

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F805104

JIMMIE REDMOND, EMPLOYEE	CLAIMANT
ST. JOSEPH'S MERCY HEALTH CENTER, SELF-INSURED EMPLOYER	RESPONDENT
SISTERS OF MERCY HEALTH SYSTEM, THIRD PARTY ADMINISTRATOR	RESPONDENT

ORDER FILED APRIL 27, 2011

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

Claimant represented by the HONORABLE LAURA BETH YORK,
Attorney at Law, Little Rock, Arkansas.

Respondent represented by the HONORABLE RANDY P. 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 December 3, 2010. The administrative law judge found that the claimant proved he was entitled to additional medical treatment. The administrative law judge found that the claimant proved he was entitled to temporary total disability benefits from August 8, 2008 through a date to be determined. After reviewing the entire record de

novo, the Full Commission affirms the administrative law judge's opinion.

I. HISTORY

Jimmie Redmond, now age 57, testified that he began working as a housekeeper for the respondent-employer in 2005. Mr. Redmond described his job duties as "mostly mopping and running the buffer....I was stripping and waxing floors." The parties stipulated that the claimant sustained a compensable injury on April 15, 2008. The claimant testified that he slipped on a wet floor: "I was walking, I went backwards and then to my right side and just fell - bang! - and hit my shoulder and my arm and my elbow....The pain was in my arm - the upper arm - and my elbow. That's where the pain was....my shoulder and my arm."

Larry Ramsay, PA, saw the claimant at St. Joseph's Mercy Business Health on April 15, 2008:

The patient is a 54-year-old male who reports last night, April 14th of 2008, while stripping floor he stepped over a wet spot and slipped and fell backwards, striking right shoulder. The patient then reported to St. Joseph Mercy Health Center emergency department and received x-rays, which were normal and then was instructed to report to the Business Health Clinic the next day. The patient currently feels right shoulder pain with movement, mostly on top portion. No numbness, tingling, swelling or warmth...

RIGHT SHOULDER EXAMINATION: No erythema, edema or ecchymosis....
No crepitation.

Larry Ramsay assessed "Right shoulder (deltoid) strain." Mr. Ramsay recommended conservative treatment and noted, "He was sent back to work with restrictions. He will follow-up in 7 days for reassessment."

Larry Ramsay saw the claimant on April 23, 2008 and assessed "Right shoulder strain, stable, but non-resolving....We will allow one week for improvement and consider additional imaging and/or physical therapy if condition warrants. Follow-up in one week to reassess condition."

Dr. Michael K. Atta examined the claimant on April 30, 2008 and assessed "Right shoulder strain to rule out rotator cuff injury." Dr. Atta scheduled an MRI of the claimant's shoulder and noted on May 8, 2008, "The patient's MRI revealed a focal full thickness partial width distal supraspinatus tendon tear." Dr. Atta assessed "Supraspinatus tendon tear" and noted, "The patient is being returned to work with restrictions until he sees an orthopedic surgeon to whom he has been referred. In the meantime he will be continued on his current medications."

He has expressed a full understanding of these instructions."

The claimant testified that he returned to light duty in accordance with Dr. Atta's release: "I was stamping the sheets and the pillow cases with a stamper. That was what I was doing in the laundry room." The claimant testified that Dr. Atta referred him to Dr. Smith. Dr. Bruce L. Smith performed an operation on May 20, 2008: "Acromioplasty of right shoulder." The pre-operative diagnosis was "Severe impingement, possible rotator cuff tear right shoulder." The post-operative diagnosis was "Severe impingement right shoulder." Dr. Smith's operative report stated, "The rotator cuff was not torn."

After surgery, the claimant followed up with Dr. Smith on May 30, 2008, June 16, 2008, and June 30, 2008. Dr. Smith noted on July 14, 2008, "Jimmie Redmond returns in follow-up with the acromioplasty of the right shoulder and has now reached maximum benefit of medical treatment and is released to return to work without restriction. He will return p.r.n."

The claimant testified that he returned to work for the respondent-employer following Dr. Smith's release on July

14, 2008, and that his job was cleaning carpets. The claimant testified, however, that "I could not squeeze the machinery. That's the pain. There was pain in my arm, my shoulder, and my hand."

Dr. Smith reported on July 22, 2008:

Jimmie Redmond returns in follow-up with the acromioplasty of the right shoulder. He was released to return to work and is really not happy about this.

