BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. G300449

SHIRLEY L. WALKER, EMPLOYEE	CLAIMANT
MICHILD ENRICHMENT CENTER, EMPLOYER	RESPONDENT
RISK MANAGEMENT RESOURCES, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED NOVEMBER 9, 2021

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

Claimant appears *pro se.*

Respondents represented by the HONORABLE KAREN H. McKINNEY, Attorney at Law, Little Rock, Arkansas.

ORDER

The claimant moves the Full Commission to supplement the record. The Full Commission grants the claimant's motion.

I. HISTORY

The parties stipulated that the claimant "sustained a compensable injury to her face" on January 7, 2013. The claimant basically testified that she was assaulted and struck in the face by a resident patient. A pre-hearing order was filed on November 19, 2020. According to the text of the pre-hearing order, the claimant contended, "The claimant contends she continues to experience problems related to her compensable injury and that additional medical treatment is reasonably necessary for treatment of those problems. She also contends that she has received treatment in the

past for which the respondents denied liability, and she contends that this treatment was reasonably necessary for treatment of her compensable injuries and the liability of the respondents. In this regard, the claimant specifically contends the treatment provided by and at the direction of Dr. Carter was related to, and reasonably necessary for, treatment of her compensable injuries and, therefore, the respondents are liable for it. The claimant specifically reserves any and all other issues for future litigation and/or determination."

The parties stipulated, "5. The respondents accepted this claim as compensable and have paid all appropriate medical and indemnity benefits to date." The respondents contended, "The respondents contend the claimant sustained an injury on January 7, 2013 and that she has received all the benefits to which she is entitled. Claimant came under the care of Dr. Reginald Rutherford who found she had obtained maximum medical improvement with a 0% impairment rating on June 17, 2013. After Dr. Rutherford passed away, Dr. Michael Chesser assumed care of the claimant until he left his practice, at which time Dr. Barry Baskin took over claimant's care. Dr. Baskin released the claimant from his care on March 7, 2016, when claimant requested a follow up appointment with Dr. Baskin for continued headaches and facial nerve pain, Respondents authorized the claimant to see Dr. Baskins (sic) on December 12, 2016. Dr. Baskin

advised the claimant at that time that she had infraorbital neuralgia that will most likely always exist and that there is nothing that can be done for this condition other than to continue on the Nortriptyline previously prescribed. The claimant advised Dr. Baskin at that time that she has having watering and matting of her left eye, for which he referred her to Dr. Dellimore. Respondents authorized an appointment with Dr. Dellimore, who diagnosed the claimant with dry eye, unrelated to her compensable injury. Claimant requested and received a Change of Physician to Dr. Pemberton, who examined the claimant on January 11, 2018. Dr. Pemberton has referred claimant to Dr. Suen 'to evaluate the left hyperesthesia, chronic pain since 2013.' Claimant has already had a thorough work-up and examinations by two neurologists, Dr. Reginald Rutherford and Dr. Michael Chesser, and a physiatrist, Dr. Barry Baskin, for her hyperesthesia. Further evaluation is not reasonable and necessary medical treatment in connection with her compensable injury as Dr. Baskins (sic) has already advised that continued Nortriptyline is the recommended treatment. Finally, Respondents contend that all medical treatment other from (sic) Dr. Pemberton is unauthorized and not reasonably necessary treatment. The respondents specifically reserve any and all other issues for future litigation and/or determination."

The text of the pre-hearing order indicated that the parties agreed to litigate the following issues:

> 1. Whether the claimant's request for additional medical treatment is related to, and reasonably necessary for, treatment of her January 7, 2013, compensable injury.
> 2. Whether the claimant's attorney is entitled to a controverted attorney's fee on these facts.

The parties stipulated, "4. The claimant requested, and the Commission granted, the claimant her one (1) time only change of physician (COP) request on December 18, 2020, from Dr. Barry D. Baskins (sic) to Dr. John D. Pemberton."

A hearing was held on February 3, 2021. At that time, the claimant contended, among other things, that Dr. Pemberton had referred her to Dr. Carter, a headache specialist with UAMS. The claimant contended that treatment provided by Dr. Carter was reasonably necessary. The following colloquy took place:

> MRS. MCKINNEY: First, with regard to the claimant's contention that Dr. Pemberton, the change of physician doctor, has referred her to Dr. Carter, who we were told is a headache specialist, we don't know anything about Dr. Carter. We don't have Dr. Carter's records, so I believe this is just Ms. Walker's characterization of what Dr. Carter does. For all we know, Dr. Carter is a physical medicine doctor, a neurologist….We don't know what Dr. Carter is. So with that, we object to just a blanket referral. Our contention is that Ms. Walker sustained the injury in 2013. My client has stood ready, willing, and able to provide all reasonable and necessary medical treatment….So it's our contention that we're providing the reasonable and necessary medical treatment and she's outside of that, so therefore it should not be authorized.
> THE COURT: Okay. I understand.
> MR. WHITE: Very quick response, Judge.
> THE COURT: Sure.

> MR. WHITE: We requested medical records – a blanket request – from UAMS. There were no records from Dr. Carter or the headache clinic included. There is a headache clinic at UAMS, and I believe Dr. Carter is the head of it. I don't have anything here today to present into evidence to corroborate that. We would request that you would be – that treatment would be authorized to the appropriate clinic at UAMS to treat headaches, which we could contend would be the headache clinic.
> THE COURT: Okay. And so you did request records? I remember at one time we had talked about that.
> MR. WHITE: I'm sorry?
> THE COURT: You say you did request records at one time?
> MR. WHITE: We did request records, and we got a ream of records from UAMS, but we did not receive anything from the headache clinic or from Dr. Carter.
> THE COURT: Okay. So even though you did get some records in response to your request for medical records, none of those records contained anything from the headache clinic –
> MR. WHITE: That's correct.
> THE COURT: - and/or Dr. Carter –
> MR. WHITE: Correct.

