

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**WCC NO. F302620**

**DENNIS CARTER, EMPLOYEE**

**CLAIMANT**

**GEORGIA-PACIFIC CORPORATION,  
SELF-INSURED EMPLOYER**

**RESPONDENT**

**SEDGWICK CLAIMS MANAGEMENT  
SERVICES, INC. (TPA), INSURANCE CARRIER**

**RESPONDENT**

**OPINION FILED MARCH 12, 2008**

Hearing before Administrative Law Judge Barbara Webb on December 13, 2007, in Monticello, Drew County, Arkansas.

Claimant was represented by Mr. Kenneth Buckner, Attorney at Law, Pine Bluff, Arkansas.

Respondents were represented by Ms. Susan M. Fowler, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

A hearing was held on December 13, 2007, before Administrative Law Judge Barbara Webb. A Pre-hearing Order was entered in this case on September 18, 2007. The Pre-hearing 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 Pre-hearing Order was made Commission's Exhibit No. 1 to the hearing record. The following stipulations as submitted by the parties in the Pre-hearing Order and as amended on the record are hereby accepted:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.

2. The employer/employee/carrier relationship existed on February 28, 2003, when claimant sustained a compensable left shoulder injury and right brachial plexus injury.
3. The claimant's earnings were sufficient to entitle him to a compensation rate of \$440.00 for temporary total disability and \$330.00 for permanent partial disability benefits.
4. The Commission determined that the treatment by Dr. Thompson prior to the hearing on February 25, 2005, was reasonable and necessary and that Dr. Thompson is the authorized treating physician.

By agreement of the parties, the issues to be decided are as follows:

1. Compensability of alleged cervical injury.
2. Claimant's entitlement to additional permanent partial disability benefits.
3. Whether claimant's cervical injury claim is barred by *res judicata*.
4. Whether referral to Dr. Vora is medical treatment that is reasonable and necessary and related to the compensable injury.

The record consists of a one volume transcript of the December 13, 2007 hearing, consisting of the testimony of Connie Carter, Dennis Carter, and all documentary evidence consisting of Commission's Exhibit No. 1 (Pre-hearing Order); Claimant's Exhibit No. 1 (medical records with index); Claimant's Exhibit No. 1 (supplemental packet of medical records); Claimant's Exhibit No. 3 (Full Commission Opinion); Respondents' Exhibit No. 1 (medical records with index);

Respondents' Exhibit No. 2 (Pre-hearing Order filed 12-20-04 and Administrative Law Judge's Opinion filed 5-26-05); Respondents' Exhibit 3 (Deposition of Dr. Jim Moore). In addition, I have blue-backed a copy of the post-hearing letter from respondents filed December 19, 2007, a copy of the claimant's post-hearing letter filed January 15, 2008, and a copy of the respondents' post-hearing letter filed January 16, 2008, and incorporate the same as part of the record of this proceeding by agreement of the parties.

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### **CONTENTIONS**

The claimant contends that he suffered a compensable injury to his neck on February 28, 2003. The claimant further contends that he is entitled to additional permanent physical impairment. The claimant further contends that he is entitled to additional medical treatment, including an evaluation by Dr. Vora by referral of Dr. Thompson.

The respondents contend that the impairment rating issued by Dr. Thompson on September 28, 2006, is invalid as it is related to a non-compensable neck condition. Further, respondents contend that Dr. Thompson has clearly related the claimant's current alleged sensory impairment in his right hand to the non-compensable neck condition. In addition, respondents contend that Dr. Thompson fails to state any current objective medical findings, related to a compensable injury, in his determination of the alleged sensory impairment to the right hand. The respondents further contend that the Administrative Law Judge found that claimant

abandoned any claim for a neck injury and that the claim is barred by *res judicata*.

The respondents contend that the claimant is not entitled to a second opinion evaluation of the claimant's neck condition or of Dr. Thompson's impairment rating as it relates to it.

