

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**CLAIM NO. F100656**

**AL O'QUINN, EMPLOYEE**

**CLAIMANT**

**CARCO CARRIAGE CORP., EMPLOYER**

**RESPONDENT**

**AMERICAN HOME ASSURANCE COMPANY,  
INSURANCE CARRIER**

**RESPONDENT NO. 1**

**WESTPORT INSURANCE CORPORATION/  
GALLAGHER BASSETT SERVICES (TPA),  
INSURANCE CARRIER**

**RESPONDENT NO. 2**

**OPINION FILED DECEMBER 11, 2003**

Hearing before Administrative Law Judge Dail Stiles on November 12, 2003, in Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. M. Keith Wren, Attorney at Law, Little Rock, Arkansas.

Respondent No. 1 represented by Mr. Frank B. Newell, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by Ms. Carol Lockard Worley, Attorney at Law, Little Rock, Arkansas.

A hearing was held on November 12, 2003, to determine the liability for continuing benefits for the claimant.

It was stipulated that the claimant sustained a compensable injury on December 27, 2000. The claimant's earnings were sufficient to entitle him to weekly indemnity benefits of \$163.00 for temporary total disability and \$154.00 for permanent partial disability benefits. Respondent carrier No. 1 accepted the claim initially and paid medical and indemnity benefits through some time in April of 2002.

The claimant contends that some time in June of 2002, he had an additional injury or an incident which exacerbated the problems with his left shoulder. The claimant contends he last worked on June 5, 2002, and is entitled to temporary total disability benefits from June 5, 2002 through a date yet to be determined, as well as attendant medical benefits and attorney's fees.

Respondent carrier No. 1 contends that any injury the claimant sustained in June of 2002, should be characterized as an aggravation or new injury which would relieve respondent carrier No. 1 of any continuing liability.

Respondent carrier No. 2 contends that whatever injury the claimant sustained to his left shoulder in June of 2002, was a recurrence of his compensable injury to his left shoulder which occurred on December 27, 2000. Respondent carrier No. 2 also contends that the claimant does not demonstrate that he sustained any injury in June of 2002. Respondent carrier No. 2 further contends that no notice was given to them until March 19, 2003.

### **STATEMENT OF THE CASE**

The claimant worked for the respondent employer driving rental cars from the airport to a washing facility.

The claimant stated that on December 27, 2000, he slipped and fell on some ice. The claimant sustained a fracture or multiple fractures to his left shoulder, a torn rotator cuff, some cracked ribs and a concussion.

The claim was accepted as compensable by the respondents, and the claimant came under the treatment of Dr. Marty Siems, an orthopedist in Little Rock.

On November 1, 2001, Dr. Siems performed surgery on the claimant which consisted of left shoulder arthroscopy, open acromioplasty and rotator cuff repair.

Dr. Siems followed the claimant post surgery and released him in April of 2002 to return to work with a 15 pound lifting restriction.

The claimant testified that when he returned to work in April of 2002, he had the same duties as he had previous to his injury of December 27, 2000. The claimant said he was given a raise in pay and that he was no longer working on Thursdays, but otherwise the work duties were the same.

The claimant was asked if performing his job duties after returning to work in April of 2002, caused him any additional pain in his left arm, and he responded that when he used his left arm to open a car door, it always caused him some pain.

The claimant stated that after surgery, he had a constant popping in his arm and shoulder but that some time in late May or early June, 2002, as he was pulling himself up into a van with his left arm, he noticed a demonstrable pop and increased pain. The claimant last worked on June 5, 2002, and testified that he does not believe there is anything he could do given the current state of his left upper extremity.

On cross-examination, the claimant was asked about his elbow popping, and the claimant responded that his elbow had popped ever since he fell on December 27, 2000. The claimant was asked about his shoulder popping and he stated that it had "popped and squeaked" ever since the injury of December, 2000. The claimant said that his shoulder hurt all the time and that it had continued to hurt ever since his fall in December, 2000, before and after the surgery of November, 2001.

