

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

AWCC NO. G702755

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| CHARLES A. BROWN, EMPLOYEE | CLAIMANT |
| CITY OF BENTON, SELF-INSURED EMPLOYER | RESPONDENT |
| ARK. MUNICIPAL LEAGUE, THIRD-PARTY ADMINISTRATOR | RESPONDENT |

OPINION FILED DECEMBER 8, 2021

Hearing before Administrative Law Judge O. Milton Fine II on September 23, 2021, in Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. Gary Davis, Attorney at Law, Little Rock, Arkansas.

Respondents represented by Ms. Mary K. Edwards, Attorney at Law, North Little Rock, Arkansas.

STATEMENT OF THE CASE

On September 23, 2021, the above-captioned claim was heard in Little Rock, Arkansas. A pre-hearing conference took place on August 30, 2021. The Prehearing Order entered that same day pursuant to the conference was admitted without objection as Commission Exhibit 1. At the hearing, the parties confirmed that the stipulations, issues, and respective contentions, as amended, were properly set forth in the order.

Stipulations

At the hearing, the parties discussed the stipulations set forth in Commission Exhibit 1. With an amendment of the second, they are the following, which I accept:

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1. The administrative law judge opinion dated August 9, 2019, and the Full Commission opinion dated February 5, 2020, are binding on this proceeding under the Law of the Case Doctrine.
2. Claimant's average weekly wage of \$872.36 entitles him to compensation rates of \$582.00/\$437.00.

Issues

At the hearing, the parties discussed the issues set forth in Commission Exhibit

1. After an amendment of first issue, they read:

1. Whether Claimant is entitled to temporary total and/or temporary partial disability benefits.
2. Whether Claimant is entitled to a controverted attorney's fee.
3. Whether Respondents are entitled to an offset.

All other issues have been reserved.

Contentions

The respective contentions of the parties, following amendment at the hearing, read as follows:

Claimant:

1. Claimant contends that admitted compensable injuries were sustained April 15, 2017, to his right knee. Surgery was performed on December 18, 2019.

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2. Claimant contends entitlement to temporary total and/or temporary partial disability benefits beginning December 18, 2019, and continuing through April 1, 2020.
3. These benefits are controverted for purposes of attorney's fees.
4. Claimant reserves the right to pursue other benefits to which he may become entitled to in the future.
5. Claimant's attorney respectfully requests that any attorney's fees owed by the claimant on controverted benefits paid by award or otherwise be deducted from his benefits and paid directly to counsel by separate check, and that any Commission direct Respondents to make payment of attorney's fees in this manner.

Respondents:

1. Respondents contend that, to date, Claimant has received all benefits to which he is entitled.
2. Claimant saw Dr. Joel Smith as a result of a change-of-physician order entered on January 22, 2018. Dr. Smith treated and released him from his care with no further recommendations for treatment. Following this release from Dr. Smith, Claimant underwent right knee surgery on December 18, 2019. Respondents contend they are not responsible for the expenses associated with any unauthorized treatment.

3. Respondents further contend that the claimant is receiving Arkansas Local Police and Fire Retirement System (“LOPFI”) disability retirement benefits. They are entitled to an offset in the event the claimant is awarded any additional indemnity benefits in this matter.
4. Respondents reserve the right to file an amended response to the Prehearing Questionnaire or other appropriate pleading and to allege any further affirmative defense(s) that might be available upon further discovery.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, including medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witness and to observe his demeanor, I hereby make the following findings of fact and conclusions of law in accordance with Ark. Code Ann. § 11-9-704 (Repl. 2012):

1. The Arkansas Workers’ Compensation Commission has jurisdiction over this claim.
2. The stipulations set forth above are reasonable and are hereby accepted.
3. Issue No. 1 (concerning whether Claimant is entitled to temporary total and/or partial disability benefits) cannot be addressed herein because a threshold matter—whether his December 18, 2019, surgery was reasonable and necessary—was not made an issue in the proceeding and

cannot be addressed *sua sponte*. Accordingly, Issue No. 1 will be considered reserved.

