

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F602358

SHEILA SMITH,
EMPLOYEE

CLAIMANT

KOHLER COMPANY,
EMPLOYER

RESPONDENT

CRAWFORD & COMPANY,
TPA

RESPONDENT

OPINION FILED JUNE 8, 2009

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

Claimant represented by the HONORABLE THOMAS W. MICKEL,
Attorney at Law, Conway, Arkansas.

Respondent represented by the HONORABLE CAROL LOCKARD
WORLEY, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed.

OPINION AND ORDER

The Arkansas Court of Appeals has reversed and remanded to the Commission for further findings. *Smith v. Kohler Company*, CA08-1067 (April 1, 2009). Based on our *de novo* review of the entire record, and in accordance with the remand from the Court of Appeals, the Full Commission finds that the claimant proved she sustained a compensable injury. The claimant proved that she was entitled to temporary total

disability benefits and reasonably necessary medical treatment. The Full Commission finds that the statute of limitations did not bar the claim.

I. HISTORY

The record indicates that Shelia Diane Smith, now age 51, was hired at Kohler Company in September 1995. Ms. Smith testified that she worked on an assembly line for the respondent-employer, putting faucets together. The claimant's work required using an air gun and reaching overhead. Dr. Doug Coleman noted on November 24, 1999 that the claimant was "complaining of some right anterior shoulder pain. She does repetitive activity at work. She points to an area just over the superior portion of the right trapezius that is aggravated by abduction and external rotation." Dr. Coleman's impression was "3) Probably a rotator cuff tendinitis on the right or an overuse syndrome....Restricted activity for four days. Return as needed."

The claimant testified that she felt a "pop" in her right shoulder and neck at work in March 2000. The claimant testified that she reported the incident to her supervisor. Dr. David N. Collins examined the claimant on September 29, 2000:

Ms. Smith is seen for a work related injury to the right shoulder. She is referred by Robert Martin, MD. The date of injury was actually 3/11/00. She describes reaching to a shelf to get a pan of parts. She did this in a jumping, reaching maneuver and felt a pop and burning in the superior aspect of the right shoulder. She denies the formation of ecchymosis. She thought it was simply a pulled muscle but it has not gotten better. She denies previous problems of significance. She has received one injection without relief....

RADIOGRAPHS: Acromioclavicular joint views were obtained. Some asymmetry is noted, right compared to left.

Dr. Collins' impression was "1. Work related injury, right shoulder. Possible internal derangement/sprain, right AC joint. 2. Strain, periscapular muscles with residual myofascial pain." Dr. Collins recommended a triple phase bone scan.

It was noted at St. Vincent Health System on October 3, 2000 that the claimant had "a work-related injury to the right shoulder." A bone scan of the claimant's right shoulder on October 3, 2000 was negative. The claimant followed up with Dr. Collins on October 3, 2000:

Her AC joint really shows no increased uptake relative to the contralateral side. She is quite tender here and we have given her an injection with some acute relief. I do not think that there is an operative lesion and I think she can return to work without restrictions. It is not likely that she is to require further treatment in the

surgical realm. There is no evidence of permanent partial impairment at this time and she will be seen as needed. She is released to work without restrictions.

Dr. Collins' impression after seeing the claimant on December 1, 2000 was "Myofascial pain, work related....From an orthopaedic standpoint, there is nothing more to offer her. I would recommend that she see Dr. Safman for further evaluation and treatment and consideration for local injection of trigger points."

Dr. Bruce L. Safman's impression on December 21, 2000 was "1) Cervical and right upper trapezius strain. 2) Levator scapulae tendonitis." Dr. Safman performed trigger point injections and noted, "I will keep her at full duty and reassess her in 2 weeks." The claimant followed up with Dr. Safman at various times until April 3, 2001. The claimant's testimony indicated that the respondent-carrier paid for the claimant's treatment with Dr. Collins and Dr. Safman.

Dr. Coleman noted on March 19, 2002, "She does have muscle spasm in the upper trapezium on the right and lateral neck strap muscle." Dr. Coleman's impression was "1) Muscle spasm; back and shoulder." The claimant followed up with Dr. Coleman on November 7, 2002, December 5, 2002, and

December 26, 2002. The claimant's testimony indicated that the respondent-carrier did not pay for Dr. Coleman's treatment in 2002.

