

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), CARRIER	RESPONDENT

OPINION FILED JULY 11, 2006

Upon review before the FULL COMMISSION, Little Rock, Pulaski County, Arkansas.

Claimant represented by HONORABLE KENNETH E. BUCKNER,  
Attorney at Law, Pine Bluff, Arkansas.

Respondent represented by HONORABLE JARROD S. PARRISH,  
Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Vacated and remanded.

OPINION AND ORDER

The issue in the present case is whether the claimant's June 28, 2004, shoulder injury was an aggravation or whether it was a recurrence. At a prior hearing, an Administrative Law Judge ruled that the claimant sustained an aggravation. The respondent now appeals, contending that the claimant sustained a recurrence and that a previous carrier should be liable for her ongoing medical care.

After a de novo review of the record, we find that this case shall be remanded to the Administrative Law Judge

because the insurance carrier from the time of the claimant's prior injury was not named in the suit. As they were a necessary party to the suit, we find that their participation was needed.

The claimant in the present case has a history of having shoulder difficulties. In 2002, while working for the respondent, the claimant sustained an injury to her right shoulder. As a result of that injury the claimant submitted to surgery to repair a torn rotator cuff. Despite that treatment the claimant continued to receive ongoing medical care related to her shoulder. As of June 16, 2004, the claimant continued to present with ongoing right shoulder complaints, for which the respondent and their carrier, Travelers Indemnity accepted liability. At some point prior to June 28, 2004, the respondent changed carriers.

On June 28, 2004, the claimant was working and was injured. She described the events surrounding the injury as follows,

I was standing between two machines at the cage watch machine, and a coworker went in the back between the hot water area where the cages come out at and stuck his hand through the curtain in that area and locked on to my forearm and scared me. As I tried to pull away,

because I was scared, and that's when the injury happened.

The claimant testified that at first she believed that the object that had locked on her arm was a snake but that she later realized it was a human hand. Ultimately the claimant sustained admittedly compensable injuries to her cervical spine, for which the respondent accepted liability. The claimant also complained of pain in her right shoulder. The respondent and their new carrier initially accepted liability for related care. However, they later controverted the claim, contending that the claimant had a pre-existing shoulder condition that was not causally related to the June 28, 2004 incident.

On March 16, 2006, an Administrative Law Judge issued a decision finding in pertinent part,

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 the same at the respondents' expense.

The Administrative Law Judge also made a finding regarding the claimant's weekly wages and found that the respondent was required to pay an attorney's fee on an impairment rating related to the claimant's neck. However, the

respondent only appeals the portion of the Administrative Law Judge's opinion finding that the claimant sustained a compensable shoulder injury in the form of an aggravation. Their argument is that the claimant had a pre-existing injury to her right shoulder and that she did not sustain an aggravation. They further argue that the claimant's symptoms and injuries were the same as those sustained in her 2002 work-related injury and that the carrier from that time period should be the party liable for benefits.

After reviewing the record, we find it is necessary to remand this case to the Administrative Law Judge in order to join Travelers Indemnity as a party to the present claim. We further order the Administrative Law Judge to conduct further proceedings with Travelers Indemnity's participation, and then render a decision regarding the issue of whether the claimant sustained an aggravation or a recurrence and apportioning liability as appropriate.

In Maverick Transp. 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 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.

Id. at 130, 10 S.W.3d at 468. An aggravation is a new injury with an independent cause and, therefore, must meet the requirements for a compensable injury. Crudup v. Regal Ware, Inc., 341 Ark. 804, 20 S.W.3d 900 (2000); Ford v. Chemipulp Process, Inc., 63 Ark. App. 260, 977 S.W.2d 5 (1998).

As determining liability is a threshold issue in the present case, the carrier from the time of the claimant's 2002 injury is a necessary party. We recognize that neither party requested that Travelers be included in the suit; however, there is no record that Travelers received notice regarding the prior hearing. Likewise, it was apparent from the onset of the request for litigation that Travelers' interests could be adversely impacted. Accordingly, they should have been named as a party.

In short, we find that by not being named as a party from the onset of the claim, Travelers was denied their due process rights of having the opportunity to appear and defend their interests. Therefore, we vacate and remand this decision to the Administrative Law Judge. We also direct the Administrative Law Judge to name Traveler's Insurance as a party to the suit and to 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.

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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SHELBY W. TURNER, Commissioner

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KAREN H. MCKINNEY, Commissioner