

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NOS. F400831 & F412571

GARY SEAL, EMPLOYEE

CLAIMANT

**RYDER INTEGRATED LOGISTICS, INC.,
SELF-INSURED EMPLOYER
and RYDER SERVICES, INC.,
THIRD PARTY ADMINISTRATOR**

RESPONDENT NO. 1

**MEYER'S BAKERIES, INC.,
SELF-INSURED EMPLOYER
and AIG CLAIMS SERVICES, INC.,
THIRD PARTY ADMINISTRATOR**

RESPONDENT NO. 2

OPINION FILED OCTOBER 3, 2007

Hearing conducted before Administrative Law Judge S. Dale Douthit in Texarkana, Arkansas.

Claimant was represented by Mr. Gregory R. Giles, Attorney at Law, Texarkana, Arkansas.

Respondent No. 1 was represented by Mr. Michael R. Mayton, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 was represented by Mr. Jarrod Parrish, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On July 10, 2007, the above-captioned claim came on for a hearing in Texarkana, Arkansas. A prehearing conference was conducted on March 21, 2007, and a Prehearing Order was entered that same day. A copy of the March 21, 2007, Prehearing Order was marked as "Commission Exhibit 1," and made a part of the record without objection, subject to any modifications made at the full hearing.

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At the full hearing, the parties stipulated to the following:

- 1) The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
- 2) The employee/employer/carrier relationship existed at all relevant times with regard to Ryder Services, Inc., including January 9, 2004, and the employee/employer/carrier relationship existed at all relevant times with regard to Meyer's Bakeries, Inc., including August 9, 2004.
- 3) Claimant's applicable weekly compensation rates at all times relevant herein were \$453/\$340 for TTD/PPD, respectively.
- 4) Respondent No. 1 stipulated that the claimant sustained a compensable right shoulder injury on January 9, 2004.
- 5) All issues regarding claimant's neck and back are reserved.
- 6) Respondent No. 1 and claimant stipulate Respondent No. 1 paid claimant TTD benefits for three days between January 25, 2004, and January 28, 2004.
- 7) Respondent No. 1 and claimant stipulate that claimant returned to full-time employment with Respondent No. 1 on January 29, 2004.
- 8) The parties stipulate that claimant began working for Meyer's Bakeries, Respondent No. 2, on March 15, 2004.
- 9) The claimant sustained a left shoulder injury while working in Iraq for Haliburton on August 28, 2005, which is unrelated to either of the above-captioned claims.

The parties agreed at the full hearing the following issues would be presented for determination:

- 1) Whether the claimant sustained a recurrence of symptoms on August 9, 2004, associated with his January 9, 2004, compensable injury.

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- 2) In the alternative, whether claimant sustained an aggravation of a preexisting injury on or about August 9, 2004.
- 3) Whether claimant is entitled to TTD benefits from August 13, 2004, through October 6, 2004, additional medical treatment from Dr. Alkire (T. pg. 13, lines 2-6) and attorney's fees.
- 4) If benefits are awarded, carrier liability must be determined.

At the full hearing the claimant contended that he sustained a recurrence of his symptoms on August 9, 2004, concerning claimant's right shoulder, and as a compensable consequence sustained injuries to his elbows. Or in the alternative, claimant contends that he sustained an aggravation of the preexisting injuries or a new compensable injury on August 9, 2004, that the claimant is in need of additional medical treatment with regard to his injuries. That the claimant is entitled to TTD benefits from August 13, 2004, through October 6, 2004. That there are medical expenses which remain unpaid, which one or both of the respondents should be ordered to pay. Claimant further contends respondents should be ordered to pay attorney's fees as permitted by law.

Respondent No. 1 contends that the claimant has received all benefits to which he is entitled from Respondent No. 1. That claimant is not entitled to additional benefits from Respondent No. 1, and that Respondent No. 1 has paid the related medical expenses that were authorized as a result of the right shoulder injury on January 9, 2004. That claimant has received unauthorized medical treatment for his right shoulder injury of January 9, 2004, which Respondent No. 1 is not responsible. Subsequent to working for

