

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. G703512

GARY D. JAYNES, EMPLOYEE	CLAIMANT
TEMPWORKS MANAGEMENT SERVICES, INC., EMPLOYER	RESPONDENT
WESCO INSURANCE COMPANY, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED AUGUST 16, 2021

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

Claimant represented by the HONORABLE GARY DAVIS, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE WILLIAM C. FRYE, Attorney at Law, North Little Rock, Arkansas.

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The claimant appeals an administrative law judge's opinion filed February 26, 2021. The administrative law judge found, among other things, that treatment provided by Dr. Schlesinger was unauthorized and was not reasonably necessary. The administrative law judge found that the claimant was not entitled to temporary total disability benefits. After reviewing the entire record *de novo*, the Full Commission finds that the respondents did not provide the claimant with a notice explaining his rights and responsibilities concerning change of physician. The Full Commission therefore finds that the change of physician rules do not apply and that

treatment provided by Dr. Schlesinger was reasonably necessary. The Full Commission finds that the claimant proved he was entitled to temporary total disability benefits from March 7, 2019 through April 30, 2019.

I. HISTORY

The parties stipulated that Doug Jaynes, now age 58, “sustained compensable injuries to his back and leg” on March 8, 2017. The claimant testified on direct examination:

Q. And what happened?

A. I got my – got my – they was handing me pipes off the top side. They was handing it down, and I got – stood in place, and my foot got submerged up underneath the mud. And when we got through, meaning 12 minutes into the deal, then I tried to raise my [left] leg and I could not. I tried three times, and I could not raise it out. It had to be literally dug out.

According to the record, the claimant treated at Lofton Medical Center on March 14, 2017, at which time the claimant’s chief complaint was “Hip Pain.” It was noted, “He pulled his leg out of a mud hole when pain started. Has been on TENS unit, Ibuprofen, Aleve with no relief. He took some left over Norco which helped.” Dr. Jason D. Lofton diagnosed “54 year old male here with complaint of left hip pain of uncertain etiology – possible pulled muscle vs. tendonitis vs. bursitis vs. other.”

Dr. Charles D. Varela’s impression on June 12, 2017 was “Nonspecific muscle strain, left hip.” An MRI of the claimant’s left hip on June 14, 2017 showed, among other things, “mild degenerative arthrosis of

both hips without fracture or dislocation.” An MRI of the claimant’s lumbar spine was taken on June 29, 2017, with the impression, “Multilevel spondylosis is seen with foraminal narrowing generally worse on the left side as described above. Central disc protrusions are noted at L4-5 and L5-S1. Significant narrowing of the thecal sac is seen at L4-5 where there is also slight narrowing of the subarticular regions where the traversing L5 nerve roots would be located, worse on the left side.

Dr. Varela referred the claimant to Dr. Steven L. Cathey for a spinal surgery evaluation. Dr. Cathey stated in part on July 17, 2017, “The patient, his sister, his son and I reviewed the 6/29/17 MRI scan of his lower back. There are multilevel degenerative changes, but I did not identify a significant disc herniation, nerve root compression, spinal stenosis, etc....Mr. Jaynes is not a candidate for spinal surgery or other neurosurgical intervention. Since he is now four months out from the injury in question, I believe he has reached maximal medical improvement. There is no impairment rating from a neurosurgical standpoint as there are no objective findings either clinically or radiographically that can be attributed to the event.”

Dr. D. Luke Knox noted on September 5, 2017, “Reviewing his MRI scan, I could discern no evidence of significant lumbar abnormalities that would be causing his difficulties. I agree wholeheartedly with Dr. Cathey. I

do not believe this is related to his lumbar spine, but rather a nerve injury over his groin area, and possibly even related to a lateral femoral cutaneous nerve of the thigh.”

Dr. Miles M. Johnson performed an electrodiagnostic evaluation on September 20, 2017 and assessed “Studies consistent with an incomplete left femoral neuropathy versus possible lumbar radiculopathy, approximate L2-L4 levels.”

The claimant participated in a Functional Capacity Evaluation on October 10, 2017: “The results of this evaluation indicate that an unreliable effort was put forth, with 40 of 57 consistency measures within expected limits....Mr. Jaynes completed functional testing on this date with **unreliable** results. Overall, Mr. Jaynes demonstrated the ability to perform work in at least the **SEDENTARY** classification of work as defined by the US Dept. of Labor’s guidelines over the course of a normal workday with limitations as noted above.”

