BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F806225

WHITNEY PHIPPS, EMPLOYEE	CLAIMANT
ST. EDWARD MERCY MEDICAL CENTER, EMPLOYER	RESPONDENT
SISTERS OF MERCY HEALTH CARE, INSURANCE CARRIER	RESPONDENT

OPINION FILED OCTOBER 15, 2010

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

Claimant represented by the HONORABLE EDDIE WALKER, JR., Attorney at Law, Fort Smith, Arkansas.

Respondent represented by the HONORABLE RANDY MURPHY, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed.

OPINION AND ORDER

The respondents appeal an administrative law judge's opinion filed June 3, 2010. The administrative law judge found that medical treatment provided by Dr. Jones was reasonably necessary in connection with the compensable injury, and that the claimant was entitled to a period of temporary total disability benefits. The administrative law judge found that Dr. Jones' treatment was not "unauthorized"

in accordance with Ark. Code Ann. §11-9-514. After reviewing the entire record *de novo*, the Full Commission affirms the administrative law judge's opinion.

I. HISTORY

The parties stipulated that the claimant sustained a compensable injury to her left shoulder on November 15, 2007. The claimant testified, "Me and a nurse were pulling a patient up in bed and when we pulled the patient up in bed, she went too high, so we pulled the drawsheet and when we did, the patient jerked and my shoulder jerked with the patient."

The respondents initially directed the claimant's medical treatment following the compensable injury. The claimant treated with Dr. Keith F. Holder and Dr. Terry L. Clark for a left shoulder strain. An MRI of the claimant's left shoulder was taken on January 8, 2008, with the impression, "Trace of fluid in the subacromial subdeltoid bursa suggestive of bursitis. Partial tear versus mild tendinopathy supraspinatus tendon but no tendinous retraction or definite through and through tear." Dr. Clark's impression on January 11, 2008 was "Tendonopathy versus partial tear left supraspinatus tendon."

Dr. Robert G. Bebout's impression on February 7, 2008 was "Bursitis tendonitis of the left shoulder and a mild frozen shoulder....We injected the bursa of the left shoulder with 1 cc of Decadron, 3 cc of lidocaine, and 3 cc of Marcaine. She tolerated the procedure well." The claimant followed up with Dr. Bebout on May 13, 2008:

> She had an MRI of her cervical spine, which was unremarkable. We did an EMG nerve conduction study of her left upper extremity back in February and this was unremarkable, as well. She complains of some chronic pain. It is not getting any better. If anything, it is getting worse from her neck, all the way down to her hands and fingers. There is some numbness and tingling in the small finger and ring finger of the left hand....
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> ASSESSMENT AND PLAN: We are going to send her to Neurology to be evaluated by them. They may want to repeat her EMG nerve conduction study. I do not have a good explanation for her chronic pain with all of her tests being unremarkable at this time.

Dr. Claude L. Martimbeau evaluated the claimant's left shoulder and informed the respondent-carrier on May 19, 2008, "At this point, my impression is that she possibly did some damage to the labrum and it could be the posterior aspect of the labrum. Associated with that, she also has pain involving the soft tissue from probably some degree of capsulitis. I gave her an injection of Cortisone in the left subacromial area which was tolerated very well and was

not painful. She was also given a prescription for Celebrex. I have ordered an Inflammatory Profile. I will see her back in three or four weeks. At some point, if there is no improvement at all, she may require an arthroscopy of her left shoulder to assess the labrum and rule out damage to the labrum."

Dr. Martimbeau noted on June 16, 2008, "The patient had an inflammatory profile that was normal. Diagnosis: 1. Tendinitis and bursitis, left shoulder." Dr. Martimbeau's diagnosis on July 7, 2008 was "1. Muscle strain injury with tendinitis."

The impression of Dr. Charles E. Pearce on August 5, 2008 was "Left shoulder, shoulder girdle, arm pain, possible brachial plexus stretch versus ulnar nerve compression. RECOMMENDATIONS: 1. Nerve conduction left arm. 2. She is not at maximum medical improvement. 3. Recheck following test for further recommendation and care. 4. No lifting greater than 20 pounds and no overhead work with involved left arm."

Dr. Reginald J. Rutherford noted on August 14, 2008, "Ms. Phipps is seen for electrodiagnostic testing referable to complaint of left arm pain. On examination she has

normal strength and symmetrical reflexes both upper extremities." The impression from a whole-body bone scan on September 5, 2008 was "1. Negative bone scan."

