

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. E404373

FRANK CLINGAN, EMPLOYEE

CLAIMANT

GEO SPECIALTY CHEMICAL, INC., EMPLOYER

RESPONDENT

**HARTFORD UNDERWRITERS INSURANCE
COMPANY, INSURANCE CARRIER**

RESPONDENT

OPINION FILED AUGUST 16, 2007

This matter comes before Administrative Law Judge Barbara Webb on the record.

Claimant represented by the Honorable Donald Ryan, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the Honorable A. Gene Williams, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

A Pre-hearing telephone conference was held on this claim on April 17, 2007.

Pursuant to the Pre-hearing Order dated April 18, 2007, the parties agreed to submit this case on stipulated record by May 15, 2007. By letter dated April 18, 2007, a list of documentary evidence submitted into evidence was provided to the parties. By letter dated May 18, 2007, the parties were advised that the stipulated record would consist of exhibits provided on April 18, 2007, in that no additional documents were submitted and no objections were raised to the exhibits listed, as follows:

- (1) Pre-hearing Order filed 4/18/07
- (2) Claimant's Response to Pre-hearing Questionnaire received 2/14/07

- (3) Respondents' Response to Prehearing Questionnaire received 2/6/07 with Exhibits:
 - Exhibit 1 - Medical records predating the 2/28/94 accident
 - Exhibit 2 - Medical records after the 2/28/ 94 accident
 - Exhibit 3 - Deposition of Dr. Phillip Johnson, 11/7/95
 - Exhibit 4 - Respondents' Brief, 3/28/03
- (4) Respondents' Medical Records exhibits (2) received 2/12/04
- (5) Dr. Charles Schock deposition of 11/1/00
- (6) Full Commission Opinion of 11/18/03
- (7) ALJ Opinion filed 1/02/03
- (8) Transcript of 11/21/02 hearing
- (9) Pre-hearing Order filed 9/23/02
- (10) Respondents' Response to Prehearing Questionnaire received 8/15/02
- (11) Claimant's Response to Prehearing Questionnaire received 8/14/02
- (12) ALJ Opinion filed 11/29/00
- (13) Court of Appeals Opinion filed 3/22/00
- (14) Full Commission Opinion filed 4/27/99
- (15) ALJ Opinion filed 2/28/98
- (16) Full Commission Opinion filed 12/5/96
- (17) ALJ Opinion filed 2/8/96
- (18) Prehearing Order filed 7/28/95
- (19) Form AR-4 filed 12/30/94
- (20) Form AR-2 filed 4/15/94
- (21) Form 1 filed 3/30/94

By agreement of the parties, the stipulations applicable to this claim are as follows:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employer/employee/carrier relationship existed on February 28, 1994, when the claimant sustained a compensable injury.
3. The claimant's earnings were sufficient to entitle him to a temporary total disability rate of \$267.00.
4. Claimant sustained work related back injuries at Stauffer Chemical on 3/6/79 and 7/15/85.
5. Dr. John Adametz assigned a 2.5% permanent physical impairment rating on 7/25/86 for back problems.
6. Dr. Thomas Fletcher performed a bilateral discectomy at two levels, L4-L5 and L5-S1, on 12/17/91.
7. On 10/1/92 Dr. Fletcher assigned a 15% permanent physical impairment rating for the two level discectomy.
8. GEO Specialty Company became the claimant's employer on 2/9/93.
9. Hartford Underwriters Insurance Company became the workers' compensation insurer of GEO Specialty Company on 2/9/93.

10. Claimant was off work 2/28/94 through 5/15/94.
11. The current claims arise from an incident which occurred 2/28/94.
12. Claimant returned to work for GEO Specialty Chemicals on 5/16/94.
13. The claimant's employment with GEO Specialty Chemicals ceased 1/3/95 due to a reduction in employment at the plant.
14. A hearing on 1/9/96 resulted in an administrative law judge opinion of 2/8/96.
15. The 2/8/96 opinion was affirmed by the Commission on 12/5/96.
16. A hearing was held on 8/4/98 on issues of entitlement to additional medical treatment and permanent disability.
17. The 8/4/98 hearing resulted in an administrative law judge opinion of 9/28/98.
18. The 9/28/98 opinion was affirmed by the Commission on 4/27/99 and the Court of Appeals on 3/22/00 that claimant is entitled to continuing and reasonable necessary medical expenses.
19. Claimant initiated treatment with Dr. Charles Schock on 6/25/99, after an 8 year absence.
20. Dr. Schock performed a lumbar fusion on 8/17/99.
21. Respondents learned of Dr. Schock's treatment on 4/6/00.
22. The Commission's opinion of November 29, 2000, denied compensability of medical treatment rendered by Dr. Charles Schock.

