

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E405485

RANDAL HENDRIX,  
EMPLOYEE

CLAIMANT

ITT AUTOMOTIVE,  
EMPLOYER

RESPONDENT

PACIFIC EMPLOYERS INSURANCE CO.,  
INSURANCE CARRIER

RESPONDENT

OPINION FILED AUGUST 31, 2005

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

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

Respondents represented by the HONORABLE J. C. BAKER,  
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed as modified.

OPINION AND ORDER

The respondents appeal an administrative law judge's  
opinion filed February 18, 2005. The administrative law  
judge found, among other things, that the findings of an  
administrative law judge on March 7, 2003 were *res judicata*.  
The administrative law judge found that the respondents were  
liable for medical treatment provided the claimant from  
April 2003 through April 2004. After reviewing the entire  
record *de novo*, the Full Commission affirms as modified the

opinion of the administrative law judge. The Full Commission affirms the administrative law judge's finding that the March 7, 2003 administrative law judge findings were *res judicata*, and that the respondents were liable for medical treatment provided the claimant from April 2003 through April 2004. The Full Commission affirms the administrative law judge's finding that the respondents were liable for a 36% penalty on medical benefits which the respondents willfully and intentionally refused to pay; however, we do not find that the respondents were liable for a penalty with regard to the claimant's travel expenses.

#### I. HISTORY

The parties stipulated that the claimant sustained "a compensable bilateral carpal tunnel syndrome" on October 27, 1993. The claimant underwent bilateral carpal tunnel releases in April 1994. The claimant testified that he did not get better following surgery, and that he had the same symptoms. The claimant began treating with Dr. Thomas M. Hart in December 1994. Dr. G. Thomas Frazier performed a right carpal tunnel release and external neurolysis of the right median nerve in approximately May 1995. The claimant testified that he did not get better following this surgery.

The parties stipulated that temporary total disability compensation was paid "for the periods of March 24, 1994 through March 26, 1994 and April 4, 1994 through May 28, 1996." The parties stipulated that "10% to both upper extremities below the elbow has been paid."

An administrative law judge filed an opinion on May 28, 1997. The administrative law judge found, among other things, that treatment provided by and at the direction of Dr. Hart was reasonably necessary. The administrative law judge found that the claimant failed to prove he was entitled to temporary total disability compensation beyond May 28, 1996. The administrative law judge ordered the respondents "to pay benefits in accordance with the findings of fact set forth herein along with their proportionate share of attorney's fees." The Full Commission affirmed and adopted the administrative law judge's May 28, 1997 decision in an opinion filed January 22, 1998.

A hearing was held on May 13, 1998. The claimant testified with regard to his symptoms, "I have burning in my hands and fingers and still around the wrist area. It feels like a fire under the skin that you can't put out and you

can't get to....And I have pains in my arms....And then it's up into my chest now."

The record contains a New Patient Consult indicating that the claimant was examined by Dr. Leland Lou and Dr. Martin L. Martucci on June 12, 2002. These physicians, pain specialists, reported on June 13, 2002:

We have been asked by Dr. Thomas Hart of Arkansas to evaluate Mr. Randal Hendrix, who is a pleasant 49-year-old white male currently experiencing pain in both arms....

The right upper extremity is symmetric compared to the left upper extremity. The extremity is warm and there are no obvious trophic changes in hair growth or nail bed. There is a slight increase in redness in the right forearm compared to that of the left forearm....

Dr. Lou and Dr. Martucci assessed, "Sympathetically maintained pain versus sympathetically independent pain in the right upper extremity greater than the left upper extremity." The physicians planned the following:

1. We will schedule a right stellate ganglion block with local anesthetic and steroid, and proceed to RFTC of the right stellate ganglion if successful.
2. In the future, we will consider a left stellate ganglion block and proceed to RFTC of the left stellate ganglion if successful.
3. We will follow with bilateral thoracic sympathetic blockade and proceed to RFTC if successful.

4. We will attempt to schedule a single versus dual dorsal column stimulator trial in an effort to reduce central pain in both upper extremities.
5. We will consider in the future the possibility of right medial nerve peripheral nerve stimulator.
6. We would suggest a possible Zonegran trial to Dr. Hart in Arkansas but will allow him to make this medication management decision. Because of the patient's Workmans Compensation status we will aggressively attempt to have these procedures scheduled and approved and do them as quickly as possible because the patient is from out of town. The patient has offered to cover some of these procedures out of their pocket, and we hope this will not be necessary.
7. The attending physician was present and involved in the entire care, planning, and treatment of this patient today.

The record indicates that the respondents initially controverted medical treatment beginning June 13, 2002, except for a "proposed stimulator implant." The respondents now assert that they paid for treatment at the "International Pain Institute" beginning in June 2002.

