STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGE OF COMPENSATION CLAIMS
MIAMI-DADE COUNTY DISTRICT

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CARRIER:
Lion Insurance Company Serviced by:
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P.O. Box 1549
Tarpon Springs, FL 34688

JCC: Sylvia Medina-Shore
OJCC NO.: 08-029832SMS
D/A: 4/29/2007

COMPENSATION ORDER

THIS CAUSE came before the undersigned Judge of Compensation Claims for a final hearing on 5/26/10 regarding petition for benefits (PFBs) filed 11/30/09. At the 5/26/10 final hearing, the undersigned granted claimant's motion to provide the deposition of Dr. Moya post-hearing. Same deposition was provided on 6/14/10 therefore, the record as it relates to the 5/26/10 final hearing became closed on same date. The 11/24/09 PFB was no longer at issue at the 5/26/10 final hearing. Accordingly, this order dismisses the 11/24/09 PFB.

Documentary Exhibits:

JCC-

1. Pre-trial stipulation e-filed 3/19/10.

Joint-

A. Deposition of Mary Merrill taken 1/20/10.

B. Payment listing as to paid workers' compensation benefits.

Claimant-

1. Deposition of Dr. Vendryes.

2. Deposition of Dr. Moya.

E/C-

1. Deposition of Dr. Kelman taken 4/16/09

2. Deposition of Dr. Kelman taken 1/21/10.

3. Deposition of Mary Merrill taken 4/27/09.

4. Deposition of Ryan Perez.

5. Deposition of the claimant.

6. Deposition of Chick Szopinski.

Claims:

1. Payment of TTD/TPD plus penalties and interest from the date of accident forward and continuing.
2. Penalties and Interest on late payment of Impairment Income Benefits (IIBs).
3. Attorney's Fees and Costs.

Defenses:

1. 1. No medical evidence to support claimant's claim for indemnity; the claimant reached overall maximum medical improvement, at the latest, on or about May 4, 2009; all indemnity timely and appropriately paid; the claimant is at overall MMI as of 5/4/2009 per Compensation Order of January 28, 2010. Pursuant to paragraph I of the Findings of Fact and Conclusions of Law, the claimant reached MMI from Dr. Vendreyes on 4/8/2009 from a pain management standpoint, full duty with no permanent work

restrictions, and reached MMI with Dr. Gary Kelman on 5/4/2009 with a 1% impairment rating with a full duty work release with no permanent work restrictions. The 1/28/10 Compensation Order represents is the law of the case.

2. All IIBs were timely paid at the correct rate.
3. Attorney's Fees and Costs not due from E/C.

Stipulation:

1. Claimant's AWW is $593.09 with a corresponding compensation rate of $395.41.

Findings of Fact and Conclusions of Law:

1. The claimant testified in person at the 5/26/10 final hearing. He was employed by Southeast Personnel to work for client company, Universal Parking as a valet. Claimant's duties included retrieving the keys to cars, driving the cars to the customers and parking the cars. He was hired on 12/22/06 and worked the shift of 3:00 pm to 11:00 pm and weekends.
2. On 4/29/07, claimant slipped in the parking garage injuring his back. Apparently, there was oil on the ramp of the parking garage. Claimant reported the accident to his supervisor, however E/C did not initially authorized medical care. After three days, claimant was instructed to seek medical care at Concentra Medical Center. Claimant claims to have been taken off work for 7 days. After those 7 days, claimant was provided with work restrictions and referred to Dr. Kelman. Dr. Kelman provided claimant with medications, physical examinations and x-rays. Dr. Kelman referred claimant to a pain management physician.
3. After the accident, the claimant continued to work for Universal Parking as a valet. The evidence reflects that claimant also worked for Universal Parking and National

Concrete from 4/30/07 to 5/16/07. After the accident, the claimant approached his supervisor, Ms. Ruesca to ask for permission to change his work hours to 4:00 pm to midnight, not including certain weekends. According to the claimant, Ms. Ruesca told the claimant that if he did not work weekends, he was not part of the valet team. Claimant was not happy with Ms. Ruesca's response and went to speak with the owner of the building, Brian. When Ms. Ruesca found out claimant had spoken to Brian, she fired him.