23. A hearing was held November 21, 2002, on claimant's request for continuing reasonable and necessary related medical care.
24. An opinion was issued by the Administrative Law Judge on January 2, 2003, and by opinion dated November 13, 2003, the Full Commission vacated the Law Judge's opinion and remanded the matter to the Law Judge to settle the record and to make additional findings.
25. On February 9, 2004, a prehearing telephone conference was held and by letter of that same date the parties were directed to furnish the Law Judge with an evidentiary packet which consisted of the documents that were introduced at the hearing on November 21, 2002, but were not included in the hearing transcript.
26. On February 12, 2004, the Commission received from the respondents two exhibits of medical records that had been offered into evidence in prior hearings. The respondents also requested in its letter dated February 9, 2004, that the November 1, 2000 deposition of Dr. Charles Schock be considered.
27. By letter dated April 16, 2004, the parties were advised that the file had been assigned to another Administrative Law Judge.
28. Due to clerical error the file was inadvertently returned to the Commission's general files on June 2, 2004, without an opinion being rendered by the Administrative Law Judge.

29. By letter dated January 25, 2005, respondents requested the status of the case and by letter dated January 27, 2005, the Clerk of the Commission, Ms. Dorothy Jackson responded advising that the file had been returned to the Commission's general files.
30. By letter dated February 1, 2005, respondents' attorney advised that he would consult with claimant's attorney and notify Ms. Jackson if the parties desired further action.
31. By letter dated January 19, 2007, claimant's attorney requested that the file be returned to an Administrative Law Judge in order that continuing reasonable and necessary medical expenses can be pursued.
32. The claimant's current claim for benefits is the same claim which was the subject of the hearing on November 21, 2002.

ISSUES

On November 18, 2003, the Full Commission vacated the January 2, 2003 Opinion of the Administrative Law Judge denying this claim for additional benefits. The case was remanded to the Administrative Law Judge to settle the record, for additional findings, and to adjudicate claimant's entitlement to additional medical treatment by applying the correct legal standard. The case was subsequently assigned to this Administrative Law Judge for the purpose of conducting all further proceedings and to enter a decision in this case.

CONTENTIONS

The claimant contends that he is entitled to continued reasonable and necessary medical expenses for the injuries sustained in the scope of his employment. The respondents contend that the claimant's current medical problems were not caused or aggravated by the incident of February 28, 1994, which gave rise to this claim.

DISCUSSION

_____ On February 28, 1994, the claimant fell from a dump truck during the course and scope of his employment with Geo Specialty Chemical, Inc., resulting in an injury to his hip, back, and leg. Following a hearing, the Commission determined that the claimant had suffered a compensable injury to his hip and leg and a compensable aggravation of his preexisting back condition. The Commission awarded benefits and authorized a neurological examination to determine whether the 1994 injury caused nerve damage to claimant's left leg or foot. In 1998, the claimant sought additional medical benefits based on notes from his treating physician, Dr. Phillip Johnson, recommending continuing treatment in the form of pain management due to recurring back symptoms related to his 1994 fall and an April 24, 1997 nerve conduction study, which revealed peripheral neuropathy in claimant's left foot. In its Opinion of March 22, 2000, the Court of Appeals affirmed the Full Commission's award of additional medical benefits to the claimant noting that the Commission had relied on evidence of nerve impingement in the nerve

conduction study and the opinion of claimant's primary physician that claimant needed further treatment.

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).

In the instant case, respondent contends that claimant's current need for treatment is not related to his compensable injuries but were caused by pre-existing conditions. However, I find that this issue has been fully litigated and resolved by the prior Opinions of this Commission and the Court of Appeals. Previous decisions in this case have found that this claimant suffered a compensable injury to his left foot, left hip, and an aggravation of a preexisting back condition. As a result of neurological testing, the claimant was found to have been suffering from slow and latent nerve conduction problems throughout his left lower extremity and that the neurological symptoms were the result of an exacerbation of the claimant's preexisting back condition.

REASONABLY NECESSARY TREATMENT

Pursuant to Ark. Code Ann. § 11-9-508(a), an employer must promptly provide all reasonably necessary medical services which are needed to treat an employee's compensable injury. However, it was not the intent of the Arkansas Workers' Compensation Law to provide general accident insurance. Duke v. Perkin Wood Products Co., 223 Ark. 182, 264 S.W.2d 834 (1954).

Claimant has the burden of proving by a preponderance of the credible evidence that medical treatment is reasonable and necessary. Norma Beatty v. Ben Pearson, Inc., Full Workers' Compensation Commission, Opinion filed February 17, 1989 (D612291); B. R. Hollingshead v. Colson Caster, Full Workers' Compensation

Commission, Opinion filed August 27, 1993 (D703346). Employers are only liable for medical treatment and services which are deemed reasonably necessary for the treatment of employees' injuries. DeBoard v. Colson Co., 20 Ark. App. 166, 725 S.W.2d 857 (1987). When assessing whether medical treatment is reasonable necessary for the treatment of a compensable injury, both the proposed procedure and the condition it is sought to remedy must be analyzed. Deborah Jones v. Seba, Inc., Full Workers' Compensation Commission, Opinion filed December 13, 1989 (D512553). What constitutes reasonably necessary medical treatment is a fact question for the Commission. Wright Contracting co. v. Randall, 12 Ark. App. 358, 676 S.W.2d 750 (1984). Also, whether the medical treatment actually provided is reasonable and necessary is a question of fact for the Commission. DeBoard v. Colson Co., *supra*. While the results obtained may be a consideration in some cases, the primary considerations are the nature of the service in relation to the injury sustained. Tonnie Crisp v. Weyerhaeuser Corp., Full Workers' Compensation Commission, Opinion filed July 27, 1993 (D812922).