Dr. Knox assigned the claimant an 11% anatomical impairment rating on October 24, 2017. Dr. Knox returned the claimant to “a full work schedule” and stated that the claimant “has reached that point of maximum medical improvement.” Dr. Knox informed the claimant’s attorney on December 21, 2017, “I do not believe there is much else to offer from the

standpoint of his spine. I do not feel that we have much to offer and recommended that he feel free to pursue another opinion, if he so desired.”

A pre-hearing order was filed on February 7, 2018. According to the text of the pre-hearing order, the claimant contended, “1. That he has sustained eleven percent (11%) permanent anatomical impairment to the body as a whole as a result of his March 8, 2017, compensable back and leg injuries; 2. That he is entitled to wage loss disability benefits in an amount to be determined; 3. That the aforementioned benefits have been controverted for purposes of payment of an attorney’s fee; and 4. That he reserves the right to pursue any and all other benefits to which he may become entitled in the future.”

The respondents contended, “1. That the claimant sustained compensable injuries to his back and legs on March 8, 2017, and that they have paid all appropriate benefits for these compensable injuries; 2. That the claimant was referred to Dr. Steven Cathey for neurosurgical evaluation, and that Dr. Cathey opined that the claimant was able to return to work without any permanent anatomical impairment or work restrictions; 3. That the claimant was thereafter treated by Dr. Knox, who believed the claimant had a femoral nerve injury, and who sent the claimant for a Functional Capacity Evaluation (FCE), the results of which were ‘invalid.’ Dr. Knox assigned the claimant the eleven percent (11%) body-as-a-whole

impairment rating, and released the claimant back to work without restrictions; 4. That the claimant was scheduled to be examined by Dr. Moore on December 6, 2017, and the respondents reserve the right to state their final position on permanent anatomical impairment after this visit; 5. That the claimant has no functional and/or work restrictions and, therefore, is not entitled to wage loss disability benefits.”

The parties agreed to litigate the following issues:

1. Whether the claimant is entitled to an 11% anatomical impairment rating as a result of his compensable injuries.
2. Whether the claimant has sustained wage-loss disability as a result of his compensable injuries.
3. Fees for legal services.

A hearing was held on March 27, 2018. The claimant testified that he was suffering from symptoms including back pain, numbness, and burning in his left leg. The claimant testified that his physical abilities were restricted as a result of the compensable injury. The claimant testified that his pain was worsening. The administrative law judge determined *sua sponte* to recess the hearing so that Dr. C. Lowry Barnes could examine the claimant.

Dr. Barnes examined the claimant on May 23, 2018 and assessed the following:

Patient has long standing pain which he relates to his on-the-job injury of March 8, 2017. Again, this injury was from getting stuck in the mud in the ditch. He did not fall. He is extremely frustrated, as is his sister, because he feels as if no one has

tried to help him and he has just been bounced around between doctors. His sister may be more frustrated than he is.

Plan: Patient did have a functional capacity evaluation on October 10, 2017. This suggested that he was an unreliable participant. Despite this, he did have an abnormal electrodiagnostic study. That study was on September 20, 2017. It should be repeated. If that study is still abnormal, the MRI of his lumbar spine should be repeated also. It was performed on June 29, 2017. Patient needs to be on a weight loss program. He also needs to be on a walking program. If his repeat EMG is normal, no objective finding of a significant neurological diagnosis has been documented. He will have reached maximal medical improvement. If he has abnormal findings on his EMG and MRI, he should be re-evaluated by a spinal surgeon. This has not been shared with the patient at this time. It is shared with those requesting the IME, and then can share with the patient.

Dr. Neil M. Masangkay performed electrodiagnostic testing on June 6, 2018 and gave the impression, "1. There was no convincing electrophysiologic evidence of a lumbosacral radiculopathy, focal neuropathy, or other general neuromuscular disorder in the left lower extremity at this time. 2. This was a somewhat limited study due to the reduced firing rates seen in the left thigh. In this clinical context, this may have been the result of reduced effort."

Dr. Michael Morse stated on July 12, 2018:

I have reviewed the above claimant's evaluation by Charles Lowry Barnes, M.D. an orthopedic surgeon at UAMS in Little Rock, Arkansas. I have also reviewed the EMG nerve conduction performed by Neil M. Masangkay MD. Their evaluations did not find any significant pathology related to the Worker's Compensation injury of 3/8/17.

