

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F008686 & F100390

BATHEL A. CUPPLES,
EMPLOYEE

CLAIMANT

ROLLISON SEED COMPANY,
EMPLOYER

RESPONDENT

AG-COMP SIF FUND,
INSURANCE CARRIER

RESPONDENT

OPINION FILED OCTOBER 14, 2004

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

Claimant represented by HONORABLE GARY DAVIS, Attorney at
Law, Little Rock, Arkansas.

Respondents represented by HONORABLE BETTY DEMORY, Attorney
at Law, Little Rock, Arkansas.

Decision of the Administrative Law Judge: Reversed.

OPINION AND ORDER

The claimant appeals an administrative law judge's
opinion filed May 20, 2004. The administrative law judge
found, among other things, that the doctrine of *res judicata*
barred the claimant's request for a change of physician.
Based on our *de novo* review of the entire record, the Full
Commission reverses the opinion of the administrative law
judge. We find that the claimant proved he is entitled to a
one-time change of physician pursuant to Ark. Code Ann. §11-
9-514(a)(3).

I. HISTORY

The parties stipulated that Bathel Allen Cupples sustained compensable back injuries in June 1998 and July 2000. The parties stipulated that the claimant received an AWCC Form N; the record includes a Form N signed by the claimant on or about July 11, 2000. The claimant treated with Dr. Stan Burleson, who referred the claimant to Dr. James Alan Pollard. Dr. Pollard planned to refer the claimant to Dr. P.B. Simpson. The claimant testified that a representative of the respondents would not allow him to treat with Dr. Simpson. The claimant testified that the respondents instead sent him to Dr. Anthony E. Russell. Dr. Jim J. Moore also examined the claimant. Dr. Moore noted on March 14, 2001, "At this point I feel the patient is stable. He still has evidence of some residuals. These factors are felt to represent a 5% permanent partial disability to the body as a whole based upon table 75, II, B." The parties have stipulated that the claimant was paid for a 5% permanent impairment rating.

A hearing was held before the Commission on July 19, 2001. The claimant contended that he had been seen "by physicians chosen by the respondents, and he has not seen a physician of his own choosing." The claimant contended that he had an "absolute" statutory right to a change of physician, and he requested a change of physician to Dr.

Simpson. The claimant alternatively contended that he was entitled to an independent medical evaluation. The respondents contended that they had provided medical treatment for the claimant, which included an evaluation by Dr. Burlison. The respondents contended that the claimant had been referred to Dr. Pollard, who had recommended a referral to Dr. Simpson. The respondents contended that "due to the length of time that it was going to take for the claimant to be able to see Dr. Simpson, the claimant was set up to see Dr. Russell." The respondents contended that the claimant "should not receive a change of physician, any further treatment, either evaluation or otherwise, from Dr. Simpson or any other physician...." An administrative law judge stated that the parties agreed to litigate the following issues: (1) Whether the claimant was entitled to a change of physician to Dr. P.B. Simpson or an independent medical examination with a physician selected by the Commission; and (2) Whether the claimant was entitled to a finding of controversion.

An administrative law judge filed an opinion on September 6, 2001. The ALJ found, "The preponderance of the evidence reflects that the claimant should have an independent medical evaluation of his low back condition by Dr. P.B. Simpson, and the examination is reasonable and

necessary medical treatment, and is related to the compensable injuries, pursuant to ACA 11-9-511 (Repl. 1996.)”

Following the administrative law judge’s award of an independent medical evaluation pursuant to Ark. Code Ann. § 11-9-511, the record indicates that Dr. Simpson examined the claimant on October 24, 2001 and released the claimant on a p.r.n. basis in January 2002.

Another pre-hearing order was filed with the Commission on January 14, 2004. The claimant contended that he needed additional medical treatment “with a physician chosen by the Commission.” The respondents contended that they had paid all appropriate benefits, and that further treatment was not reasonably necessary. The parties agreed to litigate the issues of change of physician, additional medical treatment, and controversion.

