

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F407232

DONNA GREENFIELD,  
EMPLOYEE

CLAIMANT

CONAGRA FOODS, INC.,  
SELF-INSURED EMPLOYER

RESPONDENT

OPINION FILED SEPTEMBER 8, 2006

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

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

Respondents represented by the HONORABLE BILL H. WALMSLEY,  
Attorney at Law, Batesville, Arkansas.

Decision of Administrative Law Judge: Affirmed in part and  
reversed in part.

OPINION AND ORDER

The respondent appeals an administrative law judge's  
opinion filed June 3, 2005. The administrative law judge  
found, among other things, that the change of physician  
rules "no longer applied on or after June 30, 2004, and the  
claimant was free to seek reasonably (sic) and necessary  
medical treatment at the respondent's expense from any  
physician of her own choosing." The administrative law  
judge found that the claimant was entitled to a change of  
physician to Dr. Zachary Mason. The administrative law

judge found that the claimant proved medical treatment provided by Dr. Mason beginning August 19, 2004 was reasonably necessary.

After reviewing the entire record *de novo*, the Full Commission reverses in part and affirms in part the opinion of the administrative law judge. The Full Commission finds that the treatment the claimant received from Dr. Mason beginning June 29, 2004 through December 14, 2004 was not authorized and not the responsibility of the respondent-employer. The Full Commission finds that the surgery performed by Dr. Mason was not reasonably necessary in connection with the claimant's compensable injury. We find that because the claimant has subsequently petitioned the Commission for a change of physician, the claimant is entitled to at least a one-time visit to the physician of her choosing.

#### I. HISTORY

Donna Jean Greenfield, age 44, testified that she began working at ConAgra in March 1982. The record indicates that the claimant began treating with Dr. J. Zachary Mason in October 1999. Dr. Mason performed surgery at L4-5 in February 2000. Dr. Jay M. Lipke performed a bilateral

tarsal tunnel release in December 2000. Dr. Mason performed surgery at L5-S1 in December 2003.

The parties stipulated that the claimant sustained a compensable injury on February 23, 2004. The claimant testified that she slipped and "my arm hit a stand. I caught my arm on a metal stand, and I went down on my right side."

The claimant signed a Form AR-N, Employee's Notice Of Injury, on February 23, 2004. The claimant wrote that she had injured her "right arm right hip right calf" as the result of a slip and fall.

Dr. Ron J. Bates, the company physician, reported on March 8, 2004:

Ms. Greenfield is a 42 year old white female who is presented to my office today as a Workman's Compensation claim from ConAgra. She states that 2.5 weeks ago she slipped and fell while at ConAgra. She stated that she had a large bruise on her right elbow and right hip and forearm but this is improved. She states that she has been experiencing neck pain and feels that she can palpate some swelling in the posterior aspect of the right side of her neck. She denies any other complaints and presents today for evaluation....

The patient has full active and passive range of motion of the neck....

Dr. Bates assessed "cervical strain."

An x-ray of the claimant's cervical spine was taken on March 10, 2004, with the following impression: "1. Old degenerative disc disease and hypertrophic changes at C5-6 and C6-7. 2. Reversal of the normal curvature, probably due to muscle spasm."

An MRI of the claimant's cervical spine was taken on March 19, 2004, with the following impression: "Midline disk protrusion, C6-C7, with no effacement of the cord or encroachment on a neuroforamen seen. Findings consistent with degenerative disk disease, C5-C6 and C6-C7 with suggestion of anterior disk protrusion at these levels and osteophytic spurring anteriorly of these vertebrae."

Dr. Bates again assessed "cervical strain" on March 31, 2004.

Dr. Bates eventually referred the claimant for consultation with Dr. Scott M. Schlesinger. Dr. Schlesinger reported on June 7, 2004:

Ms. Greenfield is a 42-year-old female who presents with neck pain and pain into the right shoulder. She additionally has multiple other complaints including headaches, jaws hurting, temples are sore and something pulling on the back of her tongue. She has had these problems since a fall at work on 2/4/04....

I have carefully reviewed the multiple images of the MRI of the cervical spine independent of the radiologist and have requested and compared this to the radiologist's interpretation. There are degenerative changes at multiple levels, but no evidence of disc herniation, nerve root compression, spinal stenosis or foraminal stenosis. My findings are in basic agreement with the radiologist's interpretation. I have discussed in detail the radiologic findings with the patient.

I have ordered plain x-rays of the cervical spine as clinically indicated for the patient's condition to make sure there is no cervical instability from the fall....

In this case, it is my neurosurgical consultative opinion that her neck pain and shoulder pain are musculoskeletal. I do not feel she is symptomatic from any objective injury to her spine other than musculoskeletal strain.

The multiple other symptoms that she has have no clear anatomic basis. There is nothing I can do for these symptoms.

I would recommend that she try some physical therapy back home and continue working as she is doing. There are no limitation (sic) that I can foresee. There is nothing to base a permanent partial disability rating on. I would anticipate her maximum medical improvement to occur over the next six weeks for continued healing from her strain. If the cervical flexion/extension x-rays are normal, I will release her from further neurosurgical care....

Dr. James V. Zelch noted on June 9, 2004, "The findings at C5-6 and C6-7 represent degenerative disc disease. There also is an x-ray in the jacket from 03/10/04 that

demonstrates severe spurring at both levels. CONCLUSION: All of the findings of this study are preexisting degenerative disc disease."

Dr. Bates noted on June 10, 2004, "Ms. Greenfield is very angry that she was sent back to work after her fall. She also does not feel that the neurosurgical consultation was adequate or that an answer was found for her symptoms. She now relates multiple other complaints which I cannot relate to her previous fall. This includes foot pain as well as headaches. I have informed Ms. Greenfield that she will be given physical therapy for the next week. I am returning her to full duty, and I am discharging her from my care as I do not find any objective evidence of injury."

