

right shoulder was caused or aggravated by factors of her employment.¹ After further development of the claim, the Office accepted appellant's claim for subacromial bursitis and authorized right rotator cuff repair which was performed on January 23, 1996.

In a February 10, 1997 memorandum, the Office stated that it had erroneously authorized appellant to undergo right rotator cuff repair. The Office further stated that, although appellant's claim had not been accepted for a right rotator cuff tear, it was responsible for the results of the authorized surgery. The Office noted that the surgery required an impairment rating for appellant's right shoulder. The Office stated that an Office medical adviser would review the 10 percent impairment rating provided by Dr. George M. McCluskey, a Board-certified orthopedic surgeon and appellant's treating physician. By decision dated August 13, 1997, the Office granted appellant a schedule award for a 20 percent impairment of the right upper extremity.

The Office received Dr. McCluskey's December 2, 1998 medical report indicating that appellant had a rotator cuff tear. In an April 19, 2001 report, he advised that appellant had rotator cuff syndrome and that she should undergo a magnetic resonance imaging (MRI) scan to rule out a re-tear of the rotator cuff of the right shoulder. On July 24, 2001 the Office noted that an MRI was performed and that authorization for surgery to repair the tear had been cancelled. The Office determined that appellant no longer worked for the employing establishment and that she had been working at a Winn Dixie Supermarket. The Office noted that Dr. McCluskey was under the impression that appellant was still working at the employing establishment. The Office proceeded to develop appellant's case as a recurrence of disability claim. By letter dated August 15, 2001, the Office provided appellant with a description of a recurrence. The Office advised appellant that it was possible that she sustained a recurrence and requested that she file a recurrence claim form with the employing establishment if her situation met the description.

On September 20, 2001 appellant filed a claim alleging that she sustained a recurrence of disability on June 21, 2001. Appellant indicated that her original injury occurred on September 13, 1993.² She noted that she was unable to sleep comfortably on her right shoulder at night due to pain and a burning sensation. Appellant indicated that she worked as a direct store delivery manager at Winn Dixie and her duties included vendor checkin, inventory control, computer work, preparation of reports on daily receiving functions, checking out of date merchandise, assisting vendors with computer entries and reclaiming damaged merchandise.

By letter dated October 31, 2001, the Office advised appellant to provide a detailed description of her duties at Winn Dixie and medical evidence supportive of her claim. In response, appellant submitted a November 8, 2001 letter providing a further description of her duties at Winn Dixie, which included physical activities such as occasional pulling, frequent lifting up to 10 pounds, occasional lifting up to 50 pounds and occasional pushing over 20 pounds.

¹ The Office issued an August 5, 1994 decision denying appellant's September 22, 1993 recurrence of disability claim on the grounds that appellant failed to establish that her recurrence was causally related to her November 15, 1991 employment injury. The Office stated that appellant's claim did not constitute a recurrence claim and advised her to file an occupational disease claim. The record reveals that appellant resigned from the employing establishment effective September 12, 1994.

² The Board notes that the record does not reveal that appellant sustained an injury on September 13, 1993.

By decision dated February 19, 2002, the Office noted that appellant had not worked at the employing establishment since September 12, 1994 and that she began work for Winn Dixie on June 21, 1995. The Office found that the medical evidence of record was insufficient to establish that she sustained a recurrence of disability on June 21, 2001 causally related to her accepted September 13, 1993 employment injury. The Office concluded that appellant sustained a new injury while working at Winn Dixie and denied her claim.

In a March 6, 2002 letter, appellant requested an oral hearing before an Office hearing representative. Subsequent to the hearing held on January 22, 2003, appellant submitted a January 23, 2003 letter advising the Office that she was no longer working for Winn Dixie because she was unable to perform all of her duties due to her physical impairment.

By decision dated February 26, 2003, the hearing representative found that appellant failed to establish that she sustained a recurrence of disability causally related her September 22, 1993 employment injury. Accordingly, the hearing representative affirmed the Office's February 19, 2002 decision.³

LEGAL PRECEDENT

A person who claims a recurrence of disability due to an accepted employment-related injury has the burden of establishing by the weight of the substantial, reliable and probative evidence that the disability for which she claims compensation is causally related to the accepted injury. This burden of proof requires that a claimant furnish medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that the disabling condition is causally related to the employment injury and supports that conclusion with sound medical reasoning.⁴

It is an accepted principle of workers' compensation law and the Board has so recognized that, when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury is deemed to arise out of the employment, unless it is the result of an independent intervening cause, which is attributable to the employee's own intentional conduct.⁵

In discussing how far the range of compensable consequences is carried, once the primary injury is causally connected with the employment, Professor Larson notes:

“[W]hen the question is whether compensability should be extended to a subsequent injury or aggravation related in some way to the primary injury, the rules that come into play are essentially based upon the concepts of ‘direct and

³ Similarly, the Board notes that the record does not indicate that appellant sustained an employment-related injury on September 22, 1993 rather it reveals that her September 22, 1993 recurrence claim was denied, by decision dated August 5, 1994, on the grounds that her condition was not causally related to her November 15, 1991 accepted employment injury.