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Ryder, claimant sustained an aggravation or new injury while employed at Meyer's Bakeries on or about August 9, 2004; which aggravation or new injury terminates the responsibility of Respondent No. 1. In the event it is determined that claimant is entitled to any additional benefits the additional benefits are the responsibility of Respondent No. 2 and not Respondent No. 1. Respondent No. 1 further contends that claimant's condition is due to an independent intervening cause. In the alternative, Respondent No. 1 contends that if it is determined that Respondent No. 1 owe additional benefits, that there has been payments by the group health carrier of Respondent No. 1 and request a set-off. Respondent No. 1 further contends that the claimant never had a positive MRI, shoulder MRI, of any kind of torn rotator cuff until after the injury on August 9, 2004. Respondent No. 1 contends the August 9, 2004, injury occurred while claimant was working for Meyer's Bakeries, and that there was an MRI on August 6, 2004, about three days before that fall, that did not show a rotator cuff tear. Respondent No. 1 contends that the rotator cuff tear never showed up until after the injury at Meyer's Bakeries on August 9, 2004, and after the incident at Haliburton on August 28, 2005. Respondent No. 1 contends that the right rotator cuff tear could have also been caused by the incident while working for Haliburton on August 28, 2005, while working in Iraq. Respondent No. 1 contends that the August 28, 2005, event in Iraq was an aggravation or new injury that was due to an independent or intervening event that would also terminate any

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responsibility for Respondent No. 1.

Respondent No. 2 contended at the full hearing that the claimant merely suffered a recurrence of his prior January 2004 injury on August 9, 2004, and that the carrier for Ryder Integrated Logistics should be liable for continued benefits associated with that injury. Respondent No. 2 claim that claimant cannot establish a compensable injury on August 9, 2004, by way of objective findings or otherwise. Respondent No. 2 further contends that claimant's current need for medical treatment, if any, is associated with his preexisting injury and not any incident that occurred on August 9, 2004, while working for Meyer's Bakeries, Incorporated. Respondent No. 2 contends that the medical records do not establish entitlement to indemnity benefits associated with the incident that occurred on August 9, 2004, and that claimant's condition is due to an independent intervening cause. Respondent No. 2 also contends that an MRI did not establish a rotator cuff tear until after the claimant returned from working in Iraq for a little under a year. Respondent No. 2 contends that the claimant did suffer an incident in August of 2005 while he was performing heavy labor for Haliburton in Iraq. Respondent No. 2 asserts that the claimant's employment in Iraq serves as an independent intervening cause.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, to include medical reports, documents, and

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other matters properly before the Commission, and having had an opportunity to hear the testimony of the claimant and to observe his demeanor, the following findings of fact and conclusions of law are hereby made in accordance with A.C.A. § 11-9-704:

- 1) The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
- 2) The stipulations agreed to by the parties are reasonable and hereby accepted as fact.
- 3) The claimant has failed to prove by a preponderance of the evidence that he sustained a recurrence of his compensable right shoulder injury from January 9, 2004, after August 9, 2004. Therefore, Respondent No. 1 has no liability in this claim after August 9, 2004.
- 4) Claimant has failed to prove by a preponderance of the evidence that he sustained a compensable aggravation of his previous right shoulder injury while working for Meyer's Bakeries, Respondent No. 2, on August 9, 2004.
- 5) As such, issues number three and four outlined herein are rendered moot.

DISCUSSION

A. History

The claimant, age 56, began working for Meyer's Bakeries in 1996. On or about October 31, 2003, Meyer's Bakeries contracted with Ryder Services, Inc., to handle the trucking part of their operation. So at that time in 2003, the claimant became an employee of Ryder Services, Inc. The claimant's duties consisted of driving an 18-wheel truck and delivering bakery products to warehouses and bakeries. The claimant testified

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that a part of his duties included unloading his truck. The claimant testified he could unload the truck himself or hire someone else to unload for him.

The claimant sustained an admittedly compensable right shoulder injury while working for Ryder Services, Inc., on January 9, 2004. The claimant testified as follows regarding the January 9, 2004, incident:

Q And describe for us, tell us what happened January 9, 2004 that caused you to hurt yourself at that time?

A Well, with Ryder we had slip seat trucks, and what I mean by slip seating trucks is when we got in we had to clean all our belongings and everything out of the truck, so that way somebody else would come in and take that truck on to a different route. And while I was getting my equipment out of my truck, the coax on the antenna got tangled up into my feet, and I fell backwards out of the truck on my right shoulder and my back and my head.

