

ARKANSAS COURT OF APPEALS

DIVISION IV

No. CA11-43

ST. EDWARD MERCY MEDICAL
CENTER and SISTERS OF MERCY
HEALTH SYSTEM

APPELLANTS

V.

WHITNEY PHIPPS

APPELLEE

Opinion Delivered September 7, 2011

APPEAL FROM THE ARKANSAS
WORKERS' COMPENSATION
COMMISSION

[No. F806225]

AFFIRMED

LARRY D. VAUGHT, Chief Judge

On October 15, 2010, the Workers' Compensation Commission issued an opinion awarding appellee Whitney Phipps benefits for medical treatment provided by Dr. Greg Jones and temporary-total-disability (TTD) related to that treatment. Appellants St. Edward Mercy Medical Center and Sisters of Mercy Health System appeal the decision, contending that the Commission erred in finding that Dr. Jones's medical treatment was not unauthorized. We affirm.

Phipps, employed by appellants as a nurse's aide, suffered an injury to her left shoulder on November 15, 2007, when she moved a patient. The injury was accepted as compensable, and she was directed by appellants to receive medical treatment by Drs. Keith Holder and Terry Clark. After testing and evaluations, Phipps was diagnosed with a strain. She continued to suffer from pain and was sent to Drs. Robert Bebout, Claude Marimbeau, and Charles Pearce. On September 9, 2008, Dr. Pearce opined that the testing he performed was normal; that there was no indication for further diagnostic testing and/or surgery; that Phipps could

return to work at full duty; that she had reached maximum medical improvement; and that she sustained a zero-percent-impairment rating.

Phipps testified that after Dr. Pearce released her, she received a letter from appellants advising that they would not authorize additional medical treatment for her injury. Because she continued with shoulder complaints, on September 12, 2008, she sought medical treatment on her own from the River Valley Musculoskeletal Center, where she was ultimately treated by Dr. Jones, who diagnosed her with (1) “instability [left-]shoulder with trauma and associated dead arm symptoms” and (2) “AC joint sprain with torn AC meniscus.” Dr. Jones performed surgery on April 23, 2009, which according to his subsequent records resulted in “a dramatic turn around in her preoperative level of symptoms. She feels a whole lot better and is very pleased with her progress.” Dr. Jones released Phipps to return to work without restrictions in September 2009, stating that “she states she feels 100% better and has really had good recovery.” Phipps’s testimony at the hearing confirmed Dr. Jones’s reports. She stated that she improved from surgery—“it is like a total different shoulder after the surgery compared to before the surgery.”

When Phipps sought reimbursement for Dr. Jones’s treatment and TTD benefits,¹ appellants controverted the claim. Before the administrative law judge (ALJ), one of the issues presented, as listed in the prehearing questionnaire, was “whether Dr. Jones’s treatment would

¹Phipps requested additional TTD benefits from April 23, 2009, the date of her surgery, through June 3, 2009, when she was released to return to work at light duty.

be unauthorized under Ark. Code Ann. § 11-9-514.”² After a hearing, the ALJ found that Dr. Jones’s treatment was not unauthorized. Relevant to this appeal, the ALJ found that because the evidence failed to show that appellants provided Phipps a written notice setting out her rights and responsibilities regarding a change of physician pursuant to section 11-9-514(c)(1) (Repl. 2002), based on section 11-9-514(c)(2), the change-of-physician rules did not apply.

The Commission affirmed the ALJ’s finding that appellants failed to prove that Dr. Jones’s treatment was unauthorized:

The [appellants] state that [Phipps] was provided a Form N on November 17, 2007, and that [Phipps] was provided a Workers’ Compensation booklet on November 16, 2007. The record does not support [appellants’] assertion in this regard. There is no evidence of record demonstrating that [Phipps] was provided Notice concerning her rights and responsibilities with regard to change of physician on November 16, 2007, November 17, 2007, or on any other date. The record before the Commission does not contain a Form N or any other notice with regard to change of physician. Nor was there any testimony on this issue. [Appellants have] the burden of proving delivery of the change-of-physician form. [Citation omitted.] In the present matter, there was no documentary evidence of record demonstrating that [appellants] delivered to [Phipps] a change-of-physician form after the compensable injury. Nor was there any testimony with regard to whether or not [Phipps] received such a form. [Phipps] was therefore not required to petition the Commission in order to be treated by a competent doctor.

Appellants timely appealed from the Commission’s decision.

When reviewing a decision of the Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the findings of the Commission and affirm that decision if it is supported by substantial evidence. *St. Joseph’s Mercy Health Center v. Redmond*, 2010 Ark. App. 629, at 4. Substantial evidence is such

²Two other issues were presented as well—whether Dr. Jones’s additional medical treatment was reasonable and necessary and Phipps’s entitlement to additional TTD benefits. Regarding these two issues, the ALJ found in favor of Phipps, and the Commission affirmed. Appellants do not challenge these findings on appeal.

relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* at 4. The issue is not whether we might have reached a different result or whether the evidence would have supported a contrary finding; even if a preponderance of the evidence might indicate a contrary result, if reasonable minds could reach the Commission's conclusion, we must affirm its decision. *Id.*

Arkansas workers' compensation law provides that an 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) (Supp. 2009). The employer has the right to select the initial treating physician. Ark. Code Ann. § 11-9-514(a)(3)(A)(i) (Repl. 2002). However, an employee may request a one-time change of physician. Ark. Code Ann. § 11-9-514(a)(2)(A), (a)(3)(A)(ii), (iii). When a claimant seeks a change of physician, she must petition the Commission for approval. *Stephenson v. Tyson Foods, Inc.*, 70 Ark. App. 265, 270, 19 S.W.3d 36, 39 (2000) (citing Ark. Code Ann. § 11-9-514(a)(2)(A) (Repl. 1996)). Treatment or services furnished or prescribed by any physician other than the ones selected according to the change-of-physician rules, except emergency treatment, shall be at the claimant's expense. Ark. Code Ann. § 11-9-514(b) (Repl. 2002).

