

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F900220

BRANDY ROBERTSON,
EMPLOYEE

CLAIMANT

PORK GROUP, INC.,
EMPLOYER

RESPONDENT

TYNET CORPORATION,
INSURANCE CARRIER

RESPONDENT

OPINION FILED OCTOBER 1, 2010

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

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

Respondent represented by the HONORABLE E. DIANE GRAHAM,
Attorney at Law, Fort Smith, Arkansas.

Decision of Administrative Law Judge: Reversed in part;
affirmed in part.

OPINION AND ORDER

The claimant appeals an administrative law judge's
opinion filed January 19, 2010. The administrative law
judge found that the claimant failed to prove she was
entitled to medical treatment from Dr. Sheehan and Dr.
Hamilton. The administrative law judge found that the
claimant failed to prove she was entitled to temporary total
disability benefits from March 14, 2009 until July 19, 2009.

After reviewing the entire record *de novo*, the Full Commission reverses the administrative law judge's opinion in part and affirms in part. The Full Commission reverses the administrative law judge's finding that the claimant was not entitled to treatment from Dr. Sheehan and Dr. Hamilton. We affirm the administrative law judge's finding that the claimant did not prove she was entitled to temporary total disability benefits from March 14, 2009 until July 19, 2009.

I. HISTORY

_____The record indicates that Brandy Jo Robertson, age 27, was hired at Tyson Foods, Inc. on April 9, 2007. Ms. Robertson testified that she was a caretaker and lactation worker: "I worked back with the sows, farrowed and taking care of the baby pigs when they were born." The claimant signed an **ACKNOWLEDGMENT OF MANAGED CARE NOTICE** on April 9, 2007:

This is to certify I, Brandy Robertson, have received a copy of Notice (NCC-A-1) from my employer as required by the Arkansas Workers' Compensation Commission Rules and Regulations, Rule 33. This Notice includes all toll free number (sic) to be utilized for answers to questions about National Comp. Care's Managed Care Organization, information on how to access the MCO program, the employer's right to direct treatment to the primary care physician, and the grievance procedure within the MCO. The Notice also includes information regarding the

prohibition against balance billing, penalties for misrepresentation, and the Change of Physician rules under a managed care system. Emergency treatment or if your workers' compensation claim is denied are the only exception to the managed care mandate.

The parties stipulated that the claimant sustained a compensable injury to her right ankle on May 22, 2008. The claimant testified, "I fell and heard a pop and felt a pop in my leg." The claimant's injury was described in a Form AR-3, Physician's Report, dated May 22, 2008: "Pt states she was walking from one feed barn to another and twisted her ankle on a rock c/o right ankle pain." The diagnosis was "Right ankle sprain." The claimant was treated with medication, "Moon boot and crutches," and "Ice compress q 2 hours for 10 min."

Dr. Konstantin V. Berestnev reported on May 22, 2008:

At the request of and authorization by Tyson Pork Group, we are seeing Ms. Brandy Robertson. Ms. Robertson presents today for the injury from 05-22-08. The patient states that she was walking from one feed barn to another and twisted her ankle on a rock. She complains of right ankle pain.

On physical examination, the patient has no evidence of ankle instability. Intact Achilles tendon. She has some pain to palpation of the right posterior lateral ankle. There is some swelling present over the lateral aspect of the right ankle, but no evidence of compartment syndrome. Good distal capillary refill and

peripheral pulsation. The patient has full range of motion in the ankle. No significant pain to palpation of the medial aspect of the ankle. There is some pain to palpation of the right lateral malleolus. The patient has good dorsiflexion and plantar flexion. The patient has some pain on internal rotation and external rotation, eversion and inversion against resistance of the right ankle. The x-ray of the right ankle reveals no acute fractures or dislocations.

Dr. Berestnev assessed "Right ankle sprain. Treatment plan: We are going to put the patient in a moon boot. We are going to give her crutches to use for the first 24 hours on an as needed basis. We are going to give her an ice compress to apply every two hours for ten minutes. We told her to take over-the-counter anti-inflammatory medicine during the day and we are going to prescribe her Vicodin to take at nighttime only on an as needed basis. We will see the patient for the follow up in one week. In the meantime, the patient is to avoid climbing." The record indicates that the physician returned the claimant to alternate/modified duty beginning May 22, 2008. The claimant testified that she returned to work but that she felt severe pain in her right foot. The claimant testified that she returned to the same work duties she had performed before the compensable injury.

Dr. Berestnev noted on May 28, 2008, "Brandy comes here to follow up on the right ankle sprain. She is doing better. The patient is religiously wearing the moon boot. On physical examination, the patient has full range of motion in the ankle....The patient continues to have pain to palpation over the medial and lateral aspect of the ankle. The patient has significantly less swelling over the right ankle." Dr. Berestnev assessed "Right ankle sprain healing. Treatment plan: We are going to change from a moon boot to an air cast. We are going to continue recommending over-the-counter anti-inflammatory medicine during the day and Vicodin at night. We continued to recommend stretching exercises. We will see the patient for the follow up in two weeks." The physician returned the claimant to regular work on May 28, 2008.

The claimant followed up with Dr. Berestnev on June 11, 2008: "She is doing much better. On physical examination, she has no evidence of ankle instability. Intact Achilles tendon. Good dorsiflexion, plantar flexion, internal rotation, external rotation. No significant pain to palpation of the medial or lateral aspect of the ankle. No pain to palpation of the lateral or medial malleoli." Dr.

Berestnev assessed "Right ankle sprain healing. Plan: The patient can be released to her regular duties." The claimant was again returned to regular work on June 11, 2008.

The claimant testified that she sought treatment on her own with Dr. Bryan M. Sheehan. Dr. Sheehan's impression on July 28, 2008 was "Achilles tendinitis bilateral. Calcaneal spur." Dr. Sheehan planned injection treatment. Dr. Sheehan's assessment on August 21, 2008 was "Retro-calcaneal exotosis bilateral. Plan: The patient's pain is severe and requires a nerve block steroid injection to reduce the patient's pain and inflammation in the posterior aspect of both heels."

The claimant testified that she next sought treatment with Dr. James T. Hamilton, because "Sheehan wasn't helping, it didn't help." The record indicates that Dr. Hamilton saw the claimant at Southwest Foot Clinic on September 9, 2008: "Pt c/o R heel pain. She says it hurts where the Achilles tendon is. She had a cort - inj B/L heel 1 month ago. She said it only helped for 2-3 days. Standing, walking bothers her the most." The claimant was assessed with "Achilles tendinitis vs tear" and was sent for MRI testing.

An MRI of the claimant's right ankle on September 22, 2008 showed a partial-thickness distal Achilles tendon tear. Dr. Hamilton noted on September 30, 2008, "Pt is here to be fitted for boot due to MRI study. Achilles tendon tear on her R foot. She says it hurts more now than it did the first time she was here."

The claimant filled out a Tyson Foods, Inc. Leave Of Absence Application on September 30, 2008. The Application indicated that the respondent-employer approved a paid leave of absence beginning October 1, 2008 under the Family and Medical Leave Act. The Expected Return Date was October 29, 2008. The claimant agreed on cross-examination that she took a leave of absence for one month, and that she received short-term disability benefits during that time.

Dr. Hamilton signed a Return To Work Certification for the respondent-employer on October 21, 2008. Dr. Hamilton indicated that he was treating the claimant for a "Partial Achilles Tear." Dr. Hamilton indicated that the claimant was able to return to work. A company nurse signed the Return To Work Certification on November 4, 2008. The claimant testified that she again returned to her regular work duties.

Dr. Hamilton placed the claimant in a compression cast and a short leg cast on November 17, 2008. Dr. Hamilton's assessment was "Intrasubstance Achilles tear." Dr. Hamilton signed a Return To Work slip on December 3, 2008, indicating that the claimant was able to return to work on December 4, 2008.

The record indicates that Dr. Hamilton saw the claimant on December 23, 2008 and assessed "1) healing Achilles partial tear R." The claimant was placed in a right-foot cast. It was noted on a Fax Cover Sheet from Dr. Hamilton's office on December 23, 2008, "As per prior conversation we do not do workman's comp. Dr. Hamilton saw Brandy today and will see her in future if pt decides not to file w/c. We have filled out nothing re: limitations, etc. as she related to us she will be seen by a company physician. Therefore, all that is enclosed are notes for 12/23/08."

Dr. Berestnev's assessment on January 16, 2009 was, "The patient has what appears to be a right ankle sprain, right Achilles tendinitis with a partial tear of the right Achilles tendon on MRI on September 2008. Treatment plan: In my opinion, it would be reasonable to obtain an MRI of the right ankle to see if there is any propagation of the

tear as was noted in the previous study from September 2008."

An MRI of the claimant's right ankle on January 26, 2009 was interpreted to suggest a progression of the partial thickness tear of the distal Achilles tendon. Dr. Berestnev's assessment on February 3, 2009 was "Partial tear of the right Achilles tendon with progression of the findings from September 2008 to the MRI in January 2009. Treatment plan: We are going to recommend that the patient be evaluated by an orthoped, Dr. Pleimann. In the meantime, she is to continue wearing the Ace wrap. The patient is to avoid pushing or pulling carts or climbing at work."