EXAM: Today, he holds his right arm rigidly at his side. He also states he is unable to actively flex his elbow. He resists passive motion to the right shoulder and elbow.

PLAN: I discussed with him, he should be able to resume his regular activity. I reviewed his op note and records and basically he had an impingement syndrome and a standard acromioplasty. There was some suspicion of possible rotator cuff tear pre-op, but on careful visualization and surgery there was no rotator cuff pathology. He mentioned that he thought that he had had a complete rotator cuff repair. Nevertheless, his exam is somewhat inappropriate, as compared to his last visit. I think at this time, we need to consider getting a second opinion and we will defer this to workman's comp, pending their approval, etc.

The claimant testified on direct examination:

Q. Did you ever complain about your arm and your hand to anybody?

A. Yes.

Q. Who did you complain to?

A. Dr. Smith and to Carolyn in the employment office....HR....

Q. And were you allowed to go back to see Dr. Smith?

A. No.

Q. Who did you ask to go back to see Dr. Smith?

A. I went to Carolyn in HR....

Q. And you went to see [Dr. Puen] on July 22, 2008?

A. Yes....

Q. How did you get to Dr. Puen?

A. I drove.

Q. Well, did anyone refer you there?

A. Oh, I'm sorry. It was my understanding that I needed a second opinion, so that's where I went to.

Q. Why was that your understanding?

A. Because, when I talked to Carolyn, my understanding was from her that I needed a second opinion.

Q. Did she tell you what doctor you could go see?

A. No....

Q. Anybody ever tell you to go to your own doctor?

A. Yes.

Q. Who was that?

A. Well, Carolyn had said that I needed to let them (sic) prove to them that I needed more further treatment.

Q. So you went to Dr. Puen. Did anyone ever authorize that treatment? Did the workers' comp carrier ever say, "Hey, we'll pay for that"?

A. No.

Q. Did Carolyn ever tell you to go back to Dr. Puen?

A. No.

The record shows that the claimant sought treatment on his own with Dr. Roy L. Puen on July 22, 2008. The claimant agreed on cross-examination that Dr. Puen was his primary care physician. According to Dr. Puen's notes, the claimant reported that he was unable to lift his arm or hyper-extend his right upper extremity since surgery. Dr. Puen's handwritten impression appeared to be "R shoulder frozen v. neuropathology." Dr. Puen referred the claimant to Dr. Tucker.

The parties agreed that the respondents controverted additional benefits beginning July 22, 2008. Dr. R. Paul Tucker began treating the claimant on August 8, 2008:

This 64 year old right handed black man had a rotator cuff tear. He had surgery by Dr. Bruce Smith, and was better. He is still having a great deal of trouble.

He has been told he can return to work without problems, and he attempted to do so. He really cannot extend his arm up to 90 degrees and certainly cannot go above this level. He was walking in the hospital on a floor that had been stripped of wax. The stripping agent was still there. He slipped on the floor and fell. He hurt his hand. His right hand has been swollen and he has thickening in his hand. He cannot straighten out his elbow. He has areas of thickening and some nodules. The biggest nodule is at the base of the right thumb, on the side of the web between the thumb and first finger. I wondered about things such as rheumatic nodules, but they are not in the unusual places and this is the only one that is large enough to look like this....

We have a brief history and physical examination and this might have been done by Dr. Smith....Extension was 110 degrees. He cannot straighten his arm at the elbow, and 90 degrees is a right ankle (sic) 110 degrees is still 30 degrees short from going straight. He may be a little better than this how (sic). This is a real deficit. This has nothing to do with his shoulder. His grip is three out of five and his hand grip is weak. I should have measured this. I will do this in the future. He has pain in his hand, and this has not been specifically treated. He could have things such as injections into the palm of the hand, where he has tendonitis and areas of hardening. Mentation here was noted to be intact....

He did have the surgery by Dr. Bruce Smith on 05/20/2008 for his torn rotator cuff. He has a well healed incision on the right shoulder....

He has a firm nodule, about seven to eight millimeters in diameter, perhaps one centimeter, adjacent to the thumb, at the base of the thumb, in the web site of the thumb. In the palm of the right hand, he had a number of areas that seem to

be tendonitis. These are somewhat darkened and he has thickening of the tendons in his hand, possibly related to trauma. He does not have this in the left hand....

