

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F203901

LARRY YOUNG, Employee	CLAIMANT
ROCKLINE INDUSTRIES, Employer	RESPONDENT
UNITED STATES FIRE INSURANCE COMPANY, Carrier	RESPONDENT

OPINION FILED MAY 11, 2006

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

Claimant represented by EDDIE H. WALKER, JR., Attorney, Fort Smith, Arkansas.

Respondents represented by WENDY WOOD, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On April 5, 2006, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on January 19, 2006, and a pre-hearing order was filed on January 23, 2006. A copy of the pre-hearing order has been marked Commission's Exhibit #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 the within claim.
2. The relationship of employee-employer-carrier existed among the parties at all relevant times.
3. The claimant sustained compensable injuries to his cervical spine and right upper extremity on November 16, 2001.
4. Respondent has paid compensation at the rates of \$285.00 per week for total disability benefits and \$214.00 for permanent partial disability benefits.
5. Respondent has accepted liability for an 11% permanent impairment to the body as a whole.
6. Respondent has paid a 2% rating to the shoulder.

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

1. Claimant's entitlement to surgery as recommended by Dr. Raben.
2. Temporary total disability benefits from April 1, 2005 through a date yet to be determined.
3. Attorney fee.

At the time of the hearing the respondent also raised as an issue collateral estoppel or *res judicata* contending that these same issues were previously litigated in a hearing some two years ago and addressed in an opinion dated July 1, 2004.

The claimant contends that he is entitled to additional medical treatment; specifically, surgery as recommended by Dr. Raben and temporary total disability benefits beginning April 1, 2005 and continuing through a date yet to be determined. In response to the issue of *res judicata*, claimant contends that there has been a change in his condition in that it is worse now than it was at the time of the prior hearing. Claimant also notes that there have been additional medical evaluations, diagnostic testing, and additional medical opinions.

The respondent contends that the issues raised by the claimant are barred by the doctrine of *res judicata*. In addition, respondent also controverts claimant's entitlement to additional medical treatment and temporary total disability benefits.

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 19, 2006, and contained in a pre-hearing order filed January 23,

2006, are hereby accepted as fact.

2. The doctrine of *res judicata* bars claimant's request for additional medical treatment from Dr. Raben as well as his request for additional temporary disability benefits.

### FACTUAL BACKGROUND

The claimant is a 59-year-old man who suffered a compensable injury while working for respondent on November 16, 2001 when he was struck in the back with a pallet on a forklift. The respondent accepted as compensable injuries to claimant's cervical spine and right upper extremity.

After some initial medical treatment claimant came under the care of Dr. David Davis and Dr. Luke Knox. Dr. Davis diagnosed claimant as suffering from a probable disc herniation at the C5-6 level and right-sided carpal tunnel syndrome. Dr. Davis recommended that claimant undergo a carpal tunnel release. Claimant returned to Dr. Knox who concurred in Dr. Davis' opinion and indicated that further treatment for claimant's cervical spine would be deferred until the claimant underwent a carpal tunnel release which was eventually performed on April 1, 2002. Following that procedure the claimant still had complaints of pain and numbness in his right arm and hand and as a result claimant underwent a cervical fusion which was performed by Dr. Knox in July 2002.

After the cervical fusion claimant still had complaints in his right arm and hand and underwent an independent medical evaluation by Dr. Standefer in March 2003. Dr. Standefer found that claimant had residual symptoms consistent with nerve root dysfunction. He also noted that those symptoms might not improve but recommended that claimant undergo an additional myelogram and post-myelogram CT. These additional tests had previously been recommended by Dr. Knox. After the additional tests were performed claimant was again evaluated by both Dr. Davis and Dr. Knox. In a report dated May 13, 2003, Dr. Knox stated that testing revealed a small central disc herniation

and encroachment at the C3-4 and C4-5 levels. Dr. Knox indicated that he would consider removing the fusion at the C5-6 level and operating on the above levels in an attempt to relieve the claimant's complaints. However, Dr. Knox also indicated that he wanted a second opinion from Dr. Davis. In a report dated May 13, 2003, Dr. Davis noted that an NCV performed on the claimant showed compatibility with distal median neuropathy. Dr. Davis recommended that claimant use splints on his hand in an effort to determine whether it would alleviate claimant's symptoms. According to Dr. Davis if the symptoms improved this would indicate that claimant's symptoms were distal in nature, not radicular.

