

FINAL AWARD DENYING COMPENSATION  
(Reversing Award and Decision of Administrative Law Judge)

Injury No.: 06-049702

Employee: Marica Huskic  
Employer: Missouri Baptist Medical Center  
Insurer: Self-Insured c/o BJC Healthcare

This cause has been submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have heard oral argument, reviewed the evidence and briefs, and we have considered the whole record. Pursuant to § 286.090 RSMo, the Commission reverses the award and decision of the administrative law judge dated February 17, 2009.

#### Preliminaries

The administrative law judge heard this matter to consider: 1) whether employee's accident arose out of and in the course of her employment on June 1, 2006; 2) whether employee's right shoulder condition and need for further treatment was medically causally related to the alleged incident of June 1, 2006; and, 3) whether employer should be liable for further medical treatment.

The administrative law judge found that employee's June 1, 2006, accident was a compensable accidental injury that arose out of and in the course of her employment. The administrative law judge ordered employer to provide and pay for arthroscopic surgery on employee's right shoulder and follow-up post surgical care. In addition, employer was ordered to pay any and all other medical care necessary to cure and relieve the effects of employee's shoulder injury.

Employer appealed to the Commission alleging the administrative law judge erred in finding that employee had an accident arising out of and in the course of employment and that her current right shoulder complaints were medically causally related to the alleged incident that occurred on June 1, 2006.

Therefore, the primary issue currently before the Commission concerns whether the alleged work injury of June 1, 2006, was the prevailing factor in causing employee's medical condition, disability, and need for further medical care.

#### Findings of Fact

The administrative law judge's *Findings of Fact* are incorporated to the extent they are not inconsistent with our Award.

In May of 2004, employee was involved in a motor vehicle accident, in which she hit her right arm. Following the car accident, employee initially saw Dr. Petkovich for her shoulder. Dr. Petkovich ordered an MRI scan and some physical therapy, and gave her an injection. Employee testified that after the injection she was feeling better for a while, but then began to lose strength in her whole arm. Employee then went to see Dr. Sciortino, who ordered another MRI scan. On January 4, 2006, Dr. Sciortino performed surgery on employee, which included a right shoulder scope, subacromial decompression and distal clavicle resection.

William Mellett, the manager of facilities services and employee's supervisor at Missouri Baptist Medical Center, testified that employee's shoulder injury from the car accident had gotten progressively worse prior to her January 4, 2006, surgery. Mr. Mellett based his opinion on discussions he had had with employee.

After the surgery, employee was off work for approximately four months before Dr. Sciortino released her back to work at the beginning of May 2006. Employee returned to her job on May 5, 2006, but was only able to work three and one-half days before being sent home due to increased pain. She went back to see Dr. Sciortino and he put her back off work for another two weeks. Employee returned to work for a second time on May 26, 2006.

Mr. Mellett testified that even after she returned to work for the second time on May 26, 2006, he felt that her shoulder was about the same because she had limited use of her arm and difficulty lifting. Mr. Mellett testified that employee had mentioned prior to the alleged injury of June 1, 2006, that if her shoulder was not coming around the way they had hoped, that she would need additional surgery.

Employee testified that on June 1, 2006, she went to the ground floor to clean and take out the trash. As she was lifting a trash bag out of a can with her left arm, she reached over to assist with her right arm and she heard a pop in her right shoulder and felt pain in her arm. Employee testified that she initially tried to lift the trash bag with her left arm, because she was protecting her right shoulder. Employee estimated that the trash bag weighed approximately 20-25 pounds. Employee testified that before the June 1, 2006, incident her shoulder was "real good" and with no pain.

Dr. Burke saw employee on behalf of employer on June 13, 2006. At that time, employee complained of right shoulder pain. Specifically, employee complained of pain on the superior or top part of her shoulder as the origin of most of her pain. Dr. Burke testified that employee was exquisitely reproducibly tender directly over her AC joint superiorly. Dr. Burke testified that employee's x-rays revealed that she had hypertrophic callus formation, which is new bone formation in the area where she had her prior distal clavicle excised by Dr. Sciortino. According to Dr. Burke, this callus formation caused significant subacromial impingement.

