

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F113720

BILL JASON, EMPLOYEE	CLAIMANT
STONE COUNTY, EMPLOYER	RESPONDENT
AAC RISK MANAGEMENT SERVICES, CARRIER	RESPONDENT

OPINION AND ORDER FILED MARCH 9, 2006

Hearing before Administrative Law Judge Barbara Webb in Batesville, Independence County, Arkansas.

Claimant represented by Mr. Bill Walmsley, Attorney at Law, Batesville, Arkansas.

Respondents represented by Mr. Paul M. Gehring, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on the above-styled claim on December 9, 2005. A Prehearing Order was entered in this case on September 27, 2005. This Prehearing Order set forth the stipulations offered by the parties and outlined the issues to be litigated and resolved at the hearing. A copy of the Prehearing Order was made Commission 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/carrier relationship existed between the parties on March 13, 1999 and at all other relevant times.

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2. That claimant sustained a compensable low back injury on March 13, 1999.

3. That the August 6, 2003 Arkansas Workers' Compensation Commission Opinion and September 1, 2004 Arkansas Court of Appeals opinion constitute the law of the case and all stipulations and findings set out in these opinions are final and binding.

In addition, the following stipulations were agreed to by the parties at the hearing and are hereby accepted:

1. That the IDET procedure of December 28, 2001 has been paid in full by the respondent.

2. That claimant's average weekly wage on March 13, 1999 was \$463, resulting in a \$309 temporary total disability rate and a \$232 permanent partial disability rate.

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

1. Whether a psychiatric evaluation of claimant is reasonable and necessary.

2. Whether claimant's medical expenses incurred since March 15, 2001 are reasonable and necessary.

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3. Whether the respondent's failure to pay claimant's medical expenses since March 15, 2001 merits the assessment of penalties against respondents.

4. Whether claimant is entitled to a permanent impairment rating for his compensable low back injury.

5. Whether respondent has controverted all or a portion of the permanent impairment rating, and attorneys fees.

The record consists of a two-volume transcript of the December 9, 2005 hearing. The first volume contains the witness testimony. The second volume contains all documentary evidence, including the July 12, 2002 full hearing transcript; the August 6, 2003 Full Commission decision; and the September 1, 2004 Arkansas Court of Appeals Opinion, all of which are incorporated into the record by reference.

DISCUSSION

1. Admissibility of Schlesinger Report.

As a threshold issue, the admissibility of Dr. Scott Schlesinger's 11-23-05 report must be considered. See Respondents' Exhibits 1 - 2. The Schlesinger report was provided to opposing counsel and to the Commission on December 5, 2005, only four days prior to the hearing held in this matter. In arguing for admissibility of the report, respondents contend that they were diligent in obtaining

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and furnishing the evidence, that the evidence is not cumulative, and that the evidence would change the outcome of the hearing. They further rely on a letter sent to the Commission dated November 9, in which they requested an extension of a pretrial deadline of November 14, 2005 to exchange documentary evidence. On the other hand, claimant argues that the admissibility of the Schlesinger report is controlled by Ark. Code Ann. § 11-9-705(c)(2)(A), which provides that any party seeking to introduce medical reports at a hearing must furnish the opposing counsel and the Commission copies of the reports at least seven days prior to the hearing. Respondents contend that they meet the substance of that statute, which further provides that if no written reports are available to a party, then a party shall, in lieu of furnishing the report, notify in writing the opposing party and the Commission of the name and address of the physician proposed to be used as a witness at least seven days prior to the hearing and the substance of their anticipated testimony. Based on my review of the applicable law and evidence in this case, I must find that the Schlesinger report is not admissible.

First, respondents requested an extension from the original pre-hearing 25 day deadline until December 2, 2005. There is nothing in the record to reflect that a further extension was requested. The report was not provided to the claimant or the Commission until December 5, 2005. While the respondent had named the

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physician, the substance of his testimony was not known until issuance of his report. Respondents had ample time in which to obtain and provide the report of Dr. Schlesinger in light of the pre-hearing telephone conference held in this case on September 27, 2005. The report must therefore be excluded.