Hearing before the Commission was held on February 20, 2004. The claimant testified:

Q. Now, Mr. Cupples, Dr. Tracy is your family doctor?

A. Yes, sir....

Q. If Judge Hogan were to allow you to change doctors to be seen by Dr. Tracy ...

A. Sure.

Q. - would that be okay with you?

A. Yes, sir.

The administrative law judge found that the respondents had provided reasonably necessary medical treatment, and determined that the doctrine of *res judicata* barred the claimant's request for a change of physician. The ALJ therefore denied and dismissed the claim. The claimant appeals to the Full Commission.

II. ADJUDICATION

A. Res judicata

Res judicata means a thing or matter that has been definitely and finally settled and determined on its merits by the decision of a court of competent jurisdiction. JeToCo Corp. v. Hailey Sales Co., 268 Ark. 340, 596 S.W.2d 703 (1980). Freely translated, *res judicata* means, "the matter has been decided." Hastings v. Rose Courts, Inc., 237 Ark. 426, 373 S.W.2d 583 (1963). The Arkansas Supreme Court has said that the true test of whether a particular point, question or right has been concluded by a former suit and judgment is whether such point, question or right was distinctly put in issue, or should have been put in issue, and was directly determined by such former suit and judgment. Pulaski County v. Hill, 97 Ark. 450, 134 S.W. 973 (1911); Hollis v. Piggott Junior Chamber of Commerce, 248 Ark. 725, 453 S.W.2d 410 (1970). *Res judicata* applies to decisions of the Commission. Harvest Foods v. Washam, 52 Ark. App. 72, 914 S.W.2d 776 (1996).

The administrative law judge determined in the present matter, "The evidence of record shows the claimant's request for a change of physician is barred by res judicata. That issue was litigated before Judge Curdie in his opinion dated September 6, 2001. Although the Judge ultimately awarded an independent medical evaluation with Dr. Simpson, the claimant had a full and fair opportunity to litigate the issue of a change of physician at that hearing." The claimant correctly argues on appeal that Judge Curdie "did not grant the claimant's change of physician request." In that September 6, 2001 opinion, the administrative law judge ordered an independent medical evaluation pursuant to Ark. Code Ann. §11-9-511. Based on our review of the administrative law judge's September 6, 2001 opinion, the issue of change of physician was simply not *determined* in that opinion. See, Hollis, supra. The administrative law judge on September 6, 2001 made no finding with regard to the claimant's petition for a change of physician. We can otherwise find no authority which holds that an independent medical evaluation ordered pursuant to Ark. Code Ann. §11-9-511 is tantamount to or synonymous with the granting of a change of physician request pursuant to Ark. Code Ann. §11-9-514. The Full Commission therefore does not affirm the administrative law judge's opinion that the claimant's

request for change of physician in the present matter is *res judicata*.

B. Change of Physician

Pursuant to the provisions of Act 796 of 1993, it is now well-settled that there is an absolute, statutory right to a one-time change of physician. See, Ark. Code Ann. §11-9-514(a)(3); Collins v. Lennox Industries, Inc., 77 Ark. App. 303, 75 S.W.3d 204 (2002). The present claimant contended in 2001 that he was entitled to a change of physician to Dr. Simpson. We note that Dr. Pollard had already referred the claimant to Dr. Simpson. The change of physician statute does not apply if an authorized treating physician refers the claimant to another doctor for examination or treatment. Byars Construction Co. v. Byars, 72 Ark. App. 158, 34 S.W.3d 797 (2000), citing Amer. Greetings Corp. v. Garey, 61 Ark. App. 18, 963 S.W.2d 613 (1998). The claimant eventually was able to see Dr. Simpson through an administrative law judge's order for a statutory independent evaluation. Dr. Simpson released the claimant in January 2002.

