

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F406774

DAVID R. WILLIAMS,
EMPLOYEE

CLAIMANT

NABCO,
EMPLOYER

RESPONDENT

ACIG INSURANCE COMPANY,
INSURANCE CARRIER

RESPONDENT

OPINION FILED JANUARY 10, 2006

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

Claimant represented by the HONORABLE STEVEN R. McNEELY,
Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE BETTY J.
DEMORY, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and
Adopted.

OPINION AND ORDER

Respondents appeal and claimant cross appeals an
opinion and order of the Administrative Law Judge filed
June 14, 2005. In said order, the Administrative Law
Judge made the following findings of fact and
conclusions of law:

1. The parties stipulate to the
employee/employer relationship existing
on June 16, 2004.
2. The parties stipulate that the
claimant filed a claim for a back injury
occurring on that date which was initially
accepted as compensable.

3. The parties stipulate that the claimant earned an average weekly wage of \$736.86 which yields a temporary total disability rate of \$453.00 per week. (maximum rate)

4. The parties stipulate that the claimant was provided appropriate workers' compensation benefits until he was discharged by his authorized treating physician, Dr. Thomas Ward, on October 21, 2004.

5. The Form N proffered at the hearing by Ms. Demory has been accepted as evidence in the record, and has been considered in rendering a decision on this claim.

6. The respondents controverted the claimant's entitlement to any additional medical treatment effective October 21, 2004. Therefore, the change of physician rules do not apply to any additional medical treatment which the claimant received after October 21, 2004, or that he may receive in the future.

7. The claimant has proven by a preponderance of the evidence that the treatment he received from Dr. Moody and Dr. Chan between November 1, 2004 and January 3, 2005 was reasonably necessary for treatment of his compensable back injury.

8. Since Dr. Chan has not proposed a definite course of treatment as of January 3, 2005, I find that any conclusion as to what form of additional treatment might or might not be reasonably necessary for the claimant's compensable injury after January 3, 2005 is a premature issue as of the date of the hearing.

9. The claimant has failed to prove by a preponderance of the evidence that he is entitled to any additional temporary disability compensation after October 21, 2004 through March 22, 2005. Specifically, the claimant has failed to prove by a preponderance of the credible evidence that he was incapacitated from earning during any period at issue after October 21, 2004.

10. I am without authority to award the claimant's attorney a controverted attorney's fee on the additional medical benefits awarded herein. See Ark. Code Ann. § 11-9-715(a)(2)(B).

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 June 14, 2005 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 in part 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, in part, and dissents, in part.

CONCURRING AND DISSENTING OPINION

The respondent appeals and the claimant cross-appeals the June 14, 2005 decision of the Administrative Law Judge. The Majority now affirms and adopts the decision of the Administrative Law Judge as their own. After a de novo review of the record, I concur with the Majority's finding that the Administrative Law Judge's decision should be affirmed with respect to the finding that the claimant is entitled to additional medical treatment from Dr. Moody and Dr. Chan. However, I must respectfully dissent from their finding that he is not

entitled to receive temporary total disability benefits after October 21, 2004.

The claimant sustained an admittedly compensable injury to his back on June 16, 2004. The injury occurred when the claimant was lifting a pipe at work. The claimant reported the injury and sought medical attention the next day. A note from Dr. Lackey Moody, dated June 17, 2004 indicated that the claimant hurt his back the day before at work and, "Felt at (sic) popping sensation."

An MRI was performed on the claimant's back on June 21, 2004. The Final Diagnostic Report indicated that the claimant had a "minimal central disc protrusion" at level L4-L5 and a "small left paracentral disc protrusion", at level L5-S1. A note from Dr. Moody, dated June 30, 2004 provided, "herniated nucleus pulposus L4-L5, L5 S1". It also indicated the claimant was prescribed Flexoril and referred to Dr. Schlesinger.

On July 14, 2004, Dr. Schlesinger treated the claimant. He indicated that he was in "basic agreement with the radiologist's interpretation". He further opined that the claimant had degenerative changes at levels L4-5 and L5-S1 and had a protrusion at level L5-S1. He provided that the claimant would likely remain

off work for an additional two to four weeks and recommended physical therapy and one to three epidural steroid shots.

The claimant was treated with one epidural shot to no avail. On July 26, 2004, Dr. Moody treated the claimant and continued prescribing Flexoril and Zanaflex. On August 4, 2004, Dr. Schlesinger indicated the claimant was at maximum medical improvement. On August 23, 2004, Dr. Moody referred the claimant for pain management. He continued the claimant on Flexoril.

On August 31, 2004, the claimant was granted a change of physician from Dr. Schlesinger to Dr. Moore. On September 30, 2004, the order was amended to change the authorized physician to Dr. Ward. On October 13, 2004, Dr. Ward treated the claimant. The doctor's note from that day provided that the claimant had disc protrusions at levels L4-5 and L5-S1. It also provided that the claimant had not had treatment by epidural steroids but then indicated, "the actual history of these events has not been verified."

