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

Victoria Varkett,
Employee/Claimant,

vs.

Lockheed Martin/ESIS WC Claims,
Employer/Carrier/Servicing Agent.
_____/

OJCC Case No. 18-020885TSS

Accident date: 10/13/2016

Judge: Timothy S. Stanton

FINAL COMPENSATION ORDER

THIS CAUSE came on for a final hearing before the undersigned Judge of Compensation Claims on July 19, 2019. Claimant, Victoria Varkett, was represented by David Rickey, Esquire. The Employer/Carrier (E/C) was represented by Derrick Cox, Esquire. The petition for benefits (PFB) e-filed on August 27, 2018, October 9, 2018, and December 6, 2018, were the subject of this final hearing. All live witnesses, exhibits, documents, and objections are listed in the appendix.

Claims (for this final hearing):

PFB filed August 27, 2018

1. Authorization for continued treatment as authorized doctors have told Claimant that she had to pay out-of-pocket and that she was no longer covered.

2. Attorney fees and costs.

PFB filed October 9, 2018

1. Authorization of pain management, left SI injection, spine surgery, EMG/NCV/NCS, MRI and x-rays of the lumbar spine and left hip.

2. Penalties, interest, costs, and attorney fees.

PFB filed December 6, 2018

1. IIB's from November 5, 2018 and continuing based upon a 6% PIR until statutorily paid out.

2. Authorization of PT, SI joint injection, continued TENS Unit, massage therapy and pain management pursuant to Dr. Joshua Appel.

3. Penalties, interest, costs, and attorney fees.

Defenses:

1. The major contributing cause of the need for treatment is Claimant's pre-existing disease and not the industrial accident.

2. The requested treatment is not medically necessary or causally related to the industrial accident.

3. Claimant only experienced a temporary exacerbation of her pre-existing condition.

4. Impairment benefits are not due and owing.

5. Penalties, interest, costs, attorney fees are not due and owing.

E/C's Affirmative Defenses

1. The major contributing cause of the need for treatment is Claimant's pre-existing disease and not the industrial accident.

2. The requested treatment is not medically necessary or causally related to the industrial accident.

3. Claimant only experienced a temporary exacerbation of her pre-existing

condition.

Claimant's affirmative defenses:

1. The E/C waived any MCC argument by failure to deny within 120 days of the first provision of benefits.

2. Carrier waived medical necessity by failing to authorize or deny the treatment within 10 days benefits.

3. No specific pre-existing condition identified by E/C.

Stipulations:

The parties stipulated that the determination of the correct amount for the average weekly wage (AWW) will be handled administratively should I award impairment benefits. The parties had not agreed on the AWW in the pretrial stipulation, although it technically was not a pled claim.

Findings of Fact and Conclusions of Law:

In making my findings of fact and conclusions of law I have carefully considered and weighed all the evidence presented to me. Although I will not recite in explicit detail the testimony, and I may not refer to each piece of documentary evidence, I have considered all of the testimony and evidence and I have attempted to resolve all the conflicts in the testimony and evidence. Based upon the foregoing and the applicable law, I make the following findings:

1. The undersigned has jurisdiction over the parties and the subject matter.

2. The stipulations agreed to by the parties in the Uniform Pretrial Stipulation filed on March 26, 2019, are accepted and adopted.

3. Claimant testified that two days prior to the work accident, she was promoted to a

new position and she began performing the applicable work activities. Within two days of working she began experiencing low back pain and left leg numbness and tingling. She testified that she did not have any singular, discrete accident. However, at some point, she evidently began reporting a specific accident. She described to Dr. Davis, EMA, and Dr. Appel, her IME, a specific incident of her lifting a missile cone that caused her injury. However, at the Final Hearing, she agreed that there was not a specific lifting incident that caused her injury.

4. She also testified that she had back pain prior to the work accident, but it was a much different pain than what she experienced with the work injury. She testified that she did not have any leg pain or numbness prior to the work injury. However, when questioned about her visits to Citrus Memorial Hospital prior to the work accident, she was initial vague in her answers, but then she finally agreed that she went there for back pain. I find that Claimant had back pain and back treatment prior to the work accident. She also did not recall going to Citrus Primary Care for back pain. She testified that she did not tell Dr. Davis about her prior back pain, and she couldn't recall if she told Dr. Choksi.

