

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF JUDGE OF COMPENSATION CLAIMS
PORT SAINT LUCIE DISTRICT

EMPLOYEE:

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JUDGE: Robert D. McAliley

OJCC#: 12-005297RDM

VENUE: Saint Lucie County

D/A: 11/16/2005

ORDER ON THE MERITS

This case essentially turns on a burden of proof analysis. I find claimant fails to demonstrate he is entitled to further indemnity benefits or medical care other than what is already being provided by the employer/carrier (E/C). In the process, as explained below, it appears as if this result may be a case of claimant being hoisted on his own petard, inasmuch as five years after his treatment began, claimant sought medical care outside the workers' compensation system and those doctors

apparently attribute claimant's disability to non-industrial causes.

JURISDICTION AND NOTICE

The parties agree, and I find, the Judge of Compensation Claims (JCC) has jurisdiction over the parties and subject matter. This case was properly noticed for final hearing.

STIPULATIONS

The parties agree as follows: Claimant sustained injury by accident on the date indicated while working in Saint Lucie County, Florida; there was an employer/employee relationship; workers' compensation insurance coverage applies; the employer was timely notified of the accident; a managed medical care arrangement is in place; the average weekly wage (AWW) is \$2,325.16; indemnity benefits payable, if any, will be handled administratively with the JCC retaining jurisdiction to determine the specific amounts due, if necessary; all issues pertaining to attorney's fees and costs may be reserved for subsequent hearing.

ISSUES

Claimant seeks the following: temporary total disability benefits (TTD) or temporary partial disability benefits (TPD) from August 11, 2011, to date at the applicable maximum compensation rate of \$651.00 weekly; medical care under the supervision of Dr. Levine; authorization for an L5-S1 fusion

with Dr. Gomez; interest and penalties on overdue indemnity benefits; costs and attorney's fees.

E/C responds stating: Claimant reached maximum medical improvement (MMI) prior to August 11, 2011, so that no TTD or TPD is payable; Dr. Rubenstein was substituted for Dr. Levine at claimant's request; claimant is authorized to receive treatment with Dr. Grabel but Dr. Gomez is not authorized; general denial of all remaining claims.

Claimant responds to E/C's position regarding the claim for treatment with Dr. Levine stating Dr. Rubenstein is not an appropriate substitute since they practice in different fields of medicine.

The following claims are withdrawn: determination of compensability; if claimant has reached MMI, permanent total disability benefits; payment to Mid Florida Anesthesia Associates for Dr. Levine's services. E/C withdraws their corresponding defenses.

PFBs

This order disposes of the petitions filed March 7, 2012, May 25, 2012, June 7, 2012, and June 22, 2012, to the extent indicated.

BACKGROUND

Claimant is 46 years old and has a high school education. His health history includes several prior low back injuries but minimal details are provided. Claimant began working for Florida Power & Light (FPL) in December 1995. While employed as a "groundsman" he injured his low back in November 2005 while lifting heavy ramps to a backhoe trailer. "It felt like I tore everything in my lower back."

MEDICAL CARE

E/C provided treatment with a walk-in clinic and then refers claimant to Scott Katzman, M.D., an orthopedic surgeon. Dr. Katzman recommends low back surgery and releases claimant to light duty work.

Claimant declines surgery and requests a onetime change of physicians. E/C accommodates this request, referring claimant to William Stolzer, M.D., known to me as a board certified orthopedic surgeon. After providing conservative treatment, Dr. Stolzer recommends a pain management doctor prompting E/C to authorize Marc Levine, M.D.

Dr. Levine is board certified in anesthesia and pain management. Dr. Levine's records are incomplete but there is no controversy but that he treated claimant for a "displaced lumbar disc" by providing injection therapy and potent medications. Claimant is placed at MMI by Dr. Levine on October 5, 2010, but

no impairment rating is assigned. (Dr. Stolzer issued a 7% rating.) Although the dates are vague, E/C then authorizes Dr. Rubenstein to take over claimant's case and provide pain management treatment.

I determine based on the testimony of claimant and the adjuster that this change of physicians from Dr. Levine to Dr. Rubenstein was prompted by claimant's request.

E/C also authorized a neurosurgical consultation with Jordan C. Grabel, M.D., who examines claimant on October 21, 2010. This doctor does not find a surgical problem. Dr. Grabel comments claimant can be expected to have chronic low back pain with episodic flair ups and would need to follow with a physiatrist. "I will clear him to return to his usual job, beginning Monday, October 25."

UNAUTHORIZED MEDICAL CARE

At this juncture the facts become especially fuzzy.

Claimant contends that at some point during Dr. Rubenstein's treatment, this physician advised him that he may have another medical problem unrelated to the November 2005 back injury causing his symptoms.

