

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NOS. F400831 & F412571

GARY SEAL, EMPLOYEE	CLAIMANT
RYDER INTERGRATED LOGISTICS, INC. A SELF INSURED EMPLOYER	RESPONDENT NO. 1
RYDER SERVICES, INC, TPA	RESPONDENT NO. 1
MEYER'S BAKERIES, INC., A SELF INSURED EMPLOYER	RESPONDENT NO. 2
AIG CLAIMS SERVICES, INC., TPA	RESPONDENT NO. 2

OPINION FILED OCTOBER 10, 2008

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

Claimant represented by HONORABLE GREGORY R. GILES, Attorney at Law, Texarkana, Arkansas.

Respondent No. 1 represented by HONORABLE MICHAEL MAYTON, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by HONORABLE JARROD PARRISH, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and Adopted.

OPINION AND ORDER

Respondents No. 2 appeal, and the claimant cross-appeals from a decision of the Administrative Law Judge filed October 3, 2007.

The Administrative Law Judge entered the following findings of fact and conclusions of law:

- 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.

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies

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the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings of fact made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

Thus, we affirm and adopt the decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

OLAN W. REEVES, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion denying the compensability of the claimant's August 9, 2004 injury. From a *de novo* review of the record, I find

that the claimant proved, by a preponderance of the evidence, that he sustained a compensable injury in the employment of Respondent No. 2 on August 9, 2004 and that he should be awarded medical and temporary total disability benefits for that injury.

The opinion of the Administrative Law Judge was affirmed and adopted in its entirety by the majority without additional discussion. Therefore, the opinion of the Administrative Law Judge and all of the findings and conclusions contained in that decision are now the majority opinion. *Death & Permanent Total Disability Trust Fund v. Branum*, 82 Ark. App. 338, 107 S.W.3d 876 (2003).

On January 9, 2004, the claimant was employed as a truck driver by Respondent No. 1, Ryder. On that date, he sustained an injury to his right shoulder when he fell backwards out of a truck onto his right shoulder, back and head. The injury was accepted as compensable and benefits paid. The claimant received appropriate medical care. He had his first MRI scan performed on August 6, 2004. This study showed no evidence of a rotator cuff tear.

On August 9, 2004, three days after the first MRI, the claimant suffered a second incident involving his right shoulder while working for another employer, Respondent No. 2, Meyer's Bakeries, again as a truck driver. This injury occurred when the claimant was standing on a milk crate when the crate slipped and he fell on his shoulder. As a result of this accident, the claimant experienced additional difficulties and again received medical treatment. The claimant had an independent medical evaluation by Dr. David Collins, an orthopedic surgeon, on February 16, 2005. In his report of that date, Dr. Collins stated:

It is my opinion that Mr. Seal needs to be evaluated by an orthopaedic surgeon and perhaps a neurosurgeon. He may require additional imaging studies, possibly MRI of the right shoulder, arthrography of the right shoulder and electrodiagnostic studies of the right paracervical muscles, the right shoulder girdle and upper extremity. Such investigations may lead to recommendations for specific treatment.

* * *

If his investigations were to identify a rotator cuff tear, it should be stated that the MRI dated 8/6/04 did not show a rotator cuff tear. If a subsequent report showed a full thickness rotator cuff tear, then the statements regarding injury exacerbation and new injury would be qualified relative to the results of this test. That is, **if a new study revealed a full thickness rotator cuff tear, then the conclusion must be made that this occurred on the date of 8/6/04 and not 1/9/04.** Until this information is available, the association between the injuries is supported by the patient's history, physical examination and imaging records. (emphasis added)

Subsequently, the claimant worked for Tyson Foods as a truck driver for about one week and then took a job in Iraq driving a truck for Haliburton. Both of these employers conducted pre-employment physical examinations of the claimant. The claimant did not inform either employer of his previous right shoulder injuries. There is no evidence that the claimant re-injured his right shoulder

while working for either of these companies.

However, while working for Haliburton, the claimant injured his left shoulder. He was sent back to Arkansas by Haliburton to have his left shoulder treated by Dr. Chris Alkire, an orthopedic surgeon. During that treatment, the claimant had his right shoulder examined by Dr. Alkire. Dr. Alkire suspected that the claimant was suffering from a rotator cuff tear and ordered an MRI scan of his right shoulder. That study confirmed Dr. Alkire's suspicions and showed an impingement syndrome with a rotator cuff tear and AC joint arthritis. Dr. Alkire recommended a diagnostic and operative arthroscopy, rotator cuff repair, and probable distal clavicle resection. Both respondents denied liability for the medical treatment and disability benefits associated with this recommendation and this litigation ensued.

The Administrative Law Judge correctly identifies the issues involved as follows:

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.

The Administrative Law Judge accurately identifies the law which controls the result in this case, as follows:

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. 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 Administrative Law Judge properly concluded that the claimant's current right shoulder problems were not the result of a recurrence of the January 9, 2004 injury. As the Administrative Law Judge pointed out, the accident of August 9, 2004 was in no way connected with the January 9, 2004 injury and was an event which involved a separate and distinct set of circumstances which would have independently resulted in a shoulder injury. The Administrative Law Judge noted that the claimant experienced a significant change in symptoms after the August 9, 2004 injury. Most importantly, the diagnostic studies showed that the claimant had no rotator cuff tear three days before the August 9, 2004 injury and that he had a significant tear in the rotator cuff, thereafter. In short, there simply was no evidence suggesting that the claimant's current right shoulder problems were a natural and probable result of the January 9, 2004 injury.

However, the evidence supports a finding that the claimant's current right shoulder problems were related to a

compensable aggravation occurring on August 9, 2004 in the employment of Respondent No. 2. The Administrative Law Judge's finding to the contrary was in error. An aggravation is a new injury, with an independent cause, which must satisfy the statutory requirements for compensability contained in the Act. *Crudrup v. Regal Ware, Inc.*, 341 Ark. 804, 20 S.W.3d 900 (2000). A finding of compensability in this case calls for proof, by a preponderance of the evidence, of a specific incident, identifiable by time and place of occurrence, arising out of and in the course of employment, causing physical harm to the body, requiring medical treatment or resulting in disability, which is established by medical evidence and supported by objective findings. Ark. Code Ann. §11-9-102(4)(E)(i); §11-9-102(4)(A)(i); and §11-9-102(4)(D).

The claimant proved every element of compensability. There is no dispute that the event which took place on August 9, 2004 was a specific incident occurring at an identified time and place. The incident required medical treatment. Medical evidence produced

objective MRI findings of physical harm in the form of an impingement syndrome with a rotator cuff tear and AC joint arthritis. And finally, the abnormalities demonstrated on the MRI were shown to be causally related to the August 9, 2004 injury. Three days before the injury in question, the first MRI proved that these abnormalities did not exist. During the claimant's first visit with an orthopedic surgeon following the injury, Dr. Collins strongly suspected that the claimant was suffering from a rotator cuff tear and indicated that a second MRI should be performed in order to confirm or deny his suspicions. Dr. Collins said that if the second MRI showed a rotator cuff tear, then that problem would be related to the August 9, 2004 injury. When that MRI was finally completed, it revealed undeniable evidence of an impingement syndrome with a rotator cuff tear and AC joint arthritis. While the claimant worked for other employers after the injury, the record is devoid of evidence that the claimant suffered any additional injury to his right shoulder subsequent to August 9, 2004. Therefore, the compensability of this injury was substantiated by a

preponderance of the evidence.

For the reasons stated above, I respectfully dissent from the majority opinion denying the compensability of this claim.

PHILIP A. HOOD, Commissioner