Claimant returned to Dr. Knox on July 15, 2003 and Dr. Knox noted that Dr. Davis had diagnosed claimant as suffering from possible radial tunnel syndrome. Dr. Knox referred claimant to Dr. Jim Moore, a hand specialist, for further evaluation. Dr. Knox also stated at that time that he did not believe that further surgery on claimant's cervical spine would be beneficial. Claimant underwent an evaluation by Dr. Moore on August 14, 2003 and Dr. Moore stated in his report that the weakness in claimant's hand was not explained by the NCV study. Dr. Moore opined that claimant was not suffering from radial tunnel syndrome and that claimant's symptoms were not coming from his forearm or hand. Dr. Moore stated that claimant might need an MRI of the brachial plexus and cervical spine, but would defer to the opinions of Dr. Davis and Dr. Knox.

Claimant was again evaluated by Dr. Knox on October 3, 2003, and he stated in his report of that date that he would not recommend any further surgical procedure. It was Dr. Knox's opinion that claimant had reached maximum medical improvement with respect to his cervical spine condition. Dr. Knox assigned the claimant a permanent physical impairment rating in an amount equal to 13% to the body as a whole and ordered a functional capacities evaluation for claimant.

The functional capacities evaluation was conducted on November 12, 2003 and indicated that claimant was capable of performing medium work. Following that evaluation

Dr. Knox in a report dated November 20, 2003 released claimant to return to medium work as outlined in the functional capacities evaluation. Dr. Knox also indicated that claimant's permanent physical impairment rating equaled 11% to the body as a whole, not the previously stated 13%.

After claimant was released by Dr. Knox he returned to work for the respondent for one day. After his attempt to return to work claimant did not return to Dr. Knox for additional medical treatment, but instead sought medical treatment from his family physician, Dr. Norys. In a report dated December 16, 2003, Dr. Norys noted that claimant continued to have significant pain and suggested that claimant remain off work until a second neurosurgical opinion could be obtained. Claimant filed for a change of physician which was granted by the Commission to Dr. Raben. In a report dated April 26, 2004, Dr. Raben stated that it was likely that claimant had significant osteophytosis which was present on the last CT/myelogram. Dr. Raben recommended a repeat CT/myelogram followed by other interventions including selective nerve blocks.

Respondent did not accept liability for the repeat CT/myelogram by Dr. Raben and as a result claimant filed a claim for additional benefits including a request for additional medical treatment from Dr. Raben, additional medical treatment for his right shoulder, and additional temporary total disability benefits. A hearing on claimant's claim was conducted on June 2, 2004 and an opinion was filed on July 1, 2004. In that opinion, I found that claimant had met his burden of proving by a preponderance of the evidence that he was entitled to additional medical treatment for his right shoulder complaints. Following that ruling claimant subsequently came under the care of Dr. Sites and underwent surgery for his right shoulder.

I also found in that July 1, 2004 opinion that claimant had failed to meet his burden of proving by a preponderance of the evidence that he was entitled to any additional medical treatment relating to his cervical spine. Subsequent to that hearing the claimant

continued to be evaluated by Dr. Raben and eventually underwent additional testing in the form of a CT/myelogram on September 8, 2005. Dr. Raben has now recommended surgery for claimant's condition. Respondent has not accepted liability for the recommended medical treatment by Dr. Raben and as a result claimant has filed this current claim.