At the hearing, the claimant testified that he continues to have problems with his left foot and left hip. He explained that he could not walk on the ball of his foot or bend his toes. He testified that he had previously underwent surgery by Dr. Carter, a podiatrist, at the respondents' expense. The claimant testified that he had tried to return to his primary physician, Dr. Phillip Johnson, but was told that the respondents would not pay for treatment.

Respondents contend that this case is further complicated by the fact that claimant underwent fusion surgery in 1999 by Dr. Schock. In an Opinion filed

November 29, 2000, that was not appealed, the Administrative Law Judge determined that the claimant did not meet his burden of proving by a preponderance of the evidence that the surgery performed by Dr. Schock in August of 1999 was causally related to his compensable injury of February of 1994 based on Dr. Schock's testimony that it would be speculative to say that the claimant's need for his August 1999 fusion surgery was caused by his February 1994 compensable injury.

Based on the preponderance of the evidence, I find that the claimant has proven that he is entitled to continuing treatment for his left foot as reasonable and necessary treatment by his authorized primary physician, Dr. Phillip Johnson, or by another physician selected by the Commission as a result of the claimant's submission of a proper documentation for a change of physician.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
2. The employer/employee/carrier relationship existed on February 28, 1994, when the claimant sustained a compensable injury.
3. The claimant's earnings were sufficient to entitle him to a temporary total disability rate of \$267.00.
4. Claimant sustained work related back injuries at Stauffer Chemical on 3/6/79 and 7/15/85.
5. Dr. John Adametz assigned a 2.5% permanent physical impairment rating on 7/25/86 for back problems.

6. Dr. Thomas Fletcher performed a bilateral discectomy at two levels, L4-L5 and L5-S1, on 12/17/91.
7. On 10/1/92 Dr. Fletcher assigned a 15% permanent physical impairment rating for the two level discectomy.
8. GEO Specialty Company became the claimant's employer on 2/9/93.
9. Hartford Underwriters Insurance Company became the workers' compensation insurer of GEO Specialty Company on 2/9/93.
10. Claimant was off work 2/28/94 through 5/15/94.
11. The current claims arise from an incident which occurred 2/28/94.
12. Claimant returned to work for GEO Specialty Chemicals on 5/16/94.
13. The claimant's employment with GEO Specialty Chemicals ceased 1/3/95 due to a reduction in employment at the plant.
14. A hearing on 1/9/96 resulted in an administrative law judge opinion of 2/8/96.
15. The 2/8/96 opinion was affirmed by the Commission on 12/5/96.
16. A hearing was held on 8/4/98 on issues of entitlement to additional medical treatment and permanent disability.
17. The 8/4/98 hearing resulted in an administrative law judge opinion of 9/28/98.
18. The 9/28/98 opinion was affirmed by the Commission on 4/27/99 and the Court of Appeals on 3/22/00 that claimant is entitled to continuing and reasonable necessary medical expenses.

19. Claimant initiated treatment with Dr. Charles Schock on 6/25/99, after an 8 year absence.
20. Dr. Schock performed a lumbar fusion on 8/17/99.
21. Respondents learned of Dr. Schock's treatment on 4/6/00.
22. The Commission's opinion of November 29, 2000, denied compensability of medical treatment rendered by Dr. Charles Schock.
23. The case is governed by the prior final decisions of the Full Commission and the Court of Appeals pursuant to the doctrine of res judicata.
24. The claimant has proven by a preponderance of the evidence that he is entitled to continuing medical treatment for the compensable injuries to his left foot by his primary physician, Dr. Phillip Johnson, or another medical provider designated through the proper exercise of a change of physician request.
25. The claimant has proven that his need for medical treatment for the compensable injuries to his left foot is reasonable and necessary.
26. The right to medical treatment has been controverted by Respondents. Since the claim arose prior to July 1, 2001, Claimant's attorney is entitled to the appropriate statutory attorney's fees as to the medical benefits awarded in connection with this case.

AWARD

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. All accrued sums shall be paid in a lump sum without discount, and this award shall earn interest at the legal rate until paid, pursuant to Ark. Code Ann. § 11-9-809. See, Couch v. First State Bank of Newport, 49 Ark. App. 102, 898 S.W.2d 57 (1995).

IT IS SO ORDERED.

BARBARA WEBB
Administrative Law Judge