2. Whether a psychiatric evaluation is reasonably necessary.

Respondents request that claimant undergo a psychiatric evaluation to determine whether the anti-depressant medications prescribed to claimant are reasonably necessary in relation to the claimant's compensable injury, relying on Ark. Code Ann. § 11-9-511(a). Respondents point to the testimony of Dr. Zini set out in his deposition in which he has prescribed numerous anti-depressant medications, including Remeron, Wellbutrin, Clonazepam, Amitriptyline, Trazedone, and Lexapro and the claimant's request that respondents pay for such medication. Respondents argue that claimant has taken anti-depressant medications prior his compensable injury. Claimant contends that such an examination is not reasonable and necessary, and that the evidence reflects that claimant has never exhibited psychological instability, has functioned as the Stone County Sheriff, and has been prescribed antidepressants in order to help him sleep. Claimant testified that he had not undergone a psychiatric evaluation since 1999 or 2000. Claimant has continued to serve as the Sheriff of Stone County and has been re-elected to the

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position twice. Claimant has testified that he is under continual pain and cannot sleep at night. In addition, there was evidence offered through the deposition of Dr. Zini and by claimant that there have been intervening events which have resulted in anxiety and depression, i.e., a separation from his wife, the incarceration of a daughter for illicit drug activity, and the death of his brother. Based on the foregoing, I believe it appropriate that the claimant undergo the requested psychiatric examination by a designated board-certified physician, and that any determination relating to payment for any antidepressant medications be suspended pending the result of that evaluation to determine whether the antidepressant medications were reasonably related to the claimant's compensable injury.

3. Medical Treatment Following March 15, 2001.

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

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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 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.

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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).

The purpose of the *res judicata* doctrine is to put an end to litigation by preventing a party who had one fair trial from re-litigating the matter a second time. *O'Dell v. Rickett*, ____ Ark. App. ____, ____ S.W.3d ____ (Sept. 28, 2005); *Cox v. Keahey*, 84 Ark. App. 121, 133 S.W.3d 439 (2003). The test in determining whether *res judicata* applies is whether matters presented in a subsequent suit were necessarily within the issues of the former suit and might have been litigated therein. *Id.* Although the Commission is not a court, its awards are in the nature of judgments, and the doctrine of *res judicata* applies to Commission decisions. *Gwin v. R.D. Hall Tank Co.*, 10 Ark. App. 12, 660 S.W.2d 947 (1983).

A hearing was held in connection with this claim on July 12, 2002, before Administrative Law Judge C. Michael White. At the hearing, it was stipulated that

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claimant sustained a compensable injury on March 13, 1999, while employed by the respondent, Stone County. The issue litigated was whether the claimant was entitled to continued medical treatment and whether treatment provided by Dr. Robert Valentine was authorized.

The claimant was initially treated by Dr. Zini, an osteopathic physician, after the 1999 accident. However, due to the continuation of claimant's problems, he was ultimately referred to Dr. Robert Valentine, a pain specialist, who claimant began seeing in the fall of 2001. Initially, Dr. Valentine treated the claimant with medication and steroid injections. However, Dr. Valentine ultimately determined claimant was a valid candidate for an intradiskal electrothermal annuloplasty (IDET). That procedure was performed on December 28, 2001 and resulted in relief for the claimant's leg symptoms. However, claimant testified he continued to experience some back pain. The ALJ made the following findings:

"In the present claim, I find that a preponderance of the evidence establishes that the claimant's back problems, which resulted in the need for the IDET procedure, are causally related to the March 13, 1999 injury. In this regard, although the claimant continued to experience some problems subsequent to the 1999 injury, his testimony, as well as the other evidence, establishes that the problems the claimant experienced subsequent to the March 13, 1999 accident differed both in the nature and severity to the problems that he had previously experienced. Moreover, the evidence establishes that the claimant had been relatively pain free for at least 11 months prior to the March 13, 1999 accident. I also find that the IDET

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procedure performed on the claimant was reasonably necessary for treatment of the claimant's compensable injuries. In this regard, Dr. Valentine opined that the claimant was a valid candidate for the procedure, and certainly such a procedure is indicated based on the medical evidence presented in this claim. Consequently, I find that the respondents are liable for the IDET procedure performed on the claimant, and that the claimant is entitled to continued medical treatment." Respondents were directed to pay benefits in accordance with the findings of facts in the opinion.

That opinion was appealed to the Full Commission. After a de novo review of the entire record, the Full Commission affirmed the Administrative Law Judge's opinion in an Opinion and Order filed August 6, 2003. In affirming the ALJ, the Full Commission found that the claimant proved he was entitled to IDET treatment as recommended by Dr. Valentine and affirmed the opinion of the Administrative Law Judge. The Full Commission further ordered all accrued benefits paid in a lump sum without discount with interest and attorney's fees. In so holding, the Full Commission attached more weight to the opinion of Dr. Valentine, noting that Dr. Valentine had become the claimant's "primary treating physician." The Full Commission further noted that Dr. Valentine had described an "annular tear at L5-S1" following the compensable injury which was objectively confirmed by a post-diskogram CT Scan taken in October of 2001. The Full Commission noted that Dr. Valentine recommended the IDET treatment and claimant credibly testified that his condition improved following said treatment. The Full Commission further noted