4. Because of Finding/Conclusion No. 3, Issue No. 2 (whether Claimant's counsel is entitled to a controverted fee pursuant to Ark. Code Ann. § 11-9-715 (Repl. 2012)) will not be addressed herein. Instead, it will be considered reserved.
5. Because of Finding/Conclusion No. 3, Issue No. 3 (whether Respondents are entitled to a dollar-for-dollar offset under Ark. Code Ann. § 11-9-411(a) (Repl. 2012) concerning the disability retirement benefits Claimant has received from the Arkansas Local Police and Fire Retirement System ("LOPFI")) will not be addressed herein. Instead, it will be considered reserved.

CASE IN CHIEF

Summary of Evidence

Claimant was the sole witness.

In addition to the prehearing order discussed above, also admitted into evidence in this case were the following: Claimant's Exhibit 1, a compilation of his medical records, consisting of one (1) index page and thirty (30) numbered pages thereafter; Respondents' Exhibit 1, another compilation of Claimant's medical records, consisting of two (2) index pages and sixty-three (63) numbered pages thereafter; Respondents' Exhibit 2, non-medical records, consisting of one (1) index page and eight (8) numbered

pages thereafter; and Respondents' Exhibit 3, the transcript of the June 10, 2021, deposition of Claimant, consisting of forty-six (46) numbered pages.

Without objection, the post-hearing briefs of Claimant that were filed on October 7 and 15, 2021, respectively, and consisting of two (2) pages and one (1) page, respectively, have been blue-backed to the record; as have the briefs of Respondents filed on October 6 and 14, 2021, and consisting of two (2) and three (3) pages, respectively.

The transcript of the June 20, 2019, hearing on this claim, along with its blue-backed exhibits, have been incorporated herein by reference.

Adjudication

A. Introduction

An assessment of the issues at bar first requires a recounting of the procedural history of this claim. On June 20, 2019, the first hearing was held on this claim before the undersigned administrative law judge. The August 9, 2019, opinion contains the following findings of fact and conclusions of law:

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations set forth [below] are reasonable and are hereby accepted[:]
 - A. The employee/self-insured employer/third-party administrator relationship existed on or about April 15, 2017, at which time Claimant sustained a compensable injury to his right knee.
 - B. Pursuant to a change-of-physician order entered on December 6, 2017, and an amended change-of-physician order entered on

January 22, 2018, Claimant’s primary treating physician became Joel Smith, M.D.

3. Claimant has not proven by a preponderance of the evidence that he is entitled to additional medical treatment of his compensable right knee injury from Jared Dixon, M.D.

Claimant appealed this decision. On February 5, 2020, the Full Commission affirmed and adopted the administrative law judge’s decision. *Charles Brown v. City of Benton*, Claim No. G702755 (Full Commission Opinion filed February 5, 2020)(unpublished). The opinion by the administrative law judge, as the parties have stipulated, is thus binding on this proceeding under the Law of the Case Doctrine and is *res judicata*. See *Thurman v. Clarke Industries, Inc.*, 45 Ark. App. 87, 872 S.W.2d 418 (1994).

B Temporary Total and/or Partial Disability Benefits

Introduction. Claimant has alleged that he is entitled to temporary total and/or partial disability benefits with respect to his compensable right knee injury from December 18, 2019, and continuing through April 1, 2020. Respondents have denied this.

Standards. The compensable injury to Claimant’s knee is scheduled. See Ark. Code Ann. § 11-9-521(a)(3) (Repl. 2012). An employee who suffers a compensable scheduled injury is entitled to temporary total disability compensation “during the healing period or until the employee returns to work, whichever occurs first” *Id.* § 11-9-521(a). See *Wheeler Const. Co. v. Armstrong*, 73 Ark. App. 146, 41 S.W.3d 822 (2001). The healing period ends when the underlying condition causing the disability has become stable and nothing further in the way of treatment will improve that

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condition. *Mad Butcher, Inc. v. Parker*, 4 Ark. App. 124, 628 S.W.2d 582 (1982). Also, a claimant must demonstrate that the disability lasted more than seven days. Ark. Code Ann. § 11-9-501(a)(1) (Repl. 2012).

