

**BEFORE THE ARKANSAS WORKERS' COMPENSATION
COMMISSION**

CLAIM NO. F406876

KATHERINE BANKSTON, EMPLOYEE **CLAIMANT**

BIONETICS CORPORATION, EMPLOYER **RESPONDENT**

**COMMERCE & INDUSTRY INSURANCE
COMPANY, c/o AIG CLAIM SERVICES (TPA),
INSURANCE CARRIER** **RESPONDENT**

OPINION FILED MARCH 13, 2006

Hearing before Administrative Law Judge Cynthia Estes Rogers on December 13, 2005, in Little Rock, Pulaski County, Arkansas.

Claimant represented by Mr. Kenneth E. Buckner, Attorney at Law, Pine Bluff, Arkansas.

Respondents represented by Mr. Jarrod S. Parrish, Attorney at Law, Little Rock, Arkansas.

A hearing was held on December 13, 2005, to determine the following: the correct compensation rate, claimant's entitlement to additional medical treatment by Dr. Charles Pearce for her rotator cuff injury, and what, if any, period of time the 10 percent impairment rating issued by Dr. Schlesinger was controverted for purposes of attorney's fees.

The parties stipulated that claimant sustained a compensable cervical spine and right shoulder injury on June 28, 2004. It was further stipulated that weekly indemnity benefits were paid at a rate of \$285.00 for temporary total disability (TTD)

and \$214.00 for permanent partial disability (PPD) benefits, based on an average weekly wage (AWW) of \$428.00. The parties had also stipulated, according to a prehearing order filed on November 14, 2005, that a 10 percent impairment rating issued by Dr. Scott Schlesinger on June 17, 2005, had been accepted by respondents and was being paid; however, that stipulation was withdrawn at the hearing, as it was discovered that respondents had not actually begun paying that rating until November 29, 2005. It was stipulated at the hearing, however, that a few days prior to the hearing, claimant had received a check that brought her benefits up to date since they had ceased in mid-July.

Claimant contends that she was paid at an incorrect compensation rate and that the correct average weekly wage, based on a full work week, should have been \$489.60, which would yield a TTD rate of \$326.00 and a PPD rate of \$245.00. Claimant contends that the difference in what was previously paid and the correct rate has been controverted for purposes of attorney's fees. With regard to the payment of the 10 percent impairment rating, claimant contended at the hearing that because Dr. Schlesinger had issued that rating on June 17, 2005, but that the respondents admittedly did not begin paying the rating until November 29, 2005, the rating was controverted until November 29, 2005, for purposes of attorney's fees.

Claimant further contends that respondents have not authorized additional medical treatment for her work-related shoulder injury by Dr. Charles Pearce and that she is entitled to said treatment.

Respondents contend that all appropriate benefits have been paid at the appropriate compensation rate in that the claimant was not guaranteed a forty-hour work week. Respondents admitted at the hearing that the 10 percent impairment rating issued by Dr. Schlesinger in June of 2005 did not begin being paid until November 29, 2005, due to an oversight and a change in adjustors. Respondents, however, contend that the rating was never controverted, and that they are paying an 18 percent penalty for the lateness of the payment; as such, respondents contend that an attorney's fee is not appropriate in this regard.

With regard to the issue of claimant's entitlement to additional medical treatment, respondents contend that reasonable and necessary medical care has not been denied and that claimant cannot prove that any additional medical treatment with Dr. Pearce is reasonable, necessary, or causally-related to her compensable injury of June 28, 2004. Respondents assert that any problems claimant may be having with her right shoulder were pre-existing and not related to her compensable injury of June 28, 2004.

STATEMENT OF THE CASE

Claimant is forty-five years old and had worked for respondent-employer doing animal research for a number of years. She testified that she worked in the animal research lab rooms and production area, performing death checks and feeding, case changing, and handling racks and cages.

It is undisputed that claimant sustained an injury on June 28, 2004, which respondents accepted as compensable and for which benefits have been paid. Claimant testified that as she was standing between two machines at the cage-watch machine, a co-worker went, unbeknownst to claimant, in the back between the hot water area and where the cages come out and stuck his hand through the curtain in that area, locking onto her forearm. Claimant testified that this frightened her, as she did not know he was there, and that she injured herself as she tried to jerk away. She testified that she had thought it was a snake at first and then realized it was someone's fingers that had hold of her arm, but that she was already trying to pull away at the time she realized that it was not a snake. She testified that she injured her right shoulder area and her neck.

Claimant testified that she reported her injury and was sent to the nurse and then to the family practice clinic. She testified, and medical records indicate, that she saw Dr. Gullett who diagnosed her as having a right shoulder torn rotator cuff and referred her to a neurosurgeon, Dr. Schlesinger, in December of 2004 for her neck.

Claimant testified that she began missing work in regard to these injuries on December 6, 2004.