The change-of-physician rules do not apply unless the employer satisfies the following condition:

(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,³ approved or prescribed by the commission, which explains the employee's rights and responsibilities concerning change of physician.

Ark. Code Ann. § 11-9-514(c)(1) (Repl. 2002). Any unauthorized medical expense incurred after the employee has received a copy of the notice shall not be the responsibility of the employer. Ark. Code Ann. § 11-9-514(c)(3). If, however, after notice of injury, the employee is not furnished a copy of the notice after an injury, the change-of-physician rules do not apply. Ark. Code Ann. § 11-9-514(c)(2); *Stephenson*, 70 Ark. App. at 272, 19 S.W.3d at 40-41 (holding that if an employer fails to give a claimant the Form AR-N after an injury, the claimant is not required to petition the Commission in order to be treated by a competent doctor).

Returning to the case at bar, it is undisputed that Phipps sought treatment with Dr. Jones on her own and did not seek a change of physician through the Commission. According to appellants, these undisputed facts coupled with section 11-9-514(b) establish that Dr. Jones's treatment was unauthorized and the Commission's decision to the contrary is error. Appellants also challenge the Commission's finding that because there was no evidence in the record that Phipps received and signed the Form AR-N, the change-of-physician rules do not apply. While they argue that the issue of whether Phipps received the Form AR-N was not presented below, they also argue that it was undisputed that Phipps received and signed the Form AR-N and that a signed Form AR-N can be found in the Commission's file. Arguing

³The written notice most often utilized by employers is a Workers' Compensation Commission document entitled, "Form AR-N, Employer's Notice to Employee." The Form AR-N, among other things, outlines the employee's rights and responsibilities concerning a change-of-physician request.

that Dr. Jones's treatment was unauthorized, appellants seek reversal of the Commission's decision, or in the alternative, they seek remand of the decision with instructions that findings be made on the issue of whether Phipps received and signed the Form AR-N.

Despite the fact that Phipps's treatment by Dr. Jones was not approved by the Commission as part of a change-of-physician request, we affirm the Commission's finding that Dr. Jones's treatment was not unauthorized. This is because the Commission's findings that appellants failed to establish that Phipps was provided a Form AR-N or any other notice concerning her rights and responsibilities with regard to a change of physician is supported by substantial evidence; therefore, the change-of-physician rules do not apply in this case. The record on appeal does not contain any evidence that appellants delivered or Phipps received a Form AR-N or other written change-of-physician rules. There is no Form AR-N signed by Phipps in the record. There was no testimonial evidence introduced on this issue either. Phipps was the only witness who testified, and she did not testify on the issue. The burden of proving delivery of the change-of-physician form is on the employer. *Stephenson*, 70 Ark. App. at 272, 19 S.W.3d at 41. There is substantial evidence in the record to support the Commission's findings that appellants failed to meet this burden.

While appellants concede that there is no Form AR-N signed by Phipps in the record on appeal, they argue that reversal is warranted because Phipps's signed Form AR-N can be found in the Commission's file. However, appellants did not introduce the form into evidence; they did not incorporate the form by reference; they did not ask the Commission

to take judicial notice of the form;⁴ and they did not ask Phipps if she received and/or signed the form or whether she was advised of her right to seek a change of physician.

Citing *Redmond*, appellants alternatively argue that this case should be remanded and the Commission be directed to hold another hearing and make specific findings as to whether appellants delivered the Form AR-N to Phipps. We disagree because *Redmond* is distinguishable. In *Redmond*, the issue of whether the medical treatment was unauthorized was not presented to the Commission, and it made no findings on the issue. *Redmond*, 2010 Ark. App. 629, at 5. Here, whether Dr. Jones's treatment was authorized was an issue presented to the Commission, and it made multiple findings on the issue—ultimately concluding that there was no evidence in the record that appellants delivered the Form AR-N to Phipps.

In sum, because substantial evidence supports the Commission's finding that appellants did not deliver notice (the Form AR-N) to Phipps explaining her rights and responsibilities concerning a change of physician, we affirm the Commission's conclusion that the additional treatment provided by Dr. Jones was not unauthorized.

Affirmed.

HART and GLOVER, JJ., agree.

⁴Appellants argue in their reply brief that the Commission erred in not taking judicial notice of the Form AR-N that they allege Phipps received and signed. They argue that they brought the form to the attention of the Commission “after the hearing, during the briefing process.” However, appellants' brief to the Commission is not part of the record. Therefore, we are unable to determine whether appellants brought the form to the attention of the Commission or asked that the Commission take judicial notice of it.