

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F204365**

**ROSIE C. GAY**

**CLAIMANT**

**ARKANSAS CHILDREN'S HOSPITAL  
(SELF-INSURED)**

**RESPONDENT EMPLOYER**

**ORDER AND OPINION FILED NOVEMBER 2, 2006**

Hearing before Administrative Law JUDGE LINDA K. MARSHALL.

Claimant represented by the HONORABLE JAMES W. STANLEY, JR., Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE BETTY J. DEMORY, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

The above claim came on for a hearing in Little Rock, Arkansas on October 11, 2006. A prehearing conference was held on August 29, 2006 and a prehearing order was filed on August 30, 2006. A copy of the prehearing order was marked as Commission Exhibit No. 1 and made a part of the record without objection.

At the prehearing conference, the parties agreed to the following stipulations:

1. There was a compensable April 20, 2002, injury.
2. The temporary total disability rate is \$125.

The claimant contends she is entitled to temporary total disability benefits from March 2005, to a date to be determined and attorney's fees.

Respondents contend the claimant is not entitled to any additional temporary total disability benefits following her treatment with Dr. Charles Schock. Respondents contend that issue was addressed in a previous hearing in July 2004, dealing with

additional temporary total disability benefits. By an Opinion filed September 30, 2004, the claim for treatment was found not to be reasonable and necessary and related to the claimant's April 2002, injury and temporary total disability benefits were denied. That Opinion was affirmed and adopted by the Full Commission on January 4, 2005. Respondents contend the claimant's temporary total disability issue has already been addressed and is *res judicata*.

Respondents further request attorney's fees for having to defend this issue that has already been addressed.

### **ISSUES TO BE LITIGATED**

1. Temporary total disability benefits.
2. Claimant's attorney's fee.
3. Respondent's attorney's fee.

From a review of the record as a whole, to include medical reports, documents and other matters properly before the Commission, to incorporate by reference the transcript of the July 13, 2004, hearing and the September 30, 2004, Administrative Law Judge Opinion and January 4, 2005, Full Commission Opinion, 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. There was a compensable April 20, 2002, injury.

2. The temporary total disability rate is \$125.

3. The preponderance of the evidence provides that the medical treatment related to the temporary total disability issue in this matter is barred by *res judicata*.

4. This claimant has failed to prove by a preponderance of the evidence that she remained in her healing period from March 2005 to a date to be determined following treatment for her compensable injury that was reasonable and necessary and causally related to the work injury and that she remained totally unable to earn wages.

5. Respondents' request for attorney's fees from claimant is denied.

### **DISCUSSION**

The claimant, 49 years old, sustained a compensable back injury on April 20, 2002. The claimant received some medical treatment from Dr. John Wilson and changed doctors to Dr. Reginald Rutherford. The claimant was released to full duty and returned to work for the respondent employer and continued to work until March 2004.

The claimant sought treatment on her own with Dr. Charles Schock and had fusion surgery with hardware in March 2004. The claimant underwent another procedure in April 2005, to remove the hardware from the March 2004 surgery. The claimant's group health insurance paid on these procedures. The claimant is also drawing social security disability benefits.

According to the claimant, since her spinal fusion, she has tingling in her feet and pain in her back and she takes medication, to include Soma, Darvocet and Tylenol medications. The claimant has a back brace and a TENS unit. The claimant has

spasms in her legs and back, and cannot stand or sit very long and has problems with her chores, such as cooking. The claimant testified that her condition since removal of the hardware had remained the same. She contends she remains unable to work.

The claimant contends she remained in her healing period and unable to work from March 2005 until a date to be determined. Respondents contend this issue is *res judicata* and was resolved in the September 30, 2004, Administrative Law Judge Order and Opinion that was affirmed and adopted by the Full Commission on January 4, 2005. A review of the July 14, 2004, hearing transcript and the Administrative Law Judge Opinion on September 30, 2004, reflects that the claimant's main issue was her entitlement to temporary total disability benefits from March 4, 2004, through a date to be determined. Those benefits were denied, finding "The claimant has failed to prove by a preponderance of the evidence that she remained in her healing period following treatment causally related to her work injury and totally unable to return to work."

