

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

Pat Christiansen,)	
Employee/Claimant,)	OJCC Case No. 11-029315DBB
)	
vs.)	Accident date: 10/14/2011
)	
NPC International, Inc./Gallagher Bassett)	Judge: Diane B. Beck
Services,)	
Employer/ Carrier/ Servicing Agent.)	
_____)	

FINAL COMPENSATION ORDER

This cause was heard before the undersigned Judge of Compensation Claims at Sarasota, Manatee County, Florida on December 17, 2012 upon the petitions for benefits filed on May 1, 2012 and July 26, 2012 ¹. Mediation occurred on August 14, 2012, and the parties' Uniform Statewide Pretrial Stipulation was filed on August 27, 2012. Alex Lancaster, Esquire was present on behalf of the claimant. Jonathan Cooley, Esquire was present on behalf of the employer/carrier (E/C).

OVERVIEW

Claimant Pat Christiansen was injured in a compensable injury on October 14, 2011. He seeks authorization of surgery, continuing authorization of his doctor, and temporary indemnity benefits. E/C defends on various grounds, including major contributing cause (MCC). For the reasons set forth below, I am finding in favor of claimant on the medical issues and E/C on the indemnity issues.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I have considered the candor and demeanor of the witness who testified before me and I have resolved all conflict in the testimony and evidence. Upon review of the evidence and applicable law, I

¹ A more detailed list of the parties' pretrial stipulations, claims and defenses, and my evidence log can be found at appendices 1, 2, and 3 at the end of this order.

make the following findings of fact and conclusions of law:

1. I have jurisdiction over the subject matter and parties, and venue is proper in Sarasota, Manatee County, Florida.

2. Any and all issues raised by way of the petition or petitions for benefits which are 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 claimant and therefore are denied. *See, Betancourt v. Sears Roebuck & Co.*, 693 So.2d 253 (Fla. 1st DCA 1997).

3. Claimant alleged an earlier workers' compensation injury with a different E/C on April 27, 2010 and his deposition was taken in connection with that case and received in evidence herein. On the April 27, 2010 accident date claimant was employed as a courier/delivery driver and testified that he hit his head on a fan mounted in the truck window, after which he began having problems with his back and right arm. He did not miss time from work between this accident and when he was released on May 10, 2010. Claimant testified at the deposition that he had severe pain in the right side of the middle of his back and upper back, that he experienced a lot of pain in his right elbow, down the back side of his right forearm and into his right hand, and a lot of pain in his hand and a lot of weakness which continued to the time of the deposition. He also testified that he has more of a stiffness than pain in his neck, but it's always there.

4. Claimant treated on his own with a chiropractor on two occasions for the April 27, 2010 injury. X-rays were taken and the chiropractor told claimant he thought the pain was due to a neck injury at C5 and C6, and that this was causing the pain and weakness in claimant's hand and right arm. At the time of his September 2010 deposition claimant said his biggest problem was he can't grip tightly on things and has trouble doing small things with his fingers. The court computer file reflects that claims were filed for the 2010 date of accident and that the case settled for a lump sum of money.

5. Claimant also related a prior workers' compensation injury while working for a different

employer in 2008. That accident occurred when he put his right hand up to try to avoid a heavy falling box. He injured his right shoulder in that accident. He underwent surgery for a torn rotator cuff in May 2009 and treated for six months thereafter. He was given 2 percent impairment but did not think he was assessed permanent restrictions. This claim was also settled for a lump sum of money.

6. Claimant also had a non work related rear-end motor vehicle accident in 1998 or 1999 and suffered a neck injury. He treated at a walk-in clinic, had x-rays, and underwent about three months of therapy. He said he was told he had some damage at the C3 and C4 vertebrae. He denied further problems after his release from treatment. Claimant indicated he received a small money settlement through auto insurance.

7. Claimant testified that he suffered the current work injury at issue herein on October 14, 2011 when he was moving boxes in a freezer and fell backwards, hitting his head on a shelf and twisting awkwardly. He said he felt immediate sharp pain in his neck and down his back that got progressively worse. He said he also later began having difficulty grasping with his right hand.

8. Claimant testified that he can do all the work activities he could do before his accident but he has to make adjustments so as not to drop things with his right hand. He has concurrent employment and said that he has continued to work for both employers at the same rate of pay. He wants to undergo surgery recommended by his authorized treating physician Dr. Ly.

9. Dr. Ly testified that he first saw claimant on January 3, 2012 for an evaluation of neck pain and right arm pain and numbness and tingling sensation. Dr. Ly testified that claimant's examination revealed decreased light touch and pin prick sensation to the right long and small finger. X-rays showed significant degenerative disc disease and disc osteophytes complex at C5-6 and C6-7, and MRI showed significant degenerative disc disease at C5-6 and C6-7 with moderate to severe right foraminal stenosis at C5-6 and C6-7.

