

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

Arthur Pernaci,)	
)	
Employee/Claimant,)	
)	OJCC Case No. 11-003139TGP
vs.)	
)	Accident date: September 18, 2009
Winn-Dixie/Sedgwick Claims)	
Management Services, Inc.,)	Judge: Thomas G. Portuallo
)	
Employer/ Carrier/Servicing Agent.)	

ORDER DENYING COMPENSABILITY OF CLAIMANT'S NECK CONDITION

After proper notice to all parties, this cause came to be heard before the undersigned Judge of Compensation Claims on March 7, 2012, in Daytona Beach, Volusia County, Florida. The Petition for Benefits at issue was filed on February 8, 2011. The Claimant, Arthur Pernaci, was represented by Attorney Scott Uricchio. The Employer/Carrier, Winn-Dixie/Sedgwick Claims Management Services, was represented by Attorney Derrick E. Cox.

Statement of the Case

The Claimant is a 56 year old male and a long-term employee for Winn-Dixie. For the past 15 to 17 years, the Claimant worked as a produce manager, responsible for supervising the unloading of truck loads of product and placing that product on store shelves.

On September 18, 2009, the Claimant sustained an industrial accident wherein he alleges he hurt his low back and neck while unloading a truck by taking product off of a pallet.

The Claimant's low back injury was accepted as compensable by the Employer/Carrier. The Employer/Carrier authorized medical treatment for the Claimant's low back condition with family physician, Dr. David Yoon, at Jena Medical Center, who treated the Claimant through December 2009 and referred the Claimant to physical therapy. The Employer/Carrier also authorized medical treatment for the Claimant's low back condition with additional health care providers, including, but not limited to, orthopedic physician, Dr. Stephen Goll, and pain management physician, Dr. Daniel Merck.

The Claimant secured an independent medical examination with pain management physician, Dr. Eugene Melvin.

The Claimant presently complains of continuing pain and symptoms resulting from the September 18, 2009, industrial accident, including neck pain. The Employer/Carrier has denied responsibility for the Claimant's neck condition.

Issues and Defenses

At the initial Pretrial Questionnaire the Claimant identified the outstanding issues in this case to be:

1. Compensability of back and neck;
2. Authorization of continued treatment with Dr. Merck; and
3. Costs and attorney's fee.

At the initial Pretrial Questionnaire, the Employer/Carrier defended these claims on the following grounds:

1. Major contributing cause of Claimant's neck pain is unrelated to the industrial accident;
2. Compensability of the neck is denied;
3. Apportionment may apply;
4. No costs or fees due.

At the Final Hearing on March 7, 2012, the Claimant withdrew the claim for a determination that the Claimant's back condition is compensable. Both parties agreed that the Employer/Carrier accepted responsibility of the Claimant's low back condition. The Employer/Carrier asserted that responsibility for the Claimant's low back condition was never denied in this case.

Additionally, at the final hearing, the Claimant withdrew the claim for authorization of continued treatment with Dr. Merck.

At the final hearing, the Employer/Carrier withdrew the defense of apportionment.

Both parties agreed that the sole remaining issue in this case was a determination of compensability of Claimant's neck condition, along with fees and costs.

Documentary Evidence

At the March 7, 2012, final hearing, the following documentary exhibits were admitted into evidence:

JCC's Exhibit # 1

Pretrial Questionnaire and Order of this Court dated August 22, 2011.

JCC's Exhibit # 2	Composite exhibit of Claimant's Amendments to Pretrial Stipulation, filed November 11, and November 14, 2011.
JCC's Exhibit # 3	Claimant's Trial Memorandum, admitted for argument purposes only.
JCC's Exhibit # 4	Employer/Carrier's Trial Memorandum, admitted for argument purposes only.
Claimant's Exhibit # 1	Deposition of Eugene Melvin Jr., MD, taken December 7, 2011, with attached exhibits.
Claimant's Exhibit # 2	Deposition of Eugene Melvin Jr., MD, taken February 17, 2012, with attached exhibits.
Claimant's Exhibit # 3	Deposition of Sylvia Fleming, taken November 2, 2011, with attached exhibits. However, the recorded statement of the Claimant was not included in this exhibit per the Employer/Carrier's objection and agreement of the parties at Hearing.
Employer/Carrier's Exhibit # 1	Deposition of David Yoon, MD, taken November 18, 2011, with attached exhibits.

