

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E405485

RANDAL HENDRIX,
EMPLOYEE

CLAIMANT

ITT AUTOMOTIVE,
EMPLOYER

RESPONDENT

PACIFIC EMPLOYERS INS. CO.,
INSURANCE CARRIER

RESPONDENT

OPINION FILED FEBRUARY 18, 2005

Hearing conducted before ADMINISTRATIVE LAW JUDGE MARK CHURCHWELL, in Searcy, White County, Arkansas.

The claimant was represented by HONORABLE GARY DAVIS, Attorney at Law, Little Rock, Arkansas.

The respondents were represented by HONORABLE J. C. BAKER, JR., Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above-styled claim on November 23, 2004 in Searcy, Arkansas. A prehearing order was entered in this case on March 23, 2004. This prehearing order set out the stipulations offered by the parties and outlined the issues to be litigated and resolved at the present time. A copy of this prehearing order was made Commission's Exhibit No. 1 to the hearing record.

The following stipulations were submitted by the parties in the prehearing order and are hereby accepted:

1. The employee/employer relationship existed on October 27, 1993, when the claimant sustained a compensable bilateral carpal tunnel syndrome.
2. TTD rate of \$193.00 per week and PPD rate of \$154.00 per week. TTD benefits paid for the periods of March 24, 1994 through March 26, 1994 and April 4, 1994 through May 28, 1996. 10% to both upper extremities below the elbow has been paid.
3. The transcript of the December 9, 2002 hearing and all opinions filed by the Commission in this case to date are incorporated by reference into the record for the upcoming hearing in this case.

By agreement of the parties, the issues to be litigated and resolved at the present time were limited during the course of the hearing to the following:

1. Unpaid medical expenses (for medical treatment starting April 28, 2003 until April of 2004 when the claimant started stimulator testing).
2. Statutory penalties.
3. Controverted attorney's fee.
4. Res judicata.
5. Law of the case.

The record consists of a two volume transcript of the November 23, 2004 hearing. The first volume contains the witness testimony. The second volume contains all documentary evidence.

DISCUSSION

The respondents explained their rationale for refusing to pay for the treatment at issue between April of 2003 and April of 2004 at Texas Tech University as follows:

All appropriate medical benefits have been paid to date. The Commission, in a March 7, 2003, opinion, found that the claimant was entitled to treatment by Dr. Racz in Lubbock, Texas, for a peripheral nerve stimulator implant. Since this opinion, claimant has had numerous trips to Dr. Racz for procedures other than the implant. This treatment includes diagnostic nerve blocks and radiofrequency lesioning to determine if the claimant has a sympathetic component to his condition. In prior opinions dated May 27, 1997 and August 11, 1998, the Commission found that the claimant has no sympathetic component to his injury and that the claimant is not entitled to further treatment to determine the etiology of his condition. Therefore, res judicata and/or law of the case bar the present claim for benefits. In the alternative, if these doctrines do not bar the present claim, the treatment at issue is not reasonable or necessary, nor is it related to the claimant's condition.

I have the following observations with regard to these contentions. First, the respondents are in error in suggesting that either ALJ White's May 27, 1997 opinion or his August 11, 1998 opinion found "that the claimant has no

sympathetic component to his injury". ALJ White made no such findings nor did he address that medical question specifically in either opinion.

Second, I believe that two key pieces of evidences presented to ALJ White at the December 9, 2002 hearing are critical to determining the res judicata/law of the case issue presented in this claim. In a letter dated May 17, 2002, Dr. Hart explained his rationale for referring Mr. Hendrix to the care of Dr. Racz in Lubbock, Texas as follows:

On his presentation today, I did discuss with the Hendrix' that Dr. Gabor Racz is an internationally world renowned pain specialist in Lubbock, Texas whom I have seen on many occasions at national conferences. He is the leading expert on not only spinal cord stimulation, but also peripheral nerve stimulation. It has basically boiled down to Mr. Hendrix does have a failed carpal tunnel, as with a person with a failed back surgical syndrome, many times these patients do well with spinal cord stimulation. We have never attempted this in Mr. Hendrix. Basically, the technology does not exist in the state of Arkansas, and I am not aware of any physician who is doing peripheral nerve stimulation.

