STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGE OF COMPENSATION CLAIMS
Melbourne District

EMPLOYEE:
Mark Burgess
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Lakeland, FL 33805

EMPLOYER:
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CARRIER:
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PRESIDING JUDGE:
Paul T. Terlizzese

ATTORNEY FOR EMPLOYEE:
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ATTORNEY FOR EMPLOYER/CARRIER:
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OJCC CASE NO.: 06-037509PTT

D/A: 8/2/2006 & 4/21/2006

FINAL ORDER

After due notice to all parties the Final Hearing on the Merits of this Claim came on for hearing before the Undersigned Judge of Compensation Claims on November 4, 2009, and November 19, 2009, in Melbourne, Brevard County, Florida. The Court opened the record and began the trial on the July 14, 2009 Appellate Mandate, Remanding the case back to the JCC, and on the subsequently filed June 1, 2009 Petition for Benefits. On November 19, 2009, the Court heard closing legal arguments, and thereafter announced verbal findings of fact and conclusions of law on the record, which are directly incorporated into the written Order by reference.

The claims presented by the claimant were as follows:

1. Temporary total disability benefits from October 26, 2006 to the present, the date Dr. Amann placed the claimant at MMI from a neurosurgical standpoint, and continuing in the manner and for the period of time as provided by law. Dr. Amann has referred the claimant to a pain management specialist, therefore, the claimant is not at overall MMI;

2. Temporary partial disability benefits from October 26, 2006 to the present, the date Dr. Amann placed the claimant at MMI from a neurosurgical standpoint and continuing in the manner and for the period of time as provided by law. Dr. Amann has referred the claimant to a pain management specialist, therefore, the claimant is not at overall MMI;

3. Correction of AWW and resulting compensation rate to include any and all earnings and fringe benefits the claimant may have been entitled to during the 13 weeks prior to the date of injury;

4. Medical care and treatment as the nature of the injury and the process of recovery require including cortisone injections and physical therapy for lumbar strengthening as recommended by John Amann, MD in his prescription dated August 31, 2006, and office report dated September 5, 2006;

5. The claimant requests authorization of pain management and a list of pain managers the employer/carrier will authorize to evaluate and treat, pursuant to the attached prescription from Dr. Amann;

6. Authorization of, and payment of past and future psychiatric care pursuant to the records of Charles Walker, M.D.;

7. Penalties, interest, and attorney's fees pursuant to Florida Statute §440.34(3)(b) and costs at the expense of the employer/carrier;

8. Direct treatment towards either pain management or possible surgical intervention, as recommended by Keith Simon, M.D., in his report dated August 20, 2007;

9. Authorization and set up of appointment with pain management pursuant to the recommendations of Dr. John Amann.

The defenses raised by the employer/carrier were as follows:

1. No TTD due or owing, claimant at MMI, no medical evidence of TTD;

2. No TPD due or owing, claimant at MMI, wage loss not causally related to industrial accident, voluntary limitation of income/deemed earnings;

3. AWW/compensation rate already determined per 1/28/08 Order;

4. Cortisone injections and physical therapy not medically necessary, or causally related to industrial accident;

5. Pain management not medically necessary, or causally related to industrial accident;

6. Claimant's psychiatric condition not causally related to the industrial accident;

7. Need for psychiatric care not medically necessary, or causally related to industrial accident;

8. Apportionment;

9. Pain management or possible surgical intervention not medically necessary, or causally related to industrial accident;

10. All medically necessary, and causally related treatment, has been authorized;

11. No P.I.C.A. due or owing;

12. Employer/Carrier to recover costs from claimant.

13. All issues and findings within the January 28, 2009 Order which were not reversed are final and binding.

The following documentary evidence was received into evidence pursuant to the request of the JCC.

1. EMA report of Dr. Goll;

The following documentary evidence was jointly received into evidence pursuant to the request of both the employer/carrier and the claimant:

1. Pre-Trial Stipulation and accompanying Order;
2. Deposition of Dr. Amann dated September 30, 2009;
3. Deposition of Dr. Goll dated October 22, 2009;
4. Deposition of Dr. Amann dated July 26, 2007;
5. Deposition of Dr. Amann dated June 24, 2009;
6. Deposition of the adjuster dated July 25, 2007;
7. Prior Compensation Order dated January 28, 2008;
8. First DCA opinion (May 11, 2009) and mandate (July 14, 2009) remanding the case back for hearing.