The claimant testified that he did not immediately seek medical treatment on January 9, 2004, because he felt he “would be all right.” (T. pg. 28, lines 8-16). The claimant testified he could not raise his right arm up very far after the January 9, 2004, incident, and eventually asked his employer to go to the doctor. The claimant went to a chiropractor, Laura Douglas, in Hope, Arkansas. The claimant testified the chiropractor massaged him and placed a TENS unit on his shoulder. The claimant was released to return to work by Laura Douglas on January 29, 2004.

Even though the claimant returned to work, the claimant testified he continued having problems with his shoulder. (T. pg. 32, lines 19-24). The claimant testified that

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between January 29, 2004, when he was returned to work, and August 9, 2004, he continued to seek medical treatment from Drs. Glenn and Marrow. The claimant testified Dr. Marrow gave him some Lidoderm patches, Darvocet and ordered an MRI of his right shoulder. On August 6, 2004, the claimant had an MRI of his right shoulder, which generated the following impression:

- 1) Increased signal is seen within the distal aspect supraspinatus tendon near the insertion of the humeral head consistent with tendinosis. No rotator cuff tear is seen.
- 2) Mild degenerative changes at the Acromioclavicular joint.

(R1 Ex. 1, pg. 3).

Three days after the MRI, the claimant testified he had another accident while in Florida working for Respondent No. 2. (The parties stipulated the claimant stopped working for Ryder Services on March 15, 2004, and began employment with Meyer's Bakeries doing essentially the same tasks). The claimant testified as follows regarding the fall on August 9, 2004:

A I was climbing down off of the stack of calcium propionate and I had a milk crate that was on the floor and I had my foot on the milk crate and I was leaning on my right shoulder to get down, and my right shoulder just came out of joint, felt like it came out, and when it came out I went down and it went back in, and that's basically it, and I landed on my back.

Q What were you leaning, you say you leaned on it with your right shoulder, what were you leaning up against?

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A I was leaning on the edge of the calcium propionate, the stack of goods.

Q And when your shoulder gave way, how far did you fall?

A Three foot, maybe more, I'm not for sure.

Q And this all happened when you were in Florida?

A Yes.

Q Did you see a doctor there at that time?

A No, I waited until I got back.

Q And when you got back with the truck did you go back and see Dr. Marrow?

A Yes.

The claimant testified that when he returned from Florida he reported the August 9, 2004, incident and then went to Dr. Marrow. On August 13, 2004, Dr. Marrow took the claimant off work. (C. Ex. 1, pg. 80). Dr. Marrow sent the claimant to physical therapy and then released the claimant to work on October 6, 2004. The physiotherapy at HealthSouth included mostly work on the cervical spine with less attention given to the right shoulder. Upon his release, the claimant testified he resumed his work with Meyer's Bakeries, but still had right shoulder problems and had to pay people to unload his truck.

The claimant underwent an independent medical evaluation by Dr. David Collins on February 16, 2005. In that report Dr. Collins opines "Mr. Seal aggravated the injury

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he sustained on January 9, 2004. Supporting evidence is the fact that he had undergone the ultimate investigational tests for persistent symptoms just three days prior to the incident on August 9, 2004 – that is, MRI of the right shoulder.” (C. Ex. 1, pg. 130).

The claimant testified that around the time of the IME, Meyer’s Bakeries changed ownership to Southern Bakeries. The claimant testified that Southern Bakeries was going to drop his pay, so he left and went to work for Tyson Foods. The claimant testified that Tyson Foods wanted him to drive 20 hours per day in violation of the Department of Transportation rules and regulations, and he left after about a week of work. The claimant testified that he underwent a physical before going to work for Tyson Foods, but that he was not truthful about his prior medical conditions because he felt he would not have been hired had he told Tyson Foods about his shoulder problems.

After leaving Tyson Foods, the claimant testified he began working for a division of Haliburton as a truck driver in Iraq. The claimant testified that he also underwent a physical examination before going to work for Haliburton, but once again was not truthful about his right shoulder problems in fear that he would not be hired.

Around late June of 2005, the claimant began working for Haliburton in Iraq as a truck driver. On August 28, 2005, the claimant sustained a left shoulder injury while working for Haliburton in Iraq that is unrelated to the above-captioned claims. In March of 2006, Haliburton sent the claimant back to the United States to have his left shoulder

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treated. The claimant began treating with Dr. Chris Alkire for his unrelated left shoulder injury. Ultimately Dr. Alkire performed surgery on the claimant's left shoulder.