A claim for temporary partial disability benefits can be considered in conjunction with and in the context of a claim for temporary total disability benefits. *See Palazzolo v. Nelms Chevrolet*, 46 Ark. App. 130, 877 S.W.2d 938 (1994). Temporary partial disability is the period within the claimant's healing period in which he suffers only a decrease in the capacity to earn the wages he was receiving at the time of the injury. *Ark. State Hwy. & Transp. Dept. v. Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). Per Ark. Code Ann. § 11-9-520 (Repl. 2012):

there shall be paid to the employee sixty-six and two-thirds percent (66 2/3%) of the difference between the employee's average weekly wage prior to the accident and his or her wage earning capacity after the injury.

Testimony. Claimant testified at the hearing that at the time of his compensable right knee injury, he was employed as a police officer for the City of Benton. In relating what occurred on April 15, 2017, Claimant stated:

It was during training. The—Sergeant Jackson was unfortunately supposed to show us how to get out of chokeholds, and instead grabbed my femoral artery, causing me to jump backwards, and my leg went off the mat and rolled my knee out.

He was first treated at the emergency room of Saline Memorial Hospital. From there, he went to Dr. Jared Dixon. Dixon, in turn, referred him to Dr. Jonathan Wyatt, an orthopedist. Wyatt operated on him. But per Claimant, he was not progressing in his recovery as he wished, so he asked Respondents to send him to another doctor. They

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did so, transferring his care to Dr. Joel Smith. Smith operated on him as well, performing an arthroscopic procedure.

While Claimant desired additional treatment, Dr. Smith refused to see him any further. Consequently, he had to wait until he got on his wife's health insurance before he could get more treatment for his knee. Finally, after obtaining this coverage, he went to Dr. Christopher Skelly and then Dr. Lawrence O'Malley. O'Malley performed a third procedure on the knee on December 18, 2019.

The following exchange took place:

Q. You told [Respondents' counsel] that after you had the surgery you had physical therapy?

A. Yes, sir.

Q. Okay. And that you were completely off, not working, for a month following that surgery?

A. Yes, sir.

Q. Okay. Were you working before you had the surgery?

A. Yes, sir.

Q. Okay. Where were you working before you had the surgery?

A. I was working at Boll Weevil Pawn Shop in Benton.

Q. Okay. The same place you're working now?

A. Yes, sir.

Q. Okay. So as we follow the course here from the day of your surgery, you stopped working completely for a month?

A. Yes, sir.

Q. Okay. And then I believe that you had another month in which you were working 10 hours a week?

A. Yes, sir.

Q. And you were making \$12 an hour?

A. Yes, sir.

Q. Okay. And then that was up to 24 hours a week after that month?

A. Yes, sir.

Q. All right. And, again, still making \$12 an hour?

A. Yes, sir.

Q. All right. And was that true until April of 2020?

A. Yes, to the best of my knowledge, sir. Yes, sir.

Q. All right. And so in April of—as of April of 2020, you were then full-time?

A. Yes, sir.

Claimant first related that he last saw Dr. O'Malley in mid-April 2020; but later, he revised this to March 30, 2020.

Medical Records. In the previous opinion, the medical records offered into evidence in that proceeding were summarized as follows:

The medical records in evidence reflect that on April 15, 2017, Claimant presented to the emergency room of Saline Memorial Hospital with right knee pain and swelling. He was diagnosed as having a right patella dislocation, confirmed by x-ray, and was given Dilaudid, Valium, Naproxen, Percocet, Hydrocodone and Ketorolac, along with a knee immobilizer. In addition, he was told to follow up with his primary care physician.

When he went to see Dr. Dixon on April 17, 2017, examination of the knee showed moderate effusion. The doctor ordered an MRI of the knee and gave him work restrictions of no weightbearing on the right leg. The April 19, 2017 MRI showed the dislocation/relocation of the patella, along with osseous contusions along the lateral femoral condyle, a strain of the medial patellar retinaculum and medial patellofemoral ligament, mild chondromalacia of the medial compartment, and a partial-thickness tear of the lateral collateral ligaments at the femoral insertion.