Medical records indicate that claimant saw Dr. Charles Pearce on January 27, 2005, for an independent medical examination (IME) for her right shoulder problem. The medical records indicate, and claimant freely admitted, that she has had ongoing problems with her right shoulder since 1999, prior to this injury, including a rotator cuff tear in October of 2002. Claimant testified that she thought she had been assigned a 15 percent impairment rating for her previous injury and had missed five months of work for that injury. In her deposition, she testified that she did not believe she was completely healed after her first injury. Moreover, as recently as two weeks prior to the June 28, 2004, incident, claimant admitted that she had received an injection in that shoulder. However, she testified that she was not having significant problems from her prior injuries before this incident. She testified that she thought she was better and had range of motion back, although not complete.

In the IME report of January 27, 2005, Dr. Pearce opined as follows in regard to his physical examination of claimant:

Right shoulder – Well-healed arthroscopic portals. No atrophy. She has no pain to palpation throughout her shoulder. She has quite good motion, despite the previous surgery, re-injury, and the fact that she is an insulin-dependent diabetic. She has weakness with abduction and rotation. Mildly positive impingement and Hawkins. Neurovascularly intact.

IMPRESSION: *Right shoulder pain – I suspect that she does have a full thickness rotator cuff tear.* However, she also apparently has cervical pathology that will need surgery.

RECOMMENDATIONS:

1) *My recommendation is that, in the meantime, she be on a stretching program to include pulley.* These were instructed.

2) I did give her one of my magazine articles on rotator cuff repair that she and her husband can review. *Ultimately, she may need arthroscopic care for her shoulder which may involve rotator cuff repair.*

3) I have pencilled her back in for follow up in about six weeks. When she returns in six weeks, I would like to do a plain radiographic series to include AP, axillary lateral, and an outlet view. In addition, it would be helpful if we could have the actual most-recent scan that has been performed on her shoulder.

[Emphasis added.]

Claimant testified, and medical records indicate, that Dr. Schlesinger performed neck surgery on claimant in February of 2005. Dr. Schlesinger's notes of February 23, 2005, state that on that date, claimant underwent "C4-5 and C5-6 anterior cervical decompression and fusion for spinal stenosis with partial corpectomy and discectomy from a right-sided approach for severe canal stenosis." Claimant followed up with Dr. Schlesinger, and records indicate that she even developed a Staph infection in her wound, requiring further treatment. Finally, on June 17, 2005,

Dr. Schlesinger noted in part as follows, in a letter written to Debbie Doyle, with Concentra Integrated Services:

Ms. Bankston was back today in follow-up. She has had an FCE. *I will give her two weeks more of therapy to transition. I will give her a disability rating from her surgery in February of 2005 of 10%.* The FCE suggests that she can do at least sedentary work. . . . *I will set her maximum medical improvement date for two weeks from now.* I will go ahead and release this nice lady from my care, but will certainly be happy to see her back if a new problem arises. It has been a pleasure taking care of her and unfortunately, she is going to have some residual pain the rest of her life and she understands this.

[Emphasis added.]

Claimant testified in regard to her work week that it was her belief she was hired to work a forty-hour week and that she generally did work forty hours per week. Wage records introduced at the hearing note various weeks when claimant worked less than a forty-hour week. However, even Brenda Sue Williams, Quality Control and Safety Manager for respondent-employer, who has worked for respondent-employer for eighteen years, testified that their company does not employ part-time workers; rather, all workers are considered to be “full-time.”

Ms. Williams testified at length regarding the amount of time claimant missed work and the reasons for her absences that occurred *prior* to the admittedly compensable injury of June 28, 2004. However, Ms. Williams interestingly brought no notes or records in reference to dates or reasons claimant missed work or returned

to work following the June 28, 2004, incident. The testimony did reveal that claimant was terminated by respondent-employer on July 22, 2005.

Claimant testified that she had the one visit with Dr. Pearce, the IME, and has had some physical therapy for her right shoulder but no treatment by a doctor since the June 28, 2004, injury while working for respondent-employer. She testified that Dr. Schlesinger referred her to Dr. Pearce to check her rotator cuff. She contends that she is entitled to additional medical treatment by Dr. Charles Pearce for her rotator cuff injury at respondents' expense.

FINDINGS OF FACT

1. The stipulations agreed to by the parties herein are accepted as fact;
2. Claimant was a full-time employee of respondent employer, earning an average weekly wage of \$489.60, when based on a full work week;
3. Claimant was paid at an incorrect compensation rate, and the correct compensation rate should have been \$326.00 for TTD and \$245.00 for PPD.
4. The difference in what was previously paid for indemnity benefits and the correct rate has been controverted for purposes of attorney's fees;
5. The 10 percent impairment rating for claimant's admittedly compensable neck injury was issued by Dr. Schlesinger on June 17, 2005;

6. Claimant was found to have reached maximum medical improvement for her admittedly compensable neck injury as of July 1, 2005;
7. Respondents admittedly did not issue any check for payment of the 10 percent impairment rating until November 29, 2005; as such, the rating was controverted prior to November 29, 2005, for purposes of attorney's fees.
8. Claimant has proven by a preponderance of the evidence that her right shoulder condition existing since the June 28, 2004, incident constitutes an aggravation of her prior, unrelated right shoulder injury and that she is entitled to medical treatment for same at respondents' expense.

