

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION
CLAIM NUMBER G500564**

JESSE HOPPER (DEC'D), EMPLOYEE

CLAIMANT

**J.C. FODALE ENERGY SERVICES, LLC,
EMPLOYER**

RESPONDENT #1

**NEW HAMPSHIRE INS. CO./ AIG CLAIMS, INC.,
INSURANCE CARRIER/TPA**

RESPONDENT #1

**DEATH & PERMANENT TOTAL DISABILITY
TRUST FUND**

RESPONDENT #2

OPINION FILED SEPTEMBER 24, 2021

Hearing before Administrative Law Judge James D. Kennedy on the 3rd day of August, 2021, in Little Rock, Pulaski County, Arkansas.

The claimant's estate is represented by George Bailey, Attorney at Law, of Little Rock, Arkansas.

Respondents #1 are represented by Jarrod Parrish, Attorney at Law, of Little Rock, Arkansas.

Respondent #2 is represented by David Pake, Attorney at Law, of Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was conducted on August 3, 2021, after two (2) prehearing telephone conferences, to determine payments in regard to attorney fees after the benefit payment threshold was reached for the Death and Permanent Disability Fund to take over the payment of benefits.

The claimant's stated position is that the estate is entitled to additional attorney fees from Respondents as claimed in its prehearing questionnaires and proposed stipulations that were made part of the record.

Respondents #1 contend that the claimant is not entitled to additional attorney fees and that the claim for additional attorney fees is barred by *res judicata* and the statute of

limitations.

Respondent #2 contends the Form AR-C, which was filed on September 4, 2015, made no claim for attorney fees and the Claimant's Prehearing Questionnaire alleging "controversion of the claim in its entirety" was not sufficiently specific to serve as a claim for attorney fees. Respondent #2 also raised *res judicata* and the statute of limitations. Additionally, Respondent #2 argued that it was excused from an earlier hearing due to the fact neither party contended the Trust Fund controverted the claim.

A second prehearing conference was conducted on June 28, 2021, and a Prehearing Order was filed in this matter on June 29, 2021. The second prehearing conference was a continuation of the original prehearing conference, which had to be continued due to time limitations. A copy of the Prehearing Order is marked "Commissions Exhibit 1" and made part of the record without objection. It is stipulated that the Arkansas Workers' Compensation Commission has jurisdiction of the claim and that an employer-employee relationship existed on December 7, 2014, the date of the fatal car wreck. The claimant's estate was previously found to have satisfied its burden of proof by a preponderance of evidence that the claimant's work-related death on December 7, 2014, was compensable, which was confirmed by the Full Commission. The Full Commission Opinion dated June 14, 2018, adopted the decision of the Administrative Law Judge, and consequently the Administrative Law Judge Opinion and the Commission Opinion constitutes the law of the case.

Additionally, the claimant's multiple responses, including amended responses to the Prehearing Questionnaire, were admitted into the record without objection. Both Respondents' responses to the Prehearing Questionnaire were also admitted to the record without objection.

The claimant's Exhibit One, which included the claimant's brief and an outline of the claimant's contentions, were admitted into the record without objection. The parties were instructed to submit briefs simultaneously fourteen (14) days post-hearing. Respondent's briefs were blue-backed and made a part of this opinion. In addition, Respondent's #2 submitted documents were admitted into the record without objection.

No witnesses testified, and the hearing consisted solely of oral argument in regard to the parties' respective positions on the issue of attorney fees. From a review of the record to include the documentary evidence and other matters properly before the Commission, and having had an opportunity to hear the arguments of the attorneys and to review the submitted briefs, the following findings of fact and conclusions of law are made in accordance with Ark. Code Ann. § 11-9-704.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. An employer/employee relationship existed on December 7, 2014, the date of the fatal car accident.
3. The claimant's estate was found to have satisfied the burden of proof by a preponderance of the evidence that the claimant's work-related death on December 7, 2014, was compensable, and this finding was adopted by the Full Commission on June 14, 2018, and became the law of the case.
4. The Trust Fund did not controvert the case.
5. The claimant's estate has failed to satisfy the required burden of proof to show that it is entitled to an order for additional attorney fees due to the applicable statute of limitations and *res judicata* or claim preclusion.

REVIEW OF ARGUMENTS OF COUNSEL

The claimant's estate's attorney contended the claim was controverted at every stage of the proceeding and was controverted in its entirety. Further, it was contended

that the Administrative Law Judge’s Opinion provided the case was controverted in the entirety and that the party that strings out the litigation or makes it more complicated is the party that has the burden of statutory attorney fees pursuant to Ark. Code Ann. § 11-9-715. The cap, or the threshold for the Fund to take over indemnity benefits, is a limitation of liability. “The statute simply says that when 325 weeks of indemnity is paid times the comp rate, then the Fund will take over paying the benefits.” (Tr. 8, 9) There is nothing in the statute that says there is a cap and that attorney fees are based on 325 weeks of indemnity.

In fact, the respondents have paid much more than 325 weeks times the compensation rate because they’ve paid, besides deducting half the statutory attorney fee from the Claimant’s beneficiaries portions of the indemnity, they have paid attorney fees, their share of the attorney fees on all 325 weeks [...] We would contend that they have waived any contention that attorney fees aren’t owed, that the case has not been controverted by paying those attorney fees up to that point [...] The attorney fees under 11-9-715 is one-half of that on all that is awarded and controverted.

The claimant’s argument relied on the case of Hot Springs County Bicentennial Park, and contended the case specifically addressed the issue in question. The claimant also contended that since March 1, 2020, the date of the payment of 325 weeks of indemnity benefits and the date the Fund took over the payment of benefits, an Order was entered whereby the claimant’s share of the statutory attorney fee was deducted from the amount paid by the Fund. As of March 1, one-half (1/2) of the statutory attorney fee has no longer been paid. (Tr. 10 – 12) The claimant also argued that a hearing was requested on March 24, 2021, when it was determined that Respondents #1 were not paying its share of attorney fees on the indemnity benefits. A requested hearing prior to that date would have been the equivalent of asking for an advisory opinion. (Tr. 10 – 12) The claimant also argued in the alternative that if Respondents’ #1 argument in regard to

a change in the statute were to prevail, then it would simply mean that in a death case, half of the attorney fees would never be paid once the threshold was reached and the Fund took over. (Tr. 14) “You would set up a scenario where Respondent #1 would get to quit paying after 325 weeks of benefits were paid, and Respondent #2, which deferred to the litigation, would not if their contention is that they have not controverted the case, that they deferred to the litigation, then you would always have a situation where a big part of the award, that which accrues after 325 weeks, half the statutory attorney fee would never be paid after 325 weeks.” (Tr. 15)

Respondents #1 contended that Ark. Code Ann. § 11-9-1202 plainly provided that in a claim for death benefits, the employer/insurance carrier shall pay weekly benefits for a death which should not exceed 325 times the maximum total disability rate from the date of the injury. This clearly set the maximum indemnity exposure for a Respondent and acted as a cap. “It terminates the indemnity liability for the Respondent per statute.” Ark. Code Ann. § 11-9-715, the fee statute, provides that if the claim against the death fund had been controverted in whole or in part, the Commission shall direct payment of the fees, “--- on the amount of compensation controverted and awarded from the Fund.” The sentence makes clear that the amount in excess of what the Respondents owe is separate from the amount awarded against them. Otherwise, there would no mechanism for a fee to be awarded against the Fund. “Stated another way, if Respondents owe a fee forever and always because of litigating a death claim like this, there would be no reason for a fee statute to exist to allow a fee against the Death Fund. And in this case, I’m not maintaining that the Death Fund controverted the claim or that they owe a fee, but the mechanism is there if they do [...] We paid a fee on the amount in controversy awarded against us. The Death Fund has an opportunity to accept or

deny their portion of the claim that deals with them.” (Tr. 17, 18) In regard to the case cited by the claimant, this is a 1981 case that clearly predates the Arkansas Workers’ Compensation Act of 1992. As you are aware, “Ark. Code Ann. § 11-9-1001 of the Act clearly states the legislature’s desire to repeal/overrule/annul any prior case law that constitutes a judicial broadening of the Act or addition of statements to the Act that aren’t present.” (Tr. 19) Respondents #1 also joined in Respondent’s #2 argument regarding *res judicata* and the statute of limitations. (Tr. 20)

Respondent #2 pointed out that neither party made a serious allegation that the Trust Fund should in any way be responsible for attorney fees under the facts of this particular case. When it became time for the Trust Fund to take over benefits in March 2021, the Trust Fund saw that there was no order for attorney’s fees anywhere in the case. It was aware that Ark. Code Ann. § 11-9-715 provided that any attorney fee had to have the approval of the Commission.

I’ve been doing this workers’ comp business for a long time, and I’ve never really seen a situation until now where attorney fees were paid and received in a case and there was no prior approval of the Commission for them being done that way. Had there been at some point, preferably a request by the Claimant and Respondent Number One to submit to you an attorney fee settlement agreement or however they wanted to present it to get Commission approval, then we would not be here today on these issues.

Respondent #2’s representative provided he believed that the attorney for the claimant was entitled to an attorney fee, and based upon both his thoughts and the director of the Fund, the Fund initiated the request for an Agreed Order which allowed the withholding of twelve and one-half percent (12.5%) for attorney fees out of the benefits due the claimant. However, since the Trust Fund did not controvert the claimant’s entitlement to benefits, no attorney fee was due from the Trust Fund. (Tr. 21, 22)

Respondent’s #2 representative also pointed out that the Form AR-C dated

September 4, 2015, made no request for an attorney fee. The claimant's Prehearing Questionnaire Response of August 20, 2015, had a statement in the contentions portion that the claim had been controverted but not in the issues section. The Prehearing Order of July 17, 2017, provided the claimant's claim had been controverted in its entirety, but the Prehearing Order made no provision for a request for an attorney fee. The Opinion, issued by the Administrative Law Judge and later adopted by the Full Commission, made no determination in regard to the claim being controverted in its entirety. (Tr. 23) Respondent's #2 representative also argued it was the burden of the party presenting an issue to obtain a ruling on it. (Tr. 26)

DISCUSSION AND ADJUDICATION OF ISSUES

The sole issue before the Commission at the time of the hearing was to determine the assessment of attorney fees after the payment threshold was reached and the Death and Disability Fund, Respondent #2, took over the payment of benefits. It is undisputed that an employer/employee relationship existed on December 7, 2014, the date when the claimant unfortunately and sadly lost his life due to an automobile accident that was found to be work-related. Respondents #1 controverted the claim. Respondents #2 clearly did not controvert the claim and did not appear at the original hearing. The ALJ found the claim compensable, and the decision was affirmed and adopted by the Full Commission on June 14, 2018. The original Opinion by the ALJ and the Opinion issued by the Full commission made no provision involving attorney fees. No appeal was filed in regard to the Opinion issued by the Full Commission and Respondents #1 made the required payments to the claimant's beneficiaries, deducting one-half (1/2) of the statutory attorney fees from the benefits paid to the claimant, plus also paying an additional one-half (1/2) of the statutory attorney fee payments for 325 weeks until the Trust Fund took

over the payment of benefits and the payment of the attorney fees stopped. An agreed upon Order was later entered and Respondents #2, the Trust Fund, started withholding one-half (1/2) of the statutory attorney fee from the benefits paid to the claimant by the Fund.

It is noted that the Form AR-C filed on September 24, 2015, asked for death benefits, but the box for attorney fees was not checked. The October 20, 2015, Prehearing Questionnaire filed by the claimant did not include attorney fees as an issue but did contain a provision in the Contentions section that, "This claim has been controverted in its entirety." The Prehearing Order at that time stated that the sole issue for consideration was to be, "Whether the death of Jesse Hopper was compensable."

