

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NOS. F212806 & F406876

KATHERINE BANKSTON, EMPLOYEE **CLAIMANT**

BIONETICS CORPORATION, EMPLOYER **RESPONDENT**

COMMERCE & INDUSTRY INSURANCE COMPANY
c/o AIG CLAIM SERVICES (TPA),
INSURANCE CARRIER **RESPONDENT NO. 1**

TRAVELERS INSURANCE COMPANY,
INSURANCE CARRIER **RESPONDENT NO. 2**

OPINION FILED JUNE 6, 2007

This matter comes before Administrative Law Judge Barbara Webb on the record.

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

Respondents No. 1 represented by Mr. Jarrod S. Parrish, Attorney at Law, Little Rock, Arkansas.

Respondents No. 2 represented by Mr. Phillip Cuffman, Attorney at Law, Little Rock, Arkansas.

A hearing was held on December 13, 2005, between claimant, Katherine Bankston, formerly Katherine Brown, ("Bankston"), and Respondents No. 1¹, Bionetics Corporation ("Employer" or "Bionetics") and Commerce & Industry Insurance Company ("Commerce") to determine claimant's entitlement to additional medical treatment by Dr. Charles Pearce for her rotator cuff injury of June 28, 2004, the correct compensation rate, and the period of time, if any, the impairment rating issued by Dr. Schlesinger was controverted for purposes of attorney's fees.

¹ Respondent No. 2, Travelers Insurance Company, the insurance company at risk at the time of the earlier October, 2002, compensable shoulder injury, was not a party to the proceeding.

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Commerce contended that the claimant's shoulder condition was not compensable since it was a recurrent condition of an earlier right shoulder injury that should be the responsibility of Respondent No. 2, Travelers Insurance Company, ("Travelers"), the insurance company on risk in 2002. In an Order filed March 13, 2006, an Administrative Law Judge ruled, inter alia, that the claimant had proven by a preponderance of the evidence that her right shoulder condition existing since the June 28, 2004, incident constituted an aggravation of her prior, unrelated right shoulder injury and that she was entitled to medical treatment for same at Commerce's expense. The Administrative Law Judge also made a finding regarding the claimant's average weekly wage and found that Commerce was required to pay an attorney's fee on the impairment related to the claimant's neck. Commerce appealed the portion of the Administrative Law Judge's Opinion finding that the claimant sustained a compensable shoulder injury in the form of an aggravation. In an Opinion filed July 11, 2006, the Full Commission vacated and remanded the decision of the Administrative Law Judge. The Full Commission found that Travelers was denied their due process rights to appear and defend their interest. The Full Commission directed the Administrative Law Judge to name Travelers as a party to the suit and conduct another hearing on the issues of whether the claimant sustained an aggravation or a recurrence and which carrier should be liable for the claimant's injury. The case was subsequently reassigned

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to this Administrative Law Judge for the purpose of joining Travelers as a party and conducting all further proceedings, including the decision in this case.

A pre-hearing telephone conference was held on this claim on December 5, 2006. This matter was set for a hearing on February 2, 2007, in Pine Bluff, Jefferson County, Arkansas. Prior to the scheduled hearing, the parties agreed to submit the claim on a stipulated record. The stipulated record consists of the following:

- (1) Transcript of the December 13, 2005 hearing.
- (2) Full Commission Opinion dated July 11, 2006.
- (3) Letter from Dr. Charles Pearce dated January 17, 2007.
- (4) Pre-hearing Order filed December 5, 2006.
- (5) Claimant's Brief filed June 12, 2006 and letter brief filed March 9, 2007.
- (6) Respondents No. 1 Brief on Appeal to the Full Commission filed May 26, 2006 and Respondents Reply Brief filed June 16, 2006.
- (7) Respondent No. 2 Brief filed March 6, 2007.

STIPULATIONS

Based on the stipulated record, the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of this claim.

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2. The employer/employee relationship existed on October 8, 2002, when claimant sustained a compensable injury to her right shoulder. The insurance carrier at that time was Travelers Insurance Company. Temporary total disability benefits and medical benefits were paid, along with a 9% whole body impairment rating to the right shoulder assessed by Dr. Clark.