On June 17, 2002, the claimant underwent a right stellate ganglion block under fluoroscopy at University Medical Center, Lubbock, Texas. It was indicated that the surgeon was Dr. Miles Day, but Dr. Lou marked through Dr. Day's name and signed his own name. Dr. Lou supervised a right stellate ganglion radiofrequency lesioning on June 18, 2002.

Dr. Hart noted on July 22, 2002, "Mr. Hendrix on his last visit on 5/17/02 was still failing conservative care, not considered a surgical candidate, my recommendations were to get him to the International Pain Center in Lubbock, Texas under the care of Dr. Gabor Racz, which I recently discussed my recent discussed (sic) in my letter to Nancy Morrow at ACE USA, that this was medically necessary to a degree of certainty and probability....Overall, he says that he is improved. In fact, he has been able to reduce some of his medications."

A pre-hearing order was filed on October 29, 2002. The parties stipulated, "All prior orders of this administrative law judge and the Commission are now final orders and *res judicata*." The claimant contended that "Dr. Hart referred him to Dr. Racz in Lubbock, Texas, and that the treatment provided by Dr. Racz was reasonably necessary for treatment of his compensable injuries. The respondents contend that the treatment was not reasonably necessary for his compensable injuries." The parties agreed to litigate the following issues: "1. Whether the treatment provided by Dr. Racz in Lubbock, Texas, on referral from Dr. Hart was reasonably necessary for treatment of the claimant's

compensable injuries. 2. Whether the claimant is entitled to temporary total disability compensation for the time that he was receiving treatment in Lubbock, Texas."

An administrative law judge filed an opinion on March 7, 2003. The administrative law judge found, in relevant part:

3. A preponderance of the evidence establishes that the treatment provided by at (sic) Dr. Racz and the International Pain Clinic in Lubbock, Texas, was reasonably necessary for treatment of the claimant's compensable injury;

4. A preponderance of the evidence establishes that the peripheral nerve stimulator implant recommended by Dr. Racz and the International Pain Clinic is reasonably necessary for treatment of the claimant's compensable injury;

6. The respondents controverted any liability for the treatment provided at Dr. Racz' clinic or to any additional temporary disability compensation.

The administrative law judge ordered and directed the respondents "to pay benefits in accordance with the findings of fact set forth herein, along with their proportionate share of attorney's fees."

The claimant was seen at Texas Tech University Health Sciences Center, "International Pain Institute," on April 28, 2003. Dr. Gabor B. Racz reported, "Pt here today for re-evaluation and discussion of treatment plan he stated he has won his case against WCC of Arkansas since the last

procedure he had done with us in 06/02 was not cover (sic) last March he got a positive response for his treatment to continue, reason why he presents back to us. He states he got good pain relief from right sided stellate ganglion block and pulsed mode radiofrequency, his pain to the right hand has returned and to the left remains the same." Dr. Racz assessed, "1. Sympathetically maintained pain versus sympathetically independent pain in the right upper extremity greater than the left upper extremity. 2. Bilateral ulnar nerve neuralgia." Dr. Racz planned the following: "1. Schedule left stellate ganglion block Pulsed mode radiofrequency, no steroid. 2. Schedule right stellate ganglion Pulsed Mode radiofrequency, no steroid. 3. Consider cervical DCS trial after that and possible peripheral stimulator. 4. Letter of medical necessity #577775."

Christine Hendrix, the claimant's wife, testified that the April 28, 2003 visit with Dr. Racz "was paid for by workman's comp." Ms. Hendrix testified, "The only visit that was paid was April 28<sup>th</sup>. Everything else, we've paid."

The claimant underwent left-sided ganglion pulsed radiofrequency lesioning at University Medical Center on May

14, 2003. The claimant subsequently followed up at the "Pain Institute," and the claimant underwent a right-sided ganglion block at the Medical Center on May 27, 2003.

Dr. Miles R. Day, assistant professor of pain management/anesthesiology with the International Pain Institute, stated the following on May 29, 2003:

Mr. Randall Hendrix is a 49-year-old gentleman, who was referred to our clinic by Dr. Thomas Hart in Little Rock, Arkansas back on June 13, 2002. Mr. Hendrix case is very complex and I have even dictated a letter to the Workers' Compensation Commission on October 28, 2002 regarding Mr. Hendrix. As you recall, he has a working diagnosis of complex regional pain syndrome of the bilateral upper extremities and [sympathetically independent pain of the upper extremities]. A treatment plan was devised by my colleague at the time of his initial visit, which included stellate ganglion blocks and [thoracic sympathetic blocks]. If the sympathetic blocks were effective they would be followed by radiofrequency.

