

Supreme Court Case Number SC-2018-01

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**IN THE SUPREME COURT OF THE CHEROKEE NATION**

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**STANLEY JOHN**

**CLAIMANT/APPELLEE**

**vs.**

**CHEROKEE NATION and the THE HUDSON INSURANCE COMPANY**

**RESPONDENTS/APPELLANTS**

**DISTRICT COURT CASE NUMBER: CV-2016-640**

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**BRIEF IN CHIEF OF CHEROKEE NATION/HUDSON  
INSURANCE COMPANY**

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**IN THE DISTRICT COURT OF THE CHEROKEE NATION**

STANLEY JOHN,

Claimant,

v.

Case No. CV-2016-640

CHEROKEE NATION,

Respondent,

HUDSON INSURANCE COMPANY,

Insurance  
Carrier.

**BRIEF-IN-CHIEF**

COME NOW the Respondent, CHEROKEE NATION, and its insurance carrier, THE HUDSON INSURANCE COMPANY, with their Brief-In-Chief.

**INTRODUCTION**

Respondent and insurance carrier appeal the Order of District Court Judge Luke Barteaux dated March 2, 2018. For purposes of simplicity, Cherokee Nation and the Hudson Insurance Company will be referred to as "Cherokee". The claimant will be referred to as "John".

**ASSIGNMENT OF ERROR**

The District Court erred in its March 2, 2018 Order adopting and affirming the Arbitration Order dated November 7, 2016. The Arbitrator erred in her 2016 Order when she awarded Claimant Temporary Total Disability (TTD) benefits totaling \$11,702.75 for the period April 15, 2015 to December 2, 2015. John requested TTD benefits for that same period of time at his prior arbitration hearing and the Arbitrator in his September 11, 2015 Order awarded John

\$3,968.88. John did not appeal that Order. Res Judicata applies to deny John a second request for TTD for the same period of time, from April 15, 2015 to December 2, 2015.

### **STATEMENT OF ISSUE PRESENTED**

1. Did the District Court err in affirming the award of \$11,702.75 to Claimant when the Claimant had previously requested benefits, and was awarded benefits, for the same period of time?

### **STATEMENT OF THE CASE**

John alleged an injury to his right knee that occurred on March 14, 2015. Cherokee denied the injury and the matter was tried to Arbitrator Vic Seagle on September 10, 2015. John requested a finding of compensability, temporary total disability (TTD) from April 15, 2015 forward, and medical treatment. The Arbitrator issued an Order on September 11, 2015 finding the case compensable, awarding medical treatment, and awarding eight weeks of TTD benefits up until the date of surgery, and then TTD if medically necessary "following any surgery". Neither party appealed that Order, which became final.

Cherokee complied with the Order of Arbitrator Seagle, paid the eight weeks of TTD ordered, and paid TTD after his knee surgery on December 3, 2015. After John was released from all medical care, the case was tried regarding his request for permanent partial disability on August 24, 2016 before Arbitrator Shannon Otteson (Arbitrator Seagle was removed from the list of Cherokee Arbitrators so the matter was reassigned).

At the second Arbitration hearing, John asked again for TTD during the same period of time as was requested and ruled upon at the first arbitration hearing, from April 15, 2015 to

December 2, 2015, less the eight weeks of TTD already paid. Cherokee asserted Res Judicata applied because John had already asked for TTD during that period at the first arbitration, TTD was awarded, and John did not appeal that ruling. Arbitrator Otteson denied Cherokee's Res Judicata defense and awarded the TTD from April 15, 2015 to December 2, 2015, less the eight weeks paid pursuant to the prior order. Cherokee filed a timely appeal of that award to the District Court. The District Court affirmed Arbitrator Otteson-Gosa's award without explanation. Cherokee filed a timely appeal to this Court.

### **STANDARD OF REVIEW**

This is an issue of statutory interpretation permitting this Court to review "de novo" the Arbitrator's legal conclusions. *Smith v. Election Commission*, SC-09-03 This Court's review shall be "confined to the record" regarding factual matters, as provided in Section 51 of the Cherokee Nation Workers' Compensation Act. *Cherokee Nation Entertainment v. Mary L. Dillon*, SC-12-08

### **STATEMENT OF FACTS**

At the first arbitration before Arbitrator Seagle on September 10, 2015, John's attorney asked for the following relief:

Judge Seagle, this – this matter comes before Cherokee Nation for a finding of compensability with regards to a right knee injury with a date of injury of March 14<sup>th</sup>, 2015. We're asking for temporary total disability benefits from Cherokee Nation from April 15<sup>th</sup>, 2015 to present and continuing.

