

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

Juan Martinez,
Employee/Claimant,

OJCC Case No. 18-029799SMS

vs.

Accident date: 8/2/18

F.P.G. Wholesale, Inc. and Associated
Industries/AmTrust North America of
Florida,
Employer/Carrier.

Judge: Sylvia Medina-Shore

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COMPENSATION ORDER

THIS CAUSE came before the undersigned Judge of Compensation Claims for a final hearing held on 5/30/19 regarding petition for benefits (PFBs) filed 12/7/18. The claimant is represented by Eric B. Grindal, Esquire. The employer and carrier (E/C) are represented by Andrew R. Borah, Esquire.

Documentary Exhibits:

JCC-

1. Pre-trial stipulation filed 3/29/19 (DE#18).

Joint-

- A. Deposition of Rafaella Umpierre (adjuster) filed 5/28/19 (DE#26).
- B. Deposition of Dr. Craig Steiner filed 5/28/19 (DE#27) with video.
- C. Deposition of Peter Cofino (Employer Rep) filed 5/28/19 (DE#28).
- D. Deposition of the claimant filed 5/28/19 (DE#29).
- E. Notice of Employer Continuing to Provide Health Ins. Benefits filed 6/4/19 (DE#33).

Claimant-

1. Trial memorandum for I.D. purposes filed 5/28/19 (DE#30).

E/C-

1. Trial memorandum for I.D. purposes filed 5/28/19 (DE#31).

Claims at Issue as Narrowed by Claimant at the Final Hearing:

1. TPD benefits from 10/31/18 and continuing with statutory penalties and interest.
2. Attorney's fees and costs.
3. All other claims were resolved.

Defenses at Issue as Narrowed by E/C at the Final Hearing:

1. Voluntary limitation of income.
2. Loss of income is not causally related to industrial injuries, but due to economic reasons.
3. Penalties, interest, costs, and attorney's fees not due or owing.

Findings of Facts and Conclusions of Law-

Claimant's Final Hearing Testimony:

1. Juan Martinez (hereinafter referred to as claimant) testified in person at the final hearing. The claimant is 66 years old. He has been a tractor-trailer and truck driver all his life. Approximately 6 years ago, claimant was hired by F.P.G. Wholesale as a driver. Claimant's driver duties included loading and unloading doors from the truck. Ordinarily, he would work between 10-15 hours a day in the South Florida area. He drove a 27 foot freight-line truck.

2. On 8/2/18, claimant was with a helper loading some doors when he felt a sudden sharp pain in his back. Claimant denies injuring or seeking treatment to his back in the past. Claimant reported his injury to Peter Cofino, employer representative. Mr. Cofino authorized a workers' compensation clinic for medical care. Claimant underwent 6 physical therapy sessions. Initially, claimant's physical restrictions were to not lift more than 5 pounds and not push or pull more than 10 pounds.
3. Dr. Steiner was also authorized to treat claimant. Claimant's physical restrictions then increased to lifting no more than 20 pounds.
4. For approximately 3 weeks after the accident, the employer provided claimant with 2 assistants. Claimant was just to drive and take care of the paperwork. Thereafter, claimant was provided with only 1 assistant.
5. After the accident, claimant had difficulty performing his driver job because it was too many hours of work. He had to grab the handle on the side of the cab to pull himself up the steps into the cab of the truck. Prior to the accident, claimant ascended and descended the steps of the cab without the need to use the handle bar. Also, the physical therapy sessions had ended, which sessions provided some pain relief.
6. Claimant continued to work approximately 12 to 14 hours a day after the accident, although his hours would vary. Initially, the employer paid claimant wages during the time he received medical care. At some point in time, the employer stopped paying claimant wages for the time he attended his medical appointments.
7. Claimant did not work when he had medical appointments because his driver job

required he report to work very early in the morning. Claimant told Dr. Steiner his difficulties with the driver job. However, claimant felt communication with Dr. Steiner was sub-par because of the need for an interpreter.

8. After the accident, claimant worked until approximately 10/27/18. He stopped working because of his back pain and the fact, that the employer did not pay him wages when he received medical treatment. Since 10/27/18, claimant has not worked nor looked for work.
9. Claimant testified that going in and out of the truck and the truck bouncing when driving caused claimant's back pain. Claimant wants to work if his condition improves. Presently, claimant has back pain when getting up from a sitting position. He has difficulty sleeping due to back pain and needs to takes pills. Claimant does not feel he can undertake the job of driver now due to his limitations.
10. Approximately 15 days ago, claimant received a letter from the employer offering his driver job with same hourly wage.
11. On cross-examination, claimant admitted the employer herein allowed him to work within his physical restrictions after the accident. Claimant resigned from his job because he was in too much pain due to the injury. Other reasons why claimant resigned, included but was not limited to, not being paid for the time spent receiving medical care.
12. Claimant did not advise his employer he was resigning or why he was resigning. He stopped reporting to work without any explanation to his employer. Claimant

never contacted the employer regarding returning to work.

