

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. D601189 & D614780

EDWARD L. WARREN, EMPLOYEE	CLAIMANT
YOUTH SERVICES CENTER, EMPLOYER	RESPONDENT
PUBLIC EMPLOYEE CLAIMS, INSURANCE CARRIER/TPA	RESPONDENT

OPINION FILED JULY 20, 2004

Hearing before Chief Administrative Law Judge David Greenbaum on June 21, 2004, in Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. James W. Stanley, Attorney-at-Law, North Little Rock, Arkansas.

Respondents represented by Mr. Richard S. Smith, Attorney-at-Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted June 21, 2004, to determine whether the claimant was entitled to additional permanent disability benefits.

A prehearing conference was conducted in this case on April 21, 2004, and a Prehearing Order was filed on April 22, 2004. At the hearing, the parties announced that the stipulations, issues, as well as their respective contentions were properly set out in the Prehearing Order. A copy of the Order was introduced as "Commission's Exhibit 1" and made a part of the record without objection.

It was stipulated that the claimant sustained compensable injuries arising out of and during the course of his employment with the Alexander

Youth Services Center on both October 22, 1985, and, again, on October 14, 1986; that claimant's average weekly wage was \$399.50, entitling him to the maximum applicable compensation rates; that the last formal hearing conducted in these claims was held December 14, 1994, and an Opinion filed March 30, 1995; that no appeal was taken from the prior Opinion and Award which is now final and the law of the case.

By agreement of the parties, the issue presented for determination was whether the claimant was entitled to permanent total disability benefits.

Claimant contended, in summary, that his overall condition had changed since the prior Opinion, both from a physical, as well as a compensable, psychological standpoint, entitling him to an award of permanent total disability. At the hearing, the claimant amended his contentions to include additional indemnity benefits beyond those previously awarded in the event the Commission, in its sound discretion, determined that the claimant was less than permanently totally disabled. A controverted attorney's fee was requested in the event additional benefits was awarded.

The respondents contended that the claimant was not permanently totally disabled and that he was limited to the benefits previously awarded. Respondents maintained that the claim for additional indemnity benefits was barred by the doctrine of res judicata.

In addition to the claimant, his wife, Juanita Warren, was called as a

corroborating witness. The record in this case is composed solely of the transcript of the June 21, 2004, hearing containing numerous exhibits, including a volume of medical reports. Both parties submitted briefs subsequent to the hearing to address the legal issues.

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 Ark. Code Ann. §11-9-704:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction over these claims.
2. The stipulations agreed to by the parties are hereby accepted as fact.
3. These claims are barred by the doctrine of *res judicata*.
4. The claimant has failed to prove that there has been a change in his physical or mental condition since the prior Opinion and Award filed March 30, 1995. Even if the claimant has shown a change in his condition, which is not conceded herein, a modification of the prior Award is not warranted pursuant to A.C.A. §11-9-713.
5. Respondents have controverted claimant's entitlement to additional permanent disability benefits.

6. Issues not addressed herein are specifically reserved.

DISCUSSION

As reflected by the stipulations, this claim has been the subject of a prior hearing. The sole issue presented for determination at the prior hearing concerned the extent of claimant's permanent disability. An Opinion was filed March 30, 1995, wherein the following findings of fact and conclusions of law were entered:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The relationship of employee-employer existed at all relevant times, including October 22, 1985, and October 14, 1986.
3. Claimant sustained compensable injuries arising out of and during the course of his employment with Alexander Human Services on both October 22, 1985, and again on October 14, 1986, at which time he was earning sufficient wages to entitle him to the maximum compensation rates, including \$154.00 per week for permanent partial disability.
4. Respondents have paid all appropriate temporary total disability to which claimant is entitled, to date.
5. Claimant has undergone two surgeries and has had multiple healing periods; however, claimant's final healing period ended January 3, 1988.
6. Claimant has sustained anatomical impairments totaling 20% to the body as a whole, a 10% impairment as a result of claimant's October 22, 1985 injury and surgery, and 10% attributable to claimant's October 14, 1986 injury and surgery.
7. In addition to the claimant's anatomical rating, respondents have paid an additional 33% wage loss disability for a total payment of 53% to the body as a whole in permanent partial disability benefits.

8. Claimant has sustained an overall permanent partial disability of 60% to the body as a whole as a result of his two compensable injuries, aforementioned.
9. Respondents have controverted all permanent disability in excess of 53% to the body as a whole.
10. Respondents have not controverted continued medical and related expenses, to date.

No appeal was taken by either party from the prior decision which is now final and the law of the case.