MOTOR: I tried testing power by holding his hand close to his side, to spare his shoulder. I could not do much testing. About the only things I could test were the small intrinsic hand muscles. These seemed to function fairly well. He could not seem to bear the pain in testing any major muscles in the arm or forearm. His grip strength is weak. The left arm has normal power....

IMPRESSION: The patient has some serious problems remaining in the right shoulder.

I would like to treat this now with steroid iontophoresis, moist heat, ultrasound, and massage....He will have this three times a week for four weeks, to start. I also placed him on a Medrol Dose Pack....He will try over-the-counter medicines such as Sports Cream, which may help his hand. He may need to have some injections in the palm of his hand and he could have Dr. Smith do this.

It is my opinion he should not return to work right now. It might be possible if he had some kind of work he could do, sitting at a desk and thinking, and doing things with just his left hand. He is unfortunately right handed....He will return soon for reevaluation.

The claimant testified on cross-examination that he went to Dr. Tucker on his own, without permission from the respondent-employer. The claimant testified on direct that the respondent-employer would not provide restricted work duties.

Dr. Tucker noted on September 12, 2008, "He was working in the hospital on the floor, and was slick. He fell and hurt his hand. His right hand is swollen. He has thickening of the hand....He cannot straighten the right arm at the elbow. This appears to be a definite real deficit. I can just look at his shoulder and see that it does not look like his left shoulder. Today I measured his arms, and at the axilla around the shoulder, on the left side, it was 32 centimeters and on the right, it was 30 centimeters. This was two centimeters smaller, a fairly large difference, in a man who has slender arms....His right hand is also swollen. I do not think he can return to work without problems. I think he should return to work, and he would like to return to work. He seems like an intelligent responsible man. He wants to work and would like to start on Monday, September 15th. I think he needs to be on light duty. He cannot do heavy janitorial type work with his current problem. I cannot imagine how anyone could say this. It would be very painful. He was given a Medrol Dose Pack, with one refill two weeks after he finished the first one. This may really help his shoulder...."

The claimant followed up with Dr. Tucker on November 26, 2008:

He suffered a rotator cuff tear. He cannot extend the right arm to 90 degrees. That is, he cannot abduct his arm right arm. He has had physical therapy, etc. He had rotator cuff surgery by Dr. Bruce Smith. He cannot straighten the right arm at the elbow. I think this is a separate lesion. His right arm measures 30 centimeters and the left 32 centimeters at the axilla, and this is fairly apparent in just looking at his arms. He has somewhat slender arms. His right hand is also swollen now, and it looks as if he has reflex sympathetic dystrophy. It is tender and there is clearly some swelling there. This is associated with other lesions often. He can abduct the right arm to about 75 degrees. He cannot reach 90 degrees.

He has had steroid iontophoreses and this has not relieved this condition. This would not help reflex sympathetic dystrophy.

I referred him to Dr. Arthur for possible superior sympathetic ganglion injection. This can sometimes give good relief.

He was on a Medrol Dose Pack. I see is a note that the last time he was here, they would not give him steroid iontophoreses. This makes no sense to me....

He had rotator cuff surgery on 05/20/2008. The right shoulder appeared to be healing well....

His right hand appeared to be swollen when he was here last. He had fallen and hurt his hand, and it was swollen as long ago as 09/12/08. At that time, the idea of reflex sympathetic dystrophy did not occur to me. I had hoped he would be able to return to light duty before now.

Dr. Tucker corresponded with the claimant on December 18, 2008:

I recall at one time, and we have a note about this, that you wanted to return to work on September 15th. It did not seem likely, particularly in the type of work you did, unless you do light duty work. It may be difficult to find light duty work when performing janitorial work and housekeeping.

It seems to be that you are an intelligent man, who is very alert and appropriate, and polite and cooperative. You have significant problems in the right shoulder, and I do not know how much this still persists. When we last saw you on November 26th, you were to have steroid iontophoreses. I do not know if you have been to see Dr. Arthur or not, for the question of a superior sympathetic ganglion injection. People sometimes get good relief of reflex sympathetic dystrophy, which seems to have occurred in your right hand. I have no information from you regarding this, and I do not seem to have any information from Dr. Arthur, that he has seen you. You need to have this done, as it could help.

