

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGES OF COMPENSATION CLAIMS
MIAMI-DADE COUNTY DISTRICT**

Alberto Rodriguez,)	
)	
Employee/Claimant,)	
)	
vs.)	OJCC Case No. 06-020059SMS
)	
FrankCrum, Inc.,)	Accident date: 12/28/2005
)	
Employer,)	JCC: Sylvia Medina-Shore
)	
and)	
)	
Broadspire,)	
)	
Carrier/Servicing Agent.)	
_____)	

**FINAL EVIDENTIARY HEARING ORDER ON MOTION FOR SUMMARY FINAL
ORDER FILED ON SEPTEMBER 19, 2011**

This matter came before me, the undersigned Judge of Compensation Claims on November 4, 2011 on the Employer/Carrier's (herein after E/C) motion for summary final order filed September 20, 2011. The Claimant was represented by Monica Cooper, Esquire, Esquire and the E/C by Andrew Borah, Esquire. On the motion filed, the response of the E/C, the exhibits presented and the argument of counsel this Order ensues.

EXHIBITS PRESENTED:

E/C's:

1. Motion for Summary Final Order filed 9/20/11 with attachments.
2. Letter from Richard Zaldivar to JCC office dated 7/7/08.
3. PFB dated 10/9/07 and filed 10/15/07.
4. Mediation conference report dated 11/30/07.
5. Pre-trial stipulation and order approving the same dated 12/21/07.
6. Claimant's trial memorandum dated 7/02/08.
7. PFB dated 6/17/2011.

Claimant's:

1. Response to Motion for Final Order together with attachment of Joint Stipulation on Resolution of Issues and Attorney's Fees executed on 10/21/07.

DISCUSSION OF ISSUES, FINDINGS OF FACT AND CONCLUSIONS OF LAW:

The E/C filed this motion for entry of a summary final order to dismiss or strike the pending claims for TTD/TPD benefits from 2/21/07 to 7/7/08 as well as an adjustment to the AWW. (See paragraph 6 of subject Motion dated 9/19/2011) The basis for the motion is the alleged prior resolution of this issue.

The Claimant's position in their written response is that the TTD/TP issue was only resolved through 2/20/07 by the prior stipulation and that the Order approving the resolving stipulation dated 10/25/07 resolved only issues prior to the aforementioned stipulation.

In reality, the matter is not as simple on its face as it appears and a complete review of the evidence presented reveals the following:

1. PFB dated 6/19/06 seeking TTD or TPD from date of accident and continuing as well as determination of AWW of at least \$368.00. (It is noted that this particular PFB was never offered into evidence, however Claimant attached as an Exhibit to their "Response to Motion for Summary Final Order" a Joint Stipulation on Resolution of Issues and Attorney's Fees executed by the parties on October 21, 2007, which states: "The Claimant has filed one Petition for Benefits in this matter dated June 19, 2006.", and in paragraph #2 enumerates the petitioned issues to include TT/TP and AWW.

2. PFB dated 10/09/07 seeking TTD or TPD from date of accident and continuing as well as determination of AWW of at least \$368.00. (E/C exhibit #3).

3. Filing of a Joint Stipulation executed by the parties on 10/21/07 (see attachment to Claimant's exhibit #1) which resolves temporary indemnity through 2/20/07 including any adjustments to AWW through that date and reserving as the only remaining non PICA issue future AWW adjustment. This stipulation further states:

" 11. The Claimant agrees to dismiss any and all pending (emphasis supplied)- Petitions for Benefits in this matter and agrees to cancel the Merits Hearing which is scheduled for May 14, 2007 at 1:00p.m."...

"WHEREFORE, the parties by and through their undersigned Counsel, respectfully request that this Court enter an Order approving this Joint Stipulation."

"DATED this 21 day of October, 2007'.

Thus the first question to resolve involves the extent of the Stipulation dated 10/21/07 insofar as the PFB's which it dismissed. The Claimant contends that it only dismissed

the first PFB dated 6/19/06 and the E/C contends that it dismissed all PFB's through the date of its execution on 10/21/07. While the undersigned finds that the Stipulation is far from being adroitly worded, it clearly was entered into by the parties, including the Claimant and his attorney, on October 21, 2007 without any reservation or provision giving other dates of its effectiveness besides that of the date in which it was executed. Furthermore, without any reservation, it dismissed "any and all pending Petitions in this matter". Again there is no reservation as to the meaning of "any and all Petitions in this matter" to limit the same to the first Petition. As the Claimant chose to continue filing petitions for benefits after the first one dated 6/19/06, he executed this stipulation at his own peril in dismissing *all pending petitioned* benefits through the date he executed this agreement. Coincidentally, the Claimant in his Response to the Motion for Summary Final Order admits that this Stipulation was subsequent to the filing of the 10/15/07 Petition. (See paragraph 3).

