

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

Julian Alfonso,	)	
Employee/Claimant,	)	
	)	
vs.	)	
	)	OJCC Case No. 11-016004AMK
Maintenance Tech Management,	)	
LLC/Castlepoint Florida,	)	Accident date: 6/15/2011
Employer/ Carrier/ Servicing Agent.	)	
<hr style="width: 30%; margin-left: 0;"/>	)	Judge: Margret G. Kerr

**FINAL MERITS ORDER**

THIS CAUSE came before the undersigned Judge of Compensation Claims (hereinafter “JCC”), for a Merits Hearing on November 12, 2013, regarding the Petition for Benefits (PFB) filed May 22, 2013. A second Petition for Benefits filed on November 8, 2013 has not yet been mediated and was therefore not ripe at the time of the Final Hearing. The Claimant was represented by Albert Marroquin Esq., and the Employer/Servicing Agent (hereinafter “E/C”), was represented by Andrew Borah and Kate Albin Esq.. This Order ensues.

**EXHIBITS:**

**CLAIMANT:**

1. Deposition of Dr. Kenneth Osborn taken on 11/11/2013.
2. PFB filed 7/11/2011. E/C objected to relevance – overruled.
3. Records of Dr. Michael Dennis, filed 11/8/2013.
4. E/C pay history, filed 11/8/2013.
5. Claimant Response to E/C Motion for Sanctions. E/C objected to relevance – overruled.
6. Pre trial Stipulation approved by Order filed 5/16/2012. E/C objected to relevance – overruled.
7. Deposition of Levia Finale, MRC Baptist Hospital taken on 10/17/2013 filed 11/7/2013.
8. FACT PURPOSES ONLY – Deposition of Kenia Mendoza, MRC Larkin Hospital taken on 5/23/2013, filed 6/4/2013.
9. FACT PURPOSES ONLY – Deposition of Elsa Cuello, MRC Dr. Francisco Cuello taken

on 6/18/2012, filed 6/21/2012.

10. FACT PURPOSES ONLY – Deposition of Teresita Krauss, MRC Dr. Amadeo Cabral taken on 6/28/2012, filed 7/10/2012.
11. FACT PURPOSES ONLY – Deposition of Erma Guadalupe, MRC Dr. Ragael Palmerola taken on 6/12/2012, filed 7/5/2012. E/C objected to relevance – overruled.
12. Specific medical records of Baptist Hospital filed by E/C on 6/20/2012 (specifically 2 page report and 2 page DWC-25 dated 8/7/2012). E/C objected to hearsay – overruled.

**EMPLOYER/CARRIER:**

1. Order Dismissing 7/11/2011 PFB entered by Judge Alan Kuker on 8/15/2011. Claimant objected to relevance – overruled.
2. Deposition of the Claimant, Julian Alfonso, taken on 7/12/2012 filed on 7/17/2012 and 11/7/2013.
3. Notice of Voluntary Dismissal of 11/16/2011 and 5/9/2012 PFBs, filed on 7/17/2012. Claimant objected to relevance – overruled.
4. Deposition of the Claimant, Julian Alfonso, taken on 9/20/2013 filed on 11/7/2013

**JOINT:**

1. Deposition of Daniela Beltram and attachments filed 7/12/2012, docket on 11/7/2012.

**JCC:**

1. IDENTIFICATION ONLY – Claimant Trial Summary.
2. IDENTIFICATION ONLY – E/C Trial Summary.
3. Pre Trial Stipulation filed 10/10/2013.
4. Composite of PFB filed 5/22/2013 with Response filed 6/6/2013.

**CLAIMS:**

1. Temporary total/temporary partial disability benefits from the date of accident and continuing.
2. Provision of care under the direction of Dr. Dennis.
3. Penalties, interest, costs and attorneys fees.

**DEFENSES:**

1. Claimant's injuries pre-existed the alleged date of accident.
2. The alleged date of accident is not the major contributing cause of the Claimant's condition, disability, and need for treatment.

3. While the Claimant was an employee on June 15, 2011, the Claimant did not sustain an accident within the course and scope of his employment.
4. No workers' compensation coverage in effect for Claimant's actual date of accident.
5. No TTD/TPD owing, as entire claim denied.
6. No further medical care due or owing, as claim denied.
4. No penalties, interest, costs and attorneys fees due or owing.

**LIVE TESTIMONY:**

1. Claimant, Julian Alfonso.

In making the determinations set forth below, I have attempted to detail the salient facts together with the findings and conclusions necessary to resolve the issues. I have not attempted to painstakingly summarize the substance of the parties' arguments, not the support given to my conclusions by the various documents submitted and accepted into evidence; nor have I attempted to state non essential facts. Because I have not done so, does not mean that I have failed to consider all of the evidence. In making my findings of fact and conclusions of law in this claim, I have carefully considered and weighed all evidence submitted to me. I have considered arguments of counsel and the respective parties, and analyzed statutory and decisional law of Florida.