It seems to me, with your intelligence and your pleasant personality, you could inquire of your employer about other types of employment, which is not as physical as housekeeping. You might consider this, and discuss this potential with the personnel department at St. Joseph's Hospital. I feel you could return to light duty work, if they could somehow manage this. I feel you could return to this type of work sometime after Christmas. If you were to continue doing janitorial work, I would suspect you would still have to be on light duty.

It is important that you do see Dr. Arthur.

The claimant's testimony indicated that he had not been able to see Dr. Arthur, "Because I don't have the money to pay for the treatments." The claimant's final follow-up visit of record with Dr. Tucker took place on March 26, 2009. Dr. Tucker noted in part on that date, "Workman's Compensation stopped five months ago. He has no disability. He has not applied for social security disability, and perhaps he should do this....He fell and hurt that hand, and this was swollen at first. It does not look swollen to me today. I feel he has a rotator cuff syndrome and I will try again to do the steroid iontophoreses. He will return in three months. He would like to do some kind of work."

A pre-hearing order was filed on June 23, 2009. The claimant contended that he was entitled to additional medical treatment, and that he was entitled to temporary total disability benefits from August 8, 2008 to a date to be determined. The respondents contended that they "paid benefits in this matter but controverted the claim on July 22, 2008."

The parties agreed to litigate the following issues:

1. Additional medical benefits.
2. Temporary total disability benefits.
3. Attorney's fees.

A hearing was held on September 11, 2009. At that time, the respondents contended that the claimant had received all benefits to which he was entitled. The respondents contended that the claimant reached maximum medical improvement when he was released by Dr. Smith on or about July 15, 2008. The respondents contended that, after July 15, 2008, the claimant sought treatment on his own which was not authorized and was not reasonably necessary.

The claimant testified that he was unable to make a fist with his right hand and that he could not lift his arm above his shoulder. The claimant testified that he would like to receive injection treatment from Dr. Arthur.

An administrative law judge filed an opinion on October 7, 2009. The administrative law judge found that the claimant proved additional medical treatment was reasonably necessary. The administrative law judge found that the claimant proved he was entitled to temporary total disability benefits from August 8, 2008 through a date to be determined. The respondents appealed to the Full Commission, which affirmed and adopted the administrative law judge's decision in an opinion filed February 4, 2010. The respondents appealed to the Arkansas Court of Appeals.

The Court of Appeals has reversed and remanded for the Commission to make specific findings of fact. *St. Joseph's Mercy Health Center v. Redmond*, CA10-334 (Sept. 22, 2010). The Court remanded the case to the Commission "for a specific finding on the issue of whether the requirements of section 11-9-514 were met before we consider any other issues presented."

The Full Commission filed an opinion on October 25, 2010 and remanded to the administrative law judge "for findings of fact on the issue of whether an exception to the change-of-physician rules applied in this case." The administrative law judge filed an opinion on December 3, 2010 and again found that the claimant proved he was entitled to additional medical treatment and 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 additional medical treatment is reasonably necessary. *Fayetteville School District 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, "3. The claimant has proven by a preponderance of the evidence that the additional medical he has requested is reasonable and necessary." The Full Commission affirms this finding. The parties stipulated that the claimant sustained a compensable injury on April 15, 2008. The claimant testified that he slipped on a wet floor, fell backwards, and hit his right shoulder, arm, and elbow. Dr. Smith performed an acromioplasty of the claimant's right shoulder on May 20, 2008. Dr. Smith pronounced maximum medical improvement and released the claimant on July 14, 2008. However, Dr. Smith noted on July 22, 2008 that the claimant was unable to flex his right elbow. The respondents controverted additional medical treatment beginning July 22, 2008, and the claimant presented on his own to Dr. Puen on

July 22, 2008. Dr. Puen noted that the claimant was "unable to lift his arm or hyper-extend his right upper extremity since surgery." Dr. Puen referred the claimant to Dr. Tucker.

Dr. Tucker began treating the claimant on August 8, 2008 and reported, incorrectly according to Dr. Smith's surgical report, that the claimant had sustained a right rotator cuff tear. Like Dr. Smith and Dr. Puen, however, Dr. Tucker noted that the claimant could not extend his right arm or straighten his elbow. Dr. Tucker reported, "The patient has some serious problems remaining in the right shoulder." Dr. Tucker mentioned an option of the claimant returning to Dr. Smith for further treatment. Dr. Tucker reported on September 12, 2008 that the claimant had "a definite real deficit" in his right arm. Dr. Tucker eventually planned a referral to Dr. Arthur for possible injection treatment. Dr. Tucker informed the claimant on December 18, 2008, "It is important that you do see Dr. Arthur." The claimant testified that he would like to treat with Dr. Arthur.