Dr. Ward diagnosed the claimant with dystonia. On October 21, 2004 Dr. Ward treated the claimant with bilateral marcaine chemodenervation injections. He proclaimed that the claimant did not see improvement

from the treatment and indicated the claimant had reached maximum medical improvement. He also released the claimant to return to work.

On November 1, 2004, Dr. Moody treated the claimant for his ongoing back complaints. Dr. Moody referred the claimant to Dr. Chan and released him from working until November 1, 2004. Dr. Chan treated the claimant on December 13, 2004. The claimant completed a form which indicated he had no prior history of back complaints prior to June 16, 2004. The note indicated the claimant had a, "HNP with impingement on S1 root." Dr. Chan treated the claimant again on January 3, 2005. Dr. Chan opined that the claimant would likely need L5-S1 decompression and that the claimant's prior treatment had failed.

I find that the claimant should have been awarded temporary total disability benefits. The Administrative Law Judge denied the claimant temporary total disability benefits based on the finding the claimant did not prove he was unable to work. However, in my opinion, the claimant has shown that he remained in his healing period and that he was unable to work for the time period in which he requested temporary total disability benefits. As such, I would have reversed

the portion of the Administrative Law Judge's decision that denied temporary total disability benefits.

Temporary total disability for unscheduled injuries is that period within the healing period in which claimant suffers a total incapacity to earn wages. Ark. State Highway & Transportation Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that condition. Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982). Workers' Compensation law in general indicates that even in instances where treatment is unauthorized, the fact that the treatment is unauthorized is irrelevant in determining whether the claimant is entitled to temporary total disability benefits. Stevenson v. Tyson Foods, Inc., 70 Ark. App.; 19 S.W.3d 36 (2000).

The Majority finds that the claimant exited his healing period as of October 21, 2004 and that he was not unable to work during the time period after October 21, 2004. I find that the evidence supports a finding that the claimant remained in his healing period and remained unable to work during the time period after

October 21, 2004. Specifically, in my opinion, the medical opinions of Dr. Moody and Dr. Chan show that the claimant remained in his healing period and remained unable to work during the time period in question.

The Commission has the authority to resolve conflicting evidence and this extends to medical testimony. Foxx v. American Transp., 54 Ark. App. 115, 924 S.W.2d 814 (1996). Although the Commission is not bound by medical testimony, it may not arbitrarily disregard any witnesses's testimony. Reeder v. Rheem Mfg. Co., 38 Ark. App. 248, 832 S.W.2d 505 (1992). The Commission is entitled to review the basis for a doctor's opinion in deciding the weight of the opinion. Id. There is no requirement that medical testimony be expressly or solely based on objective findings, only that the record contain supporting objective findings. Swift-Eckrich, Inc. v. Brock, 63 Ark. App. 118, 975 S.W.2d 857 (1998). Further, a medical opinion based solely upon claimant's history and own subjective belief that a medical condition is related to a compensable injury is not a substitute for credible evidence. Brewer v. Paragould Housing Authority, Full Commission Opinion filed Jan. 22, 1996 (Claim No. E417617). The Commission is not bound by a doctor's opinion which is

based largely on facts related to him by claimant where there is no sufficient independent knowledge upon which to corroborate the claimant's claim. Roberts v. Leo-Levi Hospital, 8 Ark. App. 184, 649 S.W.2d 402 (1983).

In this instance, the Majority relies on the doctors notes provided by Dr. Schlesinger and Dr. Ward to argue that the claimant exited his healing period and was able to work. I find the opinions of Dr. Moody and Dr. Chan to be more persuasive. While Dr. Ward and Dr. Schlesinger were both specialists, Dr. Moody treated the claimant throughout the entirety of his claim and consistently indicated that the claimant had herniated discs. Likewise, I note that Dr. Chan, whom appears to specialize in neurosurgery and spinal surgery, opined that the claimant had herniated discs and would likely need a decompression. This is in sharp contrast to the opinions provided by Dr. Ward and Dr. Schlesinger, whom both appear to have dismissed the legitimacy and severity of the claimant's condition.

Dr. Schlesinger, for instance, in July 2004, indicated that he was in agreement with the radiologist's assessment that the claimant had two herniated discs. In the same doctor's note he indicates that the claimant would likely not need surgery but

could be treated with one to three epidural steroid shots. Yet, he only treated the claimant before proclaiming he had reached maximum medical improvement and releasing him to return to work. I also note that Dr. Schlesinger treated the claimant for a very brief period of time. In fact, Dr. Schlesinger released the claimant to return to work on August 4, 2004, which is a time period of less than one month after he began treating the claimant.