While treating with Dr. Alkire for his left shoulder problem, the claimant eventually mentioned his right shoulder problems to Dr. Alkire. Dr. Alkire ordered another MRI of the right shoulder which was done on October 23, 2006. The October 23, 2006, MRI report states the following:

IMPRESSION:

1. HIGH GRADE PARTIAL THICKNESS TEAR OF THE DISTAL ANTERIOR FIBERS OF THE SUPRASPINATUS AT THE LEVEL OF THE FOOTPLATE MEASURING 6 MM X 4 MM IN ANTEROPOSTERIOR AND TRANSVERSE DIMENSIONS RESPECTIVELY.
2. SMALL SUBACROMIAL/SUBDELTOID FLUID COLLECTION.
3. SUPRASPINATUS TENDINOSIS AND MINIMAL DELTOID STRAIN. THERE IS QUESTIONABLE TENDINOSIS OF THE PROXIMAL BICEPS TENDON IN THE BICIPITAL GROOVE.
4. INFERIOR PARALABRAL CYST MEASURING 4 MM, SUGGESTIVE OF LABRAL TEAR.
5. ACROMIOCLAVICULAR JOINT HYPERTROPHIC SPURRING.

Based on the second MRI, Dr. Alkire recommended "a diagnostic and operative arthroscopy, rotator cuff repair and probable distal clavicle resection." (C. Ex. 1, pg. 147). Claimant seeks the surgery now recommended by Dr. Alkire, all previous treatment from Dr. Alkire, attorney's fees, and TTD benefits from August 13, 2004, through October 6, 2004.

B. Adjudication

The benefits in which the claimant seeks all relate to after the August 9, 2004, fall that claimant took in Florida while working for Meyer's Bakeries (Respondent No. 2). The main issue which must be decided is whether the claimant sustained an aggravation to his right shoulder, a recurrence of his previous compensable right shoulder injury, or neither. 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:

An aggravation is a new injury resulting from an independent incident. 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. Atkins Nursing Home v. Gray, 54 Ark. App. 125, 923 S.W.2d 897 (1996). A recurrence exists when the second complication is a nature and probable consequence of a prior injury. Weldon v. Pierce Bros. Const., 54 Ark. App. 344, 925 S.W.2d 179 (1996).

The test to determine 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. Bearden Lumber Co. v. Bond, 7 Ark. App. 65, 644 S.W.2d 321 (1983).

The facts in this claim do not support a finding that the claimant sustained a recurrence of his compensable right shoulder injury after August 9, 2004. The simple fact is that there was an independent event which took place on August 9, 2004, that

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was not a natural or probable result of the claimant's January 9, 2004, compensable injury. The claimant testified as follows regarding his fall in Florida on August 9, 2004:

Q I got you. So, you had your foot, and I think you said that floor was wet and slippery?

A Yes.

Q And you had your foot on that milk case, that milk case slipped and caused your foot to kind of come out from under you, and you had your right shoulder propped up, and that's when you fell?

A Yes, something . . .

Q Kind of like that?

A Yes.

(T. pg. 57, lines 16-25).

The claimant had different testimony about the change, if any, of his right shoulder symptoms after the August 9, 2004, fall. At one point, the claimant testified that his right shoulder problems have virtually been the same since his original January 9, 2004, injury, however; the claimant contradicted that testimony regarding some different symptoms he did have after the August 9, 2004, fall:

Q In other words, it seems like you felt like after falling on August 9th, you did need some medical treatment, or at least to get checked up to make sure you were okay after that fall?

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A Yes.

Q I was asking you also if after that fall in August of 2004 you noticed any different symptoms than you had back in January, and I think you indicated to me you'd had some different symptoms after that August, 2004, fall, is that correct?

A I believe so, it seems to me like some –

Q I was looking at your deposition and you said after the August 9, 2004 fall when you would lay your head on your right shoulder, your whole arm would go numb just like it was asleep and numb?

A Yes, yes.

Q And I asked you, I said, was that only after the August, 2004, fall, and you told me that it was, that it started after that?

A Yes.