Dr. Pearce reported on September 9, 2008:

> Ms. Phipps returns for follow-up of her left shoulder and arm pain. Bone scan has been done and showed no abnormality. We have done testing to include MR arthrogram, nerve studies and none of these have shown any specific abnormality. She is still complaining of some pain, seems to be shoulder and shoulder girdle for the most part.
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> **PHYSICAL EXAMINATION:**
> Exam really unchanged. No specific abnormality.
>
> **IMPRESSION:**
> Left shoulder and arm pain, possibly muscular in origin.
>
> **RECOMMENDATIONS:**
> 1. There is no indication for further diagnostic testing and/or surgery.
> 2. She can return to regular work duties without restriction as of today's date, 09/09/2008.
> 3. She has reached maximal medical improvement as of today's date, 09/09/2008.
> 4. She has sustained 0 percent permanent partial impairment as it pertains to the upper extremity. This is according to the Guides for Evaluation of Permanent Impairment set for by the American Medical Association Fourth Edition.
> 5. I have left the door open for her to return at any time should the need arise.

The record indicates that the claimant sought treatment on her own at River Valley Musculoskeletal Center beginning September 12, 2008: "Ms. Phipps is a 20-year-old female here

for evaluation of left upper extremity pain. She was initially injured in a distracting mechanism of the left shoulder while transferring a patient at her previous employment." Benton Loggains, P.A.-C, assessed "Upper extremity radiculopathy. PLAN: I think that she has multiple problems, one including acromioclavicular joint impingement. She has some glenohumeral multi-correctional instability, and she has ulnar neuritis at the elbow....We are going to send her to physical therapy for some Kinesio taping or neural tension stretches and modalities as indicated." The claimant was provided occupational therapy on September 16, 2008. Benton Loggains noted on September 29, 2008 that the claimant's condition had worsened following occupational therapy.

The claimant treated on her own with Dr. Greg T. Jones beginning October 15, 2008:

> This 20-year-old nursing aide at St. Edwards is sent to me for an independent opinion "on her own insurance as she has been instructed" with respect to persistent left shoulder pain dating back to a lifting injury in November 2007.
>
> Benton Loggains, physician's assistant, had seen her previously and had asked that I evaluate her given the complexity of the case. The bottom line is that she has a lifting episode with the patient, felt a pop in her shoulder, basically ignored it for that day, and later began to have

> continued pain and basically continuous pain since that point....
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> ASSESSMENT: Likely instability multi-directional in character with exacerbation of secondary neurological impingement symptoms. I have reviewed the electrodiagnostics that state the nerve is normal from the elbow and the wrist. Certainly, she would not be the first person with shoulder instability to present with neurological complaints and they are in the correct pattern for a traction injury to boot.
>
> She seems to be legitimate. I think that her goal here is not secondary gains....

Dr. Pearce corresponded with Shawn McNerlin, RN on November 11, 2008:

> As it pertains to your letter of November 6, 2008, at the time of my last visit with Ms. Phipps, 09/09/2008, there was in my opinion no indication for surgical treatment of her shoulder. I am not sure if there has been a change in her exam or status since that time. Further, it is my continued opinion that there was no further indication for diagnostic testing and/or surgery unless there has been an interval injury of some type. The surgery proposed by Dr. Jones is basically for symptomatic laxity which I had been unable to demonstrate in this lady and on the visits with me did not seem to correlate with her complaints of pain.

Dr. Jones noted on December 5, 2008, "I have not seen Ms. Phipps today, but I have received a letter from a Dr. Charles E. Pearce in Little Rock who reports that based on an examination made 09/09/08, a month before I had opportunity to see this patient in consultation. Mr. Pearce

has related that he feels there is nothing wrong with this lady and that surgery is not indicated. I do not agree. This lady's physical examination with both the apprehension test and the dead-arm and Jobe relocation maneuver as well as her symptomatology of 'dead-arm' symptoms are well known to be signs of instability based symptomatology and secondary neurologic alteration....It remains my opinion that she has a problem for which having failed to improve more than a year after onset of symptoms with a documented injury with a mechanism in terms of converting asymptomatic laxity to symptomatic laxity having failed to improve with extended conservative care regimen with physical therapy, this remains an option of 'last resort.'"

