

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. H208246

JOANN L. BAUER, Employee	CLAIMANT
MHM SUPPORT SERVICES, Employer	RESPONDENT
MERCY HEALTH, Carrier	RESPONDENT

OPINION FILED AUGUST 9, 2023

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by JARID M. KINDER, Attorney, Fayetteville, Arkansas.

Respondents represented by RANDY P. MURPHY, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On July 12, 2023, the above captioned claim came on for hearing at Springdale, Arkansas. A pre-hearing conference was conducted on May 17, 2023 and a pre-hearing order was filed on May 22, 2023. A copy of the pre-hearing order has been marked as Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. Claimant sustained a compensable injury to her thoracic and lumbar spine on November 1, 2022.
3. The claimant was earning an average weekly wage of \$2,406.15 which would entitle her to compensation at the maximum weekly rates.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Temporary total disability benefits from December 9, 2022 through January 23, 2023, and from February 17, 2023 through a date yet to be determined.
2. Claimant's entitlement to unpaid medical as follows:
  - a. Siloam Springs ER, 11/3
  - b. Mercy ER, 11/5
  - c. Mercy Sports Medicine – Dr. Jacobelli, M.D. for Thoracic and lumbar spine – 1/5, 1/20, 2/17, 3/31, 5/2
  - d. Chronic Pain Management – thoracic spine injection 4/20
  - e. Thoracic MRI ordered by Dr. Jacobelli
  - f. Mercy Neurosurgery – Alejandro Castellvi, M.D., 1/6
  - g. Mercy Therapy Services – thoracic and lumbar spine – 3/20, 3/23, 4/4, 4/27 and 5/2.
3. Claimant's entitlement to additional medical treatment recommended by Dr. Jacobelli; including, physical therapy, chronic pain management and referral to a neurosurgeon.
4. Attorney's fee.

The claimant contends that she is entitled to payment of unpaid medical expenses as well as additional medical treatment recommended by Dr. Jacobelli. She also requests payment of temporary total disability benefits from December 9, 2022 through January 23, 2023, and from February 17, 2023 through a date yet to be determined. Also, see Exhibit #1 attached to the pre-hearing order and contained as Commission Exhibit #1 to the hearing transcript.

The respondents contend that medical treatment was authorized from Dr. Berestnev and Dr. Owen Kelly. Respondent has paid for this medical treatment. All other treatment is unauthorized and not the liability of respondent. Respondent denies that

claimant is entitled to additional medical treatment recommended by Dr. Jacobelli. Also, see Exhibit #2 attached to the pre-hearing order and contained as Commission Exhibit #1 to the hearing transcript.

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

#### FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at a pre-hearing conference conducted on May 17, 2023 and contained in a pre-hearing order filed May 22, 2023 are hereby accepted as fact.

2. Respondent did not provide claimant a copy of Form AR-N as required by A.C.A. §11-9-514 and *Delargy v. Golden Years Manor*, 2014 Ark. App. 499, 442 S.W. 3d 889; therefore, the change of physician rules are not applicable and the unpaid medical treatment is not unauthorized.

3. Claimant has met her burden of proving by a preponderance of the evidence that unpaid medical bills are reasonable and necessary medical treatment for her compensable injury and that respondent is liable for payment of those bills. This includes, but is not limited to, emergency room treatment on November 3 and November 5; treatment provided by Dr. Jacobelli; a thoracic MRI scan; a thoracic spine injection; treatment by Dr. Castellvi; and physical therapy.

4. Claimant has met her burden of proving by a preponderance of the evidence

that she is entitled to additional medical treatment recommended by Dr. Jacobelli. This includes, but is not limited to, pain management and referral to a neurosurgeon.

5. Claimant has met her burden of proving by a preponderance of the evidence that she is entitled to temporary total disability benefits from December 9, 2022 through January 23, 2023, and from February 17, 2023 through July 2, 2023.

6. Respondent has controverted claimant's entitlement to all unpaid indemnity benefits.

#### FACTUAL BACKGROUND

Claimant is a 49-year-old APRN who is employed by respondent at Mercy-GoHealth in Rogers. She is a certified family nurse practitioner and is responsible for treating urgent care patients. Diagnosis and treatment may include broken bones, lacerations, IV therapy, CPR, et cetera. Her supervising physician and direct supervisor is Dr. Gomez.