Dr. Robert R. Gullett saw the claimant on January 15, 2003: "She has had some problems with her right shoulder for two years. This was originally a Worker's Comp from Koehler Assembly Operations, where she has done constant repetitive work for eight years. Originally she reached up, her shoulder hung, the plant sent her to see Dr. Winston, three visits....The company sent her to see Dr. Martin in Sheridan who sent her to physical therapy for two months. She relates this made it worse....She relates pain starts in her shoulder and goes up and down the arm and up to the neck. The index and long fingers go to sleep and wake her up at night." Dr. Gullett's impression was "Possible carpal tunnel syndrome." He planned additional diagnostic testing but noted on February 10, 2003 that there was no electrodiagnostic evidence of right carpal tunnel syndrome.

Dr. Gullett referred the claimant to a physiatrist, Dr. Virendar K. Verma. Dr. Verma's impression on February 13, 2003 was "1. Chronic shoulder pain syndrome with signs and symptoms consistent with impingement syndrome with no sign of carpal tunnel syndrome right upper extremity."

The claimant continued to follow up with Dr. Coleman.

The claimant testified that her left shoulder began hurting in 2004 from overuse: "Reaching and pulling. When my right shoulder would get tired I would use my left shoulder a lot more." The claimant testified that she told her supervisor that her left shoulder was hurting. On or about June 21, 2004, the claimant submitted a Group Health Plan Disability Claim Form related to her left shoulder.

Radiology of the claimant's left shoulder was done at Pine Bluff Imaging Center on June 28, 2004:

Three views of the left shoulder show no evidence of fracture or dislocation. There is suggestion of soft tissue swelling. The visualized portions of the AC and glenohumeral articulations are unremarkable. Mineralization is adequate. There are no fractures or dislocation.
IMPRESSION: Unremarkable three view left shoulder.

Dr. John Dedman saw the claimant on July 2, 2004 and diagnosed "1. Bilateral shoulder dysfunction - the right started about two or three years ago and the left started about two or three months ago." Dr. Dedman administered a left shoulder injection.

An MRI of the claimant's left shoulder was taken on July 12, 2004, with the impression, "Thickening and partial thickness signal change in the supraspinatus and subscapularis tendon portions of the rotator cuff consistent

with tendinosis." Dr. Gullett's impression on July 16, 2004 was "Tendonitis bursitis left shoulder."

On August 4, 2004, the claimant signed a Group Health Plan Disability Claim Form. The Disability Claim Form showed the Date Last Worked to be June 17, 2004. The claimant indicated on the Form that she had become disabled and unable to work beginning June 18, 2004, that her condition was work-related, and that the disability was due to an injury: "Pain and swelling increased over time until it became impossible to function." Dr. John Dedman wrote in the Physician's Section that the claimant "started having left shoulder pain 3-4 months ago."

Dr. Ronnie M. Fenton performed an x-ray left shoulder arthrogram on August 23, 2004: "I'm unable to see any evidence of narrowing of the supraspinatus space. I do not see evidence of a partial-thickness or full-thickness tear of the rotator cuff. The biceps tendon appears to be in its normal location." Dr. Fenton's impression was "Negative left shoulder arthrogram. There do appear to be some osteoarthritic changes about the left AC joint."

The claimant testified on direct examination:

Q. Did they do any job rotation on you in the early part of 2006 that made your symptoms worse?

A. Yes, sir, that's when I was over at the pull-out shower heads, when I had to tighten the aerators and use the air tightener on the aerators, because you had to put the weight on the machine to get your aerators on.

Q. When did you first notice that both your right and your left shoulders were hurting together this time around?

A. Into part of January. Both of them was hurting pretty bad.

The parties stipulated that an employment relationship existed on February 1, 2006. The claimant saw Dr. Gullett on February 13, 2006: "Complaining of pain in both shoulders for two weeks duration, but worse since Thursday of last week, 2/9/2006. She relates very painful, loss of movement, no numbness or tingling....Assembly worker at Kohler for ten years duration....Xrays of both shoulders, ap, are basically normal." Dr. Gullett's impression was "Acute tendonitis bursitis of the shoulders, left more than right....I will take her off work this week."