5. Dr. Choksi testified that he first examined Claimant on October 14, 2016, and she complained of low back pain with numbness into her left leg. After the examination, Dr. Choksi diagnosed Claimant with a low back strain. He also noted degenerative changes to her spine. Dr. Choksi prescribed Claimant anti-inflammatory medication and he placed her on work restrictions. He continued to treat Claimant until November 30, 2016, when he placed her at maximum medical improvement (MMI) with a 0% impairment rating and a full duty work release. He testified that Claimant did not need any additional medical treatment for her low back strain. Dr. Choksi testified that he had no explanation for Claimant's continued low back

pain as there were no clinical or diagnostic findings to support her complaint.

6. After being released by Dr. Choksi, Claimant did not receive any additional authorized medical treatment for approximately one year. Claimant then requested her one-time change doctor. The E/C authorized Dr. Trigueiro, who examined Claimant on January 11, 2018. Dr. Trigueiro diagnosed Claimant with chronic low back pain and sacroiliitis. Dr. Trigueiro continued to treat Claimant, but he agreed with Dr. Choksi's MMI date of November 30, 2016. Dr. Trigueiro testified that he attributed 90% of Claimant's low back strain to her pre-existing degenerative disc disease, and that she did not need any additional medical treatment for the work injury. He testified that any further need for medical care was from her pre-existing condition. Dr. Trigueiro testified that Claimant has sacroiliitis, but he would defer to Dr. Davis, the EMA, for this condition.

7. Dr. Appel, orthopedic surgeon and Claimant's IME, examined Claimant on November 5, 2018. He testified that Claimant told him that she was injured when she lifted a missile nose cone. He testified that she did not tell him that her pain symptoms began gradually after performing work activities and that it wasn't caused by a specific lifting incident. He also testified that he believed that Claimant may have a significant SI joint condition with radicular symptoms. He testified that Claimant should receive a diagnostic SI joint injection on the left side to determine the cause of her low back pain. He noted there were osteoarthritic changes that more than likely predated the injury, but her arthritic condition was not symptomatic or causing her any issue. However, he testified that Claimant denied any back pain prior to the work injury, and if she had prior back pain, it may change his opinion. Based upon his examination, Dr. Appel opined that regardless of her arthritis, Claimant needs treatment for her pain symptoms as

he is treating her neurologic issue as well as her SI joint dysfunction.

8. Leanne Beckwith, adjuster, testified that she did not file a notice of denial for Jet Medical treatment or refuse to pay its bills. She testified that she did file a notice of denial on February 6, 2018, for treatment at US Healthworks. Beckwith testified that she only accepted Claimant's low back strain as a compensable injury. I accept her testimony and I find that the E/C only accepted Claimant's low back strain as a compensable injury.

Major Contributing Cause of Treatment

9. While the E/C cannot argue that the work accident is not the major contributing cause of the injury once it has accepted compensability, it can affirmatively defend on major contributing cause for the need for treatment of a compensable injury. Teco Energy, Inc. v. Williams, 234 So.3d 816 (Fla. 1st DCA 2017). When a work accident combines with a preexisting disease or condition, the E/C must pay benefits "only to the extent that the injury arising out of and in the course of employment is and remains more than 50 percent responsible for the injury". Id. at 821. The E/C argues that the work accident is no longer the major contributing cause for the need of treatment for Claimant's low back pain. The E/C has the burden to prove its affirmative defense. Dr. Davis, the expert medical advisor (EMA), addressed this issue.

Expert Medical Advisor

10. Prior to the Final Hearing, Claimant filed a notice of conflict between doctors. I appointed Dr. Davis, orthopedic surgeon, as the EMA. Section 440.13(9)(c), Florida Statutes, states that "The opinion of the expert medical advisor is presumed to be correct unless there is clear and convincing evidence to the contrary as determined by the judge of compensation

claims".

