

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. E805523**

<b>JERRY MCMILLIAN, EMPLOYEE</b>	<b>CLAIMANT</b>
<b>BULLOCK FLYING SERVICE, EMPLOYER</b>	<b>RESPONDENT</b>
<b>KIMMEL AVIATION INSURANCE, CARRIER</b>	<b>RESPONDENT</b>

**OPINION FILED JULY 24, 2006**

Submitted on the record in lieu of a full hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN.

Claimant represented by the HONORABLE STEVEN MCNEELY, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE FLETCHER LONG, Attorney at Law, Forrest City, Arkansas.

**ISSUES**

This case was submitted on the record in lieu of a full hearing to determine the claimant's entitlement to additional medical expenses, anatomical impairment and attorney's fees.

At issue is whether or not this claim for additional benefits and expenses is barred by the doctrine of res judicata.

After review, I find the evidence preponderates in favor of the claimant.

**STATEMENT OF THE CASE**

The parties stipulated to an employer-employee-carrier relationship during February, 1998, at which time the claimant sustained a compensable back injury at a compensation rate of \$359.00/\$269.00. This case has been the subject of a previous hearing with an Order entered by Judge Curdie on April 28, 2003.

The claimant contends the respondents are liable for a medical bill totaling \$227.00 for a date of service of June 29, 2004. The bill corresponds with a June 29, 2004 office visit with the claimant's authorized treating physician, Dr. Philip Johnson,

and x-rays to assess the fusion surgery. The claimant also contends he is entitled to permanent partial disability benefits equivalent to a 10% rating, to be assessed by the Commission.

The respondents contend they have paid all benefits awarded in Judge Curdie's April 28, 2003 decision and payment of additional expenses and benefits is barred by res judicata. Any impairment the claimant may suffer is the result of the aging process.

The following were submitted without objection and comprise the evidence of record: the parties' prehearing questionnaires and exhibits; the February 13, 2003 hearing transcript including exhibits and Dr. Johnson's deposition; Judge Curdie's opinion filed April 28, 2003 and the Commission's prehearing order of April 26, 2006 incorporated by reference.

In a previous decision, Judge Curdie awarded additional medical treatment to determine if the claimant needed surgery.

### **FINDINGS AND CONCLUSIONS**

The doctrine of res judicata applies to an adjudication on the merits of the issue 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 (1998); Perry v. Leisure Lodge, 19 Ark. App. 143, 718 S.W.2d 114 (1986); Castleberry v. Elite Lamp Co., 69 Ark. App. 359, 13 S.W.3d 211 (2000). Res judicata bars relitigation of that determination unless there is evidence of change following the previous order. Cariker v. Ozark Opportunities, 65 Ark. App. 60, 987 S.W.2d 736 (1999); 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). The doctrine of res judicata applies to workers' compensation decisions Harvest Foods v. Washam, 52 Ark. App. 72, 914 S.W.2d 776 (1996).

The bill for the x-ray and the issue of anatomical impairment were not previously decided by the Commission. These expenses and benefits simply represent a change in circumstances following the last order. Accordingly, I find the claimant's expenses and benefits are not barred by the doctrine of res judicata.

Employers must promptly provide medical services which are "reasonably necessary in connection with" the compensable injuries. Ark. Code Ann. §11-9-508(a). However, injured employees have the burden of proving by a preponderance of the evidence that medical treatment is reasonably necessary. Patchell v. Wal-Mart Stores, Inc., 86 Ark. App. 230, 184 S.W.3d 31 (2004). What constitutes reasonable and necessary medical treatment is a fact question for the Commission, and the resolution of this issue depends upon the sufficiency of the evidence. Gansky v. Hi-Tech Engineering, 325 Ark. 163, 924 S.W.2d 790 (1996). Reasonably necessary medical services "may include that necessary to accurately diagnose the nature and extent of the compensable injury; to maintain the level of healing achieved; or to prevent further deterioration of the damage produced by the compensable injury." Greer v. Phillip Mitchell Construction, Full Commission opinion February 14, 2003 (E906565). In assessing whether a given medical procedure is reasonably necessary for treatment of the compensable injury, it is necessary to analyze both the proposed procedure and the condition it is sought to remedy.

Deborah Jones v. Seba, Inc., Full Workers' Compensation Commission, December 13, 1989 (Claim No. D511255).

The claimant has required periodic x-rays to assess the fusion site, checking the position of the Ray cages implanted and the stability of the union at the surgical site of L4-5.

