Issued by THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

FINAL AWARD DENYING COMPENSATION
(Affirming Award and Decision of Administrative Law Judge
with Supplemental Opinion)

Injury No. 03-148257

Employee: JoAnn Dabney

Employer: Mediq Life Support Services

Insurer: St. Paul Fire & Marine

Additional Party: Treasurer of Missouri as Custodian of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence, read the briefs, and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge and awards no compensation in this case.

The award and decision of Administrative Law Judge Kathleen Hart, issued April 6, 2015, is attached and incorporated by this reference.

We additionally note that, on the same day the administrative law judge issued her award on the merits in this matter, she also issued a document entitled “Order of Dismissal,” purporting to order employee’s claim for compensation against the Second Injury Fund dismissed with prejudice, on employee’s voluntary motion. We must vacate this purported order for two reasons.

First, we find no indication on this record or in the legal file provided to us by the Division of Workers’ Compensation that employee made a motion to voluntarily dismiss her claim for compensation against the Second Injury Fund. Second, 8 C.S.R. 50-2.010(12)(A) provides that “[a] Claim for Compensation may be voluntarily dismissed with or without prejudice at any time prior to the introduction of evidence at a hearing” (emphasis added). The parties proceeded to hearing in this matter on January 6, 2015. After the parties presented evidence at that hearing, the administrative law judge was without authority under 8 C.S.R. 50-2.010(12)(A) to grant any motion from employee to voluntarily dismiss her claim for compensation against the Second Injury Fund. Instead, the proper disposition of this matter was an award on the merits.

Accordingly, we hereby vacate the purported “Order of Dismissal” dated April 6, 2015. Instead, we conclude that employee’s claim for compensation against the Second Injury Fund is denied on the merits, because she failed to prove that she suffered a subsequent compensable injury for purposes of § 287.220 RSMo.

Given at Jefferson City, State of Missouri, this 6th day of July 2016.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

Issued by DIVISION OF WORKERS' COMPENSATION

AWARD

Employee: JoAnn Dabney

Injury No.: 03-148257

Dependents: n/a

Employer: Mediq Life Support Services

Additional Party: Second Injury Fund (SIF)

Insurer: St. Paul Fire & Marine

Before the
Division of Workers' Compensation
Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Hearing Date: January 6, 2015

Checked by: KMH

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
2. Was the injury or occupational disease compensable under Chapter 287? No
3. Was there an accident or incident of occupational disease under the Law? No
4. Date of accident or onset of occupational disease: alleged July 11, 2003
5. State location where accident occurred or occupational disease was contracted: alleged St. Louis
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? No
8. Did accident or occupational disease arise out of and in the course of the employment? No
9. Was claim for compensation filed within time required by Law? No
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
    Claimant was not working on the alleged date of injury.
12. Did accident or occupational disease cause death? No Date of death? n/a
13. Part(s) of body injured by accident or occupational disease: alleged right shoulder
14. Nature and extent of any permanent disability: None
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? None

17. Value necessary medical aid not furnished by employer/insurer? None

18. Employee's average weekly wages: $382.40

19. Weekly compensation rate: n/a

20. Method wages computation: n/a

COMPENSATION PAYABLE

21. Amount of compensation payable:

Medical bills, TTD and PPD from Employer	None

22. Second Injury Fund liability: None

TOTAL: NONE

23. Future requirements awarded: none

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of n/a of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

FINDINGS OF FACT and RULINGS OF LAW:

Employee: JoAnn Dabney

Injury No.: 03-148257

Dependents: n/a

Before the
Division of Workers' Compensation
Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Employer: Mediq Life Support

Additional Party: SIF

Insurer: St. Paul Fire & Marine

Checked by: KMH

A hearing was held on Injury No: 03-148258 and Injury No: 03-148257 on January 6, 2015. JoAnn Dabney (Claimant) appeared pro se. Mediq Life Support (Employer) was represented by attorney Paul Larimore for the first case and Rob Frayne for the second case.

All objections not expressly ruled on in this award are overruled to the extent they conflict with this award.

Claimant alleges she is entitled to workers' compensation benefits for surgeries she had related to her 2002 work injury.

STIPULATIONS

The parties stipulated that on the alleged dates of injury:

1. Claimant and Employer were operating under the provisions of the Missouri Workers' Compensation law.
2. On March 28, 2003, Employer's liability was fully insured by Insurance Company of the State of Pennsylvania, c/o AIG Claims, Inc.
3. On July 11, 2003, Employer's liability was fully insured by St. Paul Fire & Marine.
4. Claimant's average weekly wage was $382.40 for both cases.
5. Employer has not paid any benefits to date on either case.

ISSUES

The parties stipulated the issues to be resolved are as follows:

1. Accident

2. Arising out of and in the course of employment
3. Notice
4. Medical causation
5. Liability for past medical expenses
6. Future medical care
7. TTD
8. PPD
9. PTD
10. Statute of limitations
11. SIF liability
12. Res Judicata

FINDINGS OF FACT

Based on the competent and substantial evidence, my observations of Claimant at trial, and the reasonable inferences to be drawn therefrom, I find:

1. Claimant testified she sustained an injury while working for Employer in February 2002. She reported the injury, and her supervisor sent her to a doctor. Claimant eventually had surgery by Dr. Benz on March 28, 2003, to repair a torn rotator cuff. The parties agree this March 2003 surgery is related to the 2002 injury.

