

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F505794

DELL NITA JEFFERSON,
EMPLOYEE

CLAIMANT

AMFUEL,
SELF-INSURED EMPLOYER

RESPONDENT

CROCKETT ADJUSTMENT,
INSURANCE CARRIER/TPA

RESPONDENT

OPINION FILED DECEMBER 15, 2008

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

Claimant represented by the HONORABLE MARK E. BARTON,
Attorney at Law, El Dorado, Arkansas.

Respondent represented by the HONORABLE MICHAEL E. RYBURN,
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Vacated.

OPINION AND ORDER

The claimant appeals an administrative law judge's
opinion filed August 7, 2008. The administrative law judge
found that the claimant failed to prove she was entitled to
additional medical treatment. After reviewing the entire
record *de novo*, the Full Commission vacates the
administrative law judge's opinion. The Full Commission

finds that the claimant proved she is entitled to a change of physician.

I. HISTORY

The parties stipulated that the claimant sustained a compensable left knee injury on October 15, 2004. The claimant testified that she treated with Dr. Roberts and Dr. Daniels, and that she underwent surgery in 2005.

A pre-hearing order was filed on March 13, 2008. The claimant contended, among other things, that she continued to have problems with her knee. The claimant contended that she was entitled to additional medical treatment. The respondents contended that the claimant had been paid appropriate benefits and that the claimant's knee problem was not related to the compensable injury. The parties agreed to litigate the following issue: "1) Additional medical treatment for left knee."

A hearing was held on May 20, 2008. The claimant testified that she was asking for "additional medical benefits because my leg has not been the same since I had the surgery, since the injury....I would like to see a doctor and have a doctor show me, explain to me how, it was

a perfectly good leg until I had the injury." The administrative law judge stated on the record:

THE COURT: Ms. Jefferson, I rarely rule from the bench and I'm not going to do it today, but I am going to tell you that most of the cases that I hear on additional medical, there is some sort of medical report showing me what additional medical is needed. What I have understood you to testify to today is that you really want a second opinion. Is that correct?

MS. JEFFERSON: To see a doctor, yes.

THE COURT: I understand. And it almost seems to me that maybe the more appropriate remedy for you at this time would be for you to request a change of physician through the Arkansas Workers' Compensation Commission. Has that been done, Mr. Ryburn?

MR. RYBURN: No.

THE COURT: This claim was initially accepted as compensable. Under current Arkansas law you have an absolute right to a one time change of physician. Respondents will have to at least pay for that first visit....

The claimant's attorney corresponded with the Clerk of the Commission on May 20, 2008:

I write to you today in my capacity as attorney for Dell Nita Jefferson in the above referenced matter. On behalf of my client we are requesting a one time change of physician in the above referenced case. It is our understanding that she has a one time right to request a change of physician....

The correspondence was filed with the Clerk of the Commission on May 20, 2008 and May 27, 2008.

The administrative law judge filed an opinion on August 7, 2008. The administrative law judge stated in the ORDER section of the opinion:

For the reasons outlined herein, I find that the claimant has failed to prove by a preponderance of the evidence that she is entitled to additional medical treatment related to her compensable injury at this time. Therefore, the claimant's request for additional medical treatment at this time is denied and dismissed. However, this claim is being forwarded to the Medical Cost Containment Division of the Workers' Compensation Commission to address the claimant's post-hearing request for a change of physicians order.

The administrative law judge prepared a memo to Dorothy Jackson, the Clerk of the Commission, dated August 7, 2008: "Please refer this file to the Medical Cost Containment Division for claimant's request for a change of physicians in the above-captioned claim."

The Administrator of the Commission's Medical Cost Containment Division corresponded with the claimant's attorney on August 28, 2008 and stated in part:

Your post-hearing request for a change of physician in the above-referenced claim has been forwarded to the Medical Cost Containment Division where such requests are processed....

In this instance, the Administrative Law Judge has already ruled on the issue of what treatment is reasonable and necessary and found that she is not entitled to additional treatment. Under the current case law, she had an absolute right to a one-time change of physician **prior** to that ruling. We know of no authority supporting the right to a one-time change **after** such a ruling.

Unless the Opinion is appealed and overturned or set aside, we cannot process the claimant's change of physician given the present holding in this case.

The claimant appeals to the Full Commission.

II. ADJUDICATION

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. *Wal-Mart Stores, Inc. v. Brown*, 82 Ark. App. 600, 120 S.W.3d 153 (2003). What constitutes reasonably necessary medical treatment is a question of fact for the Commission. *Dalton v. Allen Eng'g Co.*, 66 Ark. App. 201, 989 S.W.2d 543 (1999).

The Court of Appeals has held that where an employee has exercised her absolute, statutory right to a one-time change of physician pursuant to Ark. Code Ann. §11-9-514,

the respondents 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. *Brown, supra.*

In the present matter, an administrative law judge found that the claimant failed to prove additional medical treatment was reasonably necessary "at this time." The Full Commission vacates this finding because it is premature. The claimant has filed her statutory request for a change of physician. The Full Commission directs the Medical Cost Containment Division to assist the claimant in obtaining a change of physician at the earliest possible date.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

PHILIP A. HOOD, Commissioner

Commissioner McKinney Dissents.

DISSENTING OPINION

I must respectfully dissent from the majority's finding that the decision of the

Administrative Law Judge should be vacated and directing the Medical Cost Containment Division to assist the claimant in obtaining a change of physician. While I agree that claimants are entitled to a statutory right to a one time of physician, I cannot agree that the claimant in this case is entitled to a change of physician. What the majority has done is given the claimant another "bite at the apple."

The claimant had a hearing on the issue of additional medical treatment and she failed to put on the necessary proof to prove she was entitled to additional medical treatment. In essence, the majority is allowing the claimant a "second bite at the apple" by giving her another opportunity to present evidence substantial enough to carry her burden proof. The Court of Appeals has also held that the Commission abuses its discretion by reserving an issue which serves no other purpose than to allow the claimant a "second bite at the apple" by giving the claimant an additional opportunity to present evidence substantial enough to prove a claim. See Gencorp Polymer Products v. Landers, 36 Ark. App. 190 (1991).

Accordingly, I respectfully dissent from the majority's opinion.

KAREN H. MCKINNEY, COMMISSIONER