I concur with their evaluations and stand by my original evaluation dated 12/6/2017, that the patient does not have any compensable injury nor does he have an impairment rating related to the work injury of 3/8/17.

Dr. Knox reported in part on July 16, 2018, "I agree with Dr. Morse's assessment. It appears to be reasonable, in the face of his electrical studies that were completely normal, completed on 06/06/18, that Mr. Gary Janes (sic) does not have a compensable injury resulting from his work injury dated 03/08/17."

Dr. Barnes reviewed Dr. Masangkay's study and noted on July 18, 2018, "No objective findings of injury at this time. Plan: Patient is extremely upset. His sister is with him again and she is upset. They feel as if they have had the run around because no one can help them. They understand from me today that a number of tests have been ordered and nobody is able to identify a problem which is consistent with his complaints. Consistent with previous independent medical evaluation, he has reached maximal medical improvement at this time. He has no permanent impairment. He can return to work based upon his functional capacity evaluation which is in his medical record. Again, he is extremely upset that no one can find his problem. His sister is just [as] upset. They both agree that they have had a thorough evaluation and discussion by me."

The record indicates that Dr. Scott Schlesinger subsequently arranged for an MRI of the claimant's lumbar spine. Dr. Andrew A.

Finkbeiner performed an MRI on August 6, 2018 and provided the following conclusion:

1. Shallow disc displacement most pronounced in the central position, posterior annular tear and moderate facet hypertrophy at the L4-5 level contribute to abutment of bilateral descending L5 nerves.
2. Shallow soft disc displacement at the L3-4 and L5-S1 levels contribute to abutment of bilateral exiting L3 and L5 nerves.

ADDENDUM, 08/07/18:

Upon further review, it is noted that there is a left foraminal/postforaminal protrusion or extrusion at the L2-3 level resulting in abutment of the exiting L2 nerve with possible mild compression bilaterally.

Dr. Schlesinger reported on August 6, 2018:

This 55 year old male presents with low back pain and burning painful numbness in the left medial thigh. He states the pain began in March 2017 and started suddenly. He is taking OTC medications PRN. He denies undergoing PT, chiropractic care or spinal injections. He denies any pertinent medical history. He comes now seeking neurosurgical consultation.... An MRI of the Lumbar Spine has been obtained prior to this visit. The study was performed on 08/06-2018 at Pavilion MRI.

A decision was made to personally read and interpret the multiple images of the studies. This reading was from the perspective of a Neurosurgeon and not a Radiologist. My personal reading of the multiple individual images was very thorough and detailed and was carried out with the clinical knowledge of the patient and comparing to the imaging data. I personally read and interpreted the study as abnormal with the finding of:

Probable left L2-3 neural foraminal disc protrusion with probable left L2 nerve root compression[.]

Moderate degenerative changes[.]...

Plan: The patient does have significant pain likely to be of lumbar DDD/DJD and/or disc and/or neurogenic origin and

therefore is a candidate for further treatment. After consideration of the clinical and radiological data a decision was made to offer the patient to start the Legacy Spine Injection protocol. The injections will be for potentially diagnostic benefit, to confirm the origin of the pain, and hopefully therapeutic purposes as well....

Dr. Schlesinger's diagnosis was 1. Low Back Pain. 2. Pain in left leg. 3. Intervertebral disc degeneration, lumbar region. 4. Intervertebral Disc Displacement, Lumbar Region. 5. Osseous and subluxation stenosis of intervertebral foramina of lumbar region. Dr. Schlesinger noted, "A decision was made to proceed with LESIs as the next step. I recommend that we start with a LESI at L2-3 with 10 mg of dexamethasone mixed in 8 cc of saline."

Another hearing was held on September 5, 2018. Counsel for the respondents stated at that time that Dr. Schlesinger was an "unauthorized" physician. The claimant testified on September 5, 2018 that he had undergone two lumbar injections performed in Dr. Schlesinger's clinic and that he was scheduled for a third injection on September 16, 2018. The claimant testified with regard to the injections, "The second one actually done good. I'm not in the severe pain that I once was. I'm hoping the third one will do better." The claimant testified that he continued to suffer with physical difficulties and numbness in his left leg.

