

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGES OF COMPENSATION CLAIMS
PORT ST. LUCIE DISTRICT OFFICE

Gregory Endy,
Employee/Claimant,

OJCC Case No.: 17-013276KFO

vs.

Accident date: 11/1/2016

TLR of Bonita, Inc. dba Enterprise HR,
Inc./Enterprise HR II, Inc/Big Red Tomato
Packers, LLC/Next Level Administrators,
LLC,
Employer/Carrier/Servicing Agent.

Judge: Keef F. Owens

_____ /

FINAL COMPENSATION ORDER

This cause was heard before the undersigned in Port St. Lucie, St. Lucie County, Florida on January 3, 2018, upon the Petition for Benefits filed on June 8, 2017 (Docket Number (DN) 5). Adam G. Werner, Esq. was present on behalf of the Claimant. Gregory D. White, Esq. was present on behalf of the Employer/Carrier.

A subsequent PFB was filed on December 12, 2017 (DN 70) but had not been mediated as of the date of this hearing and was not ripe for adjudication. The undersigned retains jurisdiction over this PFB.

The issues which remained to be addressed at the time of the hearing included:

1. Temporary partial disability benefits from May 22, 2017, to the present and continuing until a change in disability and/or overall MMI, whichever occurs first. (The parties agreed that any benefits awarded would be offset by the \$2,000.00 advance previously paid).
2. Authorization, payment, and provision of an appointment for a right lumbar L2-L3 transpedicular microdiscectomy to treat the Claimant's injuries as a direct result of his industrial accident on November 1, 2016, as ordered by his authorized provider Dr. Prasher on April 11, 2017.

3. Compensability of the claim and the Claimant's right hip, right leg, and low back as a direct result of his industrial accident on November 1, 2016.
4. Penalties, interest, costs, and attorney's fees.

The defenses raised included:

1. Claimant not TTD or TPD.
2. Claimant at MMI.
3. Voluntary limitation of income/deemed earnings.
4. Any loss of earnings not causally related to accident.
5. Offset for post accident earnings and social security.
6. No TTD/TPD per 440.15(4)(e) and 440.15(6).
7. AWW correct.
8. Industrial accident is not the major contributing cause of the claimant's condition and need for surgery.
9. Requested surgery not medically necessary or causally related.
10. Compensability of accident accepted. Only lumbar strain is related to accident.
11. No penalties, interest, costs, or attorney's fees due or owing.
12. E/C costs from claimant.

The following documentary items were received into evidence:

Judge's Exhibits:

- Exhibit #1: Petition for Benefits filed on June 8, 2017 (DN 5).
- Exhibit #2: Attachments to Petition for Benefits filed on June 8, 2017 (DN 6, 11). The employer/carrier objected to the attachments being utilized substantively. This objection is sustained.
- Exhibit #3: Mediation Conference Report filed on August 17, 2017 (DN 22).

- Exhibit #4: Uniform Statewide Pretrial Stipulation filed on September 25 and 26, 2017 (DN 24, 25).
- Exhibit #5: Pretrial Order and Notice of Final Hearing entered on September 26, 2017 (DN 26).
- Exhibit #6: Claimant's Addendum to Pretrial Stipulation filed on September 28, 2017 (DN 27).
- Exhibit #7: Order Appointing Expert Medical Advisor entered on October 19, 2017 (DN 46).
- Exhibit #8: Dr. Robert Simon's November 13, 2017, EMA report filed on November 27, 2017 (DN 66).
- Exhibit #9: Employer/Carrier's Trial Memorandum filed on December 28, 2017 (DN 83) (for argument purposes only).
- Exhibit #10: Claimant's Trial Summary filed on January 2, 2018 (DN 90) (for argument purposes only).