Prior to the Final Hearing, the parties stipulated to an average weekly wage of \$751.92 with a corresponding compensation rate of \$501.28.

At the outset of the hearing, the Claimant objected to the fact that no representative from the Employer was present at the hearing. Counsel for the E/C responded that the Employer is presently incarcerated, a fact long known to the Claimant. The Claimant did not subpoena him to appear for the hearing, and although his deposition was set for the week prior to the hearing, it was then cancelled by the Claimant.

I find that the Claimant knew of the employer's incarceration, and had the opportunity to perfect his testimony, but chose not to do so. Thus, there is no prejudice to the Claimant by the Employer's absence, and he made no attempt prior to the hearing to obtain the testimony of the Employer.

The Claimant further objected to counsel for the E/C representing both the Employer and the Carrier, based upon a conflict of interest as the EC has raised a lack of coverage as a defense,

alleging that there was no coverage on 6/15/2011, which would leave the employer potentially liable to the Claimant with no insurance coverage in effect. Counsel for the EC responded that he had a conference with the employer on this issue and the employer had waived any conflict of interest regarding the coverage issue.

Based upon the representations made by counsel for the Claimant, as an Officer of the Court, I find that the Employer has waived any objection it may have regarding the potential conflict of interest and dual representation. In addition, I find that Claimant has no standing to raise the objection as to conflict of interest on behalf of the Employer.

The E/C objected to the undersigned reserving jurisdiction on the PFB filed two business days before the final hearing as it claims the same issues being litigated in the existing petition, specifically repetitive trauma. I find that as the 11/8/2013 PFB has not been mediated, regardless of any additional defenses may be available to the EC at a later date, the undersigned does not have the authority to rule on the issues raised in the PFB as they have yet to be litigated. Jurisdiction is therefore reserved on the 11/8/2013 petition:

After due consideration of the matter and after having the opportunity to review and consider the aforesaid exhibits which were admitted into evidence, and having endeavored to resolve all conflicts of facts in the evidence presented herein, I hereby provide the following:

### **PROCEDURAL HISTORY**

1. In March or April 2011, the Claimant, who was employed as a handyman for the Employer, fell over backwards while at work. He has alleged an injury to his low back and developed an inguinal hernia.

2. He kept working and sought medical treatment on his own with Dr. Francesco Cuello, who first saw him on 4/11/2011. On 4/28/2011, Dr. Cuello stated in his report that "pt requires hernia specialist", and also placed the Claimant on an off work status, releasing him to return to work on 5/4/2011.

3. On 5/4/2011 the Employer secured workers' compensation insurance.

4. On 5/9/2011, the Claimant underwent surgery to repair the hernia by Dr. Cabral. Due to his ongoing complaints, he returned to Dr. Cuello on 5/18/2011 and was once more evaluated and then released to work with no restrictions on 6/1/2011. The Claimant returned to work with his employer, but continued with pain.

5. The Claimant returned to Dr. Cuello on June 11, 2011, 10 days later, and was diagnosed with a recurrent left inguinal hernia. On 6/13/2011, he was given a prescription for a referral to a general surgeon.

6. On 7/11/2011, the Claimant filed a PFB listing the date of accident as 6/15/2011 and the description of accident as "Claimant was using a hand truck to move a parking block and fell backwards". He alleged injury consisting of a left inguinal hernia. At that time, he made no reference of any complaints regarding his low back.

7. The E/C accepted the accident under the 120 day pay and investigate rule and authorized Baptist Health Urgent Care Center as the Claimant's PCP.

8. The Claimant was seen at Baptist Urgent Care on 8/2/2011 and complained of back pain as well as pain in the left abdominal area. He was transferred to Baptist Hospital for an evaluation by a general surgeon for his abdominal pain and referred to an orthopedist for an evaluation of his back complaints and to determine if they were related to the industrial accident. The Claimant was placed out of work until he was seen by a general surgeon and orthopedist.

9. On 8/15/2011, the 7/11/2011 PFB was dismissed by Judge Kuker.

10. On 9/2/2011, the Claimant was seen by Dr. Michael Dennis at the Orthopedic Care Center where he was diagnosed with a low back sprain and a herniated disc at L2-3. The Claimant was placed on light duty and physical therapy was ordered, but there is no record that the Claimant returned to Dr. Dennis.

11. New PFBs were filed, and on 5/16/2012, Judge Kuker approved the parties Pre Trial Stipulation, which again listed a date of accident of 6/15/2011.

