

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGES OF COMPENSATION CLAIMS
MIAMI DISTRICT OFFICE

Nathan Albuquerque,
Employee/Claimant,

OJCC Case No. 17-014087WJH

vs.

Accident date: 3/17/2017

Anima Domus/AmTrust North America of
Florida, and Associated Industries
Insurance Company,
Employer/Carrier/Servicing Agent.

Judge: Walter J. Havers

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COMPENSATION ORDER

THIS CAUSE came before the undersigned Judge of Compensation Claims for a final hearing on January 17, 2018 regarding the Petitions for Benefits (PFBs) filed on June 12, 2017 and August 2, 2017. Attorney Mark Touby appeared on behalf of the Claimant. Attorney Andrew Borah appeared on behalf of the Employer/Carrier (E/C).

At the hearing, the Claimant withdrew his claims for temporary partial disability benefits from May 8, 2017 through May 29, 2017 at the correct compensation rate, penalties and interest. The E/C withdrew its defenses that the Claimant is at maximum medical improvement (MMI), Claimant had no restrictions during May 8, 2017 through May 29, 2017, Claimant was earning in excess of 80% of his average weekly wage, and penalties and interest are not due or owing.

CLAIMS:

1. Authorization of physical therapy 2-3 times per week, for 4 weeks, as recommended by PA-C Serralta at OrthoNOW Doral on April 12, 2017.
2. Authorization of pain management and Tramadol medication recommended by Dr. Vega on July 13, 2017.
3. Attorney's fees and costs.

DEFENSES:

1. Industrial accident is no longer the major contributing cause of the Claimant's cervical and left shoulder conditions as such conditions have resolved.
2. The requests for authorization of physical therapy, pain management, and Tramadol are not medically necessary.
3. Attorney's fees and costs are not due and owing aside from fees and costs already stipulated to.

CLAIMANT'S AFFIRMATIVE DEFENSES:

1. E/C waived the defense of medical necessity pursuant to section 440.13(3)(d) and (i), Fla. Stat.
2. There has been no break in the chain of causation.

TESTIMONY:

1. Nathan Albuquerque (Claimant).

DOCUMENTARY EVIDENCE:**JCC:**

1. Uniform Statewide Pretrial Stipulation filed on October 25, 2017 (DE 31).

Joint:

1. Deposition transcript of Dr. Richard Rozencwaig, Expert Medical Advisor (EMA), filed on January 10, 2018 (DE 43).

Claimant:

1. Composite of medical records filed on January 11, 2018 (DE 50).
2. Deposition transcript of Dr. Andres Vega filed on January 11, 2018 (DE 48).
3. Deposition transcript of Jaclyn Sloan, adjuster, filed on January 11, 2018 (DE 45).
4. Claimant's trial memorandum filed on January 15, 2018 and case law filed on January 16, 2018 (DE 52 and 55) (ID purposes only).
5. Attachments to the PFB filed on June 12, 2017 (DE 2) (objection overruled).

E/C:

1. EMA report of Dr. Rozenewaig filed on December 18, 2017 (DE 42).
2. IME report of Dr. Amar Rajadhyaksha filed on January 11, 2018 (DE 51).
3. Medical records of Dr. Jay Stein filed on October 16, 2017 (DE 29).
4. Deposition transcript of the Claimant filed on January 10, 2018 (DE 44).
5. EMA letter issued on November 1, 2017 (DE 37).
6. PFBs filed on June 12, 2017 and August 2, 2017 (DE 1 and 12).
7. E/C's trial memorandum filed on January 11, 2018 (DE 46) (ID purposes only).

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

1. The E/C accepted compensability of the March 17, 2017 accident and “soft tissue neck injury” (cervical sprain/strain) and injury to the left shoulder.
2. The Claimant is 46 years old.
3. The Claimant testified that he was born in Brazil and came to the United States 14 years ago. He testified he received a bachelor's degree in theology in 1997 in Brazil. His primary language is Portuguese. He understands some Spanish and English.
4. The Claimant began working for the Employer in 2011. His responsibilities included processing furniture orders, driving a forklift, and furniture delivery.
5. On March 17, 2017, the Claimant was delivering furniture. He testified he hurt himself lifting a crystal table that weighed more than a hundred pounds. He testified he continued working after lifting the table, and did not feel pain until he got home that night. He testified he felt pain in his left shoulder to his arm. He testified he continued to perform his regular work duties for a week and didn't initially report the accident to the Employer because he thought the pain would go away.
6. On March 25, 2017, the Claimant presented to Baptist Health Medical Plaza at Doral Urgent Care with complaints of left upper arm and shoulder pain. The Claimant did not indicate he had a work accident. The Claimant testified he did not say he had a work accident because he thought his condition would resolve with medication and he did not want to lose days off of work. The Claimant reported pain from his shoulder to his arm. The Claimant had an

x-ray of the left shoulder, which indicated a mild irregularity along the inferior tip of the left scapula. The Claimant was diagnosed with an “abnormal bone xray; sprain of left shoulder.” The Claimant was prescribed Flexeril, Ibuprofen, and Tramadol. The Claimant was instructed to follow up with an orthopedist.