4. The claimant was then terminated from his job with National Concrete as he was accused of aiding and abetting a theft of a bicycle. Brian suggested that the claimant not return to the building. The claimant denied that he partook in stealing a bike.
5. Claimant was unemployed for approximately 3 months. He did not apply for unemployment benefits. In August of 2007, he secured a job with an electrical company earning $10.00 per hour. However, claimant could not physically undertake the job duties and searched for other employment. Thereafter, claimant secured employment with Hi-Tech delivering parts and working on electrical outlets. In March of 2008, claimant secured employment as a valet with Park One.
6. Ms. Johanna Ruesca testified as a rebuttal witness on behalf of E/C. She testified via phone, with a notary present, as she resides and works in New York. Ms. Ruesca was Area Manager for Universal Parking. She was the supervisor of 8 to 9 employees, including the claimant. She also created the schedules for her direct reports. She explained that Universal Parking provided valet services to certain buildings.
7. Ms. Ruesca recalls claimant's industrial accident. However, claimant continued to work for Universal Parking in the same capacity. According to Ms. Ruesca, claimant

did not complain of suffering any back pain. Rather, the claimant requested a schedule change. Specifically, claimant requested from Ms. Ruesca to begin work at 5:00 pm so he could undertake the Construction job during the day. Ms. Ruesca advised the claimant that she could not accommodate his request however, allowed him to start his job with Universal Parking at a later time in order to give claimant an opportunity to decide which employer he desired to continue working for. Claimant decided to stay working with the construction company and relayed his decision to Ms. Ruesca. Accordingly, claimant voluntary left his employment with Universal Parking and continued to work for the construction company. Had the claimant not left his employment with Universal Parking, Ms. Ruesca testified claimant would still be employed there.

8. During the time claimant was working solely for the construction company, Ms. Ruesca was called by the building manager to view a surveillance tape. Claimant was alleged to have aided another person in stealing a bicycle. Ms. Ruesca viewed the tape with other people in the room and claimant was identified as the person assisting in the theft. Claimant was then terminated from the construction job for misconduct and not allowed on the premises of the building.
9. Claimant verified that his work hours at Universal Parking were from 3:00 pm to 11:00 pm. After Ms. Ruesca's testimony, claimant indicated that is was true that he was allowed to report to the Universal Parking job at 4:30 pm. His hours at the concrete company were 7:30 am to 4:00 pm. The dispute for which claimant testified he was terminated from Universal Parking concerned working weekends.
10. It is uncontroverted that the claimant has reached overall maximum medical

improvement by May 4, 2009. I find that claimant is not entitled to temporary indemnity benefits following this date. Both Dr. Vendryes (4/8/09) and Dr. Kelman (5/4/09) testified that the claimant has reached the point of maximum medical improvement from their specialty. (See Deposition of Dr. Gary Kelman, January 21, 2010, page 11-13). Dr. Vendryes most recently testified that the treatment rendered to the claimant since MMI has been palliative in nature.

11. Dr. Gary Kelman restricted the claimant's employment on one occasion, June 28, 2007. The restrictions were occasional bending, kneeling, squatting and pushing or pulling no greater than ten (10) to twenty (20) pounds. (Deposition of Gary Kelman, April 6, 2009, page 11, lines 9-13). As of 6/28/07, claimant was not employed at all. He remained unemployed until August of 2007.
12. In reference to the 6/28/07 work restrictions, I find that claimant's valet parker job duties are within same restrictions. In doing so, I have taken into consideration the totality of the evidence and testimony of Dr. Kelman and Dr. Vendryes. To that extent, I find that claimant was able to undertake both jobs, that of valet parker and "toolman" after the accident.
13. In addition, I find claimant is not entitled to TPD benefits from 6/28/07 to 8/28/07 as he was terminated for misconduct from his subsequent employment, the concrete company. See, F.S. 440.15(4)(e). While Ms. Ruesca appeared via phone, her testimony was verified by the testimony of Ryan Perez and records revealing claimant was terminated from the subsequent employer for misconduct. I accept the testimony of Ms. Ruesca over that of the claimant as I find the claimant not credible.
14. Dr. Kelman released the claimant to full duty on August 29, 2007. (Dr. Kelman

Deposition, Page 11). The uncontroverted evidence was the claimant had no restrictions from August until November 28, 2007 when the claimant was seen by Dr. Vendryes. It should be noted that according to Dr. Kelman's deposition that the claimant said he was working as of October 28, 2007 at a "full duty status". (Please see deposition of Dr. Kelman, page 13, lines 5).

