

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F606132

CHARLOTTE DOWNEY, EMPLOYEE	CLAIMANT
BEAVER DAM STORE, INC., EMPLOYER	RESPONDENT
ST. PAUL TRAVELERS, CARRIER	RESPONDENT

OPINION FILED FEBRUARY 11, 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 PHILLIP CUFFMAN, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

The claimant appeals from a decision of the Administrative Law Judge filed February 16, 2007.

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

1. 1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.

2. On November 1, 2004, the relationship of employee-employer existed between the parties.

3. On November 1, 2004, the claimant earned wages sufficient to entitle her to weekly compensation benefits of \$308.00 for total disability and \$231.00 for permanent partial disability, when and if such benefits are appropriate.

4. On November 1, 2004, the claimant sustained a compensable injury to her lower back or lumbar spine. This compensable injury was in the form of a bulge or protrusion involving the L3-4 intervertebral disc.

5. With the exception of the expenses of Dr. Unruh, all medical expenses have been paid through the initial visit with Dr. Raben on August 28, 2006.

6. The medical services rendered to the claimant by and at the direction of Dr. Unruh, represent "unauthorized medical services" within the meaning of Ark. Code Ann. §11-9-514. Pursuant to the provisions of this subsection, the respondents are not liable for these expenses.

7. The medical services provided and recommended to the claimant for her low back difficulties by and at the direction of Dr. Cyril Raben, on and after August 28, 2006, represent reasonably necessary medical services for the claimant's compensable injury. The respondents are liable for the expense of these services, subject to the medical fee schedule established by this Commission.

8. The claimant has failed to prove by the greater weight of the credible evidence that she is entitled to any temporary total disability benefits, as of the present date. Specifically, the claimant has failed to prove by the greater weight of the credible evidence that she has been rendered totally disabled by the compensable injury from performing all forms of regular gainful employment for which she would otherwise be qualified.

9. The respondents have controverted the claimant's entitlement to the payment of the expenses incurred for the services of Dr. Unruh, the claimant's entitlement to payment for the services of Dr. Raben (after August 28, 2006), and the claimant's entitlement to any temporary total disability benefits.

10. As no controverted benefits have herein been awarded to the claimant, no controverted attorney's fee can be awarded to the claimant's attorney.

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 concurs, in part, and dissents, in part.

CONCURRING & DISSENTING OPINION

I must respectfully concur in part and dissent in part from the Majority's opinion. Specifically, I agree that the medical services rendered to the claimant by and at the direction of Dr. Raben were reasonable and necessary and that the claimant is entitled to additional medical treatment by and at the direction of Dr. Raben. I also agree

that the chiropractic services provided to the claimant by Dr. Unruh were reasonable and necessary. However, I respectfully dissent from the Majority's finding that the claimant failed to prove by a preponderance of the evidence that she is entitled to temporary total disability benefits from September 1, 2005 until a date yet to be determined. I must also respectfully dissent from the Majority's finding that the services of Dr. Unruh were unauthorized under Ark. Code Ann. §11-9-514 and not a liability of the respondent. Based upon a de novo review of the record in its entirety, I find that the claimant has shown by a preponderance of the evidence her entitlement to temporary total disability benefits from September 1, 2005 until a date yet to be determined, and therefore, I must respectfully dissent on this issue. Furthermore, I find that the chiropractic services of Dr. Unruh were not unauthorized under Ark. Code Ann. §11-9- 514, and therefore, I must respectfully dissent on this issue as well.

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). A claimant who has been released to light duty work but has not returned to work may be entitled to temporary total disability benefits where there is insufficient evidence that the claimant has the capacity to earn the same or any part of the wages that he was receiving at the time of the injury. Breshears, supra; Sanyo Manufacturing Corp. v. Leisure, 12 Ark. App. 274, 281-82 (1984). When an injured employee is totally incapacitated from earning wages and remains in the healing period, she is entitled to temporary total disability. Id.

