

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F507020

DONNA BOWLING, EMPLOYEE	CLAIMANT
WAL-MART STORES, INC., EMPLOYER	RESPONDENT
CLAIMS MANAGEMENT, INC., TPA	RESPONDENT

OPINION FILED AUGUST 13, 2008

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

Claimant represented by HONORABLE EVELYN BROOKS, Attorney at Law, Fayetteville, Arkansas.

Respondent represented by HONORABLE TOD BASSETT, Attorney at Law, Fayetteville, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals from a decision of the Administrative Law Judge filed July 5, 2007.

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

1. The prior administrative law judge opinion of February 2, 2006 is final.
2. Claimant has failed to prove by a preponderance of the evidence that she is entitled to additional medical treatment from Dr. Arnold.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings of fact made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

Thus, we affirm and adopt the decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion. The majority, by affirming and adopting the Administrative Law Judge, finds that the claimant failed to prove by a preponderance of the evidence that she is entitled to additional medical treatment from Dr. Chris Arnold. Based upon a de novo review of the record in its entirety, I find that the claimant has proved by a preponderance of the evidence that she is entitled to additional medical treatment from Dr. Arnold, and therefore, I must respectfully dissent.

The claimant's injury occurred on July 1, 2005. At that time, the claimant was employed at the Village Market, one of the respondent's stores, and was attempting to move a box of frozen chicken, weighing between 35 and 50 pounds. According to the claimant's testimony, the box fell, striking her right shoulder. The respondent admitted that the accident occurred, but denied the claimant sustained any

injury to her shoulder. In ensuing litigation, the Administrative Law Judge issued an Opinion dated February 2, 2006, finding, among other things, that the claimant sustained a compensable injury to her right shoulder in the admittedly job-related accident and the respondent was obligated to provide her reasonable and necessary medical treatment, including shoulder surgery.

The respondent did not appeal the Administrative Law Judge's prior decision. Accordingly, after paying for the claimant's shoulder surgery, they continued to provide medical treatment from Dr. Ray Mitchell, a Fayetteville orthopedic surgeon. However, after time, the claimant became concerned that her shoulder condition was not improving under Dr. Mitchell's treatment. Consequently, in an Order filed July 18, 2007, the Medical Cost Containment Division of the Arkansas Workers' Compensation Commission, granted the claimant a one-time change of physician from Dr. Mitchell to Dr. Chris Arnold. The respondent paid for the claimant to see Dr. Arnold one time, but refused to pay for the MRI Dr. Arnold believed the claimant needed to undergo

in order for him to fully evaluate her condition.

The Workers' Compensation Act requires employers to provide such medical services as may be reasonably necessary in connection with an employee's injury. Ark. Code Ann. § 11-9-508(a) (Repl. 2002); American Greeting Corp. v. Garey, 61 Ark. App.18, 963 S.W. 2d 613 (1998). Injured employees must prove that medical services are reasonably necessary by a preponderance of the evidence; however, those services may include that necessary to accurately diagnose the nature and extent of the compensable injury; to reduce or alleviate symptoms resulting from the compensable injury; to maintain the level of healing achieved; or to prevent further deterioration of the damage produced by the compensable injury. Ark. Code Ann. § 11-9-705(a) (3) (Repl. 2002); Jordan v. Tyson Foods, Inc., 51 Ark. App. 100, 911 S.W.2d 593 (1995); and See Artex Hydroponics, Inc. v. Pippin, 8 Ark. App. 200, 649 S.W.2d 845 (1983).

The majority, by affirming and adopting the Administrative Law Judge finds that the MRI recommended by Dr. Arnold was not reasonable or necessary medical

treatment. However, the Administrative Law Judge's determination appears to be based on a conclusion that the claimant's earlier right shoulder MRI did not reveal any specific abnormalities. The Administrative Law Judge, did not, therefore, believe that a second MRI would be of any particular value. I find that the Administrative Law Judge's conclusion, therefore the majority's conclusion, is clearly erroneous. The Administrative Law Judge's earlier decision specifically held the claimant's shoulder injury was the result of her job-related accident, and the surgery performed by Dr. Mitchell was reasonable and necessary medical treatment of her job-related condition. The parties have stipulated that the Administrative Law Judge's prior decision is the law of the case. Now, it appears that the Administrative Law Judge, by citing Dr. Mitchell's impairment evaluation, in which Dr. Mitchell refers to the claimant's shoulder problems as being the result of a pre-existing arthritic condition, is disregarding his own prior decision. Dr. Arnold is attempting to treat the same shoulder injury the Administrative Law Judge found

compensable and ordered the respondents to provide medical treatment for in his prior opinion. Therefore, regardless of Dr. Mitchell's opinion, this issue has already been decided and the respondent is clearly liable for treatment of the claimant's injury.

The respondent also asserts the MRI recommended by Dr. Arnold is not necessary because an earlier MRI did not find a rotator cuff tear. This assertion overlooks a critical factor in the earlier decision. Specifically, the original MRI did not find the cuff abrasions that Dr. Mitchell treated in his first surgery. Interestingly enough, the first MRI was available to the Administrative Law Judge in making his original decision but, he found that the operative notes from Dr. Mitchell, identifying problems of the claimant's rotator cuff, were sufficient to convince him that the disputed surgery was related to the claimant's injury. Obviously, the failure of the first MRI to find the injury treated by Dr. Mitchell calls its accuracy into question. I cannot understand how a diagnostic test that was virtually ignored in the prior decision can play such a

prominent role in the current decision.