11. Dr. Davis examined Claimant on April 10, 2019. He testified that Claimant denied any significant lower back pain prior to the work accident. However, based upon his review of the medical records, he testified that Claimant went to Citrus Memorial Hospital Emergency Room on five separate occasions for back pain between 2007 through 2015[1]. When he asked Claimant about these visits, she did not recall them. He testified that he also reviewed a medical record from Citrus Primary Care for May 31, 2016, where she reported chronic neck and back pain and an August 27, 2015, medical record from Florida Cancer Specialist where she reported a herniated disc with back pain from a prior motor vehicle accident. Claimant did not recall those visits, and she only remembered having neck pain, but no lower back pain. I find her denial of prior back pain or treatment to Dr. Davis, EMA, is contradicted by her trial testimony. Of note, the date of the work accident is October 13, 2016.

12. Dr. Davis' physical examination of Claimant did not find any muscle spasms, any tenderness of the spinous processes, or any other significant findings other than a positive finding over her sacroiliac joint. Dr. Davis testified that Claimant's current diagnosis is left lumbosacral chronic pain most likely related to sacroiliac joint degenerative disease/dysfunction. He testified that her sacroiliac joint disease is a degenerative condition and it is not related to the work accident based upon his review of the imaging studies, records review, and history.

13. Dr. Davis testified that the major contributing cause for the need of treatment of Claimant's lumbosacral chronic pain is the degenerative disease and not the work injury. Dr. Davis further testified that Claimant suffered a temporary exacerbation of a low back strain caused by the work accident and it was not a permanent aggravation. He testified that

[1] The review of the various medical records is also addressed in his report.

Claimant's compensable temporary exacerbation of a low back strain no longer required any medical treatment. In fact, Dr. Davis testified that "Indeed there is no objective evidence whatsoever on the lumbar imaging studies to suggest that the patient sustained a significant injury to her lower back or lumbosacral area as the result of the October 13, 2016 work incident".

14. While he did testify that it is reasonable and medically necessary for Claimant to undergo a diagnostic SI joint injection to determine the relationship between her low back pain and the sacroiliac joint, he also testified that any diagnosis as a result of that injection would not be related to the work accident. While a diagnostic study may not require an MCC analysis, there must be some possible nexus to the work accident, whether or not an actual nexus is determined by the study. Hamilton v. Early Bird Stud Farms, 540 So.2d 134, 136 (Fla. 1st DCA 1989)("[A]n orthopedic evaluation was reasonably required to better ascertain the cause of his symptoms, *which the evidence shows may be related to his industrial accident*")(emphasis added). See also Grainger v. Indian River Transport, 869 So.2d 1269 (Fla. 1st DCA 2004). Dr. Davis testified that any diagnosis resulting from the diagnostic injection would not be related to the work accident. I find the diagnostic SI joint injection is not awardable under workers' compensation.

15. I accept Dr. Davis' opinions, as his opinions are presumptively correct, and I find that there is not clear and convincing evidence that his opinions should not be presumed correct.

16. I find that the only compensable injury to Claimant is a low back strain, which was a temporary exacerbation and it does not require any additional treatment. I find based upon Claimant and Dr. Davis' testimony that Claimant had low back pain and treatment prior to the

work accident. Based upon Dr. Davis' testimony, I find that the major contributing cause of Claimant's current need for medical treatment for her chronic low back pain is not her work injury, but instead most likely the degenerative condition of her sacroiliac joint. Although this issue is more fully discussed below, I find that Claimant's left hip or sacroiliac joint disease/dysfunction is not compensable.

17. Furthermore, Dr. Davis testified, and I so find, that Claimant was at MMI on November 30, 2016 with a 0% permanent impairment rating. I also accept Dr. Choksi and Dr. Trigueiro's opinion that Claimant reached MMI on November 30, 2016, with a 0% permanent impairment rating.

18. In the alternative, should it later be determined that any of Dr. Davis' opinions are not afforded the presumption of correctness, where they differ, I accept his opinions over those of Dr. Appel as his opinions were the more well-reasoned and logical. Additionally, Dr. Davis reviewed Claimant's medical records for back treatment prior to her work accident. Dr. Appel was unaware of Claimant's pre-existing back pain and treatment. I also accept Dr. Choksi and Dr.Trigueiro's opinion that Claimant's low back strain does not need any further treatment. Therefore, I find that Claimant's compensable low back strain does not require any further treatment.