Dr. Schlesinger noted on September 28, 2018, "Mr. Jaynes completed a series of LESI on 09/13/2018 and reported only 30% pain relief

after the series. He spoke with our staff and continues to complain of persistent left low back pain and a painful numbness to his left medial thigh. He reports that the leg pain is minimal in comparison to his low back pain and he would therefore like to proceed with the next step in the Legacy Facet/Block/Rhizotomy protocol to treat his back pain....After a discussion of the risks and benefits and options for treatment and the technique the patient desires to proceed as planned with a lumbar facet injection/block at L3/4, L4/5 and L5/S1 on the left per the Legacy Injection/Block/Rhizotomy Protocol pending Dr. Schlesinger's approval."

An administrative law judge filed an opinion on October 31, 2018. The administrative law judge found that the claimant failed to prove he sustained any permanent anatomical impairment, wage-loss disability, or permanent total disability as a result of his compensable injuries. The claimant appealed to the Full Commission. The claimant also continued to follow up with Dr. Schlesinger.

Another MRI of the claimant's lumbar spine was taken on February 26, 2019 with the following conclusion:

1. No significant interval change from prior examination. Dominant findings noted at the L2-3 level with a left foraminal/postforaminal superiorly migrating extrusion contribute to abutment of the exiting left L2 nerve with possible partial compression laterally.
2. Shallow disc displacement with biforaminal predominance and moderate facet hypertrophy at the L3-4 level contribute to abutment of bilateral exiting L3 nerves.

3. Mild retrolisthesis, shallow disc displacement and mild to moderate facet hypertrophy at the L5-S1 level contribute to abutment of bilateral exiting L5 nerves and abutment of bilateral descending S1 nerves.

The claimant followed up with Dr. Schlesinger on February 26, 2019:

This 56-year-old male has had back and left inner thigh pain since an accident at work in 2017. Patient has had conservative care and recently a selective nerve block of the left L2 nerve root gave him significant transient benefit. He does have a left L2-3 neural foramen disc herniation and neural foramen stenosis. He would like to undergo definitive treatment. We will proceed with transforaminal discectomy and stabilization with spinous process clamp distraction device without fusion. He fully understands that someday more aggressive surgery may be necessary. He also understands that there is a small possibility that there are other factors contributing to his pain.

The patient is attempting to apply for disability because he has been unable to work since the accident is also pursuing, appropriately, a Workmen's Comp. claim that is not been accepted.

Based on what the patient has told me I do believe this problem is likely related to a Workmen's Comp. injury. I would state this with a greater than 51% medical certainty that the problem that we are treating now with this surgical plan is related to the injury at work even though this is not been accepted as a Workmen's Comp. case based on the patient's history given to me.

The record indicates that Dr. Schlesinger performed a lumbar decompression at L2/3 on March 7, 2019. Dr. Schlesinger provided follow-up treatment after surgery, which treatment included a prescription for physical therapy. A note from Dr. Schlesinger's clinic dated April 30, 2019 indicated, "We will release the patient from further care at this time. I will be happy to see the patient back if needed."

The Full Commission filed an opinion on May 13, 2019 and reversed the administrative law judge's October 31, 2018 decision. The Full Commission found that the claimant proved he sustained permanent anatomical impairment in the amount of 11%, and that the claimant proved he sustained wage-loss disability in the amount of 10%. The respondents appealed to the Arkansas Court of Appeals.

Dr. Schlesinger reported on January 7, 2020, "This 57-year-old male has persistent left anterior medial thigh pain despite our surgical intervention at L2-3 neural foramina stenosis and stabilization distraction treatment. He had an injury to Workmen's Comp. that delayed his care by a couple of years before we treated him and it is certainly possible that he has longstanding neuropathic nerve damage that is not going to resolve. Nevertheless I want to make sure there is nothing further I can directly [do] to help his upper lumbar radicular symptoms we will repeat the MRI of the lumbar spine and obtain electrodiagnostic testing. We will also perform a left L2-3 SNRB. If it does not appear that there is a direct surgical solution then a trial spinal cord stimulator would be the next step. The patient will think about the plan outlined above and will let us know how he wishes to proceed."

An MRI of the claimant's lumbar spine taken January 30, 2020 continued to show abnormalities at several levels. A left lower extremity

nerve conduction and EMG study was done on January 30, 2020 with the Diagnostic Interpretation, “This is an abnormal study most consistent with moderate, subacute on chronic, left L2 and L3 radiculopathies with evidence of ongoing denervation.”