On April 19, 2017, Claimant saw Dr. Wyatt and was prescribed physical therapy. Light duty was continued. In a follow-up appointment on May 5, 2017, Claimant reported mild improvement, but added that he was having frequent giving-way of the knee, diffuse pain, and swelling at times. Wyatt continued him on light duty and physical therapy and stated that Claimant was “making very slow progress with therapy” and might “[u]ltimately require operative stabilization.” On May 26, 2017, Dr. Wyatt wrote that conservative management had not worked and that surgery was warranted. This was confirmed on June 13, 2017.

Wyatt operated on June 15, 2017, performing a right knee arthroscopy with chondroplasty of the patella, along with an open right medial patellofemoral ligament reconstruction with hamstring autograft. The pre and post-operative diagnosis was “[t]raumatic right lateral patellar dislocation.” Claimant on July 10, 2017 presented as still having pain. Dr. Wyatt continued him in therapy and prescribed Ultram; and he kept Claimant on light duty. This was also the case on July 31, 2017, August 28, 2017, and October 2, 2017. Claimant told Wyatt on November 13, 2017 that the physical therapy was not helping. The doctor ordered another MRI and prescribed Diclofenac and additional therapy.

Next, on February 2, 2018, Claimant saw Dr. Smith. He presented with knee pain of 4/10 and “described as associated with popping, dull, associated with clicking, and associated with throbbing and is associated with joint swelling, limping, weakness and gait instability.” Claimant told Smith that physical therapy had not helped. He presented with a normal gait, but examination had positive medial and patellar grind test results in the right knee. The doctor ordered an MRI of the knee, which took place on February 16, 2018 and showed, inter alia, grade III chondromalacia of the medial femoral condyle. On February 20, 2018, Claimant represented to Smith that his knee pain was 7/10. Smith read the MRI to also show chondromalacia in the patella. He gave Claimant work restrictions of no

working more than four hours a day, limited walking and frequent breaks, and added that “911 dispatch would be best.” On March 16, 2018, when Claimant rated his pain as 5/10, Dr. Smith ordered that he undergo a functional capacity evaluation. The March 30, 2018 FCE showed that he gave a reliable effort, with 53/54 consistency measures within expected limits, and reflected that he demonstrated the ability to work in the Medium category of work.

On April 18, 2018, Dr. Smith wrote:

I have reviewed the Functional Capacity Evaluation done March 30, 2018. I agree with the findings that Mr. Brown is able to perform in the medium classification of occasional lifting of 21-50 lbs, frequent lifting of 11-25 lbs and constant lifting of 1-10 lbs. I also agree with all the other recommendations as listed in the FCE report.

In response to a written inquiry from Johnson Management Systems, Dr. Smith on April 18, 2018 wrote that Claimant reached maximum medical improvement as of March 16, 2018 and was entitled to a combined impairment rating of twenty-five percent (25%) to the lower extremity.

Notwithstanding the above, Smith saw Claimant again on August 7, 2018. During that visit, Claimant rated his pain as 5/10 and represented that his knee condition had worsened. The doctor wrote: “***he continues to have severe pain. His patella is stable. He has had PT, injections, and walks with a cane. At this point, I think his only option is to consider diagnostic arthroscopy with chondroplasty.”

Smith operated on September 11, 2018, performing a right knee arthroscopy with a chondroplasty of the patella and medial femoral condyle. His pre and post-operative diagnoses were right knee patellar chondromalacia and history of patella instability. Claimant informed Smith on September 21, 2018 that his knee pain was 4/10. The report reads in pertinent part: “He reports being highly satisfied with the current results.” The doctor found that Claimant was progressing normally. During the next visit, which occurred on October 22, 2018, Claimant still reported being satisfied with the results. Dr. Smith wrote:

With his function and restrictions, he cannot do his previous job anymore. He used to work in car sales, but he cannot be on his feet all day for a full shift anymore and he cannot work in a factory doing heav[y] lifting and manual labor. He is trying to find

something he can do. **He will also likely need additional treatment in the future with possible cartilage restoration or patellofemoral joint arthroplasty, but hopefully this won't be for several years if not decades.**

(Emphasis added)

In correspondence dated November 14, 2018 and November 19, 2018, Smith assigned Claimant an impairment rating of sixteen percent (16%) to the lower extremity. But he added that this was not in addition to the twenty-five percent (25%) assigned previously by him. In a questionnaire response to Johnson Management Systems dated December 27, 2018, Dr. Smith wrote that Claimant was at maximum medical improvement and that he had no further recommendations for treatment to Claimant's right knee.

