

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F403435**

<b>RICHARD GIBBS, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>MOFFATT LOGGING, EMPLOYER</b>	<b>RESPONDENT</b>
<b>CAPITAL CITY INSURANCE, CARRIER</b>	<b>RESPONDENT</b>

**OPINION FILED DECEMBER 7, 2006**

Hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN, on September 8, 2006, at Monticello, Drew County, Arkansas.

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

Respondents represented by the HONORABLE MICHAEL E. RYBURN, Attorney at Law, Little Rock, Arkansas.

**ISSUES**

A hearing was conducted to determine the claimant's entitlement to payment of additional medical expenses and attorney's fees.

At issue is whether this claim is barred by the doctrine of res judicata, and whether the respondents are entitled to fees and expenses pursuant to Ark. Code Ann. §11-9-714.

After reviewing the evidence impartially without giving the benefit of the doubt to either party, Ark. Code Ann. §11-9-704, I find the evidence does not preponderate in favor of the claimant.

**STATEMENT OF THE CASE**

The parties stipulated to an employer-employee-carrier relationship on February 28, 2004 at which time the claimant sustained a compensable back injury at a compensation rate of \$245.00/4184.00. Medical expenses and temporary total disability benefits until June 30, 2004, have been paid. The Medical Cost Containment Division authorized the claimant to see Dr. Chakales in a change of physician order filed January 21, 2005. This claim was the subject of a previous hearing

and an Order was entered September 23, 2005 denying the claimant's request for additional medical treatment with Dr. Chakales.

The claimant contends this claim is not barred by the doctrine of res judicata because the claimant is only asking that Dr. Chakales be allowed to complete his evaluation of the claimant. The claimant is not requesting additional medical treatment. The claimant contends the evaluation was incomplete because the respondents failed to provide the MRI scan for Dr. Chakales' review. The claimant has now provided Dr. Chakales with the scan and requests only an office visit.

The respondents contend this claim is barred by the doctrine of res judicata and seek fees of \$750.00 plus hearing costs.

The following were submitted without objection and comprise the evidence of record: the parties' prehearing questionnaires and the transcript and exhibits from the June 27, 2005 hearing. Also incorporated by reference is the opinion filed September 23, 2005 and the cover letter showing a copy was sent to the claimant.

The claimant was the only witness to testify at the hearing. The claimant, age 60 (July 3, 1946), has a tenth grade education. He was employed as a log skidder for the respondent-employer for fifteen years.

The claimant injured his back on February 28, 2004 while stacking wood. He experiences back and leg pain and has been unable to work.

The claimant requested a change of physician and the Commission's Medical Cost Containment Division chose Dr. Harold Chakales. Dr. Chakales requested additional diagnostic testing which the carrier controverted. A hearing was held and an opinion was filed on September 23, 2005, denying the claimant's request. There was no appeal of this decision.

The claimant testified Dr. Dickinson ordered an MRI scan which was conducted in Texas. The claimant has now located those films and made arrangements to send them to Dr. Chakales for his review. Once Dr. Chakales reviews the scan, he would have the diagnostic testing needed to issue an opinion on the claimant's need for additional medical treatment. It should be noted that some physicians rely on the radiologist's report while others want to view the films and make their own assessment.

The claimant also testified he was able to work for fifteen years at regular duty including overtime prior to the accident. He is now in pain, using a cane, unable to work and unable to afford medical treatment.

#### **MEDICAL EVIDENCE**

The claimant's medical history was summarized in the previous decision, which has been incorporated by reference as an exhibit.

#### **COSTS AND FEES**

The respondents have requested costs and fees, contending this hearing is frivolous.

Hearing costs are covered under Ark. Code Ann. §11-9-714, however, this statute makes no mention of attorney's fees, Couch v. First State Bank, 49 Ark. App. 102, 898 S.W.2d 57 (1995).

Attorney's fees are covered under Ark. Code Ann. §11-9-717(b) for "frivolously joining another party," Johnson v. Triple T Foods, 55 Ark. App. 83, 929 S.W.2d 730 (1996). There are no guidelines, however, on the amount that an attorney can charge.

#### **FINDINGS AND CONCLUSIONS**

The court has explained the doctrine of res judicata in several cases:

Res judicata applies where there has been a final adjudication on the merits of the issue by a court of competent jurisdiction on all matters litigated and those matters necessarily within the issue which might have been litigated. Beliew v. Stuttgart Rice Mill, 64 Ark. App. 334, 987 S.W.2d 281 (1998); Perry v. Leisure Lodges, 19 Ark. App. 143, 718 S.W.2d 114 (1986). The doctrine of res judicata is applicable to decisions of the Commission, Harvest Foods v. Washam, 52 Ark. App. 72, 914 S.W.2d 776 (1996); Tuberville v. International Paper Co., 18 Ark. App. 210, 711 S.W.2d 840 (1986). The key question regarding the application of res judicata is whether the party against whom the earlier decision is being asserted had a full and fair opportunity to litigate the issue in question. Cater v. Cater, 311 Ark. 627, 846 S.W.2d 173 (1993); Pine Bluff Warehouse v. Berry, 51 Ark. App. 139, 912 S.W.2d 11 (1995). See also Castleberry v. Elite Lamp Co., 69 Ark. App. 359, 13 S.W.3d 211 (2000).

The evidence of record shows the claimant has received diagnostic testing and treatment for aggravation of a preexisting degenerative back condition. The claimant was treated conservatively with medication, physical therapy and injections. The claimant was released after an invalid FCE showed signs of malingering.

The purpose of the change of physician was to determine if Dr. Chakales had any other treatment to offer the claimant to improve his condition. As stated in the prior opinion filed September 23, 2005, “the claimant has failed to prove by a preponderance of the evidence of record that additional medical treatment with Dr. Chakales is reasonable and necessary.” That determination is now res judicata. Due to the respondents’ motion, I am constrained to award costs and fees for the second hearing on September 8, 2006.

1. The Workers’ Compensation Commission has jurisdiction of this claim.
2. In a previous opinion filed June 27, 2005 it was determined that the claimant was not entitled to return

to Dr. Chakales as further medical treatment (including doctor visits, diagnostic testing, evaluation; prescriptions, mileage expenses etc), was unreasonable and unnecessary.

3. The claimant's request to return to Dr. Chakales at the second hearing, held on September 8, 2006, is barred by the doctrine of res judicata.
4. The respondent is entitled to reimbursement from the claimant for attorney's fees and hearing costs associated with the September 8, 2006 hearing, as the second hearing was frivolous.

IT IS SO ORDERED.

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ELIZABETH W. HOGAN  
Administrative Law Judge