12. On 7/17/2012, the Claimant filed a voluntary withdrawal of the outstanding PFBs (which were filed on 11/16/2011 and 5/9/2012).

13. On 5/22/2013, the Claimant filed the PFB which is the subject of the Final Hearing. Again the PFB listed the date of accident as 6/15/2011, gave the same description of the accident and stated the Claimant's injuries consisted of a left inguinal hernia, making no reference to the back. The E/C responded on 6/6/2013, denying compensability of the accident based on the fact that the Claimant testified in his deposition that the accident happened in March 2011 at which time the carrier did not provide coverage, the Claimant's condition was preexisting, and there was no accident in the course and scope of employment on 6/15/2011.

14. The parties completed a new Pre Trial Stipulation which was filed on 10/10/2013

and again the Claimant listed the date of accident as 6/15/2011, and alleged injuries of left inguinal hernia and low back.

15. On 11/1/2013, the Claimant underwent his choice of IME with chiropractor, Dr. Kenneth Osborn.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW:**

1. The undersigned Judge of Compensation Claims has jurisdiction over the parties and the subject matter of this case.

2. With the exception of the Petition for Benefits filed on November 8, 2013, which has not yet been mediated, any and all issues raised by way of Petitions for Benefits (“PFB”), but which issues were not dismissed or tried at hearing, are presumed resolved, or in the alternative, deemed abandoned by the claimant and, therefore, are denied and dismissed with prejudice. See, *Scotty’s Hardware v. Northcutt*, 883 So.2d 859 (Fla. 1<sup>st</sup> DCA 2004).

3. On none of the PFBs or Pretrial Stipulations filed by the Claimant was the allegation made that the Claim was based upon a theory of repetitive trauma, although it was referenced in other pleadings, specifically in a Response to a Motion for Sanctions, filed on 7/9/2013.

4. In his Trial Memorandum, the Claimant alleges that on 6/15/2011, he continued to perform his regular duty job and as a result “exacerbated and aggravated the injuries he suffered to his back and inguinal area”.

5. In his deposition, taken on 7/12/2013, the Claimant testified that he suffered an inguinal hernia in March 2011 when he fell down. He also alleged at that time, that he had injured his back.

6. The Claimant provided a history to his IME physician, Dr. Osborne, which is in line with the other medical records in evidence, specifically that the original injury occurred in approximately March of 2011. The Claimant further described to Dr. Osborne that due to a worsening of his symptoms in May 2011, he was sent to Larkin Hospital where he underwent a surgical repair of the hernia on 5/9/2011. He continued to complain of pain in his left groin and testicle even after the hernia repair.

7. Regarding his complaints of low back pain, the Claimant told Dr. Osborne that he continued to work with back pain and that he was placed on a light duty status, but none was

available, and so he continued to work his regular duties, and was never provided any treatment for his low back, other than an evaluation with orthopedist, Dr. Dennis.

8. The history provided by the Claimant to his IME physician shows that he continued to be symptomatic regarding his left hernia condition following his surgery on 5/9/2011 and continued to be symptomatic until he was last seen by Dr. Cuello on 5/18/2011, at which time he was continued on light duty until he was released to full duty on 6/1/2011.

9. In the 7/17/2011 and 5/22/2013 PFBs, the Claimant alleged an accident date of only 6/15/2011, although he did not mention an aggravation or exacerbation at that time, but instead used the description of the accident as the exact description which applied to the original March 2011 accident. There is no specific incident which the Claimant has described as an accident in the course and scope of his employment on 6/15/2011.

10. The Claimant testified live before me that his accident was witnessed by Hector Estrada, the company boss and Willy Martin, the Association President. He did not immediately request medical care, but went home. The next day, his left inguinal area was swollen and he had pain in the testicle. He rested for a few days, with the agreement of his employer. Hector told him to go to the doctor, and he therefore went to the doctor on his company health insurance.

11. The Claimant further testified that he saw Dr. Cuello approximately a week after his accident. As the records show that Dr. Cuello first saw the Claimant on April 11, 2011, this indicates a date of accident on or about April 4, 2011.

12. The Claimant returned to work after his hernia surgery, and after he was released with no restrictions by Dr. Cuello. He testified that at that time, his pain levels were 3 out of 10. He continued in his pre injury full duties and additional cleaning duties were also assigned to him. His condition continued to worsen until the pain levels in his left low back and testicle were so bad in early June that he requested to return to workers compensation.

13. When he saw Dr. Cuello again, the doctor refused to treat him as his injury needed to be handled under workers compensation. The Claimant then asked to speak to Hector Estrada, who swore at him and fired him.

