

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F403435

RICHARD GIBBS,  
EMPLOYEE

CLAIMANT

MOFFATT LOGGING, INC.,  
EMPLOYER

RESPONDENT

CAPITAL CITY INSURANCE COMPANY,  
INSURANCE CARRIER

RESPONDENT

OPINION FILED SEPTEMBER 12, 2007

Upon review before the FULL COMMISSION in Little Rock,  
Pulaski 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.

Decision of Administrative Law Judge: Affirmed in part,  
vacated in part.

OPINION AND ORDER

The claimant appeals an administrative law judge's  
opinion filed December 7, 2006. The administrative law  
judge found that the claimant's request to return to Dr.  
Chakales was barred by the doctrine of *res judicata*. The  
administrative law judge found that the respondents were  
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." After reviewing the entire record *de novo*, the Full Commission affirms the administrative law judge's finding that *res judicata*, bars the claimant's request to return to Dr. Chakales. We vacate the administrative law judge's finding that the respondents are entitled to reimbursement for attorney's fees and hearing costs.

I. HISTORY

The parties stipulated that Richard Leon Gibbs, age 61, sustained a compensable back injury on February 28, 2004. Mr. Gibbs received conservative medical treatment beginning on or about March 1, 2004. A radiology report on April 16, 2004 showed "Minimal degenerative changes at the L2-3 disc." Dr. William C. Go reported on April 16, 2004, "X-ray showed no abnormality, except for muscle spasm and degenerative changes of the articular facet." Dr. Go's impression was "The patient most likely has back strain and it has not resolved yet."

Dr. D. Bud Dickson, an orthopaedic specialist, examined the claimant on May 20, 2004: "I have reviewed copies of x-rays of the lumbar spine 04/16/04. They show some mild degenerative changes with particular involvement of joint

space narrowing at L5-S1 facet levels. There is also some mild loss of lordosis. In order to fully evaluate this gentleman I have to have some additional records. Today I do not find significant objective findings to document a great deal of pathology, however, his workup is incomplete....His diagnosis now is osteoarthritis of the lumbar spine and there is no clinical evidence of a herniated disc...."

Dr. Dickson arranged an MR of the claimant's lumbar spine, which was taken on June 17, 2004 with the following impression: "1. MODERATE DESICCATION OF THE L4-5 DISC, OTHERWISE NEGATIVE." Dr. Dickson noted on June 30, 2004, "I believe that Mr. Gibbs complaints are not documented secondary to objective findings. I have given him a complete release and he can return to unrestricted activities. I believe this man is malingering."

The Administrator for the Commission's Medical Cost Containment Department signed a Change of Physician Order on January 21, 2005: "A change of physician is hereby approved by the Arkansas Workers' Compensation Commission for Richard Gibbs to change from Dr. D. Bud Dickson to Dr. Harold Chakales[.]"

Dr. Harold H. Chakales, an orthopaedic surgeon, examined the claimant on February 21, 2005 and noted, "An MRI of the lumbar spine done in June 2004 showed a desiccated disc at L4-5. He did not bring in these films today....Complete x-rays of the lumbar spine were made today and show some early degenerative disc disease at L4-5, L5-S1." Dr. Chakales diagnosed "Lumbar disc syndrome with radicular symptoms, bilateral."

Dr. Chakales wrote to SE Claims Service on February 21, 2005:

I saw Mr. Richard Gibbs today in my office for evaluation. Mr. Gibbs appears to have an acute lumbar disc syndrome with radicular symptoms bilaterally. I would recommend repeating the MRI of the lumbar spine, as well as obtaining an EMG/NCV of his back and both legs. I will see him in three weeks after these studies have been performed. He is still disabled. Enclosed is a copy of my initial history and physical examination.

The claimant returned to Dr. Chakales on March 16, 2005: "He is still having a lot of low back and neck pain and is symptomatic in both areas. I think he needs to have a repeat MRI and EMG, but that has not been ordered yet. I will see him in 4 weeks. **ADDENDUM:** The above recommended diagnostic studies are necessary for me to complete the evaluation."

The claimant testified on cross-examination regarding Dr. Chakales' treatment, "I went to him twice....The second time, he didn't do nothing to me because he said the insurance company wasn't paying for it and he couldn't accept me. I just made a bum trip up there for nothing."

A pre-hearing order was filed on May 18, 2005. The claimant contended that he remained symptomatic and wished to "pursue the recommendation of Dr. Chakales (see his report of February 21, 2005) for additional diagnostic testing (repeat MRI scan and EMG/NCV of the lower extremities)."

The respondents contended that additional medical treatment was not reasonably necessary. The respondents contended that the claimant had "already been evaluated by an MRI scan and released to return to work with no impairment. The respondents rely on Dr. Dickson's report of June 30, 2004 opining that the claimant is malingering."

