

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. H005445

GERARDO PEREZ MUNOZ, Employee	CLAIMANT
AZZ GALVANIZING, INC., Employer	RESPONDENT
AMERICAN ZURICH INS. CO., Carrier	RESPONDENT

OPINION FILED APRIL 7, 2025

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by EVELYN E. BROOKS, Attorney at Law, Fayetteville, Arkansas.

Respondents represented by KAREN H. MCKINNEY, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On March 12, 2025, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on January 15, 2025, and a pre-hearing order was filed on that same date. A copy of the Pre-hearing Order has been marked Commission's Exhibit No. 1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.

2. The prior Opinion of June 28, 2021, is final.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Compensability of injury to claimant's cervical spine on June 10, 2020.
2. Related medical.
3. *Res judicata*.
4. Law of case.
5. Claim proclusion.

At the time of the hearing the parties agreed to litigate the claimant's entitlement to payment of an impairment rating for his compensable right shoulder injury.

The claimant contends his neck was injured at the same time his shoulder was injured and he is entitled to medical treatment for his neck. Claimant reserves all other issues.

With regard to the alleged cervical injury, respondents contend the claimant was the subject of a full hearing on May 26, 2021 wherein claimant alleged a compensable injury. Following the taking of testimony and review of the medical records, the ALJ found that the claimant proved he sustained a compensable injury to his right shoulder and upper arm. *Res judicata* applies where there has been a final adjudication on the merits of an issue by a court of competent jurisdiction on all matters litigated and those matters necessarily within the issue which might have been litigated. See *Castleberry v. Elite Lamp Company*, 69 Ark. App. 359, 13 S.W. 3d 211 (2000); *Harvest Foods v. Washam*, 52 Ark. App. 72, 914, S.W. 2d 776 (1996); *Perry v. Leisure Lodges, Inc.*, 19 Ark. App. 143, 718 SW. 2d 114 (1986). *Res judicata* applies to decisions of the Workers' Compensation Commission if the merits of the issue have already been subject to a full and fair hearing. *Beliew v. Stuggart Rice Mill*, 64 Ark. App. 334, 980 S.W. 2d 270 (1998); *Perry, supra*. The rationale underlying the doctrine of *res judicata* is

to end litigation by preventing a party who has had one fair trial of a question of fact from again drawing it into controversy. *Cox v. Keahey*, 84 Ark. App. 121, 133 S.W. 3d 430 (2003); *Mohawk Tire & Rubber Co v. Bridger*, 259 Ark. 728, 536 S.W. 2d 126 (1976).

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on January 15, 2025, and contained in a pre-hearing order filed that same date are hereby accepted as fact.

2. Claimant's claim for compensability of an injury to his cervical spine on June 10, 2020, is barred by the doctrine of *res judicata*.

3. Claimant has met his burden of proving by a preponderance of the evidence that he is entitled to payment of permanent partial disability benefits in an amount equal to 10% to the body as a whole for his compensable right shoulder injury.

4. Respondent has controverted claimant's entitlement to payment of the 10% rating to the right shoulder and is liable for payment of an attorney fee.

FACTUAL BACKGROUND

It should be noted that the primary issue of the current claim is compensability of a cervical spine injury on June 10, 2020. However, before addressing that issue it is important to set out the history of this claim.

Claimant is a 54-year-old man who began working for respondent in 2019. At the first hearing in this claim on May 26, 2021, claimant described his job duties: “I would bring the cold bars out of the water and then use a grinder to cut them so they could be used.” He also testified that on June 10, 2020, a piece of heavy metal got loose, and the following occurred:

I was working with some chassis with my partner and our crane was off and I don't know how was it that the next crane was on and it pushed the other one, and so that it would not hit me, I tried to push it back and that is how my shoulder was hurt, my right shoulder.

A video of this incident was submitted into the record at the time of the first hearing, and it has been duplicated in the transcript of the most recent hearing.

Following this incident, claimant was sent for medical treatment and diagnosed as suffering a sprain of the right shoulder. Claimant performed some light duty work for respondent for several weeks, continuing to work for respondent until he was taken off work after developing COVID. While he was off work, he was terminated by respondent.

Claimant's claim for an injury to his right shoulder was denied and a hearing on compensability of injury to his right shoulder and upper arm was conducted on May 26, 2021. Following the hearing, an Opinion was filed by this administrative law judge on June 28, 2021, finding that claimant had proven a compensable injury to his right shoulder and upper arm; and awarding payment of all reasonable and necessary

medical treatment. Neither party appealed that opinion and the parties have stipulated that it is final.

After the first hearing, claimant came under the care of Dr. James Boyle who performed surgery on claimant's right shoulder on April 25, 2022. After the surgery, claimant underwent physical therapy and was released by Dr. Boyle on August 30, 2022.

When claimant's right shoulder complaints continued, he sought additional medical treatment from Dr. Christopher Dougherty. Dr. Dougherty performed a second procedure on claimant's right shoulder on October 17, 2023, to address loosened hardware as well as impingement syndrome and acromioclavicular joint arthritis. At some point, Dr. Dougherty also performed a carpal tunnel release on claimant's right wrist. On June 5, 2024, Dr. Dougherty indicated that claimant could return to work with gradual increases in the amount of weight he could lift. A form completed at The Agility Center dated June 26, 2024, indicates that claimant reached maximum medical improvement on June 5, 2024, and that he has a 10% impairment rating to his right shoulder per the AMA Guides 4th Edition.

Claimant has filed this claim contending that he suffered a compensable injury to his cervical spine during the incident on June 10, 2020.