2. Claimant testified she had four months of physical therapy, but developed adhesive capsulitis, and ultimately required a second surgery on July 11, 2003.

3. Dr. Benz released Claimant to return to work with restrictions September 15, 2003. Claimant testified at this point she had been off work several months without workers' compensation.

4. Claimant testified she returned to Dr. Benz October 8, 2003, and although her job is physical and difficult, she asked him to release her to full duty so she would not lose her job.

5. On October 14, 2003, Claimant met with the attorney representing her on her February 2002 injury. Claimant testified she was upset that she had not been paid for her surgeries, and she had not gotten workers' compensation, so she accepted the settlement offer. Settlement stipulations for the February 2002 injury were approved October 14, 2003.

6. Claimant testified she talked to her attorney after she saw the surgeries weren't paid, but he didn't want to take the case. She testified she looked for other attorneys and told them Employer paid for the injuries but not the surgeries, and all the attorneys said Employer had paid her.

7. Claimant testified she reinjured her right arm at work when she was moving equipment on October 25, 2003. She testified Employer had not treated her for all of her 2002

injuries, so she went to Christian Northeast Hospital. Claimant testified Employer then sent her to Dr. Rottman, who ordered physical therapy and an MRI.

8. Claimant filed a claim alleging an injury date of October 25, 2003. That case was tried and an award was issued in November 2007 denying the case.

9. Claimant testified she injured her shoulder again at work December 29, 2003, while pulling equipment. Employer did not provide treatment, and advised Claimant she had been released by Dr. Rottman in November.

10. Claimant filed a claim alleging a work injury of December 29, 2003. That case was tried and an award was issued in November 2007 awarding payment of medical bills and denying the remaining issues.

11. Claimant testified Employer refused treatment for her October and December 2003 injuries. She saw Dr. Benz on her own, and he allowed her to return to work on light duty January 3, 2004.

12. Claimant testified Employer offered her a settlement to avoid paying for surgery. She testified she was harassed by Employer in retaliation for being injured, and she was written up more than anyone else. Claimant was terminated January 8, 2004.

13. Claimant testified this injury has been a hardship, and she has had difficulty providing for her family. Claimant filed for Social Security Disability in 2004, and receives $754 a month.

14. Claimant testified she continues to have problems with her right arm and it is very limited. At the time of hearing, she had surgery scheduled for January 16, 2015.

15. On November 12, 2013, Claimant filed a claim alleging “aggravation from previous surgery lead to adhesive capsulitis”.

16. Claimant testified July 11, 2003, is the date she had a second surgery for her 2002 injury. She was not working on July 11, 2003. Claimant settled her 2002 injury for 25% of her right arm on October 14, 2003. Claimant testified the case set for trial is for the surgeries that occurred in 2003, the settlement was for the injuries, and this claim is for the surgeries.

RULINGS OF LAW

Having given careful consideration to the entire record, based upon the above testimony, the competent and substantial evidence presented and the applicable law, I find the following:

1. Rulings on Exhibits

Claimant introduced into evidence a number of medical records, bills, and correspondence from Employer and Insurer. Employer's attorneys objected to Claimant's exhibits for a number of reasons. Employer's objections to Claimant's exhibits are sustained, and Exhibits 1through15 are not admitted into evidence.

Employer introduced Exhibits A through C. Exhibit A is the settlement stipulation regarding the 2002 case. Claimant objected that this 2002 settlement is not relevant to the 2003 case. Claimant's objection is overruled, and Exhibit A is admitted into evidence.

Exhibits B and C are awards issued regarding alleged injuries of October 25, 2003, and December 29, 2003. Claimant objected to the admission of these exhibits as they relate to separate cases and the cases in question are for surgeries that came from the 2002 injury. Claimant's objections are overruled, and Exhibits B and C are admitted.

2. Claimant failed to establish she was injured by accident on July 11, 2003.

Claimant has the burden to establish she sustained an injury by accident arising out of and in the course of her employment, and that the accident resulted in the alleged injury.

Claimant has a history of right shoulder problems dating back to the late 1990s. Claimant reinjured her right shoulder at work February 1, 2002. Claimant had surgery to address adhesive capsulitis resulting from her 2002 work injury on July 11, 2003, the alleged date of injury in this case. She agreed that surgery was the result of her 2002 work injury. The 2002 case was settled in October 2003.

Claimant believes she is entitled to additional benefits from Employer for her July 11, 2003 surgery. She testified she was compensated for the "injuries" that occurred in 2002, but not for the "surgeries" that occurred as a result of that injury. Claimant confuses an injury with a surgery. The medical bills related to the 2002 injury were disputed at the time of the settlement, and possibly this is the source of Claimant's confusion. Claimant had no new accident in July 2003.

Claimant did not sustain an injury by accident to her shoulder in July 2003 and was not working on the alleged date of injury.

CONCLUSION

Claimant has failed to establish she was injured by accident on July 11, 2003. As a result of this ruling, all remaining issues are moot. Claimant failed to meet the statutory thresholds necessary to trigger Second Injury Fund liability, and her Second Injury Fund claim is hereby dismissed.

Made by: _____

KATHLEEN M. HART
Administrative Law Judge
Division of Workers' Compensation