The claimant filled out and signed a Form AR-N, Employee's Notice Of Injury, on February 24, 2006. The claimant reported that she had injured "Both shoulders" on 2-1-0 (sic)." The claimant appeared to write the following in discussing the cause of injury: "The moving of shower to

bagging mach. The movement is differnet (sic) causing pain in both shoulders due to previ ingery (sic)."

According to a Workers Compensation - First Report Of Injury Or Illness, the employer was notified on February 24, 2006 of an injury occurring February 1, 2006: "EE states moving a new machine caused her shoulder to hurt went shower to bagging machine."

The claimant filled out another Disability Claim Form on April 6, 2006. The claimant indicated that she was first disabled and unable to work beginning February 10, 2006: "Pain and swelling increased over time until it became impasable (sic) to function." The claimant indicated that her condition was work-related and that her disability was due to an injury. On April 11, 2006, Dr. Dedman completed a Physician's Section of the claimant's Disability Claim Form. Dr. Dedman diagnosed "acute tendonitis both shoulders." On another disability claim form which was undated, Dr. Dedman indicated that the claimant was totally disabled beginning February 9, 2006 to "unknown."

Dr. William F. Blankenship examined the claimant on April 28, 2006 and diagnosed bilateral shoulder pain.

An MRI of the claimant's right shoulder was done on May 15, 2006, with the following impression: "1. Minimal

subdeltoid bursitis. 2. Slight infraspinatus tendinosis but no evidence of rotator cuff tear. Otherwise normal."

An MRI of the claimant's left shoulder was taken on May 15, 2006, with the following impression: "1. Active acromioclavicular arthritis causing minor impingement on the myotendinous junction of the supraspinatus. 2. Minimal subdeltoid bursitis. 3. No rotator cuff tear and otherwise normal examination of the shoulder."

Dr. Stephen A. Hudson saw the claimant on May 24, 2006:

The patient is a 48-year-old female, who has been having pain and problems with her left shoulder for several years. She has seen Dr. Blankenship, who has gotten MRIs of her cervical spine and shoulder. She had some mild spurring of the cervical spine, but has significant degenerative change of the acromioclavicular joint of the shoulder with some impingement on her rotator cuff beneath, but no evidence of rotator cuff tear. She is reporting pain over the anterior superior shoulder over the acromioclavicular joint, worse with cross-body adduction and use of her shoulder....

On examination today, she has some mild swelling over the acromioclavicular joint and is tender over the acromioclavicular joint anteriorly....I reviewed her MRI. It shows moderate degenerative change of the acromioclavicular joint, but no evidence of a full thickness rotator cuff tear....We discussed doing a subacromial decompression and distal clavicle resection. She agrees with this, so we will schedule this for outpatient basis....

Dr. Hudson performed surgery on June 13, 2006: "Left shoulder arthroscopy with subacromial decompression, mini-open rotator cuff repair of the supraspinatus tendon, and a mini-open distal clavicle resection, and placement of intra-articular pain pump for postoperative pain control." The post-operative diagnosis was "Left shoulder impingement, acromioclavicular arthropathy, and tear of the supraspinatus tendon."

Dr. Hudson provided follow-up care after surgery. The claimant testified that surgery on her left shoulder "took the constant pain away, I'll put it that way, but I cannot raise it and use it very well....It is terrible pain."

An MRI of the claimant's left shoulder was taken on December 14, 2006, with the following impression:

1. A rotator cuff repair has been performed since the previous examination along with an anterior acromioplasty and distal clavicular resection.
2. There is a small subacromial effusion that appears to communicate with a small pocket of fluid along the articular surface of the musculotendinous junction of the posterior supraspinatus tendon through a tiny full-thickness defect at the musculotendinous junction.
3. There is a small focus of increased signal along the articular surface of the posterior supraspinatus tendon. This may represent focal tendinopathy or postoperative change.

Dr. Hudson stated in part on December 20, 2006: "3. I do not think I have any further options for her. I think

this may be as good as it is going to get. She may not get complete improvement of her symptoms. 4. She is asking what she could do work wise and I just counseled her that I do not think she should be doing overhead activity with this arm but should be able to lift and use the arm below shoulder level. 5. I will see her back as needed if she has any further pain or problems."