The Arkansas Court of Appeals delivered an opinion on February 5, 2020 and affirmed the Full Commission’s finding that the claimant proved he sustained permanent anatomical impairment in the amount of 11% and wage-loss disability in the amount of 10%. *Tempworks Mgmt. Servs., Inc. v. Jaynes*, 2020 Ark. App. 70, 593 S.W.3d 519.

A pre-hearing order was filed on October 20, 2020. According to the text of the pre-hearing order, the parties agreed to litigate the following issues:

1. Whether the Claimant is entitlement (sic) to temporary total disability compensation from March 7, 2019 to a date to be determined.
2. Whether additional medical treatment is reasonably necessary for the treatment of the Claimant’s alleged compensable injuries.
3. Whether the Claimant is entitled to a controverted attorney’s fee.

A hearing was held on November 18, 2020. The claimant testified that his back was “not hurting near as much” following surgery performed by Dr. Schlesinger on March 7, 2019. The claimant testified that he was taking less medication and relied primarily on Ibuprofen.

An administrative law judge filed an opinion on February 26, 2021. The administrative law judge found, among other things, that Dr. Schlesinger's treatment was "unauthorized, and not the respondents' responsibility." The administrative law judge found that Dr. Schlesinger's treatment was not reasonably necessary. The administrative law judge found that the claimant was not entitled to temporary total disability benefits. The administrative law judge therefore denied and dismissed the claim. The claimant appeals to the Full Commission.

II. ADJUDICATION

A. Change of Physician/Unauthorized Medical Treatment

Ark. Code Ann. §11-9-514(Rep. 2012) provides, in pertinent part:

(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.

The Workers' Compensation Commission is obliged to strictly construe and apply this provision. See Ark. Code Ann. §11-9-704(c)(3)(Repl. 2012); *Delargy v. Golden Years Manor*, 2014 Ark. App. 499, 442 S.W.3d 889.

An administrative law judge found in the present matter, “3. The preponderance of the evidence herein, including but not limited to, the claimant’s attorney’s concession/admission at the hearing, the fact the claimant petitioned the Commission for his one (1)-time-only COP to the neurosurgeon of his choice, Dr. Knox; and the Commission’s final COP order dated August 22, 2017 from which the claimant did not appeal conclusively demonstrate Dr. Schlesinger’s past, present, and future medical treatment including, but not limited to the March 7, 2019 lumbar spine surgery at the L2-3 level, all of which has been and is being paid by Medicaid, was and is unauthorized, and not the respondents’ responsibility.”

The Full Commission does not affirm this finding. The parties stipulated that the claimant sustained compensable injuries on March 8, 2017. The evidence demonstrates that the respondents never provided the claimant with a notice explaining his rights and responsibilities concerning change of physician. The respondents’ attorney expressly stated at the hearing held November 18, 2020 that the respondents were not arguing that Dr. Schlesinger’s treatment was “unauthorized.” The respondents’ attorney stated regarding medical treatment, “It’s not reasonable and necessary. *There’s no Form N* [emphasis supplied]. They did ask for a change of physician, but *there is no Form N that was provided* [emphasis supplied].” If there is not a signed and delivered Form AR-N in the record

before the Commission, then the claimant is not bound by the change of physician rules. *Delargy, supra*. Additionally, there is not a Change of Physician Order in the record before the Commission.

The Full Commission finds in the present matter that the change of physician rules do not apply, and that the claimant was free to seek reasonably necessary medical treatment from any physician, including Dr. Schlesinger.

B. 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. 2012). The employee has the burden of proving by a preponderance of the evidence that medical treatment is reasonably necessary. *Stone v. Dollar General Stores*, 91 Ark. App. 260, 209 S.W.3d 445 (2002). Preponderance of the evidence means the evidence having greater weight or convincing force. *Metropolitan Nat'l Bank v. La Sher Oil Co.*, 81 Ark. App. 269, 101 S.W.3d 252 (2003). What constitutes reasonably necessary medical treatment is a question of fact for the Commission. *Wright Contracting Co. v. Randall*, 12 Ark. App. 358, 676 S.W.2d 750 (1984).

An administrative law judge found in the present matter, “4. Even if the Full Commission were to find the Commission’s August 22, 2017 COP

order was an illegal order, and thus unenforceable, as is explained in detail above the claimant has failed to meet his burden of proof in demonstrating Dr. Schlesinger's treatment, including but not limited to the March 2019 surgery, was either related to, or reasonably necessary for, treatment of his March 8, 2017 compensable injury for which he has already received benefits pursuant to a final Full Commission opinion and order for an 11% permanent anatomical impairment rating and deemed to have sustained 10% wage loss disability." The Full Commission does not affirm this finding.