Following the hearing, the administrative law judge filed an opinion on May 4, 2021. The administrative law judge found, among other things, "There exists no evidence in the record whatsoever that Dr. Pemberton ever referred the claimant to 'Dr. Carter,' or that 'Dr. Carter' ever treated the claimant as the claimant testified. Consequently, any and all of the medical treatment the claimant sought on her own or received after her COP to Dr. Pemberton constitutes unauthorized treatment, and the respondents are not responsible for paying for any such treatment." The administrative law judge found that the claimant failed to prove she was entitled to additional

medical treatment. The claimant has filed a timely notice of appeal to the Full Commission.

II. ADJUDICATION

An administrative law judge filed an opinion on May 4, 2021 and denied the claimant's request for additional medical treatment. The claimant filed a timely notice of appeal. On June 8, 2021, the Full Commission unanimously granted C. Michael White's request to withdraw as attorney for the claimant. The claimant is therefore now *pro se* and has not hired a substitute attorney. The Clerk of the Commission thereafter granted the claimant an extension of time in which to file her brief. On August 31, 2021, the Full Commission granted the claimant another extension of 30 days. The case has not yet been submitted to the Full Commission for *de novo* review.

On September 14, 2021, the claimant filed a MOTION TO SUPPLEMENT THE RECORD. The claimant states, among other things, "The records of Dr. John Pemberton, the 2nd opinion physician, were not made part of the record. I would like to submit these records and billings so that we can further proceed with this case….Dr. John Pemberton referred me to this physician, Dr. Dale Carter. I would like to make this a part of the record if I may."

In order for the Commission to allow submission of additional evidence, the movant must demonstrate that the new evidence is relevant; that the new evidence is not cumulative; that the new evidence would change the result of the case; and that the movant was diligent in presenting the evidence to the Commission. *Long v. Wal-Mart Stores, Inc.*, 98 Ark. App. 70, 250 S.W.3d 263 (2007). The Commission should be liberal rather than stringent in allowing introduction of evidence. *Bryant v. Staffmark, Inc.*, 76 Ark. App. 64, 61 S.W.3d 856 (2001). In the present matter, the evidence submitted by the claimant is relevant, not cumulative, and would change the result of the case. For instance, the newly-submitted evidence demonstrates that the claimant indeed treated with Dr. Carter at UAMS. This relevant evidence directly contradicts the administrative law judge's finding that Dr. Carter never treated the claimant.

The claimant's attorney stated at hearing that he had requested medical records from UAMS but "There were no records from Dr. Carter or the headache clinic included." The claimant is now seeking to submit the proper medical evidence into the record for the Full Commission's review. The Full Commission finds that the evidence presented by the claimant is relevant, is not cumulative, and would change the result of the case. We also find that the claimant was diligent in presenting the evidence to the Commission. *See Long, supra*.

The Full Commission therefore grants the claimant's MOTION TO SUPPLEMENT THE RECORD. We direct the Clerk of the Commission to establish a final briefing schedule. The Full Commission strongly admonishes the claimant to comply with the final briefing schedule established by the Clerk of the Commission. The record for the Full Commission's *de novo* review shall include the evidence submitted at the hearing held February 3, 2021 in addition to the exhibit packet included by the claimant in her MOTION TO SUPPLEMENT THE RECORD.

IT IS SO ORDERED.

SCOTTY DALE DOUTHIT, Chairman

M. SCOTT WILLHITE, Commissioner

Commissioner Palmer dissents.

DISSENTING OPINION

Claimant seeks to supplement the record to include medical records from a Dr. Carter at a headache clinic at UAMS. The majority has found that Claimant should be allowed to supplement the record. I respectfully dissent.

Criteria for considering additional evidence are whether the evidence is newly discovered, not cumulative, would change the outcome of the issue

tried, and whether the person seeking admittance of the evidence was diligent in discovering the evidence. *See, e.g.*, *Get Rid of It Ark. & Chartis v. Graham*, 2016 Ark. App. 88, at 7.

First, this evidence is not newly discovered. It is just evidence that Claimant failed to present at the hearing.

Second, Claimant was not diligent in discovering the evidence. *Diligent* is defined by Meriam-Webster's online dictionary as "characterized by steady, earnest, and energetic effort."[1] According to Claimant's attorney, a "blanket request" was sent to UAMS; however, no records from Dr. Carter or a headache clinic were included in the records received from UAMS. After this, Claimant did nothing to obtain records from Dr. Carter or the headache clinic. On this point, the majority concludes – without explanation – that Claimant "was diligent in presenting the evidence to the Commission." As set out above, sending a blanket request, which did not produce the records at issue here, and then doing nothing more to obtain the records, is hardly an exercise of diligence.

Lastly, there is nothing in the record to indicate that the evidence would change the outcome of the issue tried. The majority points out that the administrative law judge found that Claimant had not treated with Dr. Carter, and this evidence would change this outcome. But whether

1 Merriam-Webster, available online at https://www.merriam-webster.com/dictionary/diligent (last accessed October 28, 2021).

Claimant treated with Dr. Carter was not the issue tried. The issue tried was whether Claimant is entitled to additional medical benefits for the treatment provided by Dr. Carter. Whether she was actually treated by Dr. Carter does not necessarily mean that Claimant is entitled to the additional medical benefits.

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

_____
CHRISTOPHER L. PALMER, Commissioner