STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGES OF COMPENSATION CLAIMS
PORT ST. LUCIE DISTRICT OFFICE

Jaime Reyes-Garcia,
Employee/Claimant,

vs.

P.M. Dunn Construction Co. Inc., Southeast Employee Leasing/Lion Insurance Company, and Packard Claims Administration,
Employer/Carrier/Servicing Agent.
_____/

OJCC Case No. 14-014668RDM

Accident date: 6/5/2014

Judge: Robert D. McAliley

ORDER ON THE MERITS

Claimant was 20 years old at the time of the industrial accident which rendered him paraplegic. I find his average weekly wage is properly based on the 13 week average of actual wages pursuant to section 440.14 (1), Florida Statutes (2014). There is no evidentiary basis for an upward adjustment pursuant to section 440.14 (1) (e), Florida Statutes (2014).

I further find the claim for the provision of a motor vehicle for claimant's general use and the provision of an FES bike for claimant's home use is premature and must be denied without prejudice.

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

It is agreed claimant sustained injury by accident while working in Miami – Dade County. There was an employer/employee relationship. Workers' compensation insurance

coverage applies. The accident is accepted as compensable. The employer was timely notified of the accident. All issues pertaining to attorney's fees and costs may be reserved for subsequent hearing. Any indemnity payments due pursuant to this order will be handled administratively with the JCC retaining jurisdiction to determine the specific amount payable, if necessary.

CLAIMS

Claimant, who was 20 years old on the date of accident, seeks an increase in his average weekly wage (AWW) based on the application of section 440.14 (1) (e). Pursuant to this increase claimant seeks payment of temporary total disability benefits (TTD) and permanent total disability benefits (PTD) from December 6, 2014, to the present and continuing at the corrected compensation rate; supplemental payments pursuant to section 440.15 (1) (f) 1 paid from January 1, 2015, and continuing in accordance with an upward adjustment in the AWW; an adjustment in the past payments of "catastrophic loss" benefits paid pursuant to section 440.15 (2) (b) in accordance with this upward adjustment.

Claimant further seeks penalties and interest on the adjustments above as well as penalties and interest for supplemental benefit payments totaling $169.08 made May 22, 2015, for the period beginning January 1, 2015, through May 7, 2015.

Additionally, claimant seeks the provision of a replacement vehicle, including automobile insurance, accommodated to claimant's physical limitations. Alternatively claimant seeks transportation for all his needs.

Claimant seeks the provision of an "FES bike" to assist in the rehabilitation of his muscle strength and bulk as well as to decrease the spasticity in his lower extremities.

Finally, claimant seeks the payment of attorney's fees and costs.

DEFENSES

The employer/carrier (E/C) contends they have paid claimant based on the correct AWW. Accordingly, claimant is not due any correction for PTD or supplemental benefit payments paid in the past or to be paid in the future. Accordingly, no penalties and interest are due for past payments based on an upward adjustment in the AWW. Furthermore, E/C maintains claimant stipulated to an AWW of $464.50 which is the basis of the payments of all compensation benefits paid to date.

E/C timely agreed to provide claimant with a replacement vehicle. But as a prerequisite to an doing so it is incumbent upon claimant to successfully complete a training course in the use of hand controls which E/C is in the process of providing.

As to a FES bike, E/C is willing to provide same for claimant's home use when and if the authorized treating physician indicates this equipment is medically reasonable and necessary under the circumstances of this case.

Finally, E/C denies responsibility for all remaining claims including attorney's fees and costs and further asserts it is entitled to reimbursement for costs expended pursuant to section 440.34.

AVOIDANCES AND RESPONSES

Claimant contends that any responses by E/C to the effect that the claims for the provision of a motor vehicle or an FES bike are not yet ripe should have been raised in a motion to dismiss. By not doing so this defense has been waived. The actions of E/C also results in any medical causation question as to the need for an FES bike not being an issue. Claimant generally denies all remaining assertions.

