STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGE OF COMPENSATION CLAIMS
West Palm Beach District

EMPLOYEE:
Ramiro Chilomer
3234 Mirella Drive
West Palm Beach, FL 33404

EMPLOYER:
Unitek USA
1777 Sentry Parkway West
Blue Bell, PA 19422

CARRIER:
Broadspire, a Crawford company
P.O. Box 189091
Plantation, FL 33318

ATTORNEY FOR EMPLOYEE:
Thomas Hedler, Esquire
Sternberg and Hedler, P.A.
560 Village Blvd., Suite 270
West Palm Beach, FL 33409

ATTORNEY FOR EMPLOYER/CARRIER:
Derrick E. Cox, Esquire
Hurley, Rogner, Miller, Cox, Waranch & Westcott, P.A.
1560 Orange Avenue, Suite 500
Winter Park, FL 32789

OJCC CASE NO.: 09-021844TMB
D/A: 7/28/2009
JUDGE TIMOTHY M. BASQUILL

FINAL COMPENSATION ORDER

THIS MATTER came on for merits hearing before the undersigned Judge of Compensation Claims on November 8, 2010, on petitions filed on August 20, 2009 and August 31, 2009. The claimant was represented by Thomas A. Hedler, Esquire, and the employer/carrier was represented by Derrick E. Cox, Esquire. At the hearing, the parties agreed that a third petition for benefits filed with DOAH on March 30, 2010 was not ripe for adjudication because that petition was never mediated. The undersigned reserves jurisdiction as to said petition.

The issues for trial were: compensability of the July 28, 2009 accident; authorization of a primary care physician, and costs and attorney fees. The claims were defended on the grounds that the claimant did not sustain a compensable injury by accident arising out of the course and scope of his employment; that the major contributing cause of the claimant's disability and need for treatment was unrelated to the claimant's employment; that the claimant failed to prove his repetitive trauma claim by clear and convincing evidence, and that no costs or fees were due and owing.

The following exhibits were admitted into evidence:

Judge's Exhibits

1. Joint pretrial stipulation and order.
2. The EMA report of Dr. Chalal.

Claimant's Exhibits

1. The deposition of Dr. Reuter.
2. The deposition of Dr. Chalal.
3. The Petition for Benefits dated August 20, 2009.

Employer/Carrier's Exhibits

1. The deposition of Dr. Waeltz.

In making my findings of fact and conclusions of law in this claim, I have carefully considered and weighed all of the evidence presented. I have observed the candor and demeanor of the witnesses and resolved all of the conflicts in the testimony and evidence. I have attempted to distill the salient issues with findings and conclusions necessary to their resolution. Though I have not attempted to summarize the testimony of each witness, or to state non-essential facts, does not mean that I have failed to consider all of the evidence. After careful consideration of all of the evidence presented, and having resolved any conflicts therein, I hereby find as follows:

1. The stipulations of the parties contained in the pre-trial stipulation and order are consistent with the evidence presented and are hereby adopted as findings of fact.

2. I considered the medical testimony of Dr. Waeltz, Dr. Reuter, and Dr. Chalal. Dr. Waeltz served as the employer/carrier's independent medical examiner (IME), and Dr. Reuter served as the claimant's IME. Due to a conflict between the opinions of Dr. Waeltz and Dr. Reuter, Dr. Chalal was assigned as an expert medical advisor (EMA).

Dr. Chalal is board certified in orthopaedic surgery and sports medicine and he has served as an EMA in the past. Dr. Chalal evaluated the claimant on August 23, 2010. In connection with his evaluation, Dr. Chalal reviewed the depositions of Dr. Waeltz and Dr. Reuter. Dr. Chalal also reviewed the claimant's MRI scans and Dr. Sehayik's records. Based on the claimant's history, records review and physical examination, Dr. Chalal opined that the claimant's repetitive job duties with the employer were not the major contributing cause of the claimant's disability or need for treatment. Dr. Chalal further opined that the major contributing cause of the claimant's low back pain and right lumbar radicular complaints was not the claimant's employment or the alleged July 28, 2009 accident. Dr. Chalal further opined that the claimant's medical condition was not accelerated or exacerbated as a result of the claimant's job duties with the employer. Dr. Chalal opined that the MRI revealed facet joint hypertrophy at L1-2 to L5-S1, a central disc protrusion at L5-S1 and a bulging disc at L3-4. Dr. Chalal explained that the claimant had facet hypertrophy at multiple levels, typically a degenerative process, and it is not uncommon to have associated disc pathology.

Pursuant to F.S. § 440.13(9)(c)(2009), the opinion of the expert medical advisor is presumed to be correct unless there is clear and convincing

evidence to the contrary. An expert medical advisor's opinion has a nearly conclusive effect. Walgreen Company v. Carver, 770 So.2d 172 (Fla. 1st DCA 2000). The expert medical advisor's opinion creates a presumption that can be overcome only by evidence.....of a quality and character so as to produce in the mind of the JCC a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established. Slomowitz v. Walker, 429 So.2d 797 (Fla. 4th DCA 1983). See also: Westinghouse Elec. Corp. v. Shuler Bros., Inc., 590 So.2d 986 (Fla. 1st DCA 1991); McKesson Drug Co. v. Williams, 706 So.2d 352 (Fla. 1st DCA 1998).

I hereby accept the opinions of Dr. Chalal, the EMA physician in this case. I find that Dr. Chalal's opinions are well-reasoned and consistent with the evidence presented in this case. I further find that there was no clear and convincing evidence provided by the claimant to rebut the presumption afforded the expert medical advisor.