Dr. Terry J. Sites evaluated the claimant on February 5, 2009 and informed the respondent-carrier that his impression was "1. Right Achilles tendinopathy with partial tear, chronic....She has had appropriate treatment but was not able to carry through due to difficulties with her supervisor at work. These have since been resolved....I will put her into a nonweightbearing cast in mild equinus position to rest the Achilles, she is to be on crutches....She is to be on sit-down duties for now, I anticipate it will take a minimum of six weeks, likely

requiring three or four more months. She is not at maximum medical improvement."

The respondents' exhibits include a narrative attributed to Ayrelle Britt, human resources manager for the respondent-employer:

On Wednesday, March 11, 2009, I received a call from Randy Berry....Randy just began reporting to Decatur on the previous Monday and had expressed concerns to his supervisor Rodger Howie regarding behavior issues with the team members that he had already observed specifically, profanity and potentially one issue that had some "racial" connotations....

So, Randy stated to me that he had just met with everyone (except Brandy Robertson b/c it was her scheduled day off but that he would address the same with her when she got to work the next day) and explained that he had recently heard some language that was being used at the farm....He then stated that the previous day he had been in the office and had overheard a conversation between Eric and Brandy in which (he stated he had been present but was not paying complete attention to the conversation) he overheard Brandy and Eric "joking with one another". He stated that he overheard Brandy make a comment toward Eric stating "you look like you just swam across the river"....[Eric] stated that he was not offended in any way at all and that he had said things that were probably not "the best" either....he then stated that Brandy had called him a "beaner" on several occasions....

The following morning at approximately 9:00 am Brandy Robertson left a message and then I called her back. Her tone was calm to begin with and I began by asking her if she had any idea

why I had requested this conversation with her. Her tone changed immediately and she screamed and cried "He called me a redneck and that is not f*** fair!" She then began screaming so loudly that her words were incoherent....

I asked if she had ever referred to Eric as a "beaner" and she again screamed, (at this time she was crying and sobbing into the phone as well but the tone in her screaming was rage) and she said "Yes I have! But this isn't fair!!!!" and then screamed incoherently. I became concerned for her well-being at this time and for the well being of her co-workers. I asked her again to please calm down. I explained to her again that I was only trying to do my job and that I needed her help in understanding what had happened....

[Randy Berry] called Rodger and myself because he was concerned at Brandy behaving so erratically and she just "kept screaming and using profanity at him."

I explained to Randy that I had not been able to finish the investigation or the conversation, for that matter, because Brandy had disconnected the call and that I still needed to complete my conversation with her....Her behavior was so erratic and extremely hostile. Brandy continued saying "F*** no!" when asked to do anything.

After Brandy left the farm, she contacted our Ethics Help line. At that point, the Director of Human Resources, Lonny Jepsen, took over the investigation.

Brandy did call my office several times that afternoon stating that she tried to call me and I hadn't called her back. Brandy often would call three or four times in a one hour increment stating in each message that no one would respond to her -this was another element of the erratic and irrational behavior that she often demonstrated....

She was terminated for insubordination.

The claimant testified on direct examination:

Q. Okay, what happened on the last day of work concerning your termination?

A. I had just got out to the farm and Eric had come and told me that Ayrelle would want to talk to me that day. And so Randy come to me a few hours later and told me that I needed to call Ayrelle. I called her, she didn't answer. She called me a couple of hours later. And it was - she asked me what had happened with Eric and I told her what he said and she said that wasn't an issue. It wasn't a problem with what he said, it was a problem with what I said.

Q. Now was Eric a co-worker or was he some sort of a supervisor?

A. He was a co-worker.

Q. And had you had a problem with Eric?

A. Yes....He was always calling me names, causing problems ever since he had got there....

Q. When you spoke to Ayrelle tell me what happened with you, what you did?

A. Well when I was talking to her I just told her what had happened and she kept saying that it wasn't an issue. And I told her that that wasn't fair that I was getting in trouble and Eric wasn't. And she just constantly kept telling me it wasn't a problem, it wasn't a problem what he did.

Q. How did that conversation end?

A. I ended up hanging up.

Q. And why did you do that?

A. Because she wouldn't listen to what I was saying. She kept saying that it wasn't right....

Q. So after you hung up then what'd you do?

A. I went to Barn 43 to go to the bathroom....And then I left to go back to 42.

Q. And at that point did you leave or did you stay and work?

A. I was walking to 42 to go back and sit at my desk.

Q. And what happened?

A. Randy and Chris had pulled up and said that I needed to go home until further notice. They told me they would give me a ride and I said, no, I'll just walk to 42 and get my stuff. And so they just followed behind me and I got my stuff and I walked to the gate....

Q. Did you attempt to contact Mrs. Britt again?

A. Yes....I phoned her and I just left voicemails.

Ayrelle Britt testified for the respondents:

Q. If Ms. Robertson had not been terminated in March of 2009 would Tyson have continued to make work available to her within whatever restrictions were placed on her?

A. Yes.

Q. Does Tyson have policies relating to the use of profanity in the work place?

A. Yes....It's called the Rules of Conduct Policy and it states that profanity is prohibited.

Q. Was Ms. Robertson made aware of that policy?

A. Yes....During orientation every new hire that's - well everyone that's hired is put through a one day orientation in which we review all of our policies. Especially the policies that would affect your employment in some way regarding conduct....

Q. Why was Ms. Robertson terminated?

A. Insubordination....

Q. Can you tell us what date it was that you actually were able to talk to Brandy Robertson?

A. March 13.

Q. Is that a Friday?

A. Yes....

Q. Have you reviewed your statement that you have in front of you?

A. Yes.

Q. Is - is what you have put down on paper accurate?

A. Yes, it is.

Q. When did you prepare this statement?

A. I prepared this statement the Monday following the 13th, so whatever that date would be.

Q. Did you receive a voicemails (sic) from Ms. Robertson later that day?

A. Yes.

Q. Did you call Ms. Robertson back?

A. Yes, I did.

Q. Did you - were you able to talk to Ms. Robertson?

A. No.

In any event, Dr. Sites examined the claimant on March 19, 2009 and informed the respondent-carrier, "At this point I will start decreasing the amount of her lift and weaning the crutches, with anticipation of full weightbearing in a regular shoe over the next couple of weeks. I will start her in outpatient therapy for conditioning and work hardening, with the anticipation of returning towards regular work duties on 04-13-09 with 25% regular work duties for the first week, increasing by 25% each week, doing 100% of her regular work duties by the 4th week. We will see the patient back in four weeks to monitor her progress. Should she do well I would anticipate maximum medical improvement at approximately eight weeks, and if not we will have to reconsider her overall treatment and progress."

The record includes a Separation Notification Form, effective date March 24, 2009. The Form indicated that the Reason for Action was Involuntary, because of "Insubordination." The Form indicated that the last day worked and the last day paid was March 13, 2009.

Dr. Sites reported in part on April 16, 2009, "She informs me that she has been let go from work but did not disclose why. Her work status remains unchanged, she is not at maximum medical improvement."

Dr. Jason H. Pleimann began treating the claimant on July 2, 2009: "This is a 25-year-old female who is kindly referred by Dr. Terry Sites....I have reviewed her most recent MRI, which demonstrates some significant signal change within the distal Achilles' and the retrocalcaneal bursa consistent with an unhealed partial insertional tear. IMPRESSION: Right chronic insertional Achilles' tendinitis with non-healing partial tear. PLAN: I have recommended debridement and repair of her Achilles' insertion with a calcaneal exostectomy, possible gastroc slide, possible FHL transfer....She would like to proceed and we will get this set up pending workers' comp approval."

Dr. Pleimann performed surgery on July 20, 2009: "1. Right insertional Achilles debridement and reconstruction. 2. Right leg gastrocnemius recession. 3. Exostectomy right calcaneus." The pre- and post-operative diagnosis was "1. Right insertional Achilles tendonitis with partial

tear. 2. Painful exostosis right calcaneus. 3. Gastrocnemius contracture right leg."

A pre-hearing order was filed on August 17, 2009. The claimant contended that she hurt her right ankle while working on May 22, 2008. The respondents contended, among other things, that the claimant had continued to work for the respondents and was released to regular duties effective June 11, 2008. The respondents contended that they were "unaware that the claimant was seeking other medical treatment from two different podiatrists later in 2008. After the claimant advised the respondents that she desired additional medical treatment, the respondents sent the claimant back to the initial treating physician and also provided an MRI of her ankle as well as an appointment with an orthopedic surgeon. As of the filing of this pre-hearing questionnaire response, no medical record has been received from the orthopedic surgeon as yet." The respondents contended that they "did not and had not controverted the claimant's claim nor her right to receive reasonably necessary medical treatment for her May 22, 2008 injury. The respondents have been and are providing such treatment."

After a hearing, an administrative law judge found, among other things, that the claimant did not prove she was entitled to medical treatment from Dr. Sheehan and Dr. Hamilton. The administrative law judge found that the claimant did not prove she was entitled to temporary total disability benefits from March 14, 2009 until July 19, 2009. The claimant appeals 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 that requested 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. *Hamilton v. Gregory Trucking*, 90 Ark. App. 248, 205 S.W.3d 181 (2005).