The parties agreed to litigate the following issues: "Additional medical treatment and payment of expenses; controversion and attorney's fees. All other issues are reserved."

A hearing was held on June 27, 2005. The claimant's attorney stated, among other things, that "Dr. Chakales has indicated that in order to complete his evaluation, he needs to have some tests done; MRI and EMG studies....Now it is my contention that the change of physician has not been completed without the advent of a completed evaluation. That's what's necessary in order for Dr. Chakales to give us his opinion about Mr. Gibbs' opinion - or situation - excuse me - circumstance to which Mr. Gibbs is absolutely entitled under Arkansas workers' compensation law."

The respondents' attorney contended that "my client has complied with the law. They paid for the initial evaluation by Dr. Chakales as required and then determined after his evaluation that his treatment was not reasonable or necessary in relation to the injuries sustained by Mr. Gibbs."

The claimant testified, "I still have pain in my back just like something pressing against it all the time. Feel like a pin or something sticking in me. It feels like something's stretching in my back." The claimant testified

with regard to Dr. Chakales' treatment, "I would like to go through with the surgery."

The administrative law judge filed an opinion on September 23, 2005. The ALJ found, in pertinent part:

2. The respondents have paid all appropriate benefits (treatment, medication, diagnostic testing, consultation with specialists) pursuant to Ark. Code Ann. §11-9-508.

3. The claimant has failed to prove by a preponderance of the evidence that additional medical treatment with Dr. Chakales is reasonable and necessary.

The administrative law judge denied and dismissed the claim.

There was no appeal of the administrative law judge's September 23, 2005 opinion.

A pre-hearing order was filed on August 9, 2006. The claimant contended that the claim was 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 pre-hearing order reflected the respondents' contention, "this claim is barred by the doctrine of res judicata and seek costs of \$\_\_\_."

The parties agreed to litigate the following issues: "Res judicata; reasonable and necessary medical treatment; respondents' costs pursuant to Ark. Code Ann. §11-9-7814 (sic); controversion and claimant's attorney's fees. All other issues are reserved."

A hearing was held on September 8, 2006. The respondents' attorney stated, "We are seeking costs for me to get ready for this hearing, drive to this hearing, be at this hearing and drive back....That's gonna be \$750.00....I arrived at that as one hour preparation, one hour appearing and four hours of driving. At six hours and my charge to this client is \$125.00 an hour."

The claimant testified on direct examination:

Q. So the MRI scan that you had was, in fact, conducted after this injury. Is that true?

A. True.

Q. Okay. Now, Mr. Gibbs, Dr. Chakales, as we mentioned, was wanting to have some more testing done. Now, have you located those tests and tried to make arrangements for the films to be sent to Dr. Chakales' office?

A. Yes. I called Texas and I asked them about sending me the film. He said he couldn't send them to me but he would send them to the doctor. So that's what he sent them to....

Q. And do you understand that what we are asking Judge Hogan to do is to order the insurance people to allow Dr. Chakales to review that file and give a report in connection with that film. You understand that?

A. Yes sir.

Q. Otherwise, Dr. Chakales doesn't have any testing available to him to review. Is that your understanding?

A. Yes.

Q. Okay. Mr. Gibbs, the problems that you were talking about in your back and in your buttock area, are you still having those problems today?

A. I still have them.

The administrative law judge filed an opinion on December 7, 2006. The ALJ found, in pertinent part:

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.

The claimant appeals to the Full Commission.

II. ADJUDICATION

A. Res Judicata

The purpose of the *res judicata* doctrine is to put an end to litigation by preventing a party who had one fair trial on a matter from relitigating the matter a second time. *Cox v. Keahey*, 84 Ark. App. 121, 133 S.W.3d 430 (2003), citing *Brandon v. Arkansas W. Gas Co.*, 76 Ark. App. 201, 61 S.W.3d 193 (2001). *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). 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).

In the present matter, the Full Commission affirms the administrative law judge's finding that the issue of the claimant's entitlement to additional treatment with Dr. Chakales is *res judicata*. Following his compensable injury,

the claimant eventually received a change of physician allowing him to see Dr. Chakales. The claimant treated with Dr. Chakales on February 21, 2005. The respondents paid for this initial evaluation with Dr. Chakales, thus fulfilling their obligation to provide reasonably necessary medical treatment pursuant to Ark. Code Ann. §11-9-508. See, *Wal-Mart Stores, Inc. v. Brown*, 82 Ark. App. 600, 120 S.W.3d 153 (2003). The claimant subsequently contended that he was entitled to additional diagnostic testing to be provided by Dr. Chakales and the parties agreed to litigate the issue of additional medical treatment. At the hearing held on June 27, 2005, the claimant contended that he was entitled to additional treatment with Dr. Chakales.

