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

AMABLE MOYA,
Claimant,
v.

TRUCKS AND PARTS OF TAMPA, INC. and AMERITRUST INSURANCE CORPORATION,
Employer/Carrier/Servicing Agent.
_____/

OJCC Case #DEJ

Date of Accident:

Judge Doris E. Jenkins

Bradley G. Smith, Esq., for Claimant
Gregory White, Esq., for Employer/Carrier

COMPENSATION ORDER

This cause came on for hearing before the undersigned judge of compensation claims on December 1, 2009. Pursuant to a petition for benefits filed on May 6, 2009, Claimant seeks: (1) permanent total disability and permanent total supplemental benefits from April 16, 2009; and, (2) penalties, interest, costs and an attorney's fee. Employer/Carrier assert the following defenses: (1) Claimant is not permanently totally disabled; (2) Claimant is capable of at least sedentary work within a 50-mile radius of his residence; (3) Claimant's alleged disability is not causally related to his industrial accident; (4) the industrial accident is not the major contributing cause of Claimant's alleged disability; (5) Claimant voluntarily limited his income; (6) Employer/Carrier are entitled to a Social Security offset[1]; and, (7) no penalties, interests, costs or fee are due

[1] Claimant has not been awarded Social Security Disability benefits.

or owing. In addition, Employer/Carrier seek costs pursuant to §440.34, Fla. Stat. (2008).

Following the close of Employer/Carrier's case, the parties elected to file written closing arguments due to the lateness of the hour. The parties were given until the close of business on December 3, 2009 by which to file closing arguments not to exceed three pages. As Claimant did not timely file his closing argument, it will not be considered. Rather, the undersigned will consider the arguments set forth in Claimant's Memorandum of Fact and Law and Amended Memorandum of Fact and Law as his closing argument.

WITNESSES

Claimant testified on his own behalf. Claimant also called Joey Kilpatrick. Employer/Carrier called Robynanne Cash-Howard.

DOCUMENTARY EVIDENCE

Uniform Pre-Trial Stipulation and Order dated 9/10/09	Joint Exhibit #1
Deposition of Cecil A. Aird, M.D. taken on 11/12/09	Joint Exhibit #2
Deposition of Keith James Simon, M.D. taken on 11/18/09	Claimant's Exhibit #1
Job Search Composite	Claimant's Exhibit #2
Curriculum Vitae and Vocational Evaluation Report of Joey Kilpatrick, M.S., C.R.C., Q.R.P.	Claimant's Composite Exhibit #3
Deposition of James Ray Patterson, M.D. taken on 11/10/09	Employer/Carrier's Exhibit #1
Re-Employment Assessment	Employer/Carrier's Exhibit #2
Deposition of Laura Bast	Employer/Carrier's Exhibit #3

taken on 8/30/07

The undersigned took judicial notice of her prior compensation orders entered in connection with the instant claim. These are labeled as follows:

Compensation Order entered on 1/30/09	Judge's Exhibit #1
Compensation Order entered on 4/15/09	Judge's Exhibit #2

FINDINGS OF FACT

1. The undersigned judge of compensation claims has jurisdiction over the parties and the subject matter of this proceeding.

2. All matters upon which the parties have reached agreement, as set forth in the pre-trial stipulation, are approved and incorporated herein by reference as findings of fact.

3. Claimant, a native of the Dominican Republic, was employed by Trucks & Parts of Tampa as a diesel engine mechanic when he was injured on September 16, 2005. Claimant's complaints involved primarily his neck, shoulders and upper arms. In the compensation order entered on January 30, 2009, Claimant was found to have suffered a temporary aggravation of his pre-existing carpal tunnel syndrome, due to his work activities. The undersigned further found that Claimant had suffered temporary aggravations of his pre-existing shoulder and cervical conditions. These findings were adopted in the compensation order entered on April 15, 2009, as well, where his claim for authorization for psychiatric care and treatment pursuant to the recommendation of Dr. Charles Walker was denied. Claimant now seeks a determination that he is permanently totally disabled as a result of his September 16, 2005 industrial accident.

