

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

Jorge Hernandez,
Employee/Claimant,

OJCC Case No. 17-028430ERA

vs.

Accident date: 11/15/2017

Suffolk Construction Company,
Inc./Liberty Mutual Insurance, ACE
American Insurance Company, and AIG
Claims, Inc.,
Employer/Carrier/Service Agent.

Judge: Margret Kerr for
Edward Almeyda

FINAL MERITS ORDER

THIS CAUSE came before the undersigned Judge of Compensation Claims “JCC”, for a merits hearing on April 25, 2019, regarding the Petitions for Benefits “PFB” filed October 10, 2018, October 16, 2018 and October 23, 2018. Jurisdiction is reserved on two subsequent petitions for benefits filed 1/11/2019 and 1/14/2019, as these petitions have not yet been mediated and are therefore not yet ripe for adjudication. The unrepresented Claimant appeared live for the Final Hearing. The Employer/Carrier “E/C” was represented by Brian Ricotta Esq., for Scott Miller Esq. This order ensues:

EXHIBITS:

E/C:

1. Deposition of Dr. Guillermo Martinez with exhibits, filed 4/22/2019 (DE#141).
2. Deposition of Dr. Bernardo Garcia-Granda with exhibits, filed 4/22/2019 (DE#142).
3. Deposition of Dr. Amar Rajadhyaksha with exhibits, filed 4/22/2019 (DE#143).
4. Deposition of Dr. Kenneth Jarolem with exhibits, filed 4/22/2019 (DE#144).

JCC:

1. E/C’s Trial Memorandum filed 4/23/2019 (DE#145) – for identification only.
2. Executed Uniform Pre Trial Stipulation and Questionnaire filed 1/9/2019 (DE#114).

CLAIMS:

1. TTD/TPD from the date of accident and continuing.
2. Correction of the average weekly wage to \$322.00 plus overtime.
3. Authorization of Dr. Rajadhyaksha.

4. Return appointment at Concentra.
5. Replacement neurologist to Dr. Martinez.
6. Penalties, interest, costs and prior attorney fees.

DEFENSES:

1. The AWW is correct.
2. All indemnity benefits due or owing have been timely paid. No medical evidence taking Claimant out of work. Claimant has reached MMI.
3. The lumbar spine is not an accepted body part as it was not related to the accident.
4. No medical evidence Claimant needs to be seen by Concentra.
5. Alternative neurologist denied. Dr. Martinez remains authorized and has not refused to treat Claimant.
6. No penalties, interest, costs or attorney fees owing.

WITNESSES:

1. Jorge Hernandez, Claimant - live.

After hearing argument of the parties and reviewing the evidence and otherwise being fully advised on the facts and applicable law herein, I find that:

1. I have jurisdiction over the subject matter and the parties, and the exhibits are introduced into evidence.

2. At the outset of the hearing, Claimant offered into evidence copies of his pay stubs and indemnity checks as well as medical records from Baptist Hospital. The E/C objected to unauthenticated hearsay and the objections were sustained.

3. Claimant was noticed regarding the depositions of Drs. Martinez, Garcia-Granda, Rajadhyaksha and Jarolem, but he did not attend. At the Final Hearing, Claimant gave his reasoning that the doctors were company doctors and so their opinions were against him. No evidence of bias was introduced to substantiate Claimant's belief. The depositions were therefore introduced into evidence.

Procedural History

4. Claimant was employed as a laborer for Suffolk Construction and was involved in an industrial accident on November 15, 2017, when he hit his head on a steel bar and was knocked to the ground, with no loss of consciousness reported. The case has been accepted as compensable as to Claimant's cervical strain and headache complaints. The E/C has denied Claimant's lumbar complaints.

5. Medical care was authorized through Concentra as the PCP and Dr. Gran as the neurologist for the claimant's headaches.

6. The medical records show Dr. Gran saw Claimant on 5/15/2018 at which time he was complaining of sharp pain in the head and neck going into both shoulders with numbness and tingling of the hands. A CT scan taken on 12/4/2017 showed degenerative disc disease. A CT scan of the brain on the same day was within normal limits except for a 2.5 cm medial left temporal lobe arachnoid cyst. Dr. Gran ordered EMG/NCV and EEG studies which were read as normal.