Joint Exhibits:

- Exhibit #1: Mutually Agreed EMA Composite filed on October 27, 2017 (DN 56).
- Exhibit #2: 13-Week Wage Statement filed on December 28, 2017 (DN 80).
- Exhibit #3: Deposition of Dr. Robert Simon taken on December 11, 2017, and attachments filed on December 29, 2017 (DN 85).
- Exhibit #4: Deposition of Gregory Endy taken on July 6, 2017, and filed on January 2, 2018 (DN 87).

Claimant's Exhibits:

- Exhibit #1: Motion to Admit Medical Records and attachments filed on October 3, 2017 (DN 28) as limited by the order appearing at DN 62.
- Exhibit #2: Amendment to Motion to Admit Medical Records and attachments filed on October 5, 2017 (DN 35).
- Exhibit #3: Claimant's Witness and Exhibit List filed on October 5, 2017 (DN 41).
- Exhibit #4: Order on Motion to Admit Medical Records entered on November 3, 2017 (DN 62).

- Exhibit #5: Addendum to Pretrial Stipulation filed on December 4, 2017 (DN 69).
- Exhibit #6: Motion to Amend Petition for Benefits with the Correct Employer and Carrier filed on December 15, 2017 (DN 74).
- Exhibit #7: Deposition of Corrin Rossi taken on July 10, 2017, and filed on January 2, 2018 (DN 86).

An objection was raised to any medical records attached which were not independently admitted through a motion to admit. The objection is sustained with respect to the substance of the medical records, but the objection is overruled to the extent the records demonstrate notice to the employer/carrier of information such as complaints, diagnoses, restrictions, and referrals.

- Exhibit #8: Deposition of Patrick Engle taken on October 26, 2017, and attachments filed on January 2, 2018 (DN 88, 91).

An objection was raised to any medical records attached. The objection is sustained with respect to the substance of the medical records, but the objection is overruled to the extent the records demonstrate notice to the employer/carrier of information such as complaints, diagnoses, restrictions, and referrals.

- Exhibit #9: Deposition of Edgar Olin (Tra) Rawls taken on September 28, 2017, and filed on January 2, 2018 (DN 89).

An objection was raised to the one-page "Notice of Employee Separation" form. During the deposition authenticity and hearsay objections were raised. The witness did not qualify the record under any exception, so the hearsay objection is sustained.

Employer/Carrier's Exhibits:

- Exhibit #1: Order on Motion for Advance entered on October 18, 2017 (DN 44).
- Exhibit #2: Deposition of Dr. Michael Zeide taken on September 26, 2017, and attachments filed on December 28, 2017 (DN 82). (The IME report attached to the deposition is incomplete, so the complete IME report appearing within Joint Exhibit #1 (DN 56) was relied upon).

At the hearing, the sole live witness was the claimant, Gregory Endy. 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 witnesses' testimony and may not refer to each piece of documentary evidence, I have attempted to resolve all of the conflicts in the testimony and evidence. Based on the foregoing and the applicable law, I make the following findings.

The undersigned has jurisdiction of the parties and the subject matter. The stipulations of the parties are adopted and shall become part of the findings of fact herein. The documentary exhibits offered by the parties are admitted into evidence and shall become part of the record, unless otherwise noted.

Factual background

The claimant, Gregory Endy, was involved in a work-related accident on November 1, 2016, in the course and scope of his employment with Big Red Tomato Packers/Enterprise HR. He has worked for the company for approximately nine years. At the time of his accident, he performed mechanical maintenance work. This was heavy work, as it included the need to work with motors.

On the date of accident, while lifting lumber, the claimant was pushed backwards into a cart. He felt like something cracked, and he felt something shoot down his right thigh.

The claimant received treatment at St. Lucie Medical Center. He then came under the care of Physicians Immediate Care. Finally, he received authorized treatment with Dr. Anuj Prasher. Dr. Prasher initially diagnosed the claimant with a herniated nucleus pulposus at L4-5 on the right as well as lumbosacral radiculopathy at L5. Ultimately, on April 11, 2017, Dr. Prasher recommended a right L2-3 transpedicular microdiscectomy.