19. I find that the E/C has met its burden of proof concerning its affirmative defense that the work accident is not the major contributing cause of Claimant's current need for medical treatment of her low back pain.

Compensability of Claimant's SI joint or left hip

20. Claimant has requested treatment for her SI joint and left hip. As the E/C has not

accepted compensability, Claimant bears the burden of proof to establish that Claimant's SI joint and left hip conditions are compensable. I find that Claimant has not met her burden of proof. I accept Dr. Davis' opinion as the EMA that any condition of Claimant's SI joint or left hip is not related to her work injury based upon his review of her imaging studies, records review, and history. As an EMA, his opinions are presumptively correct, and I find there is not clear and convincing evidence that his opinions should not be presumed correct. Therefore, I find that Claimant's SI joint and left hip conditions are not compensable.

21. In the alternative, should it later be found that Dr. Davis' opinions for Claimant's SI joint and left hip are not afforded the presumption of correctness, where they differ, I accept his opinions over those of Dr. Appel, as his opinions were the more well-reasoned and logical. Additionally, Dr. Davis reviewed Claimant's medical records for back treatment prior to her work accident. Dr. Appel did not, and he was not aware Claimant had any prior back pain or treatment. Therefore, I find that Claimant's SI joint and left hip are not compensable.

Whether the E/C accepted Claimant's hip/SI joint by operation of law under Section 440.20(4), Florida Statutes

22. Claimant argued that by operation of law, the E/C accepted compensability of both Claimant's low back strain and her hip/SI joint when it provided treatment for both conditions and it did not deny compensability within 120 days of providing the treatment. Therefore, Claimant argued, Dr. Davis' opinion as an EMA is not controlling. Claimant argued that the E/C provided treatment for Claimant's low back strain on October 14, 2016, and treatment for her hip or SI joint when it authorized an injection on November 9, 2016. The E/C agreed to and did not dispute that it had accepted Claimant's low back strain as compensable. The E/C did not agree that the left hip or SI joint was accepted as compensable.

23. If an E/C provides treatment for an injury, and it does not subsequently deny it within 120 days of the first provision of medical treatment, it may no longer contest that the work accident is the major contributing cause of the injury. Section 440.20(4), Florida Statutes. The analysis that must be undertaken includes three elements: (1) the date the E/C first provided benefits for an injury; (2) the identity of the specific injury for which benefits were provided; and (3) whether the E/C timely denied compensability of the injury for which it provided benefits. Sierra v. Metropolitan Protective Services, 188 So.3d 863 (Fla. 1st DCA 2015). I do not need to perform an analysis of Claimant's low back strain as the E/C agreed it accepted compensability of that injury.

24. In regard to Claimant's argument that the E/C provided treatment in the form of an injection for Claimant's left hip or SI joint, I reviewed Dr. Choksi's medical record of November 9, 2016. It is true that Dr. Choksi performed two injections on that date: "Joint Injection" and 'Tigger Point Injection". Nothing in that medical record mentions left hip or SI joint. I also reviewed the rest of Dr. Choksi's medical records, and I did not find any mention of a left hip or SI joint injury or treatment. Additionally, I could not find any reference in Dr. Choksi's deposition for a left hip or SI joint injury or treatment. While Claimant argued that these injections were for Claimant's SI joint or hip, there is no testimony or other record evidence from Dr. Choksi that the purpose of the injections was for treatment of Claimant's hip or SI joint. The only diagnosis listed in the medical records or deposition testimony was for a low back strain.

25. I also reviewed Leanne Beckwith, adjuster, deposition and I could not find any reference to the provision of any treatment for a left hip or SI joint. It appears the E/C paid for

the injections, but there is no testimony or record evidence that the purpose of the injections was for treatment of Claimant's hip or SI joint and not her low back strain.