On November 1, 2022, claimant was in an exam room talking to a male patient that had tested positive for Covid at home. During that examination she turned and saw that he was starting to fall off of the exam table. She grabbed him and put him back on the table and as she did so, felt immediate pain in her thoracic and lumbar spine. Claimant asked an assistant to get Dr. Gomez and call an ambulance for the patient. Claimant informed Dr. Gomez of the incident and he completed a form on November 15, 2022, indicating that he was informed of the injury on November 1, 2022.

Claimant was not scheduled to work on November 2, 2022. She testified that she had back pain and could not get out of bed that day. She texted Dr. Gomez and he called

in a prescription of Flexeril for her. Claimant was also not scheduled to work on November 3, 2022. She testified that she had severe back pain and could not walk or urinate. She was taken to the emergency room in Siloam Springs by her son where she was given a catheter and prescribed medications for pain.

On November 5, 2022, claimant was again unable to force herself to urinate and again could not walk. She was taken by ambulance to Mercy emergency room in Rogers where an MRI scan revealed a disc herniation at L5-S1. Claimant was given a prescription for pain medication and muscle relaxers. She was also instructed to follow up with her primary care physician or with a neurosurgeon if the symptoms persisted.

On November 7, 2022, claimant met with Jennifer Williams, respondent's workers' compensation coordinator for Northwest Arkansas, and completed paperwork. This paperwork included Form AR-N. On November 9, 2022, claimant was evaluated by Dr. Alejandro Castellvi, neurosurgeon, for complaints of right lower extremity pain and right-sided low back pain. He noted that the MRI scan revealed a small disc herniation at L5-S1; prescribed home exercises and Valium; and also indicated that claimant could return to work on Monday (November 14).

According to the testimony of Williams, respondent decided to accept this claim as compensable on November 15, and an appointment was made for claimant to be evaluated by Dr. Berestnev on November 16, 2022. Dr. Berestnev noted the herniated disc at L5-S1 and diagnosed claimant's condition as a sprain of the ligaments of the lumbar spine. He prescribed physical therapy and placed a work restriction of lifting no more than 20 pounds on the claimant.

Claimant returned to Dr. Berestnev on November 22, 2022 and he noted that

claimant's pain was worsening. He prescribed an injection, medication, and referred claimant for a nerve conduction study. He also lowered the claimant's lifting restriction to 10 pounds. Following this visit the claimant began undergoing physical therapy.

Claimant was again evaluated by Dr. Berestnev on December 6, 2022, and he noted that her NCV was normal. He referred her for a CT scan of the right lower quadrant for pain/swelling and urinary retention symptoms. He also continued her lifting restriction at 10 pounds.

On December 9, 2022, claimant was evaluated by her primary care provider, Tu Phan, APRN. Phan noted that claimant was taking Valium but could not take it at work because it was against respondent's policy. Phan indicated that claimant should be off work until she was no longer taking sedating medications.

Claimant returned to Dr. Berestnev on December 20, 2022, and he noted that claimant's primary care physician had taken her off work. He also indicated that claimant should be seen by a specialist and referred claimant to Dr. Miedema at Ozark Orthopedics. According to a note from Dr. Berestnev's office, this referral was denied by respondent.

On December 23, 2022, claimant was again seen by Phan who noted that claimant was still taking Valium. She referred claimant to Dr. Jacobelli at Mercy Clinic Sports Medicine and claimant was seen by Dr. Jacobelli on January 5, 2023. He diagnosed claimant's condition as a strain of the abdominal muscle; low back pain radiating to the right leg; and acute right-sided thoracic back pain. He ordered a thoracic MRI and a compounding topical cream to apply to the abdomen. He did not specifically address claimant's ability to return to work, but in a report dated January 6, 2023, Phan indicated

that claimant was unable to work due to her injury and should remain off work until released by an orthopedist.

On January 20, 2023, claimant again returned to Dr. Berestnev who noted that claimant wanted a thoracic MRI scan due to the right upper abdominal symptoms. Dr. Berestnev apparently agreed with that request and he ordered an MRI scan of the thoracic spine as well as continued physical therapy. On that same day, claimant was also seen by Dr. Jacobelli who noted that the thoracic MRI scan had not been approved. He also recommended that claimant continue physical therapy and the use of compounding cream. Finally, he indicated that claimant could return to work on Monday with limitations on lifting; that she take frequent breaks; and “take her time”. Claimant did return to work for respondent on January 24, 2023.

Respondent did not accept liability for the thoracic MRI scan even though Dr. Berestnev also recommended the test. In fact, Williams contacted Dr. Berestnev’s office on January 24, 2023, and indicated that respondent would not authorize any additional medical treatment. [I note that Williams did not make this decision, but merely notified Dr. Berestnev of the decision.]