13. Claimant received a letter from the employer offering the job as a driver. At no time prior to receiving that letter did the employer ever advise claimant he could not return to work. Before his resignation, claimant was working as a driver, the same position offered to him in the letter.

Medical:

14. Dr. Craig Steiner, an orthopedic surgeon was authorized to treat the claimant. Claimant had undergone a lumbar MRI on 10/3/18 and after reviewing said MRI and examining claimant on 10/23/18, Dr. Steiner diagnosed claimant with L4-5 and L5-S1 spondylosis with radiculopathy. He opined the industrial accident exacerbated claimant's degenerative changes in his lumbar spine. Thereafter, Dr. Steiner treated claimant on 11/20/18, 12/11/18, 1/8/19, and 2/5/19. Throughout claimant's treatment, Dr. Steiner assigned physical restrictions of not lifting, pushing, or pulling greater than 25 pounds. Claimant did not have any driving restrictions or limitations on amount of daily work hours.
15. Claimant has not reached MMI as he has not completed pain management treatment. After viewing the type of truck claimant drove, Dr. Steiner opined claimant did not have any restrictions against climbing the steps and using the handle bar to climb into and out of the cab. Dr. Steiner does not want claimant loading or unloading boxes or pallets heavier than 25 pounds. I accept the unrefuted opinions of Dr. Steiner.

TPD Standard and Claimant's Burden of Proof:

16. The claimant has the burden to prove a causal connection between the injury and the loss of income. Generally, the test used to determine whether physical limitations after an accident are a contributing causal factor to a loss of wages is whether a claimant's capabilities allow him/her to return to and adequately perform her his/her prior job with the employer, and whether the workplace injury caused a change in employment status resulting in a reduction of wages below 80% of his/her pre-injury average weekly wage. See, Wyeth/Pharma Field Sales v. Toscano, 40 So.3d 795, 799 (Fla. 1st DCA 2010).
17. In the present case, claimant testified he was required to load and unload doors from the truck weighing in excess of 25 pounds. The employer did not dispute this and accommodated claimant's physical restrictions. I accept claimant's testimony and find claimant's capabilities after the accident did not allow him to perform the full duties of his prior job as a driver.
18. I find claimant satisfied his burden of establishing causal relationship between his injury and wage loss. Accordingly, this cause remains the established cause unless and until an intervening or superseding cause for the wage loss is demonstrated by E/C. See, Church's Chicken v. Anderson, 112 So.3d 545, 547 (Fla. 1st DCA 2013).

Voluntary Limitation of Income:

19. The E/C has asserted a voluntary limitation defense. The express "voluntary limitation of income" defense has been removed from the F.S. 440.15(4)(a).

However, the court has analogized the statutory defense of “refusal of suitable employment” found to F.S. 440.15(6) to a voluntary limitation of income.

Wyeth/Pharma Field Sales v. Toscano at 799, citing to Moore v. ServiceMaster Commercial Services, 19 So.3d 1147, 1152 (Fla. 1st DCA 2009).

20. F.S. 440.15(6) indicates “if an injured employee refuses employment suitable to the capacity thereof, offered to or procured therefor, such employee shall not be entitled to any compensation at any time during the continuance of such refusal unless at any time in the opinion of the judge of compensation claims such refusal is justified.”

Suitable Employment:

21. I find the instant employer procured suitable employment for claimant after the workplace accident. Specifically, I find the employer offered and claimant accepted the job of driver with reasonable accommodations satisfying the physical restrictions.
22. I accept the testimony of Peter Cofino, the employer representative that claimant had an assistant to unload and load merchandise when driving a tractor-trailer truck. All routes were reviewed by Jose Sanchez, claimant’s supervisor to ascertain compliance with claimant’s physical restrictions. When claimant drove the flatbed truck, a forklift unloaded and loaded the merchandise.
23. While Mr. Cofino’s testimony was presented via deposition, I find the evidence supports his testimony. After the accident, claimant worked for 12 weeks driving a tractor-trailer with an assistant and/or a flatbed truck. Claimant worked 40 hour

plus overtime 9 weeks out of the 12 weeks from 8/4/18 to 10/30/18.