Also, in the treatment algorithm dorsal column stimulation was discussed and the possibility of a median nerve peripheral nerve stimulator. I understand that there is a judge ruling in favor of care to be provided to Mr. Hendrix, but there is some discrepancy regarding what was and was not approved. I would appreciate a clarification of exactly what was approved for Mr. Hendrix to have. Because of the complex nature of his case, he was appropriately referred to our clinic.

There is a letter from Mr. James C. Baker, Jr. who represents Workers' Compensation regarding the patient's "routine" pain management. The care

that he is being provided here at the Texas Tech International Pain Institute is not exactly "routine." The pulsed radiofrequency lesionings that Mr. Hendrix is receiving, from what we are being told by Dr. Hart, is not available in the Arkansas area. In fact, the patient said that Dr. Hart called several pain management institutes in that area to see if they provided radiofrequency or pulse mode radiofrequency and they said that they did not. I repeat, Mr. Hendrix's care should not be labeled as routine. I feel that he would not have been referred to our clinic in Lubbock, Texas if what we provide is closer to home.

Regarding the procedures that we place in our treatment algorithm, the stellate ganglion blocks have been done, as well as the pulse mode radiofrequency lesionings of the aforementioned ganglion. Next on the treatment algorithm, depending on the patient's response, would be a thoracic sympathetic block and a pulse mode radiofrequency. They are part of the sympathetic nervous system that does not enter the stellate ganglion, therefore, they go into the arm independently and sometimes are missed by stellate ganglion blocks.

Peripheral nerve stimulators and dorsal column stimulators are more invasive pain therapies, but these are procedures that are usually not done initially because there are other procedures that can be done prior to going into something that is more advanced and more invasive. I understand currently that Mr. and Ms. Hendrix are actually having to pay out-of-pocket for their procedures and have also gone to the length of obtaining loans, so that they can get the care that Mr. Hendrix deserves.

This is a gentleman who is doing his best to cope with the pain and is really trying to get back to work. At present he is being inhibited from

accomplishing this goal because the appropriate care that he so deserves is not being approved and that is the main purpose of this letter....

Dr. Frazier wrote to Dr. Hart on August 13, 2003:

Randal Hendrix returned today for follow-up of his upper extremity complaints. Mr. Hendrix is here primarily to determine my opinion as to whether there are adequate facilities and personnel within this area to provide specialized training that he requires to have a peripheral nerve stimulated implant placed. To my knowledge there is no one in this immediate area or even in the state of Arkansas who provides this kind of level of care. It has been your recommendation that Mr. Hendrix seeks additional medical care in the Pain Institute in Lubbock, Texas and I would concur with your opinion. Therefore we respectively submit that this be covered under his workers' compensation coverage as an in-network covered modality. After reviewing the medical record, it is apparent there has been an order from the Workers' Compensation Commission granting that the treatment is necessary and reasonable....

The claimant returned to Dr. Racz at the Pain Institute on January 5, 2004:

Pt here today for follow-up and discussion of treatment plan. Although he had been assured by his lawyer that treatments he is receiving here would be covered by WCC in accordance with the Arkansas judge's ruling which was filed March 7, 2003, WCC has refused to pay for the PEMF of his stellate ganglion. He has taken a second mortgage on his family home in order to pay for the treatments he has been receiving from us. His hope, (and ours) is that he can avoid stimulator placement and the concomitant risks associated with that procedure. He received Left-sided

Stellate Ganglion PEMF last month and returned today for the same thing on the right. He has not noticed an improvement in his pain yet....He and his wife are hoping that we can help clarify the issues surrounding his WCC case. In the meantime, they want to proceed with the Thoracic Sympathetic Block with P-EMF as planned, if possible during this trip, and the issues with WCC to be clarified at a later on.

Dr. Racz assessed, "1. Sympathetically maintained pain versus sympathetically independent pain in the right upper extremity greater than the left upper extremity. 2. Bilateral ulnar nerve neuralgia."

Dr. Racz performed a "diagnostic thoracic sympathetic block" on January 6, 2004. Dr. Racz' preoperative and postoperative diagnoses were "1. Complex regional pain syndrome (CRPS), sympathetically maintained pain, central and neuropathic pain."

The claimant testified, "With the sympathetic block, I was able to have pain relief for eight to nine months. So that did help quite a bit. It reduced my pain a significant amount - not completely, but quite a bit."

The claimant continued to follow up at the Pain Institute. Dr. Racz performed "1. Right-sided T2-T3 radiofrequency thermal lesioning" on January 13, 2004.

A pre-hearing order was filed on March 23, 2004. The claimant contended that "in 1997, and again in the year 2002, he was awarded certain medical benefits. Claimant pursued those medical benefits and has incurred indebtedness in the amount of \$18,000. The medical treatment accounting for the \$18,000 was treatment awarded pursuant to a 2002 award. These matters have been controverted for purposes of attorney's fees. Likewise, whatever statutory penalties may be appropriate, should be applied. Doctrine of *res judicata* also has application to these facts."