## **DISCUSSION**

### **I. PRIOR ADJUDICATION**

In its October 5, 2005 Opinion, the Full Commission affirmed the administrative law judge's finding that the claimant sustained compensable injuries on February 28, 2003, to his left shoulder and brachial plexus. Based on a *de novo* review of the entire record, the Full Commission affirmed as modified the administrative law judge's findings of fact, as follows:

The claimant testified that he sustained an accidental injury as the result of a specific incident occurring on February 28, 2003. The claimant testified that he was struck in the head and knocked to his left side, and that he reached out with both hands and grabbed a ladder to break his fall. Two co-workers corroborated the claimant's testimony that he grabbed the ladder immediately after the accident. Based on electrodiagnostic testing carried out in May 2003, Dr. Moore opined that the claimant had sustained "a very mild injury to the lower brachial plexus on the right side with some subsequent innervation." A left-shoulder MRI taken in June 2003 showed findings suggesting a superior labral tear with resulting suprascapular nerve entrapment." Dr. Knight noted in June 2003 that diagnostic testing revealed "a multi-loculated ganglion, which extends out of the joint into the suprascapular nerve area and a glenoid labrum disruption. He needs referral to a fellowship trained shoulder surgeon."

The impression from a MR scan of the claimant's left shoulder in July 2003 was "paralabral cyst is associated with a labral tear involving the posterosuperior glenoid labrum." Dr. Pearce subsequently noted, "it sounds as if Mr. Carter could have had an axial pulling mechanism to his injury." Dr. Knight opined in December 2003, "His shoulder pathology is a glenoid labrum tear with a secondary ganglion with direct pressure on the suprascapular nerve....Injuries clearly related to his W/C injury when he fell."

We recognize Dr. Pearce's deposition testimony indicating that he

could not definitively state whether or not the accident caused the claimant's shoulder cyst or labral tear. Nevertheless, the Commission has the duty of weighing medical evidence, and if the evidence is conflicting, its resolution is a question of fact. Green Bay Packaging v. Bartlett, 67 Ark. App. 332, 999 S.W.2d 695 (1999). The Commission in the present matter places greater probative weight on the opinion of Dr. Knight. Dr. Knight testified at deposition that he believed the accidental injury "resulted in a tear of the glenoid labrum, which is actually the rim around the socket. And as a sequel to that, he developed the ganglion, which extends outside the joint and presses on the suprascapular nerve, which was causing some shoulder pain." We also place significant probative weight on the expert opinion of Dr. Moore, who stated, "the problems in the patient's right upper extremity are related to trauma sustained to the brachial plexus at the time of the injury."

The Full Commission therefore affirms the administrative law judge's finding that the claimant sustained compensable injuries. The Full Commission finds that the claimant sustained compensable injuries to his left shoulder and brachial plexus. These accidental injuries arose out of and in the course of employment and required medical services. The accidental injuries to the claimant's left shoulder and brachial plexus were caused by a specific incident identifiable by time and place of occurrence. The claimant established these injuries by medical evidence supported by objective findings not within his voluntary control. These objective findings included the electrodiagnostic studies showing trauma to the lower brachial plexus, and the left-shoulder MRI showing a superior labral tear and perilabral cyst development.

In the present matter, the claimant sustained a compensable injury to his left shoulder and brachial plexus on February 28, 2003, along with a head laceration and cerebral concussion. The claimant thus entered a healing period for compensable injuries on February 28, 2003. Dr. Moore's subsequent treatment notes indicated that the claimant was off work. Although Dr. Moore attempted to release the claimant to light duty on May 13, 2003, the claimant testified that no light duty with the respondent-employer was available. The preponderance of evidence therefore indicates that the claimant was totally incapacitated to earn wages at that time, and that the claimant remained in a healing period.

Diagnostic testing in June 2003 suggested a superior labral tear in the claimant's left shoulder and perilabral cyst development. Dr. Knight recommended treatment and kept the claimant off work in June 2003. Dr. Pearce also began treating the claimant. The impression from additional diagnostic testing in July 2003 was, "Paralabral cyst is associated with a labral tear involving the posterosuperior glenoid labrum." Dr. Pearce recommended additional treatment, which recommendation indicates that the claimant remained within a healing period. Dr. Knight noted in December 2003 that the recommended medical treatment for the claimant had not been

provided. Dr. Thompson noted in May 2004, "His employer will not take him back to work until he can do his full heavy job duties which he is unable to do at the present time." The claimant testified that he was unable to use his left shoulder to work.