### ADJUDICATION

*Res judicata* applies when there has been a final decision on the merits of the issue by a court of competent jurisdiction on all matters litigated and those matters within an issue which might have been litigated. *Beliew v. Stuggart Rice Mill*, 64 Ark. App. 334, 980 S.W. 2d 270 (1998); *Perry v. Leisure Lodge*, 19 Ark. App. 143, 718 S.W. 2d 114 (1996). Furthermore, the doctrine of *res judicata* applies to decisions of the Arkansas Workers' Compensation Commission. *Harvest Foods v. Washam*, 52 Ark. App. 72, 914 S.W. 2d 776 (1996); *Tuberville v. International Paper Company*, 18 Ark. App. 210, 711 S.W.2d 840 (1986). The primary 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, 847 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* bars relitigation of an issue unless there is evidence of change following the previous order. *Castleberry v. Elite Lamp Company*, 69 Ark. App. 359, 13 S.W. 3d 211 (2000); *Cariker v. Ozark Opportunities*, 65 Ark. App. 60, 987 S.W. 2d 736 (1999); *Tuberville, supra*.

After reviewing the evidence in this case impartially, without giving the benefit of the doubt to either party, I find that claimant's claim for additional medical treatment from Dr. Raben and his request for temporary total disability benefits is barred by *res judicata*. Specifically, I find that there is no evidence of change following the previous order.

At the time of the prior hearing on June 2, 2004, claimant sought additional medical treatment from Dr. Raben for his compensable spine injury. In an opinion filed July 1, 2004, I found that claimant had failed to meet his burden of proving by a preponderance of the evidence that he was entitled to additional medical treatment for his cervical spine. That finding was based upon the opinion of Dr. Knox that additional surgery was not needed and more importantly, his opinion that claimant had reached maximum medical improvement as a result of his cervical injury. I also noted that Dr. Miles Johnson had performed an electrodiagnostic study of the claimant's right upper extremity and cervical paraspinal musculature on March 22, 2004 and that test had returned normal. Based upon all this evidence, I found that claimant had reached maximum medical improvement with respect to his cervical spine condition and found that claimant was not entitled to additional medical treatment from Dr. Raben.

Claimant has filed this current claim again requesting additional medical treatment from Dr. Raben. Although that additional medical treatment is now in the form of surgery as opposed to additional testing, the same issue is in question; namely, whether claimant is entitled to additional medical treatment for his compensable cervical spine injury. I have previously found that claimant had reached maximum medical improvement with respect to his cervical spine condition; therefore, the doctrine of *res judicata* applies unless there is evidence of a change following the prior decision.

I find insufficient evidence that claimant's condition has changed since the time of the prior decision. While claimant may have obtained additional medical evidence supporting a request for additional medical treatment, there is no evidence of any change in claimant's physical condition other than his own testimony that his condition has worsened. However, my review of the evidence indicates that the claimant's current condition is no different than his condition at the time of the prior hearing in June 2004.

For instance, at the hearing on April 5, 2006, claimant testified that he was not

physically capable of working. At the hearing on June 2, 2004, claimant also testified that he was not physically capable of working. Claimant testified on April 5, 2006 that the symptoms in his neck had never gone away even after the surgery performed by Dr. Knox. Likewise, in June 2004 the claimant also testified that he continued to have pain in his neck and that he had never been symptom free even after the surgery was performed by Dr. Knox.

At the latest hearing claimant testified that he can sit for one and a half hours and is able to lift 30 to 50 pounds. At the hearing on June 2, 2004 claimant testified that he could sit for perhaps an hour and a half at a time and could carry 30 to 50 pounds.

At the prior hearing on June 2, 2004, claimant's wife testified that his physical condition prohibited him from engaging in most physical activities. She testified that claimant's physical activity level dropped "drastically" after his injury. This resulted in claimant's giving up chicken farming and selling the farm because claimant could no longer perform the manual work necessary to operate the farm. She also testified that activity of even 30 minutes caused claimant problems with his hand and arm.

In other words, the picture of claimant at the hearing in June 2004 was one of very limited physical ability according to the testimony of claimant and his wife. I find no evidence from the hearing in April 2006 which would prove that claimant's condition is worse now than he contended in June 2004.

The medical evidence also indicates that there has been no significant change in claimant's physical condition. First, I believe it is important to note that the deposition of Dr. Raben was taken by the parties on August 2, 2005. Much of the testimony and discussion at that deposition involved medical reports from Dr. Raben. Most of these medical reports were in existence at the time of the original hearing on June 2, 2004. These included evaluations on March 12, 2004, April 2, 2004, and April 26, 2004.

