STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGES OF COMPENSATION CLAIMS
SEBASTIAN/MELBOURNE DISTRICT OFFICE

Marcelin Phedor,
Employee/Claimant,

vs.

Cracker Barrel Old Country Store/Safety National Casualty Corp, and CCMSI,
Employer/Carrier/Servicing Agent.
_____/

OJCC Case No. 12-021207RLD

Accident date: 7/15/2012

Judge: Robert L. Dietz

FINAL COMPENSATION ORDER

This cause was heard before the undersigned in the Sebastian District Office via Video Teleconference from the Miami District Office on September 4, 2014, upon the Claimant's claims for follow-up care with Dr. Corin, authorization and provision of a neurosurgeon or orthopedic surgeon, an ear, nose and throat (ENT) specialist, a chiropractor, a repeat cervical magnetic resonance imaging (MRI), and temporary total disability (TTD) and/or temporary partial disability (TPD) benefits from date of accident through present and continuing, penalties, interest, costs and attorney fees.

The Petitions for Benefits were filed on December 12, 2013 (Docket Number (DN) 38), and March 5, 2014 (DN 45). Mediation occurred on March 21, 2014, and the parties' pretrial compliance questionnaire was filed on April 22, 2014 (DN 54). A Petition for Benefits was filed on September 2, 2014 (DN 78), however, the parties agree it has not been mediated and jurisdiction on all issues raised in that Petition for Benefits are reserved. Ernesto De La Fe, Esq. and Monica Cooper, Esq. were present on behalf of the Claimant. Andrew Borah, Esq. was present on behalf of the Employer/Carrier. Jason Bruce was present on behalf of the employer.

The defenses are no further treatment is medically necessary, all requested medical treatment is not medically necessary, the Claimant is at Maximum Medical Improvement (MMI), no TTD/TPD is due or owing, voluntary limitation of income (Employer offered Claimant light duty employment, which Claimant declined), and no penalties and interest are due or owing.

The following documentary items were received into evidence:

1. The documentary items required by Fla.App.P. Rule 9.180 (Judge's Exhibit #1).
2. Order Appointing an Expert Medical Advisor (EMA) filed April 28, 2014, (Judge's Exhibit #2, (DN) 58).
3. Order Appointing an Expert Medical Advisor filed May 9, 2014, (Judge's Exhibit #3, DN 60).
4. Order Admitting Medical Records in Evidence filed May 12, 2014, (Dr. Bernard Gran) (Judge's Exhibit #4, DN 62).
5. Expert Medical Advisor (EMA) Report of Dr. Kenneth Fischer filed July 28, 2014, (Judge's Exhibit #5, DN 71).
6. Order Approving Uniform Pre-Trial Stipulation dated April 24, 2014, (Judge's Exhibit #6, DN 55).
7. Letter to Dr. Kenneth Fischer (EMA) from Judge of Compensation Claims dated May 9, 2014, (Judge's Exhibit #7, DN 61).
8. Uniform Pre-Trial Stipulation and Pre-Trial Compliance Questionnaire dated April 22, 2014, (Joint Exhibit #1, DN 54).
9. Deposition of Dr. Kenneth Fischer taken August 20, 2014, and filed September 3, 2014, (Joint Exhibit #2, DN 81).
10. Medical Records of Dr. Bernard Gran filed September 3, 2014, (Joint Exhibit #3, DN 82).

11. Petitions for Benefits dated December 12, 2013, and March 5, 2014, (Claimant's Exhibit #1, DN 38, 45).
12. Responses to Petitions for Benefits dated and filed January 8, 2014, and April 1, 2014, (Employer/Carrier's Exhibit #1, DN 41, 48)
13. Payout Ledger filed July 28, 2014, (Employer/Carrier's Exhibit #2, DN 72).
14. Deposition of Marcelin Phedor taken January 10, 2013, and filed July 28, 2014, (Employer/Carrier's Exhibit #3, DN 73).

At the hearing, the Claimant's Counsel objected to the payout ledger (Employer/Carrier's Exhibit #2, DN 72) based on it not being listed as an exhibit on the Pre-Trial. This objection is overruled since the payout ledger was listed on the Pre-Trial and stipulated to by Claimant's Counsel. As a result, the exhibit was admitted into evidence as Employer/Carrier's Exhibit #2.