First, the preponderance of the evidence shows that after May 5, 2006, the claimant received treatments specifically designed not only to maintain her condition, but to improve her condition. Dr. Unruh wrote a letter and

testified in his deposition that the lumbar decompression treatment he provided was designed to move the disk back into place. The Majority, by affirming and adopting the Administrative Law Judge appears to find that Dr. Unruh's "lumbar decompression" treatment could not actually have done what Dr. Unruh claims, because the claimant had received "the exact procedures" from Dr. Rubin in Florida. However, the Majority's conclusion directly contradicts Dr. Unruh's medical testimony. As I can find no basis in the medical records for the Majority's conclusion, I find that it is based on conjecture and speculation, which, even if plausible, cannot take the place of proof. Ark. Dept. of Correction v. Glover, 35 Ark. App. 32, 812 S.W.2d 692 (1991). Dena Construction Co. v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1979). Arkansas Methodist Hospital v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993). While the Commission has the authority to resolve conflicting evidence, including medical testimony, Foxx v. American Transp., 54 Ark. App. 115, 924 S.W.2d 814 (1996), the Commission may not arbitrarily disregard medical evidence or the testimony of

any witness. Coleman v. Pro-transportation, ____ Ark. App. ____, ____ S.W.2d____, (2007). As there is no evidence in the record contradicting Dr. Unruh's testimony, the Majority has clearly erred by disregarding it.

Second, the Majority appears to base its finding on the May 5, 2006 report of Dr. Danks, who saw the claimant for a one-time visit at the request of the respondent. In the report from this visit, Dr. Danks stated that while the claimant was not a surgical candidate, she would benefit from additional chiropractic treatment for management of her pain. Dr. Danks later clarified his position, testifying in his deposition that the statement "no further treatment needed" only referred to neurosurgical treatment. Dr. Danks also testified that he felt that the claimant would benefit from additional conservative care, either chiropractic, or physical therapy. Based on Dr. Danks's medical report and his deposition testimony, I simply cannot find that Dr. Danks opined that the claimant's condition had become stable and entered the maintenance phase on May 5, 2006, thereby ending the healing period.

Third, the only doctor to clearly address the issue of whether or not the claimant has reached maximum medical improvement is the claimant's current authorized treating physician, Dr. Raben. In a report dated November 13, 2006, Dr. Raben indicated that the claimant had not yet reached maximum medical improvement. Dr. Raben has actually engaged in a course of treatment with the claimant, and based upon my review of Dr. Raben's medical reports, Dr. Danks's medical report and Dr. Danks's deposition testimony, I find that Dr. Raben's opinion as to the claimant not having reached MMI is not only supported by the preponderance of the evidence, but should be given great weight.

The Majority appears to give credence to the respondent's argument that the claimant has received "too much" medical treatment for "too long" to still be in her healing period. During cross-examination and in the appeal brief, the respondent pointed out that the claimant had sixty (60) visits with Dr. McNeal, seventeen (17) visits with Dr. Rubin in Florida, and twenty-four (24) visits with

Dr. Unruh, and emphasized that the claimant is still treating almost two years after the date of injury. However, it is not the law in Arkansas that a claimant has to heal within a certain period of time. Nor is there a law that healing must be accomplished within a certain number of doctor visits. Therefore, not only do I find the Majority's determination that the claimant's healing period ended on May 5, 2006 to be arbitrary, I also find that the preponderance of the evidence shows that the claimant remains in the healing period for her admittedly compensable lumbar injury.

Furthermore, I find that the preponderance of the evidence shows that the claimant has been totally disabled from work since September 1, 2005. The claimant testified that she is unable to work due to her injury, and the medical records show that none of her treating physicians have actually released her to return to work. In fact, Dr. McNeal, with whom the claimant actively treated from September 1, 2005 until January 30, 2006, stated that during the course of his treatment he recommended on numerous

occasions that the claimant not go to work, that he felt that now that she was not working she would be able to heal, and that the claimant must consider her disc condition before accepting any further employment. Immediately after treating with Dr. McNeal, the claimant engaged in a six-week course of lumbar decompression therapy in Florida, which did not end until April 17, 2006. Dr. Unruh, in his deposition testimony stated that he recommended that the claimant not work during the six-weeks of lumbar decompression therapy he provided from July 24, 2006 until August 31, 2006.

Dr. Raben, the claimant's authorized treating physician since August 28, 2006 has not released the claimant to return to work. Based on the medical evidence and the claimant's credible testimony that she is unable to work due to her compensable injury, I find that the claimant has been rendered totally disabled by her compensable injury and is entitled to temporary total disability benefits from September 1, 2005 until a date yet been determined.

