

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF JUDGE OF COMPENSATION CLAIMS
PORT SAINT LUCIE DISTRICT

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JUDGE: Robert D. McAliley
OJCC#: 09-013631MAD
VENUE: Palm Beach County
D/A: 5/1/2009

AMENDED ORDER ON THE MERITS

Claimant was struck on the head by a large piece of lumber. He eventually came under the care of Gary E. Weiss, M.D., a neurologist, who was deauthorized as of April 1, 2010. As explained below, I find this deauthorization was appropriate and that the employer/carrier (E/C) is not responsible for medical bills beyond that date. Additionally, I determine one of the modalities of treatment recommended by Dr. Weiss, Vax-D therapy, is not reasonable and necessary.

I also find claimant sustained no injury to his lumbar spine as a result of his May 2009 industrial accident. Claimant fails to demonstrate temporary disability after April 1, 2010. Therefore, he is not entitled to further indemnity benefits or penalties and interest.

All issues pertaining to attorney's fees and costs are reserved for subsequent hearing.

JURISDICTION AND NOTICE

The parties agree, and I find, the Judge of Compensation Claims (JCC) has jurisdiction over the parties and subject matter. The parties were properly notified of the merits hearing.

STIPULATIONS

The parties agree claimant sustained injury by accident on the date indicated while working in Palm Beach County, Florida. There was an employer/employee relationship. Workers' Compensation insurance coverage applies. The accident is accepted as compensable although the employer/carrier (E/C) controverts the extent of injuries. Claimant's average weekly wage (AWW) is \$349.27. All issues pertaining to attorney's fees and costs may be reserved for subsequent hearing.

CLAIMS AND DEFENSES

Claimant seeks a determination he sustained a compensable closed head and lumbar sprain injury. Consequently, claimant contends the initially authorized treating physician, Gary E. Weiss, M.D., was improperly deauthorized and claims entitlement to continued medical treatment with this physician. Claimant seeks payment of Dr. Weiss' bills from April 1, 2010, together with the provision of Vax-D therapy for the lumbar and cervical spine. Claimant seeks temporary total disability benefits (TTD) or temporary partial disability benefits (TPD) from April 1, 2010, to the date of the hearing. Claimant also seeks penalties and interest on overdue indemnity benefits as well as attorney's fees and costs.

E/C contends they have timely provided claimant with all due medical benefits. Claimant was offered orthopedic care for the aggravation of his cervical condition in accordance with the recommendations of Fernando Miranda, M.D., which claimant refuses. Claimant is medically non-compliant by refusing to proceed with medical care with the doctor that was authorized, William Stolzer, M.D.

Further neurological care is not reasonable and medically necessary nor causally related to the industrial accident. E/C contends claimant does not have continuing

symptoms from a "closed head injury" or similar condition warranting further care. All indemnity benefits have been timely paid. General denial of all remaining claims.

EVIDENTIARY RULINGS

E/C's objection, taken under advisement, to the deposition of Dr. Weiss is denied because this physician was previously authorized to provide treatment by E/C. *See, Russell v. Orange County Public Schools Transportation*, 36 So.3d 743 (Fla. 1st DCA 2010).

E/C referred claimant to a walk-in clinic, Physicians Immediate Care, shortly after the accident. Examination and treatment was provided by a nurse practitioner who prepared several reports presumably sent to E/C. Initially, I find Nurse McFarland's reports were issued under the auspices of the clinic's medical doctors, in this instance likely Dr. Palestrant. Moreover, E/C is not allowed to exclude medical reports from the very facility they utilized to comply with the Workers' Compensation Law. *See, § 440.13(2), Fla. Stat. (2009).*

As further explained below, an expert medical advisor (EMA) was appointed. The EMA addresses certain questions put to him by the JCC. In the process of answering these questions, however, the EMA also addresses other, related medical issues. In construing the statute, I find the

EMA's opinion presumptively correct as it pertains to addressing a question about which two other healthcare providers disagree. § 440.13(9)(c), *Fla. Stat.* (2010). There is no statutory limitations on the scope of EMA testimony that may be considered. Instead, section 440.25(d) provides, "The report or testimony of the expert medical advisor *shall* be admitted into evidence..." (emphasis added) Similarly, there is no limitation on the scope of the EMA's opinion that may be considered at section 440.13(5)(e).

