

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F001426

SHARON E. FERREN,
EMPLOYEE

CLAIMANT

SEARCY INDUSTRIAL LAUNDRY,
EMPLOYER

RESPONDENT

MID-CENTURY INSURANCE COMPANY,
INSURANCE CARRIER

RESPONDENT

OPINION FILED OCTOBER 28, 2004

Upon review before the FULL COMMISSION in Little Rock,
Pulaski County, Arkansas.

Claimant represented by HONORABLE ZAN DAVIS, Attorney at
Law, Little Rock, Arkansas.

Respondents represented by HONORABLE CAROL WORLEY, Attorney
at Law, Little Rock, Arkansas.

Decision of the Administrative Law Judge: Reversed.

OPINION AND ORDER

The claimant appeals an administrative law judge's
opinion that was filed on March 18, 2004. The
administrative law judge found that, "The preponderance of
the evidence reflects that the claimant's claim for
additional temporary total disability benefits is barred by
the doctrine of *res judicata*."

After reviewing the entire record *de novo*, the Full
Commission reverses the opinion of the administrative law
judge. We find that the preponderance of the evidence fails
to establish that the claimant's claim for additional

temporary total disability compensation is barred by the doctrine of *res judicata*. We further find that the claimant has proven by a preponderance of the evidence that she is entitled additional temporary total disability compensation from June 7, 2000 through March 19, 2003.

I. History

On January 13, 2000, while working, the claimant sustained an injury to her neck and back as she lifted a box of clothing. At the time of her injury, the claimant had worked for the respondent/employer for some three years, and her job title was that of a classifier. The claimant's job duties entailed boxing up "throwaway" garments, restocking the stockroom, running the computer, grading, tagging, and various other job duties. According to the claimant, prior to the incident on January 13, 2000, she had never experienced any problems with her neck or back.

Subsequently, the respondent stipulated that the claimant sustained a compensable injury to her low back on January 13, 2000, but they denied that she sustained an injury to her neck. As a result, the claimant filed a claim in this matter, and on October 19, 2000, a pre-hearing order was issued. The parties stipulated to the following:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.
2. The employer-employee-carrier relationship existed between the parties on all relevant dates.
3. That the claimant sustained a compensable injury to her lower back on January 13, 2000.

The issues to be litigated at the hearing were as follows:

1. Whether the claimant is entitled to continued medical treatment from Ron Williams and Dr. Jim Citty for her neck and whether her neck injury is causally related to her compensable injury.
2. Whether the claimant is entitled to temporary total disability benefits from June 7, 2000 to a date yet to be determined.
3. Whether the claimant is entitled to additional medical expenses.
4. Whether the claimant is entitled a controverted attorney's fee.

After a hearing before the Commission, the administrative law judge issued an opinion on March 28, 2001. At which time, the administrative law judge stated the following concerning the compensability of the claimant's neck injury (cervical and thoracic problems) and her entitlement to additional temporary total disability compensation:

Claimant has received various Leaves of Absence [sic] with releases to return to work which have been continually extended on account of various

pain complaints and allergic drug reactions experienced by Claimant. The available medical records indicate that Claimant's back condition was stabilized and her allergic drug reactions fully recognized when she was released to return to work on June 1, 2000. Her medical leave of absence was extended to July 1, 2000, by Dr. Citty after Claimant's complaints of back and foot pain on May 23, 2000; thereafter, Claimant's medical records relate to her complaints of cervical and thoracic pain and treatment which the examiner has found to be non-compensable and not causally related to her compensable back injury.

I find that the claimant has failed to meet the required burden of proof which would entitle her to temporary total disability benefits after June 6, 2000.

In addition to this, the administrative law judge made the following findings of fact and conclusions of law:

1. That the claimant failed to prove by a preponderance of the evidence that she sustained a compensable injury to her cervical spine or neck on January 13, 2000.
2. That the claimant has failed to prove by a preponderance of the evidence the existence of a causal relationship between her need for treatment of her neck condition and her compensable injury of January 13, 2000.
3. That the claimant has failed to meet the required burden of proof which would entitle her to temporary total disability benefits after June 6, 2000.
4. That the claimant's request for attorney's fees should be denied because the claimant has failed to prevail in any of the issues controverted herein.