With regard to Dr. Ward, I point out that Dr. Ward's notes regarding his assessment for the claimant's treatment appear to be incorrect and incomplete to at least some extent. On October 13, 2004, Dr. Ward indicated, "The patient has not had an operation, and as far as to be ascertained, has not undergone epidural steroids or other more invasive variety of injections, although the actual history of these events has not been verified." This statement is illustrative of two important points. First, it shows that Dr. Ward was relying on incorrect history, in that the claimant had already received an epidural shot from Dr. Schlesinger on July 22, 2004. Secondly, it shows that Dr. Ward admits that he did not verify the claimant's treatment history. This is particularly important since he

diagnosed the claimant with dystonia rather than to a disk related injury. When comparing the treatment provided by Dr. Ward with the opinions of Dr. Schlesinger, Dr. Moody, and Dr. Chan, it is clear that out of all the treating physicians, he is the only doctor that did not believe the claimant's condition was caused to a disc-related injury. Accordingly, I give little weight to his opinion.

In contrast, Dr. Moody and Dr. Chan both appear to have associated the claimant's injury with his ongoing disc complaints. Since the claimant's MRI showed herniated discs, I find those opinions should be given great weight. While Dr. Schlesinger also attributed the claimant's problems to his herniated discs, I note that Dr. Schlesinger provided the claimant with a very brief time period of treatment. Additionally, I note that Dr. Chan had the additional benefit of having a second MRI. Accordingly, I find the opinion of Dr. Chan to be more persuasive than that of Dr. Schlesinger.

The respondent relies heavily on the fact that Dr. Chan did not provide the claimant a doctor's note in arguing that the claimant was able to return to work. However, I note that Dr. Moody had released the claimant

from working up until at least November 1, 2004. Likewise, Dr. Chan indicated the claimant was on narcotics such as Oxycontin, and Lortab and would likely need a decompression in his back. In my opinion, these facts are indicative that the claimant remained in his healing period and remained unable to work after October 21, 2004. While Dr. Ward released the claimant to return to work, I note that Dr. Ward's decision to release the claimant to return to work appears to be based on the fact that his prescribed treatment for dystonia did not work and that he accordingly felt the claimant was malingering. Accordingly, I find that Dr. Moody's additional release for the claimant to return to work and the opinion of Dr. Chan that the claimant would likely need decompression surgery persuasive in finding the claimant was unable to work. Thus, I would have reversed the portion of the Administrative Law Judge's decision which denied the claimant temporary total disability benefits.

For the aforementioned reasons, I respectfully concur in part, and dissent in part from the Majority opinion.

SHELBY W. TURNER, Commissioner

Commissioner McKinney concurs, in part, and dissents, in part.

CONCURRING AND DISSENTING OPINION

I must respectfully concur, in part with, and dissent, in part, from the majority's opinion. I concur with the finding that the claimant has failed to prove entitlement to any additional temporary total disability benefits. However, I specifically dissent from the finding that the respondents controverted the claim after October 21, 2004.

After receiving medical treatment from Dr. Lackey Moody and Dr. Scott Schlesinger, the claimant requested and was granted a Change of Physician by the Medical Cost Containment Division of the Workers' Compensation Commission. A Change of Physician Order granting a change from Dr. Schlesinger to Dr. Jim J. Moore was entered on August 30, 2004. This order was amended on September 30, 2004, to reflect that the change was to Thomas Ward, M.D. After receiving this Change of Physician, but prior to his first consultation with Dr. Ward, the claimant returned to Dr. Moody's office on at least 3 occasions in order to obtain additional prescriptions for pain medications.

Dr. Ward first examined the claimant on October 13, 2004. The claimant advised Dr. Ward that his back pain was such that he could not get relief from medications consisting of Diazepam and Oxycodone. Dr. Ward noted the following findings during his examination:

On examination, Mr. Williams' neurological examination is without abnormality in terms of deep tendon reflexes or sensory abnormalities. His muscle strength is impaired from a pain standpoint versus any loss of innervation or neuromuscular limitation. His posture, as already mentioned, is abnormal, and his straight leg raise is otherwise negative. He does have significant tightness secondary to his postural changes, but there again do not reflect a positive straight leg raise as much as they do a positive pain and positional sense of muscle tightness. The areas of tenderness in palpation were revealed in the posterior extensor compartment of the lumbocacral spine, primarily in the quadratus lumborum and the longissimus muscle and specifically over the left side more so than the right. There is no atrophy of fasciculations noted on his examination.