7. At the next visit on 7/10/2018, Dr. Gran noted Claimant had presented to the emergency room with severe headaches. An MRI of the brain was within normal limits. There was no mention of the arachnoid cyst. A cervical MRI showed tiny disc protrusions at C6-7 and C5-6. Claimant complained to Dr. Gran of severe pain and stated he could barely move his head. The neurological examination on that date however was again unremarkable and Claimant was diagnosed with a concussion and headaches. On both visits, Dr. Gran noted Claimant had high blood pressure and recommended this be followed by his personal doctor.

8. Dr. Gran was then called out of the room and while he was out, Claimant was noted to become upset and disruptive. Dr. Gran noted "He says he cannot work and refuses to go back to work. While he was arguing the patient was noted to be able to turn his head left and right at least 80 degrees without any problems." Dr. Gran then decided to terminate his relationship with Claimant as he was too disruptive.

9. In addition to the referral to a neurologist, Claimant was also referred to an orthopedist. The Employer/Carrier authorized Dr. Rajadhyaksha, who first saw Claimant on 9/5/2018. Claimant's main complaint was neck pain with tingling and numbness into the upper extremities. On examination the doctor noted no objective findings. He diagnosed Claimant with a cervical sprain and deferred other opinions pending review of an MRI.

10. After reviewing the MRI films at his next evaluation on 9/19/2018, the doctor noted multi-level bulging and degenerative changes, but no canal or foraminal stenosis, nor nerve compression or narrowing. He did note a non-traumatic enlargement of the canal within the spinal cord which is congenital for which Claimant should follow up with his personal physician. On this visit, Claimant also complained for the first time of low back pain, which had not been a previous complaint. The doctor did not relate this to the original injury due to the time between the industrial injury and the first complaints of low back pain. Dr. Rajadhyaksha then placed Claimant at MMI with a 0% PPI rating.

11. As Dr. Gran had refused to continue to treat Claimant, the Employer/Carrier authorized Dr. Martinez as an alternative neurologist. Dr. Martinez reviewed the records of the prior neurologist, Dr. Gran, and evaluated Claimant on 8/30/2018.

12. Claimant complained of a continuous generalized headache and pain in the neck area. He had developed pain in both his shoulders, the upper back and chest area as well as problems walking. As a result, he was using a crutch as his legs would give way resulting in falls.

13. Dr. Martinez performed a complete neurological examination which was within normal limits and showed no objective findings. He also reviewed an MRI of the brain which was within normal limits. He opined Claimant was able to walk and did not need the crutch he was using. Dr. Martinez further opined he needed to rule out chronic Guillain-Barre syndrome and also noted symptom magnification. He recommended an EMG/NCV study and laboratory blood work and considered a psychiatric referral, although he made none at that time.

14. Dr. Martinez next saw Claimant on 9/27/2018 at which time Claimant's complaints were essentially unchanged. The test results the doctor had ordered at the previous office visit came back showing nothing irregular, but the blood tests had not been done. On that date, Dr. Martinez referred Claimant to a psychiatrist, and placed him at MMI from a neurological perspective and released him to full duty with no impairment rating. Dr. Martinez referred the claimant for a psychiatrist evaluation and the E/C authorized psychiatrist Dr. Garcia-Granda who saw Claimant on 11/20/2018.

15. Dr. Garcia-Granda reviewed medical records from Drs. Gran, Martinez and Rajadhyaksha and took a medical history from Claimant that included a visit to Baptist Hospital. Claimant complained to him of headaches, dizziness and neck pain as well as bi-lateral shoulder pain and numbness in both hands and fingers as well as weakness of his arms and legs. Claimant also related to him that he had gone to the emergency room about 6 times with severe head pain. Dr. Garcia-Granda performed a psychiatric examination of Claimant which was normal. He opined Claimant needed no psychiatric treatment or testing and has no psychiatric restrictions or impairment. He deferred to the orthopedists and neurologists regarding Claimant's physical symptoms.

16. After being seen by Dr. Garcia-Granda, Claimant returned to Dr. Martinez who next saw him on 1/24/2019, at which time his complaints remained the same. The doctor had received the psychiatric report and on that date also noted that Claimant's left quadriceps was a centimeter

and a half smaller than his right which he determined is an objective finding. Based on this finding, Dr. Martinez requested a second opinion from a neuromuscular specialist from the University of Miami for diagnostic purposes, as he was unable to make a diagnosis. He also re-ordered the blood tests which were needed to rule out inflammation in Claimant's muscles, as the tests had not been done. Dr. Martinez testified as Claimant's low back complaints started so long after the industrial injury, it was hard to relate them to the industrial injury.

17. After being placed at MMI by Dr. Martinez, the claimant requested an alternate neurologist arguing Dr. Martinez was refusing to treat him.