On June 29, 2006, the claimant incurred an x-ray bill for services ordered by his treating physician, Dr. Johnson. The x-ray was taken of the surgical site, L4-5, to compare with previous studies. According to the radiologist's notes, he was checking the stability of the fusion and looking for the presence of any osteoblastic or osteolytic lesions on the implanted prosthesis devices.

Accordingly, I find this to be a reasonable and necessary medical expense related to the compensable injury for which the respondents remain liable.

Permanent impairment, which is usually a medical condition, is any permanent functional or anatomical loss remaining after the healing period has been reached. Ouachita Marine v. Morrison, 246 Ark. 882, 440 S.W.2d 216 (1969). Also, in Wilson & Co. v. Christman, 244 Ark. 132, 424 S.W.2d 863 (1968), the Arkansas Supreme Court held that physical functional loss may best be measured through physical examination by competent medical specialists.

The Commission must first evaluate the medical evidence and determine if the permanent impairment is supported by objective and measurable findings. Reader v. Rheem Mfg. Co., 38 Ark. App. 248, 832 S.W.2d 505 (1992). Ark. Code Ann. §11-9-704(c)(1)(B)(Repl. 1996) states that "any determination of the existence or extent of physical impairment shall be supported by objective and measurable physical or mental findings." In addition, permanent benefits may only be awarded upon a

determination that the compensable injury was the major cause of the impairment, Ark. Code Ann. §11-9-102(5)(F)(ii)(Repl. 1996).

The claimant is requesting the Commission assess permanent impairment based on the AMA Guidelines which recommend a 10% rating for a surgically treated disc (Table 75 (II)(E), p. 113).

The claimant's medical history is summarized in Judge Curdie's opinion. The claimant has been diagnosed with back problems at the L4-5 level related to both the aging process (bone spurs, swollen facets) as well as to the traumatic compensable injury (disc herniation, stenosis). The claimant also has some degenerative changes at other levels of his spine and a history of back pain and surgery in the 1970's at the L5-S1 level. Nevertheless, he made a complete recovery and had been able to work until the compensable accident in 1998. Therefore, I find the compensable injury is the major cause of this impairment and disability.

The claimant has suffered a protracted recovery period due to the fusion surgery and pain from nerve root foraminal stenosis. Accordingly, I find the 10% rating to be appropriate.

1. The Workers' Compensation Commission has jurisdiction of this claim in which the relationship of employer-employee-carrier existed among the parties during February 1998 at which time the claimant sustained a compensable back injury.
2. The respondents have failed to prove that this claim for additional benefits is barred by the doctrine of res judicata.
3. The claimant has proven by a preponderance of the evidence that the x-ray ordered by Dr. Johnson was reasonable and necessary in

relation to the compensable injury. The respondents are directed to pay the radiology bill of \$227.00.

4. The claimant has proven by a preponderance of the evidence of record that he is entitled to anatomical impairment in the amount of 10% to the body as a whole based on the 4<sup>th</sup> Edition of the AMA Guidelines for a surgically treated disc with residual symptoms. The compensable injury is the major cause of this impairment.
5. This claim has been controverted and the claimant's counsel is entitled to the maximum attorney's fees to be paid in accordance with A.C.A. §11-9-715, §11-9-801, and WCC Rule 10.

Pursuant to the Full Commission decisions of Coleman v. Holiday Inn, (November 21, 1990) (D708577), and Chamness v. Superior Industries, (March 5, 1992)(E019760), the claimant's portion of the controverted attorney's fee is to be withheld from, and paid out of, indemnity benefits, and remitted by the respondent, directly to the claimant's attorney.

As a reminder, Ark. Code Ann. §11-9-715 was amended by Act 1281 of 2001, limiting attorney's fees on medical benefits and services for injuries after July 1, 2001.

### **AWARD**

Respondents are directed to pay benefits in accordance with the Findings of Fact above along with their proportionate share of attorney's fees. All accrued sums shall be paid in a lump sum without discount and this award shall earn interest at the legal rate until paid, pursuant to A.C.A. §11-9-809, and Couch v. First State Bank of Newport, 49 Ark. App. 102, 898 S.W.2d 57 (Ark. Ct. App. 1995), and Burlington Industries, et al v. Pickett, 64 Ark. App 67, 983 S.W.2d 126 (1998), 336 S.W. 515,

988 S.W.2d 3 (1999).

IT IS SO ORDERED.

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ELIZABETH W. HOGAN  
Administrative Law Judge