Dr. Burke opined that there was no work related injury sustained, as employee's symptoms were completely and utterly secondary to the sequelae from her prior distal clavicle excision. Dr. Burke further testified that employee's pain complaints were not in any way related to the lifting incident she described.

Dr. Burke's opinion was primarily based upon the tremendous amount of bone formation that was revealed in employee's x-rays. Dr. Burke testified that this was not a "borderline call," as employee had an extremely large hypertrophic area of bone directly sticking down towards her bursa and rotator cuff. Dr. Burke also noted that employee's clinical examination was consistent with pain in the area of the hypertrophic callus. Dr. Burke noted that employee's pain was directly over the AC joint, and her clinical examination suggested pain and pathology emanating from the AC joint, and her x-rays showed hypertrophic callus at the AC joint.

Dr. Burke testified that he felt employee should follow up with Dr. Sciortino for additional treatment for her hypertrophic callus of the distal clavicle. Dr. Burke made clear that this additional treatment would not be related to the alleged lifting incident. Dr. Burke testified that the size of the bone deposit at the end of employee's distal clavicle would make it extremely difficult to remove arthroscopically, and so he recommended opening up the shoulder, so that one could have a direct visualization of the large wad of bone and remove it safely.

Dr. Sedgwick testified on behalf of employee and stated that he had findings consistent with adhesive capsulitis, along with a history of an aggravation of her preexisting shoulder condition. Employee related to Dr. Sedgwick that on June 1, 2006, that while she was lifting a trash bag, she heard a pop that was associated with pain in the right shoulder. It is Dr. Sedgwick's opinion that the adhesive capsulitis is the result of the popping on June 1, 2006. However, Dr. Sedgwick acknowledged that there were a lot of things that could cause popping around the shoulder, such as adhesions, bursitis, or rotator cuff tears. Dr. Sedgwick agreed that it was possible that the popping sensation that employee described was the rubbing of her bursa sac and upper surface of the rotator cuff against the large hypertrophic callus formation.

Dr. Sedgwick testified that employee should have an examination of the shoulder under anesthesia and arthroscopy to determine exactly what the cause of the pain is and the problem she is having with her right arm.

Dr. Sedgwick only saw employee on one occasion.

Dr. Sciortino saw employee on July 10, 2006. His records from that visit state that she has some type of calcium deposit around her AC joint “which seems to be the main problem.” Dr. Sciortino recommended that they should go back surgically and remove the calcium deposit either arthroscopically or possibly via an open procedure.

## Conclusions of Law

First of all, it is important to note that employee’s alleged accidental injury occurred on June 1, 2006. Therefore, this case falls under the purview of the 2005 amendments to Missouri Workers’ Compensation Law.

Section 287.120 RSMo Supp. (2006) “requires employers to furnish compensation according to the provisions of the Workers’ Compensation Law for personal injuries of employees caused by accidents arising out of and in the course of the employee’s employment.” *Gordon v. City of Ellisville*, 268 S.W.3d 454, 458-59 (Mo. App. 2008).

Section 287.020.2 RSMo. defines “accident” as: “An unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift.”

Pursuant to § 287.020.3 RSMo, an “injury” is defined to be “an injury which has arisen out of and in the course of employment.” Section 287.020.3 RSMo further states that:

“An injury by accident is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. ‘The prevailing factor’ is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.”

The administrative law judge awarded employee benefits based on the determination that employee’s June 1, 2006 popping incident re-injured or aggravated her shoulder injury from the 2004 automobile accident. The administrative law judge’s determination applies the standard that was in usage prior to the 2005 amendments to Workers’ Compensation Law. In light of the 2005 amendments, the issue in this case is more properly framed as follows: Did employee satisfy her burden of proof that the June 1, 2006, incident is the prevailing factor in causing her current right shoulder condition and need for further medical treatment?

The facts in *Gordon*, supra, are very similar to the facts in the current case. Additionally, because the alleged injury in *Gordon* occurred after the 2005 amendments to Missouri Workers’ Compensation Law, the Court used the same legal analysis required in our case. *Gordon*, 268 S.W.3d at 459.