The parties stipulated that the claimant "sustained compensable injuries to his back and leg" on March 8, 2017. The claimant was initially treated conservatively, and we reiterate that there is not a Change of Physician Order in the record before the Commission. The claimant testified on March 27, 2017 that he was suffering from back pain, numbness, and burning in his left leg, and that his symptoms were worsening. The administrative law judge referred the claimant to Dr. Barnes who opined that the claimant was not a surgical candidate. Meanwhile, the claimant began treating on his own with Dr. Schlesinger beginning August 6, 2018. The Full Commission has determined *supra* that the change of physician rules do not apply in this case and that the claimant

was free to seek reasonably necessary medical treatment from Dr. Schlesinger.

Dr. Schlesinger performed a lumbar decompression at L2/3 on March 7, 2019. The claimant testified at a hearing held November 18, 2020 that his back was “not hurting near as much” following surgery provided by Dr. Schlesinger. The claimant also testified that he was taking less medication and relied primarily on Ibuprofen to treat his pain. It is within the Commission’s province to weigh all of the medical evidence, to determine what is most credible, and to determine its medical soundness and probative force. *USA Truck, Inc. v. Webster*, 2020 Ark. App. 226, 599 S.W.3d 368. Reasonably necessary medical treatment includes that 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 a compensable injury. *Id.* If an injury is compensable, then every natural consequence of that injury is also compensable. *Hublely v. Best Western-Governor’s Inn*, 52 Ark. App. 226, 916 S.W.2d 143 (1996). A claimant who has sustained a compensable injury is not required to furnish objective medical evidence to prove he is entitled to additional medical treatment. *Ark. Health Ctr. v. Burnett*, 2018 Ark. App. 427, 558 S.W.3d 408.

The Full Commission finds in the present matter that the current treatment of record provided by Dr. Schlesinger was reasonably necessary in connection with the compensable injury sustained by the claimant on March 8, 2017. Dr. Schlesinger opined, “Based on what the patient has told me I do believe this problem is likely related to a Workmen’s Comp. injury. I would state this with a greater than 51% medical certainty that the problem that we are treating now with this surgical plan is related to the injury at work even though this [has] not been accepted as a Workmen’s Comp. case based on the patient’s history given to me.” The Full Commission finds that Dr. Schlesinger’s causation opinion was credible and was corroborated by the probative evidence of record. Moreover, the claimant reported an improvement in his physical condition following surgery provided by Dr. Schlesinger. The Full Commission finds that surgery performed by Dr. Schlesinger on March 7, 2019 was reasonably necessary in connection with the compensable injury.

C. Temporary Total Disability

Finally, 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). “Healing period” means “that period for healing of an injury resulting from an accident.” Ark. Code Ann. §11-9-

102(12)(Repl. 2012). The healing period continues until the employee is as far restored as the permanent character of the injury will permit. *Mad Butcher, Inc. v. Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982). The determination of when the healing period has ended is a question of fact for the Commission. *Porter Seed Cleaning, Inc. v. Skinner*, 1 Ark. App. 235, 615 S.W.2d 280 (1981).

An administrative law judge found in the present matter, “5. Since the claimant’s treatment with Dr. Schlesinger was unauthorized, and/or not related to nor did it constitute reasonably necessary medical treatment for his minor March 8, 2017 compensable injury, he is not entitled to additional TTD benefits.” The Full Commission reverses this finding. We find that the claimant proved he was entitled to temporary total disability benefits from March 7, 2019 through April 30, 2019. The Full Commission finds that the claimant entered a healing period for the unscheduled compensable injury to his back on the date Dr. Schlesinger performed surgery, March 7, 2019. We also find that the claimant proved he was totally incapacitated from earning wages beginning March 7, 2019. A note from Dr. Schlesinger’s clinic dated April 30, 2019 indicated, “We will release the patient from further care at this time. I will be happy to see the patient back if needed.” The Full Commission finds that the claimant reached the end of his healing period on April 30, 2019, the date he was released by Dr. Schlesinger. The

evidence does not demonstrate that the claimant re-entered a healing period at any time after April 30, 2019. We recognize that the claimant continued to follow up with Dr. Schlesinger after April 30, 2019. Nevertheless, it is well-settled that a claimant may be entitled to ongoing medical treatment after the healing period has ended, if the medical treatment is geared toward management of the claimant's injury. *Patchell v. Wal-Mart Stores, Inc.*, 86 Ark. App. 230, 184 S.W.3d 31 (2004).