The claimant changed doctors in 2004 to Dr. Charles Schock, an unauthorized physician and continued to treat with him, to include a fusion surgery with hardware and now a surgery in April 2005 to remove hardware. The claimant had treated with Dr. John Wilson and Dr. Reginald Rutherford and diagnostic tests had been performed, to include a MRI, bone scan and EMG studies, all with normal results. The claimant was released to return to work in June 2002 and also in September 2002. Both Dr. Wilson and Dr. Rutherford did not recommend surgery in 2002. At the July 13, 2004, hearing, it was found the medical treatment the claimant pursued was unauthorized and not reasonable and necessary and the fusion surgery the claimant underwent in March 2004 was contra to the opinions and recommendations of the authorized treating

doctors and, therefore, was not the responsibility of respondents. Since the claimant proceeded with her own choice of doctor, the procedures he performed and the subsequent healing periods she entered were found to be at her own expense and not the liability of the respondents. Clearly, if the first surgical procedure was found not to be reasonable and necessary and related to the compensable injury, then the second surgical procedure would not be reasonable and necessary and related to the compensable injury, since the purpose is to remove hardware placed in the first surgery. The medical issue must be addressed to get to the requested benefits of temporary total disability.

Respondents contend the issue today is *res judicata* relying on the September 30, 2004, Administrative Law Judge opinion and the January 4, 2005, Full Commission Opinion. *Res judicata* can and does apply to workers' compensation cases, if the merits of the issue have already been subject to a full and fair hearing. See, *Beliew v. Stuttgart Rice Mill*, 64 Ark. App. 334, 987 S.W.2d 281 (1998); *Perry v. Leisure Lodges*, 19 Ark. App. 143, 718 S.W.2d 114 (1986). *Res judicata* bars re-litigation of that determination unless there is evidence of change following the previous order. See, *Cariker v. Ozark Opportunities*, 65 Ark. App. 60, 987 S.W.2d 736 (1999); *Tuberville v. Int'l. Paper Co.*, 18 Ark. App. 210, 711 S.W.2d 840 (1986).

In the present case, the claimant litigated temporary total disability benefits at the July 13, 2004, hearing and the time frame was from March 4, 2004, to a date to be determined. Those temporary total disability benefits were denied in an opinion resulting from that hearing. The claimant is now asking for additional temporary total

disability benefits while relying on the same unauthorized medical evidence to support the claimant's contention that she remained in her healing period. While I find the claim for additional temporary total disability benefits from March 2005 to a date to be determined is not the same issue as the issue at the July 13, 2004, hearing, these benefits are based on medical treatment that was denied as not reasonable and necessary and related to the compensable injury at the July 2004 hearing. I find the temporary total disability issue in the instant case is not barred by *res judicata*. However, the medical issue the temporary total disability is based on is *res judicata*. Therefore, the claimant has failed to prove by a preponderance of the evidence that she remained in her healing period following treatment for her compensable injury that was reasonable and necessary and causally related to the work injury and that she remained totally unable to earn wages.

Respondents request claimant be responsible for its attorney's fees as it was made to defend an issue already litigated and decided. Since I did not find the temporary total disability issue to be *res judicata*, respondents' request for attorney's fees is denied.

### **ORDER**

The preponderance of evidence provides that the medical treatment related to the temporary total disability issue in this claim is *res judicata*. The claimant has failed to prove by a preponderance of evidence that she remained in her healing period from March 2005 to a date to be determined following treatment for her compensable injury that was reasonable and necessary and causally related to the work injury and that she

remained totally unable to earn wages. This claim is respectfully denied and dismissed. Respondents' request for attorney's fees from claimant is denied.

**IT IS SO ORDERED.**

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**LINDA K. MARSHALL  
ADMINISTRATIVE LAW JUDGE**