4. Laura Bast, director of human resources for Trucks & Parts of Tampa, testified

that ceased working for the company in April 2006. This came about after two meetings which were occasioned by Claimant's alleged refusal to perform his modified duties because having someone watch him perform his duties caused him discomfort.[2] The first meeting took place on April 4, 2006. According to Bast, Claimant told her he had no physical difficulty in performing his modified duty. On April 10, 2006, Claimant again met with Bast and his supervisor, Jeremy Smith. Ms. Bast described the situation as follows:

> A….He actually returned to work, then continued to refuse to do the work, and we told him on April 10, 2006, that he could not return to work if he was going to sit all day long slumped over. *Employer/Carrier's Exhibit #3, p. 25, line 25 through p. 26, line 3.*

Claimant did not return to work after April 10, 2006.

Summary of Expert Medical Opinions

5. Dr. Cecil Aird is an orthopaedist who specializes in hand surgery. Initially, Dr. Aird served as the court-appointed EMA in 2007. Since that time, however, he has taken over Claimant's care. Dr. Aird testified that Claimant's diagnosis as of March 3, 2009 remained bilateral carpal tunnel syndrome. Claimant had undergone a nerve conduction studies by Dr. James Patterson at Dr. Aird's request on March 12, 2009. Claimant returned to Aird's office on March 17, 2009 to discuss the results of the testing done by Patterson. That testing revealed improvement in the carpal tunnel syndrome in both hands, as well as resolution of the bilateral ulnar nerve entrapment in the wrists. Claimant demonstrated grip strength within normal range; so, Dr. Aird recommended a functional capacity evaluation (FCE) to determine Claimant's work restrictions. The FCE was done on April 8, 2009 and concluded that Claimant could not return to his

[2] This appears to be a reference to the management style of Claimant's supervisor at the time. *See, Employer/Carrier's Exhibit #3, p. 27, line 20 through p. 28, line 8.*

previous employment as a mechanic, which is classified as a medium physical demand level. The FCE further indicated that Claimant is capable of returning to full-time work at the light physical demand level and lifting up to 20 lbs. occasionally.

6. On April 16, 2009, Aird placed Claimant at MMI for resolved or resolving bilateral carpal tunnel syndrome and resolved ulnar nerve entrapment of the wrist. *Joint Exhibit #2, p. 14, lines 2-4.* Dr. Aird assigned an impairment rating of 0% and opined that no further treatment was indicated "given the fact that the condition was resolving spontaneously." *Id., p. 14, lines17-18.* He adopted the work restrictions as outlined in the FCE. Dr. Aird testified that he did not treat Claimant's shoulder complaints and that the FCE was "geared toward hand function primarily". *Id., p. 15, lines 23-24.* When last seen by Dr. Aird on September 3, 2009, Claimant was still complaining of numbness in both hands. A repeat nerve conduction study was done by Dr. Patterson on October 7, 2009. The result showed a slight worsening of Claimant's in both hands, though it was still considered mild carpal tunnel syndrome. According to Dr. Aird, there was no obvious reason for the worsening.

7. Dr. Aird felt that Claimant was still at MMI despite the slight worsening of his carpal tunnel syndrome. He was not willing to change the impairment rating, either. Curiously, the doctor took the position that the rating was based on Claimant's condition on April 16, 2009, "…so whatever happened subsequently has no bearing on that assessment." In short, Dr. Aird refused to readdress Claimant's impairment rating without doing a new evaluation based on the changes that have occurred since Claimant was placed at MMI. Thus, Claimant's impairment rating as of October 7, 2009 is unknown or questionable, given the "slight deterioration since he was placed at MMI."

Id., p. 27, lines 4-5. When asked by Claimant's counsel if he felt that that Claimant has legitimate pain symptoms, Aird responded that he was not sure.

8. Dr. James Patterson specializes in physical medicine, rehabilitation and pain medicine. Dr. Patterson was authorized to perform EMG/nerve conduction studies in connection Claimant's workers' compensation claim. These were done on March 19, 2008, March 12, 2009 and October 7, 2009. Dr. Patterson confirmed that the testing done in March 2009 demonstrated an overall improvement over the results from 2008, while the October 2009 results were "[p]erhaps just slightly worse." *Employer/Carrier's Exhibit #1, p. 22, line 10.* He also testified that fluctuations routinely and naturally occur with the nerves and that the causes of such changes can be attributed to any number of factors.

