipf having first sought prior approval and authorization for such testing.

Based upon the above and foregoing, I find that the claimant has failed to prove by a preponderance of the

evidence that additional medical treatment consisting of her visit to the emergency room and subsequent diagnostic testing under the direction of Dr. Wipf, was reasonable and necessary for the treatment of her compensable injury.

First, the episode which the claimant testified prompted her trip to the emergency room on night of May 24, 2005, did not constitute an "emergency", either by definition or as is anticipated by our Statute. Moreover, the claimant was under the active care of her treating physician, Dr. Berestnev, who was never consulted concerning this "alleged" emergency treatment. Thus, the claimant's emergency room treatment, and the treatment that followed under the direction of Dr. Shannon Wipf, was unwarranted, unauthorized unreasonable, and not necessary.

Based upon the above and foregoing, the claimant acted on her own peril in seeking unauthorized emergency room medical treatment on the night of May 24, 2005, for a non-emergency condition. In addition, her subsequent hospitalization for the purpose of conducting unauthorized diagnostic studies did not constitute an emergency situation. Had he felt that they were warranted, Dr. Berestnev could have easily arranged for this testing to

be conducted on an out-patient basis. The claimant has failed to prove by a preponderance of the evidence that the additional medical treatment she received from May 24, 2005, through May 26, 2005, was reasonable and necessary for the treatment of her compensable injury. Therefore, for all the reasons set forth herein, I must respectfully dissent from the majority opinion.

KAREN H. McKINNEY, Commissioner