

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F406876

KATHERINE BANKSTON, EMPLOYEE	CLAIMANT
BIONETICS CORPORATION, EMPLOYER	RESPONDENT NO. 1
COMMERCE & INDUSTRY INSURANCE COMPANY c/o AIG CLAIM SERVICES (TPA), INSURANCE CARRIER	RESPONDENT NO. 1
SECOND INJURY FUND	RESPONDENT NO. 2

OPINION FILED JULY 21, 2008

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, Worley, Wood & Parrish, P.A., Little Rock, Arkansas.

Respondent No. 2, the Second Injury Fund, represented by Ms. Judy W. Rudd, Attorney at Law, Arkansas Workers' Compensation Commission - Special Funds, Little Rock, Arkansas. The Second Injury Fund waived its appearance at the pre-hearing conference and hearing in light of the issues involved.

PROCEDURAL HISTORY

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,

¹ 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.

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. 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 Travelers Insurance Company, ("Travelers"), the insurance company on risk in 2002.

In an Opinion filed March 13, 2006, the 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.

On September 7, 2006, Travelers was joined as a party to the proceeding and contended that the injury was either an aggravation of a pre-existing condition or a new injury, and was the responsibility of Commerce. The parties submitted a stipulated record to the Administrative Law Judge for determination of the following issues: 1) whether claimant's shoulder injury on June 28, 2004, was an aggravation or recurrent injury, 2) the amount of the applicable compensation rate, and 3) which carrier was responsible for attendant benefits. In an Opinion dated June 6, 2007, the Administrative Law Judge found that the injury of June 28, 2004, constituted an aggravation of the claimant's right shoulder injury, determined the proper compensation rate, and placed liability on Commerce. The decision of the Administrative Law Judge was affirmed and adopted by the Full Commission by Opinion filed November 6, 2007. No appeal was taken from the November 6, 2007, Full Commission Opinion.

On December 5, 2007, the claimant filed a request for hearing on the issues of payment of accrued benefits, a penalty, a citation of contempt, and payment of all accrued attorney's fee. On December 7, 2007, respondents No. 1, Commerce, filed a request to join the Second Injury Fund as a party to these proceedings. On January 15, 2008, the Second Injury Fund acknowledged receipt of their joinder as a party.

A pre-hearing telephone conference was held on this claim on March 25, 2008. This matter was set for a hearing on April 24, 2008, 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 (incorporated by reference).
- (2) Administrative Law Judge Opinion dated June 6, 2007.
- (3) Full Commission Opinions dated July 11, 2006, and November 6, 2007.
- (4) Pre-hearing Order dated March 25, 2008.
- (5) Stipulation of the parties filed April 17, 2008, with attachments:
 - (a) Letter from Dr. Charles Pearce dated January 19, 2007.
 - (b) Medical Record from Dr. Charles Pearce dated March 18, 2008.
- (6) Commerce's printout reflecting benefits paid through March 14, 2008.

STIPULATIONS

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

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

2. The employer/employee relationship existed on June 28, 2004, when claimant sustained a compensable injury to her cervical spine and right shoulder.
3. The claimant's earnings were sufficient to entitle her to a compensation rate of \$326.00 for temporary total disability and \$245.00 for permanent partial disability benefits.
4. On January 19, 2007, Dr. Charles Pearce noted that "it would be my opinion that if she did not have surgery for her rotator cuff tear then she would certainly have some limitations because this was her dominant arm." He restricted her from no lifting greater than 40 to 50 pounds to the waist and no greater than about 20 pounds over the shoulder. Work within those restrictions has not been offered by Bionetics.
5. Claimant had surgery on March 10, 2008, by Dr. Charles Pearce, to repair the torn rotator cuff and is presently in physical therapy with her next appointment to Dr. Pearce being April 15, 2008.
6. If claimant were to testify, she would state that she has not worked anywhere from July 12, 2005, to the present time.