The following documentary evidence was received into evidence pursuant to the request of the claimant:

1. Deposition of Dr. Simon dated June 15, 2009;
2. Deposition of Dr. Cassidy dated June 10, 2009;
3. Deposition of Dr. Walker dated July 1, 2009, (for factual and historical purposes only);
4. The claimant's Memorandum of Law (for identification and argument purposes only);

The following documentary evidence was received into evidence pursuant to the request of the employer/carrier.

1. Supplemental Pre-Trial Stipulation dated October 2, 2009;
2. Supplemental Witness List dated September 28, 2009, adding Dr. Amann;
3. Supplemental Witness List dated September 3, 2009, adding Dr. Goll;
4. Employer/carrier Memorandum of Law (for identification and argument purposes only);
5. Deposition of Dr. Robert Martinez dated March 13, 2007 (for factual and historical purposes only);
6. Deposition of the claimant (for impeachment/rebuttal purposes only);
7. Deposition of Dr. Munson dated December 13, 2007;
8. Deposition of Dr. Chacko dated December 17, 2007;

At the hearing, the claimant, Mark Burgess, appeared and testified live before me. He was the only witness to testify live at the hearing. In making my findings of fact and conclusions of law, I have carefully considered and weighed all the evidence presented to me. Although I may not recite in exhaustive detail all the witnesses' testimony, and may not refer to each piece of documentary evidence, I have observed the candor and demeanor of the live witnesses, and have attempted to resolve all the conflicts in their testimony.

As to the issue of the average weekly wage, I find that the base AWW is $662.48 as outlined by the employer/carrier on the Pre-Trial Stipulation, and that any fringe benefit would be $32.52. Furthermore, the claimant previously accepted the employer/carrier's average weekly wage and there has been no contest of it, nor any reversal of the applicable portions of the January 28, 2008 Order.

With regards to the medical evidence, the expert medical advisor was appointed due to the conflict in the medical testimony. Dr. Goll (Orthopedic Spine Specialist) was appointed as the expert medical advisor. The opinions of an expert medical advisor are presumed to be correct, unless there is clear and convincing evidence to the contrary as determined by the Court. The Court accepts the testimony of Dr. Goll, and finds there is no clear and convincing evidence to overcome the presumption. To the extent that it conflicts with other physicians, the Court accepts the deposition testimony of Dr. Goll. Dr. Goll's testimony was clear, emphatic, and unequivocal. Dr. Goll testified that the claimant had a pre-existing back condition and that his condition due to the industrial accident was a lumbar strain. Dr. Goll testified that the claimant reached MMI as of October 26, 2006, and that no surgery was needed. The only additional medical treatment being recommended by Dr. Goll as the EMA was nonremedial and palliative medication management.

Dr. Goll indicated that this care could be provided by a primary care physician, an occupational medicine specialist, a rehabilitation specialist/physiatrist, or an anesthesiologist/pain medicine physician. Dr. Goll also testified that the claimant had an aggravation of his pre-existing condition. Furthermore, Dr. Goll testified that 40% of the claimant's condition, disability, restrictions, impairment, and need for treatment is due to the pre-existing condition, and 60% of the aforementioned is related to the industrial accident.

I accept the opinion of Dr. Goll that the claimant reached MMI as of October 26, 2009, and that no further TTD/TPD would be due and owing.