The claimant appealed this decision to the Full Commission. The claimant contended that the administrative law judge's conclusions were based on erroneous interpretation of the facts, and should be reversed and benefits awarded for the claimant's cervical spine problems.

On February 21, 2002, the Full Commission issued a decision reversing the administrative law judge's decision. The Full Commission found that, "The claimant proved by a preponderance of the credible evidence that she sustained a compensable neck injury, in addition to her admittedly compensable low back injury in the incident of January 13, 2000." The Full Commission further found that the respondent was liable for the related medical expenses. However, in its decision, the Full Commission did not rule on, nor did we mention the issue of additional temporary total disability compensation.

The respondent appealed the Full Commission's decision to the Arkansas Court of Appeals. In its opinion, the court of appeals affirmed the Full Commission's decision, and found that the claimant had met her burden of proving by a preponderance of the evidence that she sustained a compensable injury to her cervical spine. The court of appeals also affirmed the award of medical benefits, but

they made no ruling or mention of the claimant's entitlement to temporary total disability compensation.

The claimant filed a subsequent claim requesting an award of additional temporary total disability benefits from June 7, 2000 through March 19, 2003. A hearing was held in this matter on February 4, 2004. Prior to the hearing, the parties agreed to the following stipulations:

1. The employee-employer-carrier relationship existed at all relevant times.
2. The claimant's temporary total disability rate is \$213.00.
3. The claimant sustained a compensable injury to her low back on January 13, 2000.

In addition, the parties agreed to litigate the following issues:

1. Whether the claimant is entitled to temporary total disability compensation from June 7, 2000, to March 19, 2003.
2. Whether the claim is barred by *res judicata* or collateral estoppel.
3. Whether the claimant is entitled to attorney's fees.

The claimant contended that now that the issue of the compensability of her neck injury has been established, she is entitled to temporary total disability compensation from June 7, 2000 through March 19, 2003.

In contrast, the respondent contended that *res judicata* and/or collateral estoppel applies with regard to the claimant's claim for entitlement to additional temporary total disability compensation. In the event that it is found that *res judicata* or collateral estoppel does not apply, the respondent contended that the medical documentation does not support a finding of entitlement to additional temporary total disability compensation.

At the hearing, the claimant essentially testified that the respondent paid her temporary total disability compensation until about June 7, 2000, and then they stopped. The claimant further testified that she did not work from June 7, 2000 through March 19, 2003 due to problems with both her neck and back. According to the claimant, during this period of time, she was not able to work because, she was "on pain medicine continually and it just seemed to not do any good." The claimant also testified that around March 19, 2003, she underwent low back surgery with Dr. Hart, at which time the respondent began paying temporary total disability compensation up until December 22, 2003.

In addition to the aforementioned testimony, several medical documents were introduced into evidence during the

hearing. Specifically, a letter dated April 23, 2001 from Dr. John L. Wilson to the claimant's attorney was introduced into evidence. In this letter, Dr. Wilson reported, "Ms. Ferren has not reached the end of her healing period."

On November 11, 2003, Dr. Ronald Williams reported the following to the claimant's attorney:

Thank you for your letter of October 22, 2003, regarding Sharon Ferron. Ms. Ferron indicated to me in her original history that she had never had any difficulty with her back or neck until she injured herself at work on January 13, 2000. Treatment and healing period from then up until 3/19/03 would have been for that work injury.

After a hearing before the Commission, the administrative law judge found, "The preponderance of the evidence reflects that the claimant's claim for additional temporary total disability benefits is barred by the doctrine of *res judicata*."

The claimant appeals to the Full Commission.