The record indicates that the claimant participated in physical therapy from June 11, 2004 until June 18, 2004.

The claimant returned to Dr. Mason on June 29, 2004; the record indicates that Dr. John R. Baker, the claimant's family doctor, referred the claimant to Dr. Mason. Dr. Mason stated on June 29, 2004, "She gives a history of slipping on a slick floor at work on February 23, 2004 and states that she has had progressive neck pain with radiation into the right shoulder, traveling down the arm as a dull,

burning sensation, worse with turning her head to the right....I have reviewed her MRI that reveals a midline C6-7 disc herniation and spondylosis at C5-6. Options were discussed and surgical intervention of an anterior cervical discectomy and arthrodesis at C5-6 and C6-7 recommended."

The parties stipulated that the claimant "made a request for a change of physician at the expense of the respondent by letter dated July 21, 2004, and respondent denied the claimant was entitled to a change of physician by letter dated August 13, 2004."

According to the record, the claimant's attorney sent correspondence dated July 21, 2004 to the Clerk of the Commission. Counsel stated, among other things, "The claimant respectfully requests a hearing on the issues of change of physician from Dr. Ron Bates to Dr. Zachary Mason, and controversion. Please assign this matter to an Administrative Law Judge."

In correspondence dated August 13, 2004, counsel for the respondent informed the Commission's head of Operations/Compliance, "The respondent denies that the claimant is entitled to a change of physician to Dr. Zachary Mason."

On August 19, 2004, Dr. Mason performed an "anterior partial corpectomy, C5, C6, C7, with placement of dowel grafts at C5-6 and C6-7." The preoperative and postoperative diagnoses were, "Cervical spondylosis and disk herniation, C5-6 and C6-7."

Dr. Mason noted on September 13, 2004, "Ms. Greenfield comes to the office today for her first postop exam and states that overall she is doing well, but she still has a sensation of a lump in her throat."

Pat Capps Hannah, the Commission's Division Head, Medical Cost Containment, informed the claimant's attorney on September 15, 2004, "When we called Dr. Zachary Mason's office to schedule an appointment for Ms. Greenfield, we were informed that he is already treating her and performed surgery on her in June 2004. Since she has already been treating with him for some time, it is not possible to grant her a change to Dr. Mason. Please advise us how you want to proceed in the matter of a change of physician for your client." The claimant's attorney replied to Ms. Hannah on September 20, 2004, "Please refer this claim to Ms. Dorothy Jackson for assignment to an administrative law judge for hearing on change of physician."

(The parties stipulated, "The Administrator of Medical Cost Containment Division of the Workers' Compensation Commission denied the request for the change of physician by correspondence dated September 15, 2004, and the claimant appealed that decision by correspondence dated September 20, 2004.")

The final medical report of record was entered by Dr. Mason on December 14, 2004: "We have obtained flexion/extension x-rays of the cervical spine, which do confirm that the fusion is in proper alignment and appears to be fusing. She may need a bone graft stimulator as she is still smoking, but I will refer this to RS Medical for arrangements."

A pre-hearing order was filed on January 10, 2005. The claimant contended that she sustained compensable injuries on or about February 23, 2004. The claimant contended that she "was subsequently seen by Dr. Ron Bates and requested a change of physician to Dr. Zachary Mason for surgery. Claimant is entitled to a change of physician and treatment provided by Dr. Mason is controverted."

The respondent contended that the claimant was not entitled to "a retroactive change of physician to Dr.

Zachary Mason, or even a prospective change of physician to Dr. Zachary Mason. Dr. Zachary Mason was not authorized to perform surgery on the claimant on August 19, 2004. The surgery performed on the claimant on August 19, 2004, was not reasonable and necessary, and was not causally connected to her injury of February 23, 2004. Respondent did not have notice of the surgery performed on August 19, 2004. Claimant's injury of February 23, 2004, was a mere transitory and temporary injury....Respondent has not controverted this claim. Respondent has paid all benefits to which the claimant is entitled as a result of her injury of February 23, 2004. If claimant prevails, the respondent is entitled to credit for group medical and indemnity benefits paid to the claimant. The injury of February 23, 2004, is not the major cause of the claimant's disability and need for treatment."

A hearing was held on March 23, 2005. The claimant testified:

Q. Are you glad you had the surgery?

A. Yes, sir.

Q. Why?

A. I could have been in worse shape than I am now.

Q. Okay. You're still having problems?

A. Yes, sir....

Q. All right. Are you feeling better than you did the day before you had your surgery?

A. Yes, sir, I guess I am. Yeah, I'm still afraid there's, my bones haven't fused back together 'cause I'm a smoker. I have cut down to maybe two cigarettes at the most. Some, I can go three weeks without even smoking one. And I've wore my machine faithfully. I have a EBI machine I'm wearing to stimulate the bone growth in my neck....

The respondent's attorney cross-examined the claimant:

Q. Now, you're continuing to have problems now with your neck; is that correct?

A. Yes.

Q. And those are daily problems?

A. Just about.

The administrative law judge filed an opinion on June 3, 2005. The administrative law judge found, among other things:

10. The respondent controverted the claimant's entitlement to additional medical treatment on and after June 30, 2004.

11. The change of physician rules therefore no longer applied on and after June 30, 2004, and the claimant was free to seek reasonably (sic) and necessary medical treatment at the respondent's expense from any physician of her own choosing.