The employer/carrier selected Dr. Michael Zeide to serve as their independent medical examiner. Dr. Zeide performed an evaluation of the claimant on June 23, 2017. He concluded that the surgery recommended by Dr. Prasher would be a “dubious decision.” He also opined that the claimant was at maximum medical improvement with no permanent impairment rating and no work restrictions.

In light of the disagreement between Dr. Prasher and Dr. Zeide, the undersigned appointed Dr. Robert Simon to serve as an expert medical advisor. Dr. Simon was asked to provide opinions regarding the medical necessity of the right L2-3 transpedicular discectomy, the major contributing cause of the need for the surgery, the major contributing cause of the need for treatment generally, the claimant’s maximum medical improvement status/date, and the work restrictions required as a result of the work-related accident.

Dr. Simon evaluated the claimant on November 13, 2017. He assessed lumbar sprain/strain, lumbar disc herniation, lumbar disc disease, sacroiliitis, and right hip arthritis-post traumatic. Dr. Simon stated: “Microdiscectomy is not medically necessary nor is it likely to give him significant relief.” With respect to causation, Dr. Simon stated: “The major contributor caused her [sic] the need for treatment is industrial injury while lifting. Whether it is due to sacroiliitis, meralgia paresthetica or intra-articular right hip pathology remains to be determined.” He also opined that the claimant is not at MMI and requires work restrictions.

Following the accident the claimant was absent from work for most of the month of November 2016. When he returned to work, he worked in a light duty capacity. The claimant checked the level of chemicals.

The claimant testified that on May 22, 2017, he was discharged because the employer no longer needed him given his inability to work during the summer time. Due to his light duty restrictions, he could not perform the work the employer performs over the summer. Consistent with this testimony, employer representative Patrick Engle testified that he did not have any work that was light duty that would have allowed the claimant to work beyond May 22, 2017.

The claimant has worked with Virtual Freight Inspection as an independent contractor since he was discharged by the employer. He worked with this company prior to the accident as well. The amount of work varies. The claimant testified he has not looked for any other work because he does not believe anyone will hire him because of his injury.

As of the date of the final hearing, the claimant testified that he continued to have pain in his back, right hip, and right leg.

Finally, the parties stipulated that the average weekly wage is \$374.27.

Legal Analysis

a. Temporary partial disability benefits from May 22, 2017, to the present and continuing.

The claimant seeks an award of temporary partial indemnity benefits from May 22, 2017, through the present and continuing.

Dr. Simon, the EMA, was charged with providing an opinion as to whether the claimant is at maximum medical improvement. He stated in his report that the claimant is not at MMI. He also testified that he is not at MMI. This is consistent with Dr. Prasher's DWC-25 forms. I accept Dr. Simon's opinion.

Dr. Simon was also charged with determining the claimant's work restrictions. On November 13, 2017, he concluded that the claimant would be restricted to mainly sedentary

duty. This included a lifting restriction of 10 to 15 pounds, no climbing, and no standing or walking for more than 10 to 15 minutes without a 5 minute break. I accept Dr. Simon's opinion.

The employer/carrier argue that Dr. Simon's opinion regarding restrictions is not competent substantial evidence of the claimant's restrictions prior to the date Dr. Simon evaluated the claimant. Even if this is true, Dr. Prasher's DWC-25 forms establish the claimant's work restrictions prior to Dr. Simon's evaluation date:

Dr. Prasher's DWC-25 of December 23, 2016, indicates the claimant's restrictions. They are handwritten and difficult to decipher, but they appear to include light duty, no "BLT," and lifting up to 20 pounds. It also notes that the claimant was not at MMI.

The DWC-25 of January 18, 2017, was silent on the issue of restrictions and MMI.

The DWC-25 of April 11, 2017, indicates that the claimant's restrictions were "same."

The DWC-25 of July 20, 2017, prepared by Dr. Prasher indicates that the claimant's restrictions were "unchanged." It also notes that the claimant was not at MMI.

