VIRGINIA: 09/25/95
IN THE WORKERS' COMPENSATION COMMISSION

CAROLYN S. FLESHMAN, Claimant

v. V.W.C. File No. 163-73-20 Opinion by DIAMOND Commissioner

CHECKERS CHECK CASHING, Employer
LIBERTY MUTUAL INSURANCE CO., Insurer

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REVIEW on the record before Commissioner Joyner, Commissioner Tarr and Commissioner Diamond at Richmond, Virginia.

This case is before the Commission at the request of the claimant for Review of a decision of the Deputy Commissioner which found that she was not temporarily totally disabled, that Dr. Lublin is her treating physician, and that her average weekly wage is as previously stipulated. We REVERSE the Opinion below.

The claimant, age 50, injured her lower back while moving a trash can on April 26, 1993. The claim was denied, and following a hearing on August 17, 1994, the Commission found that the claim was compensable and medical benefits only were awarded on August

25, 1994. At the initial hearing, the parties stipulated that the claimant's average weekly wage would be based upon her 52

weeks of employment preceding the accident.

The claimant filed a change in condition application seeking temporary total disability benefits from September 15, 1994, and continuing, and she requests that Dr. Howard G. Stern, M.D., be deemed her authorized physician. She also contends that her average weekly wage should have been based upon the wage she received in the job to which she was promoted three months before the accident.

The record reflects that the claimant was seen at Patient First on April 30, 1993, following her accident, and she was diagnosed with a lumbar strain and referred to Dr. Stern.

The claimant did not actually see Dr. Stern until October 6, 1993, because the claim was denied and she was concerned about the cost. When Dr. Stern saw the claimant, his impression was a low back injury and probable degenerative disc disease. He recommended conservative treatment, including physical therapy, a corset, and an anti-inflammatory.

The claimant received no medical care until after she was awarded benefits by the Commission in August of 1994. It was on September 9, 1994, that Dr. Stern next saw the claimant. He wrote:

> Ms. Fleshman comes in today for follow up. I have not seen her for awhile as she has been battling with WC and has won a court settlement to get her injuries covered. She continues to have pain and L sciatica. Her sciatica is not constant but does go down into the foot.

Dr. Stern scheduled the claimant for an MRI at that time to rule out a herniated disc.

On September 15, 1994, Dr. Stern wrote:

> Ms. Fleshman is a patient of mine being treated for low back injury and probably degenerative disc disease, presently ruling out HNP. She has been out of work, according to my records, from 4-26-93 and is presently out of work.

At this point, the carrier informed the claimant that it would not pay for any additional treatment by Dr. Stern. Instead, it required her to select a treating physician from a panel of its own choosing. The claimant then proceeded to see Dr. Bernard A. Lublin, M.D., one of the panel doctors, on September 22, 1994. Dr. Lublin ordered a CT scan and prescribed conservative care. The report of the radiologist indicated a bulging disc at L3-4 and an "apparent" herniation at L5-S1. The claimant saw Dr. Lublin again on October 13, 1994, at which time she complained that her symptoms were unabated. Dr. Lublin advised her "that my clinical and diagnostic evaluation does not indicate anything more than conservative measures which have been pursued. No return visit is scheduled."

The claimant testified that Dr. Lublin told her he would no longer treat her because the carrier was not paying his fees. She did not return to Dr. Lublin even after the carrier clarified that it would pay Dr. Lublin.

The claimant's next medical appointment was on April 3,

1995, with Dr. Stern. Dr. Stern testified by way of deposition

that when he saw the claimant at that time, he excused her from work "because of pain" and in order to carry through on his earlier request for an MRI. He stated:

> I believe if we would have had our MRI scan back when we originally ordered it, this whole thing would have been put to rest by now, probably. Because that's a confirmatory study... The accuracy of a plane (sic) CT of the lumbar spine is much lower
>
> than an MRI scan... CT spine is a relatively poor study for disc herniation...

Dr. Stern stated that with regards to whether the claimant could have performed light duty work:

> Possibly, yes. Some low-demand, sedentary type work. She was not bed ridden, and certainly able to go to and from her doctor's office. She probably was able to do some type of work at that time of a low-demand nature; however, she did not have a trial of low-demand working, and for me to say that she would have been able to do that, I could not say definitely yes.

The claimant testified that her job involved standing for several hours, processing checks, cleaning and vacuuming. She was promoted to night manager in December, 1992, or January, 1993, with a wage increase from $5 to $6 an hour. She stated that she has been unable to work since her accident, and has not looked for work.

From this record we find that Dr. Stern is the claimant's authorized treating physician. When the carrier denied the claim, the claimant gained the right to choose her own doctor. She chose Dr. Stern, whom she saw only on two occasions because

of a lack of funds. After the claim was deemed compensable, the claimant returned to Dr. Stern, but the carrier refused to allow her to continue treating with him, and insisted on offering a panel. The carrier's action in interfering with the claimant's treatment with Dr. Stern is impermissible, and it would be unfair to penalize the claimant because of her understandable compliance with the carrier's inappropriate direction. We therefore find that the claimant is entitled to resume treatment with Dr. Stern. The Opinion below is REVERSED on this issue.

We further find that the evidence preponderates that the claimant was totally disabled from September 15, 1994, and continuing. Although Dr. Stern stated that she "possibly" could have done some work, or that a trial of low-demand, sedentary employment would "probably" have proved successful, a trial release is not an absolute release. Langhorne v. Jamerson Bros. Trucking Co., 70 O.I.C. 94 (1991). Furthermore, we do not find that the claimant was given specific restrictions which would have enabled her to conduct a job search. Dr. Stern stated that he did not want her working until he confirmed whether she had a herniated disc, because he wanted to avoid neurological damage. The employer's failure to allow Dr. Stern to treat the claimant or to perform an MRI scan to definitely diagnosed her condition, may have contributed to the delay and lack of improvement in the claimant's condition. We therefore REVERSE the finding below

that the claimant was not temporarily totally disabled.

Finally, with regard to the average weekly wage, although the parties stipulated previously that the average weekly wage should be based on the 52 weeks prior to the accident, the claimant was not in fact awarded any disability benefits at that time. Section 65.2-500 of the Code of Virginia states that the average weekly wage shall be computed in a way which reflects the economic loss suffered by the employee. When an employee receives a promotion prior to the injury, the average weekly wage should reflect the higher salary. Smith v. The Southland Corp., 71 OWC 1 (1992); Horne v. Arby's-Tower Weld, Inc., 65 O.I.C. 22 (1986). The employer argues that the issue is res judicata. However, the Commission has the right to amend the average weekly wage in the event of mutual mistake or misrepresentation. Spencer v. Commonwealth of Virginia, 70 O.I.C. 4 (1991). We find that the correct average weekly wage is $240.00.

The Opinion below is REVERSED, and the following award shall enter.

AWARD

An award is hereby entered on behalf of Carolyn S. Fleshman against Checkers Check Cashing and Liberty Mutual Insurance Co. for the payment of temporary total disability benefits in the weekly amount of $160.00 beginning September 15, 1994 through the present and continuing.

The employer and carrier shall continue to be responsible

for the reasonable cost of medical care causally related to the claimant's accident of April 26, 1993. The employer and carrier shall also be responsible for treatment rendered by Dr. Howard G. Stern, M.D., the claimant's authorized treating physician.

All compensation having accrued shall be paid in a lump sum with the carrier directed to deduct a total fee of $2,000.00 to be paid directly to Wesley G. Marshall, Esquire, for legal services rendered.

APPEAL

This Opinion shall be final unless appealed to the Virginia Court of Appeals within thirty days.