The respondents contended that all appropriate medical benefits had been paid to date. The respondents contended that "the Commission, in a March 7, 2003, opinion, found that the claimant was entitled to treatment by Dr. Racz in Lubbock, Texas, for a peripheral nerve stimulator implant. Since this opinion, claimant has had numerous trips to Dr. Racz for procedures other than the implant. This treatment includes diagnostic nerve blocks and radiofrequency lesioning to determine if the claimant has a sympathetic component to his condition. In prior opinions dated May 27, 1997 and August 11, 1998, the Commission found that the claimant has no sympathetic component to his injury and that

the claimant is not entitled to further treatment to determine the etiology of his condition. Therefore, res judicata and/or law of the case bar the present claim for benefits. In the alternative, if these doctrines do not bar the present claim, the treatment at issue is not reasonable or necessary, nor is it related to the claimant's condition."

The parties agreed to litigate the following issues:

1. Unpaid medical expenses (for treatment from June 13, 2002 to the present except for the proposed stimulator implant which is now approved by the respondents and reserved as a potential hearing issue);
2. Statutory penalties;
3. Controverted attorney's fee;
4. Res judicata; and
5. Law of the case.

Christine Hendrix testified that the claimant underwent a permanent stimulator implant on May 10, 2004. The respondents' attorney stated at hearing that the respondents had paid for a spinal cord implant.

The administrative law judge found, in pertinent part:

3. The findings of ALJ White in his March 7, 2003 Opinion and Order are res judicata on the issue as to whether or not the treatment protocol devised for Mr. Hendrix at the International Pain Center on June 13, 2002 is reasonably necessary for and causally related to Mr. Hendrix's compensable injury.

4. Based on ALJ White's findings, the treatment proposed in the June 13, 2002 protocol for stimulator implant devised for Mr. Hendrix by the International Pain Clinic is reasonably necessary for and causally related to Mr. Hendrix's compensable injury.

5. The treatment which Mr. Hendrix received at the International Pain Clinic in Lubbock, Texas between April of 2003 and April of 2004 is precisely that treatment which was proposed in the June 13, 2002 protocol developed by the International Pain Clinic for Mr. Hendrix.

6. Consequently, based on ALJ White's findings in his March 7, 2003 Opinion and Order, I find that the respondents are liable for the treatment at issue provided at the International Pain Clinic between April of 2003 and April of 2004.

7. For reasons discussed herein, I also find that the respondents' failure to authorize and to pay for Mr. Hendrix's treatment at issue at the International Pain Clinic between April of 2003 and April of 2004 has been willful and intentional, and I therefore find that the respondents are liable to the claimant for a 36% penalty on the medical expenses and travel expenses which the respondents owe to or on the behalf of Mr. Hendrix for the treatment at issue.

The respondents appeal to the Full Commission.

## II. ADJUDICATION

### A. Res Judicata

*Res judicata* means a thing or matter that has been definitely and finally settled and determined on its merits by the decision of a court of competent jurisdiction.

JeToCo Corp. v. Hailey Sales Co., 268 Ark. 340, 596 S.W.2d 703 (1980). Freely translated, *res judicata* means, "the

matter has been decided." Hastings v. Rose Courts, Inc., 237 Ark. 426, 373 S.W.2d 583 (1963). The Arkansas Supreme Court has said that the true test of whether a particular point, question or right has been concluded by a former suit and judgment is whether such point, question or right was distinctly put in issue, or should have been put in issue, and was directly determined by such former suit and judgment. Pulaski County v. Hill, 97 Ark. 450, 134 S.W. 973 (1911); Hollis v. Piggott Junior Chamber of Commerce, 248 Ark. 725, 453 S.W.2d 410 (1970). *Res judicata* applies to decisions of the Commission. Harvest Foods v. Washam, 52 Ark. App. 52, 914 S.W.2d 776 (1996).

In the present matter, the Full Commission finds that the claimant's entitlement to treatment from Dr. Racz is *res judicata*. Following the claimant's compensable injury, the claimant began treating with Dr. Hart in December 1994. The claimant subsequently underwent surgeries performed by Dr. Frazier. In an opinion filed May 28, 1997, an administrative law judge found that treatment provided the claimant from Dr. Hart was reasonably necessary. The Full Commission affirmed and adopted the administrative law

judge's findings, and there was no appeal of the Commission's decision.

Beginning in June 2002, the claimant began treating with Dr. Lou and Dr. Martucci pursuant to Dr. Hart's referral. Dr. Lou and Dr. Martucci planned a course of treatment for the claimant which included bilateral stellate ganglion blocks, a sympathetic blockade, a dorsal column stimulator, a possible peripheral nerve stimulator, and continued medication management. The respondents initially controverted most of this medical treatment but later indicated that they had paid for the treatment the claimant began receiving in June 2002.