The DWC-25 of August 16, 2017, indicates that the claimant's restrictions were "same."

The DWC-25 of September 14, 2017, indicates that the claimant's restrictions were "same." It also notes that the claimant was not at MMI.

Accordingly, the claimant was assigned restrictions on December 23, 2016, which have not been revised through the date he was evaluated by Dr. Simon and assigned the work restrictions noted above.

Furthermore, the claimant testified that he has not earned any income (apart from his periodic income as an independent contractor) since he was discharged by the employer due to the employer's inability to accommodate his work restrictions.

Therefore, the claimant has established that as a result of his workplace injuries he was unable to perform the tasks of his pre-injury job, which directly resulted in a cessation of the performance of that employment and an attendant reduction of his income to less than 80% of his average weekly wage, thereby establishing prima facie entitlement to temporary partial disability benefits. *See Wyeth/Pharma Field Sales v. Toscano*, 40 So. 3d 795, 799 (Fla. 1st DCA 2010).

I reject the employer/carrier's defense that the claimant has voluntarily limited his income. The claimant returned to work following his accident and worked for approximately six months until he was discharged by the employer. Furthermore, to his credit, he has worked as an independent contractor since the date of termination. I find that the claimant has not voluntarily limited his income. I reject the remaining defenses to the temporary partial disability claim as either inapplicable or unsupported by the evidence.

In summary, the claimant is entitled to temporary partial indemnity benefits from May 22, 2017, to the present and continuing plus penalties and interest. By agreement of the parties, the total amount due will be offset by the \$2,000.00 advance previously paid.

b. Authorization of a right lumbar L2-L3 transpedicular microdiscectomy.

The claimant seeks authorization of a right lumbar L2-L3 transpedicular microdiscectomy. The employer/carrier defend the claim by arguing, in part, that the surgery is not medically necessary.

The issue of the medical necessity of the surgery was submitted to Dr. Simon, the EMA. In his report, Dr. Simon specifically stated: "Microdiscectomy is not medically necessary nor is it likely to give him significant relief." Dr. Simon explained further during deposition that the

claimant's L2-L3 disc was "far down on the list of things that were more likely to cause his pain." He also stated that there was "a lot" of diagnostic information to be gathered before proceeding with the surgery. Dr. Simon suggested that once diagnostics are performed, he may revise his opinion.

Dr. Simon clearly believes that it is more likely than not that the claimant's symptoms are not being caused by the disc level at which Dr. Prasher recommended surgical intervention. As a result, he has recommended additional investigation into the cause of the claimant's symptoms. Performing spine surgery when the spine is not the cause of the claimant's symptoms is not medically necessary.

Dr. Simon's opinions are presumed to be correct. *See* section 440.13(9)(c), Fla. Stat. I accept his opinion that the surgery is not medically necessary. Accordingly, the right lumbar L2-L3 transpedicular microdiscectomy is not medically necessary at this time and is denied.

c. Compensability of the claim, right hip, right leg, and low back.

Finally, the claimant seeks a determination of the compensability of the claim, right hip, right leg, and low back.

The employer/carrier do not dispute that the claimant suffered a compensable accident and a compensable low back injury.

The claimant has not presented sufficient evidence of a compensable right leg injury. Dr. Simon assessed the claimant as having a lumbar sprain/strain, lumbar disc herniation, lumbar disc disease, sacroilitis, and right hip arthritis-post traumatic. Dr. Prasher's most recent office note of September 14, 2017, includes a "problem list" which includes numerous diagnoses, but

none identify a discrete right leg condition. Neither doctor has diagnosed a right leg injury. Furthermore, there is insufficient evidence that the major contributing cause of a right leg injury is the work-related accident. Although it is recognized that the claimant may have symptoms radiating into the right leg as a result of a compensable low back or right hip condition, there is no evidence of a discrete right leg injury which can be deemed compensable at this time. Accordingly, the claim for a determination that the claimant has a compensable right leg injury is denied.

