

**NOT DESIGNATED FOR PUBLICATION**

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F309318

OLLIE COX, III, EMPLOYEE	CLAIMANT
CEDAR CREEK WHOLESALE CORPORATION, EMPLOYER	RESPONDENT
UNITED STATES FIRE INSURANCE CO., CARRIER CRUM & FORSTER, TPA	RESPONDENT

**OPINION FILED MAY 11, 2006**

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

Claimant represented by HONORABLE KEITH WREN, Attorney at Law, Little Rock, Arkansas.

Respondent represented by HONORABLE GAIL PONDER GAINES, 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 June 8, 2005.

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

1. The stipulations agreed to herein by the parties are accepted as fact;
2. Claimant is entitled to additional temporary total disability indemnity

benefits from June 23, 2004, through October 1, 2004, and again from the date of his last surgery, which was scheduled for April or May of 2005, and continuing through a date yet to be determined;

3. Claimant has failed to prove entitlement to the additional period of temporary total disability indemnity benefits sought of April 16, 2004, through a date yet to be determined;

4. Claimant has failed to prove entitlement to additional medical treatment by Dr. Counts for depression secondary to pain caused by his work injury;

5. Respondents have controverted the additional period of temporary total disability benefits prior to claimant's most recent surgery;

6. The issue of permanency is held in abeyance.

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.

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OLAN W. REEVES, Chairman

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KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

I must respectfully dissent from the Majority's decision to affirm and adopt the Administrative Law Judge's June 8, 2005 opinion. Based upon my de novo review of the record, it is my opinion that the Administrative Law Judge's opinion should be reversed.

Claimant suffered an admittedly compensable injury to his lower back on July 1, 2003. As the result of that injury, claimant underwent a discectomy at L4-L5. A few days after that procedure, he also underwent a second operation to correct a spinal fluid leak which developed after the first surgery. Respondents accepted liability for the surgeries, as well as all related medical and disability benefits. In addition, respondents later accepted a rating of 10% to the body as a whole assessed by claimant's treating physician and paid benefits pursuant to that rating.

A dispute subsequently arose regarding claimant's request for additional medical treatment in the form of psychological counseling. Also, claimant alleged that he reentered a healing period and requested additional temporary total disability benefits from April 16, 2004 through June 22, 2004 and from October 1, 2004 through the date of claimant's third surgical procedure. Respondents have refused to pay for the requested medical treatment or any additional temporary disability benefits, contending

that such treatment is not reasonable or necessary and that claimant has reached the end of his healing period and is not entitled to further temporary disability benefits.

The first issue is claimant's entitlement to the requested psychological counseling. Claimant first sought treatment from Dr. Ken Counts, a psychologist. It is not clear from the medical record whether claimant sought out Dr. Counts on his own or whether he was referred to him by another physician. Claimant testified that he saw Dr. Counts because of a referral from Dr. Butchaiah Garlapati, a pain management specialist he was seeing. Also, Dr. Counts later indicates that claimant would need to obtain medication from Dr. Garlapati, and it appears that he provided claimant with medication pursuant to Dr. Counts' direction.

The Administrative Law Judge found that the treatment from Dr. Counts was unauthorized and not reasonable or necessary. She further held that Dr. Counts was not a licensed psychologist as required by Ark. Code Ann. §11-9-113 and that his diagnosis was not in accordance with the Diagnostic and Statistical Manual of Mental

Disorders (DSM) as required by that statute. Lastly, she also noted that claimant had not established that he was entitled to any psychological treatment, regardless of the provider. I disagree with those conclusions for a number of reasons.

First of all, in my opinion, claimant has established that Dr. Counts was seen as a result of a referral from Dr. Garlapati. First, claimant testified at the hearing that he saw Dr. Counts at Dr. Garlapati's direction, who was treating him for chronic pain. Obviously, a psychological evaluation would certainly be a reasonable part of a pain management treatment program. Also, in Dr. Counts' progress notes, he refers to certain medications that claimant would need and refers to Dr. Garlapati by name in directing claimant to see him about receiving those medications. Dr. Garlapati did, in fact, prescribe claimant certain antidepressants and psychotropic medications. In my opinion it is unlikely that Dr. Garlapati would have accepted the recommendations of a psychologist if he was not aware that claimant was seeing this medical provider and had

not, in fact, referred claimant to him for treatment.