In July 2002, Dr. Hart explicitly recommended a referral to Dr. Racz at the International Pain Institute at Texas Tech University. The claimant subsequently contended in a pre-hearing order that Dr. Hart had referred the claimant to Dr. Racz, and that treatment provided by Dr. Racz was reasonably necessary. The claimant therefore distinctly put into issue the question of whether he was entitled to treatment from Dr. Racz. See, Pulaski County v. Hill, *supra*. An administrative law judge filed an opinion on March 7, 2003, and found that treatment provided by Dr.

Racz was reasonably necessary for treatment of the claimant's compensable injury. The administrative law judge ordered and directed the respondents to pay benefits in accordance with the administrative law judge's findings of fact. There was no appeal of the administrative law judge's opinion. The issue of the claimant's entitlement to treatment from Dr. Racz is thus *res judicata*.

The preponderance of evidence also shows that treatment provided by Dr. Racz was reasonably necessary in connection with the claimant's compensable injury, pursuant to Ark. Code Ann. §11-9-508(a). The Full Commission again notes that Dr. Hart, an authorized treating physician, referred the claimant to Dr. Racz. Dr. Racz began treating the claimant in April 2003. Dr. Racz' treatment included bilateral ganglion blocks and consideration of a dorsal column stimulator. Dr. Racz' treatment plan appeared to be essentially the same as the "treatment protocol" outlined by Dr. Lou and Dr. Martucci on June 13, 2002. We note that Dr. Frazier, the treating surgeon, opined that treatment provided by Dr. Racz to be reasonably necessary. We note the claimant's testimony that following the "sympathetic block" administered by Dr. Racz, "I was able to have pain

relief for eight to nine months. So that did help quite a bit. It reduced my pain a significant amount - not completely, but quite a bit."

B. Penalty

Ark. Code Ann. §11-9-802 provides:

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

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

In the present matter, the claimant contended before the Commission that treatment provided by Dr. Racz was reasonably necessary. In an opinion filed March 7, 2003, an administrative law judge found that treatment provided by Dr. Racz at the International Pain Clinic was reasonably necessary. The administrative law judge ordered the respondents to pay benefits in accordance with this finding of fact, and the respondents did not appeal the administrative law judge's decision. On May 29, 2003, however, Dr. Day reported that the respondent-carrier refused to pay for the treatment awarded by the administrative law judge. Dr. Day noted, "I understand currently that Mr. and Ms. Hendrix are actually having to

pay out-of-pocket for their procedures and have also gone to the length of obtaining loans, so that they can get the care that Mr. Hendrix deserves." On January 5, 2004, Dr. Racz reported that the respondent-carrier had refused to pay for the treatment awarded by the administrative law judge. Dr. Racz noted, "WCC has refused to pay for the PEMF of his stellate ganglion. He has taken a second mortgage on his family home in order to pay for the treatments he has been receiving from us."

The Full Commission finds that the respondents' refusal to pay for the awarded treatment from Dr. Racz and the International Pain Institute was willful and intentional. Pursuant to Ark. Code Ann. §11-9-802(e), therefore, the Full Commission affirms the administrative law judge's finding that the respondents are liable for a 36% penalty on the claimant's medical expenses incurred at the International Pain Institute and as provided by Dr. Racz. The Full Commission finds that the respondents are not liable for a 36% penalty on the claimant's travel expenses. Ark. Code Ann. §11-9-802 does not provide for a penalty on travel expenses.

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant's entitlement to treatment from Dr. Racz and the International Pain Institute is *res judicata* and the responsibility of the respondents. The claimant also proved that the medical treatment from Dr. Racz and the International Pain Institute was reasonably necessary pursuant to Ark. Code Ann. §11-9-508(a). The claimant proved, pursuant to Ark. Code Ann. §11-9-802(e), that he was entitled to a 36% penalty on the respondents failure to pay for these awarded medical benefits, and that the respondents' failure to pay medical benefits was willful and intentional. The Full Commission therefore affirms as modified the opinion of the administrative law judge. We affirm the administrative law judge's finding that the respondents are liable for treatment provided at the International Pain Institute between April 2003 and April 2004. The Full Commission does not affirm the administrative law judge's finding that the respondents are liable for a 36% penalty on the claimant's travel expenses. The claimant's attorney is entitled to fees for legal services, pursuant to Ark. Code Ann. §11-9-715(Repl. 1996). For prevailing in part on appeal to the Full Commission, the

claimant's attorney is entitled to an additional fee of two hundred fifty dollars (\$250), pursuant to Ark. Code Ann. §11-9-715(b) (2) (Repl. 1996).