Q I asked you about, if anything else was a different type of pain or anything, and you said that after that August 9, 2004 fall you were hurting back in your shoulder blades like in the muscles and around the shoulder blade, where the muscles underneath started hurting after the August, 2004, fall, does that sound about right?

A Sounds right.

Q You said you were hurting more through the muscle part of your arm after you fell in August, does that sound fair enough to you?

A It sounds about right. It's been so long, I'm sorry . . .

Q Yes, I was looking at that deposition because it was taken pretty quickly after all of this happened, which is unusual for me to get anything done that quickly, but at least we did. Mr. Parrish and I came down recently and took a deposition again, Mr. Parrish asked most of the questions since he had not had a chance to talk

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to you, and he was asking you if you could tell any change in your condition in your right shoulder and body after that August, 2004 fall, and you indicated to him that you were having more numbness in your hand and a burning sensation into your elbow, and your shoulder muscles were drawing up in a knot. And he asked you was that there before the August, 2004 and you indicated to him you felt like the burning thing was new after that August, 2004 fall?

A Yes.

(T. pg. 59, lines 14-25, pg. 60, lines 1-25, pg. 61, lines 1-13).

The above testimony was in relation to a deposition that was taken much closer in time to the August 9, 2004, fall than was the full hearing of July 10, 2007.

Therefore, I found the claimant's recollection of symptoms in his December 2004 deposition to be much more probative than his recollection of his symptoms over two years later at the full hearing:

Q Now, when you went to, I was asking you when I took your deposition, I took one back in December of 2004, pretty soon after all of this had happened, and when I took your deposition back then I was asking you kind of the problems you had in January of 2004 and the problems you had after that fall in Florida in August of 2004, and I asked you when I was taking your deposition if that fall in August of 2004, in Florida, did it make you feel worse, did you feel worse after that fall? Did your shoulder feel worse, did your neck feel worse, and you told me that it did, is that a pretty fair statement?

A I would say so. I can't remember just . . .

(T. pg. 58, lines 15-25, pg. 59, lines 1-3).

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In addition to the actual fall on August 9, 2004, and the claimant's new symptoms after the fall; the medical evidence shows a significant change in the claimant's right shoulder after the August 9, 2004, event. The claimant had an MRI of his right shoulder on August 6, 2004, just three days before the August 9, 2004, fall in Florida. The August 6, 2004, MRI clearly says "no rotator cuff tear is seen." (R1 Ex. 1, pg. 3). Then, on October 23, 2006, another MRI was done on the claimant's right shoulder which said "high grade partial thickness tear of the distal anterior fibers of the supraspinatus at the level of the footplate measuring 6 mm x 4 mm in anteroposterior and transverse dimensions respectively." (R1. Ex. 1, pg. 21). It is the rotator cuff tear that has Dr. Alkire recommending the surgical rotator cuff repair. (R2 Ex. 1, pg. 72). The MRI taken prior to the August 9, 2004, fall clearly shows the claimant had no rotator cuff tear. Only sometime after the first MRI did the claimant get a rotator cuff tear. It is clear to this examiner that the claimant's current request for benefits is not related to a recurrence of the claimant's January 9, 2004, compensable injury.

Since I have deemed the claimant did not suffer a natural and probable consequence of his prior compensable injury, it must be determined whether the claimant sustained an aggravation of his January 9, 2004, compensable right shoulder injury. An aggravation is a new injury with an independent cause and, therefore must

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meet the requirements of a compensable injury. Crudup v. Regal Ware, Inc., 341 Ark. 804, 20 S.W.3d 900 (2000).

For the claimant to establish a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, the following requirements of A.C.A. § 11-9-102(4)(A)(i)(Repl. 2002) must be established:

1. Proof by a preponderance of the evidence of an injury arising out of and in the course of his employment ;
2. proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death;
3. medical evidence supported by objective findings, as defined in A.C.A. § 11-9-102(16), establishing the injury; and,
4. proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence.

If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of the injury alleged, she fails to establish the compensability of the claim, and compensation must be denied. Mikel v. Engineered Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

The claimant filed an AR-N Form with the Commission on August 12, 2004, stating that he injured his elbows, head and shoulders when he fell and hit the floor on August 9, 2004. Subsequently, the medical records show the claimant treated with Dr. Charles Marrow, who took the claimant off work from August 13, 2004, through

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October 5, 2004. (C. Ex. 1, pgs. 80 & 124). Dr. Marrow also sent the claimant to physical therapy and prescribed some medications. The claimant was seen by Dr. David Collins for an independent medical evaluation on February 16, 2005. After reviewing the medical documentation between the August 9, 2004, fall and the second MRI of the claimant's right shoulder on October 23, 2006, which showed a rotator cuff tear; it appears the claimant primarily had subjective complaints with no objective findings of a new injury until the October 23, 2006, MRI.