3. I reviewed the deposition of Dr. Waeltz. Dr. Waeltz is board certified in orthopaedic surgery and in spine surgery. Dr. Waeltz saw the claimant on February 15, 2010. Dr. Waeltz examined the claimant, and he reviewed the deposition of the claimant, the MRI films, and the other medical records. Dr.

Waeltz opined that the major contributing cause of the claimant's disability and need for treatment was not due to his employment activities. I find that the opinions rendered by Dr. Waeltz are consistent with the opinions rendered by Dr. Chalal, and I accept Dr. Waeltz's testimony.

4. Finally, I have reviewed the deposition testimony of Dr. Reuter. Dr. Reuter performed an IME on behalf of the claimant on March 2, 2010. Dr. Reuter opined that the claimant's back pain was due to repetitively lifting a ladder several times a day. However, Dr. Reuter did not know how much the ladder weighed. Dr. Reuter did not know how many times per week the claimant lifted the ladder. Dr. Reuter also did not review the claimant's deposition or Dr. Waeltz's IME report. I find that Dr. Reuter's opinions were speculative, at best. I further find that Dr. Reuter's testimony does not constitute clear and convincing evidence sufficient to overturn the opinions rendered by the EMA. I accept the opinions of Dr. Chalal and Dr. Waeltz over the opinions of Dr. Reuter.

5. I have also considered the live testimony of both the claimant and the claimant's supervisor, Charles Gilsinan. At trial, the claimant testified as to the number of times he used a ladder on a daily basis while working for the employer.

The claimant's testimony at trial was inconsistent with the testimony he gave during his deposition. The claimant also testified that he is now performing a similar job for another employer, but attempted to downplay the significance of his use of a ladder at his current job.

Charles Gilsinan, the claimant's supervisor, testified that he has worked for the employer for 22 years. Although Mr. Gilsinan was the claimant's supervisor, he also performed some of the same job duties performed by the claimant. Moreover, Mr. Gilsinan was familiar with the claimant's job duties and service calls the claimant would make. Mr. Gilsinan testified that the claimant greatly exaggerated the number of times the claimant would need to use a ladder on a daily and weekly basis. I accept Mr. Gilsinan's testimony over that of the claimant as it relates to the claimant's job duties.

6. While repetitive trauma cases are still controlled by Festa v. Teleflex, Inc., 382 So. 2d 122 (Fla. 1st DCA 1980), pursuant to F.S. § 440.09(1)(2009), "In cases involving occupational disease or repetitive exposure, both causation and sufficient exposure to support causation must be proven by clear and convincing evidence." I find that the claimant, under each prong of Festa, has failed to prove

his claim for repetitive trauma by clear and convincing evidence. The claimant's case consisted of inconsistent and questionable testimony from the claimant, and the speculative testimony of claimant's IME physician. Therefore, for these reasons, I again deny compensability of the claimant's repetitive trauma claim.

7. The claimant's attorney cited Pearson v. Paradise Ford, 951 So.2d 12 (Fla. 1st DCA 2007), and other cases, as support for his argument that an expert opinion as to a pre-existing condition requires a prior anatomical impairment rating. In making this argument, the claimant is analogizing case law for apportionment of compensable injuries to this case. I find that Pearson is inapplicable to this case because Pearson involved apportionment of compensable injuries. This case does not involve apportionment or multiple injuries. The relevant inquiry for this case is whether or not the claimant's low back complaints are due to his alleged repetitive job duties for the employer. Both Dr. Chalal and Dr. Waeltz testified that the claimant's low back complaints are not due to his employment, and I have accepted their opinions. There are many cases which stand for the proposition that a judge of compensation claims can find that a medical condition is not due to a work-related accident, and none of those cases have

imposed a requirement that the employer/carrier show that there is a permanent impairment rating attributable to a preexisting condition.

8. Based on all of the evidence, I find that the claimant failed to provide clear and convincing evidence to overcome the presumption afforded to the EMA physician in this case. I further find that the claimant failed to provide clear and convincing evidence that his repetitive job duties were the major contributing cause of his disability and need for treatment for his low back. For these reasons, I hereby deny compensability of this claim.

WHEREFORE, it is ORDERED AND ADJUDGED as follows:

1. The claim for compensability of the July 28, 2009, accident is hereby DENIED, and

2. The attendant claims for medical benefits, costs and attorney fees are hereby DENIED.

DONE and ORDERED in West Palm Beach, Palm Beach County, Florida, this 3 day of DECEMBER, 2010.

HONORABLE TIMOTHY M. BASQUILL
Judge of Compensation Claims

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that the foregoing Order was entered on the 3rd day of December 2010, and that a copy thereof was sent by Electronic Mail to counsel for all parties:

ATTORNEY FOR EMPLOYEE:
Thomas Hedler, Esquire
Sternberg and Hedler, P.A.
560 Village Blvd., Suite 270
West Palm Beach, FL 33409
E-Mail: thedler@shpalaw.com

ATTORNEY FOR EMPLOYER/CARRIER:
Derrick E. Cox, Esquire
Hurley, Rogner, Miller, Cox, Waranch & Westcott, P.A.
1560 Orange Avenue, Suite 500
Winter Park, FL 32789
E-Mail: rmartinchich@hdalaw.com

Debra J. Holland
Judicial Assistant for Judge Basquill