Three additional exhibits were introduced by the Claimant but were met with objections from the Employer/Carrier based on lack of authentication and hearsay. This objection is the same that Employer/Carrier raised in its Employer/Carrier's Objection to Claimant's Evidence Listed on Pre-Trial filed April 25, 2014 (DN 57). The three exhibits were the February 24, 2014, Addendum to the February 12, 2014, IME report of Kenneth Osborne, D.C. (Claimant's IME) filed March 5, 2014 (Claimant's Proffer #1, DN 46), Dr. Mortin Corin's October 20, 2013, written record in response to an October 11, 2013, letter from the Claimant's attorney and the cervical MRI report dated September 4, 2012 filed April 17, 2014 (Claimant's Proffer #2, DN 51), and the February 12, 2014, IME Report of Kenneth Osborne, D.C. with the February 24, 2014, Addendum filed September 3, 2014 (Claimant's Proffer #3, DN 83). The cervical MRI report dated September 4, 2012, was already admitted into the record without objection in Dr. Bernard Gran's medical records (Joint Exhibit #3, DN 82). Other than the cervical MRI dated September 4, 2012, the other objected-to exhibits are not admitted into evidence, but are

identified as proffers pursuant to Florida Administrative Code Rule 60Q-6.121(1). Claimant's February 24, 2014, Addendum to the February 12, 2014, IME report (Proffer #1) and the February 12, 2014, IME report with the February 24, 2014, Addendum (Proffer #3) are not admissible under Section 440.29(4) based on Young v. American Airlines, 100 So.3d 1168 (Fla. 1st DCA 2012) which does not allow the admission into evidence of an IME report absent a stipulation by parties unless the doctor's deposition has been taken to resolve hearsay and authentication issues. Dr. Mortin Corin's written record in response to an October 11, 2013, letter from the Claimant's attorney (Proffer #2), which was not part of Dr. Osborne's IME report, is not admitted due to lack of authentication and hearsay and is not in compliance with Section 440.29(4).

At the hearing, Marcelin Phedor, the Claimant, Jason Bruce, the employer representative, and Nadine Barreau of Genex Services appeared and testified before me. In making my findings of fact and conclusions of law, I have carefully considered and weighed all the evidence presented to me. Although I will not recite in explicit detail the witnesses' testimony and may not refer to each piece of documentary evidence, I have attempted to resolve all of the conflicts in the testimony and evidence. Based on the foregoing and the applicable law, I make the following findings:

1. The items to which the parties were in agreement on the pretrial stipulation sheet are accepted and adopted as findings of fact.

2. The parties stipulated that the Claimant suffered an industrial accident arising out of and in the course and scope of his employment as a dishwasher at Cracker Barrel on July 15, 2012, and sustained injuries to his head and neck when a stack of plastic containers which usually held water fell off a shelf and struck him on the head while he was rolling a cart of dishes away from the sink.

3. The Claimant began working for Cracker Barrel at this location in 2011. As a dishwasher, he carried dishes to the kitchen, washed dishes, pots and pans, and stacked them on the shelf or cart.

4. The Claimant received authorized medical treatment following his accident. He initially went to Homestead Hospital Emergency Room. There was no visible evidence of trauma about his cranium and he did not experience any loss of consciousness. A brain CT scan was performed which was interpreted as normal. Dr. Blumenthal at Physician's Health Center provided follow-up care on July 16, 2012. The Claimant returned to Homestead Hospital on July 19, 2012, with persistent headaches and was evaluated and discharged. The Claimant had a syncopal spell and returned to Homestead Hospital July 20, 2012, with no new findings delineated. During that hospitalization, the Claimant had a repeat CT scan, MRI and MRA of his brain which were interpreted as normal, and he was discharged. Dr. Corona, the attending physician, requested a neurological consultation with Dr. Wiley. The Claimant returned to Homestead Hospital Emergency Room August 6, 2012, with headaches. Again his examination was normal and he was discharged. The Claimant saw Dr. Bernard Gran, a neurologist, on August 16, 2012, who recommended a cervical MRI scan, EEG, EMB/NCV testing of the upper extremities. The testing performed by Dr. Gran was normal other than NCV evidence of bilateral carpal tunnel syndrome with no cervical radiculopathy. The cervical MRI scan done on September 4, 2012, revealed chronic discogenic changes with no cord compression but left C5-6 nerve root compression. Dr. Gran placed the Claimant on light duty work on August 26, 2013, and at Maximum Medical Improvement (MMI) on November 13, 2012, with no permanent physical impairment.