3. The employer/employee relationship existed on June 28, 2004, when claimant sustained a compensable injury to her cervical spine and right shoulder. The insurance carrier at that time was Commerce & Industry Insurance Company c/o AIG Claim Services, third-party administrator. Temporary total disability benefits and medical benefits were paid through July 1, 2005.

ISSUES

By agreement of the parties, the primary issues to be determined are whether claimant's shoulder injury on June 28, 2004, was an aggravation or recurrent injury, the amount of the applicable compensation rate, and which carrier is responsible for attendant benefits.

CONTENTIONS

The claimant contends she sustained a compensable injury on June 28, 2004, and benefits should have been paid at the rate of \$326.00 per week for temporary total disability benefits and \$245.00 per week for permanent partial disability benefits. The claimant contends that the 10% impairment rating assessed by Dr. Schlesinger was not timely paid and was therefore controverted for purposes of attorney's fees.

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The claimant contends that benefits were paid by respondent carrier No. 1, Commerce & Industry Insurance Company, through July 17, 2005, but benefits after that date have been controverted, including the difference in the compensation rate paid and the correct rate. The claimant contends that her compensable injury which occurred on June 28, 2004, is either an aggravation or a recurrence.

Respondent carrier No. 1, Commerce & Industry Insurance Company, contends that claimant's shoulder problems are a recurrence of her pre-existing problems for which respondent carrier No. 2, Travelers, should be responsible. Respondents No. 1 point out that the only issue appealed was the determination that claimant suffered a compensable aggravation of her previous right shoulder injury and that the issue regarding the applicable compensation rate and any underpayments have been fully and finally adjudicated and paid.

Respondent carrier No. 2, Travelers, contends that the right shoulder injury suffered by the claimant on June 28, 2004, was either an aggravation of a pre-existing condition or a new injury and thus the responsibility of respondent carrier No. 1, Commerce & Industry Insurance Company. Alternatively, respondent carrier No. 2 contends that if they are found liable for benefits, then their liability should be apportioned with respondent carrier No. 1.

STATEMENT OF THE CASE

Claimant is forty-five years old and had worked for Bionetics Corporation doing animal research for a number of years. She testified that she worked in the

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animal research lab rooms and production area, performing death checks and feeding, case changing, and handling racks and cages.

The evidence demonstrates that the claimant had prior problems with her right shoulder. Medical records reflect two motor vehicle accidents in 1999 and 2002 which resulted in treatment for complaints of soreness in claimant's right shoulder. The claimant subsequently suffered a compensable right shoulder injury on October 18, 2002, while employed by Bionetics Corporation. She failed conservative treatment, including injections, and subsequently underwent arthroscopic surgery performed by Dr. Charles Clark on November 8, 2002, and was released to return to work with restrictions in April of 2003. In his surgical report of November 8, 2002, Dr. Clark described the procedure, as follows:

. . . At this point in time the scope was then shifted into the lateral portal into the subacromial space, where dense bursitis was appreciated. The anterior portal was directed into the subacromial space and utilizing a full-radius trimmer, a bursectomy was carried out. This allowed **good visualization** of the rotator cuff through a full range of motion. This was carried through forward flexion, external rotation, abduction and there was **no evidence of a full thickness tear**. . . (emphasis added).

Following the surgery, Claimant progressed with improvement in motion but continued with complaints of neck soreness and light strength on the right side. She continued in therapy. On March 27, 2003, she was released to light-duty work with lifting restrictions and continued physical therapy. Claimant testified that she had been assigned a 15 percent impairment rating for her previous injury. On June 16, 2004, two weeks prior to the alleged second injury on the job, she received an

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injection for recurrence of her tendonitis and was noted to have “excellent ROM and good strength”. Claimant testified that she had improved and was not having significant problems from her prior injuries before the incident in June of 2004.

On June 28, 2004, Claimant injured her right shoulder area and neck in a pulling motion when a co-worker unexpectedly grabbed her arm while hiding behind a curtain as she was standing between two machines at the cage-watch machine. Claimant testified that this frightened her and she injured herself as she tried to jerk away. She explained that she at first thought it was a snake, but later realized it was someone’s fingers that had hold of her arm. She reported her injury and was sent to the nurse and then to the family practice clinic. She sought medical treatment from Dr. Gullett who diagnosed her as having a right shoulder rotator cuff tear and possible cervical problems.