26. The only mention of a left hip or SI joint treatment was in Dr. Trigueiro's deposition. Dr. Trigueiro testified that Dr. Choksi's injection was into Claimant's SI joint. However, Dr. Trigueiro did not treat Claimant until approximately one year after Dr. Choksi and he deferred to Dr. Choksi as far as the reason for the injection. Dr. Trigueiro also testified that he thought he saw hip complaints from Claimant in Dr. Choksi's records; however, I reject that testimony as I have reviewed Dr. Choksi's medical records and I did not find those references.

27. Based upon Dr. Choksi's deposition and medical records, and Beckwith's deposition, I find that the E/C did not authorize or pay for any medical treatment by Dr. Choksi for Claimant's left hip or SI joint. Based upon those depositions and records, I find that the injections were not for treatment of Claimant's left hip or SI joint.

28. Additionally, the only specific recommendation for treatment of Claimant's SI joint or left hip was from Dr. Trigueiro, and based upon his testimony, I find that the E/C immediately denied his request to provide treatment for Claimant's left hip or SI joint. Therefore, I find that Claimant's left hip or SI Joint is not compensable by operation of law under Section 440.20(4).

29. In the alternative, even had I found that the injections were for Claimant's SI joint based upon Dr. Trigueiro's testimony (which I don't), I find that the identity of the specific injury (left hip or SI joint) for which benefits were provided was never identified to the E/C at the time the injections were authorized or paid for based upon Dr. Choksi's deposition and medical records. I find the only body part known to the E/C at the time of the provision of the

injections was Claimant's low back strain. Therefore, I find that Claimant's left hip or SI Joint is not compensable by operation of law under Section 440.20(4).

WHEREFORE it is ORDERED AND ADJUDGED:

1. The claim for authorization for continued treatment as authorized doctors have told Claimant that she had to pay out-of-pocket and that she was no longer covered is denied.

2. The claim for authorization of pain management, left SI joint injection, spine surgery, EMG/NCV/NCS, MRI and x-rays of the lumbar spine and left hip is denied.

3. The claim for IIB's from November 5, 2018, and continuing based upon a 6% PIR until statutorily paid out is denied.

4. The claim for authorization of PT, SI joint injection, continued TENS Unit, massage therapy and pain management pursuant to Dr. Joshua Appel is denied.

5. The claim for penalties, interest, costs, and attorney fees is denied.

DONE AND SERVED this 8th day of July, 2019, in Gainesville, Alachua County, Florida.

Timothy Stanton
Judge of Compensation Claims
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APPENDIX

Judge Exhibits:

1. PFB filed on August 27, 2018 (DN 1).
2. Response to PFB filed on September 4, 2018 (DN5).
3. PFB filed on October 9, 2018 (DN 10).
4. PFB filed on December 6, 2018 (DN 32).
5. EMA Order filed on December 18, 2018 (DN 41).
6. Pretrial stipulation filed on March 26, 2019 (DN65).
7. EMA report from Dr. Clifton Davis filed on April 17, 2019 (DN 66).
8. Claimant's trial memorandum, argument only, filed on July 17, 2019 (DN 72).
9. The E/C's trial memorandum, argument only, filed on July 17, 2019 (DN 73).

Joint Exhibits:

1. Dr. Choksi deposition filed on July 19, 2019 (DN 76).
2. Dr. Davis deposition filed on July 17, 2019 (DN 70).

Claimant Exhibits:

1. Dr. Appel deposition filed on January 29, 2019 (DN 52).
2. Leanne Beckwith deposition filed on July 18, 2019 (DN 75). The exhibits were filed on July 24, 2019 (DN 77).
3. Dr. Trigueiro deposition and exhibits filed on July 18, 2019 (DN 74). The E/C objected to the deposition and exhibits since this doctor was not listed on Claimant's witness list. However, Claimant argued that the doctor was listed on the E/C's witness list and the deposition was taken by the attorneys. I find little to no prejudice to the E/C as it listed the doctor in its witness list, the deposition was taken, and no clear prejudice was articulated. Therefore, I overrule the E/C's objection and the deposition and attachments are admitted into evidence.

E/C Exhibits:

None.

Live witnesses:

Victoria Varkett.