

**NOT DESIGNATED FOR PUBLICATION**

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F404485

TAMMY HEMPEL, EMPLOYEE	CLAIMANT
GENERAL PARTS, EMPLOYER	RESPONDENT NO. 1
LIBERTY MUTUAL INSURANCE CO., CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

**OPINION FILED MARCH 14, 2007**

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

Claimant represented by HONORABLE R. GUNNER DeLAY, Attorney at Law, Fort Smith, Arkansas.

Respondent No. 1 represented by HONORABLE JAMES A. ARNOLD, III, Attorney at Law, Fort Smith, Arkansas.

Respondent No. 2 represented by HONORABLE DAVID PAKE, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

**OPINION AND ORDER**

The claimant appeals and respondent no. 1 cross-appeals from a decision of the Administrative Law Judge filed March 22, 2006.

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

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on November 28, 2005, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.

2. Claimant has failed to prove by a preponderance that the surgery recommended by Dr. Johnson is reasonable and necessary for treatment of her compensable injury.

3. Claimant has also failed to prove by a preponderance of the evidence that additional medical treatment from Dr. Norwood is the liability of respondent #1.

4. Claimant has met her burden of proving by a preponderance of the evidence that she is entitled to temporary total disability benefits beginning February 19, 2005 and continuing through May 5, 2005.

5. As a result of her compensable injury the claimant has suffered a loss in wage earning capacity in an amount equal to 10% to the body as a whole.

6. The Second Injury Fund is not liable for payment of permanent partial disability benefits; therefore, payment is the responsibility of respondent #1.

7. Respondent #1 has controverted claimant's entitlement to unpaid temporary total disability benefits and

permanent partial disability of 10% to the body as a whole.

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.

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). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an

additional attorney's fee in the amount of \$500.00 in accordance with Ark. Code Ann. § 11-9-715(b) (2) (Repl. 2002).

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

I must respectfully dissent from the Majority decision finding that the claimant is not entitled to ongoing medical treatment. After a de novo review of the record, I find that the claimant should have been awarded additional medical treatment and that her entitlement to wage loss benefits should have been held in abeyance until the issue became ripe before determination.

The claimant sustained an admittedly compensable injury on May 1, 2004. The injury occurred when the claimant, who was delivering auto parts from her employer's

auto parts store to a store customer, was rear-ended by another automobile. As a result of this accident, the claimant sustained injuries to her lower back.

The respondent provided the claimant appropriate medical treatment and she was eventually seen by Dr. Michael Standefer, a Fort Smith neurosurgeon. In a report dated August 2, 2004, Dr. Standefer reviewed the claimant's condition and a recent MRI scan. According to Dr. Standefer, the claimant had degenerative changes at the L4-L5 and L5-S1 level, as well as a small disc protrusion at L4 and L5. Dr. Standefer described the disc injuries as "non-surgical lesions." Dr. Standefer also suggested that the claimant would benefit from additional physical therapy.

Because the claimant continued to suffer from significant pain and related symptoms, she sought treatment from Dr. Arthur Johnson, another Fort Smith neurosurgeon. Dr. Johnson saw the claimant on January 6, 2005, and in a report of that date stated that the claimant was suffering from a central disc herniation at L5-S1 with persistent back pain for greater than six months. Dr. Johnson recommended an

artificial disc replacement as treatment for this condition. Dr. Johnson described the claimant as being an ideal candidate for that procedure.

After having seen Dr. Johnson, the respondent directed the claimant to Dr. James Blankenship, a Fayetteville neurosurgeon, for an independent medical evaluation. Dr. Blankenship's findings and conclusions are set out in a report dated May 5, 2005. In his report, Dr. Blankenship mentions that the claimant had undergone two MRIs, one on September 10, 2004, and the other in July, 2004. Apparently Dr. Blankenship reviewed the September 10, 2004, MRI, but only read a report from the one in July. According to Dr. Blankenship, the September MRI revealed a "fairly normal" disc at L4-L5, and degenerative changes at L5-S1. He does, however, mention that the July MRI report states that the claimant has a disc herniation at L4-L5. However, Dr. Blankenship appears to be basing his recommendations on the September MRI.