12. Even if a preponderance of the evidence had not established that the respondent controverted additional medical treatment on and after June 30,

2004, the claimant is entitled to a change of physician to Dr. Zachary Mason, as she has requested, effective on July 21, 2004, when she filed her request for a change of physician with the Commission.

13. The claimant has established ... that the surgery and other medical treatment provided by Dr. Zachary Mason beginning on August 19, 2004 is reasonably necessary for treatment of her compensable cervical injury. Since the respondents did not controvert the claimant's entitlement to additional medical treatment until June 30, 2004, and since the claimant did not otherwise establish her entitlement to a change of physician for any treatment received prior to July 21, 2004, the respondents are not liable for the treatment that Ms. Greenfield received from Dr. Mason on June 29, 2004.

The respondent appeals to the Full Commission.

## II. ADJUDICATION

### A. Change of Physician

When a claimant desires a change of physician, she must petition the Commission for approval. *Sharp v. Lewis Ford, Inc.*, 78 Ark. App. 164, 78 S.W.3d 746 (2002). Pursuant to the provisions of Act 796 of 1993, there is an absolute, statutory right to a one-time change of physician. See, Ark. Code Ann. §11-9-514(a)(3); *Collins v. Lennox Industries, Inc.*, 77 Ark. App. 303, 75 S.W.3d 204 (2002). The respondent-employer must pay for at least an initial visit to the new physician in order to fulfill the respondent's obligation to provide reasonably necessary

medical treatment pursuant to Ark. Code Ann. §11-9-508(a). *Wal-Mart Stores, Inc. v. Brown*, 82 Ark. App. 600, 120 S.W.3d 153 (2003). However, treatment or services furnished or prescribed by any physician other than the ones selected according to the provisions of Ark Code Ann. §11-9-514(a)(3), except emergency treatment, shall be at the claimant's expense. See, Ark. Code Ann. §11-9-514(b).

In the present matter, the Full Commission finds that the claimant's treatment with Dr. Mason beginning on June 29, 2004 and following was not authorized and should not be charged to the respondent.

The claimant underwent nonwork-related low back surgeries from Dr. Mason in 2000 and 2003. The parties stipulated that the claimant sustained a compensable injury in February 2004. The record contains a Form AR-N signed by the claimant on February 23, 2004. The claimant was thus made aware of the change of physician rules. Ark. Code Ann. §11-9-514(c); *Sharp, supra*. The claimant subsequently began treating with Dr. Bates, the company physician. Dr. Bates referred the claimant for consultation with Dr. Schlesinger. Dr. Schlesinger recommended conservative treatment, and Dr. Bates discharged the claimant on June 10, 2004.

The claimant returned to Dr. Mason on June 29, 2004. The claimant was referred to Dr. Mason by Dr. Baker, the claimant's family physician. Dr. Mason was not within the claimant's authorized chain of referral following the claimant's compensable injury. Nor had the claimant at that time petitioned the Workers' Compensation Commission for a change of physician. The Full Commission therefore finds that the treatment provided by Dr. Mason beginning on June 29, 2004 and following, including subsequent surgery performed by Dr. Mason, was not authorized and not the responsibility of the respondent. This period of treatment, *i.e.*, from June 29, 2004 through December 14, 2004, shall therefore be at the claimant's expense. Ark. Code Ann. §11-9-514(b).

B. Reasonably necessary medical treatment

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. *Brown, supra*. What constitutes reasonably necessary medical treatment is a

question of fact for the Commission. *Wright Contracting Co. v. Randall*, 12 Ark. App. 358, 676 S.W.2d 750 (1984).

In the present matter, the Full Commission has determined that treatment provided by Dr. Mason from June 29, 2004 through December 14, 2004 was not authorized and not the respondent's responsibility. Yet even if the Full Commission found that said treatment was authorized, which we do not, we find that the surgery performed by Dr. Mason was not reasonably necessary in connection with the claimant's compensable injury. The parties stipulated that the claimant sustained a compensable injury on February 23, 2004. The claimant testified that she fell on her right side, and the documentary evidence indicates that the claimant allegedly injured her "right arm right hip left calf." Nevertheless, Dr. Bates examined the claimant after the accident and diagnosed "cervical strain." The preponderance of evidence therefore indicates that the claimant sustained a cervical strain as a result of the February 23, 2004 compensable injury.

However, the Full Commission finds, based on the record before us, that the claimant did not prove she sustained an acute injury to a cervical disc which required surgery. An

x-ray taken March 10, 2004, following the claimant's February 2004 cervical strain, showed old degenerative disc disease at C5-6 and C6-7. A subsequent MRI demonstrated findings consistent with degenerative disc disease at C5-C6 and C6-C7. Dr. Schlesinger examined the claimant in June 2004 and stated, "There are degenerative changes at multiple levels, but no evidence of disc herniation, nerve root compression, spinal stenosis or foraminal stenosis." Dr. Schlesinger anticipated maximum medical improvement for the claimant's cervical strain over the course of the following six weeks. We also note the subsequent diagnostic report of Dr. Zelch, to wit: "The findings at C5-6 and C6-7 represent degenerative disc disease. There also is an x-ray in the jacket from 03/10/04 that demonstrates severe spurring at both levels. CONCLUSION: All of the findings of this study are preexisting degenerative disc disease."