An administrative law judge found in the present matter, "2. The claimant failed to prove that the respondents are responsible for medical treatment that was

administered by Dr. Sheehan and Dr. Hamilton." The Full Commission reverses this finding. The parties stipulated that the claimant sustained a compensable injury to her right ankle on May 22, 2008. The claimant was diagnosed as having a right ankle sprain. Dr. Sheehan saw the claimant on July 28, 2008 and noted that the claimant had pain in her left heel. Dr. Sheehan planned injection treatment for bilateral Achilles tendinitis. Dr. Hamilton saw the claimant on September 9, 2008 and arranged MRI testing, which showed the partial-thickness Achilles tendon tear on the right. Dr. Hamilton discharged the claimant from further treatment on December 23, 2008, essentially stating, "we do not do workman's comp." The record demonstrates that the treatment provided by Dr. Sheehan and Dr. Hamilton was reasonably necessary in connection with the claimant's compensable injury to her right ankle.

The respondents argue that Dr. Sheehan and Dr. Hamilton were not authorized treating physicians, and that the claimant did not follow the applicable provisions to properly obtain a change of physician. When a claimant seeks a change of physician, she must petition the Commission for approval. *Stephenson v. Tyson Foods, Inc.*,

70 Ark. App. 265, 19 S.W.3d 36 (2000). However, if the respondent-employer fails to give the claimant the change-of-physician form after her injury, the claimant is not required to petition the Commission in order to be treated by a competent doctor. *Id.* Act 796 of 1993, as codified at Ark. Code Ann. §11-9-514(c) (Repl. 2002), provides:

(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.

The Full Commission recognizes in the present matter that the claimant signed an **ACKNOWLEDGMENT OF MANAGED CARE NOTICE** on April 9, 2007, the date the claimant was hired with the respondent-employer. The **NOTICE** signed by the claimant on April 9, 2007 included, among other things, "the Change of Physician rules under a managed care system." However, the record does not demonstrate that the respondent-employer gave the claimant the approved change-of-physician form *after* notification of the compensable

injury on May 22, 2008. The claimant was therefore not required to seek a change-of-physician in order to receive reasonably necessary medical treatment from Dr. Sheehan and Dr. Hamilton.

B. Temporary Disability

An employee who has suffered a scheduled injury is to receive temporary total or temporary partial disability benefits during her healing period or until she returns to work, whichever occurs first. Ark. Code Ann. §11-9-521(a) (Repl. 2002); *Wheeler Constr. Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001). The healing period is that period for healing of the injury which continues until the employee is as far restored as the permanent character of the injury will permit. *Nix v. Wilson World Hotel*, 46 Ark. App. 303, 879 S.W.2d 457 (1994).

An administrative law judge found in the present matter, "4. The claimant failed to prove by a preponderance of the evidence that she is entitled to temporary total disability benefits from March 14, 2009 until July 19, 2009." The Full Commission affirms this finding. The parties stipulated that the claimant sustained a compensable scheduled injury on May 22, 2008. Dr. Berestnev assessed

"Right ankle sprain." Dr. Berestnev placed the claimant in a "moon boot" and return the claimant to alternate/modified work duties beginning May 22, 2008. The claimant testified that she returned to work, albeit with pain in her right foot. Dr. Berestnev returned the claimant to regular work duties on June 11, 2008. The claimant continued to receive medical treatment for her compensable injury, and she took a paid one-month leave of absence beginning October 1, 2008. The record indicates that the claimant again returned to regular work duties on or about November 4, 2008.

On or about March 11, 2009, Ayrelle Britt began an investigation with regard to an alleged violation of the respondent-employer's Harassment and Discrimination policy. Ms. Britt, the respondents' human resources manager, arranged interviews with the claimant and another employee regarding comments that had been exchanged in the workplace. Ms. Britt attempted to interview the claimant in a telephone conversation, but the claimant began screaming and shouting profanities at Ms. Britt and other employees on site. Ayrelle Britt described the claimant's behavior as "erratic and irrational, " and Ms. Britt stated that she was concerned for the personal safety of other employees in the

workplace. Therefore, the claimant's employment was terminated for "insubordination." A Separation Notification Form indicated that the claimant's last day worked and last day paid was March 13, 2009.

The claimant argues on appeal that she is entitled to temporary total disability benefits from March 14, 2009 until July 19, 2009. The claimant states that the respondent-employer made accommodations for the claimant to be able to work within her physical restrictions, but that the claimant had no options for work after her termination. Ark. Code Ann. §11-9-526(Repl. 2002) provides:

If any injured employee refuses employment suitable to his or her capacity offered to or procured for him or her, he or she shall not be entitled to any compensation during the continuance of the refusal, unless in the opinion of the Workers' Compensation Commission, the refusal is justifiable.

In the present matter, the Full Commission finds that the claimant unjustifiably refused employment suitable to her capacity and offered to her by the respondent-employer. The claimant agrees that suitable work was provided within the claimant's physical restrictions following the compensable injury on May 22, 2008. On or about March 11, 2009, Ayrelle Britt attempted to speak with to the claimant

with regard to a reasonable and legitimate investigation into an alleged violation of company policy. Yet, in responding to Ms. Britt's communication, the claimant's workplace behavior became so excessively angry, vulgar, and disruptive that her employment was terminated. We affirm the administrative law judge's finding that the claimant did not prove she was entitled to temporary total disability benefits from March 14, 2009 until July 19, 2009.

Based on our *de novo* review of the entire record, the Full Commission reverses the administrative law judge's finding that the claimant was not entitled to medical treatment from Dr. Sheehan and Dr. Hamilton. The Full Commission finds that the treatment of record provided by Dr. Sheehan and Dr. Hamilton was reasonably necessary in connection with the claimant's compensable injury. The instant claimant was not required to seek a change-of-physician in order to receive reasonably necessary medical treatment from Dr. Sheehan and Dr. Hamilton. We affirm the administrative law judge's finding that the claimant did not prove she was entitled to temporary total disability benefits from March 14, 2009 until July 19, 2009. The record demonstrates that the claimant unjustifiably refused

employment suitable to her capacity offered to her by the respondent-employer.

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

IT IS SO ORDERED.

A. WATSON BELL, Chairman

Commissioner McKinney concurs in part and dissents in part.

CONCURRING DISSENTING OPINION

I respectfully concur in part and dissent in part from the majority's opinion. Specifically, I concur in the majority's finding that the claimant failed to prove by a preponderance of the evidence that she was entitled to temporary total disability benefits for the period March 14, 2009 to July 19, 2009. However, I must respectfully dissent from the majority's finding that the treatment by Dr. Sheehan and Dr. Hamilton should be paid by the respondents. In my opinion, the claimant has failed to meet her burden of proof.

My review of the evidence demonstrates that neither Dr. Sheehan or Dr. Hamilton were authorized treating physicians. The claimant was not referred to either doctor by an authorized treating physician. Nor did the claimant request a change of physician as set forth in Ark. Code Ann. § 11-9-514.

As the majority has stated, the record does not demonstrate that the respondent employer gave the claimant the approved Change of Physician Form after they were notified of the claimant's compensable injury on May 22, 2008. Therefore, the claimant was not required to seek a change of physician in order to seek treatment from Dr. Sheehan and Dr. Hamilton. My review of the evidence demonstrates that there was nothing in the evidence showing that the claimant did not receive this notification. For the majority to conclude such requires conjecture and speculation. Conjecture and speculation, 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 Constr. Co., et al v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1979); Arkansas Methodist Hosp. v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993). Therefore, I must respectfully dissent

from the majority's finding that the respondents are responsible for the medical treatment rendered to the claimant by Dr. Sheehan and Dr. Hamilton.

KAREN H. McKINNEY, Commissioner

Commissioner Hood concurs, in part, and dissents, in part.

CONCURRING AND DISSENTING OPINION

After my de novo review of the entire record, I concur in part but must respectfully dissent in part from the majority opinion. I agree with the majority opinion that the respondents are responsible for the medical treatment by Dr. Sheehan and Dr. Hamilton. However, I disagree on the issue of temporary total disability benefits. I find that the claimant is entitled to temporary total disability benefits from March 14, 2009 to July 19, 2009. I also find that the record is insufficient to determine whether offset either for group health insurance benefits or unemployment benefits is appropriate, and that the claimant is entitled to an attorney's fee.

TESTIMONY

The parties stipulated that the claimant sustained a compensable injury to her right ankle on May 22, 2008. The claimant, twenty-six years old at the time of the hearing, testified that she went to work for the respondents in April 2007 as a caretaker on the Hiwassee Hog Farm. She was a lactation worker, working with the sows and baby pigs. The claimant testified that, on May 22, 2008, at five o'clock in the morning, she fell as she left a barn with a co-worker. She testified that she heard and felt a pop in her right leg. She stayed on the ground, while her co-worker called her supervisor, Chris Tart, the farm manager. Tart and her co-worker carried her to the office, because she could not get up or walk. She testified that they called a "bunch of people" to find out what needed to be done and finally took her to the company doctor, Dr. Berestnev, at nine o'clock that morning, four hours after the incident.