⁴ *Robert H. St. Onge*, 43 ECAB 1169 (1992); *Dennis J. Lasanen*, 43 ECAB 549 (1992).

⁵ *Robert W. Meeson*, 44 ECAB 834 (1993).

natural results' and of claimant's own conduct as an independent intervening cause. The basic rule is that a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury."⁶

Thus, it is accepted that, once the work-connected character of any condition is established, "the subsequent progression of that condition remains compensable *so long as the worsening is not shown to have been produced by an independent nonindustrial cause.*"⁷ (Emphasis added.) If a member weakened by an employment injury, contributes to a later fall or other injury, the subsequent injury will be compensable as a consequential injury, if the further medical complication flows from the compensable injury, *i.e.*, "so long as it is clear that the real operative factor is the progression of the compensable injury, with an exertion that in itself would not be unreasonable in the circumstances."⁸

ANALYSIS

The Office accepted that appellant sustained subacromial bursitis and a rotator cuff tear of the right shoulder as a result of the November 15, 1991 employment-related injury. On June 21, 2001 appellant related that she was unable to sleep at night due to pain and a burning sensation in her right shoulder. The issue, therefore, is whether appellant's disability beginning June 21, 2001 is compensable as the "direct and natural" result of her accepted employment injury. She has not submitted any medical evidence which addresses how her condition of the June 21, 2001 injury was a natural progression of the accepted employment injury.

Appellant submitted a September 19, 2001 medical treatment note of Dr. McCluskey, who found that she had a rotator cuff tear that was related to her initial workers' compensation injury. He treated appellant since January 23, 1996 and performed a right rotator cuff repair and acromioplasty due to the November 1991 employment injury. In a November 15, 2001 report, Dr. McCluskey provided a history of his treatment of appellant's right shoulder from July 1, 1998 through September 19, 2001. He opined that appellant had a rotator cuff tear that was related to her previous rotator cuff tear, which had been repaired. Dr. McCluskey stated that the tissues were not normal, they were thinned and they had returned with repetitive overhead activity. He further stated that these problems occurred spontaneously with overhead activities and very seldom required traumatic events. Dr. McCluskey did not provide any medical rationale explaining how or why appellant's current rotator cuff tear was caused by her November 15, 1991 employment injury in his September 19, 2001 treatment notes and November 15, 2001 report. The record indicates that he was unaware that appellant had stopped work at the employing establishment as of September 12, 1994 and began work at Winn Dixie as of June 21, 1995. Dr. McCluskey reference to continued overhead activities in 2001, such activities cannot be attributed to appellant's former federal employment.

⁶ Larson, *The Law of Workers' Compensation* § 13.11.

⁷ *Id.* at § 13.11(a); *see also Melissa M. Fredrickson*, 50 ECAB 170 (1998).

⁸ *Kevin J. McGrath*, 42 ECAB 109 (1990).

Appellant submitted the medical treatment notes of Dr. John R. Testerman, a Board-certified orthopedic surgeon, dated August 17, September 14 and 17, 1993 indicating that she had subacromial bursitis secondary to a right shoulder sprain/strain. The July 21, 1997 report of Dr. Sidney H. Yarbrough, III, a Board-certified orthopedic surgeon, indicated that appellant was postoperative rotator cuff tear of the right shoulder and clavicle resection. He stated that the 1991 employment injury and subsequent repetitive motions appellant sustained while working at the employing establishment could cause the problems she had with her right rotator cuff tear. Dr. Testerman's 1993 treatment notes and Dr. Yarbrough's 1997 report predate the alleged recurrence of disability on June 21, 2001. Therefore, these reports are irrelevant in establishing a causal relationship between appellant's current right shoulder condition and her accepted employment injury.

As appellant has not submitted rationalized medical evidence supporting a causal relationship between her accepted employment injury and a recurrence of disability on June 21, 2001 she has failed to meet her burden of proof.

CONCLUSION

The Board finds that appellant has failed to establish that she sustained a recurrence of disability on June 21, 2001 causally related to her accepted employment injury.

ORDER

IT IS HEREBY ORDERED THAT the February 26, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 22, 2004
Washington, DC

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member