As stated, the October 23, 2006, MRI did show a rotator cuff tear, however; it must be proven by the claimant by a preponderance of the evidence that his injury arose out of and in the course of his employment with Meyer's Bakeries on August 9, 2004. Based on the evidence contained in the record, I cannot find that claimant's injury for which Dr. Alkire recommends surgery arose out of or in the course of claimant's employment with Meyer's Bakeries on August 9, 2004. Therefore, I find that claimant has failed to prove he sustained an aggravation or new compensable injury while working for Respondent No. 2 on August 9, 2004. A number of factors came into play in the making of this decision.

One factor is the significant delay in time between the August 9, 2004, fall and the October 23, 2006, MRI, and the claimant's actions and activities therein. As stated earlier, the claimant worked for two different employers after leaving Meyer's

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Bakeries, Tyson Foods and Haliburton, but before the second MRI of the right shoulder. Both employers gave the claimant a physical before he began employment. The claimant testified he was not truthful with either employer about his physical condition, which causes this ALJ to question the claimant's subjective complaints with regard to his right shoulder. The physical examination from those employers contained in the record show the claimant was not truthful at some point. (R2 Ex. 2, pg. 14 and R1 Ex. 1, pg. 28). In addition, the claimant passed both physicals.

The claimant testified that the work he did for Haliburton in Iraq was more strenuous than the work he did for either Meyer's Bakeries or Ryder Services, Inc. (T. pg. 65, lines 10-15). The strenuous work in Iraq consisted of the claimant working with chains and straps and raising and lowering trailers. In fact the claimant actually injured his left shoulder while doing these activities in Iraq. The question was posed to the claimant about whether anything new could have happened to his right shoulder in Iraq and the claimant was somewhat contradicting. At one point the claimant testified that he never hurt his right shoulder while working in Iraq, however; he also testified as follows:

Q Okay, my question was, and when you were either throwing the chains or pulling the canvas tarps down did you at anytime have a specific incident where your right shoulder started hurting worse or hurting differently, and your answer was, to be honest with you I can't tell.

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A There were so many incidents, you know, it got to where it was an everyday thing, I mean, it's been so long since my shoulder was hurt, and it's gotten to be, gotten used to it, you know, and it's hard to tell.

(T. pg. 86, lines 23-25, pg. 87, lines 1-8).

The claimant also testified that after his left shoulder injury in August of 2005 while working for Haliburton in Iraq, he continued to work his strenuous job for nearly seven months using mostly his right arm.

Q But you were doing all of your work with your right arm?

A Yes.

Q And that was from August of 2005 until March of 2006 when you left KBR?

A Yes.

(T. pg. 90, lines 16-21).

Upon returning to the United States in 2006 to be treated for his left shoulder injury, the claimant requested Dr. Alkire treat his right shoulder. An MRI was conducted on October 23, 2006, that showed a rotator cuff tear in the claimant's right shoulder. It is that rotator cuff tear for which the claimant seeks treatment and surgery from Dr. Alkire. Based on all the facts outlined herein and the claimant's activities prior to the second MRI of the right shoulder, I find the claimant has failed to prove by a preponderance of the evidence that his right shoulder injury arose out of

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and in the scope of his employment with Meyer's Bakeries on August 9, 2004.

Therefore, the claimant has failed to prove that he sustained a compensable aggravation of his right shoulder on August 9, 2004. As such, issues number 3 and 4 outlined herein are rendered moot.

ORDER

For the reasons outlined here, I find the claimant has failed to prove that he sustained a recurrence of his compensable right shoulder injury of January 9, 2004. Additionally, I find the claimant has failed to prove by a preponderance of the evidence that he sustained a compensable aggravation of his right shoulder on August 9, 2004, while working for Respondent No. 2. As such, this claim for benefits is respectfully denied and dismissed.

IT IS SO ORDERED.

S. DALE DOUTHIT
Administrative Law Judge

SDD/pjb