The claimant explained that the company doctor took an x-ray and put her in a boot and crutches for a day. He did not do an MRI. She testified that she returned to work the next day, but she still had problems, including

severe pain at the back of her right foot. She had to continue to work. She returned to the company doctor three times. She testified that the company doctor said she had a sprained ankle, and he released her. When he released her, she still had pain. She was still working. The doctor restricted her from climbing, but there was no climbing with her job. The claimant was doing the same work before and after the injury.

The claimant stated that she attempted to return to the company doctor. She called Ayrelle Britt, the HR manager, who did not return her calls. When she was transferred to the Decatur Hog Farm, she talked to Chris, Merrill and Jason, the managers at the Decatur farm, who told her they had been trying to call Britt, but she would not return the calls. The claimant explained that she was transferred to Decatur, because it was closer to where she lived. She told Chris, Merrill and Jason that she was still having problems with her right foot, and that she needed to go back to the doctor. They did not send her to another doctor.

The claimant testified that she started seeing Dr. Sheehan, a podiatrist whom her mother had used. She used

her group health insurance. He took an x-ray of her foot and diagnosed tendinitis. He gave her two injections. The claimant testified that he injected both because since she had problems in the right foot, she probably had it in the left foot as well. She did not complain of pain in both heels, but he wrote down bilateral heel pain. The claimant testified that she did not tell him she had the pain constantly for thirteen months. He examined the first heel, did an x-ray, and then examined the second. The claimant testified that Dr. Sheehan wrote out some restrictions, which she turned in to Jason and Chris, her supervisors. She did not keep a copy. The restrictions were light duty and to stay off her foot. Jason and Chris shared responsibility for her work duties. Her work was not changed when she turned in Dr. Sheehan's light duty note. She saw Dr. Sheehan twice.

The claimant stated that she saw Dr. Sheehan on August 21, 2008, because her right heel was still hurting. She was given injections in both heels. He gave her written restrictions, which she gave to the farm. She did not keep a copy.

The claimant explained that Dr. Sheehan's treatment did not help, so she went to Dr. Hamilton, who was an orthopedic specialist, using her group health insurance. He ordered an MRI, put her in a new boot, a soft cast and then a hard cast. Her restrictions in the boot were to be non-weight-bearing and use crutches. The claimant testified that she took the restrictions with her and returned to work where she was put back on her regular duties. Next, Dr. Hamilton put her in a soft cast. She was still on crutches. The claimant testified that while in the soft cast, she had a leave-of-absence at the doctor's request. She gave the paperwork to the doctor, who faxed it out to the farm. She was off work for one month, during which time she received short-term disability benefits. She did not complete any paperwork herself. She thought she needed to be off work, because she could not walk due to pain. After that month, she still had pain. The claimant testified that then Dr. Hamilton put her in the hard cast when she returned to work regular duties. She last saw Dr. Hamilton on December 23, 2008, because he did not take workers' compensation patients, and she was going to pursue a claim.

The claimant testified that she saw her family doctor for regular issues. In Dr. Honderick's notes, on September 4, 2008, he noted pain in her Achilles tendon on the left, but she complained of right pain, not left. She did not complain about her left heel. The doctor did not examine both heels. He told her to get some inserts for her shoe.

The claimant stated that, when she returned to work, she had a problem with Merrill not honoring her restrictions. After about a month, Britt called the farm and, on speaker phone, told Merrill and the other farm supervisors to accommodate her.

The claimant explained that two or three months after she returned to work, the respondents sent her back to Dr. Berestnev, who looked at her foot, put her in another boot and referred her to Dr. Sites. Dr. Sites ordered another MRI, put her in a cast, and then a boot, with restrictions to be non-weight-bearing. Dr. Sites referred her to Dr. Pleimann. He looked at her foot and scheduled surgery. She had surgery on July 20, 2009.

The claimant testified that Jason and Merrill continued to defy Ayrelle Britt and ignore her restrictions.

She told Britt, and Britt talked to Merrill, and after that, she had no more problems with her restrictions. She turned in five or six notes about her restrictions to Chris, Merrill, and Jason, in person, or to their desk.

The claimant stated that, in March 2009, her supervisors were Chris and Randy, because Merrill had just left. Randy came to the farm on March 1, 2009. The employees on the farm were Ashley, Merrill, Paul, Chris, Randy, Eric, Bobby, and the claimant. The claimant testified that she was terminated around March 20, 2009. Lonnie Jepson, with the respondents' "ethics online" program, terminated her. She called and talked to him. At that time, she was still under restrictions by Dr. Sites.

The claimant testified that, on her last day of work, she and Britt talked about Eric and some things that were said. The claimant told Britt what Eric said to her, and Britt told her that what he said was not the issue, but what the claimant said was a problem. Eric was a co-worker with whom she had a problem: "He was always calling me names, causing problems ever since he had got out there." He had been working there a couple months. While he was there, she was stationed in Barn 42, under her restrictions.

Barn 42 was where the office was and where gilts were bred. She had no duties at all. While she was in Barn 42, she was on crutches. She had made complaints to Chris about Eric, but nothing was done. The claimant explained the conversation with Britt:

Well when I was talking to her I just told her what had happened and she kept saying that it wasn't an issue. And I told her that that wasn't fair that I was getting in trouble and Eric wasn't. And she just constantly kept telling me it wasn't a problem, it wasn't a problem what he did.

The claimant testified that she hung up on Britt, because Britt would not listen to what the claimant was saying. The claimant told Britt that "it wasn't right." Britt did not tell her why Eric's behavior was not a problem.

The claimant stated that during her conversation with Britt, she used curse words, but only to report the words Eric called her. Otherwise, she did not curse. After she hung up on Britt, she went to Barn 43 to use the bathroom. There was no restroom in Barn 42. Barn 43 was a quarter or a half-mile away. That was what she normally did. She talked to a couple of co-workers. Then she returned to Barn 42 to sit at her desk. Randy and Chris

pulled up and told her to go home, that she was on leave until further notice. It was all over the issue with Eric. Randy offered her a ride, which she declined. The claimant testified that she did not use curse words. She walked to the gate, crying, and left the property. She called Britt two or three hours after she left and left voicemails. Britt did not call back, and they did not speak. Then she called the ethics hotline, because what they did to her, and not to Eric, was not fair. She talked to Lonnie Jepson who asked her to fax him a statement of what happened, which she did.

The claimant testified that she had never had a disciplinary action or a written warning.

The claimant noted that she had not worked since her termination. She could not find a job within her restrictions. She filed for and received unemployment benefits the next week. She told the unemployment people that she had restrictions and she had been terminated. She filled out some paperwork over the phone.

The claimant stated that she signed an acknowledgment of managed care on April 9, 2007, which is when she was hired.

The claimant stated that she did not recall complaining to her family doctor, Dr. Honderick, on February 11, 2008 that her feet were hurting all the time. She did not recall getting a diagnosis of plantar fasciitis. She used her group health insurance whenever she was sick and had to see her family doctor.

The claimant testified that she never had an MRI of her left heel or foot.

The claimant explained that the pain in her right foot after her injury was at the back of her foot and ankle "and would run up to the middle of my calf and on my ankle around my ankle." The injury did not hurt the bottom of her heel at all. When she went to Dr. Sheehan, she told him that the back of her heel was hurting and up the back of her leg.

The claimant explained that Dr. Berestnev gave her a written restriction of no climbing when she first got hurt, which she took to the farm. She did not keep a copy. She testified that after she had seen the other doctors, and she returned to Dr. Berestnev, he put her on light restrictions. He wrote those restrictions down, and she turned them in at work. She did not keep a copy of them, because she did not think she needed to. The claimant

testified that if she ever was hurt again, she would keep copies of everything.

The claimant testified that she called and left voicemails for Britt numerous times. When she worked at Decatur, she called every couple days about her foot, that she needed to see a doctor. She would leave that information on voicemail and ask Britt to call her back. Since she went to work for the respondent-employer, she probably called twenty times. Out of those twenty calls, Britt returned her call perhaps five times. The claimant just left a normal message that she needed to go to the doctor about her foot. She called so many times, because "I needed to see a doctor and it was hurting." She did not have the exact dates she called, but it was during work hours. The claimant testified that she did call several times in the space of one hour on the 13th. She called Britt about going to the doctor, because she was the human resources person. The employees did not have contact with the nurse. Judi Smith was the nurse, way out in Holdenville, but she was assigned to the claimant's facility.

The claimant stated that Britt did not indicate she had anything to do with her workers' compensation claim. The claimant did call her about going to the doctor. She did not get documents about her claim from Britt. Britt did manage her workers' compensation restrictions. The claimant called Britt, and not the nurse, because "she's the person you're supposed to call if there's any problems on the farm and so I called her and was hoping that she could tell me somebody to call." Britt never told the claimant who to call. The claimant testified that Britt told her she would "look into it."

The claimant testified that after seeing the statements of Randy and Britt, she stood by her testimony at the hearing.