10. Dr. Ly agreed the degenerative arthritis and foraminal stenosis was consistent with

claimant's age. Dr. Ly's diagnosis was spinal stenosis and degenerative disc disease at C5-6, C6-7, and right arm radiculopathy. He recommended claimant continue with conservative treatment with physical therapy, anti-inflammatory medications, strengthening exercises, and limited narcotic pain medicine use. Dr. Ly agreed that the treatment he recommended and undertook was as a result of the accident and the sequelae of the October 14, 2011 accident per claimant's description and his examination findings.

11. When first seen Dr. Ly put claimant on restrictions of light duty, no lifting greater than 10 pounds, and on March 5, 2012 he put him on light duty no lifting greater than 20 pounds. Dr. Ly recommended that if conservative treatment fails the next step would be surgical intervention, and claimant wished to proceed with that surgery. When asked about the MCC of the need for surgery, Dr. Ly said that claimant could completely not have the work injury and still have the same degenerative disc diseases at C5-6 and C6-7.

12. Dr. Ly testified that claimant related to him that he was involved in a motor vehicle accident twelve years ago where he had some moderate neck pain and had physical therapy and epidural injections which made the pain go away, and that he did not have any significant pain until October 2011. Dr. Ly then received documentation from E/C's counsel that claimant was involved in another work injury in 2010 with the same symptomatology. According to Dr. Ly, the MCC of the need for claimant's surgery is his symptomatology of spinal stenosis at C5-6 and C6-7 with right arm radiculopathy, but that in looking at the note from 2010, the October 14, 2011 accident and sequelae would not be the MCC.

13. Dr. Ly agreed that the MCC of the need for the surgery is a result of the two workers' compensation injuries combined with the preexisting degenerative stenosis which is consistent with claimant's age. Dr. Ly said that the accident from 2011 definitely exacerbated claimant's spinal stenosis and did aggravate his spinal stenosis, which would indicate there would be a need for surgery. Before that surgery wasn't needed because claimant's complaints weren't there.

14. Claimant underwent an E/C independent medical examination (IME) with Dr. Mark

Lonstein on June 15, 2012. Dr. Lonstein reviewed claimant's cervical MRI and said it showed degenerative changes throughout the cervical spine, worse at C5-6 and C6-7 where there is moderate disc space narrowing; no acute fracture; desiccation or drying out of the discs throughout the cervical spine, which is degenerative change; mild biforaminal narrowing at C2-3; moderate right and severe left foraminal narrowing at C3-4; moderate to severe right foraminal narrowing stenosis at C4-5 and mild left foraminal stenosis at C5-6; severe right foraminal stenosis moderate to severe left foraminal stenosis at C6-7; severe right foraminal stenosis moderate to severe left foraminal stenosis at C7-T1; moderate right and mild left foraminal narrowing.

15. After history and examination, Dr. Lonstein's impression was cervical spondylitic radiculopathy. He indicated options would be getting along with the symptoms versus anterior cervical discectomy and fusion. He opined the MCC for future care including surgery would be the preexisting degenerative changes rather than the on the job injury of October 14, 2011. Dr. Lonstein said claimant was at maximum medical improvement (MMI) from the October 14, 2011 injury, could work with a 20 pound lifting limit, and had no permanent partial impairment related to the October 14, 2011 injury.

16. On cross-examination Dr. Lonstein testified claimant has 6 percent impairment from his degenerative changes before the October 14, 2011 accident and that remains the same. He said claimant had a progression of his degenerative situation, and the accident was nothing more than a soft tissue strain. He indicated claimant has developed some radicular symptoms from the severe degenerative changes/severe foraminal narrowing. He believed that even without the accident claimant could have the restrictions he gave him.

17. Based upon the foregoing, I find that claimant has established that the major contributing cause of the need for the surgery recommended by Dr. Ly is the October 14, 2011 industrial accident. While it is clear that claimant's has a preexisting condition, and Dr. Ly could not attribute the condition to a specific accident, Dr. Ly also explained that claimant needs surgery due to his symptomatology, that

claimant's current work accident exacerbated and aggravated his condition, and that there was no need for surgery prior to the current work accident. I accept Dr. Ly's opinion over Dr. Lonstein's as more persuasive and in accord with the other facts; Dr. Ly also saw claimant an additional time.

18. Alternatively, Dr. Ly also found the need for surgery to be a combination of claimant's preexisting degeneration, which he deemed age appropriate, and his two work accidents. As such it would be error to apply a MCC analysis if all contributing causes are occupational. There is no medical evidence that claimant's motor vehicle accident resulted in any lasting effects or continuing need for treatment. *See, Byszynski v. United Parcel Services, Inc.*, 53 So.2d 328 (Fla. 1st DCA 2010); *Tutor Time Child Care/Learning Centers v. Patterson*, 37 Fla. L. Weekly D1580 (Fla. 1st DCA July 3, 2012).

19. E/C's claim for apportionment of the surgery should be denied as Dr. Lonstein's opinion was not accepted and Dr. Ly did not provide any percentages related to any preexisting condition.

20. Because I accept Dr. Ly's opinion, I find that claimant is not at MMI. However, no doctor has taken claimant off work since the industrial accident, and so the claim for temporary total disability (TTD) benefits should be denied.

