

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGES OF COMPENSATION CLAIMS
SEBASTIAN/MELBOURNE DISTRICT OFFICE

William Bonner,
Employee/Claimant,

OJCC Case No. 13-001243DSR

vs.

Accident date: 11/23/2012

Nissan Melbourne/FFVA Mutual Insurance
Company,
Employer/Carrier/Servicing Agent.

Judge: Donna S. Remsnyder

FINAL COMPENSATION ORDER

This cause was heard before the undersigned at Sebastian, Indian River County, Florida on February 28, 2014, upon the Claimant's claims for temporary total disability from November 23, 2012, to continuing or until placed at MMI by all authorized treating doctors; temporary partial disability from November 23, 2012, to continuing or placed at MMI by all authorized treating doctors; authorization of medical treatment of Claimant's left knee injury which he sustained while in the scope of employment; compensability of November 23, 2012, date of accident which occurred while the Claimant was performing his duties within the scope of his employment; penalties, interest, costs, and attorney's fees. The Petition for Benefits was filed on October 3, 2013. Mediation occurred on January 3, 2014, and the parties' pretrial compliance questionnaire was filed on January 22, 2014. Eric C. Smith, Esq., was present on behalf of the Claimant. Anthony M. Amelio, Esq., was present on behalf of the Employer/Carrier.

The defenses were that the Claimant was in the course and scope of his employment but the injury being alleged is not due to an accident as defined by §440.02; the alleged industrial accident is not the major contributing cause of the Claimant's disability and need for treatment; the Claimant's condition is pre-existing and personal in nature; the Claimant did not timely notify the Employer/Carrier regarding an alleged injury pursuant to the requirements of

§440.185; the Claimant is not entitled to temporary partial disability benefits on the basis the Claimant voluntarily resigned his position and that work was available and refused by the Claimant pursuant to the provisions of §440.15; no entitlement to penalties, interest, costs, or attorney's fees. Employer/Carrier seeks costs pursuant to §440.34.

The following documentary items were received into evidence:

1. Pretrial Stipulation Sheet and Order dated February 10, 2014, together with the documentary items required by Rule 9.180 (Judge's Exhibit #1).
2. Deposition of Dr. Homi S. Cooper with attachments taken on June 18, 2013 (Joint Exhibit #1).
3. Medical Records of Dr. Homi S. Cooper filed on February 25, 2014 (Claimant's Proffer "A").
4. Deposition of Dr. Thomas Winters taken on August 14, 2013 (Claimant's Exhibit #1).
5. Deposition of Thomas F. Winters, Jr., M.D. taken on January 15, 2014 (Claimant's Exhibit #2).
6. Deposition of Karen Smith, with attachments taken on June 27, 2013 (Employer/Carrier's Exhibit #1).
7. Deposition of Krishna Vara, M.D., with attachments taken on June 18, 2013 (Employer/Carrier's Exhibit #2).
8. Deposition of Mario Ruberte, M.D., with attachments taken on June 19, 2013 (Employer/Carrier's Exhibit #3).
9. Deposition of Robert A. Cooper, M.D., with attachments taken on June 26, 2013 (Employer/Carrier's Exhibit #4).
10. Notice of Denial filed on April 10, 2013 (Employer/Carrier's Exhibit #5).

11. Deposition of William Bonner taken on March 15, 2013 (Employer/Carrier's Exhibit #6).

At the hearing, the Claimant, William Bonner, John Vargas, Joy Carver, and Anthony Lopez, appeared and testified before me. In making my findings of fact and conclusions of law, I have carefully considered and weighed all the evidence presented to me. Although I will not recite in explicit detail the witnesses' testimony and may not refer to each piece of documentary evidence, I have attempted to resolve all of the conflicts in the testimony and evidence. Based on the foregoing and the applicable law, I make the following findings:

1. The items to which the parties were in agreement on the pretrial stipulation sheet are accepted and adopted as findings of fact.