In *Gordon*, the claimant’s primary injury occurred in 2005 while he was in the process of climbing out of a tub grinder at work when he slipped and fell on his right arm with his arm extended. The claimant’s doctor initially recommended physical therapy, but this exacerbated his pain. An MRI scan revealed a massive rotator cuff tear. An orthopedic surgeon performed surgery on his shoulder and he eventually returned to work.

The claimant sustained a prior shoulder injury in 1993, requiring open right rotator cuff repair. The claimant testified that following the 1993 surgery, but before the 2005 primary injury, he was 99.5% back to normal and had no difficulties performing the labor required for his job. He could also play softball, bowl, and golf without problems with respect to his right arm. The claimant testified that since his 2005 injury, he was unable to play sports and needed assistance performing his work duties.

The primary issue before the Court was essentially the same as ours, whether the claimant’s 2005 work-related injury was the prevailing factor in causing claimant’s need for surgery, post-operative treatment, and resulting

disability.

In *Gordon*, the claimant presented medical expert testimony that the 2005 injury was the cause of claimant's need for a second shoulder surgery and that 55% of claimant's permanent partial disability to the upper right extremity as measured at the right shoulder directly resulted from the 2005 injury. The employer presented medical expert testimony from the physician that treated his 2005 injury that the 2005 work injury was not the prevailing factor in causing his need for surgery because when he operated on the claimant there was no evidence of any good rotator cuff tissue. The administrative law judge and the Commission found the employer's evidence more convincing and found that the 2005 work-related injury was not the prevailing factor in causing the claimant's need for surgery.

On appeal, the claimant argued that because the Commission found the claimant "suffered some trauma to his right shoulder when his work accident occurred, the Commission was required to award compensation." *Id.* at 459. The Court reasoned that the claimant's argument was based upon Workers' Compensation Law preceding the 2005 amendments, and that the post-2005 amendments provided the applicable standard. According to § 287.020.3, "a work injury 'is compensable *only* if the accident was the prevailing factor in causing both the resulting medical condition and disability.'" *Id.* (citations omitted).

Based upon that standard, the Court determined that even if the claimant showed the 2005 incident was an aggravation of the prior injury, he failed to satisfy his burden of proof because he did not prove that his 2005 work accident was the *prevailing* factor in causing his need for rotator cuff surgery and post-surgery recovery. *Id.* 460.

As previously stated, the facts in the current case are very similar to the facts in *Gordon*. In our case, employee had a pre-existing injury to her right shoulder, she had surgery performed on it, and she eventually returned to work before alleging a work-related injury to the same shoulder.

Employee argues that the June 1, 2006, work-related incident was the prevailing factor in causing her current shoulder condition and need for surgery. The only medical evidence she has provided to support this argument is the testimony of Dr. Sedgwick, who has stated that it is his opinion that the adhesive capsulitis in her shoulder was the result of the June 1, 2006 incident. However, Dr. Sedgwick went on to testify that there were a lot of things that could cause popping around the shoulder. Dr. Sedgwick even agreed that it was possible that the popping sensation that employee described was the rubbing of her bursa sac and upper surface of the rotator cuff against the large hypertrophic callus formation. Dr. Sedgwick went on to testify that an examination of the shoulder under anesthesia and arthroscopy was needed to determine exactly what the cause of the pain is and the problem employee is having with her right arm.

On the other hand, Dr. Burke, in arriving at his conclusion that employee's symptoms were secondary to the sequelae from her prior distal clavicle excision and not from her alleged work-related injury, relied less on speculation and more on the medical evidence provided in the record. Specifically, Dr. Burke's clinical examination revealed that employee was exquisitely reproducibly tender directly over her AC joint superiorly. This tenderness was consistent with the hypertrophic callus formation that had formed in the area where employee had her prior distal clavicle excised by Dr. Sciortino. The callus formation was revealed on employee's x-rays. Dr. Burke opined that the callus formation caused significant subacromial impingement. Dr. Burke testified that the popping sensation that employee described was the rubbing of her bursa sac and upper surface of the rotator cuff against the large hypertrophic callus formation.