The Full Commission affirms the administrative law judge's finding that the claimant proved he was entitled to temporary total disability compensation from the date of the compensable injuries until a date to be determined. We do not affirm the administrative law judge's finding that the claimant was entitled to additional temporary disability for an injury to his head. The claimant testified that he was struck on the head on February 28, 2003, and the respondents accepted responsibility for a head laceration. Dr. Moore subsequently diagnosed "cerebral concussion." A brain MRI in March 2003 was normal, as were skull x-rays. We recognize that Dr. Moore also diagnosed "cerebral concussion" on May 13, 2003. Nevertheless, there were no diagnostic findings demonstrating continued cerebral concussion after March 2003. Further, the claimant testified that he was unable to return to work on May 13, 2003, not because of his head, but because of his left shoulder, and because of his right arm complaints resulting from the brachial plexus injury. There was also no indication of record that the claimant remained within a healing period for the head laceration he sustained on February 28, 2003.

The Full Commission found that the claimant proved he sustained compensable injuries to his left shoulder and brachial plexus on February 28, 2003. The Full Commission found that claimant proved he was entitled to temporary total disability compensation from the date of these injuries until a date yet to be determined and all of the medical treatment of record pursuant to Ark. Code Ann. §11-9-508(a), including the treatment provided by Dr. Barry Thompson, subject to a set-off pursuant to Ark. Code Ann. §11-9-411(a).

## **II. RES JUDICATA**

The claimant contends that he suffered a cervical injury on February 28, 2003, in addition to the compensable left shoulder and brachial plexus injuries which was not adjudicated in the prior proceedings in this case. Respondents contend the

Commission found that claimant suffered a compensable injury to his left shoulder and brachial plexus and contend that any claim for a neck injury and associated 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 February 25, 2005, before Administrative Law Judge Cynthia Estes Rogers. In an Opinion dated May 26, 2005, the Administrative Law Judge found that claimant proved he sustained a compensable left shoulder injury on February 28, 2003, and that the claimant proved he sustained a compensable right arm injury on February 28, 2003, and that the claimant proved he was entitled to temporary total disability compensation and reasonably necessary medical treatment. The Full Commission subsequently affirmed as modified the Administrative Law Judge in a written Opinion filed October 5, 2005. The Full Commission found that the claimant sustained compensable injuries to his left shoulder and brachial plexus.

In the prior adjudication, the Full Commission and Administrative Law Judge relied on the same evidence that the claimant now seeks to introduce to establish a cervical injury. In the prior hearing, the claimant distinctly put into issue the question of whether he had suffered a compensable cervical injury. As noted by the Administrative Law Judge in the May 26, 2005 Opinion,

The prehearing Order of December 20, 2004, includes a contention by the claimant that he suffered, additionally, a neck injury. This injury was neither addressed nor argued at the full hearing on this matter or by counsel in post-hearing briefs. It is assumed, therefore, that claimant has abandoned his claim for a neck injury and same will not be addressed here.

That decision was affirmed on appeal to the Full Commission and the Court of Appeals.

Claimant contends that there was no ruling on the cervical issue and therefore the doctrine of *res judicata* does not apply. Respondents rely on the fact that the claimant initially raised the neck injury even though the claimant failed to appeal the decision which failed to find a compensable neck injury.

Based on my review of the record and prior rulings in this case, I find that the issue of the extent of claimant's compensable injuries from the February 28, 2003, accident and his entitlement to temporary total disability benefits and right to reasonable and necessary medical treatment by his authorized physician, Dr. Thompson, was fully adjudicated as of the date of prior hearing and is thus *res judicata*.