No direct medical evidence from Dr. Rubenstein is presented in these proceedings including Dr. Rubenstein's progress notes or deposition. I accept the adjuster's testimony that claimant never requested an evaluation, neurological or otherwise.

Instead, I find from the overall evidence claimant wished to proceed outside the compensation system using his health insurance.

In this regards claimant first presented to a chiropractor, Dr. Jensen. His records are not in evidence. I reject claimant's testimony that Dr. Jensen did not provide chiropractic adjustments to the low back but limited himself to the middle back. This proposition strains credulity because claimant denies having any back symptoms whatsoever immediately preceding the November 2005 industrial accident.

Mindful that counsel's questions have no evidentiary value, I find from claimant's vague responses in conjunction with his mannerisms as a witness that he likely attributed his back symptoms to causes other than the November 2005 accident.

In any event, Dr. Jensen recommended claimant see a "neurologist" prompting him to undergo an examination with Dr. Viola who is *apparently* John Viola, M.D., a neurosurgeon located in Stuart, Florida.

According to claimant Dr. Viola recommended a spinal cord stimulator which was eventually permanently installed by a Dr. Corder, probably Harold Corder, M.D., an anesthesiologist located in Vero Beach, Florida.

In the meantime, claimant continues working for FPL as a groundsman for five years and when that job was eliminated, for one year as a "connect and disconnect" worker.

Again claimant's testimony is vague but it appears he stopped worked at FPL on or around August 11, 2011, to have the stimulator installed. He did not return to FPL and has not looked for work elsewhere.

Claimant admits he is aware the foregoing non-compensation doctors provided information to a disability insurance carrier -- insurance he collected -- that his disability was not related to an industrial accident. I infer their causation opinions were based largely on information provided by claimant.

Finally, after having residual problems following the application of the implant, claimant underwent an examination with "Dr. Gomez," an apparent reference to Heldo Gomez, M.D., also known to me as a neurosurgeon. Supposedly claimant's "wife looked him up." Dr. Gomez recommends low back surgery.

PRESENT AUTHORIZED TREATING PHYSICIANS

E/C continues to authorize treatment with Dr. Rubenstein. Claimant asserts Dr. Rubenstein declined to treat him further when he reported back after having the stimulator installed. But the adjuster knew nothing about this.

Claimant has the burden of proof in this regards and given the import of his overall testimony, I do not accept, at least

for now, that claimant demonstrates Dr. Rubenstein declines to treat him.

Dr. Grabel also remains authorized. He is of the opinion that claimant now has pathology that warrants surgical correction although he disagrees with Dr. Gomez regarding the technique that should be employed. Dr. Grabel does not have an opinion as to the major contributing cause of the need for the recommended surgery.

ANALYSIS

Based on the evidence presented, I find claimant reached MMI from injuries sustained in the November 2005 industrial accident on October 5, 2010. The evidence is insufficient to show that claimant lapsed back into a state of temporary disability subsequently as a result of injuries sustained in this industrial accident. Claimant fails to demonstrate receiving remedial care after October 5, 2010. While claimant obviously received treatment from non-authorized doctors, there is no evidence this treatment relates to the present case especially with claimant representing in another forum his disability was not industrially related.

Because I find MMI was reached on October 5, 2010, the claim for additional TTD and TPD must be denied as is the claim for interest and penalties.

As explained above, claimant does not present persuasive evidence that Dr. Rubenstein in fact refuses to treat him. E/C knows nothing of this and continues to authorize Dr. Rubenstein as well as Dr. Grabel for medical care. Nothing is presented demonstrating either physician is incapable of providing the medical care required by the injuries from the industrial accident. Certainly no basis is shown that Dr. Levine should be reauthorized.

Finally, claimant seeks surgery with Dr. Gomez. This physician is not authorized. His opinion is only presented indirectly through Dr. Grabel's deposition testimony. The evidence is insufficient to demonstrate the major contributing cause of the need for surgery is the sequella of the industrial accident. And even if it were, claimant presents no evidence Dr. Grabel is not up to the task.

CONCLUSION

Based on the foregoing analysis, it is

ORDERED AND ADJUDGED as follows:

- a. The claim for temporary total disability benefits is denied.
- b. The claim for temporary partial disability benefits is denied.
- c. The claim for interest and penalties is denied.

d. The claim for further medical care with Marc Levine, M.D., is denied.

e. The claim for authorization of an L5-S1 lumbar fusion to be performed by Heldo Gomez, M.D., is denied.

f. All issues pertaining to attorney's fees and costs are reserved for subsequent hearing.

DONE AND ORDERED in chambers, in Port Saint Lucie, Saint Lucie County, Florida, this 7th day of December, 2012.



Robert D. McAliley
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I HEREBY certify that a true and correct copy of the foregoing has been e-mailed to the attorneys this 7th day of December, 2012.



Assistant to the Judge