Since January 24, 2023, claimant has continued to receive medical treatment from Dr. Jacobelli. This treatment has included additional physical therapy; an MRI scan of the thoracic spine showing disc herniations at T8-9 and T9-10; thoracic epidural steroid injections; trigger point injections; and medications. He has also referred claimant for a neurosurgical evaluation by Dr. Castellvi. Dr. Castellvi in a report dated June 19, 2023 recommended a T11-12 transforaminal injection.

As previously noted, respondent denied payment for any additional medical

treatment subsequent to January 24, 2023. Claimant has filed this claim requesting payment for various medical treatment provided both before and after this date as well as additional medical treatment recommended by Dr. Jacobelli. She also requests payment of temporary total disability benefits from December 9, 2022 through January 23, 2023, and from February 17, 2023 through a date yet to be determined as well as an attorney fee.

### ADJUDICATION

The initial issue for consideration involves payment for various medical treatments claimant received. This includes emergency room treatment on November 3, 2022 and November 5, 2022; treatment from Drs. Jacobelli and Castellvi; injections; a thoracic MRI; and physical therapy treatment from Mercy Therapy Services.

Pursuant to A.C.A. §11-9-514(a)(3)(A)(i) the employer has the right to select the initial treating physician. However, an employee may request a one-time change of physician. A.C.A. §11-9-514(a)(2)(A). When 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). Treatment or services furnished or prescribed by a physician other than the one selected according to the change of physician rules, except emergency treatment, shall be at the claimant's expense. A.C.A. §11-9-514(b). Furthermore, A.C.A. §11-9-514 provides:

(c)(1) After being notified of an injury, the employer or insurance carrier shall deliver to the employee, in person or by certified mail, return receipt requested, a copy of a notice, approved or prescribed by the commission, which explains the employee's right 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 documentary evidence contains Form AR-N signed by claimant on November 7, 2022. On cross examination, claimant acknowledged her signature and signing the form. However, pursuant to the decision in *Delargy v. Golden Years Manor*, 2014 Ark. App. 499, 442 S.W. 3d 889, there must also be proof that the claimant actually received a copy of the Form AR-N. Simply signing Form AR-N is not sufficient. In *Delargy*, the Court first noted that a signed Form AR-N was not in the abstract or the record. Even though a signed copy of Form AR-N was not in the record, the claimant in *Delargy* admitted that she read and signed Form AR-N. However, the Court in reviewing the statute focused on the fact that claimant must also be furnished a copy of the notice. Specifically, the Court stated:

We are obliged to strictly construe and apply the workers' compensation act. *Ark. Code Ann. §11-9-704(c)(3)*(Repl. 2002). Furthermore, there must be substantial evidence that the employer complied with the statutory mandate, but here, there is no evidence to support the Commission's finding that Delargy received a copy of the notice of the procedure involved in changing physicians.

*Arkansas Code Ann. §11-9-514(a)(2)(A)* allows a one-time-only change of physician. Subsection (c)(1) mandates that the employer, after being notified of an injury, deliver a copy of a notice to the employee, in person or by certified or registered mail, return receipt requested, explaining the employee's rights and responsibilities concerning change of physician. If the employee is not furnished a copy of the notice, the change of physician rules will not apply. *Ark. Code Ann. §11-9-514(c)(2)*.

Here, as in *Delargy*, claimant acknowledged signing Form AR-N and that form is contained in the documentary evidence. However, there is no proof that claimant was provided a copy of that form as required by the decision in *Delargy*. In cases decided since *Delargy*, this proof has been provided by other means such as testimony from witnesses that in addition to signing Form AR-N, a claimant was also provided a copy of Form AR-N. See, *Fuller v. Pope County Judge*, 2018 Ark. App. 1, 538 S.W. 2d 851. Claimant did not testify that she received a copy of Form AR-N and Williams did not testify that she provided a copy of Form AR-N to claimant. Accordingly, I find that the requirements of providing a copy of Form AR-N as required by the statute and the decision in *Delargy* were not met in this case. Therefore, the change of physician rules set forth in A.C.A. §11-9-514 are not applicable.

