

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. E406229

EDDIE MOSLEY, EMPLOYEE	CLAIMANT
CLOUD OAK FLOORING COMPANY, INC., EMPLOYER	RESPONDENT
LUMBER MUTUAL INSURANCE COMPANY, INSURANCE CARRIER	RESPONDENT

OPINION FILED NOVEMBER 27, 2006

Hearing before Administrative Law Judge Barbara Webb on August 24, 2006, in Pine Bluff, Jefferson County, Arkansas.

Claimant appeared *PRO SE*.

Respondents represented by Ms. Melissa Ross, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held on August 24, 2006, before Administrative Law Judge Barbara Webb. A Prehearing Order was entered in this case on June 20, 2006. The Prehearing Order set forth the stipulations offered by the parties and outlined the issues to be litigated and resolved at this hearing. A copy of the Prehearing Order was made Commission's Exhibit No. 1 to the hearing record. The following stipulations as submitted by the parties in the Prehearing Order and as amended on the record are hereby accepted:

1. The employer/employee relationship existed on April 5, 1994, when claimant sustained a compensable injury.

By agreement of the parties, the issue to be litigated is:

1. Claimant's entitlement to additional benefits.

The record consists of a one volume transcript of the August 24, 2006, hearing, consisting of the testimony of Eddie Mosley, and all documentary evidence consisting of Commission's Exhibit No. 1 (Prehearing Order); Claimant's Exhibit No. 1 (medical records); Respondents' Exhibit No. 1 (medical

records); and Respondents' Exhibit No. 2 (claims transaction list, FCE report, and previous opinions). In addition, I have blue-backed a copy of the transcript of the original hearing held on this claim on April 20, 1995, and incorporate the same as part of the record of this proceeding by agreement of the parties. I am also taking judicial notice of the Court of Appeals Mandate issued in connection with this case on March 13, 1997.

This case was the subject of a prior hearing held on April 20, 1995, before Administrative Law Judge Lewis D. Smith on the issue of claimant's right to additional temporary total disability benefits and medical treatment. In an Opinion dated August 14, 1995, the Administrative Law Judge denied and dismissed the claim on the basis that claimant's healing period ended on December 19, 1994, that Dr. Rutherford continues to be the authorized treating physician for claimant, and the respondents remain liable for all reasonable and necessary medical treatment as a result of the compensable injury. The ALJ's decision was affirmed and adopted by the Full Worker's Compensation Commission on January 23, 1996. By Mandate dated March 5, 1997, the Court of Appeals affirmed the decision of the Full Commission.

CONTENTIONS

The claimant contends that he is entitled to additional benefits as a result of his compensable injury of April 5, 1994.

The respondents contend that all appropriate benefits have been paid with regard to this matter. Respondents contend that the statute of limitations has run with regard to this matter. Respondents contend that the doctrine of *res judicata* bars claimant's entitlement to additional benefits. Alternatively, respondents contend that any additional medical treatment is not reasonable or necessary in

connection with the claimant's injury. Alternatively, respondents contend that Dr. Mocek is not an authorized physician.

FACTUAL BACKGROUND

Claimant is 45 years of age (birth date July 30, 1961). He completed the tenth grade. He currently draws disability from Social Security and is not employed. He was last employed on April 5, 1994, by Cloud Oak Flooring. Cloud Oak was in the business of making wood floors. He worked for Cloud Oak approximately four months and also worked for its predecessor for approximately three or four months. He held previous jobs as a journeyman roofer for approximately ten years and as a general laborer for Tyson Foods.

Claimant was injured in April of 1994 while working on a platform when another worker holding an empty 55-gallon drum barrel over his head dropped it striking claimant in the back. Mosley testified that the barrel first hit his mid-back and then bounced and hit him again in his lower back. He explained that he tried to keep working but it continued to hurt, and after approximately 10 to 20 minutes, his back was getting worse and swelling. He reported the injury to his supervisor and sought immediate medical treatment with Dr. Paulk on April 5, 1994, the date of his injury. Mosley became dissatisfied with his care and contends he was not able to return to work. He testified that he did not seek other medical treatment because he did not have the money and thought the insurance company would help him, but that they kept sending him to company doctors that made false reports.