Ayrelle Britt testified that she worked for the respondent-employer as the complex human resources manager. She was responsible for both the facilities in which the claimant worked. She knew the claimant as an employee, and she approved her transfer from Hiwassee to Decatur. She was the custodian of the personnel files of the employees of those facilities.

Britt testified that, in March 2009, Randy Berry prepared and faxed to Britt a statement for the claimant's file, Respondent's Exhibit 3. She gave it to Lonnie Jepson. The document was a part of the claimant's file, and it was considered in making the decision to terminate her. At the point that Britt requested Berry's statement, she was aware that the claimant had an ongoing workers' compensation claim. The personnel file was routinely used in workers' compensation litigation if it was directly related to the reason for termination. She received Berry's statement on March 13, 2009. Britt testified that she would have to look to determine if she had the originals of Randy's statement. Typically they were faxed, and then the originals were brought in later. She believed she had the original at the office.

Britt testified that during the claimant's employment, she received voicemails from the claimant. There would be several, first a calm message, then ten to twenty minutes later, a more upset message, then a third, even up to five, with erratic behavior, all within an hour. Britt returned the calls when she received voice messages. Britt said that she never failed to return a call.

Britt testified that in her statement, she noted that the claimant would call repeatedly, getting more and more agitated. The claimant did not call her trying to see a doctor. Britt also testified that the only day that she could say that the claimant called repeatedly was on December 18. When asked if she had any reason to believe that the claimant might need medical attention, as she was on the work site on crutches, Britt stated, "Until she communicated to me that she needed anything, I was never - I had no way of knowing. I've never seen her, never till [sic]..."

Britt testified that she discussed the claimant's accommodations for the first time on December 18, 2008. The claimant complained about the lack of accommodation of her work restrictions. She instructed Merrill Reynolds that the instructions which the claimant reported had to be followed until the written restrictions from the doctor were obtained. She never had written instructions. The claimant just communicated the instructions verbally. She had to instruct Merrill on this issue twice. The claimant had called, very upset, that her restrictions were not being followed. Britt's second conversation with Merrill resolved

the problem to her knowledge. The respondent made work available to her within her restrictions. Had she not been terminated, she would still have work available to her.

Britt explained that the respondent-employer prohibited the use of profanity in the workplace. All new hires were made aware of the policy during orientation. New hires were also made aware of the harassment and discrimination policy. The claimant was terminated for insubordination, after shouting and using profanity to Britt and to Randy on the 13th. Britt stated that Respondents' Exhibit 2, pages 5-8, was her statement of the events that occurred leading up to the claimant's termination. She prepared the statement the Monday following the 13th. Britt testified that the claimant left voicemails for her after she was sent home for on the 13th. Britt called back but was unable to reach the claimant. Britt participated in the decision to terminate the claimant. The claimant never related any prior problems with Eric during her investigation on the 13th. She never reported any inappropriate behavior by Eric before the hearing. Britt did not ask the claimant to write a statement about what happened to her that day. Lonnie would have done that.

Britt would have called and left a message to respond to the claimant's call on the 13th.

Britt testified that she was responsible for investigating the harassment complaint. She did not tell the claimant that what she said was worse than what Eric said. When Britt returned the claimant's call, she left a message which said she needed a written statement. She did not send a request in writing. Britt had already spoken with Eric.

Britt testified that she spoke to Jepson after the 13th. He told Britt not to talk to the claimant and to let him handle it. Britt testified that, prior to talking to Jepson, she specifically told the claimant they needed to continue the investigation, but she did not specifically say that she needed to write a statement. That occurred "more while I was on the phone with Randy." She told Randy Berry to tell the claimant that Britt needed to finish the investigation. After the claimant hung up on her, Britt never spoke directly to her again.

Britt testified that she does not deal with workers' compensation claims. That information does not go in her personnel files. Her personnel files would contain

disciplinary action records, application and orientation records. Documents related to harassment or discrimination violations were kept in another file. Britt's statement was not in the claimant's personnel file because of the harassment and discrimination issues. Randy's statement did not address the harassment and discrimination issues, so it was in the personnel file. Anything related to harassment and discrimination went in harassment and discrimination investigation files. There was a medical file, as well, kept in Oklahoma by the occupational health nurse. Britt did not maintain any medical files. However, she had knowledge of the files maintained by the company.

Britt stated that she was responsible for the personnel file on the claimant, and the harassment and discrimination investigation file. Randy's statement was kept in the personnel file. As the keeper of the personnel file, Britt did not know why that statement was only recently provided to the respondent attorney. The active files of terminated employees were switched to separated team member files, and "it may have been placed later." On Randy's statement, Britt thought the fax mark "got cut off." There was no mark on the paper. The date was cut off. In

the personnel file, if the employee had any disciplinary notices, the documentation should be in the file. There were none in the claimant's file. Britt did not keep phone logs. Notes regarding medical restrictions were kept with the occupational health nurse and the medical file. Britt did not have access to the respondent's medical file on the claimant. She could not explain why Dr. Berestnev's notes were not provided in discovery with the other records. In the personnel file, there was nothing from Lonnie Jepson. Once the claimant complained about Britt, Jepson, human resources director at corporate, would take over. She would not get the records of the investigation since she was a subject of it.

Britt testified that the statement from Eric would be in the harassment and discrimination file. In Eric's written statement, he said it was just all in good fun. Britt testified that Randy Berry said that when he overheard the exchange between Eric and the claimant, he really did not know if he heard the whole thing.

DOCUMENTARY EVIDENCE

The claimant signed an "acknowledgment of managed care notice" on April 9, 2007.

The claimant saw Dr. Honderick on February 11, 2008, because her feet were hurting all the time. He diagnosed plantar fasciitis.

On May 22, 2008, the claimant saw Dr. Berestnev for a workers' compensation injury resulting in a right ankle sprain. She related that she was walking from one feed barn to another and twisted her ankle on a rock. She complained of right ankle pain. Swelling was observed. She was given a boot, crutches, ice, and pain relievers. She was to avoid climbing. A letter to Judi Smith, the respondent-employer's nurse, from Dr. Berestnev, stated this restriction. The claimant returned to Dr. Berestnev, on May 28, 2008, who noted that her right ankle sprain was healing and changed her cast. He returned her to work that day. On June 11, 2008, Dr. Berestnev released the claimant to regular duties.

The claimant saw Dr. Sheehan on July 28, 2008, complaining of bilateral heel pain for thirteen months. He diagnosed the claimant with bone spurs and Achilles tendinitis in both heels and performed injection in both heels. The handwritten notes from this visit indicate that the claimant reported a right ankle sprain which still

swelled after a work injury ten weeks prior, and bilateral Achilles bursitis/tendinitis for one year. On August 21, 2008, Dr. Sheehan assessed retrocalcaneal exostosis bilateral, which is the presence of heel spurs. He treated the severe pain from the heel spurs with a nerve block steroid injection in each heel. The notes indicated that the claimant was seen with complaints of continued soreness in her right ankle, and that her heels had hurt for one year.

The claimant returned to her family doctor, Dr. Honderick, on September 4, 2008. His notes reflect complaints of pain in her Achilles tendon on the left. She related that she was on her feet all day long on concrete. She reported seeing a podiatrist who did bilateral heel injections, with no relief. The diagnosis was plantar fasciitis and Achilles tendinitis. She was to use shoe inserts and to stay off her feet entirely for one week.

On September 9, 2008, the claimant saw Dr. Hamilton with complaints of right heel pain, where the Achilles tendon is. She told Dr. Hamilton that she had a cortisone injection in each heel one month ago, which only helped for two or three days. He observed mild posterior

edema at the Achilles tendon and severe pain on palpation of the posterior distal Achilles. His differential diagnosis was Achilles tendinitis versus tear. He sent her for an MRI, which was done on September 22, 2008. The MRI of the claimant's right ankle showed an incomplete inside tear. Dr. Hamilton stated there was no need for surgery, and that she needed a boot and rest, then physical therapy. She was fitted for a boot on September 30, 2008. She reported to Dr. Hamilton that she hurt more than she did at her first visit. She was restricted to partially-assisted weight-bearing. On that date, the claimant signed a leave of absence application for FMLA leave. The form states that the injury was not work-related. The handwriting on the form is consistent with the signature of Phyllis Edwards, the respondent-employer's benefits counselor.

The claimant returned to Dr. Hamilton on October 14, 2008, stating that her right foot was not any better. She had been primarily non-weight-bearing, and off work, as well. He observed edema and pain on palpation in her posterior right Achilles. His diagnosis remained an Achilles tendinitis/partial tear right Achilles. On October 21, 2008, Dr. Hamilton signed a return-to-work form for her

partial Achilles tear. Judi Smith signed the same form on November 4, 2008.

The claimant returned to Dr. Hamilton on November 17, 2008, noting that her swelling returned last week during and after physical therapy sessions, and her right leg became dark colored. She still had a lot of pain in her right Achilles area. She had completed six physical therapy sessions. Dr. Hamilton observed edema and pain on palpation at the posterior right distal Achilles. He assessed an intrasubstance Achilles tear with pain secondary to tear. He dismissed physical therapy and put her in a compression cast.