Governed by section 440.015, and avoiding interpreting the statute so as to produce an absurd result, I find that any relevant opinion of an EMA for which that doctor is otherwise qualified to testify, it admissible into evidence.

Where this opinion pertains to a medical issue about which two other doctors disagree, then the EMA's opinion is presumed correct whether or not the doctor is asked by the JCC to address the question. If there is no disagreement the EMA's opinion is not given special weight as a matter of law although, as with any witness, the doctor's impartiality may be an enhancing factor in considering his or her testimony.

All other objections taken under advisement are likewise overruled.

PETITIONS FOR BENEFITS

This order disposes of all claims in Petitions for Benefits filed April 2, 2010, April 19, 2010, and May 20, 2010, except for attorney's fees and costs.

BACKGROUND

Claimant is a 40 year old Mexican national who speaks a little or no English. On Friday, May 1, 2009, while performing his job as a construction laborer, a large plank fell from scaffolding striking claimant's hardhat. The plastic was not penetrated but the interior strapping was broken. Loss of consciousness is uncertain due to claimant's inconsistent medical histories.

The accident was reported to his foreman, "Marcos," who was dismissive of claimant's complaints and did not further report the injury to the employer.

Symptoms worsened over the weekend. When claimant returned to work the following Monday he advised Marcos of his complaints who still took no action. Claimant went to the emergency room. He then circumvented Marcos and reported the incident to office personnel. Physicians Immediate Care was authorized to provide medical care. The walk-in clinic recommended claimant follow with a

neurologist so E/C authorized R. Edward Montejo, M.D., who treated claimant for several months. Dr. Montejo suffered an automobile accident which left him unable to practice medicine. E/C then authorized Dr. Weiss, also a neurologist, for medical care.

Questioning Dr. Weiss' course of treatment and recommendations, E/C obtained an independent medical examination (IME). This examiner, Dr. Miranda, takes issue with Dr. Weiss' diagnosis and recommendations.

These conflicts were brought to the attention of the JCC who appointed Kenneth C. Fisher, M.D., also a neurologist, as an EMA. I reject claimant's arguments to the effect that Dr. Fisher's opinions should be disregarded.

Claimant, the only live witness in the case, testifies through an interpreter. His complaints and limitations seem exaggerated. He points to symptoms in his head, face, jaw, vision, balance, cognition, depression, left hip, and low back. The scope of complaints to health care providers is even more extensive. However, considering the language barrier and sociological factors, I treat much of this apparent hyperbole as an effort to emphasize his injury as opposed to fabricating a story.

INITIAL MEDICAL CARE

Claimant recorded his first medical care at the emergency room of Lawnwood Regional Medical Center in Fort Pierce. He advises of having loss of consciousness due to a blow to the head. Hospital personnel did not detect any neurological problems. There were no complaints below the neck. CT scans are read as normal. The diagnosis is a cervical strain and the non-descript term, "head injury."

Claimant again reports to the hospital on May 11, 2009, with a chief complaint of persistent headaches with nausea exacerbated by light. Objective clinical testing is again normal. The process is repeated three days later on May 14, 2009, and again on May 18, 2009.

In the meantime, authorized care is provided at Physicians Immediate Care. The impact of the injury on consciousness is characterized by claimant as "dazed." Claimant advises of having dizziness with tingling in his face and scalp, tingling in his arms and legs, and blurry vision. The clinical examination, which appears thorough, is negative.

Claimant's follow-up and last visit with the walk-in clinic occurs May 18, 2009. His various symptoms have worsened with the addition of memory problems. The

clinical examination, however, is again within normal limits.