II. Adjudication

In the present matter, the administrative law judge found that the claimant's claim for additional temporary total disability compensation is barred by the doctrine of *res judicata*. However, the Full Commission finds that the administrative law judge erred in finding that *res judicata* bars the claimant's claim for additional temporary total

disability compensation. *Res judicata* applies where there has been a final adjudication on the merits of an issue by a court of competent jurisdiction on all matters litigated and those matters necessarily within the issue which might have been litigated. Perry v. Leisure Lodges, 19 Ark. App. 143, 718 S.W.2d 114 (1986). The doctrine of *res judicata* bars the reopening of matters once judicially determined by competent authority. Gwin v. R. D. Hall Tank Co., 10 Ark. App. 12, 660 S.W.2d 947 (1983). *Res judicata* applies to decisions of the Workers' Compensation Commission. Perry, supra; Gwin, supra. The rationale underlying the doctrine of *res judicata* is to end litigation by preventing a party who has had one fair trial of a question of fact from drawing it into controversy. Mohawk Tire and Rubber Co. v. Brider, 259 Ark. 728, 536 S.W.2d 126 (1976). However, the doctrine does not bar issues which were not decided and could not have been decided. In this regard, the Arkansas Supreme Court made the following comments in Fawcett v. Rhyne, 187 Ark. 940, 63 S.W.2d 349 (1933):

The doctrine of *res judicata* rests, not upon the fact that a particular proposition has been affirmed or denied in the pleadings, but upon the fact that it has been fully and fairly investigated and tried. A point not raised by the pleadings nor decisive of the case and not actually litigated is not conclusively established

for the purpose of a subsequent suit upon a different cause of actions, although it may be expressly or tacitly involved in the judgment.

In the present matter, the Full Commission finds that the administrative law judge was correct in finding that the claimant is making the same claim for additional temporary total disability compensation for the exact time frame, based on the same circumstances, as were requested at the hearing in March of 2001. However, we do not find that the claim is barred by the doctrine of *res judicata* because although the prior administrative law judge found in his opinion of March 28, 2001 that the claimant's neck injury was not causally related to her compensable back injury, he did not reach the issue of additional temporary total disability compensation once he found the neck injury not to be a compensable injury. Moreover, we note that once the case was appealed to the Full Commission and the Arkansas Court of Appeals, they did not adjudicate, and nor did they address the issue of temporary total disability compensation. As such, we find that the claimant has not had an opportunity to litigate her entitlement to additional temporary total disability compensation. Therefore, we further find that the doctrine of *res judicata* does not preclude the claimant from claiming entitlement to

additional temporary total disability compensation from June 7, 2000 through March 19, 2003.

As to the claimant's claim for additional temporary total disability compensation, an injured employee is entitled to temporary total disability compensation during the time that she is within her healing period and totally incapacitated to earn wages. Arkansas State Highway and Transportation Department v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981).

On April 23, 2001, Dr. Wilson opined that the claimant was still within her healing period for her compensable injury, and on November 11, 2003, Dr. Williams opined that the claimant remained within her healing period from the date of her compensable injury of January 13, 2000 until March 19, 2003. No other medical documentation has been presented to contradict these two opinions or otherwise show that the claimant's healing period had ended. Therefore, based on these two opinions, the Full Commission finds that the preponderance of the evidence establishes that the claimant remained within her healing period from June 7, 2000 until March 19, 2003.

In addition, we find that the claimant presented credible testimony concerning her inability to work(due to

problems with her neck and back) from June 7, 2000 until March 19, 2003. At which time, the claimant underwent surgery with Dr. Hart to correct problems with her low back, which resulted from her compensable injury of January 13, 2000. Thus, considering the claimant's credible testimony concerning her inability to work due to neck and back problems, and the fact that her compensable low back problems were not corrected by surgery until around March 19, 2003; the Full Commission finds that it is more probable than not that the claimant remained totally unable to work from June 7, 2000 through March 19, 2003 due to her compensable injury.

Therefore, due to all of the foregoing reasons, we find that the claimant has proven by a preponderance of the evidence that she remained within her healing period and totally incapacitated to earn wages from June 7, 2000, until March 19, 2003.

Based on our *de novo* review of the entire record, the Full Commission reverses the opinion of the administrative law judge. We find that the preponderance of the evidence fails to establish that the claimant's claim for additional temporary total disability compensation is barred by the doctrine of *res judicata*. Thus, we further find that the

claimant has proven by a preponderance of the credible evidence that she is entitled additional temporary total disability compensation from June 7, 2000 through March 19, 2003.