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claimant testified he wished to return to Dr. Valentine for additional treatment. The Full Commission's decision was appealed to the Arkansas Court of Appeals. In the appeal from the award of benefits by the Full Commission, the appellants contended that there was no substantial evidence that the IDET procedure was reasonably necessary for treatment of the compensable injury. The Court of Appeals affirmed the Full Commission's decision in a decision not designated for publication in CA-03-1305 on September 1, 2004. In affirming the Commission, the Court of Appeals noted that:

The Commission had made specific mention of medical opinions that conflicted with that of Dr. Valentine. However, the Commission held that it attached more weight to the opinion of Dr. Valentine, noting that Valentine became claimant's primary treating physician, that he described an annular tear at L5-S1 following the compensable injury, and that the doctor's description of an annular tear was objectively confirmed by post-diskogram CT Scan taken in October 2001.

The Commission also noted:

Dr. Valentine recommended the IDET procedure and that the claimant credibly testified that his condition improved following that treatment. On this record, we cannot say that there is no substantial evidence to support the finding of the Commission that the IDET procedure was reasonably necessary medical treatment. Accordingly, we affirm.

In the instant case, claimant seeks payment of medical bills and reimbursement for amounts paid by him incurred since March 15, 2001. In addition,

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claimant seeks reimbursement for mileage for trips to Dr. Valentine's office between 9/27/01 and 10/23/01 and trips to Mountain Home between 11/13/01 and 12/28/01, for a total amount of \$936.32. By way of a letter dated March 30, 2005, respondents contend that they will not pay for treatments with Dr. Zini since March 15, 2001 and that the only procedure paid for was the IDET procedure based on the Arkansas Court of Appeals mandate. They argue that the decision of the Court of Appeals was limited to authorization for IDET procedure and that any further treatment was not found to be reasonable or necessary.

The record in this case establishes that following the IDET procedure, Dr. Zini and Dr. Valentine placed the claimant on a pain management program, including the use of Duragesic patches and Lorcet. In May of 2003, Dr. Zini added a prescription for 50 milligrams of Trazadone, a form of antidepressant, at bedtime to help claimant with rest because of pain. In December of 2003, claimant was given Gabitril and Wellbutrin and the Trazadone was discontinued. Claimant reported trouble sleeping with the Wellbutrin and Gabitril and was subsequently changed to Amitriptyline. In April of 2004, the claimant's dosage of Amitriptyline was increased. During this time, claimant continued follow up visits with Dr. Valentine. Claimant also continued use of Napro, a Hydrocodone with Tylenol pain medication. In August of 2004, claimant was reporting a lot more pain and

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consulted Dr. Valentine about a rhizotomy, but did not undergo the procedure due to the fact he could not afford to pay for the procedure. Dr. Zini testified that at some point in time he placed the claimant on Klonopin and continued to see the claimant on regular intervals for a “benign chronic pain control plan”. On August 16, 2005, Dr. Zini issued an opinion that the claimant’s history and physical findings support a ten percent (10%) permanent partial impairment to the body as a whole based on Table 75 of the AMA Guides, Fourth Edition. Dr. Zini further opined that the ongoing treatment was causally related to the March 13, 1999 motor vehicle accident and that such treatment was reasonable and necessary.

In the prior hearing, the claimant distinctly put into issue the question of whether he was entitled to treatment from Dr. Zini and from Dr. Valentine, including the IDET procedure. The Administrative Law Judge found that the treatment provided by Dr. Valentine was reasonably necessary for treatment of the claimant’s compensable injury. The Administrative Law Judge ordered and directed the respondents to pay benefits in accordance with the findings of fact. That decision was affirmed on appeal to both the Full Commission and the Court of Appeals. The issue of claimant’s entitlement to treatment from Dr. Zini and Dr. Valentine rendered as of the date of prior hearing is thus *res judicata*.

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4. **Penalty**

Ark. Code Ann. § 11-9-802 provides:

(d) Medical bills are payable within thirty (30) days after receipt by the respondent unless disputed as to compensability or amount.

(e) In the event that the commission finds the failure to pay any benefit is willful and intentional, the penalty shall be up to thirty-six percent (36%), payable to the claimant.