9. Dr. Patterson deferred to Dr. Aird when asked about the clinical significance of the October 7, 2009 test results and causal relationship. He did not assess Claimant's work status. Still, according to Dr. Patterson, both sets of test results were in the mild range.

10. On November 9, 2009, Claimant underwent an updated IME with orthopaedic surgeon Keith Simon. Dr. Simon agrees with Drs. Aird and Patterson that Claimant still has bilateral carpal tunnel syndrome. Dr. Simon also agrees with Dr. Aird that surgery is the only treatment left for Claimant and that, without surgical intervention, Claimant is at maximum medical improvement. Simon believes that Claimant has a 12% impairment as a result of his bilateral carpal tunnel syndrome. This rating was based on Dr. Simon's exam and the multiple testing done by Dr. Patterson. When asked his opinion of the most recent test results reported by Dr. Patterson, Dr. Simon responded that he would classify Claimant's carpal tunnel syndrome as "somewhere in the mild to

moderate, but that's sort of hard to determine that precisely." *Claimant's Exhibit #1, p. 20, lines 2-4.*

11. As for work restrictions, Dr. Simon would limit Claimant to lifting no more than 15 pounds using both hands, no more than 20 pounds on an occasional basis and no repetitive lifting. In all other respects, Simon basically agreed with the findings of the FCE.

Summary of Vocational and Re-Employment Expert Opinions

12. Claimant's vocational expert, Joey Kilpatrick, testified at the final hearing. Her testimony was consistent with the findings set forth in her Vocational Evaluation Report of November 15, 2009. From her report, it is clear that Ms. Kilpatrick performed an extensive review of Claimant's medical records. Not surprisingly, she is of the opinion that Claimant possesses no transferable skills.

13. Ms. Kilpatrick places a fair amount of emphasis on Claimant's psychiatric condition. The history of this claim does not include any judicial determination that Claimant suffers from a psychiatric condition, the major contributing cause of which is the industrial accident. In fact, in the compensation order entered on April 15, 2009, the undersigned denied a claim for authorization of psychiatric care and treatment pursuant to the recommendations of psychiatrist Charles Walker. As a part of the analysis, the undersigned considered and rejected the opinions of Dr. Weller. More importantly, the undersigned specifically found there was no reliable evidence establishing the industrial accident as the major contributing cause of any alleged psychiatric condition. *See, Judge's Exhibit #2.* The opinions of the psychiatrists upon which Ms. Kilpatrick relies are not a part of the record of this proceeding; consequently,

the undersigned has no means of evaluating the accuracy of Ms. Kilpatrick's assessment of Claimant's overall psychiatric condition.

14. The undersigned finds other aspects of Ms. Kilpatrick's evaluation difficult to reconcile with the record evidence, as well. The following excerpt from page 34 of her report is significant in this regard:

> Other doctor's[sic] involved with the treatment of Mr. Moya's work-related injuries, particularly Dr. King and Dr. Imfeld, have issued physical restrictions that would prevent this IW from returning to his life-long occupation, that of an engine repair mechanic.
>
> From a vocational viewpoint, Mr. Moya is not[sic] is facing a very difficult return to work potential due to his lack of transferable skills and lack of English speaking skills. There is no doubt Mr. Moya would like to return to work. In fact, following his work-related accident, he continued to work, light duty, until April 27, 2006 when he no longer could tolerate his pain and discomfort and his employer released him as they did not have further light duty work for him. Mr. Moya continues to look for suitable gainful employment, but so far, unfortunately, he has not been successful with his searches. *Claimant's Composite Exhibit #3.*

First, the undersigned is compelled to point out that there is no evidence that either Dr. King or Dr. Imfeld has seen or evaluated Claimant since their depositions were taken in January and March 2007, more than two years prior to Dr. Aird placing him at MMI. Further, from the undersigned's January 30, 2009 compensation order, Dr. Nancy King last saw Claimant on January 10, 2006; while Dr. Imfeld treated Claimant through October 31, 2006. *See, Judge's Exhibit #1, p. 8, paragraph 8 and p. 9, paragraph 11.* These doctors' opinions are so remote in time as to be of very questionable reliability in an evaluation of Claimant's current ability to engage in at least sedentary employment within a 50-mile radius of his residence, given his physical restrictions.