ISSUES

By agreement of the parties, the issues presented are claimant's entitlement to additional temporary total disability benefits from July 13, 2005, to January 17, 2007, interest, an 18% penalty, and attorney's fees.

CONTENTIONS

The claimant contends that she has been temporarily and totally disabled for her shoulder injury since she was released by Dr. Schlesinger for the cervical problem. She has been under a work restriction and no offer of work within those restrictions has been forthcoming. The claimant contends that she will be temporarily and totally disabled until her healing period ends after the shoulder surgery by Dr. Charles Pearce and that these benefits have been controverted.

Commerce contends that the medical records do not contain evidence that the claimant remained in a healing period while being totally incapable of working between July 13, 2005, and January 17, 2007. Commerce further contends that they have paid temporary total disability benefits beginning January 19, 2007, and those benefits are continuing.

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 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. 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 second injury on the job, she received an 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 claimant's right shoulder performed on November 17, 2004, revealed a "Full-thickness tear supraspinatus portion of the rotator cuff." An MRI of her cervical spine reflected that she had herniated discs at the C4-C5 and C5-C6 levels.

In December of 2004, Dr. Gullett referred her to a neurosurgeon, Dr. Schlesinger, for her neck injuries. 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.

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. On June 17, 2005, Dr. Schlesinger assigned a 10 percent impairment rating for the claimant's neck injury. On July 1, 2005, Dr. Schlesinger determined that the claimant reached maximum medical improvement in connection with her neck injury. In a letter dated July 22, 2005, the claimant was notified that she was terminated and that there were no positions available to accommodate her permanent limitations.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties herein are accepted as fact.

2. The employer/employee relationship existed on October 8, 2002, between the claimant and Bionetics Corporation when claimant sustained a compensable injury to her right shoulder. The insurance carrier at that time was Travelers Insurance Company. Temporary total disability benefits, medical benefits, and permanent partial disability benefits were paid based on a 9% whole body impairment rating to the right shoulder assessed by Dr. Clark. The insurance carrier at that time was Travelers.
3. The employer/employee relationship between the claimant and Bionetics Corporation 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.
4. Temporary total disability benefits and medical benefits in connection with the June 28, 2004, injury were paid by Commerce through July 1, 2005. Permanent partial disability benefits were paid by Commerce based on the 10% impairment rating in connection with the claimant's cervical injuries assessed by Dr. Schlesinger.
5. 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.
6. Claimant's right shoulder condition existing since the June 28, 2004, incident constituted an aggravation of her prior, unrelated right shoulder injury.
7. Claimant had surgery on March 10, 2008, by Dr. Charles Pearce, to repair the torn rotator cuff and was continuing treatment with Dr. Pearce as of April 15, 2008. Commerce has paid medical expenses in connection with claimant's right shoulder injury. In connection with the right shoulder, Commerce has paid temporary total disability benefits beginning January 19, 2007, and those benefits are continuing.
8. Claimant has proven by a preponderance of the evidence that she has not been able to work from July 12, 2005, to the present time, due to her work-related injury to her right shoulder and that she is entitled to temporary total disability benefits from July 12, 2005, until January 17, 2007, with interest.

9. Respondents No. 1 fully controverted payment of additional benefits and therefore claimant has not proven by a preponderance of the evidence that she is entitled to an 18% penalty.
10. Claimant has proven by a preponderance of the evidence that she is entitled to payment of attorney's fees in connection with the temporary total disability indemnity benefits awarded herein.