Findings of Fact and Conclusions of Law

In making my findings of fact and conclusions of law in this matter, I have carefully considered and weighed all the testimony and evidence presented to me including all the live testimony as well as the documentary exhibits and I have resolved any and all conflicts therein. After having carefully considered the arguments of the parties and all evidence presented in this case, I make the following findings of fact and conclusions of law:

1. The stipulations of the parties as listed above and as identified in the Pretrial Questionnaire are approved and adopted by me.

2. This Court has jurisdiction over the subject matter and over the parties.

3. In making the determinations set forth below, I have attempted to distill the testimony and salient facts together with the findings and conclusions necessary for the resolution of this claim. I have not attempted to painstakingly summarize the substance of all the documentary evidence or the testimony of the witnesses nor have I attempted to state nonessential facts. Because I have not done so does not mean I have failed to consider all the evidence.

Burden of Proof

4. Based upon the totality of evidence in this case, I accept the Employer/Carrier position in its entirety and I find the Claimant failed to satisfy his burden of proof, by a preponderance of evidence, that he sustained an injury to his neck as a result of the industrial accident or work activities performed in the course and scope of his employment with Winn-Dixie on or about September 18, 2009.

5. Based upon the totality of evidence, I find that the Claimant failed to satisfy his burden of proof, by a preponderance of evidence, that his existing cervical condition is causally related to his work activities performed on or about September 18, 2009, by way of direct and proximate cause or by way of major contributing cause.

6. When finding that the Claimant did not sustain a work-related injury to his neck on or about September 18, 2009, I note that the Claimant did sustain a compensable work-related injury to his low back on that date.

First Report of Neck Pain

7. After reviewing the totality of evidence in this case, I find the first time the Claimant ever reported neck pain or symptoms in this case was in January 2010, following completion of the Claimant's treatment with Dr. Yoon and corresponding physical therapy. This finding is consistent with the documentary evidence in this case, including the various medical reports and physical therapy reports generated from the date of the accident through December 2009. I reject any contrary evidence in the Record on this issue for various reasons as mentioned in the contents of this Order, including on the grounds that any such contrary evidence is not supported by documentary evidence generated prior to January 2010.

8. Similarly, I find that the Claimant did not initially report cervical complaints to his Employer following his accident. In making this finding, I note that, at hearing, on cross examination, the Claimant agreed that he did not tell his supervisor, Mr. Martin, about neck complaints upon his return from vacation when filling out the Notice of Injury Form in this case.

Dr. Yoon

9. The Employer/Carrier authorized Dr. David Yoon, family physician at Jena Walk-In Clinic, to treat the Claimant's low back condition following the September 18, 2009, industrial accident. Dr. Yoon examined the Claimant on eight occasions beginning on October 5, 2009, and ending on December 15, 2009 (Deposition Dr. Yoon).

10. I find that Dr. Yoon kept detailed records of the Claimant's complaints of pain and established a practice of noting any "new" complaints the Claimant may have experienced during his course of treatment. I base this finding on my review of Dr. Yoon's testimony and

reports in their entirety, including the various documented physical examinations performed by Dr. Yoon during his course of treatment from October through December 2009. Consistent with this finding, I also note Dr. Yoon did, in fact, record “new” complaints on behalf of the Claimant, particularly hip and sciatica pain on October 20, 2009 (Deposition Dr. Yoon, pages 8 and 9).

11. I accept Dr. Yoon’s testimony that there is no documentation that the Claimant ever complained of neck pain while treating with Dr. Yoon at Jena Walk-In Clinic (Deposition Dr. Yoon, page 13). Further, I accept Dr. Yoon’s testimony that he would have included history of neck complaints and examined the Claimant’s neck if the Claimant made such complaints (Deposition Dr. Yoon, page 12).

12. I also accept Dr. Yoon’s testimony that there was no objective medical evidence during Dr. Yoon’s course of treatment with the Claimant to suggest that the Claimant sustained any type of cervical injury or that an examination of the Claimant’s neck should be performed (Deposition Dr. Yoon, page 13).

13. I accept Dr. Yoon’s testimony as follows:

Q. So in other words, since the Claimant did not have any cervical complaints, and there was no objective evidence of any cervical injury during the months that you provided treatment, your opinion is that he did not sustain a neck injury on September 18, 2009; is that correct?

