

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

L. V. Rogers,)	
Employee/Claimant,)	
)	
vs.)	
)	OJCC Case No. 08-016910MES
02HR, LLC/Providence Property and Casualty)	
Insurance, and Imperial Casualty & Indemnity)	Accident date: 9/17/2007
Company,)	
Employer/ Carrier/ Servicing Agent.)	Judge: Margaret E. Sojourner
_____)	

FINAL COMPENSATION ORDER

This matter was heard at a Final Hearing before the undersigned at Lakeland, Polk County, Florida on December 16, 2010. The issues arose from Petitions for Benefits filed June 26, 2008, July 23, 2008, August 15, 2008, October 29, 2008, October 30, 2009, July 27, 2009 and June 8, 2010. Mediations were held on October 13, 2008, January 8, 2009 and October 4, 2010. Pretrial Stipulations were completed by the parties and filed on October 17, 2008, January 9, 2009, November 3, 2009 and October 4, 2010. The initial Final Merits Hearing was continued as an EMA was appointed. Two subsequent Final Hearings were continued due to a rescheduling of the EMA appointment and to additional testing required by the EMA physician to complete his examination and report. Finally a mandatory stay was entered on December 17, 2009 when the Carrier was declared insolvent. The stay was removed and proceedings went forward in April 2010. Present at the hearing were, L.V. Rogers, claimant, and his counsel, Joshua Nelson. Also present at the hearing were attorneys Gregory White and Michele Bayhi on behalf of the Employer/Carrier (EC).

Issues:

1. Temporary total or temporary partial disability benefits from April 28, 2008 to the present and continuing.
2. Correction of the average weekly wage and compensation rate.
3. Medical care and treatment to include MRI's of the cervical, thoracic and left hip, x-rays of the lumbar spine, a discogram, CT scan, IDET procedure or discectomy as recommended by Dr. Greenburg.
4. Medical costs of Dr. Kabaria.

5. Authorization of pain management in Moultrie, Georgia.
6. Penalties, interest, costs and attorney's fees.

Defenses:

1. All temporary total or temporary partial disability benefits due have been paid.
2. Claimant is at MMI with a 0% rating per Dr. Munson.
3. Claimant voluntarily limited his income.
4. Deemed Earnings.
5. Any loss of earnings are not related to the industrial accident.
6. Claimant refused employment per FS. 440.15(6).
7. Claimant's work restrictions are not due to the compensable accident.
8. EC is entitled to apportionment, social security offset and unemployment offset.
9. Claimant's work restrictions are not due to the compensable accident.
10. AWW is correct.
11. The recommendations of Dr. Greenberg are not medically necessary.
12. Dr. Greenberg is not an authorized provider.
13. The compensable accident is not the major contributing cause of the need for ongoing medical treatment.
14. Claimant's condition is pre-existing and need for requested medical care and testing is due to pre-existing condition.
15. Dr. Kabaria is not owed any monies.
16. The JCC does not have jurisdiction over the issue of payment of Dr. Kabaria's bill.
17. No penalties, interest, cost or attorney's fees are due.

At the hearing the following items were marked as exhibits:

Judge's Exhibits:

1. Pretrial Stipulations filed October 17, 2008, January 9, 2009, November 3, 2009, and October 4, 2010.
2. EC's supplements to the pretrials filed January 8, 2009, two filed January 12, 2009, August 24, 2009, August 25, 2009, two filed September 4, 2009, September 17, 2010 and October 25, 2010.
3. Claimant's supplements to the pretrials filed January 9, 2009, August 25, 2009 and November 2, 2010.
4. Claimant's Trial Memorandum filed December 14, 2010, for purposes of argument only.
5. EC's Trial Memorandum filed December 14, 2010, for purposes of argument only.

6. Deposition of Dr. Cutler with attachments taken September 21, 2009 and filed December 13, 2010.
7. Deposition of Dr. Cutler with attachments taken November 1, 2010 and filed December 13, 2010.
8. Order Granting Stay filed December 17, 2009.

Joint Exhibits:

1. Deposition of Debra Johnson with exhibits taken on January 8, 2009 and filed December 13, 2010 in two parts.
2. Deposition of Bobby Edward Lee taken January 8, 2009 and filed December 13, 2009.
3. Deposition of Rosa Garcia with exhibits taken on January 14, 2009 and filed on December 13, 2010 in two parts.
4. Deposition of Vipul Kabaria with exhibits taken on January 21, 2009 and filed on December 13, 2009.
5. Deposition of Gregory Lee taken on February 7, 2009 and filed on December 13, 2009.
6. Deposition of Nancee Hache taken on November 17, 2010 and filed on December 13, 2010.
7. Deposition of Robyanne Cash-Howard taken on December 3, 2010 and filed on December 13, 2010.

Claimant's Exhibits:

1. A composite of medical claim exhibits filed August 25, 2009 and November 2, 2010 with the exception of the letter from Garcia to Kabaria dated January 7, 2009 and report of Kabaria dated February 2, 2009 to which objections were sustained.
2. Report of Dr. Greenberg filed as part of the medical composite exhibit dated December 14, 2010.
3. Deposition of L. V. Rogers taken August 25, 2010 and filed December 14, 2010.
4. Deposition of L. V. Rogers taken October 22, 2010 and filed December 14, 2010.