PETITIONS FOR BENEFITS (PFB)

This order resolves PFBs filed April 22, 2015, June 18, 2015, July 2, 2015, July 22, 2015, and July 29, 2015, to the extent indicated. A PFB pending at the time of the merits hearing filed September 22, 2015, and the issues raised therein, were severed from these proceedings. It is noted that subsequent to the merits hearing PFBs were filed September 29, 2015, and September 30, 2015.

BACKGROUND

Claimant was born in Madras, Oregon on April 9, 1994. At age 4 he moved to Miami, Florida with his parents. When he was 14 years old claimant moved to Mexico, having completed the 7th grade in the United States. Claimant completed the 8th grade in Mexico and has a "middle school certificate." He returned to the United States and the Miami-Dade County area in 2014. He has relatives and family friends in southern Dade County.

Claimant never worked in Mexico. Since returning the United States claimant was employed under the table as a plasterer's helper. At age 19 claimant was hired at P. M. Dunn Construction Co. as a carpenter's helper through Southeast Personnel Leasing, a professional employment organization. His supervisor was Patrick Dunn. Claimant earned $13.00 hourly and established an average weekly wage of $464.50 based on section 440.14 (1) (a). Claimant is literate in both Spanish and English.

At the time of this accident, claimant owned a pickup truck which he since sold. He has a Florida driver's license.

THE INDUSTRIAL ACCIDENT AND SUBSEQUENT MEDICAL CARE

Little or no evidence is presented pertaining to the details of the industrial accident or

claimant's medical treatment. However, the trial memoranda are essentially in agreement as to the facts. Claimant fell from a ladder sustaining a T11 – 12 spinal cord injury rendering him paraplegic. He underwent spinal stabilization surgery at Jackson Memorial Hospital and was transferred to the Jackson Memorial Medical Spinal Cord Rehabilitation Center for an extended recuperation. He is presently under the outpatient care of various specialists. His primary care physician is Dr. Pomerola. Claimant undergoes physical therapy for 2 hours every weekday.

According to claimant's trial testimony each session of physical therapy involves a half hour of using an "FES bike." Although there is no evidence on point, as I understand it this is a stationary bicycle which also sends low energy electrical pulses to paralyzed muscles, "FES" standing for functional electrical stimulation. Claimant contends the use of this apparatus helps him control pain associated with muscle spasticity in his legs.

Claimant lives by himself in a studio apartment modified to accommodate his limitations. He receives three hours of aide and attendant care daily. Claimant's landlord is also a friend and was a friend of his mother. The landlord and other acquaintances will occasionally drive him on personal errands.

The carrier provides medical transportation as needed. Medicines and medical paraphernalia are delivered to claimant's home.

IMPRESSION AS A WITNESS

Claimant makes an excellent appearance on his own behalf. He is a sincere and forthright witness. Certainly claimant has exhibited admirable courage in facing up to his catastrophic injury.

Nothing in the evidence materially suggests any neurological injuries or deficits other

than falling 10 to 12 feet to the ground. However, on deposition he remembered virtually nothing about the accident and could not recall a good deal of information about his remote or recent past. The latter may have been due to nervousness.

INDEMNITY BENEFITS AND PENALTY CONCESSION

E/C timely initiated TTD benefits including 6 months of catastrophic loss TTD based on section 440.15 (2) (b). On June 2, 2015, claimant was accepted as PTD beginning December 5, 2014, reflective of a change in the characterization of indemnity benefits already paid.

On May 22, 2015, E/C issued checks totaling $169.08 to catch up supplemental payments pursuant to section 440.15 (1) (f) 1 due for the period from January 1, 2015 through May 7, 2015. PTD and supplemental payments are continuing.

At the onset of the merits hearing, E/C conceded penalties and interest are due on the $169.08 catch-up payment.