Claimant sought a total knee replacement, but was informed that he was too young for one. He told Dr. Jeffrey Stambough at UAMS on September 11, 2019, that he had been having worsening right knee pain for one year that was due to the work-related accident at the police department. Claimant rated his pain as 9/10, informed the doctor that he cannot lose weight because of his constant pain, and added that he cannot obtain a job because he cannot stand or walk for any significant length of time or distance. Stambough referred him to Dr. O'Malley and ordered an MRI. On September 18, 2019, Claimant underwent the MRI. The report thereof reads in pertinent part:

Impression:

Post surgical changes from medial patellofemoral ligament repair with intact graft.

No definite evidence of trochlear dysplasia or laterally tilted or subluxed patella however the patella appears high riding and the TT TG distance measures 1.9 cm.

The menisci, cruciate and collateral ligaments appear intact.

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On September 30, 2019, Claimant told a resident at UAMS that the second surgery did not provide him with any relief, that he has continued right medial knee pain with almost any activity, and that he uses a walker to help. Dr. James Kee ordered a CT scan of the knee.

The CT scan, which occurred on November 18, 2019, revealed a tibial tuberosity trochlear groove distance of approximately 23mm, and a prominent screw from the previous surgery. On November 21, 2019, Dr. O'Malley saw Claimant and recommended surgery in the forms of a right knee arthroscopy with chondroplasty and a possible meniscectomy, along with removal of the hardware from the femur and tibial tubercle osteotomy, with anterior medialization to offload the patellofemoral joint. The operation took place on December 18, 2019. The pre and post-operative diagnoses were "right knee chondromalacia" and "painful hardware." O'Malley on January 2, 2020, wrote that Claimant was "doing well" and that he would be going into physical therapy. Claimant reported on February 13, 2020, that his pain had improved. His March 30, 2020, report by Dr. O'Malley reads:

[Claimant] comes in after right knee tibial tubercle osteotomy. He is actually doing great. He is not using his cane anymore. His pain is barely at 1/10. It previously was at least a 5/10 and constant. He is very satisfied with his progress. He is working on weight loss at this point. He otherwise is continuing to progress his activity. He has done home physical therapy.

...

[H]e is doing great. He continued progress his [sic] activities as tolerated. He needs to continue work on weight loss. At this point we will see him back on a p.r.n. basis.

Discussion. In this action, Claimant is seeking temporary total and/or temporary partial disability benefits only for the period of time that he allegedly remained in a healing period that he purportedly entered as a result of his December 18, 2019, surgery by Dr. O'Malley. If in fact the surgery was reasonable and necessary, then Claimant re-entered his healing period. See *Pratt v. Rheem Mfg.*, 2013 Ark. App. 577, 2013 Ark. App. LEXIS 599. As stated above, Claimant must show, *inter alia*, that he was in his healing period in order to qualify for temporary total and/or partial disability benefits for the time in question. But the issue concerning whether or not the December 18, 2019, operation constituted reasonable and necessary medical treatment was not presented to the Commission. Not only is it absent from the enumerated issues in the Prehearing Order as set out above, but Claimant's counsel confirmed in the following colloquy that it was not being raised:

JUDGE FINE: Well, let me make two responses to that: One, I don't have the issue of Mr. Brown's treatment in front of me.

MR. DAVIS: Correct.

JUDGE FINE: We're only here on the TTD—

MR. DAVIS: Correct.

JUDGE FINE: —and the offset, and, of course, controversion for the purpose of attorney's fees.