### **III. PERMANENT ANATOMICAL IMPAIRMENT**

Ark. Code Ann. § 11-9-704(c)(B) (Repl. 2002) provides that "[a]ny determination of the existence or extent of physical impairment shall be supported by objective and measurable physical or mental findings." Further, permanent disability "benefits shall be awarded only upon a determination that the compensable injury was the major cause of the disability or impairment." Ark. Code Ann. § 11-9-102(4)(F)(ii)(a) (Supp. 2002). The Commission had adopted the American Medical Association's Guides to the Evaluation of Permanent Impairment, (4<sup>th</sup> Ed. 1993), for use in assessing the extent of permanent anatomical impairment. The burden rests upon the claimant to prove the existence and extent of permanent physical impairment. He must show that any permanent physical impairment is supported by objective and measurable physical or mental findings, Ark. Code Ann. § 11-9-

704(c)(1)(B). He must also show that the degree or percentage of permanent physical impairment is calculated in a manner that conforms to the Guides. The claimant must also show that the compensable injury or injuries was the “major cause” of the specific degree or percentage of permanent physical impairment, Ark. Code Ann. § 11-9-102(4)(F)(ii)(a). The term “major cause” is defined as more than 50% of the cause, Ark. Code Ann. § 11-9- 102(14)(A).

Although expert medical opinion may be relevant to the existence and extent of permanent physical impairment, it is the obligation of this Commission, rather than any medical expert, to ascertain the existence and exact extent of permanent physical impairment in a manner that conforms with the requirements of the Act. In order for expert medical opinions to be considered by the Commission on this issue, they must be stated within a reasonable degree of medical certainty, Ark. Code Ann. § 11-9-102(16)(B). In determining the existence or extent of permanent physical impairment neither any medical expert nor this Commission may consider complaints of pain.

The Commission has the authority to resolve conflicting evidence and this extends to medical testimony. *Foxx v. American Transp.*, 54 Ark. App. 115, 924 S.W.2d 814 (1996). Although the Commission is not bound by medical testimony, it may not arbitrarily disregard any witness’s testimony. *Reeder v. Rheem Mfg. Co.*, 38 Ark. App. 248, 832 S.W.2d 505 (1992). The Commission is entitled to review the basis for a doctor’s opinion in deciding the weight of the opinion. Id. There is no requirement that medical testimony be expressly or solely based on objective

findings, only that the record contain supporting objective findings. *Swift-Eckrich, Inc. v. Brock*, 63 Ark. App. 118, 975 S.W.2d 857 (1998). Further, a medical opinion based solely upon claimant's history and own subjective belief that a medical condition is related to a compensable injury is not a substitute for credible evidence. *Brewer v. Paragould Housing Authority*, Full Commission Opinion filed Jan. 22, 1996 (Claim No. E417617). The Commission is not bound by a doctor's opinion which is based largely on facts related to him by claimant where there is no sufficient independent knowledge upon which to corroborate the claimant's claim. *Roberts v. Leo-Levi Hospital*, 8 Ark. App. 184, 649 S.W.2d 402 (1983).

\_\_\_\_\_The claimant has presented impairment ratings by Dr. Barry Thompson issued September 28, 2006 and by Dr. Vora on November 15, 2007. Respondents deny the Claimant is entitled to an additional permanent partial disability based on their contention that the additional impairment ratings are related to the noncompensable neck injury which is barred by res judicata. Respondents contend that neither is valid as neither addresses a compensable injury in this matter. In addition, respondents contend that Dr. Thompson's rating was based on the subjective complaints of numbness by the Claimant versus review of any EMG/NCV or other objective findings related to a compensable injury. Respondents submit that the impairment rating of Dr. Rutherford of May 29, 2007, of 0% impairment to the right upper extremity is the only valid rating.

A. Dr. Thompson's rating

On September 28, 2006, Dr. Thompson assigned an impairment rating to the claimant stating,

Based on the Guides to the Evaluation of Permanent Impairment Fourth Edition he has prolapsed cervical disc C5-6 which gives him 6% whole person impairment according to Table 75 II C page 113. Due to sensory impairment of the ulnar nerve figure 5 page 22 affecting the 4<sup>th</sup> and 5<sup>th</sup> digits of the right hand there is a 10% impairment of the hand. 10% of the hand is 9% to the upper extremity according to Table 2 page 19 and 9% impairment of the upper extremity is 5% of the whole person impairment according to Table 3 page 20. Using the combined values chart on page 322 6% whole person impairment plus 5% whole person impairment is 11% whole person impairment as a result of his workers' comp injury on 2/28/03.

