

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

Stanley Jones,)	
Employee/Claimant,)	
)	
vs.)	
)	OJCC Case No. 09-028457JTF
Royalty Foods, Inc./Gallagher)	
Bassett Services, Inc.,)	Accident date: 2/11/2008
Employer/Carrier/)	
Servicing Agent.)	Judge John J. Lazzara
_____)	

FINAL ORDER

AFTER DUE NOTICE to the parties, a Final Hearing on this matter was held on June 23, 2010 in Orlando, Orange County, Florida and simultaneously in Tallahassee, Leon County, Florida via the Division of Administrative Hearings' Video Teleconference System. The parties were represented by counsel of record indicated below. The undersigned judge of compensation claims was assigned by Deputy Chief Judge David W. Langham to preside over the final hearing in the absence of Judge Joseph T. Farrell. The undersigned judge has jurisdiction of the parties and the subject matter.

The litigation history of this matter reflects that the subject Petition for Benefits (PFB) was filed on November 5, 2009. The matter was mediated on March 8, 2010 resulting in an impasse. The Pretrial Stipulation and Pretrial Compliance Questionnaire filed on March 9, 2010 and approved by Order entered on March 11, 2010. After several continuances, the matter proceeded to trial on the date above mentioned. This final order ensues.

At the hearing, the claimant sought the following benefits:

1. Such further medical treatment as the nature of the injury and the process of recovery requires; to wit: the provision and authorization of pain management care for the claimant's right shoulder condition;

2. A reasonable attorney's fee for claimant's counsel of record; and

3. The cost of these proceedings.

The claim was defended on the following grounds:

1. The alleged right shoulder condition is not causally related to the claimant's work accident of February 11, 2008;

2. The work accident was not and is not the major contributing cause of the claimant's alleged right shoulder condition and the need for treatment thereof;

3. Claim for pain management care for the claimant's right shoulder is not medically necessary;

4. Employer/Carrier denies claimant's entitlement to costs and attorney's fees at their expense; and

5. Should the employer/carrier prevail herein, the employer/carrier requests the costs of these proceedings at the expense of the claimant.

The parties have entered into the following stipulations:

1. The Judge of Compensation Claims has jurisdiction of the parties and the subject matter of this claim.

2. Venue properly lies in Orange County, Florida.

3. Notice of Hearing, and Notice of Injury for the Left

Shoulder, were properly furnished and received as required by the Workers' Compensation Law.

4. On February 11, 2008, the claimant was employed by the captioned employer and on that date sustained an injury to his left shoulder by accident arising out of and within the course and scope of said employment. There is no stipulation as to work-related injury to the claimant's right shoulder.

5. The PFB filed on 5/13/2009 for psychological testing and prescriptions was previously resolved by the parties.

6. That PFB filed on 8/31/2009 seeking temporary total/temporary partial disability benefits was previously resolved by the parties.

7. The issue of entitlement to and the amount of attorney's fees, if any, at the expense of the employer/carrier regarding the PFBs filed on 5/13/2009 and 8/31/2009 is reserved for a later hearing.

At the trial of this cause, the following Exhibits were admitted into evidence.

Claimant's Exhibits

1. Petition for Benefits filed on 11/5/2009.

Employer/Carrier's Exhibits

1. Deposition of Dr. Randy Schwartzberg, M.D., together with attachments, taken 11/10/2009.

2. Medical records of Dr. Joseph C. Tutorino, M.D., dated 8/24/2009 and 9/28/2009.

Joint Exhibits

1. Pretrial stipulation and order entered on __, 2010, together with supplemental pretrial stipulations.

2. Deposition of Dr. Joseph C. Tutorino, M.D., together with attachments, taken 8/18/2009.

3. Deposition of Dr. Robert Murrah, M.D., together with attachments, taken 4/28/2010.

The following individual testified live before me:

1. Stanley Jones, the claimant/employee.

After due consideration of this matter and after having the opportunity to review and consider the aforesaid exhibits which were admitted into evidence, and having observed and considered the candor and demeanor of the witnesses who appeared and testified before me, and having endeavored to resolve all conflicts of facts in the evidence presented herein, I hereby make the following findings of fact and conclusions of law:

1. The undersigned Judge of Compensation Claims has jurisdiction of the parties and the subject matter of this claim;

2. The stipulations entered into by and between the parties herein are hereby approved and adopted as findings of fact and are incorporated herein by reference;

3. In my determination herein I have attempted to distill all the testimony and salient facts together with the findings and conclusions necessary to the resolution of this matter. I have not necessarily attempted to summarize the substance of the claimant's testimony or the testimony of any live or deposition witness, nor have

I attempted to state nonessential facts. Because I have not done so should not be construed that I have failed to consider all of the evidence.

4. Any and all issues raised in the petition or petitions for benefits described above which was the subject matter of the final hearing, but which issues were not tried at the hearing are presumed resolved or, in the alternative, deemed abandoned by the employee/claimant and therefore denied. See Betancourt v. Sears Roebuck & Co., 693 So.2d 253 (Fla. 1st DCA 1997).

5. On February 11, 2008, the captioned claimant, Stanley Jones, who is 43 years of age, was employed by the captioned employer and on that date sustained and suffered a compensable injury by accident arising out of and within the course and scope of the claimant's employment with said employer when he injured his left shoulder while wrapping a pallet. At trial, Mr. Jones also claims he also injured his right shoulder at the time. Yet, he admitted that when he gave his deposition he said that the injury was only to his left shoulder. He testified that he told his authorized treating physician, Dr. Joseph C. Tutorino, M.D., a board certified orthopedic surgeon, about his right shoulder problem but that it was his understanding that his right shoulder would be treated after his left shoulder was treated. Such assertion is nonsensical and defies logic.

6. Mr. Jones went on to say that his left shoulder was treated, and underwent surgery and physical therapy but still has difficulty with his left shoulder. He claims that the expert medical

evaluation performed by Dr. Robert Murrah, M.D., a board certified orthopedic surgeon, was not a thorough evaluation of his bi-lateral shoulder condition. Mr. Jones, who is right hand dominant, claims he has never had any problems with either shoulder in the past. He testified that his shoulder injuries have adversely impacted his activities of daily living wherein he experiences problems shaving, performing toilet functions, and lifting his daughter. During the trial, I observed that Mr. Jones mostly kept his right arm guarded and extremely close to his body, but freely used and gestured with his left upper extremity and hand without apparent difficulty or limitations.

7. On cross-examination, Mr. Jones admitted that he is a three time convicted felon. While testifying during his cross-examination, he abruptly announced that he had to take what he claimed was his pain medication and dramatically proceeded to wash down the same with a bottle of water he apparently brought with him into the hearing room for that purpose. I also observed during the hearing that Mr. Jones would often grimace and hold his right shoulder after responding to a question. At another point during his examination, he punctuated his testimony when he exclaimed that he had to adjust or increase the level of his TENS Unit which he proceeded to do. I believe that all of Mr. Jones' histrionics during the hearing was to effect and influence the undersigned into thinking that he was truly hurting. In fact, such display had the opposite result. I found Mr. Jones' demeanor, presentation, and testimony completely devoid of any

credibility or veracity, and will say and do whatever he thinks is to his advantage in seeking worker's compensation benefits. This finding and conclusion is further supported by the medical evidence below. I find that he exaggerates his symptoms and limitations and, frankly, is a prevaricator. His exaggerated displays of discomfort were blatant, obvious and simply for dramatic effect and I found them disingenuous.