After examining the claimant and reviewing the diagnostic findings, Dr. Ward concluded that the claimant's pain was the result of "symptomatic torsional dystonia." Dorland's Medical Dictionary defines "dystonia" as "disordered tonicity of muscle." As explained by Dr. Ward, this resulted from the claimant altering his posture as a means to compensate after his

low back injury. In order to address this condition, Dr. Ward recommended injections of Marcaine and Botulinum Toxin. On October 21, 2004, Dr. Ward administered bilateral Marcaine chemodenervation injections, from which the claimant received no benefit. In his procedure report of that date Dr. Ward specifically stated:

Post Injection Findings: Mr. Williams had no benefit from his injections on this date. There has not been a single instance in which injections carried out of this variety has not assisted in a patient's pain. It can be therefore assumed that there can be no organic cause of his pain, and in fact after further observation the patient noticed dramatic pain behavior which correlated highly with positive Waddell signs.

Conclusion: No organically identified injury and/or condition in which symptoms in the variety of injuries complained of by the patient can be substantiated. He is at maximum medical improvement. I do not have any explanation for her (sic) patient's complaints of pain, however, I can categorically indicate that there are no findings present on this date to substantiate his claim. He has been released back to work full duty.

After being released by Dr. Ward, the claimant returned to Dr. Moody's office with continued pain complaints. Dr. Moody ordered a full body scan and referred the claimant to Dr. Patrick Chan, a Neurosurgeon in Searcy.

The issue for determination is whether the respondents controverted the claimant's entitlement to

additional medical treatment when the claimant returned to Dr. Moody after being released by Dr. Word. The record clearly indicates that the claimant was granted a one-time change of physician by the Medical Cost Containment Division of the Commission. The majority finds that the respondents controverted the claim after the claimant was released by Dr. Ward thereby rendering the change of physician rules moot. However, as noted by the respondents the treatment the claimant received after he was released by Dr. Ward was unauthorized medical treatment and therefore, it is not the responsibility of the respondents.

The record is silent with regard to any evidence of controversion. The respondents have consistently contended that they have provided the claimant with all appropriate benefits to which he is entitled. The respondents paid both indemnity and medical benefits until such time as the claimant was released at maximum medical improvement by his authorized treating physician, Dr. Ward, on October 21, 2004. There is no evidence in the record that Dr. Ward refused to see the claimant anymore, leaving the claimant without a treating physician, or that the respondents refused to pay for any additional authorized

medical treatment. On the contrary, the claimant never provided the respondents an opportunity to controvert authorized medical treatment. The claimant never attempted to treat with Dr. Ward again or to even seek a referral from Dr. Ward. Rather the claimant ran back to his family physician at the first opportunity and obtained more samples of medication. Failure to pay for unauthorized medical treatment has never amounted to controversion of a claim. Controversion is a question of fact to be determined from the circumstances of each particular case. New Hampshire Ins. Co. v. Logan, 13 Ark. App. 116, 680 S.W.2d 720 (1984). The mere failure to pay compensation benefits, in itself, does not necessarily amount to controversion. Revere Copper & Brass, Inc. v. Talley, 7 Ark. App. 234, 647 S.W.2d 477 (1983). Likewise, controversion may not be found where the respondent accepts its compensability but delays payment in a reasonable attempt to investigate the extent of the claimant's disability. Horseshoe Bend v. Sosa, 259 Ark. 267, 532 S.W.2d 182 (1976); Hamrick v. The Colson Company, 271 Ark. 740, 610 S.W.2d 281 (Ark. App. 1981). However, assuming a position which requires an injured employee to retain an attorney so that the employee's rights are protected may constitute

controversion. Turner v. Tradewinds Inn, 267 Ark. 861, 592 S.W.2d 454 (1980).

Given the absence of any evidence regarding the respondents alleged controversion of this claim, the Administrative Law Judge inquired of counsel for respondents whether he [the Administrative Law Judge] understood correctly that the respondents were not going to pay for any more medical treatment after October 21, 2004, to which counsel responded in the affirmative. This is not an admission of controversion. Rather, it is a clear statement of fact. The respondents were not going to pay for the treatment the claimant received after October 21, 2004, because such treatment was not administered by the claimant's authorized treating physician. This explanation is clear in counsel for respondents explanation to the Commission on page 31 of the record wherein she explained the chain of physicians and specifically stated; "...So it is our position that after Doctor Ward released him in October of 2004, his return visits to Doctor Moody were unauthorized visits. In conjunction with that, it is our position that the had healed as of August of 2004 from his temporary aggravation of his pre-existing condition...."

Accordingly, absent any evidence that the respondents controverted the claimant's entitlement to authorized medical treatment, it is error as a matter of law to find that respondents are liable for the claimant's unauthorized medical treatment. Therefore, the treatment provided by Dr. Moody and Dr. Chan after October 21, 2004, should be at the claimant's expense. See. A.C.A. § 11-9-514(b); Gaston v. Watson Chapel School District, Full Commission Opinion filed February 16, 2005 (F207885).

According to those reasons set forth herein, I respectfully concur, in part with, and dissent in part from the majority opinion.

KAREN H. MCKINNEY, Commissioner