15. Second, Ms. Kilpatrick maintains there is no doubt that Claimant desires to return to work and that he has continued to look for suitable gainful employment. Based on Claimant's testimony at the final hearing, the undersigned has considerable doubt as to his desire to return to work. Claimant was asked more than once if he would accept work within his restrictions. Each time, he responded that he would try to do the job but suggested that he would not be successful because of his "condition".

16. Third, Ms. Kilpatrick states that Claimant worked light duty until April 27, 2006, "when he no longer could tolerate his pain and discomfort and his employer released him as they did not have further light duty work for him." This statement is somewhat at odds with the undersigned's findings in her January 30, 2009 order, addressing Employer/Carrier's defense of voluntary limitation of income in response to a claim for temporary indemnity benefits. That order acknowledged the discrepancy between Claimant's testimony at the final hearing and Ms. Bast's deposition testimony. The undersigned found the facts established that, for whatever reason, Claimant refused to perform the light duty work assigned to him. This refusal led to his termination. *See, Judge's Exhibit #1, p. 18, paragraph 29.*

17. Fourth, Ms. Kilpatrick's report refers to Claimant's continued search for suitable gainful employment. This statement is simply not supported by the record evidence. Rather, Claimant's job searches have concentrated almost exclusively on jobs which are outside of his assigned work restrictions. In fact, Ms. Kilpatrick acknowledged this at the final hearing. She went so far as to state that Claimant has applied for jobs which were outside of his restrictions but which, in his mind, he was capable of doing. Claimant's testimony confirmed this, as well. When questioned about the wisdom of applying for jobs which his restrictions clearly prohibited him from performing, Claimant

would answer simply that he had a family to support. Claimant filed what he presumably asserts is evidence of a good faith job search. *See, Claimant's Composite Exhibit #2.* At least four pages of the composite are illegible. Of those pages which are legible, it appears that from November 9, 2006 through August 3, 2009, Claimant made application for three jobs per week. Of these, at least 143 were mechanics' positions and outside of his assigned restrictions. The undersigned declines to accept this as evidence of a good faith job search.

18. Ms. Kilpatrick concluded that Claimant would not be a very good candidate for retraining. In support of this conclusion, she points to his three-year-long attendance at ESL[3] taught by Claimant's wife. Based largely upon conversations with Mrs. Moya, Ms. Kilpatrick concluded that Claimant has made a dedicated but unsuccessful effort to learn any English. Ultimately, given Claimant's physical limitations, his psychiatric condition, age, education, past relevant work history and inability to speak English, Ms. Kilpatrick is of the opinion that Claimant would not be competitive in an open labor market. She also believes that are no jobs within there are no jobs within a 50-mile radius of Claimant's home that he would be able to perform.

19. Employer/Carrier engaged Robynanne Cash-Howard, rehabilitation counselor/vocational consultant, to perform a re-employment assessment. Ms. Cash-Howard met with Claimant on November 4, 2009, after reviewing substantial medical records. Contrary to Ms. Kilpatrick's representations regarding Claimant's facility with the English language, Ms. Cash-Howard testified that she communicated directly with Claimant and that they spoke English for approximately 75% of the interview, resorting to using an interpreter only when necessary. Ms. Cash-Howard's report states that

[3] This acronym stands for "English as a second language".

Claimant told her he is able to read and write in Spanish, can speak English fairly well but cannot read or write in English. He has the equivalent of a high school education and one semester of college. He took his Citizenship test in English, having passed it the first time.

20. Claimant's ability to communicate in English is critical to his vocational prospects. The glaring inconsistency between Ms. Kilpatrick's description of Claimant's English language skills and that of Ms. Cash-Howard cannot be ignored or explained. Like Ms. Kilpatrick, at the final hearing Ms. Cash-Howard stood by the findings in her November 5, 2009 report.