ALJ White at the December 9, 2002 hearing also had before him the June 13, 2002 treatment protocol developed for Mr. Hendrix by Dr. Leland Lou, an attending physician in Dr. Racz's group at the Texas Tech Pain Institute in

Lubbock, Texas. That protocol for stimulator placement proposed as follows:

- PLAN:** This plan was discussed with the patient with verbal understanding.
1. We will schedule a right stellate ganglion block with local anesthetic and steroid, and proceed to RFTC of the right stellate ganglion if successful.
 2. In the future, we will consider a left stellate ganglion block and proceed to RFTC of the left stellate ganglion if successful.
 3. We will follow with bilateral thoracic sympathetic blockade and proceed to RFTC if successful.
 4. We will attempt to schedule a single versus dual dorsal column stimulator trial in an effort to reduce central pain in both upper extremities.
 5. We will consider in the future the possibility of right medial nerve peripheral nerve stimulator.
 6. We would suggest a possible Zonegran trial to Dr. Hart in Arkansas but will allow him to make this medication management decision. Because of the patient's Workmans Compensation status we will aggressively attempt to have these procedures scheduled and approved and do them as quickly as possible because the patient is from out of town. The patient has offered to cover some of the procedures out of their pocket, and we hope this will not be necessary.
 7. The attending physician was present and involved in the entire care, planning, and treatment of this patient today.

ALJ White specifically found in relevant part in his March 7, 2003 Opinion and Order:

3. A preponderance of the evidence establishes that the treatment provided by Dr. Racz and the International Pain Clinic in Lubbock, Texas was

reasonably necessary for treatment of the claimant's compensable injury;

4. A preponderance of the evidence establishes that the peripheral nerve stimulator implant recommended by Dr. Racz and the International Pain Clinic is reasonably necessary for treatment of the claimant's compensable injury...

Further in that same opinion, ALJ White specifically found:

In short, I find that the treatment by Dr. Racz and the International Pain center [sic] was directed at maintaining the claimant's condition and toward control [sic] his pain and other symptoms. I also find that the treatment provided by, and recommended by, the center consists of proven modes of treatment which are commonly accepted by the medical profession, and I find that the treatment is not an experimental or exotic form of treatment. Consequently, I find that a preponderance of the evidence establishes the treatment provided by and at the direction of Dr. Racz and the International Pain Clinic was reasonably necessary for treatment of the claimant's compensable injury and the liability of the respondents. In addition, I find that the recommended peripheral nerve stimulator is reasonably necessary for treatment of the claimant's compensable injury.

My review of the medical evidence submitted at the current hearing indicates that the treatment provided to Mr. Hendrix at the International Pain Clinic between April of 2003 and April of 2004 was precisely the treatment proposed in the protocol which I have quoted above from June 13, 2002. The respondents apparently paid for the treatment

provided in Step 1 of the protocol on June 18, 2002, but thereafter refused to authorize treatment for the remaining protocol steps until Mr. Hendrix underwent stimulator testing in April of 2004.

In White v. Gregg Enterprises, 72 Ark. App. 309, 37 S.W.3d 649 (2001), the Arkansas Court of Appeals summarized the doctrines of res judicata and law of the case as follows:

Res judicata applies where there has been a final adjudication on the merits of the issue by a court of competent jurisdiction on all matters litigated and those matters necessarily within the issue that might have been litigated. *Castleberry v. Elite Lamp Company*, 69 Ark. App. 359, 13 S.W.3d 211 (2000). The doctrine of *res judicata* is applicable to decisions by the Commission. *Castleberry v. Elite Lamp Company, supra*. The doctrine of res judicata applies only to final orders or adjudications. *White v. Air Systems, Inc.*, 33 Ark. App. 56, 800 S.W.2d 726 (1990). The filing of a petition for review with the full Commission within thirty days prevents the order of the administrative law judge from becoming final. *White v. Air Systems, supra*. The key question regarding the application of *res judicata* is whether the party against whom the earlier decision is being asserted had a full and fair opportunity to litigate the issue in question. *Castleberry v. Elite Lamp Company, supra*.

Whatever is before the supreme court and disposed of in the exercise of its jurisdiction must be considered settled, and the lower court must carry that judgment into execution according to its mandate. *Bussell v. Georgia Pacific Corp.*, 64 Ark. App. 194, 981 S.W.2d 98 (1998). The trial court, and by analogy the Commission, has no power

to change or extend the mandate of the appellate court. *Bussell v. Georgia, supra*. In *Bussell v. Georgia*, we stated:

Whatever was before the Court, and is disposed of, is considered as finally settled. The inferior court is bound by the judgment or decree as the law of the case, and must carry it into execution according to the mandate. The inferior court cannot vary it, or judicially examine it for any other purpose than execution. It can give no other or further relief as to any matter decided by the Supreme Court even where there is error apparent; or in any manner intermeddle with it further than to execute the mandate and settle such matters as have been remanded, not adjudicated by the Supreme Court. . . . The principles above stated are, we think, conclusively established by the authority of adjudged cases. And any further departure from them would inevitably mar the harmony of the whole judiciary system, bring its parts into conflict, and produce therein disorganization, disorder, and incalculable mischief and confusion. Besides, any rule allowing the inferior courts to disregard the adjudications of the Supreme Court, or to refuse or omit to carry them into execution would be repugnant to the principles established by the constitution, and therefore void.