7. The Claimant testified he reported the accident to his Employer after his visit to Baptist Health Medical Plaza at Doral Urgent Care. He testified he did not report the accident until 9 days later because he thought the pain would go away with medication.
8. On March 29, 2017, the Claimant presented to OrthoNOW with pain in his left shoulder and triceps, and he was seen by Shamiyaaz Jauhari PA-C. The assessment was left shoulder pain and unspecified injury of muscle, fascia and tendon of triceps, and left arm. An MRI of his left shoulder inclusive of his triceps was recommended.
9. On April 4, 2017, the Claimant had an MRI of the left shoulder at Badia Hand to Shoulder Center. The MRI revealed mild inflammation in the subacromial subdeltoid bursa; mild osteoarthritic changes in the AC joint, which findings were diagnosed as chronic in nature; a mildly curved configuration of the acromion; the rotator cuff tendons were preserved; and the labrum and cartilage was preserved.
10. On April 5, 2017, the Claimant was seen by Yanira Serralta PA-C at OrthoNOW for his left shoulder and cervical complaints. The note indicates that the pain seems to be of cervical origin.
11. On April 12, 2017, the Claimant was seen by Yanira Serralta PA-C at OrthoNOW for his left shoulder and cervical complaints. The left shoulder exam was unremarkable. The assessment was left shoulder pain and unspecified injury of muscle, fascia and tendon of triceps, and left arm; and spondylosis with radiculopathy, cervical region. PA-C Serralta recommended physical therapy for the cervical spine and a cervical MRI.
12. On April 12, 2017, the Claimant presented to Baptist Health Medical Plaza at Doral Urgent Care complaining of back and neck pain radiating to the left shoulder. The Claimant had a cervical spine x-ray. The claimant was diagnosed with acute bursitis of the left shoulder; acute cervical myofascial strain; and acute cervical radiculopathy.
13. Jaclyn Sloan, adjuster, testified OrthoNOW was authorized by operation of law for the treatment provided to the Claimant, and was no longer authorized on April 17, 2017. The

adjuster testified she received the April 12, 2017 referral for physical therapy on April 12, 2017. The adjuster testified she did not communicate to OrthoNOW that it was no longer authorized and did not respond to the referral for physical therapy.

14. On May, 3 2017, the Claimant saw Dr. Jay Stein, orthopedic surgeon, for the left shoulder only. The Claimant was diagnosed with osteoarthritis in his left AC joint, and a left shoulder strain. A subacromial injection of Celestone and Xylocaine to the left AC joint was administered.
15. On May 17, 2017, the Claimant was seen by Dr. Stein for his left shoulder and cervical complaints. The Claimant indicated the injection improved his left shoulder symptoms. Dr. Stein diagnosed the Claimant with pre-existing cervical spondylosis. Dr. Stein opined there is no further treatment necessary.
16. On July 13, 2017, the Claimant had an independent medical examination (IME) performed by Dr. Andres Vega, pain management specialist, on behalf of the Claimant. Dr. Vega testified he reviewed the medical records of Baptist Health Medical Plaza at Doral Urgent Care, OrthoNOW, Dr. Stein, and the MRI report of the left shoulder. Dr. Vega diagnosed the Claimant with cervical spondylosis; cervical strain; possible cervical disc displacement, occipital and suprascapular neuralgia; and a left shoulder injury. Dr. Vega recommended physical therapy to the cervical area; a cervical MRI; a pain management physician; an anti-inflammatory regimen with muscle relaxants; possibly analgesics such as hypnotics for sleep; and to continue on gastric protective medications such as Protonics or AcipHex.
17. On September 1, 2017, the Claimant had a cervical MRI. Dr. Vega reviewed the cervical MRI report, but not the images. Dr. Vega testified that the cervical MRI did not change the opinions expressed in his report.
18. On October 4, 2017, the Claimant had an IME performed by Dr. Amar Rajadhyaksha, orthopedic spine surgeon, on behalf of the E/C. Dr. Rajadhyaksha's report states that he reviewed the medical records of Baptist Health Medical Plaza at Doral Urgent Care, OrthoNOW, Dr. Stein, Dr. Vega, radiological films, and the cervical MRI. Dr. Rajadhyaksha's report states the cervical MRI shows mild degenerative disc disease without nerve root compression, herniation, or spinal stenosis. His report states the Claimant had no objective abnormalities or findings on physical examination. He opined the Claimant may

have had a cervical sprain/strain. However, it had resolved by the time the Claimant was seen by Dr. Stein. He opined the Claimant does not require any further treatment as it relates to his March 17, 2017 accident, and stated the Claimant has no permanent impairment for his cervical spine.