The Claimant requested a one-time change of neurologists and was referred to Dr. Mortin Corin, who evaluated the Claimant on April 4, 2013, and recommended EMG/NCV testing of

the upper extremities and trigger point injections. Electrodiagnostic testing performed June 15, 2013, was normal other than some mild slowing of the median nerves not relevant to the accident. Trigger point injections were performed. Dr. Corin followed the Claimant through September 6, 2013, at which time he placed the Claimant at MMI with a 0% permanent physical impairment and felt that no further treatment was medically necessary. The Claimant was placed on light duty restrictions of no heavy lifting.

5. On May 9, 2014, upon agreement of the parties, an Order was entered appointing Dr. Kenneth Fischer as a neurological Expert Medical Advisor (EMA) to resolve disagreements over future medical care. On June 5, 2014, Dr. Kenneth Fischer performed an evaluation of the Claimant and found that the Claimant had sustained a minor closed head injury, had numerous examinations by at least three neurologists and brain MRI, MRA and CT scans which are completely normal. His cervical studies reveal chronic degenerative changes with no posttraumatic abnormalities and there was no contemporaneously documented cervical trauma. His EMG/NCV analysis reveals only unrelated carpal tunnel syndrome. The neurological examination that he performed was totally normal. Dr. Fischer found no evidence of any residual neurological dysfunction related to his industrial accident, and placed the Claimant at MMI with a 0% permanent physical impairment. It was also his opinion that the Claimant was able to return to full-time work without restrictions, and that no additional neurological care is medically necessary, reasonable or related to the accident in question. Dr. Fischer also testified that the Claimant did not need additional neurologic, orthopedic, chiropractic, or ENT (although recorded in error as EMT in the transcript) authorization or treatment, or a follow-up cervical MRI as recommended by Kenneth Osborne, D.C. (Deposition of Dr. Fischer, pp. 23-26, Joint Exhibit #2, DN 81).

6. After the Claimant was released to return to light duty work, the Claimant, who

speaks Creole, remembers receiving a telephone call from Nadine Barreau of Genex (the field case manager who speaks fluent Creole) and being advised that the employer had work for him and requested that he return to the Employer. He did not return because he thought he couldn't do the job or lift anything heavy and wasn't feeling well. He apparently assumed that the only job available was his former work as a dishwasher. (Hearing audio recording (Official Record) 38:15 – 40:15)

7. The Claimant testified that he believed he worked 8 hours a day, 40-45 hours a week when the restaurant was busy and 39 hours when they weren't. He also testified that he believed the job required standing six hours or longer a day. The Claimant wasn't sure how much lifting, or the weight of the lifting, he was doing in his work.

8. An additional reason the Claimant gave for not returning to work was his car was repossessed, although he could not recall when. The Claimant lived 1.2 miles from the restaurant, and had ridden a borrowed bicycle to work on occasion when he was running late.

9. Jason Bruce, an associate manager at Cracker Barrel for 3.5 years, had been responsible for maintaining the Claimant's work schedule. Mr. Bruce testified that he was aware that the Claimant had been placed on light duty restrictions by the Claimant's doctors. Specific restrictions were e-mailed to the restaurant so the light duty restrictions could be accommodated. Mr. Bruce did not remember the specific restrictions that had applied to the Claimant, but was again made aware of the specific restrictions on the day of the hearing: no standing more than six hours, no lifting greater than 10-20 pounds, and limited bending and squatting. Cracker Barrel's policy was to accommodate work restrictions and work was available within the Claimant's restrictions, for the same number of hours per week as the Claimant worked before the accident. Once the restrictions were e-mailed to the restaurant, the Claimant was placed on the schedule, but failed to return to work. The restaurant accommodated light duty restrictions with work

assignments that included sweeping floors using a dustpan on an extended handle so that it does not require stooping, wiping tables, carrying glasses back into the kitchen, sweeping the bathroom floors, resupplying paper towels, toilet paper, and soap dispensers, and rolling silverware. Mr. Bruce testified that servers pick up the dishes, which are heavier than the glasses. I accept the testimony of Jason Bruce and find him to be a credible witness.

10. Nadine Barreau has worked for Genex Services for 12 years as a field case manager. She coordinates medical care, attends doctor visits with her clients, and serves as a Creole interpreter. She testified that on August 24, 2012, she discussed the Employer's light duty work with the Claimant and requested that he return to the Employer. He indicated that he did not have transportation and she requested that he contact the Employer. I accept the testimony of Nadine Barreau and find her to be a credible witness.