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

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DISSENTING OPINION

I must respectfully dissent from the majority opinion. My carefully conducted de novo review of this claim in its entirety reveals that the claimant has failed to prove that he is entitled to additional medical benefits based upon the doctrine of *res judicata*. In my opinion, we should deny compensation on the basis of *res judicata*, rather than *award* the claimant compensation based upon *res judicata*.

The majority now finds that the findings of the Administrative Law Judge in the March 7, 2003, Opinion and Order are *res judicata* as to the issue of whether the

treatment protocol devised for the claimant at the International Pain Center (IPC) in Lubbock, Texas, on June 13, 2002, is reasonably necessary and causally related to the claimant's compensable bilateral carpal tunnel syndrome injury. While I agree with this finding, I must disagree with the majority's interpretation of the March 7, 2003, opinion. Clearly that opinion leaves room for interpretation.

A review of the four previous Administrative Law Judge Opinions and one previous Full Commission Opinion reveals the following pertinent information. First, in an Opinion filed on May 28, 1997, the Administrative Law Judge addressed the reasonableness and necessity of various modes of treatment recommended by pain specialist, Dr. Thomas Hart. The claimant came under the care of Dr. Hart for unrelenting pain in his hands and wrists after bilateral carpal tunnel releases failed. At that time, the compensability of claimant's bilateral carpal tunnel syndrome was not disputed. Over the course of his treatment, Dr. Hart recommended several potential modes of treatment, many of which were not found to be reasonable and necessary for the treatment of the claimant's compensable injury. In

the March 7, 2003 Opinion, the Administrative Law Judge addressed the issue of the claimant's medical treatment as follows:

However, in summary, his authorized treating physician for several years has been Dr. Hart, a pain specialist, and Dr. Hart has recommended several potential modes of treatment, many of which have been found to be not reasonably necessary for treatment of the claimant's compensable injury. In this regard, Dr. Hart has stated that he has suggested many of these treatment modalities under what he calls "the glimmer of hope theory." Apparently, in light of the severity of the pain of which the claimant complains, Dr. Hart feels any treatment that offers the claimant any glimmer of hope for relief is reasonably necessary for treatment of the injury. Dr. Hart's medical reports at times sound more like legal briefs in which he is trying to persuade the Commission rather than objective medical reports, and he has frequently questioned the Commission's understanding of the claimant's situation and the condition from which the claimant suffers.

After explaining that the Commission is not unsympathetic to the claimant's sufferings, but that it is bound by the applicable law of this state, the Administrative Law Judge stated further:

... while it's clearly understandable that the medical profession considers

any treatment that offers an individual who suffer[s] from a chronic pain syndrome, such as the claimant, any "glimmer of hope" for relief, that simply is not the legal standard that must be applied in cases such as this.

In reciting language from previous opinions in which he had attempted to "draw a line" to establish the type of medical treatment that would be considered reasonably necessary for the treatment of claimant's compensable injury under the applicable law, the Administrative Law Judge stated:

The claimant is entitled to treatment which is reasonably necessary to maintain his condition and to control his pain and other symptoms. This includes only proven modes of treatment which are commonly accepted by the medical profession. It does not include experimental or exotic forms of treatment. The claimant is not entitled to modes of treatment and evaluation pursued in an effort to exhaust all possible means of determining the etiology of the claimant's problems and to completely resolve these problems.

In his March 2003 Opinion, the Administrative Law Judge found that, among other things, the treatment that the claimant had previously received under the direction of Dr. Racz at IPC was "directed at maintaining the claimant's condition and toward control of his pain and other

symptoms." Consequently, the Administrative Law Judge specifically found that the medical treatment provided at IPC under the direction of Dr. Racz "was" reasonably necessary for the treatment of the claimant's compensable injury. In addition, the Administrative Law Judge specifically found that "the periheral nerve stimultor recommended by Dr. Racz and the International Pain Clinic *is* reasonably necessary for treatment of the cliamnt's compensable injury... ". Based upon these findings, the Administrative Law Judge ordered the respondents to pay benefits "in accordance with the findings of fact set forth herein".

It is from this ambiguous language with the use of past and present tenses that we are asked to determine whether the findings in the March 7, 2003, Opinion are dispositive of the issue of the compensability of the ganglion block and radio-frequency lesioning treatments administered to the claimant at IPC during April of 2003 through April of 2004. A review of the record clearly reveals that the issues litigated in the March 7, 2003, Opinion, were limited to the compensability of treatment administered at the IPC prior to the December 9, 2002,

hearing. The March 7, 2003 Opinion found that the medical treatment already rendered by Dr. Racz at IPC had been reasonably necessary for the treatment of the claimant's compensable injury. In terms of future treatment, the Administrative Law Judge only concluded that a peripheral nerve stimulator would be considered a reasonably necessary mode of treatment for the claimant's compensable injury. The Administrative Law Judge obviously foresaw that the claimant's condition would require ongoing treatment in order for him to be able to manage his pain. And, considering that in his March 2003 Opinion the Administrative Law Judge specifically addressed Dr. Hart's frequently harsh criticism of Commission decisions concerning the claimant's ongoing treatment, the Administrative Law Judge apparently attempted to offer general clarification, or at least a guideline, regarding the type of treatment modalities that would be considered reasonably necessary for future treatment of the claimant's compensable injury. With the exception of a peripheral nerve stimulator, however, the Administrative Law Judge did not award any specific future medical treatment in his March Opinion. Furthermore, contrary to the present Administrative