Dr. Jones administered a steroid injection on January 2, 2009. Dr. Jones noted on February 5, 2009, "The bottom line is I think I can help this girl by both doing capsular plications and strengthening the glenohumeral instability findings and address the acromioclavicular joint, what appears to be a torn meniscal element, with an acromioclavicular resection."

The parties stipulated that there was "no dispute over temporary total disability benefits accruing prior to April

23, 2009." Dr. Jones performed a left shoulder arthroscopy and resection on April 23, 2009. The post-operative diagnosis was "1. Instability right shoulder with trauma and associated dead arm symptoms, positive drivethrough and positive capsular laxity with instability findings on exam under anesthesia. 2. Torn AC meniscus by arthroscopic visualization."

Benton Loggains noted on May 4, 2009, "Miss Phipps is seen for postoperative evaluation of left shoulder arthroscopic plication. She is doing well. She has absence of the radicular symptoms that she has been plagued with." Dr. Jones reported on June 3, 2009, "She has had a dramatic turn around in her preoperative level of symptoms. She feels a whole lot better and is very pleased with her progress....She has a sedentary secretarial type job. She can go back with a five pound weight limit. She is able to type and do other things. We will let her return to work at this juncture."

The parties stipulated that there was "no dispute over medical expenses incurred except those for treatment by and at the direction of Dr. Greg Jones." A pre-hearing order was filed on December 15, 2009. The claimant contended that

she was entitled to medical treatment provided "after the respondents refused to continue to provide medical treatment. The claimant contends that her entitlement to treatment includes but is not limited to treatment by or at the direction of Dr. Greg Jones." The claimant contended that she was entitled to temporary total disability benefits from April 23, 2009 until June 4, 2009.

The respondents contended that Dr. Pearce had released the claimant on September 9, 2008 at maximum medical improvement with zero percent permanent anatomical impairment. The respondents contended that the claimant had been paid all benefits she was owed. The respondents contended that Dr. Jones' treatment was not authorized and was not reasonably necessary.

The parties agreed to litigate the following issues:

1. The claimant's entitlement to additional medical services by Dr. Jones.
2. The claimant's entitlement to additional temporary total disability benefits from April 23, 2009 through June 3, 2009.
3. Whether Dr. Jones' treatment was unauthorized in accordance with Ark. Code Ann. §11-9-514.
4. Fees for legal services.

A hearing was held on March 16, 2010. The claimant described the condition of her shoulder following surgery from Dr. Jones: "My symptoms basically went - I mean, I went

from having constant pain to having basic - I mean, I have pain, but not like what I had. I mean, I still have problems with it, like sleeping on it wrong, but my pain basically, what I would say, is not the same....it's not what it was before."

An administrative law judge filed an opinion on June 3, 2010. The administrative law judge essentially found that treatment provided by Dr. Jones was reasonably necessary, that Dr. Jones' treatment was not unauthorized, and that the claimant was entitled to a period of temporary total disability benefits. The respondents appeal to the Full Commission.

II. ADJUDICATION

A. Medical Treatment

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)(Repl. 2002). The employee has the burden of proving by a preponderance of the evidence that medical treatment is reasonably necessary. *Fayetteville School Dist. v. Kunzelman*, 93 Ark. App. 160, 217 S.W.3d 149 (2005). 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).

In the present matter, an administrative law judge essentially found that the claimant proved Dr. Jones' treatment was reasonably necessary in connection with the compensable injury. The Full Commission affirms the administrative law judge's finding. The parties stipulated that the claimant sustained a compensable injury to her left shoulder on November 15, 2007, and the claimant was diagnosed with left shoulder strain. The claimant was treated with medication and occupational therapy, but the claimant's pain symptoms persisted. An MRI in January 2008 showed abnormalities in the claimant's left shoulder. The claimant subsequently treated with Dr. Bebout, Dr. Martimbeau, and Dr. Pearce. On September 9, 2008, Dr. Pearce determined that the claimant had reached maximum medical improvement and found no indication for further diagnostic testing or surgery.

The claimant began treating with Dr. Jones on October 15, 2008. Dr. Jones assessed instability in the claimant's left shoulder and recommended additional treatment. Dr.

