U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ROBERT J. WESCOE and DEPARTMENT OF THE TREASURY, BUREAU OF ALCOHOL, TOBACCO & FIREARMS, Philadelphia, PA

Docket No. 02-1479; Submitted on the Record;
Issued October 23, 2002

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether appellant sustained a recurrence of disability on August 26, 2000 causally related to his August 28, 1999 employment injury.

On August 28, 1999 appellant, then a 33-year-old special agent, filed a traumatic injury claim alleging that on that date he sustained a dislocation of his left shoulder during the execution of an arrest warrant. The Office of Workers' Compensation Programs accepted appellant's claim for a left shoulder dislocation. By decision dated August 9, 2002, an Office hearing representative accepted that appellant sustained an employment-related recurrence of disability on June 21, 2000 when he dislocated his shoulder while playing recreational softball.[1]

In a report dated February 16, 2000, Dr. Barry S. Gleimer, an orthopedic surgeon, stated that appellant could return to full duty, noting that a magnetic resonance imaging study was essentially normal.

In a report dated June 26, 2000, Dr. Guy Lee, an orthopedic surgeon, stated that appellant had recently sustained a second left shoulder dislocation causally related to his August 28, 1999 employment injury. He indicated that appellant was prone to have more dislocations in the future and advised him to consider reconstructive surgery.

In a report dated August 28, 2000, Dr. David V. Craft, an orthopedic physician and an associate of Dr. Lee, stated that appellant had dislocated his left shoulder several days previously during a volleyball game and stated his opinion that the dislocation was a continuation of his August 1999 employment injury.

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[1] In her decision dated August 9, 2001, the Office hearing representative found that appellant's left shoulder dislocation on June 21, 2000 was a consequential injury of the August 28, 1999 employment injury. She found that appellant's participation in the softball game was not unreasonable or rash in light of the fact that he had been released for full duty and there were no medical restrictions placed on him regarding his shoulder at the time that he participated in the softball game.

In a report dated November 2, 2000, Dr. Gleimer stated his opinion that appellant's two left shoulder dislocations were directly related to the August 28, 1999 employment injury and he would continue to have dislocations with lesser and lesser degrees of trauma unless he underwent surgical stabilization.

In a report dated February 20, 2001, Dr. Craft stated his opinion that appellant's employment-related left shoulder dislocation on August 28, 1999 caused him to be susceptible to recurrent dislocations that occurred in the spring and fall of 2000 and necessitated reconstructive surgery. He stated, "let it be clearly understood that [appellant's] injury and subsequent need for reconstructive surgery[2] and all subsequent dislocations were a direct result of the original injury, which he sustained on the job."

By decision dated September 13, 2001, the Office denied appellant's claim for a recurrence of disability on August 26, 2000.

By letter dated September 17, 2001, appellant requested an oral hearing that was held on January 30, 2002. At the hearing, appellant testified that at the time of his shoulder dislocation on August 26, 2000 he was on light-duty work status. He testified that he was aware that his shoulder was susceptible to subsequent dislocations following the second dislocation on June 21, 2000 but thought that the restrictions established by his physician were meant to prevent him from engaging in the type of activity that caused his original dislocation on August 28, 1999, not a "leisurely picnic associated activity."

In a report dated September 27, 2001, Dr. Craft stated that appellant sustained an employment-related traumatic left shoulder dislocation in the fall of 1999. He stated:

> "As previously stated, once an initial shoulder dislocation occurs, ligament tears result which lead to inevitable recurrent dislocations throughout the patient's life up to the point at which the patient has surgical reconstruction. Not surprisingly, [appellant] sustained several dislocations of his left shoulder prior to corrective surgery in November 2000.
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> "As I stated in my February 20, 2001 correspondence, it remains my medical opinion that any and all pain dysfunction, and time lost from work all flow from the original dislocation…. There are numerous medical reports in the form of medical journals and textbook chapters which confirm this conclusion."

By decision dated and finalized March 27, 2002, the Office hearing representative affirmed the Office's September 13, 2001 decision.

The Board finds that appellant failed to establish that he sustained a recurrence of disability on August 26, 2000 causally related to his August 28, 1999 employment injury.

It is an accepted principle of workers' compensation law that when the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that

[2] Appellant underwent left shoulder surgery on November 3, 2000.

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. Once the work-connected character of any injury has been 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 and so long as it is clear that the real operative factor is the progression of the compensable injury, associated with an exertion that in itself would not be unreasonable under the circumstances.[3] A different question is presented, of course, when the triggering activity is itself rash in light of the claimant's knowledge of his condition.

The facts of this case are similar to those presented in the case of *John R. Knox.*[4] In *Knox,* the employee sustained a left knee injury in the performance of duty, which the Office accepted for medial collateral ligament sprain. He reinjured his left knee playing basketball when he turned sharply to the right on a planted right foot. The Board affirmed the rejection of his claim for a recurrence of disability, noting that the triggering episode for the reinjury was the exertion that the claimant placed on his knee during a basketball game. Given the circumstances of the later injury, the Board held that the employee's disability was not the result of the natural consequence or progression of his employment injury; rather, the basketball injury constituted an independent intervening cause attributable to the employee's own intentional conduct. The Board found that, given the employee's knowledge of his left knee condition, playing basketball was not a reasonable activity.

The facts of this case lead to the same conclusion. In a June 26, 2000 report, following appellant's second left shoulder dislocation of June 21, 2000, Dr. Lee, an orthopedic surgeon, advised appellant to consider reconstructive surgery because he was prone to have more dislocations in the future. At the hearing, appellant testified that he was on light-duty medical restrictions at the time of the third left shoulder dislocation on August 26, 2000 and that he was aware, following the second dislocation on June 21, 2000, that his shoulder was susceptible to dislocations. He testified that he felt that his physician's restrictions did not apply to playing volleyball, described by him as a "leisurely picnic associated activity." The Board finds that it was unreasonable for appellant to participate in playing volleyball while on medical restrictions in light of the fact that he had been advised that he was prone to have further shoulder dislocations. The Board finds that, given appellant's knowledge of his left shoulder condition following his second dislocation in June 2000 and the fact that he was on light-duty medical restrictions, playing volleyball was not a reasonable activity. As the triggering activity for the August 26, 2000 injury was itself rash in light of appellant's knowledge of his condition, the injury cannot be deemed to have arisen out of the employment, but rather the result of an independent intervening cause attributable to appellant's own intentional conduct.[5]

[3] *John R. Knox,* 42 ECAB 193 (1990).

[4] *Id.*

[5] *Clement Jay After Buffalo,* 45 ECAB 707 (1994); *John R. Knox, id.*

The decision of the Office of Workers' Compensation Programs dated March 27, 2002 is affirmed.

Dated, Washington, DC
October 23, 2002

Michael J. Walsh
Chairman

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member