If an injury is compensable, then every natural consequence of that injury is also compensable. *Air*

Compressor Equip. v. Sword, 69 Ark. App. 162, 11 S.W.3d 1 (2000), citing *Hublely v. Best Western Governor's Inn*, 52 Ark. App. 226, 916 S.W.2d 143 (1996). The basic test is whether there is a causal connection between the two episodes. *Jeter v. B.R. McGinty Mechanical*, 62 Ark. App. 53, 968 S.W.2d 645 (1998). In the present matter, the Full Commission finds that the claimant proved the continuing problems with his right shoulder, arm, and hand were a natural consequence of the April 15, 2008 compensable injury. The record does not show that the claimant suffered from any problems with his shoulder or right upper extremity before the compensable injury. We find that the claimant proved he was entitled to at least one evaluation by Dr. Arthur, as recommended by Dr. Tucker. We also find that Dr. Tucker's treatment to date was reasonably necessary in accordance with the compensable injury. The Full Commission therefore affirms the administrative law judge's award of additional medical treatment.

B. Medical services and supplies - Change of physician

The Court of Appeals has remanded the case to the Commission for a specific finding with regard to whether the

requirements of Ark. Code Ann. §11-9-514(Repl. 2002) were met.

Statutory procedures regarding change of physician are set forth in Ark. Code Ann. §11-9-514(a) (Repl. 2002). Ark. Code Ann. §11-9-514(Repl. 2002) further provides:

(b) Treatment or services furnished or prescribed by any physician other than the ones selected according to the foregoing, except emergency treatment, shall be at the claimant's expense.

(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....

(f) When compensability is controverted, subsection (b) of this section shall not apply if:

(1) The employee requests medical assistance in writing prior to seeking the same as a result of an alleged compensable injury;

(2) The employer refuses to refer the employee to a medical provider within forty-eight (48) hours after a written request as provided above;

(3) The alleged injury is later found to be a compensable injury; and

(4) The employer has not made a previous offer of medical treatment.

An administrative law judge found in the present matter, "4. Respondents failed to prove that the claimant was provided the Change of Physician (AR-N) after the compensable injury, therefore claimant was not required to file a Change of Physician Petition to treat with a competent physician." The Full Commission finds that the respondents did not prove the employer or carrier delivered to the employee a copy of a notice explaining the employee's rights and responsibilities concerning change of physician. The parties stipulated that the claimant sustained a compensable injury on April 15, 2008. The claimant subsequently received authorized medical treatment from Mr. Ramsay, Dr. Atta, and Dr. Smith. After performing surgery in May 2008, Dr. Smith opined on July 14, 2008 that the claimant had "reached maximum benefit of medical treatment and is released to return to work without restriction. He will return p.r.n." Dr. Smith noted on July 22, 2008, "I think at this time, we need to consider getting a second opinion and we will defer this to workman's comp, pending their approval, etc."

The claimant sought treatment on his own with his primary care physician, Dr. Puen, beginning July 22, 2008,

and Dr. Puen subsequently referred the claimant to Dr. Tucker. The claimant plainly and repeatedly testified at hearing that the respondents did not authorize treatment with Dr. Puen or Dr. Tucker. The respondents on appeal assert that "it is beyond dispute that a signed AR-N is found in the Commission file." The Commission's file contains no such signed Form AR-N. Following the September 22, 2010 remand order and mandate from the Court of Appeals, the respondents proffered a Form AR-N, Employee's Notice Of Injury. The proffered exhibit was not received by the Commission until November 16, 2010 and there has previously been no such exhibit in the record before the Full Commission or in the Commission's file.