A. That’s correct. (Deposition Dr. Yoon, page 15).

14. I find that Dr. Yoon’s testimony in this case is logical, reasonable, and consistent with the totality of evidence. I find that Dr. Yoon, as the authorized treating physician who examined and treated the Claimant for several months following the industrial accident, is in the

best position to form an acceptable medical opinion on the Claimant's history and complaints of pain during that time period. I also accept Dr. Yoon's testimony on the grounds that the Doctor testified in a very clear manner, without hesitation and did not vacillate in his opinion despite a pointed cross exam by Claimant's counsel. Based upon Dr. Yoon's firsthand examinations of the Claimant from October through December 2009, I accept Dr. Yoon's testimony and history over any contradictory evidence in the Record. I find that the Claimant did not report a cervical injury or neck pain while treating with Dr. Yoon at Jena Walk-In Clinic.

15. After reviewing the totality of evidence, I reject the Claimant's allegations that Dr. Yoon's reports are essentially "boilerplate" medical reports. Instead, I find Dr. Yoon accurately detailed the history provided to him by the Claimant, including new complaints of hip pain and sciatica (Deposition Dr. Yoon, page 8). I note Dr. Yoon clearly testified, without hesitation, that this is not a situation where the Dr. Yoon was denied by the insurance company the ability to evaluate the Claimant's neck if anyone had asked him to (Deposition Dr. Yoon, page 28). I accept Dr. Yoon's testimony that if there was any indication that the Claimant had neck pain, he would have evaluated the neck complaint, similar to the way Dr. Yoon evaluated other new complaints of the Claimant in this case (Deposition Dr. Yoon, page 28).

16. Furthermore, I accept Dr. Yoon's opinion that, even if the Claimant began complaining of neck pain some time after Dr. Yoon last saw the Claimant in December 2009, that those neck complaints would not be the result of the September 18, 2009, industrial accident (Deposition Dr. Yoon, pages 14 and 15). I accept Dr. Yoon's testimony, page 27, of his deposition, as follows:

Q. So if Mr. Pernaci were to have gone to see a doctor, which he did about one month later, maybe a few weeks later after you saw him, and for the first time complained of neck pain, does your opinion still remain the same; namely, any complaints of neck pain this gentlemen would have had starting in January 2010, leading all the way up to the present, would be unrelated to the accident of September 18, 2009?

A. That's correct.

Dr. Melvin

17. Dr. Melvin is a board certified anesthesiologist and pain management physician who examined the Claimant on October 28, 2011, as an independent medical examination in behalf of the Claimant. Dr. Melvin's Deposition has been taken two times in this case (Claimant's Exhibits #1 and #2). I find Dr. Melvin's opinion fluctuated in this case. Consistent with this finding I note Dr. Melvin, himself, testified that his prior opinion may be "somewhat altered" (Deposition Dr. Melvin, February 17, 2012, page11).

18. Initially, the Claimant gave Dr. Melvin a history of a sudden onset of cervical pain immediately following the September 18, 2009, accident. Relying on this history, during the course of Dr. Melvin's first deposition on December 7, 2011, on direct examination, Dr. Melvin testified that the Claimant's cervical complaints were due to the September 18, 2009, industrial injury (Deposition Dr. Melvin, December 7, 2011, pages 5, 6, and 9).

19. However, I find that, in response to hypothetical questions posed by counsel for the Employer/Carrier on cross examination, Dr. Melvin altered his opinion and stated that, if the Claimant's cervical conditions did not begin until three to four months after the accident, then the Claimant's cervical complaints would not be related to the industrial accident (Deposition Dr. Melvin, December 7, 2011, pages 38-42).

20. During the course of his second deposition, on February 17, 2012, I find that Dr. Melvin, once again, altered his opinion on medical causation and stated that the Claimant's neck condition was related to the industrial accident (Deposition Dr. Melvin, February 17, 2012, page 11).

21. Notwithstanding Dr. Melvin's various opinions in this case, I find the facts of the hypothetical question posed to Dr. Melvin by the Employer/Carrier in Dr. Melvin's first deposition of December 7, 2011, have been proven in this case.