The claimant saw Dr. Hamilton on December 3, 2008 and again on December 23, 2008. She could not tell that the cast helped. Her foot still hurt. Dr. Hamilton made the same clinical observations. He noted her great pain and assessed a healing Achilles partial tear, returning her to a compression cast. On December 23, 2008, Dr. Hamilton faxed a letter to Judi Smith, stating that his office did not take workers' compensation cases. He would continue to see her if she decided not to pursue a claim. He left the issuing of restrictions to the company physician.

The claimant returned to Dr. Berestnev on January 16, 2009 for a follow up on her right ankle sprain. He noted that she reported long term bilateral heel pain to Dr. Sheehan. He also noted the MRI findings showing the incomplete tendon rupture on the right. He remarked that Achilles tendon injuries are "at risk for propagation." He stated that the claimant remained symptomatic. He assessed a right ankle sprain and right Achilles tendinitis with a partial tear of the right Achilles tendon. He planned an MRI to check for propagation of the tear. She was to use a pain gel and ace bandage.

The January 26, 2009 MRI showed a prominent partial thickness tear of the distal Achilles tendon where it inserted upon the calcaneus. The intrasubstance tear shown in September 2008 had progressed. Dr. Berestnev stated on February 3, 2009 that she had a partial tear of her right Achilles tendon with progression of the findings from September 2008. He recommended evaluation by orthopedic surgeon, Dr. Pleimann. She was to continue using the ace bandage and avoid pushing or pulling carts and climbing.

The claimant was seen on February 5, 2009 by Dr. Sites, who assessed right Achilles tendinopathy with partial tear, chronic. He felt that her treatment needed to "start back at square one." He put her in a cast and crutches, non-weight bearing, with sit-down duties. He noted that she felt that her restrictions were not previously honored, because she sought treatment outside workers' compensation.

On February 26, 2009, the claimant returned to Dr. Sites, who put her in a walking boot, with the same work restrictions. On March 19, 2009, Dr. Sites planned physical therapy for conditioning and work hardening. He began the process of weaning her off of crutches and cast, increasing her work load incrementally, and expecting maximum medical improvement in about eight weeks. On April 16, 2009, Dr. Sites suggested a change in physical therapy providers to increase the modalities available, and stated that if therapy did not improve her situation, shockwave therapy and surgery would be considered. Her work status remained the same.

On March 24, 2009, a separation notification form was completed, terminating the claimant for insubordination.

Two statements are in the record, describing the events surrounding the claimant's termination.

On July 2, 2009, Dr. Pleimann evaluated the claimant. He assessed a right chronic insertional Achilles' tendinitis with a non-healing partial tear. He recommended debridement and repair of her Achilles' insertion with a calcaneal exostectomy, possible "gastroc slide," and possible FHL transfer. He noted that extensive conservative treatment was not successful.

On July 20, 2009, Dr. Pleimann performed a right insertional Achilles debridement and reconstruction, right leg gastrocnemius recession, and exostectomy right calcaneus. Her post-operative diagnosis was right insertional Achilles tendinitis with partial tear, painful exostosis right calcaneus, and gastrocnemius contracture of right leg. During the procedure, Dr. Pleimann found a high-grade partial insertional Achilles rupture with granulation tissue at chronic rupture site.

The claimant returned to Dr. Pleimann on August 7, 2009, reporting that she was doing well, with minimal discomfort. She was placed in a dial boot, with instructions on changing the degree of flexion

incrementally. On September 17, 2009, she reported that she was doing very well, with minimal pain. Dr. Pleimann directed her to resume physical therapy for strengthening and to begin to wean out of the boot, expecting her release in six weeks.

ANALYSIS

I. MEDICAL TREATMENT OF DR. SHEEHAN AND DR. HAMILTON

The majority has found that the claimant is entitled to the requested medical benefits, because the change of physician rules did not apply due to the failure of the respondent to deliver notice to the claimant in a timely fashion. I agree with the result but write separately to address both issues presented by the respondents' purported method of notice.

Ark. Code Ann. Section 11-9-514 prescribes the "change of physician" rules for the selection of an authorized medical provider for the treatment of a compensable injury. The statute also requires that the employer provide notice of the employee's rights and responsibilities concerning a change of physician, upon notice of injury. The consequences for the failure to provide such notice is that the change of physician rules do

not apply. In this claim, the acknowledgment purported to satisfy the notice requirement is ineffective, due to the timing of the document's signing and the content of the document.

A. Timing of notice

The claimant received and signed a document entitled "Acknowledgment of Managed Care." This was presented at the hearing apparently to serve as a notice of the rules concerning change of physician under Ark. Code Ann. Section 11-9-514. She received the document and signed it on April 9, 2007, when she was hired, as part of the orientation process. There is no evidence of any other form of notice to the claimant. The claimant was injured on May 22, 2008.

The fact that the claimant signed a document on April 9, 2007, purporting to inform the claimant of the rules regarding change of physician, has no bearing on the respondents' liability for the medical treatment by Dr. Sheehan and Dr. Hamilton. Arkansas Code Annotated Section 11-9-514(c) requires:

(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. (emphasis supplied).

There is no evidence that the claimant received a notice of the change of physician rules, compliant with the statute and the Commission's mandate, after the injury. Therefore, the change of physician rules do not apply, and the respondents are liable for the medical treatment of Dr. Sheehan and Dr. Hamilton. The Arkansas Court of Appeals has so held in Stephenson v. Tyson Foods, Inc., 70 Ark. App. 265, 19 S.W.3d 36 (2000). In that case, the Court stated that "if Tyson failed to give [the claimant] the change-of-physician form after her injury, [the claimant] was not required to petition the Commission in order to be treated by a competent doctor," under Ark. Code Ann. § 11-9-514(c). Stephenson, at 270. In that case, there was a factual issue as to when the Form N was signed. In this case, there is no question that the document purported to satisfy the notice requirement was provided and signed during her new employee orientation, over a year prior to

the compensable injury, and thus the purported notice did not satisfy the statute.

B. Validity of form of notice

The acknowledgment upon which the Administrative Law Judge and the respondents relied is insufficient to satisfy the requirements of the statute. The acknowledgment form states:

This is to certify I, Brandy Robertson, have received a copy of Notice (NCC-A-1) from my employer as required by the Arkansas Workers' Compensation Commission Rules and Regulations, Rule 33. This Notice includes all toll free numbers to be utilized for answers to questions about National Comp. Care's Managed Care Organization, information on how to access the MCO program, the employer's right to direct treatment to the primary care physician, and the grievance procedure within the MCO. The Notice also includes information regarding the prohibition against balance billing, penalties for misrepresentation, and the Change of Physician rules under a managed care system. Emergency treatment or if your workers' compensation claim is denied are the only exception to the managed care mandate [sic].

Respondents' form apparently refers to the Commission's Form H, Health Care Notice for Employees under Managed Care, which satisfies the requirement of Commission Rule 33. Respondents' form in no way satisfies the requirements of Rule 33, as it merely lists the types of information, but not the information itself, of Form H.

Even if it was sufficient for the purposes of Form H, it is insufficient to provide notice of the rules of change of physician under Ark. Code Ann. Section 11-9-514.

Respondents' form does not reference Form N, nor does it satisfy the purpose of Form N.

In Stephenson v. Tyson Foods, Inc., supra, the Court of Appeals noted that a verbal explanation of the change of physician rules was insufficient to satisfy the notice requirement, relying on the language in the statute, which requires the employer to provide to the injured employee "a copy of a notice, approved or prescribed by the commission, . . ." Stephenson, at 272. This analysis can be applied here as well. An acknowledgment that Form H was provided, with or without a signed Form H, cannot possibly satisfy the requirement of the statute to provide a notice "approved or prescribed" by the Commission. The acknowledgment is neither Form H or Form N.¹ Form H is to effectuate Rule 33, which does not discuss notice. Form H

¹ Worthy of note is the respondents' vigorous examination of the claimant on her failure to retain copies of the documentation of her restrictions for herself. If the respondents' wished to rely on a completed Form H or Form N to satisfy the notice requirements of the rules of change of physician, then the respondents should have retained a copy of either or both of those forms, in order to place them in evidence.

does not contain all the information of Form N, which is the notice approved and prescribed by the Commission to inform an injured employee of his rights and responsibilities under the change of physician rules. The Commission did not approve or prescribe Form H to satisfy Ark. Code Ann. Section 11-9-514(c). There is no evidence at all that a Form N even exists in this claim, despite the fact that the respondent-employer was on notice of the injury within minutes of its occurrence.

The respondents' failure to provide the claimant with a Form N and to provide it in a timely fashion bars their use of the change of physician rules to shield themselves from responsibility for the claimant's medical treatment.

C. Reasonable and necessary medical treatment of the claimant's compensable injury by Dr. Hamilton and Dr. Sheehan.

The change of physician rules do not apply to the claimant in this claim, because the respondents failed to provide a notice of them in accordance with Ark. Code Ann. Section 514(c). Thus, the respondents are responsible for the claimant's reasonable and necessary medical treatment of

her compensable injury, including that of Dr. Hamilton and Dr. Sheehan.