15. In claimant's trial memorandum, he references work restrictions assigned by Concentra Care from the date of accident to the time the claimant was seen by Dr. Kelman. However, no medical evidence in the form of depositions or medical records was admitted into evidence to substantiate claimant's testimony.
16. Moreover, claimant attended his IME with Dr. Moya on 4/20/09 Dr. Moya did not review the medical records or the MRIs. He assigned light duty work restrictions to the claimant of no lifting more than 20 pounds and no repetitive bending. He testified claimant is able to valet park cars.
17. I reject Dr. Moya's opinions as he was not given the medical records and diagnostic studies to review. Further, Dr. Moya could not opine as to major contributing cause or future medical treatment. While these are not at issue in the instant order, it is apparent that Dr. Moya was not comfortable providing opinions without first reviewing medical and diagnostic records of claimant's past treatment. As Dr. Kelman treated the claimant and also reviewed all records, I accept his opinions over those of Dr. Moya.
18. With regard to restrictions assigned by Dr. Vendryes, Dr. Vendryes testified that as of November 28, 2007 the claimant would have thirty (30) pound lifting restrictions. (Deposition of Dr. Vendryes, Page 10, Lines 10-17). However, Dr. Vendryes testified

that the claimant would have been capable of performing his duties as a valet driver within these restrictions. (See deposition of Dr. Vendryes, Page 29, lines 18-21).

19. I accept Dr. Kelman's opinions regarding work restrictions, over the opinions of Dr. Vendryes, as they are more consistent with evidence. Dr. Kelman inquired on each visit as to whether the claimant was working or not. On each visit, Dr. Kelman specifically addressed his opinions regarding work restrictions and the fact the claimant was capable of full duty work.
20. Claimant continued to work as a valet parker for the insured after the accident. I find that he voluntarily left said employment due to a conflict in hours with the "toolman" job with the concrete company. I find that claimant's job at the concrete company required some moderate lifting and carrying tools in organizing the tool room. To that extent, I find claimant's job duties with the concrete company as "toolman" required more physical exertion than claimant's job as a valet parker, where the only weight claimant would have to lift are the car keys.
21. Thereafter, claimant became employed for an electrical company delivering parts and placing electrical outlets in buildings. Claimant undertook this job on a full time basis from August to November 2007. Again, I find claimant's job duties with the electrical company to require more physical demands on the claimant than his valet parker job duties. Claimant is currently undertaking the same valet parker duties as he did with Universal Parking.
22. It is the claimant's burden to show a causal relationship between his or her compensable injury and the wage loss claimed. Betancourt vs. Sears Roebuck & Co., 693 So.2d 680 (Fla. lst DCA 1997). The Judge of Compensation Claims must

determine this by consideration of the totality of the circumstances. Id. at 684. Factors to be considered are unsuccessful job search, or evidence that work restrictions precluded the adequate performance of his or her prior job. Interim Services and Specialty Risk Services v. Levy, 843 So.2d 915 (Fla.1st DCA 2003). An unsuccessful job search, however, in and or itself, does not establish a causal relationship between the industrial accident and the wage loss. Id. at 916.

23. Notwithstanding that Dr. Kelman's opinions are accepted over those of Dr. Vendryes, I find that Dr. Vendryes thirty (30) pound lifting restrictions would have not precluded the claimant's work as a valet driver which was his occupation at the time of the accident. As previously indicated, to establish a causal relationship between the loss of earnings and the injury, the claimant should show that his or her capabilities preclude adequate performance of his or her prior job. Nicholls v. University of Florida, 606 So.2d 410, 413 (Fla. 1~ UCA 1992); Burger King v. Nicholas, 580 So.2d 656, 658 (Fla. 1st DCA 1991).