21. Claimant does have work restrictions per Dr. Ly. Claimant did not file DWC-19 forms showing his earnings, nor was there evidence that he was provided the forms by E/C. However, claimant testified that he is able to perform the work duties for both his job with employer herein and with his concurrent employer, provided he makes adjustments for his right grip problems. Therefore, in addition to not establishing that he had any loss of earnings, he has not established that any loss in earnings is related to his work injury.

22. A prior merits proceeding was scheduled in this matter to address various issues, including correction of the average weekly wage (AWW) and compensation rate (CR). A hearing was begun on June 28, 2012 and I have listened to the recording of that hearing. The parties agreed at that time that claimant's base AWW was \$129.99, and further agreed that \$231.56 in concurrent wages should

be added to this amount, resulting in a total of \$361.55. E/C indicated (as did claimant's Trial Memorandum) that a Notice of Action/Change was issued amending the AWW to the agreed amount. The claimant was consulted and he agreed that he received a check paying him additional money to account for this adjustment. Claimant's counsel indicated claimant was paid indemnity benefits when off work and that the claim for temporary indemnity benefits was resolved, with the parties agreeing to handle whether claimant's past benefits were properly adjusted administratively.

23. Therefore, claimant's claims for temporary partial disability (TPD) benefits from the date of accident to the present and continuing at the correct AWW/CR should be denied, as they were previously resolved through the June 28, 2012 date of hearing, and claimant has not established any loss of earnings subsequent to that date. Because no indemnity benefits are awarded, the claim for penalties and interest should also be denied.

24. Counsel for claimant is entitled to an attorney's fee and taxable costs related to securing the medical benefits at E/C expense pursuant to section 440.34(3)(b), Fla. Stat. (2011) and jurisdiction should be retained to address the amount. Jurisdiction should also be retained to determine E/C's entitlement to and amount of any costs due for prevailing on the indemnity issue.

WHEREFORE, based upon the forgoing, it is **ORDERED AND ADJUDGED**:

A. E/C shall continue to authorize Dr. Ly and authorize and provide the recommended surgery.

B. E/C's claim for apportionment of the cost of surgery is denied.

C. The claims for TTD/TPD benefits from the date of accident to the present and continuing at the correct AWW/CR, along with penalties and interest, are denied.

D. E/C shall pay claimant's counsel an attorney's fee and taxable costs related to securing the medical benefits and jurisdiction is retained to address the amount.

E. Jurisdiction is retained to determine E/C's entitlement to and amount of any costs due for

prevailing on the indemnity issue.

DONE AND EMAILED this 21st day of December, 2012, in Sarasota, Manatee County, Florida.



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Appendix 1: The Parties' Pretrial Stipulations

Contained within the parties' written pretrial stipulations and/or orally on the record at the final hearing, the parties entered into the following stipulations which I accepted and adopted as findings of fact:

- a. The date of accident is October 14, 2011 and Sarasota, Manatee County, Florida is the proper venue.
- b. There was an employer/employee relationship on the date of accident, and employer had workers' compensation insurance coverage in effect.

- c. E/C accepted claimant's accident and injuries as compensable.
- d. The claimant gave timely notice of the accident and the parties received timely notice of the final hearing.
- e. I have jurisdiction over the parties and subject matter of this claim.
- f. Claimant's base AWW is \$129.99 and his concurrent wages are \$231.56 resulting in a total of \$361.55; the parties agree to resolve administratively the issue of whether the tips are included in the total as per the wage statement.
- g. Dr. Ly has been authorized for claimant.

Appendix 2: Claims and Defenses

Claimant seeks: surgery per Dr. Ly; TTD/TPD from the date of accident to the present and continuing at the current AWW/CR; authorization for continued care with Dr. Ly; and penalties, interest, costs, and attorney's fees.

The E/C defends on the basis that: industrial accident not the MCC of need for surgery recommended by Dr. Ly; all indemnity paid at correct rate; E/C seeks apportionment if cervical surgery is awarded; E/C seeks costs; claimant is at MMI; AWW correct; industrial accident is not the MCC of claimant's alleged disability, loss of earnings, or earning capacity; failure to return DWC 19s; and no penalties, interest, costs, or attorney's fees due.

Appendix 3: Evidence and Witness Log

Judge's Exhibits

Exhibit 1: Uniform Statewide Pretrial Stipulation as amended at the beginning of the final hearing and E/C's Amendment to Pretrial Stipulation filed November 15, 2012.

Exhibit 2: Claimant's Trial Memorandum for argument only.

Exhibit 3: E/C's Hearing Information Sheet for argument only.

Claimant's Exhibit

Exhibit 1: Deposition of Tan Ly, D.O. taken on September 18, 2012.

E/C's Exhibits

Exhibit 1: Deposition of Pat Christiansen taken on September 2, 2010.

Exhibit 2: Deposition of Mark Lonstein, M.D. taken on August 9, 2012.

I took judicial notice of the appropriate pleadings in the court computer file and the record of proceedings on June 28, 2012.

Pat Christiansen appeared and testified at the hearing. Counsel for the parties presented oral argument and submitted written Trial Memorandum/Hearing Information Sheet.