After considering the claimant's symptoms and the results of her MRI scans, Dr. Blankenship, like

Dr. Standefer, was of the opinion that the claimant's condition would not benefit from surgery. He did believe that she was depressed and that she should begin taking antidepressant medication. He also believed that she would benefit from neuropsychological testing and evaluation. Lastly, he recommended that she undergo an aggressive, exercise-oriented physical therapy program.

The claimant underwent a psychological evaluation by Patricia J. Walz, a clinical psychologist in Fort Smith, Arkansas. The claimant saw Dr. Walz on June 14 and June 17, 2005. In a report authored by Dr. Walz dated June 17, 2005, it was noted that the claimant was suffering from underlying depression and somatoform pain disorder. Dr. Walz concluded her report by recommending that the claimant undergo biofeedback training to help her manage her pain and be seen by a clinical psychologist who could work with her on the somatoform disorder.

Dr. Blankenship had also recommended that the claimant undergo a Functional Capacity Evaluation. This evaluation was performed by Tammy Watkins, who authored a

report relating to the evaluation, dated August 12, 2005. Based upon the results of the evaluation, Ms. Watkins found that the claimant was not ready for a return to work. The report stated that the claimant's abilities were only at the sedentary level and that her pre-injury job required at least a minimal level of lifting, with the requirement of prolonged sitting and standing. The report also recommends that the claimant undergo an aggressive lumbar stabilization program for at least four weeks to address her problems with pain and endurance.

The respondent eventually began paying the claimant permanent partial disability benefits based upon Dr. Blankenship's assessment of a 7% permanent partial disability to the body as a whole. The additional treatment recommended by Dr. Walz and Ms. Watkins were not provided to the claimant. When the claimant's condition did not resolve, she decided to follow through with the surgical option recommended by Dr. Johnson. At that point, the respondent refused to provide the claimant any additional medical benefits and the claimant filed a request for those benefits

or, in the alternative, that the Commission determine the extent of her permanent disability. The respondent then asserted that the Second Injury Fund would be liable for any wage-loss component of the claimant's permanent disability. This argument was based upon an automobile accident in which the claimant was involved in 1995, in which she apparently sustained some injury to her neck and shoulder at the time of the accident. In January 2004, the claimant also sought treatment for neck pain from her personal physician.

Because of the dispute over those issues, the parties requested a hearing before an Administrative Law Judge. The hearing was held on February 27, 2006. At the hearing, the parties requested that the Judge determine whether the respondent was liable for medical treatment provided by Dr. Michael Norwood (primarily in the form of medication), and the surgical recommendation by Dr. Arthur Johnson. In the alternative, the claimant requested that if the Judge found that she was not entitled to the surgery recommended by Dr. Johnson, that the Judge determine her entitlement to permanent disability benefits in excess of

the 7% rating accepted by the respondent. In that regard, the respondent also requested that the Judge determine the extent of any liability of the Second Injury Fund for those benefits.

In a decision dated March 22, 2006, Judge Stewart found that the claimant was not entitled to the medical treatment proposed by Dr. Johnson and that his recommended surgery was not reasonable or necessary. The Judge also denied any requested treatment by Dr. Norwood because of a lack of medical evidence establishing what treatment the claimant received from Dr. Norwood, and because she saw Dr. Norwood after a change of physician to another doctor so, therefore, Dr. Norwood's treatment was unauthorized. The Judge also held that, since further medical treatment was not appropriate, the claimant was at the end of her healing period and that she had proven that she was entitled to permanent disability benefits in an amount of 10% to the body as a whole in excess of the 7% anatomical impairment previously assessed by Dr. Blankenship. Lastly, the Judge found that the Second Injury Fund had no liability for any

portion of the wage-loss award. From that decision, the claimant filed an appeal of the Judge's decision without specifying any particular issue. The respondent appealed the Judge's wage-loss award and his findings that the Second Injury Fund had no liability. In the claimant's brief, she clarified that her appeal was only of the denial of the requested medical treatment. The Majority now affirms and adopts the decision of the Judge as their own.