An MRI of her cervical spine reflected that she had herniated discs at the C4-C5 and C5-C6 levels. Dr. Gullett referred her to a neurosurgeon, Dr. Schlesinger, in December of 2004 for her neck. 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 developed a Staph infection in her wound, requiring further treatment.

An MRI of claimant's right shoulder performed on November 17, 2004, revealed a "Full-thickness tear supraspinatus portion of the rotator cuff." On January 27, 2005, Dr. Charles Pearce conducted an independent medical examination (IME) for the claimant's right shoulder problem. Due to the cervical issues, additional treatment for the shoulder was delayed until after claimant healed from the fusion surgery.

FINDINGS OF FACT

1. The stipulations agreed to by the parties herein are accepted as fact;
2. The employer/employee relationship existed on October 8, 2002, when claimant sustained a compensable injury to her right shoulder. The insurance carrier at that time was Travelers Insurance Company. Temporary total disability benefits and medical benefits were paid, along with a 9% whole body impairment rating to the right shoulder assessed by Dr. Clark.
3. The employer/employee relationship existed on June 28, 2004, when claimant sustained a compensable injury to her cervical spine and right shoulder. The insurance carrier at that time was Commerce & Industry Insurance Company c/o AIG Claim Services, third-party administrator. Temporary total disability benefits and medical benefits were paid through July 1, 2005.
4. Claimant was earning an average weekly wage of \$489.60, resulting in a compensation rate of \$326.00 for TTD and \$245.00 for PPD;
5. 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;
6. Claimant has proven by a preponderance of the evidence that she is entitled to reasonable and necessary medical treatment for same at Commerce's expense.

DISCUSSION

In this case, respondent carrier No. 1 asserts 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 prior right shoulder problems, including a prior torn rotator cuff for which she 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.

In *Maverick Transportation v. Buzzard*, 69 Ark. App. 128, 10 S.W.3d 467 (2000), the Arkansas Court of Appeals discussed the difference between an aggravation and a recurrence as it relates to workers' compensation law. The Court stated that 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). 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). Only where it is found that a second episode has resulted from an independent intervening cause is liability imposed upon the second carrier.

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).

In the instant case, it seems obvious that the incident in which claimant was 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 claimant’s right shoulder and a new injury to her neck. There is no medical evidence suggesting that the second incident was a natural and probable consequence of the prior injury. In November of 2002, Dr. Clark noted that the claimant had “moderate to significant labrale fraying”. The October 28, 2002 MRI showed “a partial tear thickening of the rotator cuff distal to the critical zone.” Dr. Clark further observed that during the procedure there was “good visualization of the rotator cuff . . . and there was no evidence of a full thickness tear.” Following the incident of June 28, 2004, the

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November 17, 2004 MRI of the claimant revealed a “full-thickness tear supraspinatous portion of the rotator cuff”. While claimant had prior right shoulder problems, the preponderance of the evidence demonstrates that her injury of June 28, 2004, clearly amounts to an aggravation, rather than a recurrence.

Finally, while liability may be apportioned between carriers or between employers where a second episode results from an independent intervening cause. *Aetna Ins. Co. V. Dunlap*, 16 Ark. App. 51, 696 S.W.2d 771 (1985), I find that apportionment is not supported by the evidence in this case. The preponderance of the evidence demonstrates that the claimant’s shoulder condition had significantly improved after her November, 2002, surgery. Dr. Pearce’s notes reflect that her continued pain and symptoms were related to neck problems which arose as a result of her physical therapy. It was the June 2004 specific work-related incident that resulted in the claimant’s need for additional surgery on her shoulder after the post-incident MRI revealed a full thickness rotator cuff tear not present on earlier tests as well as cervical problems which resulted in surgery which was not controverted. Based on the preponderance of the evidence, I find that the surgery recommended by Dr. Pearce for the claimant’s shoulder injury is certainly reasonable, necessary and causally related to her work injury of June 28, 2004, and claimant is entitled to same at respondent carrier No. 1’s expense.

The evidence demonstrates that respondent employer hired only full-time employees. While it is true that the wage records reflect a number of weeks when

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claimant did not actually work forty hours, the fact remains that she was considered a full-time employee. Therefore, the applicable compensation rate is \$326.00 for TTD and \$245.00 for PPD.

AWARD

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

Respondent carrier No. 1, Commerce is 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 right shoulder injury 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.

BARBARA WEBB
Administrative Law Judge