Employer/Carrier Exhibits:

1. Deposition of Dr. Weber taken November 20, 2008 and filed December 13, 2010.
2. Deposition of Dr. Munson taken on November 18, 2008 and filed December 13, 2010.
3. Order on Medical Records filed August 26, 2009.

Proffered Exhibits:

1. The letter from Garcia to Kabaria dated January 7, 2009 and report of Kabaria dated February 2, 2009 contained in the medical composite filed November 2, 2010.
2. Report of Dr. Kabaria contained in the medical composite filed on December 14, 2010.

Background:

Rogers worked as a maintenance man for the Crystal Court Apartments. He lived in one of the apartments rent free for about one year. He was injured when he was lifting a refrigerator and felt a pop in his back. Rogers had a prior back injury, which occurred approximately 15 years prior to his compensable accident.

Findings of Fact and Conclusions of Law

In making my findings of fact and conclusions of law in this claim, I have carefully considered and weighed all of the testimony and evidence presented. I have resolved all of the conflicts in the testimony and documentary evidence. Based upon the foregoing, the evidence, and the applicable law, I make the following determinations:

1. I have jurisdiction over the parties and the subject matter of this claim.
2. Venue is in Polk County, Florida.
3. I accept the opinions of the EMA Dr. Cutler. Dr. Cutler was appointed to act as the EMA in this matter by order of the JCC dated February 12, 2009. The opinion of the EMA is presumed correct absent clear and convincing evidence to the contrary. *Amos v. Gartner*, 17 So.3d 829 (Fla. 1st DCA 2009). Dr. Cutler opined that Rogers' current symptoms and need for medical treatment were due to an unrelated degenerative disc disease. He opined that any strain or sprain from the compensable accident would have healed within 8-10 weeks of the accident. He opined that Rogers would have a 0% impairment based upon the compensable accident. In his opinion no further medical care, treatment or diagnostic studies were required as a result of the accident of September 17, 2007. He opined that Rogers reached MMI on December 17, 2007. Rogers argues that the other physicians have all opined that he needs pain management and that the weight of these opinions should overrule that of Dr. Cutler. The mere fact that the other physicians disagree with Dr. Cutler does not constitute clear and convincing evidence that the presumption of correctness accorded Dr. Cutler's opinion should be overturned. Rogers also argues that as Dr. Greenberg reviewed both the MRI performed in 2000 after the first injury and the MRI performed in 2007 after the second injury, Dr. Greenberg's opinion should be accepted over that of Dr. Cutler. However, Dr. Cutler explained that his opinion was based upon his review of the 2007 MRI performed 9 days after the compensable injury, which in his opinion did not show any evidence of an acute event such as hemorrhaging in the muscle, muscle swelling, fractured bone, blood in the canal or acute disc herniation. I do not find anything in the opinion of Dr. Greenberg that constitutes clear and convincing evidence which would overcome the presumption of

correctness of Dr. Cutler's opinion.

4. No temporary benefits are due as Rogers reached MMI from his compensable condition on December 17, 2007 per the opinion of Dr. Cutler.
5. I find that the current need for medical care and treatment is not causally related to the compensable injury per the opinion of Dr. Cutler.
6. Rogers testified that he was provided with an apartment to live in rent free as part of his employment. He testified that the apartments rented for \$735 per month. He did not provide evidence of the actual cost of the apartment to the employer, nor did he provide evidence of the costs under the Fair Market Rent Survey from the Housing and Development Act of 1974. As such he has failed in his burden to establish the amount of wages that should be included in his average weekly wage. *Blickle v. Bradwood Collections*, 632 So.2d 170 (Fla. 1st DCA 1994).
7. Rogers contends that the EC has failed to pay Dr. Kabaria for authorized care. The undersigned does not have jurisdiction over this issue as it involves only the issue of payment of a medical bill. Section 440.13(11)(c), Fla. Stat. (2008); *Bryan LGH Med. Ctr. v. Fla. Beauty Flora, Inc.*, 36 So.3d 795 (Fla. 1st DCA 2010).

Wherefore it is ordered and adjudged as follows:

1. The claims for temporary total and temporary partial disability benefits are denied.
2. The claim for correction of the average weekly wage is denied.
3. The claim for medical care and treatment as recommended by Dr. Greenberg is denied.
4. The claim for authorization of pain management is denied.
5. The undersigned does not have jurisdiction over the claim for payment of Dr. Kabaria's medical bills.
6. No penalties or interest are due.
7. The claimant is not entitled to recover attorney fees or costs.

DONE AND ELECTRONICALLY MAILED this 19th day of January, 2011, in Lakeland, Polk County, Florida.



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Addendum Rulings on EC Objections in the Depositions of Dr. Greenberg.

No objections were made in the deposition taken on January 23, 2009.

Deposition of December 6, 2010.

Page 8, line 14 overruled

Page 10, line 1 overruled

Page 10, line 16 overruled

Page 11, line 7 overruled

Page 12, line 12 overruled

Page 13, line 20 overruled

Page 15, line 15 overruled

Page 16, line 12 overruled

Page 16, line 22 overruled

Page 20, line 17 overruled