Dr. Arnold's report notes that it has been a substantial period of time since the claimant has undergone an MRI and it is possible that the condition treated by Dr. Mitchell has progressed. However, until the test is run, there is no way of knowing. I also note that it is not uncommon for surgical treatments to accelerate an ongoing degenerative condition. It may well be that the surgery performed by Dr. Mitchell, while helping in the short term, may have accelerated the claimant's ongoing problem, creating the necessity for additional medical treatment at this time. Considering that over two years had elapsed between the original MRI and Dr. Arnold's examination of the claimant, it is expected that he would want additional diagnostic tests to determine the claimant's condition. After all, he was seeing the claimant because her condition had not significantly improved following her course of treatment with Dr. Mitchell. An obvious question that comes to mind in this circumstance is whether a problem may have been missed in the earlier MRI. This Commission has, on

numerous occasions, approved such follow-up diagnostic testing in similar cases. In fact, follow-up MRI's are almost routine. I simply do not find in the evidence of record any basis for denying Dr. Arnold's reasonable request for a follow-up MRI.

Furthermore, Arkansas Code Ann. §11-9-514(a)(3)(A)(ii) established an absolute, statutory right to a one-time change of physician under the Workers' Compensation Act where the employer has contracted with a managed care organization and has exercised the right to select the initial primary-care physician. Collins v. Lennox Industries, Inc., 77 Ark. App. 303, 75 S. W. 3d 2004 (2002). In Wal-Mart Stores, Inc. v. Brown, 82 Ark. App. 600, 120 S.W. 3d 153 (2003) the Court of Appeals stated:

The holding in Collins allows both statutory provisions [Ark. Code Ann. §11-9-508 and Ark. Code Ann. §11-9-514(a)(3)(A)(ii)] to be read in harmony. Without an initial visit and report from appellee's one-time-change of physician doctor, there is simply no way to determine whether any additional treatment proposed by that physician would be reasonably necessary. It would be inconsistent for the legislature to make a one-time change of physician

mandatory without allowing an individual to see that doctor, at least for the initial visit, at the employer's expense.

We hold that in this situation, where appellee has exercised her absolute, statutory right to a one-time change of physician pursuant to Ark. Code Ann. §11-9-514(a)(3)(A)(ii), appellants must pay for the initial visit to the new physician in order to fulfill their obligation to provide adequate medical services under the provisions of Ark. Code Ann. §11-9-508.

The underlying rationale for the Court's holdings Collins and in Brown was that an employer could not simply declare that further treatment is not reasonable or necessary without knowing what treatment the change of physician doctor would recommend. In the instant case, Dr. Arnold could not recommend any particular treatment for the claimant without first reviewing a new MRI of the claimant's right shoulder. Understandably, the doctor is concerned that some aspect of the claimant's problem has not been properly diagnosed in the past and, until he has seen a follow-up diagnostic study, he is not in a position to fully evaluate the claimant's condition and recommend appropriate

treatment. I find that the majority's refusal to require the respondent to pay for the diagnostic test requested by Dr. Arnold is in clear violation of the Court's holdings in Collins and Brown, both of which acknowledge that Ark. Code Ann. §11-9-508, which requires that the respondent pay for reasonable and necessary medical treatment, and Ark. Code Ann. §11-9-514(a)(3)(A)(ii), which mandates a change of physician procedure, must be read in harmony. Here, Dr. Arnold cannot accurately evaluate the claimant without a follow-up MRI, and it is certainly reasonable for one to be taken. Until the MRI recommended by Dr. Arnold is performed, he cannot complete his evaluation of the claimant and make any meaningful recommendations for future medical treatment.

Unlike the majority, I cannot find that the Court's holdings in Collins and Brown allow the respondent to pay for one "visit" to the claimant's change of physician doctor, then dispute any further treatment regardless of the doctor's findings and recommendations. I am also concerned as to what bare minimum level of service the majority would

accept as fulfilling the respondent's obligation to pay for the initial "visit". I cannot find, as the majority does here, that a "visit" with a doctor, where the doctor is not allowed to either run standard tests to evaluate the claimant, or to provide any treatment, actually qualifies as a "visit" for either the purpose of providing reasonable and necessary medical treatment under Ark. Code Ann. §11-9-508, or for the purpose of providing a change of physician under Ark. Code Ann. §11-9-514(a)(3)(A)(ii).

Here, the Medical Cost Containment Division of the Workers' Compensation Commission ordered a change of physician from Dr. Mitchell to Dr. Arnold. Dr. Arnold's request for an MRI in order to evaluate the claimant's compensable shoulder injury is not an unreasonable or outrageous request. While the majority may not agree with the claimant's right to reasonable and necessary medical treatment through the change of physician procedure, it has been mandated by the legislature and passed judicial scrutiny in Collins and Brown. The majority's erroneous conclusion that the respondent can refuse to pay for

diagnostic tests recommended by the authorized treating physician during the claimant's initial visit, a visit ordered by the Commission, is not only violative of Ark. Code Ann. §11-9-508, it also renders Ark. Code Ann. §11-9-514 useless for the very purpose implied by its title: "Medical services and supplies- Change of Physician."

For the aforementioned reasons I must respectfully dissent.

PHILIP A. HOOD, Commissioner