Having considered the testimony in evidence and made a part of the record, I find that the Administrative Law Judge's decision denying the claimant medical treatment from Dr. Norwood and Dr. Johnson should have been reversed and his finding in regard to the claimant's entitlement to permanent disability benefits should have been vacated and held in abeyance until a date it became ripe for determination.

I first address the claimant's entitlement to medical treatment from Dr. Norwood. During the hearing, the claimant testified that this treatment was for pain and related symptoms associated with her compensable injury.

Significantly, both Dr. Blankenship and Dr. Walz recommended that the claimant seek medical treatment for her pain condition.

The Majority, by affirming and adopting the decision of the Judge as their own, offers two grounds for finding that the respondent is not liable for the claimant's medical treatment from Dr. Norwood. The first of these grounds is that the claimant has not offered sufficient medical evidence to establish that the treatment she received from Dr. Norwood was connected to her compensable injury. However, this point does not appear to have been in dispute at any time prior to the Judge's decision. In fact, after the hearing testimony, the respondent's attorney reiterated their contention in regard to Dr. Norwood's treatment by stating, "It's our position he's not an authorized physician after the change of physician order was reviewed by the Commission." No other objection was raised either before or after the hearing about the type of medical treatment rendered by Dr. Norwood. The only evidence relating to Dr. Norwood's treatment after the claimant's

injuries was her testimony that he had been providing her pain management assistance. This is exactly the type of treatment that had been recommended by Drs. Standefer, Blankenship, and Walz. Since the respondent never raised this issue themselves, or offered any evidence to support it, I find that the Judge erred in raising this point on his own. Further, I believe that the Majority errs in affirming the Administrative Law Judge's on this issue. I further find that the Judge conclusion was incorrect and that the testimony regarding Dr. Norwood's treatment was that it was in accordance with the recommendations of her other physicians and was appropriate for her condition.

The other ground used by the Majority for finding the respondent not liable for Dr. Norwood's treatment is that he was not an authorized treating physician for the claimant. However, this finding is in error on a legal and factual basis. There was no dispute that the respondent had previously authorized Dr. Norwood's treatment of the claimant. As has been held many times, once a doctor is authorized to provide treatment, that doctor remains an

authorized treating physician. While it could be argued that an authorized physician's treatment was not appropriate, a respondent cannot deny that treatment because another physician has been authorized by the respondent or by the Commission.

In Hamilton v. Gregory Trucking, 90 Ark. App. 248, \_\_\_ S. W. 3d \_\_\_, (2005), a claimant had been granted a change of physician to a doctor whose license to practice medicine was later suspended. The claimant then sought treatment from his prior authorized treating physician. The respondent controverted that treatment. In finding that the respondent was liable for the medical treatment in issue, the Court specifically noted that the claimant's prior treating physicians were authorized. Another Court of Appeals decision reaching the same result was Welch v. Tri-County Shirt Company, 49 Ark. App. 112, 897 S. W. 2d 575 (1995). In that case, the claimant was already receiving care from another physician at the time of her admittedly compensable injury. The claimant continued to see and be treated by this doctor after the time her employer was

notified of the injury. The employer initially accepted this doctor as the claimant's physician, but then designated another physician for the claimant to be treated by. The claimant later returned to her original doctor, but the respondent refused to pay for any medical treatment she received from him. In reversing a Commission decision which held the respondent was only liable for the doctors they had specifically authorized, the Court indicated that it was possible for either party to acquiesce in the other's choice and the respondent was liable for the disputed medical expenses. See also, Benard v. Wal-Mart Stores, Inc., Full Commission Opinion, April 3, 1998 (E607182, E601485); Quinones v. Coca Cola Bottling Company, Full Commission Opinion, June 24, 1992 (E104355).