Dr. Yoon Accepted Over Dr. Melvin

22. After reviewing the totality of evidence in this case, I accept Dr. Yoon's opinion over that of Dr. Melvin where they contradict. I find that Dr. Yoon's opinion is the most logical, most reasonable, and most consistent medical opinion in the Record. I also accept Dr. Yoon's opinion over that of Dr. Melvin on the grounds that Dr. Yoon maintained a much more clear, strong, and consistent opinion, even under pointed cross examination by Claimant's counsel. On the other hand, I find Dr. Melvin altered his opinion several times as mentioned above (Deposition Dr. Melvin, February 17, 2012, page 11).

23. Additionally, I accept Dr. Yoon's opinion on the grounds that, as the Claimant's treating physician from October through December 2009, Dr. Yoon was in a better position to obtain accurate history from the Claimant during the period of time at issue, that being the months immediately following the industrial accident. I find that Dr. Yoon saw the Claimant on a more frequent basis and is more familiar with the Claimant's actual pain complaints and symptoms for the months following the industrial accident.

24. Additionally, I find Dr. Yoon's opinion is more consistent with the totality of evidence, including the documentary evidence in the Record. I note Dr. Yoon's opinion is consistent with the physical therapy notes which fail to reveal any mention of neck pain. In making this finding, I note that Dr. Melvin reviewed physical therapy records in this case and testified that there is no reference to cervical complaints (Deposition Dr. Melvin February 17, 2012, page 15).

25. Furthermore, for reasons set forth below, I reject the portion of the Claimant's testimony where he alleged that neck pain started at the date of accident, or a few days thereafter. As such, I reject Dr. Melvin's medical opinions insofar as those opinions are based on inaccurate history provided from the Claimant. I particularly reject those opinions of Dr. Melvin which are based upon history from the Claimant that the Claimant's neck pain began on the date of accident or a few days thereafter (Deposition Dr. Melvin, December 7, 2011, pages 5, 21, and 40) (Deposition Dr. Melvin, February 17, 2012, pages 8).

Claimant's Testimony

26. I reject the Claimant's testimony regarding the onset of neck complaints on the grounds that his testimony is not supported by the documentary evidence in this case. I also reject the Claimant's testimony regarding whether he provided complaints of neck pain to Dr. Yoon and Jena Medical on the grounds that the Claimant's testimony is inconsistent with the testimony of Dr. Yoon and the corresponding medical records and physical therapy reports generated during the period of time the Claimant treated with Jena Medical.

27. At the final hearing, I had the opportunity to observe the candor and demeanor of the Claimant while testifying live. Although I find the Claimant testified to the best of his ability, I also find that the Claimant appeared confused and demonstrated a poor recollection for certain material events in this case, particularly those events establishing a temporal relationship between his onset of neck complaints and the industrial accident. Based upon this Court's observation of the candor and demeanor of the Claimant while testifying live, I find that the Claimant's testimony of when his neck pain began is not clear or reliable.

28. In finding that the Claimant appeared confused when testifying regarding the onset of neck complaints, I note the Claimant initially denied that his neck pain started while on vacation, but on cross examination the Claimant was reminded that he went on vacation immediately following the industrial accident. Thereafter, the Claimant agreed the neck pain started while on vacation.

29. Additionally, in finding that the Claimant appeared confused when testifying regarding the onset of neck complaints, I also find the Claimant was successfully impeached by the Employer/Carrier at the final hearing when describing the frequency of his neck complaints. At the hearing, the Claimant testified that he had neck pain every day beginning two or three days following the industrial accident. However, during the course of cross examination, the Claimant acknowledged that at the time he gave prior deposition testimony in January 2011, he testified that he experienced neck pain only every other month or one time every other month. I find the Claimant offered no logical or reasonable explanation to reconcile these statements.

30. Accordingly, I find the Claimant's testimony with regard to the onset and duration of neck pain is not logical, not reasonable, not internally consistent, and not consistent with the totality of evidence.

WHEREFORE IT IS ORDERED AND ADJUDGED as follows:

1. The claim for determination of compensability of the Claimant's neck condition is **DENIED**.
2. The claim for attorney's fees and costs is **DENIED**.
3. Any arguments or issues not raised at the time of the final hearing are considered waived.

DONE AND ELECTRONICALLY TRANSMITTED VIA EMAIL to the attorneys listed below this 12th day of March, 2012, in Daytona Beach, Volusia County, Florida.



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