Res judicata applies where there has been a final adjudication on the merits of an issue by a court of competent jurisdiction on all matters litigated and those matters necessarily within the issue which might have been litigated. *Perry vs. Leisure Lodges*, 19 Ark. App. 143, 718 S.W.2d 114 (1986). The doctrine of *res judicata* bars the reopening of matters once judicially determined by competent authority. *Gwin vs. R.D. Hall Tank Co.*, 10 Ark. App. 12, 660 S.W.2d 947 (1983). *Res judicata* applies to decisions of the Workers' Compensation Commission. *Perry, supra; Gwin, supra*. The rationale underlying the doctrine of *res judicata* is to end litigation by preventing a party who has had one fair trial of a question of fact from again drawing it into controversy. *Mohawk Tire and Rubber Co., vs. Bridger*, 259 Ark. 728, 536 S.W.2d 126 (1976). However, the doctrine does not bar issues which were not decided and could not have been decided. In this regard, the Arkansas

Supreme Court made the following comments in *Fawcett vs. Rhyne*, 187 Ark. 940, 63 S.W.2d 349 (1933):

The doctrine of *res judicata* rests, not upon the fact that a particular proposition has been affirmed or denied in the pleadings, but upon the fact that it has been fully and fairly investigated and tried. A point not raised by the pleadings nor decisive of the case and not actually litigated is not conclusively established for the purpose of a subsequent suit upon a different cause of actions, although it may be expressly or tacitly involved in the judgment.

The claimant's entitlement to permanent disability benefits has been previously adjudicated. Rather than conduct an exhaustive analysis of the claimant's testimony, suffice it to say that it is apparent from the record that the claimant is attempting to re-litigate an issue which has been previously decided. Based upon my observations of the character and demeanor of the claimant, it was apparent that the claimant remains angry and dissatisfied with the results of the prior hearing despite the fact that no appeal was taken from the decision. Further, the claimant's testimony was of little probative value. He was frequently unresponsive to various questions. He was also extremely argumentative on cross-examination. Further, despite the claimant's assertion that he has undergone a change in his condition, warranting a modification of the prior Award, it is apparent from the following exchange with his attorney, that his physical condition has not changed:

Q Okay. Now, in 1994 and 1995, that period of time, how were you doing back then as far as your treatment, as far as getting around, what were your symptoms like back at that point in time, Mr. Warren? Just tell the Judge, because only you know how you were feeling.

A I'm there same as now .

Q No, just a minute. You didn't answer my question. How were you feeling back then. What particular problems were you having back then?

A I'm having the same problems then as I'm having now .

Q Okay. Have they gotten better or gotten worse?

A Getting' worse with age.

Q All right. That's fair enough. But I want to go back now. What particular symptoms were you having in 1995? Tell the Judge ... back then ... what were the things that were bothering you the most?

A Well, I think I'd say the same thing as now ... (Tr.20-21)

I find that this claim is barred by the doctrine of *res judicata*. In addition, even if the claim is not barred, which is contrary with the foregoing findings, it is clear that the claimant is attempting to obtain a modification of a prior Award. Ark. Code Ann. §11-9-713 (Repl. 2002) is set out in its entirety below:

(a)(1) Except where a joint petition settlement has been approved, the Workers' Compensation Commission may review any compensation order, award, or decision.

(2) This may be done at any time within six (6) months of termination of the compensation period fixed in the original compensation order or award, upon the Commission's own motion or upon the application of any party in interest, on the ground of a change of physical condition or upon proof of erroneous wage rate.

(3) Upon the review, the Commission may make an order or award terminating, continuing, decreasing, or increasing for the future the compensation previously awarded, subject to the maximum limits provided for in this chapter.

(b) The review and subsequent order or award shall be made in accordance

with the procedure prescribed in §11-9-704.

(c) No review shall affect any compensation paid pursuant to a prior order or award.

(d) The Commission may, at any time, correct any clerical error in any compensation order or award.

(e) Aging and the effects of aging on a compensable injury are not to be considered in determining whether there has been a change in physical condition. Nor shall aging or the effect of aging on a compensable injury be considered in determining permanent disability pursuant to this section or any other section in this chapter. The purpose and intent of this section is to annul any and all case law inconsistent herewith, including *International Paper Co., vs. Tuberville*, 302 Ark. 22, 786 S.W.2d 830 (1990).

The record reflects that the only change in the claimant's overall condition is the effect of aging on his prior condition which cannot be considered in determining permanent disability.

In view of the foregoing, it is herein determined that claimant has failed to prove that he is entitled to additional permanent disability benefits. Accordingly, the within claim is hereby respectfully denied and dismissed.

IT IS SO ORDERED.

DAVID GREENBAUM
Chief Administrative Law Judge