AVERAGE WEEKLY WAGES

The claim for an increase in the AWW is predicated on section 440.14 (1) (e) which provides:

> "If it is established that the injured employee was under 22 years of age when the accident occurred and that under normal conditions her or his wages should be expected to increase during the period of disability, the fact may be considered in arriving at her or his average weekly wages."

In 1988 the Legislature substituted "under 22 years of age" for "a minor." Ch. 88 – 203, §3, Laws of Fla. The decisional law in accordance with section 743.07 limits "a minor" to a person 17 years of age or less. See, *Sam Blum Plumbing Co. v. Boykin*, 513 So.2d 193, 194 (Fla. 1st DCA 1987). Perhaps as a consequence of this relatively recent increase in the applicable age for the statute to apply, there is little case law to serve as guidance in reaching a decision.

Claimant urges the plain language of the statute – – "during a period of disability"– – requires consideration of claimant's entire working life absent an injury in determining expected wage increases. The decisional law on this point is uncertain.

The case of *Miami v. Fernandez*, 603 So.2d 1346 (Fla. 1st DCA 1992) involves a claimant who worked as a standby labor. Mr. Fernandez' age is not reported in the opinion but is obviously less than 22 years old. Given the nature of the work involved it seems unlikely he was less than 18 years old. Yet the court, notwithstanding *Boykin*, characterizes him as a "minor." *Id* at 1349.

The Fernandez court held that as to such a worker a presumption exists that his or her wages would have increased during the period of disability. Nonetheless, "… a reasonable reading of subsection (1) (e) indicates it was not intended to be applied automatically, but only where the facts and circumstances show that the employee's wages were not as great *due to his minority*." Id at 1349 (emphasis quoted).

Overall, I interpret *Fernandez* as meaning claimant must demonstrate his wages were otherwise less than would have been expected had he not been less than 22 years old. It seems unlikely the district court intended on creating one test for claimants ranging from ages 18 through 21 and another test for claimants 17 years old or younger.

Claimant is literate but has little formal education. He has no office skills. There is no evidence pertaining to claimant's general IQ or analytical ability. Claimant was not a member of any unions or guilds.

Essentially the only testimony pertaining to claimant's native abilities is that of Patrick Dunn, testimony that I accept as credible. Mr. Dunn explains that he would classify claimant's

job as being semiskilled in nature. Claimant was not "really good with power tools yet, but he was young and he was learning." Claimant was "mostly a laborer."

A few weeks before this industrial accident claimant requested a raise but this was refused. Mr. Dunn advised claimant to be patient and as he learned more he we get paid more. Claimant's pay was based on his skill level and not his age. Stated differently, a worker of any age would have been paid the same $13.00 hourly for the work performed by claimant. According to this witness (as well as common experience) some people are more mechanically inclined than others and some individuals are not cut out for construction work. "And where Jamie was in there, I don't know, because he hadn't worked for me that long, you know."

I accept Mr. Dunn's testimony and find that claimant's wages were not adjusted downwards due to his age but instead were commensurate with any worker performing similar tasks regardless of age.

Additionally, I also review the evidence in light of claimant's position that the statute should be read more broadly and consideration given to the likelihood of an increase in the AWW during the period of disability, in this instance over the course of claimant's working life, absent his catastrophic injury. Claimant contends the JCC is given broad discretion in making this determination as is the case in calculating "full – time weekly wages of the injured employee" pursuant to section 440.14 (1) (d). See *Mauranssi v. Centerline Util. Contract Co.*, 685 So.2d 66, 68 (Fla. 1st DCA 1996) and the cases cited therein.

Broad discretion is not the equivalent of guess work. "In order for the statutory adjustment permitted by section 440.14 (1) (e) to apply, there must be evidence in the record displaying the probability that the minor's wages would increase during the period of the

disability at issue. There was none at bar." *Florida Ins. Guar. Association v. Valez*, 514 So.2d 395,396 (Fla. DCA 1987).