Finally, with respect to the right hip, the only evidence regarding causation is that provided by Dr. Simon. Dr. Simon stated within his EMA report: “The major contributor caused her [sic] the need for treatment is industrial injury while lifting. Whether it is due to sacroiliitis, meralgia paresthetica or intra-articular right hip pathology remainns [sic] to be determined.” In other words, Dr. Simon has concluded that while there are multiple conditions which may be causing the claimant’s symptoms, the major contributing cause of all of those conditions is the work-related accident. One of those conditions it the claimant’s right hip condition.

During deposition, Dr. Simon testified that the claimant’s work-related accident is the major contributing cause of the claimant’s need for treatment for the right hip condition. On cross-examination, he reiterated that due to the absence of records of prior difficulty with the hip, the hip condition is related to the industrial accident. On redirect examination he testified that because there was no evidence of prior right hip pain, the work-related accident caused his right hip pain.

Dr. Simon performed a physical examination of the claimant which revealed that the right hip had no internal rotation with the hip flexed and hip flexion was significantly abnormal. The examination elicited significant pain, and Dr. Simon could not even perform a Patrick's test due to the claimant's pain.

The only other testimony presented in this matter was provided by the employer/carrier's IME, Dr. Zeide. Dr. Zeide provided no specific opinions regarding causation of the claimant's right hip condition.

During the claimant's deposition, he testified that he had right hip pain on the date of the accident. This is supported by the medical records. It is interesting to note that the claimant's initial complaints focused upon the right hip, not the low back. The claimant was seen at St. Lucie Medical Center on November 2, 2016, the date after the accident, with a chief complaint of a right hip problem. He reported he was lifting a heavy load at work. He returned to St. Lucie Medical Center on November 3, 2016, with chief complaints of hip injury on the right, decreased range of motion of the right hip, and right thigh pain.

The employer/carrier argue that compensability of the right hip is premature. They argue that additional diagnostic tests must be performed before a specific diagnosis for the right hip can be made.

Although a specific diagnosis with respect to the hip is not known, the claimant has objective evidence of a right hip injury in the form of Dr. Simon's physical examination findings. The claimant made complaints of right hip pain immediately following the accident. Furthermore, Dr. Simon has opined that the work-related accident is the cause of the claimant's hip pain and need for treatment. I accept Dr. Simon's uncontroverted opinion.

For all the foregoing reasons, I find that the claimant has a compensable right hip injury.

It is **ORDERED and ADJUDGED**:

1. The claim for temporary partial disability benefits from May 22, 2017, to the present and continuing is granted. The amount due will be offset by the \$2,000.00 advance previously paid.
2. The claim for authorization, payment, and provision of a right lumbar L2-L3 transpedicular microdiscectomy is denied.
3. The claim for compensability of the claim (i.e., accident) is granted. The claim for compensability of the low back is granted. The claim for compensability of the right leg is denied. The claim for compensability of the right hip is granted.
4. The claim for penalties, interest, costs, and attorney's fees is granted. Jurisdiction is reserved with respect to the amount of attorney's fees and costs due in the event the parties cannot amicably resolve the same.

Done and electronically served on Counsel and Carrier this 16th day of January, 2018, in Port St. Lucie, St. Lucie County, Florida.



Keef F. Owens
Judge of Compensation Claims
Division of Administrative Hearings
Office of the Judges of Compensation Claims
Port St. Lucie District Office
WestPark Professional Center, 544 NW University Blvd., Suite
102
Port St. Lucie, Florida 34986
(772)873-6585
www.fljcc.org

COPIES FURNISHED:

Next Level Administrators, LLC
legal@nextleveladmin.com,lwagner@nextleveladmin.com

Adam G. Werner, Esq.
LSchwab@fortheinjured.com,ETrevino@fortheinjured.com

Gregory D. White, Esquire
GWhite@hrmcw.com,Apeters@hrmcw.com