

**NOT DESIGNATED FOR PUBLICATION**

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. G905578

RAYMON CLOPTON, EMPLOYEE	CLAIMANT
SEBASTIAN COUNTY JUDGE, EMPLOYER	RESPONDENT
AAC RISK MANAGEMENT SERVICES, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED MARCH 18, 2021

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

Claimant represented by the HONORABLE MATTHEW KETCHAM,  
Attorney at Law, Fort Smith, Arkansas.

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

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Respondents appeal an opinion and order of the Administrative Law Judge filed August 20, 2020. In said order, the Administrative Law Judge made the following findings of fact and conclusions of law:

1. The stipulations agreed to by the parties at a pre-hearing conference conducted on March 4, 2020 and contained in a pre-hearing order filed that same date are hereby accepted as fact.
2. Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to payment of additional medical treatment provided in

connection to his compensable right big toe injury subsequent to January 23, 2018.

3. Claimant has proven by a preponderance of the evidence that he is entitled to temporary total disability benefits from June 3, 2019 through January 14, 2020.
4. Claimant has proven by a preponderance of the evidence that he is entitled to permanent partial disability benefits in an amount equal to 4% to the right great toe.
5. Respondents have controverted claimant's entitlement to all unpaid indemnity benefits.

We have carefully conducted a *de novo* review of the entire record herein and it is our opinion that the Administrative Law Judge's August 20, 2020 decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

We therefore affirm the decision of the Administrative Law Judge, including all findings of fact and conclusions of law therein, and adopt the opinion as the decision of the Full Commission on appeal.

All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. §11-9-809 (Repl. 2012).

For prevailing on this appeal before the Full Commission, claimant's attorney is entitled to fees for legal services in accordance with Ark. Code Ann. § 11-9-715(Repl. 2012). 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. 2012).

IT IS SO ORDERED.

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SCOTTY DALE DOUTHIT, Chairman

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M. SCOTT WILLHITE, Commissioner

Commissioner Palmer dissents.

DISSENTING OPINION

For the reasons set out below, I respectfully dissent from the majority.

I. BACKGROUND

The sole issue before the Commission is whether Respondents may be held liable for the additional medical treatment (three toe surgeries) provided by Dr. Evan Young. Relevant to this issue are the following undisputed facts. Claimant sustained a compensable toe injury on January 18, 2018. Claimant received from his employer, and signed a Form AR-N,

dated January 18, 2018. Just above Claimant's signature on the Form AR-N is the following acknowledgment:

My signature below also indicates that I have been provided with my rights regarding change-of-physician. (See additional information back side of form).

Claimant's initial treating physician was Dr. Terry Clark.

Claimant independently sought treatment from Doctor Evan Young. Dr. Young is not Claimant's "initial treating physician." Respondents did not approve this change of physicians and Claimant did not petition the Commission for approval of this change of physician. Dr. Young performed three outpatient surgeries on Claimant's toe – each exceeded \$1,000 in billed services. Claimant did not receive preauthorization for these services.

## II. STANDARD

Sections 11-9-514 and 11-9-508 of the Arkansas Code govern changes of physician in workers' compensation cases where, such as here, compensability of the injury is not controverted.

Under these change-of-physician rules, the "employer has the right to choose the initial primary care physician. Once a physician is chosen, a claimant is only allowed to change physicians once, and then only by petitioning the Commission. "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." Ark. Code Ann. § 11-9-514(b) (emphasis added).

After being notified of an injury, the employer or insurance carrier must deliver to the claimant (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 claimant's rights and responsibilities concerning change of physician. § 11-9-514(c). Providing this notice is critical. If an employer fails to provide this notice, then the change-of-physician rules do not apply. If the employer does provide this notice, then any unauthorized medical expenses incurred after the claimant has received a copy of the notice "shall not be the responsibility of the employer." Ark. Code Ann. § 11-9-514(c)(3) (emphasis added).

In addition to these change-of-physician rules, Rule 99.030(I)(S) of the Arkansas Workers' Compensation Commission (Rule 30) requires a claimant to receive preauthorization for all nonemergency hospitalizations, transfers between facilities, and outpatient services expected to exceed \$1,000 in billed charges for a single date of service by a provider. Even in emergency situations, the claimant must give notice to the carrier within 24 hours or the next business day. *Id.* The Court of Appeals of Arkansas has noted that this preauthorization requirement is not discretionary but mandatory. *ABF Freight Sys. v. Dugger*, 2019 Ark. App. 176, at 9, 574

S.W.3d 670, 675. In other words, if the claimant fails to follow the preauthorization requirements set out above, then the employer may not be held liable for payment of those unauthorized services. *Id.*

### III. DISCUSSION

As set out above, it is undisputed that Dr. Young is not Claimant's initial treating physician and that Claimant did not follow the change-of-physician rules or receive preauthorization before receiving treatment from Dr. Young. If the change-of-physician rules apply, then Respondents may not be held liable for the additional medical treatment. Moreover, regardless of whether the change-of-physician rules apply, under Rule 30's preauthorization requirement, Respondent may not be held liable for Claimant's unauthorized treatment.

It is beyond doubt that Claimant received a copy<sup>1</sup> of the notice of the change-of-physician rules as required by Section 11-9-514. Claimant testified that his employer – specifically Captain Dumas – hand delivered to him a copy of Form AR-N, which Claimant signed on January 18, 2018. Importantly, this Form AR-N is in the record. Just above Claimant's signature on the Form AR-N is the following acknowledgment:

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<sup>1</sup> Claimant's brief makes much ado about § 11-9-514's use of the word "copy." I note that there is no requirement that Claimant be provided two copies. Thus, the one he signed is sufficient.

My signature below also indicates that I have been provided with my rights regarding change-of-physician. (See additional information back side of form).

In finding that there was insufficient proof that Claimant received notice of the change-of-physician rules, the ALJ relied on *Delargy v. Golden Years Manor*, 2014 Ark. App. 499, at 3, 442 S.W.3d 889, 891, in which the court held that there was insufficient evidence that the claimant had received notice from his employer, either by personal delivery or by certified mail. In *Fuller v. Pope Cty. Judge*, 2018 Ark. App. 1, at 7, 538 S.W.3d 851, 856, the court held that there was sufficient evidence that the claimant had received notice from his employer. The difference? Whether the Form AR-N is in the record. In *Delargy*, no Form AR-N in the record. In *Fuller*, a signed Form AR-N in the record. Here, the actual signed Form AR-N is in the record. Accordingly, under *Fuller*, there is sufficient evidence to support a finding that Respondent – Claimant’s employer – personally delivered notice of the change-of-physician rules as required by Section 11-9-514 of the Arkansas Code. Accordingly, I would reverse the ALJ’s findings that the change-of-physician rules do not apply in this case.

Given that the change-of-physician rules apply, and the undisputed fact that Claimant did not follow those rules, § 11-9-514(b) requires that Dr. Young’s services “shall be at the claimant’s expense.”

Regardless of whether the change-of-physician rules apply, or were followed, Respondents may not be held liable for Dr. Young's surgeries under Rule 30's preauthorization requirement. See e.g., *ABF Freight Sys. v. Dugger*, 2019 Ark. App. 176.

**IV. CONCLUSION**

For the reasons set out above, I respectfully dissent from the majority.

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CHRISTOPHER L. PALMER, Commissioner