The Full Commission recognizes Dr. Mason's unauthorized June 29, 2004 examination of the claimant, at which time Dr. Mason immediately recommended surgery. It is within the Commission's province to weigh all of the medical evidence and to determine what is most credible. *Minnesota Mining & Mfg. v. Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999). In the

present matter, the Full Commission finds that the opinions of Dr. Bates, Dr. Schlesinger, and Dr. Zelch are entitled to more probative weight than the opinion of Dr. Mason that the claimant needed surgery. The preponderance of evidence in the present matter does not demonstrate that surgery from Dr. Mason was reasonably necessary in connection with the claimant's cervical strain. We also note the claimant's testimony that she still suffered from neck pain even after surgery. This lack of post-surgical improvement is additional probative evidence that surgery was not reasonably necessary. *Winslow v. D&B Mech. Contrs.*, 69 Ark. App. 285, 13 S.W.3d 180 (2000).

Based on our *de novo* review of the entire record, the Full Commission reverses in part and affirms in part the opinion of the administrative law judge. The Full Commission finds that treatment provided to the claimant from Dr. Mason beginning June 29, 2004 through December 14, 2004 was not authorized and not the responsibility of the respondent-employer. The Full Commission finds that the surgery performed by Dr. Mason was not reasonably necessary in connection with the claimant's compensable injury. The Full Commission notes that the claimant has now petitioned

the Commission for a change of physician. The claimant is thus entitled to at least a one-time visit to the physician of her choosing. The claimant's attorney is entitled to a fee for legal services pursuant to Ark. Code Ann. §11-9-715(c)(1)(Repl. 2002).

\_\_\_\_IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

Commissioner McKinney concurs.

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CONCURRING OPINION

I respectfully concur with the majority opinion and write separately to explain why I reach the same result as the principal opinion with respect to the authorized medical treatment and the change of physician.

First of all, I would note that the Administrative Law Judge seems to imply in his opinion that whenever the respondents controvert medical treatment they are controverting the change of physician. The Administrative Law Judge, in his opinion, stated, "However, as I understand the law, in light of

the respondent's June 30, 2004 controversion, no authorization was required since the claimant was free to seek reasonably necessary treatment from any physician of her own choosing." This is a clear misrepresentation of Arkansas law. Under the law, the claimant is entitled to a one-time change of physician and is entitled to be examined by that physician. However, the respondents are not obligated to honor the request for a change of physician until the Commission has issued an order granting the request. Ark. Code Ann. §11-9-514. Moreover, the claimant still has to prove that any additional treatment sought is reasonable and necessary medical treatment. Simply because additional medical treatment might be controverted does not mean that the change of physician request is likewise controverted. Essentially, controverting medical treatment and controverting change of physician are not the same thing. If the respondents had controverted the claimant's change of physician, a finding I do not make, the claimant still has to prove that the treatment that she received at the hands of her own physician is

reasonable and necessary and related to her compensable injury.

In order for there to be a change of physician controversion, the claimant must satisfy a two-part test. First of all, the claimant's authorized treating physician must have refused to see her again and the respondent must have refused to provide a new physician. The change of physician rules would appear not to apply after the point in time that the claimant's authorized treating physician refuses to continue to treat her, and the respondents refused to provide the claimant with a new physician. See Sanyo Mfg. Corp. v. Farrell, 16 Ark. App. 59, 696 S.W.2d 779 (1985), and Bennett v. Earthgrains of Little Rock, Full Workers' Compensation Comm. Opn. filed March 17, 1997 (Claim No. E317764). The facts of this case reflect neither of these requirements were met.

Further, the Full Commission has held on more than one occasion that once an injured worker has filed a request for a change of physician with the Commission, and then seeks treatment from a new physician that the claimant wishes to change to, the claimant does so at

her own financial risk. The Commission does have the discretion to hold the respondents liable for any treatment rendered by the physician selected by the claimant beginning on the date that the petition was filed if the Commission, in its discretion, awards a change of physician to the physician that the claimant began seeing after filing the request for a change of physician. Sandra Tapman v. A-1 Insulation, Inc., Full Workers' Comp. Comm. Opn. filed December 2, 1997, (Claim No. E514658).

The evidence in this case demonstrates that the claimant was not refused treatment by her authorized treating physician. The evidence demonstrates that on June 29, 2004, the claimant went to see Dr. Mason. The claimant had previously signed Form AR-N and was aware of her right to petition for a change of physician. Moreover, the claimant had previously made a verbal request of her employer to see Dr. Mason which was not honored. Nevertheless, she arranged the appointment to see Dr. Mason and did not tell her employer that she was going to see him. When she saw Dr. Mason on June 29, 2004, she and Dr. Mason agreed that he would perform

neck surgery on her on August 19, 2004. She first told her employer about seeing Dr. Mason on June 30, 2004.

The following exchange took place at the hearing:

Q. You intended to go see Doctor Mason on your neck whether anybody approved it or not, didn't you?

A. I like Doctor Mason.

Q. But you intended to go see him if Doctor Baker would refer you down to him, didn't you?

A. Yes, sir.

Q. And you knew that ConAgra objected to you going to see Doctor Mason as part of your workers' compensation claim, didn't you?

A. No, I didn't. We'd done, they'd done cancel the, they already started saying there wasn't nothing wrong with me at work.

Q. You knew that - -

A. I asked at first could I go see Doctor Mason. They said we're gonna go see Doctor Cathey.

Q. And then, Cathey wasn't available, so you went to see Doctor Schlesinger?

A. Right.

Q. So, obviously, you knew then that ConAgra was not in favor of you seeing Doctor Mason, didn't you?

Because they wanted to send you to another specialist, didn't they?

A. Yes.

Q. And so, all along, ConAgra has not wanted you to see Doctor Mason as part of your workers' comp. claim; isn't that correct?