Under Arkansas Workers' Compensation Law, employers must promptly provide medical services which are reasonably necessary for treatment of compensable injuries. Ark Code Ann. Sec. 11-9-508(a) (Supp. 2005). Wal-Mart Stores, Inc. v. Brown, 82 Ark. App. 600, 120 S.W.3d 153 (2003). Injured workers have the burden of proving by a preponderance of the evidence that medical treatment is reasonably necessary for treatment of the compensable injury. Norma Beatty v. Ben Pearson, Inc., Full Commission Opinion filed February 17, 1989 (D612291). What constitutes reasonable and necessary medical treatment is a question of fact for the Commission. Wackenhut Corp. v. Jones, 73 Ark. App. 158, 40 S.W.3d 333 (2001). Reasonable and necessary medical services may include those 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. Jordan v. Tyson Foods, Inc., 51 Ark. App. 100, 911 S.W.2d 593 (1995). A claimant does not have

to support a continued need for medical treatment with objective findings. Chamber Door Industries, Inc. v. Graham, 59 Ark. App. 224, 956 S.W.2d 196 (1997). Treatment intended to reduce, or enable a claimant to cope with, chronic pain attributable to a compensable injury may constitute reasonably necessary medical treatment within the meaning of Ark. Code Ann. Sec. 11-9-508. Billy Chronister v. Lavaca Vault, Full Commission Opinion filed June 20, 1991 (D704562). Post-surgical improvement is a proper consideration in determining whether surgery was reasonable and necessary. Hill v. Baptist Medical Center, 74 Ark. App. 250, 48 S.W.3d 544 (2001), citing Winslow v. D & B Mechanical Contractors, 69 Ark. App. 285, 13 S.W.3d 180 (2000).

The claimant had a compensable injury to her right ankle in May 2008, which caused pain which did not resolve. The claimant was released by the company doctor, after three visits, on June 11, 2008. The claimant, operating without adequate notice of the rules concerning authorized medical treatment and change of physician, repeatedly requested assistance from her human resources director, Britt, with no result. There is no evidence that nurse Judi Smith, who did

not testify, was ever available to the claimant as a resource for her claim and treatment. The claimant finally sought her own care, when her efforts to go through her employer proved futile. She saw Dr. Sheehan on July 28, 2008. His notes reflect that she presented with two issues, a right ankle sprain arising out of a work injury ten weeks prior and bilateral tendinitis. Dr. Sheehan focused upon her bilateral tendinitis and heel spurs, but did not address her report that her "right ankle sprain still swells" of which he made a handwritten note. Again, Dr. Sheehan focused on her heel spurs in August, despite her complaints about both her heels and that her "right ankle [was] still sore." Dr. Sheehan's treatment was reasonable and necessary medical treatment of her compensable injury, because she presented with complaints specific to the right ankle. Dr. Sheehan did not focus on her right ankle, but this does not change the fact that he noted on each visit that she presented with right ankle complaints which she related to her work injury. The claimant attempted to get treatment of her work-related injury from Dr. Sheehan.

Likewise, the treatment of Dr. Hamilton was reasonable and necessary. The claimant saw Dr. Hamilton

with the same complaints of right heel pain at the location of the Achilles tendon, in September 2008. He sent her for an MRI, which showed an incomplete tear of her Achilles tendon. He used casts and physical therapy to treat the tear, but the claimant did not improve. In December 2008, Dr. Hamilton stated that, if the claimant intended to pursue treatment through workers' compensation, he could no longer treat her, as he did not treat through that system. At that time, the respondents sent the claimant back to the company's Dr. Berestnev, who relied upon the September 2008 MRI in his treatment plan. There is no question that Dr. Hamilton's treatment of the claimant's right Achilles tendon was reasonable and necessary treatment of her compensable injury. Dr. Hamilton's diagnostic work, in particular, led to her subsequent surgery and improvement.

In between seeing Dr. Sheehan and Dr. Hamilton, the claimant saw her family doctor in early September 2008, whose notes reflect a problem with the Achilles tendon on her left foot. There is no other place in the record where the claimant's left Achilles tendon was the subject of her complaints or where it was treated. In February 2008, the claimant had bilateral plantar fasciitis, which caused foot

and heel pain. In July 2008, the claimant complained of bilateral heel pain for thirteen months and a right ankle sprain at work, ten weeks prior. Dr. Sheehan did not address the sprain in his notes but assessed bone spurs and tendinitis arising out of the bilateral heel pain. Dr. Honderick also focused on heel spurs and tendinitis. When her ankle was finally repaired, the claimant had a torn Achilles tendon, as well as a heel spur, on the right. The claimant credibly testified, and the record supports, that she did not have an MRI of the left ankle. I find that Dr. Honderick's notation of a left ankle problem was a recording error, which does not undermine the extensive record showing that, while she had bilateral heel pain as a pre-existing condition, her ankle pain was on the right and did not arise until she fell on May 22, 2008.

The respondents are responsible for the medical treatment by Dr. Sheehan and Dr. Hamilton. To the extent that this treatment included her pre-existing condition of heel spurs or tendinitis or plantar fasciitis, all related to the heels, "the employer takes the employee as she is found, and circumstances which aggravate pre-existing conditions are compensable." Nashville Livestock Commission

v. Cox, 302 Ark. 69, 787 S.W.2d 664 (1990). The claimant's Achilles tendon tear was a new injury, initially confused with her pre-existing condition. The record supports this unequivocally.

II. OFFSET FOR GROUP HEALTH BENEFITS

The record is insufficient to determine what was paid under the group health insurance plan, and therefore, a determination cannot be made as to the respondents' entitlement to an offset for the amounts paid for the claimant's medical care under her group health insurance plan under Ark. Code Ann. Sec. 11-9-411. In Potlatch Corp. v. Word, 2009 Ark. App. 772, the Court of Appeals determined that there was insufficient evidence to make a decision regarding offset, where there was testimony by the claimant that he received short-term disability benefits for a specific period of time, but no other details. In this claim, there is even less information in the record on what amount was paid to whom, and what amount was paid by the claimant herself. Due to the paucity of the record on this issue, the request for offset of health benefits cannot be granted.

III. TEMPORARY TOTAL DISABILITY BENEFITS

Temporary total disability is that period within the healing period in which an employee suffers a total incapacity to earn wages. K II Constr. Co. v. Crabtree, 78 Ark. App. 222, 79 S.W.3d 414 (2002). In order to be entitled to temporary total disability compensation for a scheduled injury, the employee must prove: (1) that she remains within her healing period; and (2) that she has not returned to work. Wheeler Construction Co. v. Armstrong, 73 Ark. App. 146, 41 S.W.3d 822 (2001).

A. Returned to Work

The respondents argued, and the majority found, that the claimant's termination for insubordination caused her incapacity to work and not her injury, barring her receipt of indemnity benefits under Ark. Code Ann. Section 11-9-526. I vehemently disagree.

First and most importantly, the basis of her termination and whether she was incapacitated are irrelevant to the question of temporary total disability benefits. The majority finding is in direct contradiction to the case law. The Court of Appeals determined that Ark. Code Ann. Section

11-9-521 does not require a demonstration that an employee with a scheduled injury is incapacitated from earning wages:

We hold that the plain meaning of the language employed indicates that an employee who has suffered a scheduled injury is to receive temporary total or temporary partial disability benefits during his healing period or until he returns to work regardless of whether he has demonstrated that he is actually incapacitated from earning wages.

Wheeler Construction Co. v. Armstrong, 73 Ark. App. 146, 152, 41 S.W.3d 822, ___ (2001). In that case, the fact that the claimant had been incarcerated was immaterial to his receipt of indemnity benefits. Id. at 153.

The majority looked to the reasons for the claimant's termination to deny the claim under Section 11-9-526, despite the Wheeler case, and despite the case of Superior Industries v. Thomaston, 72 Ark. App. 7, 32 S.W.3d 52 (2000), which is precisely on point and controlling. In Superior, the Court of Appeals wrote:

Appellant's first argument on appeal is that the Commission applied the wrong standard in awarding the temporary total disability benefits. At the hearing, appellant argued that since they provided Mr. Thomaston employment within his restrictions, and because his termination was his own fault due to misconduct, he should not be entitled to any disability benefits. However, the Commission disagreed, stating "the basis for claimant's

employment separation is irrelevant in determining claimant's entitlement to temporary total disability benefits." The appellant submits that this statement is incorrect, and that the Commission should have made a factual determination as to whether Mr. Thomaston was fired for misconduct or fired because he was physically unable to work. If his termination was for misconduct, appellant asserts, his temporary total disability benefits should be reversed.

Arkansas Code Annotated section 11-9-526 (Repl. 1996) provides:

If any injured employee refuses employment suitable to his capacity offered to or procured for him, he shall not be entitled to any compensation during the continuance of the refusal, unless in the opinion of the Workers' Compensation Commission, the refusal is justifiable.

The appellant argues that we should use the above statute as a basis to deny appellee disability benefits by analogy. Its argument is that, if the employer provides suitable employment and a claimant is disqualified for refusing it, he should also be disqualified for getting fired for his own misconduct.