21. Ms. Cash-Howard stated that Claimant "is motivated to return to work for financial reasons associated with providing for his growing family". She performed a transferable skills analysis and identified a number of jobs that fall within the sedentary and light restrictions category which are available in the local labor market within a 50-mile radius of Claimant's residence. *See, Employer/Carrier's Exhibit #2, pp. 9-10.* This is yet another point on which the two vocational experts do not agree, as Ms. Kirkpatrick maintains that Claimant has no transferable skills. Ms. Cash-Howard's report states:

> Mr. Moya may benefits from the services of a Certified Rehabilitation Counselor for placement assistance, in that they would be able to not only identify area employers with occupations within his abilities, but also that of other service providers in that area that could assist both with language services and with vocational issues. It was apparent through interview, that Mr. Moya did not know of available vocational assistance programs, nor did he have a firm grasp on other types of vocations he might engage within his restrictions. This is due to his limited vocational experiences, as he has always worked as a mechanic. *Id., p. 11.*

At the final hearing, Ms. Cash-Howard acknowledged that the current economy is negatively impacting job placement efforts; however, she testified that she referred

Claimant to Polk Works, a job placement and matching service, even going so far as to give him directions on how to get there. She was unable to state whether Claimant followed up on this referral.

Entitlement to Permanent Total and Permanent Total Supplemental Benefits

22. Section 440.15(1)(b), Fla. Stat. (2005) sets forth the criteria for determining an injured worker's entitlement to permanent total disability benefits. Claimant cannot show that his mild to moderate bilateral carpal tunnel qualifies as a condition which is presumed to render him permanently and totally disabled under (b) 1. through 5. The statute goes on to state:

> In all other cases, in order to obtain permanent total disability benefits, the employee must establish that he or she is not able to engage in at least sedentary employment, within a 50-mile radius of the employee's residence, due to his or her physical limitations…Only claimants with catastrophic injuries or claimants who are incapable of engaging in employment, as described in this paragraph, are eligible for permanent total benefits. In no other case may permanent total disability be awarded. *§440.15(1)(b), Fla. Stat. (2005).*

23. As stated herein, Claimant does not have a catastrophic injury. The record establishes that Claimant suffers from mild to moderate bilateral carpal tunnel syndrome. Both Dr. Aird and Dr. Simon agree that Claimant is at MMI, without surgical intervention. The FCE indicates that Claimant is capable of returning to full-time work at the light physical demand level and lifting up to 20 lbs. occasionally. Dr. Simon acknowledged that his opinion differs only slightly from the findings set forth in the FCE, this pertaining to the maximum lifting restrictions. Dr. Patterson deferred to Dr. Aird on the issue of restrictions, as Patterson testified that he did not address Claimant's work status. Dr. Aird adopted the findings set forth in the FCE. Thus, from a medical standpoint, Claimant's physical limitations do not prohibit him from engaging in at least

sedentary employment within a 50-mile radius of his residence.

24. Turning, now, to the opinions of the two vocational experts, the undersigned accepts the opinions of Ms. Cash-Howard over those of Ms. Kilpatrick. The undersigned finds Ms. Cash-Howard's opinions are based upon findings and observations which are consistent with the record evidence. The same cannot be said of Ms. Kilpatrick's findings. As previously stated, the undersigned rejects Claimant's job search composite as evidence of a good faith job search. Thus, from a vocational standpoint, the undersigned finds there are jobs within a 50-mile radius of Claimant's residence which fall within Claimant's restrictions and which he is capable of performing. For these reasons, the claim for permanent total disability and permanent total supplemental benefits from April 16, 2009 must be denied.

CONCLUSIONS OF LAW

25. In light of the foregoing, the claim for permanent total disability and permanent total supplemental benefits from April 16, 2009 is denied.

26. The claim for penalties and interest is denied.

27. The claim for an attorney's fee and taxable costs is denied.

28. Employer/Carrier are entitled to costs pursuant to §440.34, Fla. Stat. (2008). The undersigned reserves jurisdiction as to the amount of taxable costs due in the event the parties are unable to reach agreement.

Done and ordered in Tampa, Hillsborough County, Florida.

Doris E. Jenkins
Judge of Compensation Claims

I HEREBY CERTIFY that a true and correct copy has been sent via electronic mail to the counsel of record on December 17, 2009

Digitally signed by Carmen Anrecio
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