14. The Claimant's testimony is uncontroverted that he was treated particularly poorly by his employer. The facts remain however, that the Claimant has failed to plead a repetitive trauma in his claim, and instead, used the 6/15/2011 date of accident coupled with a specific description of injury which did not occur on that date, but rather several months earlier,

when the employer had no workers' compensation insurance coverage.

15. The Claimant testified that he was out of work for almost a year after being fired. He then hired an attorney and the carrier sent him to Dr. Dennis, who examined him and recommended treatment, but this was not allowed by the carrier.

16. The Claimant testified that he continued with physical problems, his low back is worse, and he has times where he can do nothing. He referred to these periods as times of "crisis". He is still having occasional problems in the inguinal area where he had surgery, but the strongest pain is his back. The inguinal pain is less and only occasional.

17. The Claimant has worked only sporadically since that time and earned a total of approximately \$1,500.00. He finally obtained work at an electrical company named Electrix, for 2½ months, earning \$13.00 per hour for on average 3 hours a week. He has now obtained employment at Marriott Hotels and started a week before the Final Hearing, earning \$10.50 per hour, full time.

18. While the Claimant was unsure as to exact dates, including the exact date of accident and the dates saw particular doctors, I find him to be a credible witness, who was attempting to provide as accurate information to the undersigned as possible.

19. The Claimant testified at Final Hearing that he continued to take pills for his back pain, even after he was returned to work.

20. In the Pre Trial Stipulation completed by both parties and approved by Judge Kuker on 5/16/2012, the parties stipulated to a date of accident of 6/15/2011. The Claimant argues that the E/C is now estopped from denying that an industrial injury occurred on that date. I find that the 5/16/2012 Pre Trial Stipulation was rendered moot when the Claimant dismissed the underlying PFBs on which it was based. When a new PFB was filed on 5/22/2013, a new Pre Trial Stipulation was completed by the parties and the E/C denied the existence of a 6/15/2011 date of accident. I find that the second Pre Trial Stipulation filed on 10/10/2013 became the basis for the instant Final Hearing and supersedes the first Pre Trial Stipulation of 5/16/2012.

21. The Claimant has alleged a specific accident in the course and scope of his employment on 6/15/2011, but described an incident which he admits occurred at least two months earlier. Significantly, the undersigned finds that the Claimant did not describe repetitive or cumulative trauma as a result of his employment in the PFB. Accordingly, based upon the competent substantial evidence, the undersigned cannot award benefits based upon the



mechanism of injury included in the 5/22/2013 PFB. The Claimant did not allege a repetitive trauma leading to an aggravation or exacerbation of a pre existing condition in his claim, and in fact only referenced this theory in a response to a motion for sanctions. I find that this is insufficient to place the E/C on notice of a claim for repetitive exposure. As the repetitive trauma theory was not pled by the Claimant, the requested benefits must be denied and the PFB dismissed with prejudice.

22. I find that the greater weight of the evidence shows that the Claimant suffered an industrial accident to his left groin in the course and scope of his employment in March or April 2011, at which time the Employer had no workers' compensation insurance coverage in effect. The Claimant reported this accident to his employer, but did not report any repetitive trauma injury, rather, he requested to return to the doctor.

23. I further that the Claimant remained symptomatic regarding his left groin consistently following his March 2011 accident, and there is no medical evidence of a new injury on 6/15/2011.

24. The Claimant, and his IME physician, Dr. Osborne, both allege a temporary aggravation of the pre-existing injury as a result of the Claimant's work duties, but this is based on the theory of repetitive trauma, which does not correlate with the allegations contained in the PFB filed by the Claimant, which refers to a specific injury.

25. Based on the finding that there is no accident in the course and scope of the Claimant's employment on June 15, 2011, and that the Claimant failed to plead repetitive trauma leading to an aggravation or exacerbation of a pre existing condition, I find that the Employer/Carrier has no liability for any benefits to the Claimant for the alleged accident on 6/15/2011.

Based on the foregoing, it is hereby:

**ORDERED AND ADJUDGED THAT:**

1. The Claim for temporary total/temporary partial disability benefits from 6/15/2011 and continuing is DENIED.
2. The claim for ongoing care with Dr. Michael Dennis is DENIED.

3. The claims for penalties, interest, costs and attorney fees are DENIED.
4. Jurisdiction is retained on the issue of attorney fees and costs.
5. The May 22, 2013 Petition for Benefits is DISMISSED WITH PREJUDICE.
6. Jurisdiction is reserved for the issues raised in the November 8, 2013 Petition for Benefits.

DONE AND EMAILED/MAILED this 13<sup>th</sup> day of December, 2013, in Miami, Dade County, Florida.



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