18. Claimant utilized his one-time change of physician away from Dr. Rajadhyaksha and the Employer/Carrier authorized Dr. Jarolem, who first evaluated the claimant on 11/15/2018. Claimant complained of neck pain, back pain, numbness and tingling in the arms and legs as well as balance problems. In addition, Claimant continued to use crutches to ambulate. He complained of tenderness in the neck and shoulders but his physical examination was normal, with no objective findings to substantiate Claimant's subjective complaints. Dr. Jarolem took x-rays and reviewed the MRI scan which showed only mild pre-existing degeneration in the neck. He diagnosed Claimant with a neck sprain and laced him at MMI with a 0% PPI rating and no physical restrictions.

19. On 1/22/2019, Dr. Jarolem saw Claimant in follow up. In the interim, Claimant had presented to the emergency room and was provided pain medications. His complaints at the evaluation were largely unchanged but again Dr. Jarolem was unable to identify any objective findings to support Claimant's subjective complaints. In deposition, Dr. Jarolem testified that if Claimant had injured his low back in the industrial accident, he would have expected to see complaints of low back pain documented prior to 9/19/2018, a year after the accident. Dr. Jarolem went on to testify that no additional treatment was medically necessary or causally related to the industrial injury of 11/15/2017.

20. Claimant has thus been placed at MMI by the authorized treating physicians. Dr. Rajadhyaksha, orthopedist, placed him at MMI with a 0% PPI rating on 9/18/2018. Dr. Martinez, neurologist, placed him at MMI on with a 0% PPI rating and no restrictions on 9/27/2018. Dr. Garcia-Granda, psychiatrist, opined Claimant did not require psychiatrist treatment or testing. Dr. Jarolem, Claimant's one-time change in orthopedist, placed him at MMI with a 0% PPI rating on 122/219. No authorized physician has placed any restrictions on

Claimant's activities as it relates to the industrial accident.

21. The burden is upon the claimant to prove entitlement to any benefits sought. *McDevitt Street Bovis v. Rogers*, 770 So. 2d 180 (Fla. 1st DCA 2000). "It is the specific intent of the legislature that workers' compensation cases shall be decided on their merits. . . it is the intent of the legislature that the facts in a workers' compensation case are not to be interpreted liberally in favor of either the rights of the injured worker or the rights of the employer. . .disputes concerning the facts in workers' compensations are not to be given a broad liberal interpretation in favor of the employee on the one hand or the employer on the other, and the laws pertaining to the workers' compensation are to be construed in accordance with the basic principles of statutory construction and not liberally in favor of either the employee or employer." Section 440.015, Florida Statutes.

22. Where the alleged medical condition is not readily observable, the burden is on the Claimant to introduce medical evidence to establish a causal connection between his employment and his injuries. *See Wausau Ins. Co., v. Tillman*, 765 So.2d 123 (Fla. 1st DCA 2000).

23. In order to be compensable, "the injury, its occupational cause, and any resulting manifestations or disability must be established to a reasonable degree of medical certainty . . . and the accident compensable injury must be the major contributing cause of any resulting injuries." Section 440.09(1). The claimant has not presented any objective medical evidence from an authorized treating physician, IME, or EMA, who have placed him on any work restrictions or have recommended any future medical treatment.

24. Dr. Rajadhyaksha placed the claimant at MMI, with a 0% Permanent Impairment Rating, and no functional restrictions as of September 19, 2018. The claimant utilized his one-time change in orthopedic and the employer carrier authorized Dr. Kenneth Jarolem who also placed the claimant at MMI, with a 0% PIR, and no restrictions as of November 15, 2018. Both Dr. Rajadhyaksha and Dr. Jarolem testified that the claimant did not require any further medical treatment from an orthopedic standpoint. Neurologist, Dr. Martinez placed the claimant at MMI, with a 0% PIR, and no restrictions as of September 27, 2018. He did refer the claimant for a second neurologist opinion. However, Dr. Martinez testified that the referral for a second opinion is not related to the November 15, 2017 industrial accident. Finally, the claimant was placed at MMI, with a 0% PIR, and no restrictions per psychiatrist Dr. Garcia-Granda on November 20,

2018. Dr. Garcia-Granda testified that the claimant did not suffer any psychiatric disorder as a result of the industrial accident and does not require any additional treatment.