NEUROLOGICAL DIAGNOSIS AND CARE

Dr. Montejo, initially examining claimant in June 2009, diagnoses a diffuse, widespread (axonal) brain injury. This is based in large part on claimant's purported history and symptoms. Dr. Montejo detects the presence of an endgaze nystagmus, bilaterally. His diagnosis is also supported by what a neuroradiologist reads on MRI as being an arachnoid cyst which is normally congenital. However, Dr. Montejo believes this cyst may in fact be a collection of blood called a hygroma. This would indicate an acute bleed in the brain. A possible, alternate diagnosis is a trigeminal or brain stem injury. Claimant presented with widespread cervical spasm which, combined with claimant's symptoms, prompts a diagnosis of acute cervical sprain.

This neurologist also determines claimant has a possible temporomandibular joint injury as well as a low back and hip sprain. Due to complaints of "altered awareness", Dr. Montejo suspects a seizure disorder. Claimant later develops intractable headaches. Finally, claimant reports clear fluid coming out of one nostril and one ear. The doctor issues strips which he instructs

claimant to stain with this fluid but none are ever returned to Dr. Montejo for analysis.

In Dr. Montejo's reports he advises the seizure disorder is supported by EEG examination. However, on deposition the doctor testifies this abnormality was caused by a loose electrode connection.

Following Dr. Montejo's injury, Gary Weiss, M.D., assumed claimant's care on December 1, 2009. Dr. Weiss was never provided Dr. Montejo's notes which seems especially odd for a head injury but is never commented on in the testimony.

Dr. Weiss' diagnosis is closed head injury with loss of consciousness, dizziness, blurred vision, short-term memory loss and headaches; disc bulging in the cervical spine with possible radiculopathy; low back pain with possible radiculopathy; early chronic pain syndrome.

Dr. Weiss recommends a neuropsychological evaluation, a 72 hour EEG, Vax-D therapy, and an MRI of the low back.

The neuropsychological evaluation was performed through an interpreter which Dr. Weiss considers invalid. An MRI is read as showing a small herniation at L5-S1. The lumbar MRI report is not placed in evidence. Electrical testing was within normal limits indicating a radiculopathy was not present. However, some irregularity (apparently

within normal limits) in the EEG demonstrates a "closed head injury" but no seizure activity.

E/C refused to provide Vax-D therapy. Dr. Weiss, however, claims this treatment has a 90% success rate. The apparatus, in essences, stretches the spine so that it "...creates a suction to literally suck the disc back into place." (The source of this suction is not explained.)

Dr. Weiss comments that absent surgery, a neurologist, such as himself, is the appropriate specialist to treat a spinal injury.

Dr. Weiss emphasizes the primary diagnostic test claimant should undergo is a neuropsychological examination with a Spanish speaking, qualified psychologist. This enables the treating physician to see which areas of the head are impacted by a brain injury thereby facilitating treatment.

Dr. Weiss specifically addresses opinions of E/C's independent medical examiner (IME), Dr. Miranda. Dr. Weiss states disc bulges are abnormal for a 39 year old male. He questions whether claimant actually failed to inform Dr. Miranda of having low back pain, based on the purported briefness of the IME.

He does agree that an arachnoid cyst is probably congenital and likely does not cause symptoms.

Dr. Weiss treats claimant with medications. However, it appears from the questioning claimant is also receiving medications from outside the workers' compensation system which Dr. Weiss indicates are suitable.

Claimant has not reached maximum medical improvement (MMI).

Dr. Weiss' deposition was concluded because of time constraints. There is no testimony from Dr. Weiss or elsewhere elaborating on this doctor's deauthorization.

Claimant continues treating with Dr. Weiss at least through September 15, 2010, perhaps November 16, 2010, according to the progress notes. The first note mentioning authorization is dated July 9, 2010 ("Work comp won't authorize anything now.").

Claimant's medication regimen is not fully explained. Recently he has been prescribed pain killers, headache medication, muscle relaxants, and several drugs known to me as used to treat hypertension.

FERNANDO MIRANDA, M.D.

This board certified neurologist performs an IME at E/C's behest on March 9, 2010. A clinical examination performed at that time disclosed no pertinent objective neurological findings. I accept Dr. Miranda's testimony that his clinical examination was thorough.