A. Probably so.

The evidence demonstrates that the claimant did not ask for a change of physician until July 21, 2004. The claimant went ahead and had the surgery in August of 2004 without having heard whether or not her change of physician had been approved. The Administrative Law Judge found that the respondents had denied that change of physician on August 13, 2004. This letter from the respondents used by the Administrative Law Judge to make this finding merely states that the respondents deny that the claimant was entitled to a change of physician to Dr. Zachary Mason. Essentially, what Mr. Walmsley's August 13, 2004, letter does is state a response to the claimant's letter dated July 21, 2004, asking for a change of physician. The letter from Gary Davis dated July 21, 2004, states: "The claimant respectfully requests a hearing on the issues of change

of physician from Dr. Ron Bates to Dr. Zachary Mason, and controversion. Please assign this matter to an Administrative Law Judge." (Emphasis mine) In my opinion, the claimant was asking for a hearing on the change of physician issue and before a hearing could even be scheduled, she went ahead with the surgery. On September 15, 2004, when the Medical Cost Containment Division sent a letter to the claimant's attorney telling him that it was not possible to grant her a change of physician to Dr. Mason. Specifically, Ms. Pat Capps Hannah's letter of September 15, 2004, states:

When we called Dr. Zachary Mason's office to schedule an appointment for Ms. Greenfield, we were informed that he is already treating her and performed surgery on her in June 2004. Since she has already been treating with him for some time, it is not possible to grant her a change to Dr. Mason. ...

The Commission is not allowed to grant retroactive changes of physician. Essentially, that is what the Administrative Law Judge did in this case. He approved the claimant's change of physician retroactively. Two cases I found particularly enlightening were American Transportation Co. v. Payne, 10 Ark. App. 56, 661 S.W.2d

418 (1983), and Wright Contracting Co. v. Randall, 12 Ark. App. 358, 676 S.W.2d 750 (1984). Judge Churchwell seemed to ignore the findings of these cases on retroactive approval of change of physician requests. These cases state that a retroactive approval of an application for change of physician will be granted if the claimant has not sought treatment. The claimant in this case went to a new physician almost a month before she even petitioned for a change of physician. The decision to perform surgery had been made before she petitioned to change physicians. The Court specifically stated in Wright:

Under the present law, the Workers' Compensation Commission no longer has the broad discretion it once had to retroactively approve change of physicians, and, absent compliance with Ark. Stat. Ann. 81-1311 (Supp. 1983), [now codified at Ark. Code Ann. §11-9-508] the employer is not liable for a new physician's services.

Further, the Court found that when the person seeking the change of physician complied with the statute, in applying for a change of physician in advance of actually be treated by a doctor of her choice, the

Commission acted within its discretion in approving that request. It is undisputed that the employee in this case did not request prior approval of the change of physician therefore she has failed to comply with the provision of the statute.

Furthermore, I find that the respondents did not controvert medical treatment and the change of physician rules are therefore applicable. In the case of Bennett v. Earthgrains of Little Rock, Ark. Workers' Compensation Opinion filed March 17, 1997 (Claim No. E317764), the Court stated that the change of physician rules did not apply when the claimant's authorized treating physician refused to see her or refer her and the employer failed to authorize additional medical treatment. See also, Sanyo Mfg. Corp. v. Farrell, 16 Ark. App. 59, 696 S.W.2d 779 (1985). In the case presently before us, the claimant's authorized treating physician did not refuse to see her. In fact, her authorized treating physician had released her to return to work. The claimant was not satisfied with this and decided on her own to seek treatment from Dr. Mason. The Administrative Law Judge used the testimony of Ms. Anita

Vanravensway to bolster his opinion that the respondents had controverted the claimant's entitlement to additional medical treatment. The Administrative Law Judge stated that when the claimant advised Ms. Vanravensway that she needed additional medical treatment that Ms. Vanravensway did not arrange for any additional authorized treatment to be provided to the claimant by the respondent. From my reading of the hearing testimony, I do not garner the same opinion. The following testimony is enlightening:

Q. Okay. Were there any other conversations that you can recall that related to whether or not ConAgra would authorize her to see any additional doctors?

A. There was.

Q. What was that?

A. She did come into my office the day she's referring to, and I - -

Q. That's on June the 30<sup>th</sup>?

A. Yes. And told me that she was gonna have surgery on her neck, that Doctor Zachary Mason was gonna perform this surgery.

Q. Was that the first time you knew that she had actually seen Doctor Mason?

A. Yes.

Q. You didn't know on June 29<sup>th</sup> - -

A. No.

Q. - - that she had went to see - -

A. No.

Q. - - Doctor Mason?

A. No.

Q. She didn't tell you that in advance?

A. No. I saw her June 30<sup>th</sup>.

Q. Okay. And what conversation did the two of y'all have about workers' compensation benefits on June 30<sup>th</sup>?

A. I explained to her at that time that that would not be authorized, you know, under workers' compensation, for Doctor Mason to do that surgery.

Q. And did you tell her how she'd have to file or what she'd have to file on if she sought any payment at all?

A. I didn't tell her how she would have to do anything, but I explained to her anything non-work related could be filed on her medical insurance. Yes, I did.

Q. And workers' compensation would not - -

A. Absolutely.

Q. - - authorize surgery - -

A. Absolutely.

Q. - - by Doctor Mason?

A. Absolutely. Explained to her Doctor Zachary Mason was not authorized to do that surgery under workers' compensation.

Q. If it were non-work related, she had the ability to file it under her group insurance?

A. Yes.

Q. And did she appear to understand?

A. Oh, yes.

Q. Do you have any recollection of her ever asking you to see Doctor Mason before June 30<sup>th</sup>, 2004?

A. No, she did not ask me.

Ms. Vanravensway's testimony demonstrates that the claimant never asked to go see Dr. Mason. She never asked to go see Dr. Mason with respect to her compensable injury. As I read Ms. Vanravensway's testimony she was under the impression that the treatment provided by Dr. Mason was not even related to the claimant's compensable injury. There is no evidence that the claimant requested additional medical treatment

for her compensable injury. As explained by Ms. Vanravensway, non-work related medical treatment could not be filed on the workers' compensation claim. While the claimant may have thought she was requesting additional medical treatment for her compensable injury, there is nothing in the manner in which she went about it, to convey that message to Ms. Vanravensway. Was Ms. Vanravensway suppose to read the claimant's mind to determine whether or not she was going to see Dr. Mason for her compensable injury. I think not.