Appellant's first argument is reasonable and persuasive; however, it does not comport with the stricture of our current law. Arkansas Code Annotated section 11-9-704(b)(3) (Repl. 1996) provides that "any reviewing courts shall construe the provisions of this chapter strictly." Consequently, construing section 11-9-526 strictly, as we must, the controlling fact in this case is that Mr. Thomaston did not refuse employment; he accepted the employment and was later terminated not by his choice, but at the option of this employer. Since no provision enacted by the legislature supports the

appellant's position in this case, we are constrained to affirm.

When our General Assembly enacted Act 796 of 1993, it issued the following "Legislative Declaration," codified at Ark. Code Ann. § 11-9-1001 (Repl. 1996):

The Seventy-Ninth General Assembly realizes that the Arkansas workers' compensation statutes must be revised and amended from time to time. *Unfortunately, many of the changes made by this act were necessary because administrative law judges, the Workers' Compensation Commission, and the Arkansas courts have continually broadened the scope and eroded the purpose of the workers' compensation statutes of this state.* The Seventy-Ninth General Assembly intends to restate that the major and controlling purpose of workers' compensation is to pay timely temporary and permanent disability benefits to all legitimately injured workers that suffer an injury or disease arising out of and in the course of their employment, to pay reasonable and necessary medical expenses resulting therefrom, and then to return the worker to the work force. *When, and if, the workers' compensation statutes of this state need to be changed, the General Assembly acknowledges its responsibility to do so.* It is the specific intent of the Seventy-Ninth General Assembly to repeal, annul, and hold for naught all prior opinions or decisions of any administrative law judge, the Workers' Compensation Commission, or courts of this state contrary to or in conflict with any provision in this act. *In the future, if such things as the statute of limitations, the standard of review by the Workers' Compensation Commission or courts, the extent to which any physical condition, injury, or disease should be excluded from or added to coverage by the law, or the scope of the workers' compensation statutes need to be liberalized, broadened, or narrowed, those things shall be addressed by the General Assembly and should not be done by administrative*

law judges, the Workers' Compensation Commission, or the courts.

(Emphasis added.) If our workers' compensation laws are to be changed or broadened, this should be left to the legislature.

Superior Industries v. Thomaston, 72 Ark. App. at 10-12. In the current claim, the claimant was working restricted duty, actually just sitting through her shift not performing any duties, when she was terminated for alleged insubordination. The claimant did not refuse employment under Section 11-9-526. The claimant's termination is not a bar to the receipt of temporary total disability benefits. After her termination, the claimant was not working and was within her healing period. The basis of the termination is irrelevant for purposes of a claimant's entitlement to temporary total disability benefits according to the Superior Industries case. The Commission has held similarly in Narvaiz v. Tyson Poultry, Inc., Full Commission Opinion Filed June 10, 2010 (WCC No. F710978); and Biles v. Farmer's Co-op, Full Commission Opinion Filed May 23, 2001 (WCC No. F006691). Whether she could be performing restricted duty but for her termination or not, she was not working, and thus she meets one prong of the Wheeler test.

Secondly, the circumstances of the claimant's termination are more than suspect. The claimant was accused of using an inappropriate epithet and using profanity toward another employee, who stated that this was in fun and was not hurtful. During a phone call between Britt and the claimant, the claimant allegedly used profanity and behaved in an erratic manner, prompting Britt to have her sent home, and later justifying her termination for insubordination.

The claimant is a more credible witness than the respondents' witness Ayrelle Britt. Britt's testimony contained exaggerations and contradictions concerning the claimant's behavior, which undermine the credibility of her version of the events justifying the claimant's termination.

Britt testified and wrote in her statement that the claimant would call her repeatedly, becoming more agitated with each message. However, when questioned, Britt could only describe one date in which the claimant did this.

Britt testified that she was the custodian of the claimant's personnel record but could not explain why the statement of Randy Berry about the circumstances relating to her termination, which was maintained in that file, was not provided to the claimant during the discovery process.

Similarly, notes of Dr. Berestnev which would have been maintained by the nurse, Judi Smith, were not provided, despite her responsibility for workers' compensation issues at the claimant's work locations. Smith did not testify.

Britt testified that she did ask the claimant for her written statement of the events which were the subject of Britt's original investigation. Then, she stated that she did not have a chance to ask for a written statement before the claimant hung up on her, but that when she returned the claimant's phone call later that day, in the message she left, she asked for a statement. Later in her testimony, Britt gave a different answer, that she specifically told the claimant they needed to continue the investigation, but that she did not specifically say that the claimant needed to write a statement. Then she clarified that this happened while she was on the phone with Randy and that she told him to tell the claimant that Britt needed to finish the investigation.

The evidence concerning the exchange between co-employee Eric and the claimant seems to indicate that, while the behavior was less than politically correct, it was also mutual and in fun. The evidence, from both respondent and

claimant witnesses, also indicates that the claimant went through remarkable difficulties with her management team at the farm in getting accommodations for her restrictions. She likewise had difficulty getting adequate treatment for her injury from Dr. Berestnev, from Judi Smith who was responsible for workers' compensation claims, or from Britt, who was the human resources manager. The claimant also had an injury prone to, and which, in fact did, propagate. It got worse. Her pain never improved. It would be reasonable for the claimant to be stressed during the phone call from Britt.

Coupled with the above is the interesting fact that within one month of Dr. Sites' mention of possible surgery, the claimant was terminated for insubordination after two years of employment with an otherwise spotless disciplinary record.

Lastly, the respondents have demonstrated a level of disregard for the law of workers' compensation in Arkansas, by failing to provide notice as required by Arkansas Code Annotated 11-9-514 and by attempting to use a form signed at the claimant's hiring to serve as notice of rights which only were triggered upon her injury more than a

year later. The claimant testified as to her difficulty in getting further care, which is explained in the record not by any fault on the claimant, but by the failure of the respondents to provide the claimant with the information statutorily due her in order to proceed with the care of her injury.

The respondent-employer's justification for the termination of the claimant is not credible.

B. Healing Period

The healing period is statutorily defined as that period for healing of an injury resulting from an accident. Dallas County Hosp. v. Daniels, 74 Ark. App. 177, 47 S.W.3d 283 (2001). The healing period ends when the employee is as far restored as the permanent nature of her injury will permit, and if the underlying condition causing the disability has become stable and if nothing in the way of treatment will improve that condition, the healing period has ended. Crabtree, supra; Mad Butcher, Inc. v. Parker, 4 Ark. App. 124, 628 S.W.2d 582 (1982).

The persistence of pain may not, in and of itself, prevent a finding that the healing period is over, provided that the underlying condition has stabilized. Arkansas

Highway & Trans. Dept. v. McWilliams, 41 Ark. App. 1, 628 S.W.2d 670 (1993); J.A. Riggs Tractor Co. v. Etzkorn, 30 Ark. App. 200, 785 S.W.2d 51 (1990).

The claimant suffered a compensable injury, originally diagnosed as a sprained right ankle on May 22, 2008. Despite Dr. Berestnev's release after three visits, the claimant continued to have pain and swelling, for which she sought care from Dr. Sheehan, Dr. Hamilton and Dr. Honderick. Once Dr. Hamilton identified the source of her consistent complaints, the respondents sent the claimant back to Dr. Berestnev. This resulted in her treatment by Dr. Sites and Dr. Pleimann, who did surgery to successfully correct the claimant's progressively worsening Achilles tendon tear. The claimant underwent a long course of unsuccessful conservative treatment, which delayed the resolution of her pain and limitations and allowed the original intrasubstance tear to propagate. The claimant had surgery on July 20, 2009 and, on September 17, 2009, Dr. Pleimann stated that he planned to release the claimant to full duty, as tolerated, six weeks later. The hearing was on October 22, 2009, before that six weeks ended. The

claimant's healing period had not ended at the time of the hearing.

The claimant sought temporary total disability benefits from the respondents from March 14, 2009 to July 19, 2009. Because the claimant was within her healing period during that time and was not working, she is entitled to those benefits.

III. OFFSET FOR UNEMPLOYMENT BENEFITS

Respondents sought a credit for unemployment compensation received by the claimant against any temporary total disability benefits owing. Ark. Code Ann. Sec. 11-9-506 provides that, because the claim for temporary total disability benefits was controverted, and because the claimant is entitled to such benefits, "temporary total disability shall be payable to an injured employee with respect to any week for which the injured employee receives unemployment benefits but only to the extent that the temporary total disability otherwise payable exceeds the unemployment benefits." The record is insufficient to determine what was paid to the claimant in the form of unemployment benefits or when it was paid, and therefore, a determination cannot be made as to the respondents'

entitlement to an offset for those benefits. Due to the paucity of the record on this issue, the request for offset of unemployment benefits cannot be granted.

CONCLUSION

After my de novo review of the entire record, I concur in part but must respectfully dissent in part from the majority opinion. I agree with the majority opinion that the respondents are responsible for the medical treatment by Dr. Sheehan and Dr. Hamilton. However, I disagree on the issue of temporary total disability benefits. I find that the claimant is entitled to temporary total disability benefits from March 14, 2009 to July 19, 2009. I also find that the record is insufficient to determine whether offset either for group health insurance benefits or unemployment benefits is appropriate, and that the claimant is entitled to an attorney's fee.

PHILIP A. HOOD, Commissioner