19. Dr. Richard Rozencwaig, orthopedic surgeon, was appointed by the undersigned as an EMA. Dr. Rozencwaig examined the Claimant on November 10, 2017 and issued his report the same day. Dr. Rozencwaig testified he reviewed the medical records of Baptist Health Medical Plaza at Doral Urgent Care, OrthoNOW, Dr. Stein, Dr. Vega's IME report, Dr. Rajadhyaksha's IME report, MRI reports relating to the cervical and left shoulder, and MRI images of the cervical spine. Dr. Rozencwaig opined the Claimant's left shoulder symptoms had resolved. Regarding the cervical spine, Dr. Rozencwaig diagnosed the Claimant with cervical degenerative disc disease and disc osteophyte complexes at C4-C5 and C5-C6. Dr. Rozencwaig opined the Claimant did not suffer a cervical injury on March 17, 2017. Dr. Rozencwaig opined that the Claimant was at MMI with no permanent impairment, and there is no reasonable need for medical care for the injuries sustained as a result of the March 17, 2017 accident.
20. "The opinion of the expert medical advisor is presumed to be correct unless there is clear and convincing evidence to the contrary as determined by the judge of compensation claims." Section 440.13(9)(c), Fla. Stat. "Such evidence must be of a quality and character so as to produce in the mind of the JCC a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established." *McKesson Drug Co. v. Williams*, 706 So. 2d 352, 353 (Fla. 1st DCA 1998).
21. The Claimant contends because Dr. Rozencwaig's opinion that the Claimant did not suffer a work-related cervical injury is inconsistent with the stipulation of the parties that the Claimant suffered a compensable cervical injury, there is clear and convincing evidence that the remainder of his opinions are not correct.
22. Dr. Rozencwaig's opinion that the Claimant did not suffer a cervical injury as a result of the March 17, 2017 accident exceeded the scope of disagreement between the medical opinions. Therefore, Dr. Rozencwaig's specific opinion that the Claimant did not suffer a cervical injury as a result of the March 17, 2017 accident is not afforded the presumption of

correctness and carries the same weight as an IME or authorized physician. *Lowe's Home Centers, Inc. v. Beekman*, 187 So. 3d 318, 322 (Fla. 1st DCA 2016). This opinion by Dr. Rozencwaig is of no legal consequence because the E/C accepted compensability of a cervical sprain/strain.

23. While Dr. Stein, Dr. Rajadhyaksha and Dr. Rozencwaig disagree on whether the Claimant suffered a cervical sprain/strain, they all agree the Claimant does not suffer from a cervical sprain/strain now. They also all agree that the Claimant's current cervical condition is pre-existing and degenerative and no treatment related to the March 17, 2017 accident is medically necessary. Dr. Rozencwaig's opinions that the Claimant's current cervical condition is pre-existing and degenerative and that there is no reasonable need for medical care for the injuries sustained as a result of the March 17, 2017 accident are presumed correct. These opinions are contradicted only by the opinions of Dr. Vega. The evidence does not leave the undersigned with a firm belief, without hesitancy, that these presumptively correct opinions of Dr. Rozencwaig should be rejected. I accept these opinions of Dr. Rozencwaig, which are consistent with the opinions of Dr. Stein and Dr. Rajadhyaksha regarding the Claimant's current condition and need for medical treatment.
24. Dr. Rozencwaig was asked during his deposition by E/C counsel to put causation aside and describe an appropriate plan for the Claimant's cervical injury. In response, Dr. Rozencwaig proceeded to outline a possible treatment plan. The Claimant contends that since causation of the cervical injury is not in dispute, Dr. Rozencwaig's possible treatment plan confirms the Claimant's work related cervical injury has not resolved. This argument is fatally flawed because the possible treatment plan outlined by Dr. Rozencwaig was for the Claimant's current non-compensable pre-existing degenerative cervical condition, not a cervical sprain/strain.
25. The Claimant contends that the E/C has forfeited its right to contest the medical necessity of the physical therapy recommended on April 12, 2017 by PA-C Serralta because the E/C failed to respond to the request within 10 days pursuant to section 440.13(3)(d) and (i), Fla. Stat. This is true only if the medical care is necessary as a result of a compensable injury. *Elmer v. Southland Corporation*, 5 So. 3d 754, 755 (Fla. 1st DCA 2009). The physical therapy recommended on April 12, 2017 by PA-C Serralta addressed a diagnosis of cervical

spondylosis with radiculopathy, which is not a compensable injury.

26. I conclude no further treatment is necessary for the cervical and left shoulder injuries the Claimant sustained in his March 17, 2017 accident because those injuries have resolved.

WHEREFORE, IT IS ORDERED:

1. All claims are denied with prejudice.
2. All pending Petitions for Benefits are dismissed with prejudice.
3. Jurisdiction is reserved on entitlement to and amount of E/C paid attorney's fees and costs for a future hearing, if necessary.

DONE AND SERVED this 16th day of February, 2018, in Miami, Dade County, Florida.



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