To illustrate this point, the *Valez* court cites *American Plastics and Packaging, Inc. v. McCann*, I.R.C. Order 2 – 3390 (April 5, 1978) cert. den. 368 So.2d 1361 (Fla. 1979). There the Industrial Relations Commission upheld the application of the statutory language so as to allow for an AWW increase where at the time of the minor's injury he had discussed employment in another field and had been offered a better paying job.

There is no evidentiary basis in this record for increasing the AWW to a specific amount and there is no basis in the law for a JCC giving it his or her best guess. Consequently, I find claimant's AWW is $464.50 and is not subject to an upward adjustment. I decline to reach the question of whether claimant stipulated to this fact.

Given this finding all associated claims for an increase in the amount of all indemnity benefits paid in the past and for an increase in the PTD and supplemental payments benefits to be paid in the future are denied.

PROVISION OF MOTOR VEHICLE OR GENERAL TRANSPORTATION

Claimant received a prescription dated August 22, 2014, from Dr. Dalal for a driving evaluation. This is performed on November 18, 2014, by Davis Sapper, an occupational therapist and a certified driver rehabilitation specialist.

Mr. Sapper performed a clinical evaluation which is not explored on deposition. At the time of this evaluation claimant was continuing with both physical and occupational therapy. Claimant demonstrated decreased strength in both arms as well as a decrease in trunk stability.

Mr. Sapper recommended a vehicle with wheelchair accessibility and a variety of

assistive devices. A final determination as to the mechanical equipment required should be made after claimant completes the training program. Minimum requirements for assistive devices are established by the Department of Motor Vehicles. Fla. Admin. Code R. 15 A – 1.003 (4) (d).

In that respect Mr. Sapper recommends 10 hours of training although this might vary depending on claimant's progression. This witness observes that claimant did not have much actual experience driving prior to his industrial accident.

The first training session was provided by Mr. Sapper. This primarily hurdle once securely behind the wheel is learning to use hand controls. As to this training session, Mr. Sapper observes, "It was kind of surprising. He had a lot more anxiety than I was anticipating."

Claimant is now receiving instructions with another person. This instructor recommended an eye examination and an appointment has presently been scheduled. Claimant admits to experiencing anxiety during these lessons. He describes himself as being "a bit nervous." Claimant desires more lessons in order to feel comfortable.

The remote possibility exists that claimant will not be able to master the use of hand controls in conjunction with his anxiety. In any event claimant needed to complete a training program before a final decision can be reached on how to suitably outfitted vehicle for claimant's general use. Claimant is at least potentially subject to testing by the Department of Motor Vehicles. Fla. Admin. Code R. 15 A – 1.010 (2) and 15 A – 1.014 (2) (The foregoing rules apply to "applicants." Hence, their applicability to a person already licensed is uncertain.)

Given E/C's agreement to provide a motor vehicle for claimant's use the question of medical necessity is moot. But until claimant establishes that he can safely operate a motor vehicle and a final decision can be reached on suitably outfitting the motor vehicle, this claim

must be denied without prejudice as premature.

There is an alternative claim for E/C to provide transportation "for all claimant's needs." I interpret this to mean claimant is seeking that E/C be required to provide some type of service to transport him for any activity whatsoever. Possibly claimant is seeking carte blanche authority for neighbors or other third parties to drive him for any reason whatsoever and be automatically entitled to reimbursement. Certainly this is not in keeping with claimant's own entirely believable testimony to the effect that he seeks the greater independence and sense of self-worth that he believes operating a motor vehicle on his own would permit.

Little argument and no evidence are presented in support of this claim. As the case law has developed, the provision of a motor vehicle for a profoundly injured worker's use is provided under the category of being an "other medically necessary apparatus" pursuant to section 440.13 (2) (a). See *Aino's Custom Slip Covers v. DeLucia*, 533 So.2d 862, 865 (Fla. 1st DCA 1988).