Dr. Raben's medical reports subsequent to the last hearing on June 2, 2004 contain

references to claimant's subjective rating of his neck and arm pain. Dr. Raben's medical reports indicate that claimant rated his neck and arm pain as either a 6 or 7 out of 10 at the time of his visits on March 29, 2005 and July 1, 2005. Dr. Raben's last medical report before the prior hearing in June 2004 occurred on April 26, 2004. At that time, claimant rated his overall pain level as 6 out of 10.

Most importantly, I note that at the time of Dr. Raben's deposition he was not willing to state that claimant's injury was the cause of his continued problems as opposed to claimant's pre-existing condition. However, after a subsequent CT/myelogram, Dr. Raben opined that at least 51 percent of the claimant's current condition was due to his on-the-job injury as opposed to his pre-existing condition. However, even before the last hearing Dr. Raben had taken the position that claimant's current condition was the result of his on-the-job injury. In a report dated April 26, 2004, Dr. Raben stated:

He has questions about the etiology of where this is coming from. With a reasonable degree of medical certainty, he has post-traumatic arthritis that came from the injury that he described or at least this is what I see from his history. I have nothing further to base this on other than his history. The other thing about this is that, of course, changes like this can come from post-traumatic arthritis; i.e., wear-and-tear arthritis over the years or other injuries predating that time.

Thus, Dr. Raben had this same opinion as to causation prior to the last hearing; namely, that claimant's current symptoms were causally related to his on-the-job injury.

Finally, I note that Dr. Raben in his September 27, 2005 report states that claimant's CT/myelogram shows spinal stenosis at C3-4, 4-5, and 6-7. However, these findings of stenosis were in existence prior to the first hearing. In his report of March 12, 2004, Dr. Raben noted that his review of the April 8, 2003 CT scan revealed stenosis and he assessed claimant's condition as:

6. Question of recurrent disc and/or further neuro-foraminal stenosis and degeneration.
7. Residual stenosis at C3/4 and C4/5.

In summary, I find that claimant's claim for compensation benefits is barred by the doctrine of *res judicata*. Claimant requested additional medical treatment for his cervical spine condition from Dr. Raben at a hearing conducted on June 2, 2004. In an opinion filed July 1, 2004, I found that claimant was not entitled to additional medical treatment and found that claimant had reached maximum medical improvement as a result of his compensable cervical spine injury. The doctrine of *res judicata* will not apply if there has been a change in claimant's condition since the time of the original injury. While claimant has testified that his condition has worsened since that time, I find insufficient credible evidence establishing a change in claimant's condition. At both hearings claimant contended that he was incapable of working and that he was in need of additional medical treatment. At both hearings claimant testified that he had continually had pain and symptoms with his neck since the time of his original injury. After the hearing on June 2, 2004 claimant rated his pain to Dr. Raben as a 6 or 7 on a scale of 10. However, at the time of claimant's last visit with Dr. Raben prior to the June 2004 hearing claimant rated his pain as a 6 out of 10. While Dr. Raben has opined that claimant's current condition is causally related to his on-the-job injury, Dr. Raben had this same opinion with regard to causation at the time of the prior hearing on June 2, 2004. In addition, the findings of stenosis made by Dr. Raben in September 2005 also existed prior to the hearing in June 2004.

While claimant may have obtained additional testing and additional medical opinions since the time of the June 2, 2004 hearing, that evidence does not indicate a change in claimant's condition, but rather simply constitutes additional evidence in support of the issue of claimant's entitlement to additional medical treatment.

I find that claimant's entitlement to additional medical treatment for his compensable injury was decided in the opinion of July 1, 2004, at which time it was determined that claimant had reached maximum medical improvement with respect to his cervical spine condition. Absent evidence of a change in claimant's condition since that time, the doctrine of *res judicata* bars claimant's request for additional medical treatment and additional temporary total disability benefits associated with his current condition.

ORDER

\_\_\_\_\_ Claimant's claim for additional medical treatment and temporary total disability benefits is barred by the doctrine of *res judicata*. Accordingly, claimant's request for additional compensation benefits is hereby denied and dismissed.

IT IS SO ORDERED.

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GREGORY K. STEWART  
ADMINISTRATIVE LAW JUDGE