All accrued benefits shall be paid in a lump sum without discount and with interest thereon at the lawful rate from the date of the Administrative Law Judge's decision in accordance with Ark. Code Ann. § 11-9-809 (Repl. 2002).

Since the claimant's injury occurred prior to July 1, 2001, the claimant's attorney's fee is governed by the provisions of Ark. Code Ann. § 11-9-715 as it existed prior to the amendments of Act 1281 of 2001. Compare Ark. Code Ann. § 11-9-715 (Repl. 1996) with Ark. Code Ann. § 11-9-715 (Repl. 2002). For prevailing on this appeal before the Full Commission, claimant's attorney is hereby awarded an additional attorney's fee in the amount of \$250.00 in accordance with Ark. Code Ann. § 11-9-715(b) (Repl. 1996).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

CONCURRING AND DISSENTING OPINION

I respectfully concur in part and dissent in part from the decision of the majority finding that the claimant's claim for temporary total disability benefits related to her cervical injury is not *res judicata* and that the claimant is entitled to such benefits from June 7, 2000, through March 19, 2003. My de novo review of this claim reveals that, although the claimant's claim is not barred by the doctrine of *res judicata*, the claimant has failed to prove by a preponderance of the evidence that she is entitled to temporary total disability benefits as described above. Specifically, the claimant has failed to establish by a preponderance of the evidence that she was totally incapacitated from earning wages from June 7, 2000, through March 19, 2003, due to her cervical neck injury.

The claimant sustained an admittedly compensable low-back injury arising from an incident at work on January 13, 2000. The respondents accepted the compensability of that injury and paid all appropriate benefits associated therewith, including temporary total disability until such time as the claimant reached maximum medical improvement as to her back. Sometime later, the claimant asserted that a herniated disk in her neck was a compensable consequence of the incident which arose on

January 13th. A hearing was held on March 6, 2001, to determine, among other things, the compensability of the claimant's neck injury. At that time, the issue of additional temporary total disability benefits was also raised and litigated. In an opinion dated March 28, 2001, the Administrative Law Judge denied the compensability of the claimant's neck injury, and he found that the claimant had failed to prove that she was entitled to additional temporary total disability benefits. On appeal, the Full Commission found that the claimant had sustained a compensable neck injury arising out of the incident of January 13, 2000, and this decision was later affirmed by the Arkansas Court of Appeals. Consequently, the respondent was ordered to pay all medical benefits associated with the claimant's back and neck injuries. The issue of additional temporary total disability, however, was not appealed nor addressed by either the Full Commission or the Court of Appeals.

The issue of temporary total disability benefits related to the claimant's compensable neck injury was heard on February 4, 2004. At that time the Administrative Law Judge found that this issue had been previously litigated, and was, therefore, barred from re-litigation under the doctrine of *res judicata*. Specifically, the Administrative

Law Judge reasoned that the claimant was making the same claim for benefits for the exact same time frame based on the exact same set of circumstances, and that she had not been entitled to temporary total disability benefits with regard to her cervical spine. Additionally, the claimant had specifically asked for those benefits at the hearing in 2001, but she was not granted temporary total disability benefits in either the previous Administrative Law Judge's Opinion, nor in subsequent appeals. Therefore, because the claimant had an opportunity to litigate entitlement to temporary total disability benefits and she chose not to, she could not again litigate entitlement to those exact same benefits. Furthermore, the Administrative Law Judge opined that the claimant had not alleged a change in her physical condition since her prior proceedings, nor did she allege fraud or collusion, lack of jurisdiction, or newly discovered evidence. In conclusion, the Administrative Law Judge stated that the preponderance of the evidence reflected that the claimant sought to have her temporary total disability benefits awarded based upon her back and neck injuries, and they were denied. Therefore, the Administrative Law Judge found that the doctrine of *res judicata* bars the claimant's entitlement to additional temporary total disability benefits.