Therefore, after conducting a de novo review of the record, I cannot find that the respondents controverted treatment of the claimant by Dr. Mason therefore, the change of physician rules do apply and the claimant was not entitled to seek treatment from whomever she wanted.

Therefore, for all the reasons set forth herein, I respectfully concur with the majority opinion.

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KAREN H. MCKINNEY, Commissioner

Commissioner Turner dissents.

DISSENTING OPINION

\_\_\_\_\_ I respectfully dissent from the Majority's finding that the treatment the claimant received from Dr. Mason beginning June 29, 2004 through December 14, 2004 was not authorized and not the responsibility of the respondents and that the surgery performed by Dr. Mason was not reasonably necessary in connection with her compensable injury. It is my opinion that the Administrative Law Judge's June 3, 2005 opinion should be affirmed and adopted.

\_\_\_\_\_ The following stipulations were submitted and accepted by the parties:

- \_\_\_\_\_ 1. Existence of employment relationship on February 23, 2004.
- \_\_\_\_\_ 2. Claimant sustained a compensable injury on February 23, 2004.
3. Claimant's average weekly wage on February 23, 2004, was \$420.80.
4. Claimant continued working from February 23, 2004, through August 18, 2004.
5. Claimant has had previous surgery at L4-5 level on February 24, 2000, and at L5-S1 level on December 3, 2003, performed by Dr. Zachary Mason, as well as surgery on both feet in December, 2000, performed by Dr. Lipke.

- \_\_\_\_\_ 6. Claimant made a request for a change of physician at the expense of respondent by letter dated July 21, 2004, and respondent denied the claimant was entitled to a change of physician by letter dated August 13, 2004.
7. The claimant went to Dr. Zachary Mason and he performed surgery on her cervical spine on August 19, 2004.
8. The Administrator of Medical Cost Containment Division of the Workers' Compensation commission denied the request for the change of physician by correspondence dated September 15, 2004, and the claimant appealed that decision by correspondence dated September 20, 2004.
9. In the event the respondent was found liable for the medical treatment at issue provided by Dr. Mason, the respondent has controverted the medical treatment provided by Dr. Mason.

Claimant is 44 years old and began working at ConAgra in March 1982. As stipulated, Claimant had previously been treated by Dr. Zachary Mason for her low back. Claimant has also had pervious surgeries on both feet by Dr. Lipke. Claimant sustained an admittedly compensable injury on February 23, 2004. Claimant signed a Form AR-N, Employee's Notice of Injury, on the date of the accident.

\_\_\_\_\_ Claimant was first seen by the company physician, Dr. Ron Bates, on March 8, 2004. Claimant's

chief complaint was neck pain. Dr. Bates assessed the claimant as having a cervical strain.

An x-ray of the cervical spine taken on March 10, 2004, showed "degenerative disc disease and hypertrophic changes at C5-6 and C6-7" and "reversal of the normal curvature, probably due to muscle spasm".

The impression from an MRI taken on March 19, 2004, was:

Midline disk protrusion, C6-7, with no effacement of the cord or encroachment on a neuroforamen seen. Findings consistent with degenerative disk disease, C5-C6 and C6-C7 with suggestion of anterior disk protrusion at these levels and osteophytic spurring anteriorly of these vertebrae.

\_\_\_\_\_ Claimant continued to have persistent neck pain. Claimant was seen by Dr. Scott Schlesinger on June 7, 2004. Dr. Schlesinger agreed with Dr. Bates' assessment of cervical strain, and suggested physical therapy. Dr. Schlesinger anticipated maximum medical improvement to occur in approximately six weeks and released Claimant from further neurosurgical care. On June 10, 2004, Dr. Bates prescribed one week of physical therapy and discharged Claimant from his care.

Claimant testified as follows about asking to see another doctor after her release by Dr. Bates.

A. He released me. There was nothing wrong with me. He released me.

Q. Okay. So did you talk with the person -

A. I went up front and talked to Anita. And she said since I was released, they gave me a week of physical therapy and released me. And since I was released, I could go see any doctor I wanted to go see. I was released.

Anita Vanravensway, respondents'

representative at the hearing, testified as follows in regard to conversations had with Claimant about seeing another physician.

Q. You heard her testimony about a conversation that you had with her about her ability to go see other doctors?

A. I have.

Q. And did you in fact have some such conversation with her?

A. I did.

Q. Was this conversation before or after she had seen Doctor Schlesinger?

A. She and I had a conversation on the way back from the appointment with Doctor Schlesinger.

Q. So it was after she had seen Doctor Schlesinger. Did you tell her at that time that Doctor Schlesinger had released her?

A. I did.

\_\_\_\_\_ . . .

\_\_\_\_\_ Q. Did you also know that Doctor Bates, the company doctor, had released her except for a week of physical therapy?

A. I believe Doctor Schlesinger released her back to Doctor Bates, released, you know, he didn't want to see her back, Schlesinger didn't want to see her back. Released her back to Bates, who then released her with a one week therapy.

. . .