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant is entitled to a one-time change of physician. The doctrine of *res judicata* does not bar the present claimant's request for a change of physician. The Full Commission grants the claimant a one-

time visit with Dr. Tracy, the claimant's family physician. The respondents must pay for the claimant's initial visit with Dr. Tracy. However, the Full Commission expressly makes no findings with regard to whether subsequent treatment sought by the claimant, following this one-time visit, is reasonably necessary in connection with the claimant's compensable injuries. See, Wal-Mart Stores, Inc. v. Brown, CA 03-81 (Ark. App. 6-25-2003), 120 S.W.3d 153 (2003). For prevailing on appeal to the Full Commission, the claimant's attorney is entitled to the sum of two hundred fifty dollars (\$250). Ark. Code Ann. §11-9-715(b)(2) (Repl. 1996). For prevailing on the claimant's change of physician request, the claimant's attorney is entitled to an additional fee of two hundred dollars (\$200). Ark. Code Ann. §11-9-715(c) (Repl. 1996).

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

SHELBY W. TURNER, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I respectfully dissent from the majority's opinion finding that the claimant's request for a change of physician was not barred by the doctrine of *res judicata*. Based upon my de novo review of the record, I find that the

claimant's request for a change of physician is barred by the doctrine of *res judicata*.

In an opinion dated September 6, 2001, an Administrative Law Judge found that the respondent was responsible for an Independent Medical Evaluation by Dr. P.D. Simpson. The majority has found that this finding is not *res judicata* because a finding was not made by the Administrative Law Judge on the issue of the change of physician in the September 6, 2001, opinion. At the hearing that was conducted on July 19, 2001, the issues to be considered were whether or not the claimant was entitled to a change of physician to Dr. P.B. Simpson OR an Independent Medical Evaluation with the physician selected by the Arkansas Workers' Compensation Commission. After reviewing all of the evidence in the case, at that time, the Administrative Law Judge found that the claimant was entitled to an independent medical evaluation. Evidence was presented at that hearing with respect to whether or not the claimant was entitled to a change of physician.

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. Perry v. Leisure Lodges, 19 Ark. App. 143, 718 S.W.2d 114 (1986). The doctrine of *res judicata* bars the

reopening of matters once judicially determined by competent authority. Gwin v. R. D. Hall Tank Co., 10 Ark. App. 12, 660 S.W.2d 947 (1983). *Res judicata* applies to decisions of the Workers' Compensation Commission. Perry, *supra*; Gwin, *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. Mohawk Tire and Rubber Co. v. Brider, 259 Ark. 728, 536 S.W.2d 126 (1976). However, the doctrine does not bar issues which were not decided and could not have been decided. In this regard, the Arkansas Supreme Court made the following comments in Fawcett v. Rhyne, 187 Ark. 940, 63 S.W.2d 349 (1933):

The doctrine of *res judicata* rests, not upon the fact that a particular proposition has been affirmed or denied in the pleadings, but upon the fact that it has been fully and fairly investigated and tried. A point not raised by the pleadings nor decisive of the case and not actually litigated is not conclusively established for the purpose of a subsequent suit upon a different cause of actions, although it may be expressly or tacitly involved in the judgment.

In my opinion, *res judicata* applies to the facts of this case because the claimant had a full and fair opportunity to litigate the issue of change of physician during the July 19, 2001, hearing. See Cater vs. Cater,

311 Ark. 627, 846 S.W.2d 173 (1993). Whether or not the change of physician was granted was not the issue. The claimant brought that issue to the hearing, he had a full and fair opportunity to litigate his request and he was granted the opportunity to see Dr. Simpson until Dr. Simpson stated there was no further treatment necessary.

Therefore, for all the reasons set forth herein, I find that the claimant is not entitled to a change of physician and further, I find that *res judicata* bars the claimant's claim for benefits. Therefore, I must respectfully dissent from the majority opinion.

KAREN H. MCKINNEY, Commissioner