Prior to the industrial accidents of April 21, 2006 and August 2, 2006, the claimant was seen by Dr. Martinez in November, 2003 for back problems. Dr. Martinez is a board certified neurologist that was seeing the claimant for back problems. The employer/carrier took the deposition of Dr. Martinez and his deposition was admitted for factual and historical purposes. Dr. Martinez diagnosed the claimant in 2003 with chronic lower thoracic, lumbo sacral strain with palpable fibro-myositis, chronic insomnia, degenerative disc bulge at L3-4. Additionally, Dr. Martinez, back in 2003, assigned the claimant permanent work restrictions of avoiding jumping or bouncing. Dr. Martinez also noted that the claimant could do low impact light duty such as walking, swimming, bike riding, rowing and not to lift greater than 20 pounds from a bent position or 10 pounds repetitively. Dr. Martinez was also 100% adamant that he told the claimant about the work restrictions. Finally, Dr. Martinez noted that he assigned a 20% permanent partial impairment rating to the claimant for this pre-existing condition. I find that the claimant lacked credibility regarding his inability to recall his restrictions from Dr. Martinez, that were assigned in November, 2003.

I find that the close proximity of time from 2003, to the claimant's first industrial accident in April, 2006, does not seem consistent with logic and reason. I accept the opinion of Dr. Martinez that he remembers telling the claimant of these restrictions.

The claim for injections and surgical intervention is denied and dismissed with prejudice. Again, Dr. Goll indicated that the only future care that the claimant needs is non-curative and palliative medication management. The court does award an evaluation and treatment with either a primary care physician, occupational medicine specialist, rehabilitation medicine specialist per Dr. Goll's testimony.

As to the claim of psychiatric care, the Court finds that the claimant has significant pre-existing psychiatric conditions. To the extent that they are in conflict, the court accepts the expert testimony of Dr. Chacko, psychiatrist, over all others. The Court finds that the testimony of Dr. Chacko comports more with logic and reasoning, and the claim for psychiatric care is denied and dismissed with prejudice.

The Court denies and dismisses all claims for medical care other than evaluation and treatment for palliative medication management. The Court also notes that the medical issues have already been litigated and they will not be relitigated in the future unless it is established that there is a change of condition. An expert medical advisor has already been appointed to determine what, if anything, the claimant currently needs, and the only thing that has been established is that the claimant needs conservative palliative medication management.

The employer/carrier also raise the affirmative defense of apportionment. The undersigned accepts the persuasive opinion of Dr. Goll. The Court accepts the opinions of Dr. Goll, and finds

that apportionment does apply. The employer/carrier are only responsible for 60% of the claimant's future benefits. The employer/carrier will pay future medical benefits at 60% of the workers' compensation fee schedule. See Roy Pearson v. Paradise Ford and Budget Group, Case #1D05-957 (Florida 1st DCA February 5, 2007)

The Court finds that the claimant's attorney was responsible for getting some type of pain management, and that he is entitled to a reasonable fee and taxable costs as it relates only to the issue of palliative pain management. Fees and costs for all other issues are denied and dismissed with prejudice.

ACCORDINGLY, IT IS ORDERED AND ADJUDGED as follows:

1. The claimant reached MMI on October 26, 2006 and no further indemnity is due and owing;
2. The claim for TTD/TPD from October 26, 2006 to the present and continuing is denied and dismissed with prejudice;
3. The base AWW is $642.48 and any fringe benefit is $32.52 per week;
4. The claim for injections and possible surgical intervention is denied and dismissed with prejudice;
5. The claim for psychiatric care is denied and dismissed with prejudice;
6. The claimant is awarded an evaluation and treatment for palliative medication management, the employer/carrier shall authorize one of the occupational, rehabilitative or primary care doctors as indicated by Dr. Goll in his deposition;
7. All other medical care is denied and dismissed with prejudice;

8. The employer/carrier are entitled to an apportionment. The employer/carrier are only responsible for 60% of the claimant's benefits, and any medical benefits shall be paid pursuant to 60% of the Florida Worker's Compensation Medical Fee Schedule;

9. Fees and costs are awarded to Claimant's Counsel, only as they relate to securing palliative pain management. All other fees and costs are hereby denied;

10. Jurisdiction is reserved as to entitlement on the employer/carrier's request for their costs to be paid by the claimant.

11. All findings of fact and conclusion of law from the January 28, 2008 Order, which were not reversed and remanded are hereby ratified and readopted.

DONE and ORDERED in Melbourne, Florida, this 1st day of December, 2009.

Honorable Judge Terlizzese
Judge of Compensation Claims