The majority opines that the Administrative Law Judge erred in finding that the doctrine of *res judicata* bars the claimant's claim for additional temporary total disability benefits because although the prior Administrative Law Judge found in his opinion of March 28, 2001, that the claimant's neck injury was not causally related to her compensable back injury, he did not consider the issue of additional temporary total disability benefits for the neck injury once he found the neck injury was not compensable. Moreover, once the case was appealed to the Full Commission and the Arkansas Court of Appeals, neither body adjudicated nor did they address the issue of temporary total disability compensation.

Res judicata applies where there has been a final adjudication on the merits of an issue by a court of competent jurisdiction on all matters litigated and those matters necessarily within the issue which might have been litigated. Perry v. Leisure Lodges, 19 Ark. App. 143, 718 S.W.2d 114 (1986). The doctrine of *res judicata* bars the reopening of matters once judicially determined by competent authority. Gwin v. R.D. Hall Tank Co., 10 Ark. App. 12, 660 S.W.2d 947 (1983). *Res judicata* applies to decisions of the Arkansas Worker's Compensation Commission. Perry, supra; Gwin, supra. The rationale underlying the doctrine of *res*

judicata is to end litigation by preventing a party who has had one fair trial of a question of fact from again drawing it into controversy. Mohawk Tire and Rubber Co. v. Brider, 259 Ark. 728, 536 S.W.2d 126 (1976). However, the doctrine does not bar issues which were not decided and could not have been decided. In this regard, the Arkansas Supreme Court made the following comments in Fawcett v. Rhyne, 187 Ark. 940, 63 S.W.2d 349 (1933):

The doctrine of *res judicata* rests, not upon the fact that a particular proposition has been affirmed or denied in the pleadings, but upon the fact that it has been fully and fairly investigated and tried. A point not raised by the pleadings nor decisive of the cause and not actually litigated is not conclusively established for the purpose of a subsequent suit upon a different cause of actions, although it may be expressly or tacitly involved in the judgement.

In his March 28, 2001, opinion, the Administrative Law Judge stated:

Here, the claimant sustained ... a compensable back injury, on January 13, 2000. She has been treated continuously ever since for back and neck complaints as well as for allergic reactions to various pain medications.

In his Findings of Fact and Conclusions of Law, the Administrative Law Judge stated that the claimant had failed

to prove her entitlement to temporary total disability benefits after June 6, 2000. The Administrative Law Judge did not state that this finding was specific to the claimant's back injury, however, and as demonstrated in the above excerpt, he indicated that he took the claimant's neck complaints into consideration when deciding her entitlement to additional temporary total disability benefits. However, without an initial finding of compensability, a claimant cannot be awarded temporary total disability benefits or additional medical treatment. Ark. Code Ann. §11-9-102(4)(D)(Repl. 2002). The parties here stipulated to the compensability of the claimant's back injury, and the Administrative Law Judge found that the claimant's neck injury was not compensable. Because the claimant's neck injury has since been found to be compensable, and based upon the above, it must be concluded that the doctrine of *res judicata* does not bar the issue of temporary total disability benefits in association with the claimant's neck injury from now being considered in this claim.

It is well established in Worker's Compensation law that an injured employee is entitled to temporary total disability compensation during the time that she is within her healing period and totally incapacitated to earn wages. Arkansas State Highway and Transportation Department v.

Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period is defined as that period for healing the injury, which continues until the claimant is as far restored as the permanent nature of the injury will allow. Nix v. Wilson World Hotel, 46 Ark. App. 303, 879 S.W.2d 457 (1994). In the event that the underlying condition has stabilized and there is no additional treatment that will improve the claimant's condition, the healing period has ended. The record reveals that the claimant was taken off of work from the date of her injuries through June 7, 2000, for which time she was paid benefits. Afterwards, the weight of the credible evidence indicates that the claimant remained in her healing period, at least for her back injury, until such time as she had a lumbar discectomy in March of 2003. Although the claimant has not returned to work and currently receives Social Security disability benefits, the March surgery reportedly resolved her back problems.