ADJUDICATION

Claimant contends that in addition to his compensable right shoulder and upper arm injury on June 10, 2020, he also suffered a compensable injury to the cervical spine

on that date. Respondent contends that the doctrine of *res judicata* bars litigation of the cervical spine claim.

Res judicata applies where there has been a final adjudication on the merits of an 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. Stuggart Rice Mill*, 64 Ark. App. 334, 987 S.W. 2d 281 (1998). The key question 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).

Res judicata does not apply if a claimant has sustained a change in condition or seeks benefits for a subsequent period of complications. *Rothrock v. Advanced Envtl. Recycling*, 218 Ark. App. 88, 544, S.W. 3d 61.

Even though the Workers' Compensation Commission is not a court, its awards are in the nature of judgements, and the doctrine of *res judicata* applies to its decisions. *Gwin v. R. D. Hall Tank Co.*, 10 Ark. App. 12, 660 S.W. 2d 947 (1983).

I find that the matter of compensability of an alleged cervical spine injury could have been litigated at the time of the first hearing; therefore, the doctrine of *res judicata* is applicable and bars litigation of the current claim.

The issue at the time of the first hearing was compensability of an injury to claimant's right shoulder and upper arm. At the first hearing claimant did not mention complaints of neck pain immediately after his accident. However, at the second hearing claimant testified that he had neck pain present since the time of the accident. This is the only significant difference in claimant's testimony at the first hearing versus his testimony at the second hearing.

At some point, claimant's primary care physician, Dr. Clinton Turner, recommended physical therapy for claimant's right shoulder/arm pain. This was delayed for a period of time because claimant was no longer working. (Turner report of December 30, 2020). Claimant began physical therapy on January 20, 2021, and the initial evaluation includes complaints of right sided neck pain with cervical traction included in claimant's physical therapy regimen. Thereafter, Dr. Turner in a report dated February 19, 2021, indicated that he believed claimant had cervical radiculopathy, and he ordered an MRI scan that was performed on February 26, 2021, and read as showing a central disc protrusion at C5-6 and C6-7. Thereafter, claimant's treatment was primarily for his right shoulder and arm. Nevertheless, these medical reports existed prior to the original hearing on May 26, 2021.

The initial hearing on May 26, 2021, was just three months after claimant's cervical MRI scan. The testimony presented at the second hearing in this claim involves the exact same accident previously testified to by claimant at the first hearing and with the exception of claimant mentioning pain in his neck at the second hearing it is essentially the same testimony. Claimant was also questioned about his movements during the accident with the same exact video used to question his movements at the time of the first hearing.

More significantly, the medical evidence relating to a potential cervical spine injury is the same medical evidence that existed at the time of the first hearing. Claimant has not undergone any additional evaluations for his cervical spine complaints since the first hearing.

In short, virtually all of the evidence that existed relating to a potential cervical spine injury existed at the time of the first hearing. This supports the finding that this is a matter that might have been litigated at that time.

In support of his contention that the doctrine of *res judicata* is not applicable, claimant notes that in his contentions at the time of the first hearing it includes language stating: “Claimant reserves all other issues.” No mention was made of reserving the specific issue of compensability of an injury to the cervical spine. Obviously, there are instances in which compensability of injuries to different parts of the body may necessitate more than one hearing, such a newly discovered diagnosis or testing revealing an additional potential body part that was injured. Those do not exist here. Nor is there any evidence of a change in condition or of the claimant seeking benefit for a subsequent period of complications.

In this case, the evidence is essentially the same as the evidence presented at the first hearing. No reason has been offered as to why compensability of an injury to claimant’s cervical spine could not have been litigated at the time of the first hearing. Thus, I do not find that this general statement in claimant’s contentions is sufficient to nullify the doctrine of *res judicata*.

The purpose of the doctrine of *res judicata* 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); *Brandon v. Arkansas Western Gas Company*, 76 Ark. App. 201, 61 S.W. 3d 193 (2001). As previously noted, the key question 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, id. This includes not only the matters litigated, but also those matters within the issue that might have been litigated. Here, it seems clear that the issue of compensability of an injury to claimant's cervical spine was within the issue of compensability and could have been litigated at the time of the first hearing. Claimant's testimony at the two hearings was essentially the same and the medical evidence was in existence at the time of the first hearing.

Based on the foregoing, I find that the issue of compensability of injury to the neck on June 10, 2020, is an issue that could have been litigated at the time of the first hearing. Therefore, this claim is barred by the doctrine of *res judicata*.

The final issue for consideration involves claimant's request for payment of permanent partial disability benefits based on a 10% impairment rating assigned for his compensable right shoulder injury. Claimant has undergone two surgical procedures on his right shoulder. The documentary evidence contains a report dated June 26, 2024, from The Agility Center noting that claimant reached maximum medical improvement on June 5, 2024, and stating that according to the AMA Guides 4th Edition, claimant has a permanent impairment rating equal to 10% to the body as a whole for his right shoulder injury. I find that the report assigning the 10% rating is credible and entitled to great weight. Therefore, I find that claimant has met his burden of proving by a preponderance of the evidence that he is entitled to payment of permanent partial disability benefits in an amount equal to 10% to the body as a whole. Respondent has controverted payment of this impairment rating.

AWARD

Claimant's claim for a compensable cervical spine injury is barred by the doctrine of *res judicata*. Claimant has proven by a preponderance of the evidence that he is entitled to payment of permanent partial disability benefits in an amount equal to 10% to the body as a whole. This payment was controverted by the respondent.

Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the indemnity benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant. Also pursuant to A.C.A. §11-9-715(a)(1)(B), an attorney fee is not awarded on medical benefits.

Respondents are liable for payment of the court reporter's charges for preparation of the hearing transcript in the amount of \$582.30.

IT IS SO ORDERED.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE