

**BEFORE THE ARKANSAS WORKERS' COMPENSATION
COMMISSION**

CLAIM NO. F004444

JO ANN SILK (BLANKENSHIP), EMPLOYEE **CLAIMANT**

**LAMB & ASSOCIATES PACKAGING, INC.,
EMPLOYER** **RESPONDENT**

**NATIONAL SURETY COMPANY,
INSURANCE CARRIER** **RESPONDENT**

OPINION FILED OCTOBER 5, 2005

Submitted on the record before Administrative Law Judge Cynthia Estes Rogers.

Claimant represented by Mr. Michael Hamby, Attorney at Law, Greenwood, Arkansas.

Respondents represented by Ms. Wendy Scholtens Wood, Attorney at Law, Little Rock, Arkansas.

This case was submitted on briefs to determine the issues of whether claimant is entitled to a change of physician and ongoing medical treatment or whether these claims are barred by the doctrine of *res judicata*.

According to the Prehearing Order filed May 2, 2005, the parties stipulated to the following:

- 1) that claimant suffered an injury to her right elbow/arm, which was accepted as compensable by respondents;

- 2) that respondents have paid indemnity benefits in excess of \$38,000.00 and medical benefits in excess of \$46,000.00;
- 3) that claimant received an impairment rating issued by Dr. Tod Ghormley in November of 2001, and respondents have paid that rating;
- 4) that in October of 2002, claimant filed a Form AR-C, requesting additional medical treatment. The case was submitted on the record before the Administrative Law Judge who, on April 7, 2003, entered an Opinion that the claimant did not meet her burden of proving by a preponderance of the evidence of record that she is entitled to ongoing medical treatment as a result of her compensable injury. The claimant then appealed this Opinion to the Arkansas Workers' Compensation Full Commission which, on December 15, 2003, affirmed the Opinion of the Administrative Law Judge. The claimant then appealed the case to the Arkansas Court of Appeals which, on September 29, 2004, dismissed claimant's appeal.

Claimant contends that she has moved to California and would like a change of physician to a doctor in California, as well as continued medical treatment at respondents' expense.

Respondents contend that the claimant's claims are barred by the doctrine of *res judicata*. Respondents originally also contended that the claimant's claims were

barred by the statute of limitations; however, respondents chose not to assert this argument in their brief. As an alternative to their *res judicata* argument, respondents contend that the claimant's claim for additional medical treatment is not reasonable and necessary.

STATEMENT OF THE CASE

In this case, it is undisputed that claimant suffered an injury to her right arm/elbow on or about January 24, 1999, while in the employ of respondent-employer. As was stipulated, the injury was accepted as compensable by respondents, and respondents have paid medical benefits in excess of \$46,000.00, as well as indemnity benefits, both temporary total disability and permanent partial disability benefits, in excess of \$38,000.00.

Claimant worked on the conveyor line for respondent-employer, flipping cardboard boxes, in sizes anywhere from 12 x 12 to 8 x 10. She maintains that on January 24, 1999, while flipping the boxes into a machine, she felt intense pain between her elbow and her wrist on the inside of her right arm and elbow. She claims she reported the injury to her foreman and was sent immediately to Dr. Jeff Carfagno in Maumelle. Respondents maintain that Dr. Carfagno was claimant's family physician and that she chose to see him. Either way, claimant began seeing Dr. Carfagno the day after the accident, missed time from work on and off for the next several months, respondents accepted the claim, and paid appropriate benefits.

Dr. Carfagno initially treated claimant with ice and a cock-up splint. The claimant later advised Dr. Carfagno she could not wear the splint because of pain in her right elbow. Dr. Carfagno continued treating claimant with a regimen of physical therapy. He treated her until August 13, 1999, whereupon he referred her to Dr. Frazier, an orthopaedist. On the claimant's last visit with Dr. Carfagno, he stated in an office note: "Nothing I've done seems to have made much difference."

The claimant began treating with Dr. Frazier on August 30, 1999. Dr. Frazier diagnosed the claimant with chronic lateral epicondylitis. In October of 1999, Dr. Frazier recommended a Nirschl procedure of the right elbow. That procedure was performed in November of 1999. The claimant continued to treat with Dr. Frazier, complaining of pain. Dr. Frazier later assessed the claimant with some radial nerve irritation following a radial tunnel decompression.

The claimant continued to treat with Dr. Frazier, and in March of 2000, Dr. Frazier referred the claimant to Dr. Bruce Safman for pain management evaluation. Dr. Safman, in March of 2000, remarked in an office note, "I am unable to elicit the exact cause of her persistent elbow complaints."

The claimant then returned to Dr. Frazier for additional treatment. Dr. Frazier stated in a letter to Dr. Carfagno, dated June 5, 2000, that he had placed the claimant under general anesthesia for purposes of manipulating her elbow a few days prior to the June 5, 2000, letter. He stated specifically:

I informed her that at the time of her general anesthetic, no manipulation of her elbow was required for her elbow to gain full extension and full flexion, as well as full forearm supination/pronation. The only thing that was done intraoperatively was to inject her right elbow with some local anesthetic and 1cc of betamethasone. She still complains of inability to straighten her elbow and pain diffusely about the elbow.

Examination of the elbow shows the lateral surgical incision is well healed. There is no swelling or intra-articular effusion. Attempts at passive extension of the right elbow result in cogwheel rigidity of the biceps and brachialis muscles and attempts at active extension show co-contraction of these muscles.

I told Ms. Blankenship that I do not believe there is anything else that we can do with her elbow. She is concerned about her ability to return to work, and I told her I can find no organic or anatomic reason why she is unable to use her right upper extremity. I informed her that she may want to obtain a second opinion, or at least another opinion, in regards to her right elbow dysfunction. However, based on my examination today, I can see no cause for her continued complaints and dysfunction.

Dr. Frazier went on to say in that report that the claimant did not have any impairment to her right upper extremity.

The claimant then sought a second opinion by choosing to see Dr. Tod Ghormley. She first saw Dr. Ghormley on July 21, 2000. Dr. Ghormley also diagnosed the claimant with lateral epicondylitis with loss of extension of the elbow and recommended some physical therapy. Claimant next saw Dr. Ghormley at the end of August 2000 and advised that she was doing better with therapy. She then saw him

again in October of 2000. Dr. Ghormley advised the claimant to continue occupational therapy and to return to see him in January of 2001.

Claimant was next seen by Dr. Terence Edgar in November of 2000. Dr. Edgar recommended Botox injections and an EMG/nerve conduction study. The claimant saw Dr. Edgar again in February of 2001. Dr. Edgar stated that the EMG/nerve conduction studies were performed and the results were normal. Dr. Edgar said in a letter to Dr. Ghormley dated February 1, 2001, "There is no evidence for a neuropathy with normal muscular cutaneous, ulnar and median nerve function." He also stated in that same letter, "I find no objective organic reason for the limited extension of the right elbow."

On April 18, 2001, Dr. Ghormley placed the claimant under general anesthesia for general manipulation of her affected elbow. Dr. Ghormley stated that the claimant had full flexion to 140 degrees and lacked 10 degrees of full extension.

On May 21, 2001, the claimant was released by Dr. Ghormley to return to work to full duty.

The claimant returned to see Dr. Ghormley in June of 2001, complaining of pain in her right elbow.

On July 5, 2001, the claimant underwent a three phase bone scan, the results of which were normal.

On July 5, 2001, a laser Doppler study was performed, and it was noted, “The results of the test were not compatible with any of the three stages of reflex sympathetic dystrophy.”

In November of 2001, Dr. Ghormley assessed the claimant as having a 30 percent impairment to her right upper extremity based on loss of grip strength. The respondents accepted and paid this impairment rating.

The claimant last saw Dr. Ghormley in January of 2002. At that time, Dr. Ghormley recommended the claimant continue range of motion and strengthening exercises.

Some time in November of 2001, the claimant saw Dr. William Ackerman, a pain specialist. Dr. Ackerman issued a letter to claimant dated November 28, 2001, stating that the claimant has reflex sympathetic dystrophy in her right upper extremity and that he was unaware of any work that she could do at that time. Dr. Ackerman continued his recommendation of physical therapy and medication and last saw claimant in April of 2002, at which time he noted that she was moving to San Francisco. Based upon the fact that claimant was moving out of state, he terminated further treatment of claimant at that time.

In October of 2002, claimant filed a Form AR-C requesting additional medical treatment. Respondents contended that additional medical treatment was not reasonable and necessary for the compensable right elbow/arm injury. As was

stipulated, the case was submitted on the record before the Administrative Law Judge who, on April 7, 2003, entered an Opinion finding the claimant did not meet her burden of proving by a preponderance of the evidence that additional medical treatment was reasonable and necessary for her compensable injury. On January 24, 1999, the claimant appealed that Opinion to the Arkansas Workers' Compensation Full Commission which, on December 15, 2003, affirmed the Administrative Law Judge's Opinion. Claimant appealed to the Arkansas Court of Appeals which, on September 29, 2004, dismissed the claimant's appeal.

In March of 2005, claimant filed a Pre-Hearing Questionnaire wherein she contended that she is entitled to additional medical treatment for her compensable injury and a change of physician. Respondents have controverted those requests based on the doctrine of *res judicata* and, in the alternative, because additional medical treatment and a change of physician are not reasonable and necessary treatment for claimant's compensable injury.

Claimant admits in her trial brief that, during the pendency of her original appeal, she continued treatment at her own expense with Dr. Ackerman and then, after moving to California, she began treatment on her own with Dr. Benjamin Greer. She continued physical therapy with Dr. Greer, and he prescribed Darvocet, Vicodin, Motrin, Soma, and Skelaxin, as well as other medications, up through the date of the

trial brief. She argues in her brief that “certainly her move to California in and of itself would entitle the claimant to a change of physician.”

FINDINGS OF FACT

1. The stipulations agreed to by the parties herein are accepted as fact;
2. Claimant’s claims are barred by the doctrine of *res judicata*.

DISCUSSION

Claimant’s claims for ongoing medical treatment, as well as a change of physician, are barred by the doctrine of *res judicata*. Under Arkansas Law, the doctrine of *res judicata* requires five elements:

1. The first suit results in a final judgment on the merits;
2. The first suit was based on proper jurisdiction;
3. The first suit was fully contested in good faith;
4. Both suits involved the same claim or cause of action; and
5. Both suits involve the same parties or their privies.

Office of Child Support Enforcement v. Williams, 338 Ark. 347, 995 S.W.2d 338 (1999). A final judgement is “one that dismisses the parties, discharges them from the action, or concludes their rights to the subject matter in controversy.” *Looney v. Looney*, 366 Ark. 542, 547-48, 986 S.W.2d 858 (1999). “*Res judicata* bars not only the re-litigation of claims that were actually litigated in the first suit but also those that could have been litigated Where a case is based on the same events as the subject

matter of a previous lawsuit, *res judicata* will apply even if the subsequent lawsuit raises new legal issues and seeks additional remedies.” *Id.* at 350-51. The rule against splitting a single cause of action is intended to keep defendants from being harassed by a multiplicity of suits and to lighten the already overcrowded dockets of the trial courts. *Lisenby v. Farm Bureau Mutual Ins. Co. of Arkansas, Inc.*, 245 Ark. 144, 146, 431 S.W.2d 484 (1968).

In the case at bar, each of the five required elements are satisfied and, as such, there is no question that *res judicata* applies barring the claimant’s claims. First, the first suit results in a final judgment on the merits. Claimant’s first claim for additional medical treatment was denied by the Administrative Law Judge; this opinion was appealed to the Full Commission which affirmed the Administrative Law Judge; and this opinion was appealed to the Arkansas Court of Appeals, which dismissed the appeal on September 29, 2004. Clearly, the first claim resulted in a final judgment on the merits.

Second, the first suit was based on proper jurisdiction. The claimant’s first claim was properly presented to the Workers’ Compensation Commission. Third, the first suit was fully contested in good faith. The first claim filed by the claimant was fully contested in good faith as both parties had the opportunity to file briefs and submit medical evidence. Also, the parties had the right of appeal which the claimant exercised on two occasions.

Fourth, both suits involve the same claim or cause of action. The claimant's first claim was for additional medical treatment. This was the sole issue presented and was fully briefed to the Administrative Law Judge. The Administrative Law Judge's opinion clearly establishes that on the only issue presented, whether the claimant was entitled to additional medical treatment, she had failed to meet her burden and he denied her claim. This was the issue presented to the Full Commission which affirmed the Administrative Law Judge. This was the same issue presented to the Arkansas Court of Appeals which ultimately dismissed the claimant's appeal. The claimant's current claim is also for additional medical treatment. This is the very same claim she made back in October of 2002. Claimant concedes this point in her trial brief.

Fifth, both suits involve the same parties or their privies. Both the claimant's first and second claims involve the very same parties. Each of the five elements are satisfied in this case and therefore, *res judicata* applies.

Claimant's position seems to be that *res judicata* does not apply because she is seeking reimbursement for medical treatment she received *after* the Administrative Law Judge handed down his opinion on April 7, 2003. This is nonsensical. Once the claimant filed a claim for additional medical treatment back in October of 2002, and that issue preceded in litigation, it is irrelevant when, thereafter, she received or requested additional medical treatment. The fact of the matter is that the claimant's

claim for additional medical treatment, originally filed in October of 2002, was litigated all the way up to the Arkansas Court of Appeals and ultimately dismissed in favor of respondents.

Additionally, in this examiner's opinion, if a claimant is allowed to proceed with a subsequent lawsuit on an issue previously litigated, as in this case, then what is to prevent a claimant from continuously refiling a claim for additional medical treatment, for example, each and every time she so desires. This is exactly the type of action that the doctrine of *res judicata* was established to prevent. The doctrine seeks to avoid the splitting of a cause of action and to "keep defendants from being harassed by a multiplicity of suits and to lighten the already overcrowded dockets of the trial courts." *Lisenby v. Farm Bureau Mutual Ins. Co. of Ark., Inc.*, 245 Ark. at 146.

Further, not only does *res judicata* bar the claimant's claim for additional medical treatment, it also bars the claimant's claim for a change of physician. This was clearly something that could have and should have been litigated in the prior case. "*Res judicata* bars not only the re-litigation of claims that were actually litigated in the first suit but also those that could have been litigated" Where a case is based on the same events as the subject matter of a previous law suit, *res judicata* will apply even if the subsequent law suit raises new legal issues and seeks additional remedies. *Office of Child Support Enforcement v. Williams*, 338 Ark. at 350-351.

However, even if claimant's claim for a change of physician was not barred by the doctrine of *res judicata*, claimant would, nonetheless, not be entitled to a change of physician. The law is clear that changing physicians without prior approval from the carrier or the Commission constitutes an unauthorized change of physician. *Lybrand v. Saline Nursing Center*, 2002 AWCC 194, Claim No. E90894. In this case, claimant has admitted that she sought treatment on her own from Dr. Greer in California before seeking prior approval from the carrier or the Commission. In fact, she knew at the time that she saw Dr. Greer that her benefits had ceased and that her appeal had been dismissed. Still, she chose to seek medical attention on her own.

Moreover, claimant would not have been entitled to a change of physician, anyway, because she had already chosen two of her prior doctors. Claimant chose to be treated initially by her family doctor, Dr. Carfagno. Dr. Carfagno's referrals ended with Dr. Frazier, who released claimant with a 0 percent rating on June 5, 2000. Dr. Frazier, in his June 5, 2000, report stated that claimant may want to pursue a second opinion. Claimant *did* seek a second opinion and *requested* to see Dr. Tod Ghormley, who first saw claimant on July 21, 2000. In this case, claimant has selected not only her initial treating physician, but also a second opinion physician. Therefore, she is not entitled to select yet another doctor.

For all of these reasons, it is this examiner's opinion that the claimant's claims for additional, ongoing medical treatment, as well as a change of physician, should

be and hereby are denied and dismissed, as they are barred by the doctrine of *res
judicata*.

IT IS SO ORDERED.

CYNTHIA ESTES ROGERS
Administrative Law Judge