Q. And in fact, did the two of you not discuss that if in fact she wanted to see Doctor Mason or some other doctor, she'd have to turn that in on her group insurance?

A. Well, yeah, I explained to her that any doctor she saw for this injury would have to be okayed by our workers' compensation carrier of the Work. Comp. Commission. And you know, she was free to see who she wanted to as long as she was released from this claim, you know, for whatever condition she wanted to.

- Q. She was not free on the basis of workers' compensation to see anybody she wanted to see?
- A. Absolutely. I think I made that very clear.

\_\_\_\_\_ Claimant was seen by Dr. Zachary Mason for her continued complaints of neck pain on June 29, 2004. Dr. Mason's report from that date states:

I have reviewed her MRI that reveals a midline C6-7 disc herniation and spondylosis at C5-6. Options were discussed and surgical intervention of an anterior cervical discectomy and arthrodesis at C5-6 and C6-7 recommended.

Claimant informed the respondents of Dr. Mason's recommendations on June 30, 2004. Ms. Anita Vanravensway confirmed that this conversation took place, and that she told Claimant "that would not be authorized, you know, under workers' compensation, for Doctor Mason to do that surgery."

As stated previously, Claimant made a request for a change of physician by letter to the Commission dated July 21, 2004. Respondents denied that Claimant was entitled to a change of physician by letter to the Commission dated August 13, 2004. Claimant had an anterior partial corpectomy, C5,C6,C7 with placement of dowel grafts at C5-6 and C6-7 performed by Dr. Mason on

August 19, 2004. Claimant's request for a change of physician was denied on September 15, 2004. The Medical Cost Containment Division's September 15, 2004, explanation for refusing Claimant a change of physician to Dr. Mason reads in relevant part as follows:

When we called Dr. Zachary Mason's office to schedule an appointment for Ms. Greenfield, we were informed that he is already treating her and performed surgery on her in June [sic] 2004. Since she has already been treating with him for some time, it is not possible to grant her a change to Dr. Mason.

The final medical report of record was entered by Dr. Mason on December 14, 2004, and states:\_\_\_\_\_

We have obtained flexion/extension x-rays of the cervical spine, which do confirm that the fusion is in proper alignment and appears to be fusing. She may need a bone graft stimulator as she is still smoking, but I will refer this to RS Medical for arrangements.

\_\_\_\_\_A pre-hearing order was filed on January 10, 2005, in which the following contentions were made:

Claimant:

Claimant contends that she sustained compensable injuries on or about 02/23/04. She was subsequently seen by Dr. Ron Bates and requested a change of physician to Dr. Zachary Mason for surgery. Claimant is entitled to a change of physician

and treatment provided by Dr. Mason is controverted.

Respondent:

The claimant is not entitled to a retroactive change of physician to Dr. Zachary Mason, or even a prospective change of physician to Dr. Zachary Mason. Dr. Zachary Mason was not authorized to perform surgery on the claimant on August 19, 2004. The surgery performed on the claimant on August 19, 2004, was not reasonable and necessary, and was not causally connected to her injury of February 23, 2004. Respondent did not have notice of the surgery performed on August 19, 2004. Claimant's injury of February 23, 2004, was a mere transitory and temporary injury. . . . Respondent has not controverted this claim. Respondent has paid all benefits to which the claimant is entitled as a result of her injury of February 23, 2004. . . .

\_\_\_\_\_As a general rule, treatment or services furnished or prescribed by unauthorized physicians shall be at the claimant's expense. See Ark. Code Ann. §11-9-514 (C) (3) (Repl. 2002). However, the change of physician rules do not apply absent proof that the claimant received a copy of the change of physician rules from the respondent either in person or by certified registered mail. Ark. Code Ann. §11-9-514 (C) (1) & (2). See also, Stephenson v. Tyson Foods, Inc.,

70 Ark. App. 265, 19 S.W.3d 36(2000). In addition, if a preponderance of the evidence establishes that the claimant's authorized treating physicians refuse to see her again, and the respondents refuse to provide a new physician, then the change of physician rules do not apply after the claimant has been denied additional authorized medical treatment. See Sanyo Mfg. Corp. v. Farrell, 16 Ark. App. 59, 696 S.W.2d 779 (1985); Bennett v. Earth Grains of Little Rock, Full Commission Opinion, Filed March 17, 1997 (Claim No. E317764); Sharon Lybrand v. Saline Nursing Center, Full Commission Opinion, Filed October 23, 2002 (Claim No. E908946).

In the present claim, the record clearly establishes that Claimant signed a Form AR-N on the date of her injury, and began a course of treatment with her authorized treating physician, Dr. Bates. Claimant then received a neurosurgical referral to Dr. Schlesinger. Dr. Schlesinger released Claimant on June 7, 2004. Claimant returned to Dr. Bates on June 10, 2004, and Dr. Bates released Claimant from his care with one week of physical therapy. Physical therapy was completed on June 18, 2004.

Claimant presented to Dr. Mason on June 29, 2004, for a second neurosurgical opinion. Dr. Mason recommended surgery. Claimant advised the respondents on June 30, 2004, of her need for additional medical treatment and Dr. Mason's recommendation. The preponderance of the credible evidence established that on June 30, 2004, the respondents advised Claimant that she could see whatever physician that she wanted to, but that she would need to put the treatment on her group health insurance. On these facts, it is my opinion, that respondents controverted Claimant's entitlement to additional medical treatment on June 30, 2004, when respondents were made aware that Claimant needed additional treatment (after being released by both authorized physicians), and respondents did not arrange for any additional treatment. In my opinion, the change of physician rules no longer applied as of June 30, 2004, and Claimant was therefore free to seek additional reasonably necessary medical treatment after that date from any physician of her own choosing. Farrell, supra.