I determine this aspect of the transportation claim is not covered under section 440.13. The provision of a motor vehicle and driver at claimant's unfettered disposal cannot reasonably be defined as an "apparatus." Webster's Encyclopedic Unabridged Dictionary of the English Language, 1996 ed.: "1. a group or combination of instruments, machinery, tools, materials, etc. having a particular function or intended for specific use." In any event, no medical evidence supports this claim as required by section 440.13 (2) (a). See, DeLucia at 865. This aspect of the claim for transportation is denied.

FES BICYCLE

A nurse case manager accompanies claimant to his medical appointments. The nurse case manager at least by March 2015 received a prescription from Dr. Palmerola for an FES bike. As

I understand the testimony presented in the adjuster's deposition, the nurse case manager inquired as to the medical necessity of the bike. The doctor explained the medical efficacy of the device. But the nurse case manager did not receive a response from the prescribing physician as to the need for providing this device for claimant's use at home given that claimant was using this device during his occupational therapy.

I accept E/C's contention they are trying, so far unsuccessfully, to obtain the doctor's confirmation that the provision of an FES bike is medically necessary under these circumstances.

Claimant's contention that E/C's efforts have been lacking or insufficiently vigorous under the circumstances may be well taken. But this is not an investigation pursuant to section 440.525. Instead, this is a medical claim and for claimant to recover it is incumbent on him to establish an FES bike, under the circumstances of his case, is medically reasonable and necessary. Because there is presently no medical evidence on point, this claim must be denied without prejudice as premature.

WAIVER, ET CETERA

Claimant misapprehends the impact of failing to move for the dismissal of a PFB. Under section 440.192 (5), E/C waives its right to have a PFB dismissed for lack of specificity if E/C fails to do so within 30 days of receiving the PFB. Such a failure, assuming it occurs, does not constitute a waiver of the underlying claim but is a procedural waiver of the right to have the PFB dismissed on these grounds. In the general law a waiver is a voluntary or intentional abandonment of a known right and must be based on an agreement in turn founded upon a valid consideration. See gen. 22 Fla Jur 2d, Estoppel and Waiver §31.

It is settled that E/C may not obtain a dismissal based on facts outside the four corners of

the PFB. *Locker v. United Pharmaceutical Group*, 46 So. 3rd 1126 (Fla. 1st DCA 2010).

The question of "causation" was never raised by E/C at least in these proceedings and is not shown to have any applicability as to the claims for a motor vehicle and a FES bike.

BASED ON the foregoing analysis, it is

ORDERED AND ADJUDGED as follows:

1). The claim for an increase in the average weekly wage is denied.

2). The claim for an adjustment in the amount of temporary total, catastrophic temporary total, permanent total, and supplemental payments paid in the past and the be paid in the future based on an increase in the average weekly wage is denied.

3). The claim for interest and penalties on the foregoing adjustment is denied.

4). The employer through its carrier shall pay claimant penalties and interest in the amount provided by law for the $169.08 catch-up supplemental benefit payments for the period beginning January 1, 2015, through May 7, 2015.

5). The claim for the provision of a motor vehicle otherwise suitable for claimant's use is denied as premature.

6). The claim for the provision of transportation for "all of claimant's needs" is denied.

7). The claim for the provision of an FES bike is denied as premature.

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

DONE AND ORDERED this 8th day of October, 2015, in Port St. Lucie, St. Lucie County, Florida.

Robert D. McAliley
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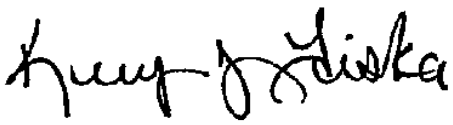
CERTIFICATE OF SERVICE

I HEREBY certify that a true and correct copy of the foregoing has been e-mailed to Counsel on October 8th, 2015.



Secretary to Judge of Compensation Claims

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