Jones also found the claimant to be a legitimate patient who was not seeking secondary gain. Dr. Jones ultimately performed surgery on the claimant’s shoulder. We recognize Dr. Pearce’s opinion that the claimant was not entitled to additional diagnostic testing or surgery. Nevertheless, the Commission has the authority to accept or reject medical opinion and the authority to determine its medical soundness and probative force. *Green Bay Packaging v. Bartlett*, 67 Ark. App. 332, 999 S.W.2d 692 (1999). The Commission’s authority to resolve conflicting evidence also extends to medical testimony. *Maverick Transp. v. Buzzard*, 69 Ark. App. 128, 10 S.W.3d 467 (2000). In the present matter, the Commission attaches significant probative weight to the expert opinion of Dr. Jones. Dr. Jones opined in December 2008 that the claimant’s post-injury physical condition had not improved with conservative treatment, and that surgery was required. We find that Dr. Jones’ opinion is supported by the evidence of record and should be entitled to more weight that the opinion of Dr. Pearce. Dr. Jones’ treatment recommendation was also corroborated by the opinion of Dr. Martimbeau, who had stated in May 2008, “she may require an arthroscopy of her left shoulder to assess the labrum and

rule out damage to the labrum." Dr. Jones' post-operative diagnosis included a finding of instability in the claimant's right shoulder, also with "positive capsular laxity."

Moreover, the claimant reported a significant improvement in her pain symptoms following surgery by Dr. Jones. Post-surgical improvement is a relevant consideration in determining whether surgery was reasonably necessary. *Winslow v. D & B Mech. Contractors*, 69 Ark. App. 285, 13 S.W.3d 180 (2000). The post-surgical reports of Dowell Loggains and Dr. Jones, as well as the claimant's testimony, indicated that the claimant experienced post-surgical improvement following the operation performed by Dr. Jones. The claimant therefore proved by a preponderance of the evidence that the treatment provided the claimant at River Valley Musculoskeletal Center and the treatment provided by Dr. Jones was reasonably necessary in connection with the compensable injury.

B. <u>Change of Physician</u>

Ark. Code Ann. §11-9-514(Repl. 2002) provides:

> (c)(1) After being notified of an injury, the employer or insurance carrier shall deliver to the employee, in person or by certified or registered 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 of injury, the employee is not furnished a copy of the notice, the change of physician rules do not apply.
> (3) Any unauthorized medical expense incurred after the employee has received a copy of the notice shall not be the responsibility of the employer.

However, if the respondent fails to give the claimant the change-of-physician form after the injury, the claimant is not required to petition the Commission in order to be treated by a competent doctor. *Stephenson v. Tyson Foods, Inc.*, 70 Ark. App. 265, 19 S.W.3d 36 (2000).

In the present matter, the respondents argue that treatment provided by Dr. Jones and treatment provided at River Valley Musculoskeletal Center were "unauthorized" in accordance with Ark. Code Ann. §11-9-514. The respondents state that the claimant was provided a Form N on November 17, 2007, and that the claimant was provided a Workers' Compensation booklet on November 16, 2007. The record does not support the respondents' assertion in this regard. There is no evidence of record demonstrating that the claimant was provided a Notice concerning her rights and responsibilities with regard to change of physician on

November 16, 2007, November 17, 2007, or on any other date. The record before the Commission does not contain a Form N or any other notice with regard to change of physician. Nor was there any testimony on this issue. The respondent has the burden of proving delivery of the change-of-physician form. *Stephenson, supra*. In the present matter, there was no documentary evidence of record demonstrating that the respondents delivered the claimant a change-of-physician form after the compensable injury. Nor was there any testimony with regard to whether or not the claimant received such a form. The instant claimant was therefore not required to petition the Commission in order to be treated by a competent doctor. *Id.*

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant proved treatment provided by Dr. Jones, including surgery, and treatment provided at River Valley Musculoskeletal Center were reasonably necessary in connection with the compensable injury. Because the respondents did not prove that the claimant was provided a change-of-physician form after the compensable injury, the claimant was not required to file a change-of-physician petition in order to treat with Dr.

Jones. The respondents did not prove that Dr. Jones' treatment was "unauthorized" in accordance with Ark. Code Ann. §11-9-514. The claimant proved that she remained within her healing period and was totally incapacitated to earn wages from April 23, 2009 through June 3, 2009. The claimant therefore proved she was entitled to temporary total disability benefits from April 23, 2009 through June 3, 2009.