A pre-hearing order was filed on February 16, 2007. The claimant contended that she sustained gradual shoulder injuries as a result of her job duties. The claimant contended that she was entitled to reasonably necessary medical treatment and "temporary total disability benefits from February 13, 2006 to a date yet to be determined and attorney's fees."

The respondents contended that the statute of limitations barred the claim. The respondents contended that the claimant did not sustain a compensable shoulder injury. The respondents contended that the claimant's present condition was "a recurrence of a pre-existing condition. Alternatively, in the event of an award, there is no medical documentation to support indemnity benefits."

The parties agreed to litigate the following issues: "Statute of limitations; compensability; medical expenses;

temporary total disability benefits; controversion and attorney's fees. All other issues are reserved."

A hearing was held on May 25, 2007. At that time, the claimant contended that she was entitled to temporary total disability benefits from February 9, 2006 until December 20, 2006. The respondents contended, among other things, that the claimant began receiving treatment for her left shoulder in 2000 and that no hearing was requested until October 16, 2006.

An administrative law judge filed an opinion on August 22, 2007. The administrative law judge found that the claimant proved she sustained a compensable injury. The administrative law judge directed the respondents to pay medical expenses, and the administrative law judge directed the respondents to pay temporary total disability benefits from February 9, 2006 until December 20, 2006. The respondents appealed to the Full Commission. The Full Commission reversed the administrative law judge's opinion and found that the claimant did not prove she sustained a compensable injury. The Court of Appeals has reversed and remanded for further findings.

II. ADJUDICATION

A. Compensability

Ark. Code Ann. §11-9-102(4) (A) (Repl. 2002) defines "compensable injury":

- (ii) An injury causing internal or external physical harm to the body and arising out of and in the course of employment if it is not caused by a specific incident or is not identifiable by time and place of occurrence, is the injury is:
 - (a) Caused by rapid repetitive motion....

A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. §11-9-102(4) (D). "Objective findings" are those findings which cannot come under the voluntary control of the patient. Ark. Code Ann. §11-9-102(16) (A) (i).

The employee's burden of proof shall be by a preponderance of the evidence, and the resultant condition is compensable only if the alleged compensable injury is the major cause of the disability or need for treatment. Ark. Code Ann. §11-9-102(4) (E) (ii).

In the present matter, the Court of Appeals has determined that the claimant's job involved rapid-repetitive motion. The Full Commission therefore finds that the claimant proved she sustained an injury causing physical harm to her left and right shoulders. We find that the claimant's injury arose out of and in the course of employment and was caused by rapid repetitive motion. The

claimant established a compensable injury by medical evidence supported by objective findings. These objective findings included Dr. Hudson's notation of swelling over the acromioclavicular joint and a tear in the supraspinatus tendon. The claimant proved that the compensable injury to her shoulders was the major cause of the disability and need for treatment.

B. Filing of claims

Ark. Code Ann. §11-9-702 provides:

(a) TIME FOR FILING

(1) A claim for compensation for disability on account of an injury, other than an occupational disease and occupational infection, shall be barred unless filed with the Workers' Compensation Commission within two (2) years from the date of the compensable injury. If, during the two-year period following the filing of the claim, the claimant receives no weekly benefit compensation and receives no medical treatment resulting from the alleged injury, the claim shall be barred thereafter.

(B) For purposes of this section, the date of the compensable injury shall be defined as the date an injury is caused by an accident as set forth in §11-9-102(4)....

(b) TIME FOR FILING ADDITIONAL COMPENSATION: (1) In cases where any compensation, including disability or medical, has been paid on account of injury, a claim for additional compensation shall be barred unless filed with the commission within one (1) year from the date of the last payment of compensation or two (2) years from the date of the injury, whichever is greater...

The statute of limitations does not commence to run until the true extent of the injury manifests and causes an incapacity to earn wages sufficient to give rise to a claim for disability benefits. *Donaldson v. Calvert-McBride Printing Co.*, 217 Ark. 625, 232 S.W.2d 651 (1950).

