STATE OF MICHIGAN

COURT OF APPEALS

NATHAN BANKS, Plaintiff-Appellant,	FOR PUBLICATION June 1, 2006 9:05 a.m.
v	No. 259934 WCAC
LAB LANSING BODY ASSEMBLY, Defendant-Appellee.	LC No. 03-000400 Official Reported Version

Before: Murphy, P.J., and O'Connell and Murray, JJ.

MURRAY, J. (*concurring*).

I concur in the decision to reverse the Workers' Compensation Appellate Commission because, for the reasons stated by the majority opinion, under the transactional test adopted in Michigan, plaintiff's subsequent claim for benefits is not barred by res judicata. See *Adair v Michigan*, 470 Mich 105, 124-125; 680 NW2d 386 (2004). There is no doubt that the two unrelated injuries claimed by plaintiff would not create a convenient trial unit. *Id.* at 125.

However, it is important to point out what the limitations are, at least in my estimation, in the decision issued today. From a review of the rather sparse case law on the issue of res judicata in the workers' compensation field, it appears that the Supreme Court has concluded that subsequent claims for benefits can be successfully brought if the second claim is based on new or aggravated injuries that did not exist at the time the initial decision was made. See, e.g., *Gose v Monroe Auto Equip Co*, 409 Mich 147, 162; 294 NW2d 165 (1980), and *Hlady v Wolverine Bolt Co*, 393 Mich 368, 375-376; 224 NW2d 856 (1975). Thus, the *Gose* Court held that res judicata did bar the plaintiff's second claim for benefits because it was based on the same injury as that in the first claim and was only premised on a different theory. *Gose*, *supra* at 163. And this is perfectly consistent with a common understanding of res judicata, because the original injury is not at issue in the second proceeding when it is a *changed* condition for which the plaintiff is seeking to recover benefits. Since the condition changed after the decision on the first claim, it could not have been presented in the first instance. *Thompson v Ford Motor Co*, 139 Mich App 177, 181-183; 362 NW2d 240 (1984); *Wood v Fabricators, Inc*, 189 Mich App 406, 417-418; 473 NW2d 735 (1991).

This case is somewhat different, in that plaintiff had suffered his second injury at least six months before the hearing on his first claim for benefits. Hence, plaintiff literally "could have" brought this injury before the magistrate at the time of the first hearing. Under the transactional test, however, he ultimately is not required to do so because of the significant differences in the time and origin of the two injuries, which are so diverse that it would not have allowed for a convenient trial of the issues. *Adair, supra* at 125; see, also, *Askew v Ann Arbor Pub Schools*, 431 Mich 714, 732-733; 433 NW2d 800 (1988) (Boyle, J, concurring). In other words, it is the unique facts of this case, rather than an all encompassing rule of law, that allows plaintiff to continue with this second claim for benefits.

Therefore, in my view, nothing in the majority opinion detracts from the *Gose* Court's admonition that workers' compensation proceedings "would scarcely be enhanced by a construction [of res judicata] which would authorize piecemeal compensation for an injury." *Gose, supra* at 162. It is wise counsel to pursue all claims in one proceeding unless, as in this case, the two claims are so unrelated that they could not have properly been tried together.

/s/ Christopher M. Murray