8. Dr. Joseph C. Tutorino, M.D., a board certified orthopedic surgeon, began treating the claimant on 3/4/2008 and the last visit was on 8/11/2009. The history Mr. Jones gave the doctor was that while wrapping a pallet he "felt a pop in his left shoulder." There were no complaints of right shoulder problems at that time. Dr. Tutorino eventually performed arthroscopic surgery of the left shoulder, which revealed impingement and a partial tear of the rotator cuff. Post-operative the claimant experienced blood pressure and breathing issues following surgery possibly related to the claimant's history of laryngeal trauma. He was hospitalized as a precaution.

Dr. Tutorino first placed the claimant at maximum medical improvement (MMI) on 11/18/2008 with a 4% permanent impairment rating (PIR) of the body as a whole, when he had nothing further to offer from a remedial standpoint. No permanent restrictions were given at that time. Because of the claimant's continued left shoulder complaints, the doctor recommended repeat surgery was suggested. However, due to the claimant's anxiety and fears about additional surgery, no decision to go forward with additional surgery has been made. Because the claimant was still considering the possibility of

repeat surgery, Dr. Tutorino rescinded the initial MMI date. He stated that if the claimant had no surgery then he would release him to pain management.

9. Dr. Tutorino testified that he first addressed the claimant's right shoulder complaints on 3/17/2010 when Mr. Jones brought it up. Mr. Jones told the doctor that his right shoulder was hurting him because of his inability to use his left shoulder requiring him to use his right shoulder quite a bit more. The doctor stated that although there were some symptoms of bursitis in the right shoulder, there was no direct relationship with the left shoulder injury except for possible indirect correlation resulting from overuse of the right upper extremity.

10. The claimant was also evaluated by Dr. Randy Schwartzberg, M.D., a board certified orthopedic surgeon. This was at the request of the employer/carrier for an independent medical examination (IME). The IME took place on 10/20/2009. Again, the claimant gave a history of sharp pain in his left shoulder while wrapping a pallet. However in regard to his right shoulder, this time the claimant told the doctor that his "right shoulder pain developed after he was using a stick to help raise the left shoulder at physical therapy" rather than the "overuse" explanation he told Dr. Tutorino. These inconsistencies in histories are not surprising considering the claimant's lack of candor. He told Dr. Schwartzberg that he noted right shoulder pain several months into the treatment of his left shoulder, rather than at

the time of the accident as he testified to at trial, and that the right shoulder now felt similar to the left shoulder.

The Dr. Schwartzberg found that the claimant's complaints were greater than expected given the objective findings that he had at that point. The claimant also resisted performing certain tests for ranges of motion during the exam claiming that it was too painful. The doctor noted that Mr. Jones displayed deep breathing during the exam and that, interestingly, Mr. Jones "had to adjust his TENS Unit that he was wearing." The examination revealed that there were no objective instability and rotator cuff issues. The doctor found that the examination of the right shoulder was fairly similar to the left with an overall diagnosis consisting of left shoulder pain, status post arthroscopic left subacromial decompression, and right shoulder pain.

11. Dr. Schwartzberg found the claimant did not need any treatment, restrictions, and did not have any impairment. He also stated that he did not believe claimant's right shoulder complaints were causally related to the work accident of 2/11/2008. He also stated that he did not believe that the right shoulder complaints were related to any overuse of that shoulder or any incident which may have occurred at physical therapy.

12. Because of the disagreement in the medical opinions of Drs. Tutorino and Schwartzberg regarding the right shoulder condition, the claimant was ordered to undergo an expert medical advisor (EMA) evaluation. Dr. Robert Murrah, M.D., a board certified orthopedic

surgeon with a specialty in sports medicine involving reconstruction of the knee and shoulder, was appointed to perform the same. The evaluation took place on 3/19/2010. Mr. Jones gave Dr. Murrah the same history of injuring his right shoulder during physical therapy that he gave Dr. Schwartzberg, unlike the overuse factor he gave to his treating physician, Dr. Tutorino. Dr. Murrah's examination of the claimant's left and right shoulders were similar to that of Dr. Schwartzberg and, again, the physical examination was somewhat compromised because of the claimant's reported discomfort during the exam. There was no evidence of any rotator cuff weakness. The MRI of the right shoulder showed mild evidence of arthritic changes.