Since the last hearing, the claimant has continued to treat with Dr. Thompson for both his compensable injuries in addition to other unrelated to the work-related accident in this matter. Dr. Thompson has consistently related the claimant's complaints of numbness in the 4<sup>th</sup> and 5<sup>th</sup> fingers of his right hand to a "prolapsed disc" in the claimant's neck despite previous EMG/NCV studies to the contrary. Dr. Thompson ordered another MRI of the claimant's neck on 9-21-06 under the mistaken assumption that he was to issue a rating for a neck injury resulting in the numbness complaints. The findings of the 9-21-06 MRI are nearly identical to those on his 5-12-2003 MRI with no herniated disk noted. On September 27, 2006, Dr. Thompson's notes still state "Prolapsed disk at C5-6 on the right affecting the ulnar nerve. I expect this to cause him difficulty for the remainder of his life. He may require epidural injection and/or surgery in the future."

The respondents denied Dr. Thompson's rating on the basis that he addressed only a non-work related cervical condition, and failed to site any other

objective basis for the portion assigned for right hand numbness. At that time, claimant was referred to Dr. Reginald Rutherford, a neurologist, and Dr. Michael Moore, a hand specialist, to properly evaluate whether or not the claimant was entitled to an impairment rating for the compensable right brachial plexus injury.

Dr. Rutherford conducted EMG/NCV studies and reviewed claimant's medical records including the recent MRI. Dr. Michael Moore, a hand specialist, also examined the claimant to determine whether or not there was another cause of the claimant's right hand complaints. Dr. Rutherford opined that the EMG/NCV confirmed the prior brachial plexus injury and ruled out a cervical cause of the claimant's complaints. Dr. Moore found possible mild bilateral carpal tunnel. Dr. Rutherford sent the claimant for evaluation of functional ability of the claimant's right hand and subsequently assigned a 0% rating for the brachial plexus based on the results and the Fourth Ed. of the Guides to Permanent Impairment.

Dr. Thompson's medical records note that on 8-14-07 the claimant's current counsel contacted him about his 9-28-2006 impairment rating. Dr. Thompson's note again relate claimant's numbness complaints to a "prolapsed disc" in the claimant's neck despite Dr. Rutherford's evaluation and testing of claimant. Dr. Thompson suggested the claimant undergo a second opinion evaluation by Dr. Vora regarding his September 28, 2006 impairment rating. The claimant saw Dr. Vora on October 4, 2007. Dr. Vora diagnosed the claimant with cervicalgia with resultant "bilateral median and ulnar and radial sensory distal neuropathy; and, bilateral carpal tunnel syndrome if there was a clinical correlation." Again, there is no mention of a brachial

plexus injury in relation to all what are now bilateral findings. In fact, it does not appear from Dr. Vora's notes in this matter that the claimant even discussed the previously diagnosed brachial plexus injury with Dr. Vora. On October 5, 2007, Dr. Thompson wrote the claimant's attorney a letter that simply states, "My impairment rating does indeed address the brachial plexus injury." However, Dr. Thompson's rating makes no mention of a brachial plexus injury and makes no mention as to what portion of the rating assigned is related to the brachial plexus, if any at all. All previous notes of Dr. Thompson, relate his belief that the numbness in the 4<sup>th</sup> and 5<sup>th</sup> fingers of claimant's right hand is a result of a "prolapsed disc" which affects the ulnar nerve. To the extent Dr. Thompson has related all of his rating to a non-compensable neck condition, and lists no other objective finding on which to base the portion of his rating related to numbness complaints in claimant's right hand, the validity of the rating is suspect.

#### B. Dr. Vora's Impairment Rating

Dr. Vora issued a rating on October 25, 2007, as follows:

Based upon the Nerve Conduction/EMG findings the impairment is 10% of the body in each hand due to bilateral carpal tunnel syndrome as well as due to bilateral ulnar and radial sensory distal neuropathy, in addition to bilateral median sensory distal neuropathy. Total of 20% impairment for each hand, total of 40% of the body.