Throughout the claimant's medical records, the treatment speaks to the claimant's lumbar injury, but little is mentioned pertaining to the claimant's cervical injury. The claimant's first recorded reports of neck problems were in late April of 2000. Thereafter, the claimant's medical treatment continued to focus on the claimant's lower back problems. Moreover, the record is completely devoid of any

evidence defining the claimant's healing period for her neck. For example, on July 11, 2000, Dr. Ron Williams reported that an MRI of the claimant's thoracic and cervical spine showed some bulging discs, but no well-defined nerve root compromise. Dr. Williams concluded from his examination of the claimant and from his review of these films that the claimant was not a surgical candidate for her cervical injury. The only treatment recommended by Dr. Williams at that time was lumbar epidural injections. Dr. Williams stated in his July 11, 2000, report that he wanted to get a work evaluation done for the claimant to "see if it is safe for her to return to work." However, in an off work slip dated July 11, 2000, Dr. Williams advised that the claimant was to remain off work while she was undergoing lumbar epidural steroid injections and awaiting a Functional Capacity Evaluation. On September 5, 2000, the claimant sought medical treatment from the Searcy Medical Center for "multiple symptom complaints upper body," but more particularly the claimant complained of "new onset of [left] sciatica symptoms." By November 15, 2000, the only complaint the claimant made when seeking treatment at the Searcy Medical Center was low back pain for which she was seeking painkillers. On January 3, 2001, Dr. Citty recommended a leave of absence for the claimant pending an MRI and a

neurosurgery evaluation. The June 5, 2001, report of Dr. Williams reveals that the only requested MRI and neurosurgery evaluation was for the claimant's lumbar complaints; not the claimant's neck complaints. By the time Dr. Williams examined the claimant for her neck complaints on May 28, 2003, Dr. Williams described the claimant's condition as cervical degenerative disc disease and he noted; "...there is probably not much else to do."

My review of these records, leads me to find that the Functional Capacity Evaluation and leave of absence slips were clearly for the claimant's lumbar injury, not her cervical injury, as the cervical injury was relatively minor and did not require any active medical treatment. Moreover, the majority awards temporary total disability from July, 2000, through March 19, 2003. There is no evidence that Dr. Williams treated the claimant for her neck complaints between the summer of 2000, and the May 28, 2003, evaluation, yet it is Dr. Williams release to return to work on March 19, 2003, upon which the majority relies to end claimant's entitlement to benefits. Therefore, based upon my review of the record, the off work slips relied upon by the majority to support an award of temporary total disability benefits all involve the period of time that the claimant sought and received treatment for her lower back injury. Accordingly, I

cannot find that any of the off work slips relied upon by the majority to support an award of temporary total disability benefits for the claimant's cervical injury were actually for the claimant's cervical injury. As the issue of claimant's entitlement to temporary total disability benefits for her lower back injury was fully adjudicated in the first hearing, and as this issue was not cross-appealed by the claimant when the claim was on appeal to the Full Commission and the Court of Appeals on the compensability of the cervical claim, I find that any award of additional temporary total disability benefits for the claimant's lower back injury is *res judicata*.

Accordingly, for those reasons set forth herein, I find that the issue of claimant's entitlement to temporary total disability benefits related to her compensable cervical injury was not fully litigated and is therefore not *res judicata*. Therefore, I concur with the majority's finding in this regard. However, I must respectfully dissent from the majority's finding that the claimant has proven entitlement to temporary total disability benefits for her cervical injury from July, 2000, through March 19, 2003. In my opinion the record fails to support a finding by a preponderance of the evidence that the claimant's cervical injury totally incapacitated the claimant from earning wages during this

period of time. The off work slips in the record all correspond with treatment to the claimant lower back, not her cervical injury. Accordingly, I am unable to find based upon this record that the claimant has proven entitlement to temporary total disability benefits for her cervical injury. In reaching this finding, I acknowledge that the record relied upon by the majority does support a finding that the claimant was totally incapacitated from earning wages from July 2000, through March 19, 2003, for her lower back injury. However, the issue of claimant's entitlement to temporary total disability benefits for her admittedly compensable lower back injury was fully litigated and is now *res judicata*.

Therefore, for all the reasons set forth herein, I respectfully concur in part and dissent in part from the majority opinion.

KAREN H. MCKINNEY, Commissioner