11. As mentioned above, Dr. Kenneth Fisher was the EMA in this case. Claimant's Counsel argues that Dr. Fisher went beyond the questions posed by the Judge of Compensation Claims which related to medical issues in the Letter to Dr. Kenneth Fischer (EMA) from Judge of Compensation Claims dated May 9, 2014, (Judge's Exhibit #7, DN 61), and his opinions on other issues should be dismissed. The Employer/Carrier was willing to stipulate, since they believed that Dr. Fischer's opinions were the only medical opinions in evidence on the other issues he addressed (pursuant to Section 440.13(5)(e), Fla. Statute), that there was no EMA presumption on Dr. Fischer's opinions which related to non-medical issues,. I disagree with this conclusion since Dr. Bernard Gran's medical records are in evidence (Joint Exhibit #3, DN 82). Dr. Gran returned the Claimant to light duty work on August 16, 2012, based on the limitations documented in the Descriptive Restrictions Chart included in his records (8 hours sitting, 6 hours standing and walking, lifting 10 pounds continuously, 11-20 pounds occasionally, and occasional bending and squatting). Dr. Gran placed the Claimant at MMI on November 13, 2012, assigned

a 3% permanent physical impairment, and released the Claimant to full duty work. I accept Dr. Gran's opinions regarding the Claimant's ability to work during the course of his authorized medical treatment, which impacts entitlement to indemnity benefits.

Dr. Fisher's opinions are accepted and given the appropriate presumptive weight as they apply to the medical treatment issues raised in the EMA appointment letter. As summarized above, this results in denial of the claim for follow-up neurologic care with Dr. Corin, authorization and provision of a neurosurgeon or orthopedic surgeon, ENT, and chiropractor, and authorization of a repeat cervical MRI. Although I have been unable to locate any case law on outside-the-scope-of-the-EMA-appointment-letter issues being addressed in an EMA and whether outside-the-scope opinions still carry the EMA presumption (or are even admissible), In the case at bar, I agree with the Claimant's Counsel and do not accept Dr. Fischer's opinions on the non-medical treatment issues since they are beyond the scope of the issues that were the basis for the appointment of the EMA. There has been no prejudice to the parties who had an opportunity to depose and cross-examine Dr. Fischer on all his opinions as they relate to the facts in this case.

12. The Claimant was paid temporary total disability (TTD) benefits until August 26, 2012. At issue are indemnity benefits from August 27, 2012, to November 13, 2012. I find that the Claimant was offered work within his restrictions by the Employer, and the Claimant refused to return to work because he was afraid he could not perform the work assigned to him. In order to be eligible for TPD benefits, the Claimant would have had to make a good faith effort to return to the light duty work the Employer had available. No such good faith effort was made. The Claimant's transportation problems are not a factor in the Claimant returning to work. No date was identified by the Claimant as to when his car was repossessed. The Claimant's house was only 1.2 miles from the restaurant and in the past he apparently walked when he had

transportation problems and rode a borrowed bicycle when he was running late for work. Dr. Gran's restrictions allow the Claimant to walk up to six hours in an eight hour work day. I do not find this to be a justifiable refusal of work within his restrictions under 440.15(6), Fla. Statutes. It was clear from the Claimant's testimony he did not believe that he could work regardless of what the doctors said, or the actions taken by Cracker Barrel to accommodate his restrictions. As a result, his excuses for not attempting to return to light duty work are not persuasive, and do not meet the statutory requirements of Section 440.15(6), Fla. Statutes:

> "If the 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 justifiable."

The TPD benefits from August 27, 2012, to November 13, 2012, are therefore denied.

WHEREFORE, it is hereby ORDERED and ADJUDGED that:

1. TPD benefits from August 27, 2012, to November 13, 2012, are denied.
2. Follow-up care with Dr. Corin is denied.
3. Authorization and provision of a neurosurgeon or orthopedic surgeon is denied.
4. Authorization and provision of an ENT is denied.
5. Authorization and provision of a chiropractor is denied.
6. Authorization of a repeat cervical MRI is denied.
7. Penalties, interest, costs and attorney fees are denied.

DONE AND ELECTRONICALLY SERVED ON COUNSEL AND CARRIER this 11th day of September, 2014, in Sebastian, Indian River County, Florida.

Robert L. Dietz
Judge of Compensation Claims
Sebastian/Melbourne District Office

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