In my opinion, Claimant would still be entitled to a one time change of physician to Dr. Mason even if the respondents had not controverted her

entitlement to additional medical treatment. An injured worker with an admittedly compensable injury has an absolute statutory right to a one time change of physician pursuant to Ark. Code Ann. §11-9-514 (Repl. 2002). A change of physician is mandatory, and a respondent's assertion that further medical treatment is not reasonably necessary is not a defense to a requested change of physician. Wal-Mart Stores, Inc. v. Brown, 82 Ark. App. 600, 120 S.W.3d 153 (2003). When a claimant petitions for his or her one time change of physician, the Administrative Law Judge and the Medical Cost Containment Division cannot ignore the claimant's choice of physician. If the claimant's choice is not selected, the decision maker must set forth the reasons for choosing a physician other than the one favored by the claimant. Johnny Rogers v. Chrisman Ready Mix, Inc., Full Commission Opinion, Filed November 20, 2002 (Claim No. F100985).

It is beyond question that claimants have the right to a one-time change of physician during the administration of their claim. Arkansas law states:

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 the 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 such 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.

. . .

Where the employer does not have a contract 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 any managed care entity certified by the commission 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 a physician associated with any managed care entity certified by the commission for any specialized treatment, including physical therapy, and only if such primary care physician agrees to comply with all the rules, terms, and conditions regarding services performed by any managed care entity certified by the commission.

Ark. Code Ann. § 11-9-514(a)(3)(A) (Repl. 2002).

In addition, the Arkansas Court of Appeals has stated that the change-of-physician statute is mandatory, not discretionary, upon the Commission. In Collins v. Lennox Indus., Inc., 77 Ark. App. 303, 75 S.W.3d 204 (2002), the appeals court stated: "The currently applicable subsection, (a)(3), contains no discretionary phrase regarding approval of the change, but simply states that the right to a one-time change 'shall be allowed, by petitioning the commission.' Therefore, there is no discretion left to the Commission." Collins, supra.

Claimant filed a request for a change of physician on July 21, 2004. Respondents denied claimant's entitlement to a change of physician on August 13, 2004. Dr. Mason performed surgery on August 19, 2004. The Medical Cost Containment Division denied

Claimant's request on September 15, 2004. In my opinion, it appears that the Medical Cost Containment Division initially intended to order for the Claimant her one time change of physician to Dr. Mason. I am unaware of any authority which would support the Medical Cost Containment Division's decision to refuse the claimant a change of physician to Dr. Mason simply because the claimant was already treating with Dr. Mason at the time the Medical Cost Containment Division contacted Dr. Mason's office. In this regard, the Courts and the Commission have long held that the Commission has discretion to impose liability on a respondent for service and treatment rendered by a new physician between the time the claimant files a petition for a change of physician and the date that the Commission actually enters an order authorizing the change. American Transportation Co. v. Payne, 10 Ark. App. 358, 676 S.W.2d 750(1984); Paula Reed v. Jefferson Regional Medical Center, Full Commission Opinion, Filed August 12, 1991 (Claim No. E018666); Sandra Tatman v. A-1 Insulation, Inc., Full Commission Opinion, Filed December 2, 1997 (Claim No. E514658).

Claimant's symptoms, for what was diagnosed as a musculoskeletal injury, did not resolve, and therefore, it is my opinion, that a neurosurgical evaluation of Claimant's ongoing neck symptoms was an appropriate medical speciality for Claimant's one time change of physician. It appears to me, that Dr. Mason is especially appropriate under the circumstances in light of his prior relationship with the claimant as the treating physician for a previous lumbar spine condition.

Therefore, even if the preponderance of the evidence had not established that the respondents controverted Claimant's entitlement to additional medical treatment beginning on June 30, 2004, it would nevertheless be my opinion that Claimant has established by a preponderance of the evidence that she is entitled to a change of physician to Dr. Mason as of July 21, 2004, when her attorney filed a request for a change of physician with the Commission.

In my opinion, the surgery performed by Dr. Mason on August 19, 2004, was reasonably necessary in connection with Claimant's compensable injury. The employer must 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 medical treatment. Dalton v. Allen Eng'g Co., 66 Ark. App. 201, 989 S.W.3d 543 (1999). What constitutes reasonably necessary medical treatment is a question of fact for the Commission. Wright Contracting Co. v. Randall, 12 Ark. App. 358, 676 S.W.2d 750 (1984).

In my opinion, Claimant has proven by a preponderance of the evidence that the surgery performed by Dr. Mason on August 19, 2004, and his post-surgical treatment was reasonably necessary for her compensable cervical injury. Dr. Mason clearly did not agree with Drs. Bates and Schlesinger that Claimant's cervical problems were musculoskeletal in nature. Dr. Mason notes that he surgically observed and treated posterior osteophyte abnormalities during surgery which were causing bilateral cord compression and which were removed during the course of the fusion surgery.

In my opinion, the medical records indicate that Claimant's fall at work aggravated previously asymptomatic abnormalities in her neck, that the

cervical abnormalities caused spinal cord compression and related symptoms as a result of the injury, that surgery was required to treat the spinal cord compression, that Dr. Mason's surgery was appropriate for the condition, and that Claimant has had a reasonably successful result. Therefore, I believe that Claimant's treatment by Dr. Mason was reasonably necessary.

For the forgoing reasons, I respectfully dissent from the Majority opinion. In my opinion, Claimant has proven entitlement to a change of physician to Dr. Mason and that Dr. Mason's treatment was reasonable and necessary in connection with her compensable injury.

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SHELBY W. TURNER, Commissioner