The claimant argued and relied upon the case of Hot Springs County v. Walker, 271 Ark. 688, 610 S.W.2d 268 (1981), which provides that attorney fees are calculated on the amount controverted and awarded. Ark. Code Ann. § 11–9-715 provides that fees for legal services rendered in respect of a claim shall not be valid unless approved by the Workers' Compensation Commission. The statute goes on to provide that attorney fees shall be twenty-five percent (25%) of the compensation for indemnity benefits payable to the injured employee or dependents of a deceased person, with one-half (1/2) of the attorney fee payable by the employer or carrier and one-half (1/2) of the attorney fee payable by the injured employee or dependents of a deceased employee out of the compensation payable to them. The 2001 amendment to the statute added a provision that required the Death and Total Disability Trust Fund to pay an attorney fee if it controverted benefits. Here it is clear that Respondent #2, the Fund, did not controvert the claim or any of the indemnity benefits and further that no party really contended that it did.

The original Opinion by the ALJ entered on January 12, 2018, found the claim compensable but made no finding in regard to attorney fees and also no finding in regard to the claim being controverted in its entirety. The Opinion entered by the Full Commission on June 14, 2018, adopted and affirmed the ALJ's Opinion, only awarding the claimant's attorney a fee of \$500.00 for prevailing on the appeal, but made no additional finding in regard to attorney fees for the original hearing.

A mere claim or contention does not constitute a finding. No finding for attorney fees was ever ordered or approved as required under the Arkansas Workers' Compensation Act, and since no finding or award of attorney fees occurred on January 12, 2018, the attorney fees payment by Respondents #1 must be considered voluntary. Arkansas is a "benefit specific state" and there is clearly a distinction between the various types of benefits available such as medical, indemnity, attorney fees, etc. See Kirk v. Cent. States Mfg., 2018 Ark. App. 78, 540 S.W.3d 714 (2018). The claimant has the burden of proof for a specific benefit, which would include a Commission-ordered attorney fee. If the benefit is not ordered for whatever reason, the burden lies on the claimant to make a contention in a timely manner, either by a Motion for Reconsideration or by filing an appeal or cross appeal at the time the matter is appealed to the Full Commission. Ark. Code Ann. § 11-9-702 (C) 3 provides for a two (2)-year statute of limitations on benefits on account of death. In the present matter, no claim for the specific benefit of attorney fees was made within two (2) years of the fatal accident or the final Order of the Commission. The voluntary payment of attorney fees does not toll the statute of limitations.

Additionally, the legal concept of *res judicata* is also applicable. Under the doctrine of *res judicata* or claim preclusion, a valid and final judgment rendered on the

merits by a court of competent jurisdiction bars another action by the claimant or his privies against the respondents or its privies on the same claim or cause of action. Here, a decision was entered by the Full Commission on June 14, 2018, and there was no appeal from the decision. See Ark La Gas v. Taylor, 314 Ark. 62, 858 S.W.2d 88 (1993). Clearly, the Arkansas Workers' Compensation Commission is the place for the appropriate and competent jurisdiction. The doctrine of *res judicata* applies not only to those issues which were actually tried, but also to the issues which could have been tried and therefore determined in the one action. See Williams v. Connecticut General Life Ins. Co., 26 Ark. App. 59, 759 S.W.2d 815 (1988). The issue of attorney fees was not addressed in the Opinion issued by the Full Commission. No Order by the Full Commission was entered in regard to the payment of attorney fees, and the time for appeal or for reconsideration has long run. The matter cannot be re-litigated.

Clearly, the issue in regard to the sufficient payment of attorney fees is an important one under the Workers' Compensation Act. It is easy to understand how the issue of attorney fees in the present matter could have gone unnoticed due to the fact that the attorney, who was ably representing the claimant's survivors, was being paid up and until Respondent #2 took over the payments as required by statute. However, the Arkansas Workers' Compensation Act must be strictly construed, and since no attorney fee was ordered either in the Opinion issued by the ALJ nor the later Opinion issued by the Full Commission on June 14, 2018, there is no alternative but to find that the claim for the additional attorney fees is time barred by the statute of limitations and also by *res judicata*.

After reviewing this case impartially, without giving the benefit of the doubt to either party, it is found that the claimant's estate has failed to satisfy the required burden of proof to show that it is entitled to an order for additional attorney fees due to the applicable

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statute of limitations and *res judicata* or claim preclusion.

IT IS SO ORDERED.

JAMES D. KENNEDY
Administrative Law Judge