Claimant was referred to Dr. Runyan, an orthopaedic surgeon. Mosley was seen by Dr. Runyan on April 26, 1994. Runyan's report states that his examination revealed that "the patient is able to stand on heels and toes without too much trouble. He is able to flex to the floor and almost touch it with the

Burn's test." He further concludes that Mosley has a contusion of the low back which will resolve with time. Mosley was treated with continued muscle relaxants and scheduled for a follow-up visit. Upon Dr. Runyan's referral, claimant received psychological testing by Dr. Gary Souheaver on May 16, 1994. He was diagnosed with Somatization Disorder. He returned for a follow-up evaluation with Dr. Runyan on May 31, 1994. Runyan notes in his report that Mosley is slowly improving and should reach maximum recovery within the next two to four weeks. He released him to light work activity and opined that "From an orthopedic standpoint I don't find any abnormality which warrants surgical intervention or further treatment at this time and he could return to his normal duties within two to four weeks."

He was subsequently treated by Dr. P.B. Simpson, a neurosurgeon. On June 22, 1994, Mosley was evaluated by Dr. P.B. Simpson and underwent an MRI of the lumbar spine. The MRI results were normal with no significant findings. On July 11, 1994, the thoracic spine films revealed no irregularity or abnormality. Based on the negative findings and without finding any objective evidence of any neurological deficit, Dr. Simpson recommended Mosley undergo a functional capacity evaluation and declined to prescribe any narcotics. On July 26, 1994, Dr. Simpson notes that the claimant's functional capacity tests showed that he was not putting out maximum effort and that there was psychological overlay associated with his problem.

Claimant next sought treatment from Dr. Robert Abraham, another neurosurgeon, and Dr. Hal Astle. Dr. Abraham ordered a nerve conduction study. On October 24, 1994, Mosley was referred to Dr. Miles for electro-diagnostic testing. The tests resulted in normal findings.

The Claimant was subsequently referred to Dr. Rutherford at the pain clinic. On December 19, 1994, Mosley was released by Rutherford to return to work without restriction. Mosley testified that he was not able to go back to work due to his pain and he filed for Social Security disability in 1995 which he was awarded in 1996.

In March of 1995, he treated with Dr. Jeff Ketcham. Ketcham recommended further testing. Mosley testified that he continued to seek medical attention. On September 10, 1996, he was evaluated by Dr. Harold Chakales. Dr. Chakales noted that the claimant had been treated intermittently in 1994 and 1995. From x-rays, Chakales concluded that there was spondylolysis at L5, bilateral. From his physical examination, he concluded that Mosley has "true muscle spasm, involuntary". While he noted that Mosley might be rehabilitated for light work, he indicated he might be a candidate for surgical arthrodesis for his symptomatic spondylolysis. He opined that Mosley could not perform heavy manual labor based on his functional capacity evaluation. Based on Chakales report, Mosley was awarded Social Security disability on December 3, 1996.

Medical records reflect that Mosley underwent right and left SI joint injections on December 17, 2003, by Dr. Mocek. He returned for follow-up treatment reporting that he had 50% pain relief on April 17, 2003, with continued complaints of pain in the back radiating to the right leg. Mocek noted that an MRI revealed a bulging disc at L4-5 and L5, S1. The doctor noted Mosley has degenerative disc disease and that he suspected a bulging disc causing nerve root irritation in the right L5 nerve root or a small disc herniation. He referred Mosley for a new MRI and counseling with Dr. Bracy due to depression

associated with pain. He was scheduled for a follow-up evaluation on February 24, 2004.

On March 3, 2005, the claimant was seen by Dr. Mocek with complaints of back pain. He was assessed with chronic depression, scoliosis, herniated disc thoracic, and lumbar spondylosis. He was treated conservatively with pain and depression medication and muscle relaxants and referred for followup with Dr. Highsmith for hypertension. On March 31, 2005, he was seen by Dr. Mocek with complaints of mid back pain. Clinic notes reflect that Mosley had a history of disc protrusion at T8-9, discogenic back pain in the lower lumbar spine, and depression which resolved with increased daylight. Based on his examination and review of an MRI, Mosley was diagnosed with a central disc protrusion at T8-9 and seasonal affective disorder. He was treated with an epidural injection and referred for therapy. On April 26, 2005, he returned to Mocek for follow-up and was determined to be ready for physical therapy. On June 14, 2005, he returned to Mocek with complaints of pain in the back/spine, right leg and left leg. It was noted that he had not done the physical therapy that had been ordered and was scheduled to begin therapy. On August 2, 2005, Mosley returned for a follow-up indicating that he had water therapy and noticed improvement. He was directed to continue a walking program and prescription medication as part of his long-term chronic pain management. On October 3, 2005, he reported 100 percent relief of the pain in his spine for one week from diagnostic facet joint blocks of T11, T12, and L1. He underwent a scheduled facet joint nerve radio-frequency lesioning procedure by Mocek. He returned for follow-up with Mocek on November 22, 2005, with complaints of low back and leg pain. He was continued on prescription medications for pain.

Mosley testified that he continues to seek medical treatment with Dr. Mocek without improvement. He testified that he currently takes muscle relaxers and pain medication. He testified he is not able to work at this time. He testified he remained in bed for two years, from 1995 until after he received his Social Security award in 1996. He testified that he had no prior injuries or problems with his back prior to the work-related incident. He testified he had no other reason to seek disability other than the injury. Mosley testified that he sought disability when the workers' compensation carrier told him that they would no longer pay for his medical treatment.

DISCUSSION

Claimant contends that he has continued to need medical care and could not work due to his work-related injury relying on the medical evaluations by Dr. Chakales and Mocek. Respondents argue that no payments of compensation have been made after 1995, and therefore the statute of limitations has run on this claim. Based on the preponderance of the evidence offered in this case, I find that the claim for additional benefits is barred by the applicable statute of limitations.

I. STATUTE OF LIMITATIONS

Ark. Code Ann. § 11-9-702 (b) sets out the allowable time for filing a claim for additional benefits. In cases where any compensation has been paid, the claim for additional compensation, including disability or medical, will be barred unless filed within one year from the date of the last payment of compensation or two years from the date of the injury, whichever is greater. Ark. Code Ann. § 11-9-702 (b)(1). When the claimant submits a timely request for additional benefits that is never acted upon, the statute of limitations is tolled. *Barnes v. Fort Smith Public Schools*, ___ Ark. App. ___, ___ S.W.3d ___ (May 17, 2006); *Eskola*

v. Little Rock Sch. Dist., ___ Ark. App. ___, ___ S.W.3d ___ (Nov. 30, 2005); *Dillard v. Benton Co. Sheriff's Office*, 87 Ark. App. 379, ___ S.W.3d ___ (Sept. 22, 2004); *Spencer v. Stone Container Corp.*, 72 Ark App. 450, 38 S.W.3d 309 (2001); *Bledsoe v. Georgia-Pacific Corp.*, 12 Ark. App. 293, 675 S.W.2d 849 (1984).

In this case, the claim was accepted as compensable and benefits were paid. The first claim for additional benefits was fully adjudicated in 1995 and affirmed on appeal in 1997. The evidence further demonstrates that no benefits were paid after November 9, 1995. Two years from the date of injury would have been April 5, 1996. One year from the last payment of benefits would have been November 9, 1996. Because Mosley did not make a claim for additional compensation until 2005, I find that the claim is barred by the statute of limitations.

Mosley contends that he has continued regular medical treatment for his back and such services constitute payments of compensation within the meaning of Ark. Code Ann. § 11-9-702(b). See, *Plante v. Tyson Foods, Inc.*, 319 Ark. 126, 890 S.W.2d 253(1994). However, as in *Barnes*, Mosley was told in 1995 that Cloud Oak Flooring and its insurance carrier were denying further medical treatment. *Barnes v. Fort Smith Public Schools*, ___ Ark. App. ___, ___ S.W.3d ___ (May 17, 2006). He submitted no medical bills to Cloud Oak Flooring or its insurance carrier after this date. Mosley testified that his medical bills after 2005 have been paid by Social Security disability. There is no evidence that the respondents had actual notice or had reason to know that Mosley was receiving further medical treatment. Consequently, the contention that there was a furnishing of medical services, with knowledge of the

respondents, within the statutory period is simply not supported by the preponderance of the evidence and simply must fail.