Mr. Johns [sic], the claimant, has a recommendation for treatment by Dr. Basener, who he has seen, and that treatment includes surgery to the right knee. We're asking for medical treatment, along with the TTD in accordance with Dr. Basener's recommendations. (Arbitration Transcript of 9/10/15, Page 8, Line 4)

Cherokee announced it denied injury, but did not assert any “Soft Tissue” defenses found in 85 CNCA §35(A) (CNWCA Legislative Act 20-10 Section 36)<sup>1</sup>. (A.T. of 9/10/15, P.9, L.4) In fact, there was no mention of any statutory soft tissue limitations on TTD or 85 CNCA §35 at the 9/10/15 arbitration. “Soft tissue” restrictions were simply not at issue at Arbitration.

Arbitrator Seagle entered in his September 11, 2015 Order the following ruling:

The Nation is ordered to provide the above-mentioned medical treatment and to pay eight weeks of Temporary Total Disability to the Claimant (\$3,968.99 – all of which has accrued) and is to pay additional Temporary Total Disability benefits – if medically necessary following any surgery. (Arbitration Order dated 9/11/15)

The Arbitrator gave no explanation for the award of only eight weeks of TTD, and neither party appealed the Order. Soft tissue limitations on TTD the Cherokee Act are twelve weeks, not eight. Arbitrator Seagle did not discuss at arbitration he might apply soft tissue limitations. Arbitrator Seagle did not reserve any issue of a “gap period” of TTD to be addressed at a future hearing.

### **PROPOSITION ONE**

#### **RES JUDICATA APPLIES BECAUSE JOHN ASKED TWICE FOR THE SAME BENEFIT**

It is undisputed John requested at the first arbitration TTD benefits from April 15, 2015 through the date of surgery and until he would be released. The arbitrator specifically awarded John 8 weeks of TTD benefits for the period of April 15, 2015 until his future date of surgery, which ultimately occurred December 3, 2015. The arbitrator also awarded TTD from the date of surgery forward. This award by Arbitrator Seagle was not appealed by John and became final and binding.

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<sup>1</sup> The documents in evidence and testimony in the record reference CNWCA section numbers as outlined in Legislative Act 20-10. When that Act was codified in the Cherokee Nation Code Annotated, the numbering of the sections was modified. Cherokee will provide reference to both citations for this Court’s reference.

Furthermore, the Order did not *reserve* the award of TTD for the remaining portion of the “gap period” from April 15, 2015 to the date of surgery to be adjudicated at a later date. There was no intent for this issue to be retried in the future by the Arbitrator. The Arbitrator’s Order states Cherokee, “...is to pay additional Temporary Total Disability benefits – if medically necessary following any surgery.” That language is clear – any additional benefits of TTD other than the eight weeks, is to be paid for the period of time after surgery. No reasonable interpretation of the Order would support that the language of the award was to pay eight weeks, TTD after surgery, and TTD before surgery during this “gap period”.

Nothing at the first arbitration or in the first Order discussed such soft tissue limitations. This is an effort after the fact by John to retroactively apply the soft tissue statute to the first arbitration and retry the same issue.

The soft tissue limitations on TTD referenced by John are found in Section 36 of the CNWCA (85 CNCA § 35). The sections argued by John are 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.

At the first arbitration the Arbitrator was not asked to put any “soft tissue” cap on TTD by Cherokee. Furthermore, soft tissue limits on TTD under the Cherokee Act are twelve weeks, not eight weeks. At the first arbitration, Arbitrator Seagle was asked to award continuous TTD from April 15, 2015 forward. The request for TTD for the time period of April 15, 2015 to the date of surgery (December 3, 2015) was specifically addressed by the Arbitrator. Had John not been happy with that outcome, he could have appealed that Order, but he chose not to do so. Nothing in that Order even indicates the Arbitrator had soft tissue limitations on TTD in mind.

John attempted to invent an issue at the second arbitration that simply did not exist in the first. This award of benefits for a period of time previously adjudicated is a clear violation of the concept of Res Judicata. John, at the second arbitration, simply tried to characterize that first award of TTD benefits as being awarded under soft tissue limitations to allow the infamous “second bite at the apple”, yet the soft tissue limitations had nothing to do with Arbitrator Seagle’s decision. John affirmatively chose not to appeal Arbitrator Seagle’s decision of September 11, 2015. His effort to skip that appeal and instead ask for the same benefit again must be denied.

### **CONCLUSION**

The District Court erred in affirming the award of additional TTD benefits for a period previously adjudicated. Arbitrator Otteson’s Order of November 7, 2016 is improper in that it awards TTD benefits for a period of time previously adjudicated, violating the legal principle of Res Judicata.

WHEREFORE, for the reasons stated above, Cherokee requests this Court reverse, vacate, or modify the District Court's Order to deny the \$11,702.75 award of TTD, and to award any other relief as this Court deems appropriate.

Respectfully submitted,

 #0222

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 4th day of June 2018, a true and correct copy of the above and foregoing Brief-in-Chief has been mailed to the following persons:

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