In the present matter, the claimant contends that he is entitled to reimbursement and payment for medical expenses rendered from March 15, 2001 through the date of the prior ALJ's Opinion. I find that the respondents' refusal to pay for the any medical expenses in connection with the treatment from Dr. Valentine and Zini from March 15, 2001 through October 10, 2002, the date of the ALJ's Opinion, was willful and intentional. Pursuant to Ark. Code Ann. § 11- 9-802(e), I find that the respondents are liable for a 36% penalty on the unpaid and reimbursable medical expenses from March 15, 2001 through October 10, 2002, as set forth in Claimant's Exhibit 7. I find that respondents are not liable for a 36% penalty on the claimant's travel expenses since Ark. Code Ann. § 11-9-802 does not provide for a penalty on travel expenses. See, *Hendrix v. ITT Automotive*, 2005 AWCC 173 (August 31, 2005).

In addition, I find that the preponderance of the evidence also shows that the continued treatment from March 15, 2001 until October 10, 2002, and the treatment

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from October 10, 2002, and continuing to date provided by Dr. Zini and Dr. Valentine for pain management (except the anti-depressant medications referenced above) was reasonably necessary in connection with the claimant's compensable injury, pursuant to Ark. Code Ann. § 11-9-508(a).

5. Permanent Impairment

_____The claimant contends that he has sustained a ten percent (10%) permanent partial impairment to the body as a whole as a result of his injury of March 13, 1999. He relies on the medical opinion of his treating physician Dr. James Zini. Respondents challenge the rating on the basis that Dr. Zini has not made his rating in accordance with the AMA Guides, in that the claimant's IDET procedure would not qualify as a "surgically treated disc lesion", as per Table 75 of the *AMA Guides, 4th Edition*. Based on the preponderance of the evidence, I find that the medical and other credible evidence in the case supports the rating assessed by Dr. James Zini and that said rating conforms with Table 75 of the *AMA Guides, 4th Edition*.

6. Controversion

_____ Based on my review of the evidence in this case, I find that respondents have fully controverted payment of all medical benefits since March 15, 2001, with the exception of the IDET procedure. I further find that Respondents

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fully controverted payment of permanent partial disability benefits, notwithstanding their announcement that they were accepting permanent impairment of seven (7%) to the body as a whole at the hearing held in December of 2005 and subsequent payment. I find that the claimant's attorney is entitled to a maximum statutory attorney's fee on the benefits (medical, reimbursement, and penalties) awarded to the claimant as a result of 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/carrier relationship existed between the parties on March 13, 1999 and at all other relevant times.
2. That claimant sustained a compensable low back injury on March 13, 1999.
3. That the August 6, 2003 Arkansas Workers' Compensation Commission Opinion and September 1, 2004 Arkansas Court of Appeals opinion constitute the law of the case and all stipulations and findings set out in these opinions are res judicata on the issue as to whether or not the medical treatment

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provided to Mr. Jason by Dr. Zini and Dr. Valentine until October 10, 2002, is reasonably necessary for and causally related to Mr. Jason's compensable injury.

4. That the IDET procedure of December 28, 2001 has been paid in full by the respondent. That the respondents have accepted and paid the claimant a 7% permanent partial disability payment.

5. The treatment received by Mr. Jason from March 15, 2001 until October 10, 2002, is precisely the continuing medical treatment at issue in the prior decision. Consequently, based on ALJ White's findings in his October 10, 2002 Opinion and Order, as affirmed by the Commission and the Court of Appeals, I find that the respondents are liable for the treatment at issue provided by Dr. Valentine and Dr. Zini between March 15, 2001 and October 10, 2002. I further find that the medical treatment provide to Mr. Jason by Dr. Valentine and Dr. Zini was reasonable and necessary and causally related to the compensable injury.

6. For the reasons discussed herein, I find that respondents' failure to pay for Mr. Jason's treatment at issue between March 15, 2001 and October 10, 2002, 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 (with the exception of travel expenses) which the respondents owe to or on behalf of Mr. Jason for the treatment at issue.

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7. That the continued medical treatment for pain management (except the antidepressant medications) provided to Mr. Jason by Dr. Zini and Dr. Valentine from October 10, 2002, and continuing to date is reasonable and necessary and casually related to his compensable injury. Any finding related to the antidepressant medications will be held in abeyance pending the examination ordered herein.

8. That claimant's average weekly wage on March 13, 1999 was \$463, resulting in a \$232 permanent partial disability rate.

9. That claimant is entitled to a permanent partial disability rating of 10%.

10. The respondents have fully controverted the payment of all additional benefits.

11. The claimant's attorney is entitled to the maximum statutory attorney's fees on the benefits (medical, reimbursement, ppd, and penalties) awarded herein.

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ORDER

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

IT IS SO ORDERED.

HONORABLE BARBARA WEBB
Administrative Law Judge