Since the change of physician rules of A.C.A. §11-9-514 are not applicable, respondent is liable for all reasonable and necessary medical treatment provided to claimant for her compensable thoracic and lumbar spine injuries. With respect to this issue, I note that there was testimony provided at the hearing regarding back complaints which claimant was experiencing prior to the incident on November 1, 2022. The medical records indicate that when claimant sought treatment from the emergency room on November 3, 2022, she gave a history of her back pain beginning after working in the yard the weekend before. However, the history also indicates that the incident of catching a patient occurred on November 1, 2022, and that ever “since then I have had horrible pain on my right lower back going down my right knee.” Claimant acknowledged this history during her testimony. I also note that Dr. Gomez, claimant’s supervisor, completed

a Supervisor Incident Evaluation Form on November 15, 2022, indicating that although claimant had reported to work with back pain on November 1, the “Pain was exacerbated after she helped a patient that was about to fall from exam room table.” Dr. Berestnev also indicated that the treatment he provided was related to claimant’s work activities. Dr. Castellvi also indicated in his report of June 19, 2023: “At this point I do not feel that her symptoms were related to running. I felt that her symptoms were related more towards at the time when she moved the patient.”

I also note that respondent requested that claimant undergo an independent medical evaluation by Dr. Owen Kelly. In his report of March 29, 2023, Dr. Kelly indicated that claimant’s work injury contributed to her symptoms: “Her pain localizes around the T8-10 dermatomal area. This seems consistent and is the likely source of her pain. This could be related to a rotation type stress at work coupled with the history of pain from the yard work noted in her history.”

In addition, Dr. Kelly addressed causation of her complaints in a follow-up report dated April 14, 2023. In his report of that date he noted:

There is noted to be some “gray area” in the history. There was documentation of pain relating to irritating her back when she was doing yard work. Although this could be a cause of her pain or part of it, the rotation injury contributed. (Emphasis added.)

Finally, and most importantly, respondent has stipulated that claimant suffered a compensable injury to her thoracic and lumbar spine on November 1, 2022.

I find based on my review of the medical records submitted in this claim that the unpaid medical treatment provided at the emergency rooms; treatment from Drs. Jacobelli

and Castellvi; injections; thoracic MRI; and physical therapy was reasonable and necessary medical treatment for claimant's admittedly compensable thoracic and lumbar spine injuries. Therefore, respondent is liable for payment of this unpaid medical treatment.

Even if the change of physician rules of A.C.A. §11-9-514 were applicable, I would have found that most of the medical treatment was the liability of respondent. First, A.C.A. §11-9-514(b) states:

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

I find that the medical treatment provided at the emergency rooms on November 3, 2022 and November 5, 2022 constituted emergency treatment. Claimant testified that she sought medical treatment from the emergency room because she could not walk and could not urinate. Thus, I find that this treatment was emergency treatment and respondent is liable for payment.

Furthermore, as previously noted, respondent denied payment for any additional medical treatment subsequent to January 24, 2023. Williams testified as follows:

Q Will you agree with me that as of January 24<sup>th</sup> of 2023, you had informed Ms. Bauer's treating physician that you would not authorize any further treatment?

A Correct.

Q And would you agree with me that of as January 24<sup>th</sup> of 2023, Mercy has not provided any other benefits to the claimant?

A Correct. But these are not decisions that I am

making if that is what you are alluding to.

Respondent chose to deny medical treatment even though it had accepted compensable injuries to the thoracic and lumbar spines and even though its own chosen treating physician, Dr. Berestnev, had recommended additional medical treatment. Even Dr. Kelly indicated that claimant needed additional medical treatment for her thoracic spine, but this was likewise denied by respondent. Apparently, respondent took this position because claimant sought medical treatment on her own. Williams testified as follows:

Q Do you know why Ms. Bauer has not been sent back to Mercy at this point?

A So to the best of my knowledge, in the work comp paperwork it states that you will not seek treatment outside of work comp and she chose to do so, so we chose to end treatment.

If a claimant seeks medical treatment (non-emergency) on their own, a respondent may not be liable for payment of that medical treatment. However, that does not excuse respondent from providing authorized medical treatment. By denying any medical treatment subsequent to January 24, 2023, respondent permitted claimant to seek medical treatment from the providers of her own choosing as long as the treatment was reasonable and necessary and related to the compensable injuries. Thus, all medical treatment provided to claimant subsequent to January 24, 2023 would have been the liability of respondent even if the change of physician rules had been applicable.

I also find that claimant has met her burden of proving by a preponderance of the evidence that she is entitled to additional medical treatment for her compensable injuries

as recommended by Dr. Jacobelli. This includes continued treatment from his referral to Dr. Castellvi; chronic pain management; and physical therapy.