Law Judge's statements concerning the claimant's treatment protocol as developed by Dr. Lou, and the majority's finding, future ganglion blocks and radio-frequency lesioning were not listed in issue, awarded, or otherwise mentioned in the previous Administrative Law Judge's March 7<sup>th</sup> Opinion. In my opinion, in this case it is error to go beyond the four corners of the March 7, 2003 Opinion to find otherwise.

Regarding this treatment protocol, or treatment algorithm, as it sometimes called, the record reveals the following. To begin with, Dr. Hart first referred the claimant to Dr. Racz at IPC in his May 17, 2002 medical report. In that report, Dr. Hart confirmed that the claimant suffered from failed carpal tunnel and failed back surgical syndrome, and he stated that "many times these patients do well with spinal cord stimulation." Therefore, the claimant was seen for his initial evaluation at IPC on June 13, 2002, by Dr. Leland Lou. Dr. Lou assessed the claimant as having either sympathetically maintained or sympathetically independent pain in his upper extremities, and he then set forth the following proposed treatment plan:

1. We will schedule a right stellate ganglion block with local anesthetic and steroid, and proceed to RFTC of the right stellate ganglion if successful.

2. In the future, we will consider a left stellate ganglion block and proceed to RFTC on the left stellate ganglion if successful. (Emphasis added)

3. We will follow with bilateral thoracic sympathetic blockade and then proceed to RFTC if successful.

4. We will attempt to schedule a single versus dual dorsal column stimulator trial in an effort to reduce central pain in both upper extremities.

5. We will consider in the future, the possibility of right medial nerve peripheral nerve stimulator.

6. We would suggest a possible Zonegran trial to Dr. Hart in Arkansas but will allow him to make this medication management decision. Because of the patient's worker's compensation status, we will aggressively attempt to have these procedures scheduled and approved and do them as quickly as possible because the patient is from out of town. The patient has offered to cover some of the procedures out of their pocket, and we will hope this will not be necessary.

7. The attending physician was present and involved in the entire care, planning, and treatment of this patient.

Although before him at the hearing, the Administrative Law Judge did not address the above treatment plan in his March 2003 decision. Nor did the Administrative Law Judge incorporate any portion of that plan into his final award, by reference or otherwise. Further, as Dr. Hart admitted in his report dated July 21, 2003, the stellate ganglion blocks were used to determine whether the claimant's pain is sympathetically maintained or independent; thus, these blocks were diagnostic in nature. As previously mentioned, in his March 2003 Opinion, the Administrative Law Judge clarified that diagnostic procedures would not be considered reasonably necessary for the future treatment of the claimant's compensable injury. Rather, the only future medical treatment that the Administrative Law Judge awarded in that decision was the recommended stimulator implant. More specifically, and as previously stated, the Administrative Law Judge found "the periheral nerve stimultor recommended by Dr. Racz and the International Pain Clinic *is* reasonably necessary for treatment of the claimant's compensable injury... ". In summary, the Administrative Law Judge, by no means, took a blanket approach to the claimant's medical treatment,

thereby giving Dr. Racz "carte blanche authority" to treat the claimant as he saw fit. See, Miller v. Concordia Care Center, Full Commission Opinion filed August 28, 2002 (File No. E911074). Nor by the Administrative Law Judge's Opinion of March 7, 2003, or any Opinion prior to that, were the respondents obligated for any and all expenses which may have been incurred as the result of these services. Indeed, these services must still be reasonably necessary for the claimant's compensable injury as required by the Act. Id.; See also, A.C.A. §11-9-508(a).

\_\_\_\_\_The doctrine of *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 again drawing it into controversy. Mohawk Tire and Rubber Co. v. Bridger, 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.