The claimant was asked what limitations he had when he returned to work in April of 2000, and the claimant stated that he could not raise his left arm up and that he still could not raise it above his head. The claimant was asked about the inability to lift his arm over his head since his injury, and the following exchange took place:

Q. And was that getting better as time went on, or did it just kind of stay the same?

A. It stayed the same.

Q. And it's the same now as it was then?

A. The same as it was then.

Q. It hasn't gotten any better still?

A. Not a bit.

Dr. Siems' deposition was taken on June 17, 2003, and introduced into evidence.

It was Dr. Siems' opinion in his deposition that the claimant's incident of pulling himself into a van in late May or early June of 2002, was a continuation or recurrence of his compensable injury of December 27, 2000.

Dr. Siems was asked if the second injury or incident, which occurred in late May or early June of 2002, was physically at the same site as the compensable injury of December 27, 2000, and he responded that it was. When questioned more closely, he responded:

A. Well, he didn't say it was in the same place. He wouldn't know where the first one was because he wasn't the surgeon involved. But it's the same tendon. The tendon involved is probably about 12 to 15 millimeters in length, whereas how specific on place he'd be, I'm not real sure. But it's involving the same tendon.

Dr. Siems was asked specifically:

Q. . . . Or what I'm driving at, I'm trying to figure out whether he had a separate and distinct injury when he pulled himself up in the truck, or whether he had a recurrence of the previous injury, just an exacerbation of the previous injury?

A. Well, I think that's the one question you guys want to answer, and I'd have to say that it's all a continuum of the process that's going on. Certainly if he hadn't have had that initial insult of lifting himself into the van that day, he may have never had any more exacerbated pain of his shoulder. However, he could have done that, you know, getting into his own car because, you know, as you know, you probably pull yourself into a vehicle all the time and don't have that problem. So it's the fact that you have that underlying problem certainly has something to do with it. And in his age group there's a – you know, there's a higher incidence of recurrence of tears after repair. And other factors that factor into it are the fact that he's had this recurrent, you

know, pain. He was never 100 percent. He had some stiffness and pain with his shoulder.

### **FINDINGS OF FACT**

1. The claimant's injury of late May or early June of 2002 in the incident of pulling himself into a van and re-injuring his left shoulder is a recurrence of his compensable injury of December 27, 2000.

2. The claimant is entitled to additional temporary total disability benefits commencing June 5, 2002 and continuing through a date yet to be determined, as well as attendant medical benefits.

3. Respondent carrier No. 1, American Home Assurance Company, has continuing liability for this claim and has controverted benefits subsequent to June 5, 2002.

### **DISCUSSION**

#### **Aggravation vs. Recurrence**

When the primary injury is shown to have arisen out of and in the course of the employment, the employer is responsible for every natural consequence that flows from that injury. If, after the period of initial disability has subsided, the injury flares up without an intervening cause and creates a second disability, it is a mere recurrence, and the employer remains liable. Atkins Nursing Home v. Gray, 54 Ark. App. 125, 923 S.W.2d 897 (1996). A recurrence is not a new injury but simply another period of incapacitation resulting from a previous injury. Pinkston v. General Tire & Rubber Company, 30 Ark. App. 46, 782 S.W.2d 375 (1990). The test for determining whether a subsequent episode is a recurrence or an aggravation is whether the subsequent episode was a natural and probable result of the first injury or if it was precipitated by an independent intervening cause. Georgia-Pacific Corp. v. Carter, 62 Ark. App. 162, 969 S.W.2d 677 (1998). If there is a causal connection between the primary and the subsequent disability, there is

no independent intervening cause unless the subsequent disability is triggered by activity on the part of the claimant which is unreasonable under the circumstances.

In the instant case, the claimant never became asymptomatic but continued to experience pain and discomfort from the original injury before and after his surgery of November, 2001. The incident in late May or early June of 2002, is merely an exacerbation, continuation or recurrence of his original compensable injury of December 27, 2000.

**AWARD**

Respondent carrier No. 1, American Home Assurance Company, is directed to pay the claimant benefits in accordance with the findings of fact above.

Respondent carrier No. 1, American Home Assurance Company, is directed to pay the claimant's attorney, Mr. Keith Wren, the maximum attorney's fee on this award pursuant to Ark. Code Ann. §11-9-715.

IT IS SO ORDERED.

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DAIL STILES  
Administrative Law Judge