

STATE OF MICHIGAN
COURT OF APPEALS

JOSEPH CELLETTI,

Plaintiff-Appellant,

v

FIAT AUTO USA, INC., and AMERICAN
GUARANTEE AND LIABILITY INSURANCE
COMPANY,

Defendants-Appellees.

UNPUBLISHED
February 17, 2005

No. 251918
WCAC
LC No. 02-000409

Before: Fort Hood, P.J. and Griffin and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals by leave granted from a decision of the Worker's Compensation Appellate Commission reversing the magistrate's award of medical benefits for surgery to plaintiff's lower back on the ground that the claim was barred by res judicata. Because defendants failed to plead the defense of res judicata and stated that their defense was to litigate the relationship of plaintiff's injury to the automobile accident, the defense of res judicata is waived. We reverse and remand.

The parties do not dispute that plaintiff was totally disabled as the result of a work-related automobile accident in August 1989. Plaintiff filed his first application for mediation or hearing in July 1992. Plaintiff received an open award of benefits in August 1994 and has been receiving benefits since that time.

In June 2000, plaintiff filed a claim for medical benefits seeking coverage for surgery to his lower back. On that petition, plaintiff described his injury as "Spinal cord and back injury. Car accident." In a two-page document entitled "Legal and Factual Grounds and Affirmative Defenses," defendants argued, among other things, that plaintiff's lower back injury was not related to the accident, that it was an ordinary disease of life, and that plaintiff failed to make a timely claim for compensation for the injury. Following a hearing, the magistrate determined that plaintiff had proven by a preponderance of the evidence that his lower back injury was related to the 1989 car accident and granted plaintiff's petition for medical benefits.

Defendants appealed the decision to the commission, arguing for the first time that the claim was barred by res judicata. Plaintiff asserted that defendants waived this defense by failing to raise it in the proceedings before the magistrate. The commission addressed plaintiff's

argument first, but simply quoted a portion of the record in which defense counsel asked the magistrate whether the prior opinions were part of the record as support for its finding that defendants had raised the defense of res judicata during the hearing. The commission went on to find that the case law relied on by plaintiff was inapposite, and that it was legal error for the magistrate to find for the first time in 2002 that plaintiff's low back pain was related to the accident. The commission concluded that because the question could have been resolved in 1994, and plaintiff had not established a change in his condition, relitigation of the issue was barred.

Initially, it should be noted that this is not a case involving a plaintiff who fails to raise an issue and only later seeks recovery on that ground. A review of the record reveals that plaintiff did file a claim for a lower back injury and presented evidence regarding such an injury at the initial hearing, but the magistrate completely failed to address it. Plaintiff's amended application for mediation or hearing filed May 28, 1993 included "low back" in the section asking for a description of the nature of the disability or injury; moreover, plaintiff testified at the first hearing that he had lower back pain after the accident for which he received medication, and the medical depositions from the original hearing noted that plaintiff complained of lower back pain from the time of the accident.

Because the question whether plaintiff's back injury was related to the accident was adjudicable at the time of the original proceeding, res judicata is an issue in this case. *Gose v Monroe Auto Equipment Co*, 409 Mich 147, 160; 294 NW2d 165 (1980). In *Gose*, a somewhat similar factual situation was presented; the plaintiff sought worker's compensation benefits on the basis of two alleged injuries: the loss of the industrial use of his legs, and "insanity." *Id.* at 163. During the hearing, Gose's attorney withdrew the claim for mental injury. *Id.* at 168. The Supreme Court held that claim was barred under the broad form of res judicata because it could have been adjudicated at the time of the hearing. In contrast, in this case plaintiff never withdrew his claim for benefits for a lower back injury. Thus, *Gose* is distinguishable on its facts.

The WCAC has stated that in regard to procedural matters, it looks to the Michigan Court Rules for guidance. *Dyer v Johnson Controls, Inc*, 2002 ACO 282; *Swander v Family Dollar Stores*, 2002 ACO 143. MCR 2.116(D)(2) requires that a motion for summary disposition based on the defense of a prior judgment, or res judicata, must be raised in the defendant's responsive pleading. "Unlike MCR 2.116(D)(1), which provides that certain defenses are permanently waived if not timely presented, MCR 2.116(D)(2) does not foreclose a party from adding a defense in an amended responsive pleading." *Leite v Dow Chemical Co*, 439 Mich 920; 478 NW2d 892 (1992). However, in this case, defendants raised the issue for the first time in their appeal to the WCAC, not in a responsive pleading. There is simply no authority holding that the defense of res judicata may be raised for the first time on appeal.

Furthermore, even if defendants could have raised the argument for the first time on appeal, the Supreme Court has acknowledged that it is possible for a defendant to waive the defense of res judicata. *JAM Corp v AARO Disposal, Inc*, 461 Mich 161, 170 n 8; 600 NW2d 617 (1999). Our review of the record reveals that, at the beginning of the August 8, 2002 hearing, the magistrate inquired: "The only issue that's pending before me today is [plaintiff's] . . . request for some further surgeries, is that right?" Plaintiff's counsel responded affirmatively and defense counsel did not reply. The magistrate then asked if the attorneys wished to make a

statement before testimony was taken, and counsel for defendants stated in part: “There’s been a suggestion of possible surgery, and the issue is over whether or not any treatment necessary is related to the initial automobile accident.” At the close of the hearing, defense counsel and the magistrate engaged in a colloquy in which counsel asked if copies of the previous opinions were included in the record. Defense counsel never argued that the claim was barred and did not use the term *res judicata* or any similar language at any time. Accordingly, there is no evidence in the record to support the commission’s finding that defendants raised the issue of *res judicata* at the hearing. MCL 418.861a(14); *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 709; 614 NW2d 607 (2000). The record supports only the conclusion that defendants waived the defense of *res judicata* by indicating that they intended to litigate the question whether plaintiff’s injury was related to the automobile accident.

Plaintiff argues in the alternative that *res judicata* is inapplicable because his condition has changed. Plaintiff’s argument regarding a change in his physical condition improperly assumes that the first magistrate determined that his lower back injury was work-related. As previously noted, the first magistrate completely failed to address plaintiff’s back injury. The “change in condition” exception to the doctrine of *res judicata* in worker’s compensation cases applies only where there has been a prior adjudication holding that a particular disabling injury was work-related, or where an employee continues to work and a work-related injury previously found to be non-disabling is aggravated to the point of being disabling. See, e.g., *Reiss v Pepsi Cola Metropolitan Bottling Co, Inc*, 249 Mich App 631; 643 NW2d 271 (2002). The second magistrate was the first to find that plaintiff’s back problems were related to the automobile accident. Because the commission did not review this finding to determine if it was supported by the requisite competent, material and substantial evidence, we remand the matter to the commission for such review.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Richard Allen Griffin
/s/ Pat M. Donofrio