The final issue for consideration is claimant's request for temporary total disability benefits. Claimant's injuries to her thoracic and lumbar spines are unscheduled injuries. A claimant who suffers an unscheduled injury is entitled to temporary total disability benefits during their healing period when they suffer a total incapacity to earn wages. *Arkansas State Highway & Transportation Department v. Breshears*, 272 Ark. 244, 613 S.W. 2d 392 (1981).

After reviewing the evidence, I find that claimant has remained in her healing period since the time of her injury. As previously noted, claimant's treating physicians have recommended additional medical treatment in the form of medications, physical therapy, and injections. Dr. Castellvi has even mentioned the possibility of a thoracic discectomy. Even Dr. Berestnev and Dr. Kelly, respondent's chosen physicians, recommended additional medical treatment for claimant's injury. Accordingly, I find that claimant remains within her healing period.

I also find that claimant suffered a total incapacity to earn wages from December 9, 2022 through January 23, 2023, and again from February 17, 2023 through July 2, 2023. Dr. Berestnev did not take claimant off work, but instead indicated that claimant could return to work with lifting restrictions. However, on December 9, 2022, claimant was examined by APRN Phan who noted that claimant was taking Valium for her compensable injuries and that employees of respondent were prohibited from taking that medication while working. I also note that claimant testified that she would be unable to perform her job duties with her restrictions. Claimant testified that she could not suture a

patient, perform CPR, or catch a patient that was falling. Claimant testified that they have had patients suffer heart attacks or pass out while in the waiting room. It is reasonable that claimant would not be capable of performing job duties of a medical provider while taking Valium and having a 10 or 20-pound lifting restriction. Accordingly, I find that claimant suffered a total incapacity to earn wages from December 9, 2022 through January 23, 2023.

Claimant's incapacity to earn wages continued until January 23, 2023, when she returned to work after seeing Dr. Jacobelli on January 20, 2023, and he indicated that claimant could return to work with frequent breaks. On January 23, 2023, Dr. Gomez, as claimant's leader, indicated that claimant could perform job duties of providing clinical services – including evaluation, diagnosis, and treatment of urgent care conditions. He also indicated that she could interpret diagnostic tests and keep timely and accurate encounter note documentation. Claimant returned to work for respondent on January 23 and continued to work until February 16, 2023.

On February 17, 2023, Dr. Jacobelli indicated that claimant could continue working as tolerated. However, he subsequently completed a Medical Leave Certification form for claimant indicating that claimant had been incapacitated due to her medical condition since February 17, 2023, and that this would continue through July 2, 2023. I find that Dr. Jacobelli's opinion is credible and entitled to great weight. The documentary evidence does not contain any opinion from claimant's treating physicians stating that her total incapacity has been extended beyond July 2, 2023. Accordingly, I find that claimant was in her healing period and suffered a total incapacity to earn wages from February 17, 2023 through July 2, 2023.

In summary, I find that claimant is entitled to temporary total disability benefits from December 9, 2022 through January 23, 2023, and again from February 17, 2023 through July 2, 2023.

Finally, I note that claimant testified that she is currently drawing long term disability benefits and received a check backdating those benefits to November 4, 2022. Pursuant to A.C.A. §11-9-411, respondent is entitled to a credit for those disability benefits. However, respondent is not entitled to a credit if claimant paid for her long term disability policy. A.C.A. §11-9-411(a)(2). Although claimant testified that she was receiving long term disability benefits, there was no testimony or evidence offered regarding whether claimant or respondent paid for the disability policy.

### AWARD

Claimant has met her burden of proving by a preponderance of the evidence that respondent is liable for payment of various unpaid medical bills provided for treatment relating to her compensable thoracic and lumbar spine injuries. Claimant has also proven by a preponderance of the evidence that she is entitled to additional medical treatment recommended by Dr. Jacobelli. Finally, claimant has met her burden of proving by a preponderance of the evidence that she is entitled to temporary total disability benefits from December 9, 2022 through January 23, 2023, and again from February 17, 2023 through July 2, 2023. Respondent has controverted claimant's entitlement to all unpaid indemnity benefits.

Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the



claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the indemnity benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant. Also pursuant to A.C.A. §11-9-715(a)(1)(B), an attorney fee is not awarded on medical benefits.

Respondent is liable for payment of the court reporter's charges for preparation of the hearing transcript in the amount of \$1,327.95.

All sums herein accrued are payable in a lump sum and without discount.

IT IS SO ORDERED.

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GREGORY K. STEWART  
ADMINISTRATIVE LAW JUDGE