After reviewing the entire record *de novo*, the Full Commission finds that the respondents did not provide the claimant with a notice explaining his rights and responsibilities concerning change of physician. The Full Commission therefore finds that the change of physician rules do not apply in the present matter, and that the current treatment of record provided by Dr. Schlesinger was reasonably necessary in connection with the compensable injury. The Full Commission finds that the claimant proved he was entitled to temporary total disability benefits from March 7, 2019 through April 30, 2019. The Full Commission finds that the claimant did not re-enter a healing period for his compensable injury at any time after April 30, 2019. The claimant's attorney is entitled to fees for legal services in accordance with Ark. Code Ann. §11-9-715(a)(Repl. 2012). For prevailing in part on appeal, 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.

SCOTTY DALE DOUTHIT, Chairman

M. SCOTT WILLHITE, Commissioner

Commissioner Palmer concurs in part and dissents in part.

CONCURRING AND DISSENTING OPINION

The only issue Claimant raised at the hearing and now raises on appeal is whether Claimant is entitled to temporary total disability benefits for the recovery time following Dr. Schlesinger's surgery. I concur with the majority's finding that Dr. Schlesinger's treatment was reasonable and necessary treatment for Claimant's compensable injury and that Claimant is, therefore, entitled to the award of temporary total disability benefits.

Claimant does not argue (nor has he ever argued in this case) that the change-of-physician rule does not apply or that Respondents should be responsible for the medical treatment provided by Dr. Schlesinger. In fact, Claimant has consistently conceded these points. Although the Full Commission reviews cases *de novo*, I do not believe the Commission

should swoop in, *sua sponte*, and reverse the ALJ on issues not raised by the parties.

Claimant has consistently conceded that Respondents should not be responsible for Claimant's treatment with Dr. Schlesinger. At the close of the November 18, 2020, hearing, Respondents acknowledged that they had not presented proof that Form N was provided to Claimant. Following this colloquy, however, Claimant's attorney stated, "Your Honor, I just want to emphasize, you know, what we're here for today on – Mr. Jaynes and I are for the temporary disability. That's what we're here for." Claimant's attorney went on to clarify, "We have not made an allegation that the respondents should pay for the surgeries that Mr. Jaynes had." Later he stated, "we're cognizant of the fact that change of physician rules in place that might make it difficult to have [Respondents] ordered to pay for the surgery. Our chief concern here is the temporary disability, the recovery from the surgery."

On the opening page of Claimant's brief, he writes, "In the hearing held November 18, 2020, Claimant . . . recognized that the bills incurred would be considered 'unauthorized' and that [Respondents] would not be responsible for any bills generated." In the closing paragraph of Claimant's brief, he writes, "While the surgery was not 'authorized' (as admitted) recovery time will follow, temporary disability time."

Claimant has long known about the potential issues about the change-of-physician rule and consequences (or lack thereof) regarding his failure to obtain a change-of-physician order.

In the Opinion filed May 13, 2019, the majority wrote,

Another hearing was held on September 5, 2018. At that time, the parties' colloquy indicated that the claimant had presented on his own to Dr. Schlesinger in August 2018. The respondents apparently contended that any treatment provided by Dr. Schlesinger was unauthorized, despite the absence in the record of any evidence demonstrating that the claimant received a copy of the change of physician rules.

Although this is indicative of the majority's current opinion on the matter, it highlighted that the change-of-physician rules might not apply in this case and the resulting consequence (who bears the burden of picking up Claimant's tab for Dr. Schlesinger's treatment). Rather than take the hint and argue that Claimant was not bound by the change-of-physician rule and allege that Respondent must pick up the tab, Claimant has continued to concede that Respondents "would not be responsible for any bills generated [by Dr. Schlesinger's treatment]."

Because I would not address issues that the parties agree on, have not litigated, and have not raised on appeal, I would not award Claimant medical benefits that he does not seek, nor the unsought attorney's fees associated with those unsought medical benefits. Accordingly, I respectfully dissent on these points.

CHRISTOPHER L. PALMER, Commissioner