2. The Claimant alleges that he suffered an industrial accident arising out of and in the course and scope of his employment on November 23, 2012, and suffered injuries to his left knee. The Employer/Carrier has not accepted the alleged injury as a result of an accident as defined by Florida Statutes Section 440.02(1).

3. The parties stipulated that average weekly wage was not an issue for determination at the hearing and that the claim was not governed by a Managed Care Arrangement.

4. The Claimant filed a Motion for Expert Medical Advisor on February 20, 2014. The Employer/Carrier filed its response on February 21, 2014, asserting that the claim was not appropriate for an EMA and that the Motion was untimely. The Motion was heard at the time of the Final Hearing. The main issue for determination by an EMA would be the date of MMI and the parties agreed that the Final Hearing would go forward on compensability and the temporary indemnity issues and that the EMA issue could be determined at a later date if necessary.

5. The Claimant offered the medical records of Homi Cooper, M.D., into evidence.

The Employer/Carrier objected as the records has never been exchanged and offered as required by the Rules and the Pre-trial Order. The records were not received into evidence over the Employer/Carrier's objection and were marked as Claimant's Proffer A.

6. The Claimant was hired by the Employer in approximately July of 2012, as a salesman to sell automobiles for the dealership.

7. The Claimant, pursuant to his own account, used to be a very active young man. He is quite an athletic individual who used to participate in hobbies such as tennis, basketball, football, surfing, skateboarding, mountain biking, and working out at the gym on a regular basis. The Claimant travelled all across the State of Florida and outside of the state to compete in motocross, or dirt biking competitions until as recent as November of 2011.

8. The Claimant suffered injuries in the past participating in these activities; he was run over by a truck while he was skateboarding in December of 2000, and treated for his injuries until October of 2001. Not long thereafter, he was injured in a dirt bike accident on April 14, 2002, which resulted in an open reduction internal fixation (ORIF) of the left distal femur where a median parapatellar arthrotomy was created and screws were inserted within the medial and lateral femoral condyles. This hardware was subsequently surgically removed on September 25, 2002.

9. The Claimant testified that on November 23, 2012, he was running to the back lot to retrieve a vehicle for a customer and began slipping on gravel. He planted his left foot to stop himself when his left knee bent inward and buckled, causing him to fall. The Claimant testified that he went inside and told his supervisor, John Vargas, what had happened and that he was going home. According to the Claimant this was witnessed by another supervisor, Anthony Lopez. The Claimant testified that Mr. Vargas' response was that he was a big guy and should tough it out and that he was a hypochondriac. The Claimant admitted that he did not request

medical care at that time and no reports of injury were filled out.

10. The Employer/Carrier agrees that the Claimant was working on Friday, November 23, 2012, and that on the following Monday, November 26, 2012, he returned to work as scheduled and again, performed his regular job duties. The testimony of John Vargas and Anthony Lopez is that the Claimant never reported to them that he had been injured as described and if that it had happened they would have immediately filled out an injury report and obtained medical care for the Claimant. According to John Vargas the Claimant would also have been immediately sent for a drug test.

As this time of year was close to Christmas, the Employer hosted a holiday/Christmas party for all employees on Saturday, December 1, 2012. The Claimant worked all day on December 1, 2012, but still attended the party. The Claimant testified in his deposition that he did not dance at the party, but at the Final Hearing testified that he stood around on the dance floor with his date to one slow song. The testimony of John Vargas, Anthony Lopez, Karen Smith, and Joy Carver is that the Claimant attended the dance and danced with his girlfriend, and not just to one slow song.

11. According to the Employer/Carrier, the Claimant continued to work as scheduled performing his regular job duties, without missing any time from work until December 14, 2012. The Claimant testified that while he worked he was in pain, limping, and unable to perform his full duties during this time. The Claimant testified that everyone in the dealership knew that he was having knee problems. None of the witnesses who testified in this matter support the Claimant's assertion that he exhibited any signs of knee problems during this time.