DISCUSSION

In this case, respondents assert that any problems claimant may be having with her right shoulder were pre-existing and not related to her compensable injury of June 28, 2004. Claimant admitted that she had had prior right shoulder problems, including a prior torn rotator cuff for which she had had prior surgery. The question, therefore, becomes, whether her present right shoulder problems are simply a recurrence of her old, prior problems, or an aggravation of a pre-existing injury.

The law is clear that a recurrence is not a new injury but merely another period of incapacitation resulting from a previous injury. *Crudup v. Regal Ware, Inc.*, 341 Ark. 804, 20 S.W.3d 900 (2000); *Atkins Nursing Home v. Gray*, 54 Ark. App. 125,

923 S.W.2d 897 (1996). A recurrence exists when the second complication is a natural and probable consequence of a prior injury. *Weldon v. Pierce Bros. Constr.*, 54 Ark. App. 344, 925 S.W.2d 179 (1996).

An aggravation is a new injury resulting from an independent incident. *Crudup v. Regal Ware, Inc.*, *supra.*; *Farmland Ins. Co. v. DuBois*, 54 Ark. App. 141, 923 S.W.2d 883 (1996). An aggravation, being a new injury with an independent cause, must meet the requirements for a compensable injury. *Ford v. Chemipulp Process, Inc.*, 63 Ark. App. 260, 977 S.W.2d 5 (1998). In order to prove compensability of a claim, a claimant must prove by a preponderance of the evidence that: (1) the injury arose out of and in the course of his employment; (2) the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death; (3) the injury was caused by a specific incident, identifiable by time and place of occurrence; and (4) the injury must be established by medical evidence supported by objective findings. *See* Ark Code Ann. § 11-9-102(4)(A)(i); 11-9-102(4)(D); 11-9-102(4)(E)(i).

Certainly, claimant being grabbed suddenly and unexpectedly by a co-worker would not be considered a “natural and probable consequence of a prior injury,” but rather constitutes an independent incident that caused further problems with her shoulder and a new injury to her neck, as well. As such, while claimant admittedly had prior right shoulder problems, her injury of June 28, 2004, clearly amounts to an

aggravation, rather than a recurrence, of her pre-existing condition for which claimant has certainly established the requirements of a compensable injury, in this examiner's opinion. That being the case, treatment for her shoulder injury is certainly reasonable and necessary as it is causally-related to her work injury of June 28, 2004, and claimant is entitled to same at respondents' expense.

In regard to the calculation of claimant's compensation rate, it was the claimant's testimony that she was hired as a full-time employee to work a forty-hour week. Moreover, Brenda Sue Williams testified that respondent-employer does not hire part-time employees, but that all employees are considered full-time. While it is true that the wage records reflect a number of weeks when claimant did not actually work forty hours, the fact remains that she was considered a full-time employee. Therefore, when basing her average weekly wage on the weeks claimant did work a full forty hours, the correct compensation rates should have been \$326.00 for TTD and \$245.00 for PPD. The difference in what was previously paid for indemnity benefits and the correct rate has been controverted by respondents.

With regard to the issue of controversion of the 10 percent impairment rating issued by Dr. Schlesinger on July 17, 2005, the respondents admit that they did not issue any check for payment of said rating until November 29, 2005, at which point they paid the rating, as well as an 18 percent penalty for the lateness of the payment. It is respondents' position, however, that the rating, although paid substantially late,

was never actually “controverted,” but that there was simply some confusion or oversight by the adjustor. This, in fact, may be the case; however, claimant was forced through her attorney to pursue payment of the rating for the admittedly compensable neck injury for quite some time. As such, it is this examiner’s opinion that the rating was controverted, for purposes of attorney’s fees, until November 29, 2005.

AWARD

Respondents are directed to pay the claimant benefits in accordance with the findings of fact above.

Respondents are directed to pay all past and future reasonable, necessary, and related medical expenses the claimant has incurred and may incur as a result of her compensable injuries of June 28, 2004, in accordance with the findings of fact herein.

Respondents are directed to pay the claimant’s attorney, Mr. Kenneth E. Buckner, the maximum attorney’s fee on this award pursuant to Ark. Code Ann. § 11-9-715.

IT IS SO ORDERED.

CYNTHIA ESTES ROGERS
Administrative Law Judge

