



**TENNESSEE BUREAU OF WORKERS' COMPENSATION
IN THE COURT OF WORKERS' COMPENSATION CLAIMS
AT CHATTANOOGA**

Kimberlee Thomas,)	Docket No.: 2020-01-0624
Employee,)	
v.)	
Duracell Manufacturing Co.,)	State File No.: 06668-2018
Employer,)	
And)	
Zurich American Insurance Co.,)	Judge Audrey A. Headrick
Carrier.)	

ORDER REFERRING CLAIM TO MEDIATION

This case came before the Court on remand from the Tennessee Workers' Compensation Appeals Board. The Board affirmed in part, vacated in part, and remanded this Court's November 9, 2023 Order, which permitted Ms. Thomas to nonsuit her case. On remand, the Court must determine whether Duracell filed an actionable counterclaim with its August 2, 2021 petition and consider the effect of Ms. Thomas refiling her petition.

Claim History

On September 14, 2020, Ms. Thomas filed a Petition for Benefit Determination for an alleged injury of January 20, 2018, seeking medical benefits denied by Duracell. After mediation, the Bureau mediator issued a Dispute Resolution Statement indicating the parties resolved the disputed issues.

On August 2, 2021, Duracell filed a petition and identified the issue as "[f]inalizing the benefit resolution aspect of the claim. We are ready to mediate in hopes of resolving the claim."

In November 2022, the mediator issued a Dispute Certification Notice checking multiple disputed issues, including permanency. Duracell asked the mediator to include these additional defenses: "[e]xtent of permanent impairment related to the left shoulder and neck, compensability (and permanency) of back and/or left hip conditions, and

overpayment credit.” Duracell filed a request for a scheduling hearing, and the Court entered a Scheduling Order in June 2023 setting the compensation hearing for November 2023.

In October 2023, Ms. Thomas filed a Notice of Voluntary Nonsuit under Rule 0800-02-21-.24 (February 2022) of the Tennessee Compilation Rules and Regulations. Duracell opposed it.¹ The Court denied the nonsuit because the Court’s file did not contain a Petition for Benefit Determination. Ms. Thomas filed a motion to reconsider including a September 2020 petition, and the Court then permitted her to nonsuit her claim.

Duracell appealed the order, and Ms. Thomas filed another petition in December 2023 during the pendency of the appeal. She also filed a duplicate petition in March 2024.

Findings of Fact and Conclusions of Law

Tennessee Rules of Civil Procedure 13.01 states as follows:

A pleading shall state as a counterclaim any claim . . . which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party’s claim, . . . except that a claim need not be stated as a counterclaim if at the time the action was commenced the claim was the subject of another pending action.

Tennessee Rules of Civil Procedure 41.01(1) also discuss counterclaims in the context of a voluntary dismissal as follows: “[i]f a counterclaim has been pleaded by a defendant prior to the service upon the defendant of plaintiff’s motion to dismiss, the defendant may elect to proceed on such counterclaim in the capacity of a plaintiff.”

In *Blake v. Plus-Mark, Inc.*, 952 S.W.2d 413, 416 (Tenn. 1997), the court held that the employer pled a valid counterclaim when it: “incorporated the material contained in the answer, identified the parties, acknowledged that the employee had filed a claim for workers’ compensation benefits, and set forth additional information regarding the conditions of the employee’s employment.” *Id.* The employer also asserted the employee’s claim was time-barred and alleged she did not sustain a work-injury. *Id.* The court found the counterclaim’s allegations “sufficient to state a claim for relief under the workers’ compensation statute as an original complaint filed by the employer.” *Id.*

Duracell’s August 2021 petition is distinguishable. It only asserted Duracell’s desire to “finaliz[e] the benefit resolution of the claim” and “to mediate in hopes of resolving the claim.” While the Dispute Certification Notice identifies disputes and asserts

¹ The Bureau revised the Tennessee Compilation Rules and Regulations in December 2023.

defenses, a Bureau mediator prepared and filed the form. Likewise, the Dispute Certification Notice is not signed by the attorneys. The Court finds that neither the petition nor the Dispute Certification Notice equates to a pleading filed by Duracell stating a claim for relief. Therefore, the Court holds that Duracell's petition is not a counterclaim, and it did not survive the nonsuit.

In so holding, the Court now considers the effect of Ms. Thomas filing two additional petitions. Ms. Thomas took her voluntary nonsuit under Rule 0800-02-21-.24, which states that "either party may file a new claim within ninety (90) days of the order granting the voluntary dismissal." Ms. Thomas filed a petition during the appeal in December 2023 and a duplicate petition in March 2023. This complied with the Rule's requirement to file a new claim within 90 days of the nonsuit, and the Court holds that Ms. Thomas's petitions reinitiated her claim.

Referring Claim to Mediation

The Court finds that mediation of the disputed issues is in the best interest of judicial efficiency and refers both refiled petitions to the Mediation and Ombudsman Services of Tennessee for alternative dispute resolution of all disputed issues, **including permanency**, under to Rule 0800-02-21-.10(4). The mediation is scheduled for Tuesday, April 9, 2024, at 9:00 a.m. Eastern Time with Mediator Brad Frank who will determine the manner in which the mediation will be conducted. Further, this mediation shall not substitute for the post-discovery alternative dispute resolution required by Rule 0800-02-21-.17.

The parties shall appear for a scheduling hearing on Wednesday, April 24 at 9:00 a.m. if they do not resolve all disputed issues in mediation.

IT IS ORDERED.

ENTERED March 22, 2024.

Audrey A. Headrick

Judge Audrey A. Headrick

Court of Workers' Compensation Claims

CERTIFICATE OF SERVICE

I certify that a copy of the Order was sent as indicated on March 22, 2024.

Name	Certified Mail	Email	Service sent to:
Ronnie Berke, Employee's Attorney		X	ronnie@berkeattys.com margo@berkeattys.com
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/s/Penny Shrum w/permission JD

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