I also note that, despite the Judge's conclusion that Dr. Counts was not a psychologist, the reports in the medical records contain a letterhead identifying his practice as, "Dr. Ken Counts and Associates." The letterhead also states that Dr. Counts was a Ph.D. Further, in Dr. Counts' report, under the heading of Diagnosis, he has written in 309.28. This section clearly references Sections 309.28 of the DSM. That section relates to adjustment disorders which are caused by an inability to adapt to a particular stressful event. Obviously, the stressor in claimant's life was the loss of his job and dealing with the permanent disability and chronic pain associated with his back injury. Dr. Counts saw claimant again on September 21, 2004 and once again diagnosed claimant with an adjustment disorder and suggested that further treatment be in the form of cognitive behavioral therapy. However, this treatment was not provided due to respondents' refusal to pay for it.

I also note that another of claimant's treating physicians has opined that claimant would benefit from a

psychological evaluation and possible treatment. In his consultative reports dated December 15, 2004 and January 31, 2005, Dr. Scott Schlesinger, a Little Rock neurosurgeon who saw claimant at the direction of respondents, opined that claimant would benefit from undergoing an MMPI test to determine his mental status.

In short, it is my opinion that claimant has met all of the requirements to establish that he was entitled to a psychological evaluation and treatment. I also believe that claimant's testimony, combined with the reports from Dr. Counts referring to Dr. Garlapati, are sufficient to establish that claimant was seen by Dr. Counts as a result of a valid referral and that respondents are obligated to pay not only for the past treatment by Dr. Counts but any future treatment that claimant should receive from him in regard to his psychological problems.

The remaining issue is claimant's entitlement to temporary total disability benefits. The Administrative Law Judge held that he was only entitled to TTD benefits from June 23, 2004 through October 1, 2004, based upon a release

from Dr. Derek Lewis, a general practitioner in Little Rock, Arkansas. In my opinion, claimant is entitled to additional TTD benefits from April 16, 2004 through June 22, 2004 and from after October 1 to a date yet to be determined. While it is true that Dr. Lewis stated in his off-work notice that claimant was to be off through October 1, 2004, the note was dated August 17, 2004. The note states that claimant is to remain off work for six weeks. However, claimant did not receive any followup visits or treatment from Dr. Lewis on or after October 1, and that there is no statement in the record indicating that claimant was ever released to return to work any time after that date. In my opinion, in the absence of any indication that claimant's condition had changed or improved, or some opinion from another doctor that claimant was able to return to work, I believe that terminating his temporary total disability benefits on that date is not appropriate.

In fact, subsequent examination of claimant determined that he had suffered a recurrent disc herniation and that this disc herniation was responsible for the pain

and back spasms claimant was suffering. There is no indication that claimant ever left his healing period at any time after October 1, 2004 or that he was physically able to return to work. Significantly, it is for this recurrent disc herniation that claimant was scheduled to undergo surgical treatment at the time of the hearing. At the hearing, respondents conceded that they would owe temporary total disability benefits on and after the date the surgery was performed. However, I do not see any basis for denying claimant temporary total disability benefits from April 16, 2004 through June 22, 2004, and after October 1, 2004 to the date of the surgery. Claimant's condition was not stable and he was not able to work. In my opinion, these findings are more than sufficient to entitle claimant to receive temporary total disability benefits as requested.

For the reasons set out above, it is my opinion that claimant's request for additional medical treatment in the form of psychological counseling is reasonable and necessary and I further find that Dr. Ken Counts is an appropriate physician to provide such treatment to claimant.

Also, I believe that claimant established his entitlement to temporary total disability benefits from April 16, 2004 through June 22, 2004, and from October 1, 2004 to a date yet to be determined. For those reasons, I would reverse the Administrative Law Judge's decision and award the benefits set forth herein.

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SHELBY W. TURNER, Commissioner