25. I find Claimant has reached overall MMI as he has been placed at MMI, with a 0% permanent impairment rating, and no functional restrictions by all of his authorized treating physicians including Dr. Martinez, Dr. Rajadhyaksha, Dr. Jarolem, and Dr. Garcia-Granda. The authorized physicians remain authorized for palliative care only.

26. I further find Claimant has not met his burden by providing any objective medical evidence that he injured his lumbar spine in the industrial accident. The authorized treating physicians agree that the complaints of lumbar pain were too remote in time to be related to the original industrial injury, despite Claimant's belief to the contrary.

1. I conclude Claimant has failed to carry his burden of proof to show by medical evidence that he has a disability as a result of his industrial injury of 11/15/2017 which has resulted in a loss of ability to return to work. As Claimant has not carried his burden of proof to show a disability as a result of his accident, I have no authority to award temporary disability benefits.

2. Claimant has already availed himself of his one-time change in treating physicians when he chose to transfer his care from Dr. Rajadhyaksha to Dr. Jarolem. I conclude therefore that Dr. Rajadhyaksha is no longer authorized and I cannot grant Claimant's request to return to him, as his authorized treating orthopedist is now Dr. Jarolem who remains available for palliative care for the cervical spine only.

3. Despite his assertions that Dr. Martinez has refused to see him, Dr. Martinez has testified to the contrary that he would continue to treat Claimant. I conclude Dr. Martinez remains authorized and Claimant is not entitled to an alternate neurologist but may return to Dr. Martinez for palliative care.

4. Claimant was unable to provide any evidence the average weekly wage as calculated by the E/C is incorrect.

5. Claimant further requests to return to Concentra, the authorized PCP. The E/C argues there is no medical evidence that Claimant needs to be seen at Concentra. After a careful review of the medical evidence and the deposition testimony of the authorized medical providers, I find Dr. Martinez and Dr. Jarolem have both taken over care from Concentra, the PCP. This is evidenced by the fact that the referral for a psychiatric consultation came not from the PCP, but from the authorized neurologist. I therefore find merit in E/C's argument that there is no medical

evidence that a return visit to Concentra is medically necessary. Claimant remains entitled to return to Dr. Jarolem and Dr. Martinez for palliative care to his head and neck.

Based on the foregoing, it is hereby:

ORDERED and ADJUDGED that:

1. The claim for TTD/TPD from the date of accident and continuing is denied.
2. The claim for a correction in the AWWWS is denied.
3. The claim for an alternate neurologist to Dr. Martinez is denied.
4. The claim for authorization of Dr. Rajadhyaksha for the lumbar spine is denied.
5. The claim for a return appointment to Concentra is denied.
6. The claim for penalties and interest is denied.
7. The claim for attorney fees and costs is denied.
8. The petitions for benefits filed s contained in the petitions for benefits filed October 10, 2018, October 16, 2018 and October 23, 2018 are dismissed with prejudice .

DONE AND SERVED this 7th day of May, 2019, in Miami, Miami-Dade County, Florida.



Margret G. Kerr
Judge of Compensation Claims
Division of Administrative Hearings
Office of the Judges of Compensation Claims
Miami District Office
401 Northwest 2nd Avenue, Suite N-918
Miami, Florida 33128-3902
(305)377-5413
www.fljcc.org

MGK/aa
COPIES FURNISHED:

Jorge Hernandez
11607 Louis St.
Miami, FL 33176

Liberty Mutual Insurance
175 Berkley Street
Boston, MA 02116
CMC555Tampa@libertymutual.com;

Suffolk Construction Company, Inc.
701 NW 62nd Ave Ste 450
Miami, FL 33126

ACE American Insurance Company
436 Walnut Street, WA04A
Philadelphia, PA 19106
apolloops1customerserviceincoming@acegroup.com

AIG Claims, Inc.
PO Box 25908
Shawnee Mission, KS 66225
FL_OJCCmail@aig.com,

Steven L. Miller
Kaplan & Miller, P. A.
999 Ponce de Leon Blvd, Suite 555
Coral Gables, FL 33134
smiller@kaplanandmiller.com

Scott B. Miller, Esquire
Hurley, Rogner, Miller, Cox, Waranch & Westcott, P.A.
1560 Orange Avenue, Suite 500
Winter Park, FL 32789
smiller@hrmcw.com, asurujlall@hrmcw.com

Michael R. Gilmartin
Law of Office of J. Christopher Norris
9130 S Dadeland Blvd., Suite 1520
Miami, FL 33156
michael.gilmartin@libertymutual.com, miamilegalmail@libertymutual.com