In addition, Dr. Sciortino's July 10, 2006, records support Dr. Burke's opinion when he states that employee has some type of calcium deposit around her AC joint "which seems to be the main problem."

The Commission, based on the totality of the medical opinions and supporting facts in the record, finds Dr. Burke's opinion to be more credible than Dr. Sedgwick's. Dr. Burke came to a definitive conclusion as to the cause of employee's right arm complaints that was based on the medical evidence in the record; whereas Dr. Sedgwick's opinion is primarily based on speculation. Dr. Sedgwick even conceded that additional surgery would be required before a determination could be made as to the exact cause of employee's pain and problems with her right arm.

Even setting the medical testimony aside, it is clear from the chronology of the events that employee still had significant limitations following her prior distal clavicle excision. Employee had just been released to work following the January 4, 2006, surgery less than a month before the alleged injury. She worked three and one-half days before having to be taken off work again for an additional two weeks. Employee then worked, at the most, one week before her alleged injury of June 1, 2006. This coupled with employee's testimony that she was protecting her right arm when she was lifting the trash bag out of the container, is enough to show that employee was significantly limited at the time of the alleged injury.

As previously stated, the administrative law judge applied the old standard in determining that employee was entitled to benefits. The determination was based on a conclusion that employee "re-injured her shoulder" or "aggravated" the injury she incurred in the 2004 automobile accident. The Commission applies the proper standard and disagrees with the administrative law judge's determination. The Commission finds that the accident was not the prevailing factor in causing employee's medical condition, disability, and need for further medical care.

Consequently, the Commission also disagrees with the administrative law judge as to his award of future medical treatment for employee's right shoulder.

Therefore, employer is not liable for the arthroscopic surgery on employee's right shoulder, follow-up post surgical care, or any other medical care necessary to cure and relieve the effects of employee's shoulder injury.

The award and decision of Administrative Law Judge Cornelius T. Lane, issued February 17, 2009, is attached hereto for reference. Its findings are incorporated to the extent they are not inconsistent with our findings herein.

Given at Jefferson City, State of Missouri, this 24th day of July 2009.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

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William F. Ringer

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Alice A. Bartlett, Member

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DISSENTING OPINION FILED

John J. Hickey, Member

Attest:

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Secretary

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be affirmed.

The administrative law judge made his determination after hearing live testimony, and reviewing the testimony of

both medical experts. After considering the entire record, the administrative law judge found employee's evidence to be substantial, credible and persuasive.

Employee testified that following her January 4, 2006, surgery, she returned to full duty with no restrictions. Mr. Mellett, employee's supervisor, even testified that, based on hospital policy, Missouri Baptist Medical Center does not let employees come back from medical leave with limitations.

Employee also testified that before the June 1, 2006, accident the condition of her shoulder was good and without pain. She stated she was able to drive her car. After the injury, she is not able to drive and she can barely eat food because it will fall out of her hand.

Although employee and Mr. Mellett contradict each other on some issues, the administrative law judge had the opportunity to listen to their live testimony and chose not to give credibility to Mr. Mellett's testimony.

It is also telling that Dr. Sciortino's records of July 10, 2006, refer to employee's complaints as a "[r]e-injury." Dr. Sciortino's records also state that employee "was getting better until she reportedly injured her shoulder at work. [Employee] feels that her work injury is responsible for her current shoulder symptoms. I certainly think that her described incident could have aggravated her shoulder condition...."

Based on the above, I believe the administrative law judge correctly applied the law, and made findings consistent with the overwhelming weight of the evidence. The evidence and testimony fully establish that employee sustained an accident on June 1, 2006, arising out of and in the course of her employment, which is the prevailing factor in causing her right shoulder condition, and her need for treatment arising therefrom.

I would affirm the award of the administrative law judge ordering employer to provide and pay for the arthroscopic surgery on employee's right shoulder and follow-up post surgical care, and any and all other medical care necessary to cure and relieve the effects of employee's shoulder injury.

For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission.

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Jack Hickey, Member

Unless otherwise indicated, all statutory references are to RSMo. Supp. (2006).