

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

Alberto Rodriguez,)	
Employee/Claimant,)	
)	
vs.)	Judge: Stephen L. Rosen
)	
FrankCrum, Inc.,)	OJCC Case No. 06-020059SMS
Employer,)	
)	Accident date: 12/28/2005
Broadspire,)	
Carrier/Servicing Agent.)	
_____)	

FINAL ORDER

This Cause came on for hearing before the undersigned Judge of Compensation Claims on December 8, 2011 through the video teleconferencing process with the parties in Miami and the undersigned in St. Petersburg. The claimant, Alberto Rodriguez, was represented by Albert Marroquin, Esq. The employer, Frank Crum, Inc., and the carrier, BroadSpire , were represented by Andrew Borah, Esq.

For purposes of this order, the employee will be referred to as "employee" or "claimant". The employer/carrier will be referred to as "employer" or "carrier" or "employer/carrier".

This Final Order resolves the petition for benefits filed June 23, 2011. All unmediated petitions currently filed are not ripe for determination in this order by agreement of the parties.

All evidence was received and the record was closed on December 8, 2011.

Claim was made for the following:

1. Temporary total or temporary partial disability compensation from May 1, 2007 and continuing through the exhaustion of 104 weeks of temporary disability benefits.

2. Determination of the correct average weekly wage and compensation rate to include the value of fringe benefits the amount of \$29.76 as of the claimant's termination date with this employer on June 17, 2006.
3. Payment of impairment benefits based on 10% impairment rating.
4. Penalties, interest, cost of litigation and reasonable attorney's fees at the expense of the employer/carrier.

The claim was defended on the following grounds:

1. No additional temporary disability benefits are due and owing.
2. Claimant reached maximum medical improvement on May 24, 2007.
3. All impairment benefits due and owing have been timely paid.
4. The average weekly wage of \$388.15 with a corresponding compensation rate of \$270.62 is correct.
5. Claimant indicated in a letter to the Judge of Compensation Claims dated July 7, 2008 that all issues were resolved.
6. Claimant is precluded from litigating temporary disability benefits and penalties, interest, costs of litigation and reasonable attorney's fees for the time period until October 22, 2007 as well as average weekly wage and impairment benefits due to claimant filing double voluntary dismissal for those claims.
7. No penalties and interest are being knowning.
8. No attorney's fees or costs of litigation are owed other than what has already been stipulated to.

The parties entered in the following stipulations:

1. I have jurisdiction of the parties in the subject matter of this claim.
2. The claimant was injured on December 28, 2005 and venue lies in Miami Dade County where the accident occurred.
3. On the date of accident, there existed an employer/employee relationship with workers compensation coverage in effect as noted in the accident was accepted is compensable to the

claimant's right shoulder only.

4. There is timely notice of the accident and timely notice of the final hearing given to the parties.

5. On the date of accident, the claimant's base average weekly wage was \$388.15 per week which would entitle him to compensation rate of \$258.78 per week. If the claimant is entitled to a higher average weekly wage after June 17, 2006 for the addition of fringe benefits, the parties agree that the value of those fringe benefits is \$29.76 per week which would entitle the claimant to an average weekly wage, including fringe benefits, \$417.91 per week with the corresponding compensation rate of \$278.62 per week.

6. If applicable, amount of attorney's fees will be decided by hearing.

7. The parties agree that the petition for benefits and a response thereto were filed as noted.

The following documents were offered into evidence:

Judge's Exhibits:

1. Petition for benefits filed June 23, 2011.
2. Response to petition for benefits filed June 24, 2011.
3. Mediation settlement agreement filed September 19, 2011.
4. Mediation conference report filed September 19, 2011.
5. Motion for summary final order filed September 20, 2011.
6. Final summary order filed November 18, 2011.
7. Uniform pretrial stipulation form signed by the parties and filed October 19, 2011.
8. Employer/carrier's trial memorandum (for argument only).
9. Claimant's trial memorandum (for argument only). The employer/carrier objected to this exhibit due to late filing and the objections overruled.

Joint Exhibits:

1. Petition for benefits filed July 11, 2006.

2. Petition for benefits filed October 15, 2007.
3. Deposition of Francisco Noda, M. D., taken May 12, 2008 with attachments.

Claimant's Exhibits:

1. Deposition of Randall Blinn, M. D., taken December 1, 2011 with attachments. The employer/carrier objected to this exhibit based on late filing and that objection is overruled.
2. Deposition of Ruby Aries taken October 3, 2011 with attachments. The employer/carrier objected to this exhibit based on late filing and the objections overruled.
3. Employer/carrier payout ledger. The employer/carrier objected to this exhibit but it was filed on December 5, 2011 by the employer/carrier attorney and the objections overruled.

Employer/Carrier Exhibits:

1. Records of Jerry Sher, M. D.
2. Records of Robert Baylis, M. D.
3. Joint stipulation on resolution of issues and attorneys fees filed October 22, 2007.
4. Order approving interim attorney's fee filed October 25, 2007.
5. Mediation conference report filed November 30, 2007.
6. Order approving uniform pretrial stipulation filed December 21, 2007.
8. Notice canceling hearing of July 7, 2008 (issues resolved) filed July 7, 2008.
9. Mediation settlement agreement filed February 12, 2010.
10. Mediation conference report filed February 12, 2010.
11. Deposition of Winnifred Williams, unemployment records custodian, taken November 22, 2011 with attachments.
12. Payroll Records of Mastec North America.
13. Payroll Records of STK Miami.