Thus, the undersigned finds that the Stipulation dated October 21, 2007 dismissed all pending petitions for benefits filed through that date. The benefits dismissed include determination of AWW and TTD/TPD from the date of accident and continuing which were petitioned twice, on 7/11/06 and later on 10/09/07.

Having found that AWW as well as TTD/TPD were twice petitioned (in separate PFB's dated 6/19/06 and 10/9/07) which were dismissed, the next question is whether or not said dismissal is with or without prejudice. There is more to this issue following these previously enumerated factors.

In spite of the Stipulation and Order entered in October 2007, the Claimant continued to litigate this issue as follows:

1. Attendance at State Mediation on 11/30/07 resulting in an impasse.
2. Scheduling of Final Hearing to be held on July 7, 2008 and Pretrial to be held on December 21, 2007. (This information was taken from the docket).
3. Pretrial and Order dated 12/21/07 where the Claimant was seeking TT/TP from 2/20/07 forward as well as adjustment to AWW. Defensively the E/C asserted that these issues were previously resolved by Joint Stipulation executed by the parties 10/21/07, among other defenses.
4. Claimant filing of a Trial Memorandum dated 7/02/08 seeking TTD/TPD and an adjustment to AWW together with other benefits.
5. Letter from Richard Zaldivar to this Court dated 7/7/08 which states:
"This letter is to respectfully inform Your Honor that the parties have resolved the pending issues concerning the above captioned matter. As a result of this agreement

the undersigned will be dismissing the past Petition for Benefits filed in this claim. Therefore, we respectfully request that Your Honor cancel the Final Hearing currently scheduled to take place on July 7, 2008 at 1:00p.m."

6. Filing of a third PFB dated 6/17/2011 seeking again TT/TP from 2/21/07 and continuing through 104 weeks as well as correction of AWW.

This brings us to the currently filed Motion for Summary Final Order seeking dismissal of TT/TP to 7/7/08.

The undersigned concludes that there is no question or doubt but that there has been more than one dismissal of TT/TP from the date of accident and continuing. The letter dated July 7, 2008 is deemed to be a dismissal. The Claimant's argument to the contrary because they never actually filed a dismissal pleading as indicated in the letter is rejected. In fact, that position is tantamount to fraud on this tribunal, as the Claimant on one hand is litigating an issue they content is pending, for which a Final Hearing is set pursuant to F.S. 440.25(4), they request a cancellation of the hearing advising that they are taking a voluntary dismissal, and in reliance of this the Final Hearing scheduled pursuant to specific statutory mandate is cancelled, only to later say that there was no dismissal because a formal pleading as such was never filed. The letter dated 7/7/08 is considered to be a voluntary dismissal without the need for a further pleading as such, and is considered to be a formal pleading accomplishing this purpose.

Thus, we now have a dismissal on 10/21/07 which dismissed two pending PFB's seeking TT/TP and AWW, and in addition *if there was any doubt* as to the second PFB filed 10/15/07 being dismissed, the letter dated 7/7/08 accomplished this. Thus, without any equivocation twice the Claimant dismissed petitioned TT/TP benefits post accident and continuing together with AWW.

These facts next lead to the application of the doctrine of *Mieses v. Applebee's*, 14 So.3rd 1228 (Fla. 1st DCA, 2009). Clearly the claimed TTD, TPD and AWW adjustment were petitioned more than one time and dismissed subsequently. Thus these claims for TT/TP are dismissed with prejudice through the date of the second dismissal, 7/7/08 together with the claim for adjustment to AWW.

The undersigned concludes further that these uncontroverted facts justify the entry of a summary final order without the need of a further complete final evidentiary hearing, as there is no issue as to these facts, and as such grants the E/C's motion.

Wherefore: it is the Order of the undersigned Judge of Compensation Claims that:

1. The Motion for Summary Final Order is hereby granted.
2. The petitioned TTD/TPD from the date of accident to 7/7/08 as well as the adjustment to the AWW in the Petition for Benefits filed 6/23/11 are dismissed with prejudice.

DONE AND MAILED this 18th day of November, 2011, in Miami, Dade County, Florida.



Sylvia Medina-Shore
Judge of Compensation Claims

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