Claimant's brain MRI showed the presence of a congenital arachnoid cyst. This was not traumatically induced because if it was, the cyst would contain iron residue from blood collecting in the area which in turn would be detected on the MRI.

Dr. Miranda explains characterizing claimant's injury as a "closed head injury," standing alone, is meaningless. Any blow to the head, not resulting in a cranial fracture, is properly described as such.

There is no clinical evidence of claimant ever having a generalized seizure. If a seizure disorder does exist, which is characterized as a "big stretch," it is more likely congenital.

In this physician's opinion a neuropsychological test is not reasonable and necessary because there is no evidence of a brain injury. The soft tissue structure of the brain reflects no traumatic damage.

Consequently, claimant does not require neurological care. Moreover, he has reached neurological MMI with no permanent impairment. Claimant has no vocational restrictions resulting from the industrial accident.

Claimant advised Dr. Miranda of having left hip pain and a sore neck with decreased range of motion. Dr. Miranda opines that given the history of no low back

symptoms during claimant's initial medical care, summarized above, lumbar complaints and the herniated disc are not caused by the industrial accident. Left hip pain does not result from a L5-S1 herniation.

Dr. Miranda has a definite opinion regarding the efficacy of Vax-D therapy: "And it's one of those treatments that are out there in the out layers of left field that no one seriously considers them as being effective for the treatment of the low back."

There are no herniated discs in the cervical spine. Claimant does have a sprain/strain injury at this level. The appropriate treatment would be by physical therapy. Orthopedic care, however, is not recommended.

EXPERT MEDICAL ADVISOR

As a result of the conflicting medical opinions the JCC appointed Kenneth C. Fischer, M.D., a board certified neurologist, to serve as an EMA. Dr. Fischer speaks Spanish fluently. He is asked by the JCC to address (1) whether claimant had a closed head injury necessitating neurological care, and (2) whether claimant has work restrictions after March 9, 2010, and (3) whether Vax-D is reasonable and medically necessary to treat claimant's complaints.

Claimant is examined by Dr. Fischer on October 28, 2010. He performs a complete neurological examination which is within normal limits. Claimant demonstrates a mild gait problem caused by pain and not a neurological injury. Dr. Fischer reviews all EEG reports. Subsequent to giving his deposition, Dr. Fischer also reviews a particular EEG tracing which suggests a neurological injury. He concludes there is no evidence of a seizure disorder on electrical testing. Dr. Fischer testifies the brain cyst is congenital.

Continuing neurological care is unnecessary. He agrees with Dr. Miranda that March 9, 2010, is the MMI date regarding any neurological injury. Claimant has no residual work restrictions.

Vax-D treatment is unnecessary. "There is no body of evidence scientifically that it's useful." Moreover, even if the procedure is otherwise valid, there is no orthopedic problem to treat. According to the doctor's testimony claimant has no mechanical injury at any level of his spine, lumbar or cervical. If claimant in fact has difficulty with headaches it does not stem from his neck or head injury. Prescribing narcotic analgesics is "inappropriate."

Dr. Rainwater's report pertaining to the neuropsychological examination is not placed in evidence. Like all other physicians who comment on it, Dr. Fischer questions its validity. And he questions the need for this examination in the first instance but is not as dismissive of it as Dr. Miranda.

Dr. Weiss found claimant had short term memory problems. Dr. Fischer testifies otherwise, finding claimant was a "very good historian." Claimant's memory at the merits hearing was unflagging regarding every event from the accident itself to his transportation to the trial and all events in between.

ANALYSIS AND CONCLUSIONS

Claimant seeks the determination he sustained a compensable closed head injury. This is unnecessary inasmuch as E/C accepts this fact and has provided medical care. The issue is what, if any, continuing care is needed.

Governed by Dr. Fischer's opinion, I find that Vax-D treatment is not reasonable and necessary. § 440.13(9)(c), *Fla. Stat.* (2009).

Moreover, as of March 9, 2010, until the date of the merits hearing, claimant had no disability as a result of this accident. See, § 440.02(13), *Fla. Stat.* (2009)

(defining "disability" as the incapacity because of an injury to earn wages being received at the time of the injury). Without a disability being present, claimant is not entitled to TTD or TPD. See, § 440.15(2)(a)&(4)(a), *Fla. Stat.* (2009).