THEREFORE, undersigned Judge of Compensation Claims finds that:

1. I have jurisdiction of the parties in the subject matter of this claim.
2. Venue lies in Dade County, Florida where the accident occurred.
3. The stipulations of the parties are adopted and shall become part of the findings of facts herein.
4. The documentary exhibits offered by the parties are admitted into evidence and shall become a part of the record herein.
5. The claimant, Alberto Rodriguez, worked for the actual employer, Sunshine Towing, and his duties included truck driving, cleaning the yard, gasoline dispatch, and various other physical duties. On December 28, 2005, the claimant was cleaning with a pressure machine and the hose broke. The claimant was struck multiple times by the hose with the major injury being a fractured right collarbone. Surgery was ultimately performed by Dr. Noda who found the claimant to be at maximum medical improvement as of May 25, 2007.
6. Dr. Noda did not initially assign a permanent impairment rating to the claimant, but during his deposition of May 12, 2008, Dr. Noda assigned an impairment rating of 3% which the carrier accepted and paid in a lump sum based on that deposition opinion. The deposition of the adjuster shows that payment was made on July 7, 2008 more than 14 days after the employer/carrier became aware that an impairment rating had been assigned.
7. After release by Dr. Noda, the claimant sought evaluations by two other authorized orthopedic physicians, neither of which offered any treatment to the claimant or changed the original date of maximum medical improvement regarding the right shoulder injury.
8. The claimant designated Dr. Blinn as his independent medical examiner. Dr. Blinn did not review any prior medical records and relied simply upon the claimant history and an MRI to determine that the claimant needed further surgery and that his impairment rating would be in the area of 10% of the body. I accept the opinion of Dr. Noda over that of Dr. Blinn and find the claimant did, in fact, reach maximum medical improvement on May 25, 2007 with a 3%

impairment. The preponderance and/or greater weight of the evidence does not lead the undersigned to believe that the claimant needs further treatment for that shoulder, including surgery, at the present time.

9. I find that the stipulation dated October 21, 2007 dismissed all pending petitions for benefits filed through that day. The benefits dismissed include determination of average weekly wage and PTD/TPD from the date of accident and continuing. The petitions of July 11, 2006 in October 19, 2007 make the same claims in separate petitions for benefits

10. I find that the letter from the office of the attorney for the claimant dated and filed July 7, 2008 is deemed to be a dismissal. This dismissal, coupled with a dismissal on October 22, 2007 dismissing two other pending petitions seeking temporary disability benefits and increase in average weekly wage, leaves no doubt that there are at least two dismissals of average weekly wage/temporary disability benefit petitions. This invokes the doctrine of Mieses v. Applebee's, 14 So. 3rd 1228 (Fla. 1st DCA, 2009) which requires a dismissal with prejudice once the same issues are dismissed for a second time. Therefore, the issues temporary disability benefits and increase in average weekly wage and compensation rate to include the value of fringe benefits from June 17, 2006 are denied.

11. Reaching the issue of penalties and interest on late payment of 3% impairment benefits assigned on July 7, 2008 in the deposition of the authorized treating physician as well as late payment of benefits pursuant to the order of October 25, 2007, I find that penalties and interest most probably were due on both of those payments. Certainly, penalties and interest on those late payments were ripe, whether claimed by petition or not, when the parties entered into the mediation settlement agreement of February 12, 2010. The first sentence of the handwritten Mediation Settlement Agreement Report of that date states "All issues ripe due and owing have been resolved." That agreement is signed by the parties and the mediator. The claimant argues that there was no intention to resolve any issues other than the medical only issue specifically handled in that Mediation Settlement Agreement Report

12. I am not empowered to vary the terms of a written agreement entered into and signed by the

parties. There are no allegations of intentional fraud or misrepresentation on the part of either party when the agreement of February 12, 2010 was entered into. Whether a petition for penalties and interest was pending or not is immaterial. The first sentence of the agreement quoted above clearly displays the parties' intent at the time the agreement was entered into: to resolve all issues that were ripe whether petitions for or not. Therefore, the current claim for penalties and interest on late payment of impairment benefits and late payment of benefits pursuant to the order of October 25, 2007 are denied.

WHEREFORE, it is ordered that:

1. The claims for temporary disability benefits, increase in average weekly wage, penalties, and interest, as well as reimbursement of costs of litigation and reasonable attorney's fees at the expense of the employer/carrier, are denied and dismissed with prejudice.

2. Jurisdiction is reserved to determine costs of litigation to the prevailing party should same be sought and the parties are unable to agree on the amount.

DONE AND MAILED this 12th day of December, 2011, in St. Petersburg, Pinellas County, Florida.



**Stephen L
Rosen**

Stephen L. Rosen
Judge of Compensation Claims
Division of Administrative Hearings
Office of the Judges of Compensation Claims
St. Petersburg District Office
501 1st Avenue, North, Suite 300
St. Petersburg, Florida 33701
(727)893-2321

www.jcc.state.fl.us

Albert Marroquin
Marroquin1997@aol.com
Zaldivarpa@gmail.com

Andrew R. Borah, Esquire
zzevallos@hrmcw.com
sfournier@hrmcw.com