24. In the Interim Services case, the Court noted that in the Betancourt case the claimant's work restrictions prohibited heavy lifting and an award of temporary partial was made where there was evidence that the claimant's job entailed lifting computers weighing seventy (70) pounds. However, in the Interim Services case the work restrictions accepted by the Judge required the claimant to avoid sitting for more than two hours at a time, avoid sitting or standing for more than one hour, and avoid carrying or lifting more than twenty (20) pounds. In that case there was no evidence that the claimant's job at the time of his accident would have required her to do tasks outside the scope of her restrictions. Applying the logic of Interim Services

to the case at bar, I find claimant failed to present evidence that the most restrictive work restrictions prevented him from doing the "performance of his... prior job.", i.e., a valet driver. See, Nicholls vs. University of Florida.

25. Further, I find that claimant has not presented evidence, other than his bare testimony as to post injury employment, of a wage loss following the accident. See Cosmos Contracting Co. vs. Courtney, 617 So.2d 439 (Fla. 1st DCA 1993) and General Repair Services, Inc. vs. McKenzie, 577 So.2d 619, 620 (Fla. 1st DCA 1991) wherein the 1st DCA held that in the case of a claimant who failed to keep adequate records regarding wages, the claimant failed to make competent showing of wage loss. Therefore, the claimant was not entitled to any temporary partial or wage loss benefits. In that case, the claimant testified regarding an amount he was paid but did not keep adequate records and the District Court found that his bare testimony alone on the wage issue was not competent substantial evidence.
26. Similarly, in the instant case, the claimant failed to present any documentary evidence to support his post-injury earnings beyond May 15, 2007 in which the claimant was employed with National Concrete as referenced above.
27. As to the penalties and interest claim for alleged late payment of IIBs based on Dr. Kelman's 1% permanent impairment rating (PIR), I find the evidence is confusing. However, I find that the totality of the evidence substantiates that IIBs were paid late. Specifically, Dr. Kelman's 5/4/09 Medical Report assigns a 1% PIR. It does not make the 1% PIR contingent on claimant undergoing the prescribed MRI. On the other hand, the DWC-25 regarding the 5/4/09 visit and Dr. Kelman's testimony substantiate that claimant was not at MMI on 5/4/09 and a 0% PIR was written.

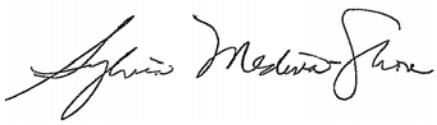
28. Claimant underwent the MRI on 5/28/09. The adjuster did not follow-up on claimant's MMI status. Rather, E/C counsel held a conference with Dr. Kelman and as a consequence, Dr. Kelman signed off on the 1% PIR on 8/31/09.

29. I find that E/C failed in their statutory duty to monitor claimant's medical treatment subsequent to the 5/4/09 visit. E/C failed to inquire about an MMI date to determine whether permanent income benefits would be due and owing. E/C failed to pay the 1% PIR included in the 5/4/09 medical report also. Accordingly, I find claimant is entitled to penalties and interest for late payment of IIBs.

30. However, I find that E/C overpaid impairment benefits by paying IIB benefits from May 4, 2009 to July 26, 2009, well over two weeks of impairment benefits. Accordingly, I find that E/C is entitled to recoup the overpayment against any benefits (including penalties and interest) awarded.

WHEREFORE, IT IS ORDERED:

1. Claim for payment of TTD/TPD plus penalties and interest from the date of accident forward and continuing is denied.
2. E/C shall pay claimant penalties and interest on late payment of Impairment Income Benefits (IIBs) with an offset for overpayment of IIBs.
3. Jurisdiction is reserved on claimant's attorney entitlement to and amount of E/C paid attorney's fees and Costs for a future attorney's fee hearing.



Sylvia Medina-Shore
Judge of Compensation Claims

CERTIFCATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Compensation Order has been furnished to the parties via U.S. Mail at the above listed addresses and to the attorney's of record via e-mail at: zaldivarpa@gmail.com and AAmelio@HRMCW.com this 1st of July of 2010.

Secretary to JCC