Dr. Murrah noted, as did all of the examining physicians, that "there seems to be a greater amount of distress and discomfort during the examination of the shoulders by this individual than one might expect based upon the MRI findings." Dr. Murrah found that the claimant's right shoulder symptoms were unrelated to the claimant's industrial accident, and that the claimant had reached MMI in regard to his left shoulder at least as of 8/24/2009 with no more than a 4% PIR. Dr. Murrah also opined that there was no further treatment needed for the left shoulder or any treatment needed for the right shoulder.

13. Considering the totality of the evidence, I find the medical opinions of Dr. Schwartzberg in regard to claimant's right shoulder condition being unrelated to his work accident and the lack of need of treatment therefore, is more logical and consistent than

the opinions of Dr. Tutorino. I accept Dr. Schwartzberg's opinion over those of Dr. Tutorino and reject that the claimant's right shoulder condition may be the result of "overuse" as the doctor suggests.

14. I further find that Dr. Tutorino's opinion is based on an inconsistent and false history provided to him by Mr. Jones thus I cannot rely on his opinion regarding causation of the right shoulder condition since it is based on an inaccurate factual foundation. Ullman v City of Tampa Parks Dept., 625 So. 2d 868 (Fla. 1st DCA 1993).

15. Finally, Dr. Murrah's EMA opinion has "nearly conclusive effect." See Walgreen Co. v Carver, 770 So. 2d 172, 174 (Fla. 1st DCA 2000), quoting from Pierre v. Handi Van, Inc., 717 So. 2d 115, 117 (Fla. 1st DCA 1998). This statutory presumption of correctness provided in section 440.13(9)(c), Fla. Stat., may only be rejected on the basis of clear and convincing evidence. Cromartie v. City of St. Petersburg, 882 So. 2d 271 (Fla. 1st DCA 2004). The clear unconvincing evidence standard requires that the evidence be of such "quality and character so as to produce in the mind of the JCC a firm belief or conviction, without hesitation, as to the truth of the allegation sought to be established." See McKesson Drug Company v Williams, 706 So. 2d 352, 353 (Fla. 1st DCA 1998). The claimant here has failed to show such clear and convincing evidence, much less any credible evidence, which would controvert Dr. Murrah's opinions. Even if there was such a showing and Dr. Murrah's opinions were thrown out, Dr. Schwartzberg's opinions in regard to the issue here would still

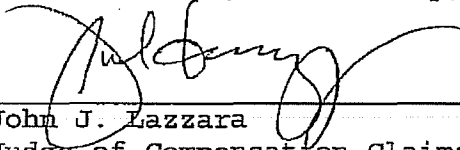
prevail over those of Dr. Tutorino for the reasons stated above. For all of the foregoing reasons, the compensability of the claimant's alleged right shoulder condition is denied and the claim for medical care for such condition is rejected.

WHEREFORE, it is ORDERED that the claim of the employee/claimant, Stanley Jones, based on his claimed right shoulder injury by accident arising out of and within the course and scope of employment on February 11, 2008, is hereby DENIED and his claim for pain management care for said condition is also DENIED.

IT IS FURTHER ORDERED that the claimant, Stanley Jones, pay the costs of the employer/carrier in the defense of the aforesaid claim, the amount thereof to be determined at a later time or by agreement of the parties subject to approval of the undersigned judge.

DONE AND ORDERED at Tallahassee, Leon County, Florida.

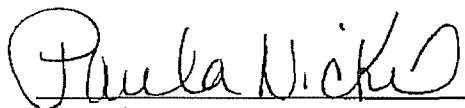




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Certificate of Service

I HEREBY CERTIFY that the foregoing Order was entered and a true copy furnished by U.S. Mail on this 24th day of June, 2010 to the parties and their attorneys listed below at the following addresses:


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