The Majority seems to find that the claimant made no attempt to return to work, a conclusion which is not

supported by the evidence of record. The claimant testified that after her September 1, 2004 injury she worked, with her injury, until she saw Dr. Kresse on December 28, 2004. The claimant testified that she returned to work in February, 2005, and with Dr. McNeal's treatments, was able to work until the beginning of April, 2005. However, the claimant testified that due to her injury she was not able to perform her job duties and that she ultimately had to sell the Beaver Dam Store. I find the claimant to be a very credible witness. I find it unreasonable to conclude, as the Majority has, that if the claimant were able to work "clerical, sales, or managing a convenience store," she would have taken the radical step of selling the convenience store at which she made her living. I find it more reasonable to find that the claimant has been totally disabled from work since September 1, 2005.

The Majority has found the chiropractic treatments the claimant received from Dr. Unruh to be reasonable and necessary. However, the majority erroneously determined that this treatment was unauthorized under Ark. Code §11-9-514,

and therefore not a liability of the respondent. Ark. Code §11-9-514 gives the respondent the right to select the claimant's initial primary physician. Ark. Code §11-9-514 (3) (A) (i). Here, the respondent allowed the claimant to treat with Dr. Kresse, her family physician. The respondent also allowed the claimant to select Dr. McNeal for chiropractic care in Arkansas, and Dr. Rubin for chiropractic care in Florida. Although the respondent had approved the claimant's prior chiropractor selections, the respondent apparently objected to the claimant's decision to treat with Dr. Unruh. However, I find that the respondent, after having previously allowed the claimant to select her own chiropractors, cannot belatedly argue that the claimant's decision to treat with Dr. Unruh was an "unauthorized change of physician." Arkansas Code Ann. §11-9-514 (c) provides:

- (1) After being notified of an injury, the employer or insurance carrier shall deliver to the employee, in person or by certified mail, return receipt requested, a copy of a notice, approved or prescribed by the commission, which explains the employee's rights and

responsibilities concerning change of physician.

(2) If, after notice or injury, the employee is not furnished a copy of the notice, the change of physician rules do not apply.

(3) Any unauthorized medical expenses incurred after the employee has received a copy of the notice shall not be the responsibility of the employer.

Here, there is no evidence of record that the claimant received a copy of the notice and change of physician rules pursuant to Ark. Code Ann. §11-9-514 (c) (2). Without that notice, the change of physician rules do not apply, and the claimant was free to seek reasonably necessary medical treatment from Dr. Unruh. See, Stephenson v. Tyson Foods, Inc. 70 Ark. App. 265, 19 S.W. 3d 36 (2000); Sharp v. Lewis Ford, Inc., 78 Ark. App. 164 (2002); Alsup v. Wal-Mart, Full Commission Opinion, F505225 (2006); Hudson v. City of Little Rock, Full Commission Opinion, F111738 (2007). The Commission is obligated to strictly construe and apply the workers' compensation act. Ark. Code Ann. §11-9-704(c) (3). Under strict construction, the respondent must present proof that the claimant received a copy of the

change of physician rules either in person or by certified mail, in order to avail themselves of the protection offered by Ark. Code Ann. §11-9-514 (c) (3) Stephenson, Sharp, Id., Fisher v. StaffMark, Full Commission Opinion, F411831 (2006). Here, had the respondent not allowed the claimant to select her own chiropractors and given the claimant proper notice of the change of physician rules as required by Ark. Code Ann. §11-9-514 (c) (3), the claimant's selection of Dr. Unruh over the respondent's objection might have been an "unauthorized change of physician." However, the evidence shows that the respondent did not comply with Ark. Code Ann. §11-9-514 (c) (3) and therefore cannot seek its protection. Accordingly, the Majority's finding that the respondents are not responsible for the reasonably necessary medical treatment provided by Dr. Unruh because it was "unauthorized" by Ark. Code Ann. §11-9-514 (c) (3) is clearly in error.

In conclusion, I find that the medical services rendered to the claimant by and at the direction of Dr. Raben were reasonable and necessary and that the

claimant and is entitled to additional medical treatment by and at the direction of Dr. Raben. I find that the claimant proved by a preponderance of the evidence that she is entitled to temporary total disability benefits from September 1, 2005 until a date yet to be determined. I find that the chiropractic services provided to the claimant by Dr. Unruh were reasonable and necessary and not unauthorized under Ark. Code Ann. §11-9-514 and are therefore a liability of the respondent.

For the aforementioned reasons, I must respectfully concur in part and dissent in part.

PHILIP A. HOOD, Commissioner