The administrative law judge filed an opinion on September 23, 2005, and found that the claimant did not prove he was entitled to additional treatment with Dr. Chakales. The claimant did not appeal the administrative law judge's September 23, 2005 opinion. The claimant now contends that Dr. Chakales did not "complete his evaluation." Nevertheless, the record shows that the respondents paid for the claimant's initial visit with Dr. Chakales. See, *Brown, supra*. The claimant did not appeal

the administrative law judge's finding on September 23, 2005 that additional treatment with Dr. Chakales was not reasonably necessary. The claimant had full and fair opportunity to litigate additional treatment with Dr. Chakales. This issue is *res judicata*, and we affirm the decision of the administrative law judge.

B. Costs/Sanctions

The respondents' attorney stated at hearing that he was entitled to "costs" for time spent preparing for hearing, appearing at the hearing, and driving to and from the hearing. Counsel on appeal cites Ark. Code Ann. §11-9-714, which provides for an assessment of costs when a proceeding has been instituted without reasonable grounds. However, there is no provision in Ark. Code Ann. §11-9-714 for an award of attorney's fees. See, *Couch v. First State Bank*, 49 Ark. App. 102, 898 S.W.2d 57 (1995). The respondents also cite Ark. Code Ann. §11-9-717:

(b) Appropriate sanctions, including the amount of reasonable expenses and attorney's fees, may also be imposed against a party or its attorney which, without good cause shown, fails to appear for a hearing, deposition, or any other matter scheduled by the commission or administrative law judge, or frivolously joins another party.

In the present matter, although the Full Commission has found that the claimant's request for medical treatment is *res judicata*, there is no indication that the claimant "frivolously joined another party." Nor does the record show that the claimant's attorney filed a claim that was not grounded in fact. See, *Johnson v. Triple T Foods*, 55 Ark. App. 83, 929 S.W.2d 730 (1996). The Full Commission therefore vacates the administrative law judge's finding, in the instant matter, that the respondents are entitled to reimbursement for attorney's fees and hearing costs.

Based on our *de novo* review of the entire record, the Full Commission affirms the administrative law judge's finding that the claimant's request to return to Dr. Chakales is barred by the doctrine of *res judicata*. We vacate the administrative law judge's finding that the respondents are entitled to reimbursement for attorney's fees and hearing costs. This claim is denied and dismissed.

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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KAREN H. MCKINNEY, Commissioner

Commissioner Hood concurs and dissents.

CONCURRING AND DISSENTING OPINION

I must respectfully concur in part and dissent in part from the Majority opinion. Specifically, I concur with the Majority's opinion that the respondents are not entitled to costs pursuant to Ark. Code Ann. §11-9-714 or Ark. Code Ann. §11-9-717. However, I must respectfully dissent from the finding that the doctrine of res judicata applies and that the claimant is therefore not entitled to additional medical treatment.

I now write separately to briefly elaborate on the issue of whether the respondents are entitled to costs pursuant to Ark. Code Ann. §11-9-717. The only basis that I can see in the Judge's Opinion for finding that the claim was frivolous was that the claimant did not prevail. As previously indicated, I believe that the claimant's claim should not have been barred. However, irregardless of whether one agrees with that opinion, I believe that more evidence is necessary to justify an award of costs and attorney's fees to the respondent. From my review of prior decisions of this Commission, it has been stated that, after a claim has been dismissed

for lack of prosecution, a claimant or their attorney can be sanctioned for immediately refiling the claim when no dispute exists and there is no intention to pursuing it to a hearing. See Johnson v. Triple D, Inc., Full Commission Opinion, January 11, 1995 (E219745); Gore v. National Pizza Company, Full Commission Opinion, February 7, 1997 (E404917).

I believe that this case falls well short of that standard. Here, the claimant's attorney, gave a good faith argument, that the issue presented here was different than the issue dealt with in the September 23, 2005 decision. While he ultimately did not prevail in that regard, it does not appear to me that this argument was made without reasonable cause. Further, there is no finding that either the claimant or his attorney failed to review or read the claim documents or that the claimant's attorney did not believe that their argument was without merit under existing law or that it was filed for any improper purposes such as delay or harassment. If failing to convince an Administrative Law Judge or the Commission to rule favorably was the basis for an award of costs or attorney's fees, then the award of such benefits would become routine. In my

opinion, before such a harsh action is taken, it must be apparent that the actions of the claimant and his attorney in filing the claim were made knowing that there was no basis for the claim or that it was made for an improper purpose. In this case, there is simply no basis for reaching such a conclusion.

Therefore, I respectfully concur in part and dissent in part.

PHILIP A. HOOD, Commissioner