The claimant's attorney is entitled to fees for legal services in accordance with Ark. Code Ann. §11-9-715(Repl. 2002). For prevailing on appeal to the Full Commission, the claimant's attorney is entitled to an additional fee of five hundred dollars ($500), pursuant to Ark. Code Ann. §11-9-715(b)(Repl. 2002). The respondents are entitled to an appropriate offset in accordance with Ark. Code Ann. §11-9-411(Repl. 2002).

IT IS SO ORDERED.

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A. WATSON BELL, Chairman

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PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority's findings that the claimant proved by a preponderance of the evidence that the medical treatment provided by Dr. Greg Jones represented authorized medical treatment and was reasonable and necessary medical treatment associated with the claimant's compensable injury and finding that the claimant was entitled to temporary total disability benefits for the period April 23, 2009 through June 3, 2009. Based upon my de novo review of the record, I find that the claimant has failed to meet her burden of proof.

The majority found that because the respondents did not demonstrate that they had provided the claimant with a Form N that the provisions of Ark. Code Ann. § 11-9-514 did not apply. This was not an issue at all before the Administrative Law Judge. There was no questioning regarding whether the claimant received notice of the Form N. There was no testimony by the claimant that she was unaware of her right to seek a change of physician or to obtain a second opinion following Dr. Pearce's determination that she had reached maximum medical improvement and had a zero percent permanent anatomical impairment rating. In fact, the claimant acknowledged at the hearing that she saw Dr. Greg

Jones on her own, separate and apart from the Workers' Compensation system. She even testified that she turned those expenses into her group health coverage.

I find that the provisions of § 11-9-514 apply. Therefore, the claimant's treatment by Dr. Jones was by an unauthorized physician and the respondents are not responsible for such. The provisions of the Arkansas Workers' Compensation Act are clear that in order for the claimant to get her medical treatment paid for, she must follow the rules and the claimant failed to do so. It is clear that the treatment was not an emergency. The respondents in this case provided the claimant treatment by at least four doctors and they could not find anything wrong with the claimant. The claimant sought treatment on her own and she is responsible for this treatment. The claimant did not file for a change of physician, nor did she seek a referral to Dr. Greg Jones. The respondents paid for the claimant to see Dr. Bebout, Dr. Martimbeau, and Dr. Pearce as well as undergo many tests which yielded negative results. The claimant was unhappy with those findings and sought treatment on her own without following the rules. Therefore, she should not be compensated for the treatment she received outside of these parameters.

Even if this treatment were not unauthorized, a finding I do not make, the medical treatment that the claimant received from Dr. Jones was not reasonable and necessary. Employers must promptly provide medical services which are reasonably necessary for treatment of compensable injuries. Ark. Code Ann. § 11-9-508(a)(Repl. 2002). However, injured employees have the burden of proving by a preponderance of the evidence that the medical treatment is reasonably necessary for the treatment of the compensable injury. Norma Beatty v. Ben Pearson, Inc., Full Workers' Compensation Commission Opinion filed February 17, 1989 (Claim No. D612291). When assessing whether medical treatment is reasonably necessary for the treatment of a compensable injury, we must analyze both the proposed procedure and the condition it is sought to remedy. Deborah Jones v. Seba, Inc., Full Workers' Compensation Commission Opinion filed December 13, 1989 (Claim No. D512553). Also, the respondent is only responsible for medical services which are causally related to the compensable injury.

The evidence demonstrates the treatment was an elective procedure and voluntarily undertaken by the claimant after she had been opined to have reached MMI on September 9, 2008 by Dr. Pearce. Dr. Pearce, at that time,

stated that the claimant had a 0% permanent anatomical impairment rating and that she was not a candidate for any further diagnostic or surgical intervention. Dr. Pearce reiterated these conclusions in a letter dated November 11, 2008 stating that he strongly disagreed with Dr. Jones's position that the claimant was a candidate for left shoulder surgery.

When I consider the fact that the claimant was assessed to be at maximum medical improvement on September 9, 2008, and the fact that all of her objective as well as subjective tests were negative, I cannot find that the surgery performed by Dr. Greg Jones was anything more than elective, not reasonable and necessary and not the responsibility of the respondents. Because I find that the claimant is not entitled to the surgery by Dr. Jones, she is, therefore, not entitled to temporary total disability benefits from April 23, 2009 to June 3, 2009.

Accordingly, for all the reasons set forth herein, I must dissent from the majority's award of benefits.

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KAREN H. MCKINNEY, COMMISSIONER