Ark. Code Ann. §11-9-705(c) (1) (B) (Repl. 2002) provides that each party shall present all evidence at the initial hearing. With regard to the issue of whether or not to allow submission of newly-discovered evidence, the Arkansas Supreme Court has set out the following prerequisites: "(1) Is the newly discovered evidence relevant? (2) Is it cumulative? (3) Would it change the result? (4) Was the movant diligent?" *Haygood v. Belcher*, 5 Ark. App. 127, 633 S.W.2d 391 (1982), citing *Mason v. Lauck*, 232 Ark. 891, 340

S.W.2d 575 (1960). In the present matter, the respondents seek to submit into the record what can only be characterized as newly-discovered evidence, a Form AR-N not received by the Commission until November 16, 2010. The Full Commission is unable to find that the respondents were diligent in proffering this evidence. The Full Commission therefore is constrained to find that the respondents did not deliver to the claimant a notice explaining the claimant's rights and responsibilities concerning change of physician. Since the evidence of record shows that the respondents failed to give the claimant the change-of-physician form after his injury, the claimant was not required to petition the Commission in order to be treated by a competent doctor. See *Stephenson v. Tyson Foods, Inc.*, 70 Ark. App. 265, 19 S.W.3d 36 (2000).

The Full Commission does not find that Ark. Code Ann. §11-9-514(f) (Repl. 2002) should apply to the instant claim. Compensability of the claimant's initial injury was not controverted by the respondents, and the claimant did not request medical assistance in writing prior to seeking unauthorized medical treatment with Dr. Puen beginning July

22, 2008. See *Lepel v. St. Vincent Health Servs.*, 96 Ark. App. 330, 241 S.W.3d 784 (2006).

C. Temporary Disability

The parties stipulated that the claimant sustained a compensable injury on April 15, 2008. The claimant initially received treatment for symptoms related to his right shoulder, *i.e.*, an unscheduled injury. Temporary total disability for an unscheduled injury is that period within the healing period in which the employee suffers a total incapacity to earn wages. *Ark. State Hwy. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). The Full Commission has found *supra* that the claimant's continued problems with his right upper extremity are a natural consequence of the April 15, 2008 compensable injury. To the extent that these continued problems can be considered a scheduled injury, an employee who has suffered a scheduled injury is to receive temporary total disability benefits during his healing period or until he returns to work regardless of whether he has demonstrated actual incapacity from earning wages. *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).

The instant claimant sustained a compensable injury on April 15, 2008. After operating on the claimant's right shoulder, Dr. Smith essentially pronounced maximum medical improvement and returned the claimant to work on July 14, 2008. The claimant testified that he attempted to return to work but was not able to use the required machinery to perform his job. Dr. Puen noted on July 22, 2008 that the claimant was unable to lift his right arm or hyper-extend his right upper extremity. Dr. Tucker opined on August 8, 2008 that the claimant "should not return to work right now." The claimant testified that restricted work duties with the respondent-employer were not available. The evidence demonstrates that the claimant remained within a healing period for his compensable injuries as of August 8, 2008. In addition, the claimant was totally incapacitated from earning wages and did not return to work after August 8, 2008. Therefore, the Full Commission affirms the administrative law judge's finding that the claimant proved

he was entitled to temporary total disability benefits beginning August 8, 2008 until a date to be determined.

Based on our *de novo* review of the entire record currently before us, and in accordance with the mandate from the Arkansas Court of Appeals, the Full Commission finds that treatment provided by Dr. Puen and Dr. Tucker was reasonably necessary in accordance with Ark. Code Ann. §11-9-508(a) (Repl. 2002). The claimant proved that he was entitled to at least one treatment evaluation by Dr. Arthur, as recommended by Dr. Tucker. The change of physician rules do not apply in the present matter, because the respondents did not prove that the claimant was furnished a copy of a notice explaining the claimant's rights and responsibilities concerning change of physician. The claimant proved that he was entitled to temporary total disability benefits beginning August 8, 2008 until a date yet to be determined. The Full Commission therefore affirms the administrative law judge's December 3, 2010 order and opinion.

The claimant's attorney is entitled to fees for legal services in accordance with Ark. Code Ann. §11-9-715(a) (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).

IT IS SO ORDERED.

A. WATSON BELL, Chairman

PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority's opinion finding that the claimant was not required to file a change of physician request with the Commission.

The issues at the hearing held on September 11, 2009, were additional medical treatment, temporary total disability, and attorney's fees. With regard to additional medical treatment, the evidence revealed that the claimant had surgery to his shoulder and after four weeks was released to return to full duty. The claimant continued to have problems with his arm so he went to the respondent employer and asked to see another physician. He was told that he would have to see his treating physician or workers' compensation would not pay for it. The claimant sought

medical treatment on his own. A change of physician issue was initially brought up by the Administrative Law Judge in her questioning of the claimant at the hearing. The following exchange took place:

Judge Marshall: Did you ever ask to see another doctor, for a change of physician or anything like that?