Based on Dr. Fischer's opinion, I find claimant reaches MMI regarding any neurological injury stemming from being struck on the head as of March 9, 2010. However, I accept Dr. Miranda's opinion that physical therapy to the cervical spine would be potentially beneficial to claimant. Hence, because claimant has not reached overall MMI, E/C's defense that claimant is ineligible for temporary disability benefits because of having reached MMI is rejected. However, reaching MMI is not determinative. I conclude any residual injury does not limit claimant's ability to work. See, *Publix Supermarkets, Inc. v. Hart*, 609 So. 2d 1342,44 (Fla.1st DCA 1992).

Based on the EMA testimony, together with that of Dr. Miranda, I find claimant does not require further neurological care.

I accept Dr. Miranda's testimony that providing physical therapy for claimant's cervical injury would be beneficial. It strikes me as unusual this has never been attempted given the number of physicians treating claimant

in the past and apparent objective signs of a neck injury following the industrial accident.

On this point, no claim is advanced seeking this benefit. And this question was not tried by consent. Of interest is that the only witness testifying on point, Dr. Miranda, states that orthopedic care as authorized by E/C, is not recommended.

As explained above, if the issue were before me, I would not find the EMA's opinion necessarily controlling as a matter of law. Dr. Fischer was not asked by the JCC what further care of any nature was warranted, but only whether neurological care should be provided.

Moreover, there is no dispute between the physicians preceding Dr. Fischer pertaining to whether physical therapy should be provided.

The opinion of Dr. Miranda effectively shows claimant was not making "appropriate progress in recuperation" with Dr. Weiss. See, § 440.13(2)(d), *Fla. Stat.* (2009). Dr. Miranda opines claimant does not have an injury requiring neurological care in the first place. To the extent the recommended Vax-D treatment qualifies as recommended physical therapy, this procedure is useless if not silly. This is a sufficient basis for deauthorizing Dr. Weiss. Furthermore, I find E/C's deauthorization was warranted

under the facts of this case. *See, Teners of Miami Corp. v. Busot*, 764 So.2d 701, 702 (Fla. 1st DCA 2000) and *State Attorney v. Johnson*, 770 So.2d 187 (Fla. 1st DCA 2000).

Since the deauthorization was appropriate, the claim for payment of Dr. Weiss' medical bills incurred after April 1, 2010, is denied.

I accept Dr. Miranda's opinion claimant did not sustain an orthopedic injury to his low back as a result of being struck on the head. This opinion is supported by that of Dr. Fischer. Furthermore, I consider claimant's inconsistent testimony on point together with information he provides to hospital personnel and his symptoms immediately following the industrial accident.

WHEREFORE, it is

ORDERED AND ADJUDGED as follows:

a. The claim for a determination claimant sustained a lumbar injury as a result of his industrial accident is denied, and

b. The claim for reinstatement of Gary E. Weiss, M.D., as the treating physician is denied, and

c. The claim for payment of Dr. Weiss' bills incurred after April 1, 2010, is denied, and

d. The claim for temporary total disability benefits from April 1, 2010, to the date of the hearing is denied, and

e. The claim for temporary partial disability benefits from April 1, 2010, to the date of the hearing is denied, and

f. The claim for penalties and interest is denied, and

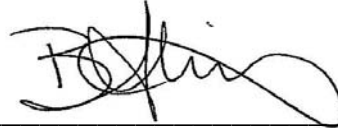
g. All issues pertaining to attorney's fees and costs are reserved for subsequent hearing.

DONE AND ORDERED in chambers, in Port Saint Lucie, Saint Lucie County, Florida, this 19th day of January, 2011.



Robert D. McAliley
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I HEREBY certify that a true and correct copy of the foregoing has been mailed via U.S. Mail to all of the parties and e-mailed to the attorneys listed on this 19th day of January, 2011.

A handwritten signature in black ink, appearing to be "T. J. H.", written over a horizontal line.

Assistant to the Judge