The rating makes no mention of the cause of these multiple bilateral findings. Dr. Vora's medical notes and rating address bi-lateral problems in the median, ulnar and radial nerves, and carpal tunnel. On November 15, 2007, Dr. Vora wrote that based

on the nerve conduction/EMG of the upper extremities, the impairment to the upper extremities would be 30%, resulting in impairment to the body as a whole of 10%.

### C. Dr. Rutherford's Impairment Rating

On May 29, 2007, Dr. Rutherford wrote that based on an OT evaluation regarding potential impairment to the right upper extremity and the 4<sup>th</sup> Edition AMA Guides to the Evaluation of Permanent Impairment, there was 0% impairment. Based on EMG/NCV and functional testing, Dr. Rutherford determined the claimant sustained no permanent impairment on the right hand due to the right brachial plexus injury. Dr. Rutherford reviewed the claimant's cervical MRI, and conducted an updated EMG/NCV studies. He also had an evaluation conducted by a physical therapist to determine functional loss, if any, of the claimant's hand. The EMG/NCV study confirmed the claimant's complaints were due to the brachial plexus injury. Dr. Rutherford specifically opined that the cervical injury was non-contributory and did not need any further treatment at that time.

In this case, I find that the opinion of Dr. Rutherford should be afforded more weight than the reports of Dr. Thompson or Dr. Vora. Dr. Rutherford properly considered only the amount of additional impairment caused by the work-related injury. Based on preponderance of the medical evidence in this case and the prior determination that the claimant suffered only a compensable left shoulder and brachial plexus injury, I find that Dr. Rutherford's 0% anatomical impairment rating is the proper rating in this matter. *Wal-mart Stores, Inc. v. Westbrook*, 77 Ark. App.

167, 72 S.W.3d 889 (2002); *Second Injury Fund v. Stephens*, 62 Ark. App. 255, 970 S.W.2d 331 (1998).

#### **IV. MEDICAL TREATMENT BY DR. VORA**

Dr. Thompson referred the claimant to Dr. Vora for the purpose of a second opinion evaluation of his impairment rating to the claimant's neck. Respondents deny they are liable for this evaluation or any future treatment by Dr. Vora on the basis that Dr. Vora is treating the claimant for noncompensable conditions, including cervicalgia, and bilateral median, ulnar, and radial nerve disorders and carpal tunnel. Respondents further contend that Dr. Vora does not even mention the compensable previous right lower brachial plexus in his medical notes.

Based on the preponderance of the evidence and the application of the doctrine of *res judicata*, I find that to the extent that claimant's request for evaluation and treatment by Dr. Vora related to the neck, the request must be denied.

#### **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, 2003, when claimant sustained a compensable left shoulder injury and right brachial plexus injury.
3. The claimant's earnings were sufficient to entitle him to a compensation rate of \$440.00 for temporary total disability and \$330.00 for permanent partial disability benefits.

4. The Commission determined that the treatment by Dr. Thompson prior to the hearing on February 25, 2005, was reasonable and necessary and that Dr. Thompson is the authorized treating physician.
5. That the Administrative Law Judge's May 26, 2005 Opinion as modified by the Arkansas Workers' Compensation Commission's October 5, 2005 Opinion constitute the law of the case and all stipulations and findings set out in these opinions are res judicata on the issue of the extent of claimant's compensable injuries arising from the February 28, 2003 work-related accident. Any claim for a determination of a compensable neck injury and related benefits is precisely the claim at issue in the prior decision and is barred by res judicata.
6. Claimant has failed to prove by a preponderance of the evidence that he is entitled to additional permanent partial disability benefits associated with his compensable injuries to his left shoulder and brachial plexus.
7. Claimant has failed to prove that he is entitled to additional medical treatment with Dr. Vora as reasonable and necessary treatment related to his compensable injuries.

**ORDER**

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

**IT IS SO ORDERED.**

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**BARBARA WEBB**  
Administrative Law Judge