DISCUSSION

Additional Temporary Total Disability

Claimant is contending that she is entitled to additional temporary total disability benefits from July 12, 2005, to January 17, 2007, the date that Commerce resumed paying temporary total disability benefits. The claimant is entitled to temporary total benefits if she can satisfy a two-prong test: (1) claimant must be within her healing period; and (2) completely incapacitated from earning wages. Ark. Highway & Trans. Dept. v. Breshears, 272 Ark. 244, 613 S.W.2d 392 (1981). The healing period is defined as that period for healing the injury, which continues until claimant is as far restored as the permanent nature of the injury will allow. Nix v. Wilson World Hotel, 46 Ark. App. 303, 879 S.W.2d 459 (1994). Based on Dr. Schlesinger's recommendations of July 1, 2005, the claimant was released to limited duty with restrictions on standing, sitting, lifting, pulling, grasping and bending. Because of the permanent nature of these restrictions, Bionetics determined that there were no positions available for the claimant. On January 19, 2007, Dr. Pearce noted that if the claimant did not have surgery for her rotator cuff tear, she would have limitations due to the fact that this was her dominant arm. He restricted her from lifting greater than 40 to 50 pounds to the waist and no greater

than 20 pounds over the shoulder. Bionetics has not offered the claimant work within these restrictions. On March 10, 2008, the claimant underwent surgery by Dr. Charles Pearce for the rotator cuff tear in her right shoulder. As of the date of submission of this case, she was continuing physical therapy and treatment. The evidence further demonstrates that even if the claimant was able to return to work at Bionetics, her current position would require some physical activity which goes beyond her current restrictions.

Based on the preponderance of the evidence, I find that the claimant is entitled to additional temporary total disability for the time period from July 12, 2005, until January 17, 2007. I further find that the claimant is entitled to continued medical treatment and temporary total disability benefits in connection with her June 28, 2004, right shoulder injury until the date she reaches maximum medical improvement and is released from care by her authorized treating physician, Dr. Charles Pearce.

Penalty

Ark. Code Ann. § 11-9-802(b) provides:

(b) If any installment of compensation payable without an award is not paid within fifteen (15) days after it becomes due, as provided in subsection (a) of this section, there shall be added to the unpaid installment an amount equal to eighteen percent (18%) thereof, which shall be paid at the same time as, but in addition to, the installment unless notice of controversion is filed or an extension is granted the employer under § 11-9-803 or unless such nonpayment is excused by the commission after a showing by the employer that, owing to conditions over which he had no control, the installment could not be paid within the period prescribed.

In the present matter, the claimant contends that she is entitled to late payment penalties in connection with additional temporary total disability benefits owed from July 12, 2005, to January 17, 2007. However, the preponderance of the evidence demonstrates that Commerce fully controverted compensability of the June 28, 2004 right shoulder injury and related benefits. The decision by the Full Commission establishing compensability of the right shoulder was entered November 6, 2007, and became a final opinion thirty days later. Respondents No. 1 had 15 days to pay the awarded benefits. However, the issue of payment of temporary total benefits for the period of time after July 12, 2005, was not raised at that time. Following the determination of compensability, Commerce paid additional temporary total disability benefits as of January 19, 2007, based on the medical opinion of Dr. Charles Pearce, but controverted payment of any temporary total disability benefits between July 12, 2005, and January 17, 2007. Pursuant to Ark. Code Ann. § 11-9-802(b), I find that the respondents controverted the additional indemnity benefits and are not liable for an 18% penalty on the unpaid temporary total disability benefits from July 12, 2005, through January 17, 2007.

Controversion and Attorney's Fees

Based on my review of the evidence in this case, I find that respondents No. 1 have fully controverted payment of additional temporary total disability benefits from July 12, 2005, until January 19, 2007. I find that the claimant's attorney is entitled to a twenty-five percent (25%) statutory attorney's fee on the indemnity benefits awarded to the claimant as a result of the findings herein, one-

half of the fee to be paid by the claimant and one-half of the fee to be paid by the respondents in accordance with Ark. Code Ann. § 11-9-715 (Repl. 1996); and Death & Permanent Total Disability Trust Fund v. Brewer, 76 Ark. App. 348, 65 S.W.3d 463 (2002).

AWARD

Respondent No. 1, Commerce, is directed to pay additional temporary and total disability payments to the claimant for the period of time between July 12, 2005, and January 17, 2007, with interest.

Respondents No. 1 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