The witness: Yes.

Judge Marshall: You did?

The witness: Yes.

Judge Marshall: What happened?

The witness: They said they couldn't do that. I talked to Carolyn Shackelford. They said that Dr. Smith was their doctor.

Judge Marshall: And you couldn't have a change?

The witness: No. So, therefore, after he released me, I went to Dr. Tucker.

Judge Marshall: Did you ever ask for a change of physician?

The witness: No. the claim was denied.

Mr. Murphy: There was no formal request, Your Honor.

Judge Marshall: You can still get a change of physician after a claim is denied.

Ms. York After it's been denied?

Judge Marshall: Absolutely. I mean --

Ms. York: Really? I've had them deny them before.

Judge Marshall: Well, they can deny it, but you have a one-time right for a change of physician.

Ms. York: Okay.

Judge Marshall: Usually the insurance company is going to say that nothing is reasonable and necessary, but you still have that right. They may only pay for the one visit, but that may help you.

Ms. York: Okay.

Judge Marshall: And again, it may not. But, just because they deny the claim, doesn't mean it's over.

Counsel for the respondents stated at the beginning of the hearing that the claimant sought treatment on his own which was not authorized. The respondents contended, however, that the treatment was not reasonable and necessary. It appears that the Administrative Law Judge sua sponte brought up the change of physician issue and the Court of Appeals, based upon the above exchange at the very end of the hearing, remanded on this issue. The mandate states that the Commission needs to consider the facts in light of Ark. Code Ann. § 11-9-514. The Administrative Law Judge found that the AR-N was never provided to the

claimant. That is not true and was not argued by the claimant. Since the Court of Appeals remanded the claim on the change of physician issue, respondents moved to introduce the AR-N on remand. The Administrative Law Judge did not have a new hearing, stated that the record was closed to any new evidence, and would not allow respondents to introduce the AR-N, which the parties concede was provided to the claimant.

In my opinion, the Commission should take judicial notice of the AR-N. In order to best ascertain the rights of the parties, the AR-N should be included in the record. The court stated in its' opinion:

There is no question on appeal whether Redmond sought approval of a change-of-physician request: he did not. Rather, the issue is whether an exception to the change-of-physician rules applied in this case. While there is an exception to filing the change-of-physician forms under Ark. Code Ann. § 11-9-514, when the claim has been controverted, this is governed by subsection (f) of the statute. The Administrative Law Judge made no findings to support this exception.

The claimant was clearly given the AR-N and signed it. The claimant never argued at the hearing that he was not given the AR-N. The change of physician rules CLEARLY apply.

Therefore, pursuant to the remand, then an analysis of Ark. Code Ann. § 11-9-514(f) is required. Ark. Code Ann. § 11-9-514 provides:

(F) When compensability is controverted, subsection (b) of this section shall not apply if:

(1) The employee requests medical assistance in writing prior to seeking the same as a result of an alleged compensable injury;

(2) The employer refuses to refer the employee to a medical provider within forty-eight (48) hours after a written request as provided above;

(3) The alleged injury is later found to be a compensable injury; and

(4) The employer has not made a previous offer of medical treatment.

It is undisputed from the record that the claimant never made a written request of additional treatment from Dr. Puen or Dr. Tucker. Furthermore, his right shoulder injury was never controverted, only the additional medical treatment sought by the claimant after reaching maximum medical improvement and being released by Dr. Smith. The respondents clearly provided medical treatment to the claimant which included shoulder surgery and physical therapy. As such, Ark. Code Ann. § 11-9-514(f) does not

apply to the facts of this case and, therefore, does not provide an exception to the change of physician rules.

Therefore, after considering the case pursuant to the directive of the Court on remand, I take judicial notice of the AR-N signed by the claimant. I find that the claimant was provided with the form AR-N. The change of physician rules apply to the facts of this claim. The claimant has failed to prove that the provisions of Ark. Code Ann. § 11-9-514(f) apply to the case.

Therefore, I find that the respondents are not liable for the claimant's unauthorized treatment pursuant to Ark. Code Ann. § 11-9-514(b). Accordingly, for all the reasons set forth herein, I respectfully dissent from the majority's award of benefits.

KAREN H. MCKINNEY, COMMISSIONER