In their contentions (see *supra*), Respondents did not take a position concerning whether the surgery that O'Malley performed was reasonable and necessary. This stands to reason, since (again), this issue was not presented. They did, however, posit

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that the surgery was unauthorized. *See supra*. But this does not resolve this issue. The Court of Appeals has held that respondents are not relieved of liability for temporary total disability benefits during a period just because that the treatment related to that period was unauthorized. *Byars Const. Co. v. Byars*, 72 Ark. App. 158, 34 S.W.3d 797 (2000).

Claimant appears to have recognized his oversight belatedly. In his October 7, 2020, he argued for the first time: “the treatment [the surgery] was shown to be ‘reasonably necessary.’” Not surprisingly, Respondents in their reply brief, filed October 14, 2021, took exception to the issue being raised at this juncture.

It has been held repeatedly that administrative law judges may not address issues *sua sponte*. *See Burkett v. Tiger Mart, Inc.*, 2009 Ark. App. 93, 304 S.W.3d 2; *Ralston v. Automatic Auto Fin. Inc.*, 2017 AR Wrk. Comp. LEXIS 157, Claim No. G409055 (Full Commission Opinion filed March 15, 2017); *Pruitt v. Comm. Dev. Inst. Head Start*, 2013 AR Wrk. Comp. LEXIS 19, Claim No. F908541 (Full Commission Opinion filed February 12, 2013); *Carthan v. School Apparel, Inc.*, 2006 AR Wrk. Comp. LEXIS 451, Claim No. F410921 (Full Commission Opinion filed November 28, 2006).

Furthermore, as the Court of Appeals stated in *Sapp v. Tyson Foods*, 2010 Ark. App. 517, 2010 Ark. App. LEXIS 549, “elementary principles of fair play” apply in Commission proceedings. I find that addressing whether the December 2019 surgery was reasonable and necessary herein would change the nature of what the parties reasonably expected to litigate—and did litigate—at the hearing. Coming after the close

of the evidence, it would violate “elementary principles of fair play” to do so at this point. Accordingly, it will not be addressed herein. Because of this, the issue concerning whether Claimant is entitled to temporary total disability benefits cannot, and will not, be addressed in this opinion. Instead, it (and the related treatment issue)¹ will be considered reserved.

C. Attorney’s Fee

One of the purposes of the attorney's fee statute is to put the economic burden of litigation on the party who makes litigation necessary. *Brass v. Weller*, 23 Ark. App. 193, 745 S.W.2d 647 (1998). Under Ark. Code Ann. § 11-9-715 (Repl. 2012):

(B) Attorney’s fees shall be twenty-five percent (25%) of compensation for indemnity benefits payable to the injured employee or dependents of a deceased employee . . . In all other cases whenever the commission finds that a claim has been controverted, in whole or in part, the commission shall direct that fees for legal services be paid to the attorney for the claimant as follows: One-half (½) by the employer or carrier in addition to compensation awarded; and one-half (½) by the injured employee or dependents of a deceased employee out of compensation payable to them.

The issue concerning Claimant’s entitlement to indemnity benefits has not been addressed, but instead has been considered reserved. For that reason, this issue must be treated in likewise fashion.

D. Offset

Respondents have argued that in the event that Claimant is awarded temporary total or temporary partial disability benefits, there must be an offset under Ark. Code

¹Per the Prehearing Order, “[a]ll other issues [other than those listed in the order]

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Ann. § 11-9-411(a) (Repl. 2012) concerning the disability retirement benefits that

Claimant has drawn from LOPFI. This provision reads:

(a) Any benefits payable to an injured worker under this chapter shall be reduced in an amount equal to, dollar-for-dollar, the amount of benefits the injured worker has previously received for the same medical services or period of disability, whether those benefits were paid under a group health care service plan of whatever for or nature, a group disability policy, a group loss of income policy, a group accident, health, or accident and health policy, a self-insured employee health or welfare benefit plan, or a group hospital or medical service contract.

The issue concerning Claimant's entitlement to temporary total and/or partial disability benefits has not been addressed here, but instead has been considered reserved. For that reason, this issue cannot be addressed either, but will be considered reserved as well.

CONCLUSION

Judgment is hereby entered in accordance with the findings of fact and conclusions of law set forth above.

IT IS SO ORDERED.

Hon. O. Milton Fine II
Chief Administrative Law Judge

have been reserved.”