12. On December 14, 2012, the Claimant testified that his knee was getting worse so he went to MIMA and saw his primary care doctor, Dr. Mario Ruberte. The Claimant testified that he told Dr. Ruberte exactly how the accident happened and that it occurred at work. The

Claimant admitted that he used his personal health insurance for the visit, but testified that the bill was denied since it was an injury at work.

13. A review of the intake sheet that the Claimant completed reveals that he reported complaints of left knee pain which had been ongoing for 1 or 2 weeks. The Claimant provided a history of believing he “may have hurt his knee with overuse and or sports.” The testimony of Dr. Ruberte is that the Claimant’s private health insurance, Health first, denied the bill on the basis of “a pre-existing condition.”

14. The Claimant testified that Dr. Ruberte took him off work and scheduled him for a MRI of his knee. Since he thought that there was a problem with his knee and that it should be covered by Workers’ Compensation, the Claimant testified that he call the “Hot-Line” and reported the injury to FFVA. Karen Smith, the office manager testified that in mid-December, 2012, she received a letter from their Workers’ Compensation Carrier, (FFVA), advising them that the Claimant had reported an alleged work accident on November 23, 2012. Ms. Smith called FFVA and was told that the Claimant was alleging an injury to his left knee as a result of an alleged accident on November 23, 2012. Mr. Anthony Lopez, Ms. Joy Carver, and Mr. John Vargas, soon thereafter learned that the Claimant was alleging an injury to his left knee at work.

15. The Claimant testified that a co-worker called him mid-December and told him that he had been fired and that they were cleaning out his office, wanting to know if the Claimant needed any of his personal belongings. According to the Employer, the Claimant just never returned to work after December 14, 2012, and was subsequently terminated for job abandonment after attempts were made by the dealership and John Vargas to contact him about returning to work.

16. Upon learning of the alleged injury, the Claimant was sent for authorized medical care to Dr. Krishna Vara, while his claim was being investigated. Dr. Vara found nothing wrong

with the Claimant, made no recommendations for ongoing care, and assigned no work restrictions as attributable to an alleged November 23, 2012, work accident. The Claimant testified that he was not satisfied with the evaluation by Dr. Vara and requested his one-time change in physician and he was authorized to treat with Dr. Homi Cooper. Dr. Homi Cooper could not correlate the Claimant's subjective pain complaints with any objective medical findings. After an MRI was performed, Dr. Homi Cooper referred the Claimant to Dr. Robert Cooper, an orthopedic specialist, to see if he was a surgical candidate. Dr. Robert Cooper evaluated the Claimant and determined that he was not a surgical candidate. Dr. Cooper did not recommend any ongoing medical care and discharged him from his care.

17. Based on the totality of the evidence before me I find that the Claimant is not a credible witness. His history of the accident and his reporting of the accident to his supervisors and initial physicians, is not supported by the other witnesses who testified nor the medical forms the Claimant himself completed when he went to his own physician. I find that the Claimant did not sustain an industrial accident arising out of and in the course and scope of his employment and he is not entitled to any benefits pursuant to Florida Statutes Section 440 (2012). All claims are hereby denied and dismissed.

18. Since the Employer/Carrier is the prevailing party they are entitled to reimbursement of the taxable costs of these proceedings pursuant to Florida Statutes Section 440.34. Jurisdiction is reserved on the amount if the parties are unable to agree.

WHEREFORE, it is hereby ORDERED and ADJUDGED that:

1. All pending claims of the Claimant are hereby denied and dismissed.
2. The Claimant shall reimburse to the Employer/Carrier the taxable costs of these proceedings. Jurisdiction is reserved on the amount if the parties are unable to agree.

DONE AND ELECTRONICALLY SERVED ON COUNSEL AND CARRIER this

5th Day of March, 2014, in Sebastian, Indian River County, Florida.



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