Therefore, for the reasons set forth herein, I find the preponderance of the evidence shows that the claim is barred by the statute of limitations.

Because I have ruled that the preponderance of the evidence shows the claim is barred by the statute of limitations, it is not necessary for me to address this issue or the remaining claim on the merits of whether the medical treatment was reasonable or necessary and whether claimant is entitled to a re-examination and further treatment.

II. RES JUDICATA

In addition, respondents contend the Commission found that the healing period ended with Dr. Rutherford's release on December 19, 1994, and contend that any claim for benefits for any indemnity would be barred by the doctrine of *res judicata*.

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 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).

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).

This case was the subject of a prior hearing held on April 20, 1995, before Administrative Law Judge Lewis D. Smith on the issue of claimant's right to additional temporary total disability benefits and medical treatment. In an Opinion dated August 14, 1995, the Administrative Law Judge found that:

1. On April 5, 1994, Claimant sustained [a] compensable injury to his lower back arising out of and during the scope of his employment with Cloud Oak Flooring Company.
2. Respondents have accepted Claimant's claim as compensable and have paid appropriate benefits associated with that injury.
3. Claimant has failed to show by a preponderance of the credible evidence that he remains within his healing period, and in fact Claimant's healing period ended on December 19, 1994.
4. Dr. Reginald Rutherford continues to be the authorized treating physician for Claimant, and the Respondents remain liable for all reasonable and necessary medical treatment as a result of the compensable injury.

In denying and dismissing the claimant's request, the Administrative Law Judge relied on the fact that claimant had a significant number of objective tests and treatment by several competent physicians who found no objective findings to support his continued complaints, the medical records consistently established

that he would not benefit from additional treatment, all appropriate tests had been conducted, and that claimant had been released to return to work by Dr. Rutherford without restriction.

In the prior hearing, the claimant distinctly put into issue the question of whether he had reached the end of his healing period. The Administrative Law Judge found that the claimant had reached the end of his healing period when Dr. Rutherford released him to return to work on December 19, 1994. The ALJ further held that claimant was entitled to any reasonable and necessary medical treatment from Dr. Rutherford, the authorized treating physician. That decision was affirmed on appeal to both the Full Commission and the Court of Appeals. The issue of claimant's entitlement to additional temporary total disability benefits and right to reasonable and necessary medical treatment by his authorized physician, Dr. Rutherford, was fully adjudicated as of the date of prior hearing and is thus *res judicata*.

Claimant contends that he continued to seek medical treatment for his work-related injury with other medical providers after December 19, 2004, and has not been able to return to work since the date of his injury in 1994. As noted above, the preponderance of the evidence demonstrates that this claim is barred by the applicable statute of limitations. Moreover, as noted by respondents, the MRI taken in 2004 revealed new objective findings which were not present in 1994 following the compensable injury.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employee/employer/carrier relationship existed between the parties on April 5, 1994, and at all other relevant times.

3. That claimant sustained a compensable low back injury on April 5, 1994.
4. Two years from the date of injury would have been April 5, 1996.
5. No benefits were paid by respondents after November 9, 1995.
6. One year from the last payment of benefits would have been November 9, 1996.
7. Based on the preponderance of the evidence, I find that the claim for additional temporary benefits and medical benefits after the date of the April, 20, 1995 hearing is barred by the applicable statute of limitations.
8. That the Arkansas Workers' Compensation Commission Opinion and 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 the end of claimant's healing period on December 19, 1994, and whether claimant was entitled to reasonable and necessary medical treatment from his authorized physician, Dr. Rutherford. Any claim for additional temporary total disability benefits after December 19, 1994, related to the compensable injury is precisely the claim for benefits at issue in the prior decision and is barred by res judicata.

ORDER

For the reasons discussed herein, this claim must be, and hereby is, respectfully denied.

Mosley - E406229

14

IT IS SO ORDERED.

BARBARA WEBB
Administrative Law Judge