In the present matter, the claimant has proved by a preponderance that she sustained a compensable injury to her left and right shoulders. The claimant began her assembly-line work for the respondents in 1995 and first reported shoulder pain in November 1999. The record indicates that the respondents provided medical treatment with Dr. Collins in March 2000 and with Dr. Safman until April 3, 2001. The Full Commission recognizes that the claimant suffered from chronic shoulder problems since 1999. Nevertheless, the claimant testified that she was placed in a different job rotation beginning in early 2006, and that this change in work responsibilities caused an increase in the symptoms of pain, and objective findings which in our opinion constitutes a new injury for statute of limitations purposes. The medical records corroborated the claimant's testimony. Dr. Gullett noted that the claimant's pain had worsened beginning in February 2006. The claimant provided the respondents with notice of her increased work-related

symptoms when she submitted the Form AR-N, Employee's Notice Of Injury, on February 24, 2006. The parties implicitly agree that the claimant requested workers' compensation benefits no later than October 16, 2006. The claimant's claim therefore falls squarely within the two-year statute of limitations found in Ark. Code Ann. §11-9-702(a)(1).

Based on our *de novo* review of the entire record, and in accordance with the remand from the Court of Appeals, the Full Commission finds that the claimant proved she sustained a compensable injury to her shoulders bilaterally. The Full Commission finds that the statute of limitations does not bar the claim. The claimant proved that the medical treatment of record, including surgery from Dr. Hudson, was reasonably necessary pursuant to Ark. Code Ann. §11-9-508(a). The claimant proved that she remained within a healing period and was totally incapacitated from earning wages for the period of February 9, 2006 until December 20, 2006. The Full Commission therefore affirms the administrative law judge's opinion. The claimant's attorney is entitled to fees for legal services in accordance with Ark. Code Ann. §11-9-715(Repl. 2002). For prevailing on appeal to the Full Commission, the claimant's attorney is

entitled to an additional fee of five hundred dollars (\$500), pursuant to Ark. Code Ann. §11-9-715(b) (Repl. 2002).

IT IS SO ORDERED.

A. WATSON BELL, Chairman

PHILIP A. HOOD, Commissioner

Commissioner McKinney dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion finding that the claimant's claims for bilateral shoulder problems were new injuries or aggravations for which the statute of limitations has not run. In my opinion, the claimant's present problems which initiated this claim in 2006, are a recurrence of two separate injuries, the first in 2000 for the right shoulder and the second in 2004, for the left.

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).

A recurrence exists when the second complication is a natural and probable consequence of a prior injury. Aetna Ins. Co. v. Dunlap, 16 Ark. App. 51, 696 S.W.2d 771 (1985). A recurrence is not a new injury but simply another period of incapacitation resulting from a previous injury. Atkins Nursing Home v. Gray, 54 Ark. App. 125, 923 S.W.2d 897 (1996).

Granted the claimant changed jobs in 2006 and exacerbated her symptoms in 2006, however, I am unable to find that she experienced new objective findings as a result of this exacerbation to create a new injury or aggravation. In my opinion the evidence only reveals that the claimant's symptoms in 2006 were a recurrence or new period of incapacitation resulting from her earlier injuries.

Having found that the claimant did not sustain a new injury in 2006, I find that she failed to file her present claim for benefits in a timely manner. Claimant's right shoulder injury first manifested itself in 2000, and she received some benefits as a result of this injury into 2001. Claimant's left shoulder injury occurred in June of 2004. The claimant did not receive any workers' compensation benefits as a result of this injury. Thus, the claim for the right shoulder injury is a claim for additional benefits which must be filed within one year of the last receipt of benefits or two years from the date of injury. A.C.A. § 11-9-702(b). Clearly the claimant did not file her claim for her right shoulder recurrence within the appropriate time frame. As claimant's claim for benefits arising out of her left shoulder injury was an initial claim for benefits, the claim had to be filed within two years from the date of

injury. A.C.A. § 11-9-702(a)(1)(A). The injury occurred in June of 2004. She did not file a claim for benefits until October 16, 2006. Accordingly, I find that the claimant's claims for benefits for both her right and left shoulder injuries are barred by the statute of limitations. Therefore, I must respectfully dissent.

KAREN H. MCKINNEY, Commissioner