24. Claimant's testimony as to suitability of the accommodated driver position is contradictory and unreliable. At the final hearing, claimant testified the accommodated driver position was not suitable because it required too many hours of work and he had to lift his body weight (in excess of 25 pounds) into the cab of the truck. I reject claimant's testimony as not supported by the medical evidence and his own deposition and final hearing testimony.
25. Dr. Steiner did not place any limitations on the amount of hours claimant could work. Further, Dr. Steiner opined claimant was capable of ascending and descending 2 steps while grabbing onto the handle to get into and out of the cab of the truck. The only limitations Dr. Steiner placed on the claimant dealt with loading and unloading merchandise in excess of 25 pounds.
26. Claimant admitted at his deposition and at trial that the employer accommodated his restrictions. Claimant admitted in his deposition that the employer always allowed him to work within his restrictions as assigned by the doctor after the accident (Pg. 30 of claimant's deposition). I accept claimant's deposition testimony that the employer accommodated his physical restrictions as supported by the evidence. I find claimant's final hearing testimony to the contrary is unsupported by the evidence and thus, I reject it.

Refusal of Employment and Justification for Refusal of Employment:

27. Claimant admitted in his deposition and at final hearing that he simply did not report to work after 10/30/18. He did not advise his employer of his decision to

quit work either.

28. Mr. Cofino confirmed claimant did not inform him or anyone at the employer of his last date of employment. Mr. Cofino testified claimant simply stopped coming to work after 10/30/18. Claimant was not terminated or laid off. On the contrary, claimant is eligible for re-hire. I accept Mr. Cofino's testimony as credible and supported by the evidence.
29. Claimant testified at the final hearing that he stopped working at the end of October of 2018 because he was in too much pain. He also had other reasons including, but not limited to, the employer not paying him wages during the time he received medical care.
30. However, at his deposition, claimant testified he chose to leave his job because the employer was not paying him for the days he attended physical therapy and medical appointments. Claimant did not mention any other reasons for leaving his employment.
31. Mr. Cofino sent claimant a letter offering a driver position on 4/23/19. Claimant admitted to receiving the job offer letter however, contends the employer's offer is not suitable as it does not satisfy his restrictions. The 4/23/19 letter offers claimant his previous driver position at the same rate of pay. Therefore, claimant argues his is justified in refusing this job offer.
32. I find claimant is not justified in refusing the accommodated job he voluntary left on 10/30/18 as well as the April 2019 job offer. I find the 4/23/19 letter offers claimant the job as driver, which is the same title he held when working the

accommodated driver job.

33. I reject claimant's testimony that the 4/23/19 job offer was unsuitable as not credible. Claimant did not attempt to contact the employer after receiving the 4/23/19 letter to discuss the job offer, accommodations for his restrictions or any other concerns. Claimant has not looked for other work either.
34. I find claimant's final hearing testimony is self-serving and contradicts his own deposition testimony. I find claimant refused suitable employment without good cause or justification.

Duration of Refusal of Suitable Employment:

35. Claimant admitted at the final hearing that at no time prior to receiving the 4/23/19 letter did the employer ever advise him he could not return to work.
36. Mr. Cofino testified, which testimony I accept, that the accommodated driver position was continually available for claimant after 10/30/18 (Pg. 16 of Mr. Cofino's deposition).
37. Mr. Cofino testified FPG Wholesale is in short supply of drivers and he would continue to make accommodations for the claimant, as he did upon claimant's return to work after the accident.
38. I find claimant is not entitled to TPD benefits from 10/31/18 to present as he has unjustifiable refused suitable employment.

WHEREFORE, IT IS ORDERED:

1. Claim for TPD benefits from 10/31/18 and continuing with statutory penalties and interest is denied.

2. Jurisdiction is reserved on claim for entitlement to and amount of fees and costs for future determination at a fee hearing, in the event the parties are unable to amicably resolve it.
3. PFB filed 12/7/18 is dismissed.

DONE AND E-MAILED TO THE ATTORNEYS OF RECORD AND THE CARRIER THIS 12th DAY OF JUNE OF 2019. THE ATTORNEYS OF RECORD SHALL PROVIDE A COPY OF THE INSTANT ORDER TO THEIR RESPECTIVE CLIENTS UPON RECEIPT OF IT.



Sylvia Medina-Shore
Judge of Compensation Claims

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