

Supreme Court Case No. SC-2018-01

IN THE SUPREME COURT OF THE CHEROKEE NATION

STANLEY JOHN

CLAIMANT/APPELLEE

Vs.

CHEROKEE NATION and THE HUDSON INSURANCE COMPANY

RESPONDENTS/APPELLANTS

DISTRICT COURT CASE NO. CV-2016-640

ANSWER BRIEF OF CLAIMANT

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IN THE SUPREME COURT OF THE CHEROKEE NATION

Stanley John,	)	
	)	
Claimant,	)	
	)	
v.	)	S Ct. No. SC-2018-01
	)	
Cherokee Nation,	)	Case No. CV-16-640
	)	
Respondent,	)	
	)	
Hudson Insurance Company,	)	
	)	
Insurance Carrier.	)	

CLAIMANT’S ANSWER TO RESPONDENT’S BRIEF-IN-CHIEF

Claimant, STANLEY JOHN, by and through his Attorney of Record, Brian R. Berry, and answers Respondent’s appeal and Brief in Chief.

INTRODUCTION

Respondent and insurance carrier appeal the Order of District Court Judge Luke Barteaux dated March 2, 2017 (2018). Throughout this Brief, the Cherokee Nation, Hudson Insurance Company, and Tribal First will be referred to as “Cherokee”, “Cherokee Nation”, or “employer”, unless otherwise indicated. The claimant will be referred to as “Mr. John” or “claimant”. This is a workers’ compensation case.

ASSIGNMENT OF ERROR

The District Court’s March 2, 2017 (2018) Order adopting and affirming the Arbitration Order dated November 7, 2016 is supported by the law and competent evidence and based upon the totality of the evidence presented and should be affirmed. The Arbitrator’s Order,

finding res judicata does not apply to the claimant's requested period of TTD and awarding the Claimant Temporary Total Disability (TTD) benefits from April 15, 2015 to December 2, 2015 for 25 weeks at \$496.11 per week, was just and appropriate under the law.

STATEMENT OF ISSUES PRESENTED

1. Did the District Court err in affirming the Arbitrator's award of TTD to Claimant, following surgery as ordered at previous Arbitration, for the period of April 15, 2015 to December 2, 2015 (less 8 weeks paid) for 25 weeks?

STATEMENT OF THE CASE

A previous Arbitration Order issued September 11, 2015 by Arbitrator Victor Seagle found Mr. John had sustained an on-the-job injury to his right knee on 3/14/15, and that he was in need of further treatment, including surgery, as set out by Dr. Basener. Arbitrator Seagle also ordered Cherokee "to pay eight weeks of Temporary Total Disability to the Claimant (\$3,968.88-all of which has accrued) and is to pay additional Temporary Total Disability benefits – if medically necessary following any surgery."

Cherokee complied with the September 11, 2015 Order for payment of 8 weeks of Temporary Total Disability and Claimant had surgery to the right knee by Dr. Basener on 12/3/15. Respondent then paid Claimant temporary disability *from* the date of surgery, December 3, 2015 to May 3, 2016, *following* surgery as ordered.

After Claimant was released from all medical care, the case was tried regarding Claimant's request for PPD, TTD and travel reimbursements on August 24, 2016 before a new Arbitrator, Shannon Otteson. The Arbitration Order entered on November 7, 2016, by

Arbitrator Shannon Otteson-Gosa, awarded PPD to the right knee and TTD from April 15, 2015 to December 2, 2015 (less eight weeks paid) for 25 weeks at \$496.11 per week. Cherokee has complied with payment of the PPD Award but appealed the TTD Award from April 15, 2015 to December 2, 2015. In paragraph 4 of the November 7, 2016 Order, Arbitrator finds that "Claimant was unable to work during the period for which Claimant now seeks temporary total disability, namely April 15, 2015 to December 2, 2015, therefore the Arbitrator FINDS res judicata does not apply and the Respondent is ordered to pay the additional temporary total disability benefits sought for 25 weeks at \$496.11 per week, less \$700.00 paid to Claimant as sick leave pay."