Clearly, once a physician has been authorized to diagnose a treatment, a change of physician, whether granted by the Commission or agreed to by the respondent, does not change the fact that the original physician remains authorized to provide treatment. Therefore, the Majority's finding that Dr. Norwood was no longer authorized to treat

the claimant is clearly in error and cannot be a basis for denying the claimant medical treatment from him.

The next issue concerns the claimant's entitlement to medical treatment from Dr. Arthur Johnson, a Fort Smith neurosurgeon. The claimant saw Dr. Johnson after the Commission authorized a change of physician to him. Dr. Johnson examined the claimant and authored a report dated January 6, 2005, outlining his findings and conclusions. In essence, Dr. Johnson felt that the claimant was a candidate for a disc replacement procedure or similar corrective surgery. Dr. Johnson felt that, given the duration of the claimant's complaints, surgery was her only treatment option.

After the claimant saw Dr. Johnson, she was referred by the respondent to Dr. James Blankenship, a Fayetteville neurosurgeon. As indicated above, Dr. Blankenship did not believe that the claimant was a surgical candidate. He stated in his report of May 5, 2005, that he generally agreed with Dr. Standefer's report from August, 2004, that the claimant was not a surgical candidate.

Dr. Blankenship stated that he did not believe that any treatment would significantly improve the claimant's condition, but he did recommend that she undergo six months of extensive physical therapy and receive psychological and pain management treatment.

In my opinion, the findings and conclusions of Dr. Johnson are entitled to more weight than either Dr. Standefer's or Dr. Blankenship's. As for Dr. Standefer, who saw the claimant in July 2004, I note that he did not have access to the MRI relied upon by Dr. Johnson and Dr. Blankenship which was performed in September 2004. It therefore appears to me that Dr. Standefer was not in as good a position to evaluate the claimant's condition as Dr. Johnson.

While Dr. Blankenship saw the claimant after Dr. Johnson did, I am also of the opinion that Dr. Johnson's conclusion should carry more weight than that of Dr. Blankenship. I believe that Dr. Johnson's approach is much more proactive, in that he wanted to try to improve the claimant's condition. Dr. Blankenship, on the other hand,

essentially took the position that the claimant's condition was hopeless and that there was no way to improve her condition. I also note that, at the present time, it is over two years from the last time Dr. Johnson saw the claimant. According to her testimony, she has not significantly improved and is still suffering from essentially the same problem she had when she saw all three neurosurgeons. I believe that the claimant would certainly benefit from the treatment of Dr. Johnson and she should be allowed to return to him and to follow whatever recommendations he makes, including, if he still believes it is appropriate, spinal surgery.

The Workers' Compensation Act specifically provides that respondents are to provide claimants all appropriate medical treatment. I do not believe that it is within the spirit of that requirement to simply find that the claimant's condition is hopeless, as is apparently the position of Dr. Blankenship. A review of the evidentiary record in this case reveals that the claimant's condition had not appreciably improved since she saw Dr. Standefer in

August, 2004. Further, the claimant's testimony regarding her physical condition is supported by the reports from Dr. Walz and the Functional Capacity Evaluation, both of which indicated that she was still suffering from intractable pain and was not yet ready to attempt a return to work. In short, since the claimant's only treatment option appears to be those outlined by Dr. Johnson, I believe that his recommendation should be given more weight and the claimant should be entitled to receive further medical treatment by him. I, therefore, would have reversed the Judge's decision finding that the respondent is not liable in the further treatment by Dr. Johnson and would have recommended that the claimant be directed to return to Dr. Johnson for any additional treatment he deems necessary.

For the aforementioned reasons, I respectfully dissent.

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PHILIP A. HOOD, Commissioner