Clearly the issue of whether treatment in the form of a series of left stellate ganglion blocks and radio-frequency lesioning was reasonably necessary for the treatment of the claimant's compensable injury, was not raised in the pre-hearing or at the hearing of March 7, 2003. Furthermore, as these procedures were merely future considerations in terms of proposed treatment modalities, the issue of their reasonable necessity was not ripe for

determination at the time of the claimant's March 2003 hearing. Again, in his March 2003 Opinion, the Administrative Law Judge awarded benefits on the medical treatment received by the claimant under the direction of Dr. Racz at IPC prior to the time of that hearing. Moreover, even though the Administrative Law Judge was obviously aware of the proposed treatment modalities at the time of that hearing, the only future treatment that he specifically awarded was that of a peripheral nerve stimulator. Therefore, although perhaps tacitly involved in the March 2003 judgement of the Administrative Law Judge, the reasonableness and necessity of the medical treatment that the claimant would potentially receive at IPC commencing in April of 2003 through April of 2004 had not been raised by the pleadings, was not decisive of the case, and not been actually litigated. This issue, therefore, was not conclusively established at the claimant's hearing of December 2002, nor was it consequently barred by *res judicata*.

Finally, as the respondents correctly assert, the actual treatment received by the claimant went well beyond the treatment proposed by Dr. Lou in his treatment protocol

dated June 13, 2002. Beyond Point No. 1, there were no definite proposals set forth in the June 13, 2002, protocol established by Dr. Lou; only future considerations. This assertion is supported by the language used in Points 2 through 6 of the treatment protocol, i.e., "In the future"; "We will consider"; and, "We would suggest." Actual treatment received by the claimant at IPC during the time in question included the following. On May 14, 2003, the claimant underwent a left-sided stellate ganglion block with radio-frequency lesioning. On May 27, 2003, the claimant underwent a repeat of the right-sided stellate ganglion block. On January 6, 2004, the claimant underwent a diagnostic thoracic T 3 sympathetic block, and he underwent a right-sided T 2-3 radio frequency thermal lesioning just 7 days later. In summary, the claimant underwent two right-sided blocks, three right-sided lesionings, one thoracic blockade, and one left-sided ganglion block with lesioning. Since Dr. Lou's treatment protocol included one planned right-sided block, and it considered one left-sided ganglion block and one bilateral thoracic sympathetic blockade, clearly the actual treatment received by the claimant subsequent to his hearing of March 2003 well exceeded that

considered in the June, 2002 protocol. None of these additional procedures were offered to the Administrative Law Judge for a determination of reasonableness and necessity at the December 2002 hearing.

In summary, in his March 7, 2003, Opinion, it is apparent that the Administrative Law Judge limited his award for medical treatment to that which was at issue; namely, the treatment that the claimant received at the IPC in June of 2002. In terms of future medical treatment, the Administrative Law Judge exclusively found that the proposed nerve stimulator implant was reasonable and necessary to the treatment of the claimant's compensable injury. The Administrative Law Judge did not, however, by reference or otherwise, award any other future treatment to the claimant in his March 2003 opinion. This would leave reasonable minds to conclude, therefore, that had the Administrative Law Judge intended to approve of and to award that treatment which was outlined in Dr. Lou's treatment protocol, he would have specifically done so. Furthermore, the record reveals that the procedures undergone by the claimant between April 3002 and April 2004, were diagnostic procedures which were performed in order to determine the exact etiology of the

claimant's pain. Clearly, by previous orders of the Commission, the claimant was prohibited from receiving compensation for further diagnostic procedures. Therefore, if *res judicata* is applicable to this claim, it should be to used as a basis to deny the medical treatment in question.

In finding that the treatment the claimant received at the IPC was reasonable and necessary the majority has gone beyond the record from the December 9, 2002, hearing and considered evidence from the treatment rendered subsequent to that date. Thus, I must question how the Administrative Law Judge could have determined that possible future medical treatment was reasonable and necessary back in 2002 if the Full Commission cannot reach this conclusion without reliance on the actual medical records which were generated for those proceedings after that hearing. I must say he could not, and as explained above, he took precise measures to only award past treatment and the initial phase of treatment protocol. The March 7, 2003 Opinion did not provide carte blanche to all future treatment.

The record lacks substantial evidence to prove that the respondents' refusal to pay benefits was wilful and

intentional, in the malicious sense of those words. Clearly, the respondents had valid justification for disputing the reasonableness and necessity of the claimant's treatment at the IPC from April of 2003 through April of 2004. And, although employers must promptly provide medical services which may be reasonably necessary in connection with the injury received by the employee, Ark. Code Ann. § 11-9-508(a), injured employees still have the burden of proving by a preponderance of the evidence that the medical treatment is reasonably necessary for the treatment of the compensable injury. Norma Beatty v. Ben Pearson, Inc., Full Workers' Compensation Commission Opinion filed February 17, 1989 (Claim No. D612291). Given the fact that reasonable minds clearly differ on the interpretation of the March 7, 2003, Opinion, I find that it is plain error to assess the respondents with a 36% penalty.

Therefore, I respectfully dissent from the majority opinion.

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KAREN H. MCKINNEY, Commissioner