64 Ark. App. at 199-200, 981 S.W.2d at 100 (quoting *Fortenberry v. Frazier*, 5 Ark. 200, 202 (1843)).

The Commission cannot change its findings of fact on remand. *Lunsford v. Rich Mountain Elec. Coop.*, 38 Ark. App. 188, 832 S.W.2d 291 (1992). Matters decided on prior appeal are the law of the

case and govern our actions on the present appeal to the extent that we would be bound by them even if we were now inclined to say that we were wrong in those decisions. *Lunsford v. Rich Mountain Elec. Coop., supra*. The supreme court has long adhered to the rule that when a case has been decided by it and, after remand, returned to it on a second appeal, nothing is before it for adjudication except those proceedings had subsequent to its mandate. *Ouachita Hospital v. Marshall*, 2 Ark. App. 273, 621 S.W.2d 7 (1991).

Clearly, if the respondents in the present case did not intend to pay for the treatment protocol outlined on June 13, 2002 for a stimulator placement, then the respondents' appropriate recourse was to appeal ALJ White's March 7, 2003 opinion finding that the stimulator implant was reasonably necessary for treatment of Mr. Hendrix' compensable injury. No appeal was taken and that finding is now res judicata on the treatment issue presented at the most recent hearing.

The respondents have offered no reasonable rationalization for their refusal to authorize or pay for the treatment which ALJ White concluded was reasonably necessary and the responsibility of the respondents, and I find that the respondents' admitted refusal to pay, as well documented throughout the documentary evidence submitted to me, has been willful and intentional. I therefore find pursuant to Ark. Code Ann. § 11-9-802(d) and (e) that the respondents are liable to the claimant for a 36% penalty on

the unpaid medical bills and expenses associated with Mr. Hendrix's treatment for the period in question between April of 2003 and April of 2004. Accord Cooper Tire & Rubber Co. v. Angell, 75 Ark. App. 325, 58 S.W.3d 396 (2001).

I also find that the claimant's attorney is entitled to the maximum statutory attorney's fee on the benefits (medical, reimbursement, and penalties) awarded to the claimant as a result to the findings herein, one-half of the fee to be paid by the claimant and one-half of the fee to be paid by the respondents in accordance with Ark. Code Ann. § 11-9-715 (Repl. 1996); and Death & Permanent Total Disability Trust Fund v. Brewer, 76 Ark. App. 348, 65 S.W.3d 463 (2002).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The employee/employer relationship existed on October 27, 1993, when the claimant sustained a compensable bilateral carpal tunnel syndrome.

2. TTD rate of \$193.00 per week and PPD rate of \$154.00 per week. TTD benefits paid for the periods of March 24, 1994 through March 26, 1994 and April 4, 1994 through May 28, 1996. 10% to both upper extremities below the elbow has been paid.

3. The findings of ALJ White in his March 7, 2003 Opinion and Order are res judicata on the issue as to whether or not the treatment protocol devised for Mr. Hendrix at the International Pain Center on June 13, 2002 is reasonably necessary for and causally related to Mr. Hendrix's compensable injury.

4. Based on ALJ White's findings, the treatment proposed in the June 13, 2002 protocol for stimulator implant devised for Mr. Hendrix by the International Pain Clinic is reasonably necessary for and causally related to Mr. Hendrix's compensable injury.

5. The treatment which Mr. Hendrix received at the International Pain Clinic in Lubbock, Texas between April of 2003 and April of 2004 is precisely that treatment which was proposed in the June 13, 2002 protocol developed by the International Pain Clinic for Mr. Hendrix.

6. Consequently, based on ALJ White's findings in his March 7, 2003 Opinion and Order, I find that the respondents are liable for the treatment at issue provided at the International Pain Clinic between April of 2003 and April of 2004.

7. For reasons discussed herein, I also find that the

respondents' failure to authorize and to pay for Mr. Hendrix's treatment at issue at the International Pain Clinic between April of 2003 and April of 2004 has been willful and intentional, and I therefore find that the respondents are liable to the claimant for a 36% penalty on the medical expenses and travel expenses which the respondents owe to or on the behalf of Mr. Hendrix for the treatment at issue.

8. The claimant's attorney is entitled to the maximum statutory attorney's fees on the benefits (medical, reimbursement, and penalties) to which Mr. Hendrix is entitled for the treatment that he received at the International Pain Clinic between April of 2003 and April of 2004.

ORDER

The respondents are directed to pay benefits and attorney's fees in accordance with the findings of fact set forth herein.

IT IS SO ORDERED.

MARK CHURCHWELL
Administrative Law Judge