Cherokee filed an appeal of Arbitrator Otteson's November 7, 2016 Order for TTD to the District Court. The District Court issued an Order on Appeal on March 2, 2018 (The District Court file stamp inadvertently reflects March 2, 2017). The District Court found "The arbitrator being the trier of fact was in the best position to evaluate the credibility of the testimony and evidence presented" and affirmed the Order in its entirety "including but not limited to the issues of travel reimbursement and res judicata."

STATEMENT OF FACTS

At the first arbitration before Arbitrator Seagle on September 10, 2015, Claimant requested temporary total disability benefits from April 15, 2015 to present and continuing (Arbitration Transcript of 9/10/15, Page 8, Line 9). The Arbitrator's September 11, 2015 Order states "The Nation is ordered to provide the above-mentioned medical treatment and to pay eight weeks of Temporary Total Disability to the Claimant (\$3,968.88 – all of which has accrued)

and is to pay *additional* Temporary Total Disability benefits – if medically necessary *following* any surgery” (emphasis added). The Arbitrator did not specifically reference any period of time the eight weeks of TTD is to cover, other than saying it has all accrued. The Arbitrator did state in the Order that additional TTD benefits were to be paid “following” any surgery. The Arbitrator did not deny any specific period of TTD in the Order.

Claimant did have surgery on December 3, 2015, after the September 11, 2015 Order was entered. Therefore, claimant requested *additional* TTD *following* surgery as ordered in September 11, 2015 Order, less the eight weeks already awarded for no specific time period.

CLAIMANT’S RESPONSE TO PROPOSITION NUMBER ONE <u>RES JUDICATA APPLIES BECAUSE JOHN ASKED TWICE FOR THE SAME BENEFIT</u>
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Claimant disputes Cherokee’s “undisputed” information in paragraph one of Cherokee’s Proposition One, wherein Cherokee inaccurately depicts what period of TTD John requested at the first arbitration as well as what the arbitrator awarded. The exact request of claimant at the first arbitration was for “temporary total disability benefits from Cherokee Nation from April 15, 2015 to present and continuing” (Arbitration Transcript of 9/10/15, Page 8, Line 9) and the exact award stated in the Arbitrator’s Order of September 11, 2015 was “eight weeks of Temporary Total Disability”. Cherokee inaccurately states in their proposition that the arbitrator “specifically” awarded TTD for the period of April 15, 2015 until his future date of surgery and awarded TTD from the date of surgery forward. The September 11, 2015 Order does not indicate what dates the award of eight weeks of TTD is for at all. Furthermore, the September 11, 2015 Order awards claimant “additional” TTD “following” surgery. Nothing in

the September 11, 2015 Order limited claimant's TTD outside of the eight weeks ordered therein.

Mr. John requested ongoing TTD benefits from April 15, 2015 and continuing, due to the treating physician, Dr. Basener's, light duty restrictions that were not being accommodated by his employer. The Arbitrator's September 11, 2015 Order states "The Nation is ordered to provide the above-mentioned medical treatment and to pay eight weeks of Temporary Total Disability to the Claimant (\$3,968.88 – all of which has accrued) and is to pay additional Temporary Total Disability benefits – if medically necessary following any surgery." The Arbitrator did not specifically reference any period of time the eight weeks of TTD is to cover, other than saying it has all accrued. Cherokee is incorrect in stating that the request for TTD for the time period of April 15, 2015 forward was *specifically* addressed by the Arbitrator and decided (emphasis added). Furthermore, the Arbitrator did address *additional* TTD (beyond the eight weeks awarded) by stating "The Nation...is to pay *additional* Temporary Total Disability benefits – if medically necessary *following* any surgery" (emphasis added). The Order did not state that the additional TTD be paid *from* the date of any surgery (emphasis added). The Order did not deny any specific period of TTD. Claimant did have surgery following the September 11, 2015 Order, on December 3, 2015. Therefore, at the second arbitration on August 24, 2016, claimant requested additional TTD from April 15, 2015 up to the date TTD had been reinstated on December 3, 2015 (less the 8 weeks previously awarded), based on the supportive medical records and the first Arbitrator's Order allowing additional TTD following any surgery and pursuant to Section 36 of the CNWCA (85 CNCA § 35) which provides as follows:

- A. NONSURGICAL-In case of a nonsurgical soft tissue injury, neither temporary total compensation, nor temporary partial compensation shall not (sic) exceed 12 weeks.
- B. SURGICAL-A claimant who has been recommended by a treating physician for surgery for a soft tissue injury may petition the Employer for an extension of temporary total compensation and the Employer may authorize such an extension if the treating physician indicates that such an extension is appropriate and as agreed to by all parties. In the event surgery is not performed, the benefits for the extension period shall be terminated as of the date of cancellation of the surgery.
- C. For purposes of this section, "soft tissue injury" means damage to one or more of the tissues that surround bones and joints. "Soft tissue injury" includes, but is not limited to: sprains, strains, contusions, tendonitis, and muscle tears. Cumulative trauma is to be considered a soft tissue injury.

Therefore based on the 12 week limitation pursuant to Cherokee statute, additional TTD beyond the 12 weeks was not ripe at the time of the September 11, 2015 Order. Upon receipt of that Order the claimant's counsel noted that the arbitrator awarded 8 weeks (presumably per the State of Oklahoma Title 85A, Section 62A "soft tissue" statutory limitation on TTD instead of the 12 week limitation per the Cherokee code Section 36 (A) of the CNWCA (85 CNCA § 35)). Claimant's counsel did not to appeal the inaccurate 8 week limitation since the claimant was to undergo surgery and therefore, the period of time after the initial 8 weeks would be compensated for in *additional* TTD as the Arbitration Order and medical records support. The plain language of the Order only awards the initial closed period of TTD pursuant to statute which was the period of TTD that was ripe at the time of the arbitration on September 10, 2015. The first Arbitration Order is void on its face of any denial for specific dates of TTD, namely April 15, 2015 to December 2, 2015, which the respondent, likewise,

could have appealed and did not.

Arbitrator Otteson, in the second Arbitration Order dated November 7, 2016 ordered “THAT there is no evidence before this court that the Claimant was able to work during the period for which Claimant now seeks temporary total disability, namely April 15, 2015 to December 2, 2015, therefore the Arbitrator FINDS res judicata does not apply and the Respondent is ordered to pay the *additional* temporary total disability benefits sought for 25 weeks at \$469.11 per week, less \$700.00 paid to Claimant as sick leave pay” (emphasis added). Regardless of whether or not Arbitrator Seagle in the first Arbitration Order was awarding statutory “soft tissue” benefits, he doesn’t specifically state any period of time the eight weeks of TTD he does award is to cover, other than saying it has all accrued and then further states Cherokee is to pay *additional* TTD following (not from) any surgery, if medically necessary. Furthermore, Arbitrator Seagle did not deny any specific dates of TTD. At the second Arbitration, Arbitrator Otteson found TTD was medically necessary and awarded the *additional* TTD, which was not found to be res judicata, as the claimant had surgery following the first Arbitration award, making the issue of *additional* TTD now ripe for the second Arbitration.

Cherokee alleges Arbitrator Otteson’s award of benefits for a period of time previously adjudicated is a clear violation of the concept of res judicata. However, the period of time in question, April 15, 2015 to December 2, 2015, was not previously adjudicated, was not denied, and was reserved in the first Arbitrators Order awarding *additional* TTD *following* any surgery.

CONCLUSION

WHEREFORE, for the reasons stated, Claimant requests this Honorable Court to affirm

the Arbitrator's Order of November 7, 2016 and award additional attorney's fees pursuant to the Cherokee Nation Uniform Arbitration Act at § 21 and any and all further relief this Court deems just and proper.

Respectfully Submitted,



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CERTIFICATE OF MAILING

The undersigned hereby certifies that on June 12, 2018, a true and correct copy of the above and foregoing was mailed, postage prepaid, to:

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