

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGES OF COMPENSATION CLAIMS
FT. MYERS DISTRICT OFFICE**

Theresa Clark,)	
)	
Employee/Claimant,)	
)	
vs.)	OJCC Case No. 08-16672 EDS
)	
Southeast Personnel Leasing,)	Date of Accident: 04/18/2008
(DHL USA, Inc.))	
)	
Employer,)	
)	
and)	
)	
Packard Claims Administration, Inc.)	
)	
)	
Carrier/Servicing Agent.)	
_____)	

FINAL COMPENSATION ORDER

THIS CAUSE was heard by the undersigned in Fort Myers, Lee County, Florida on, January 16, 2009 upon Claimant's claims for the worker's compensation benefits contained in the Petitions for Benefits docketed on June 20, 2008, July 29, 2008, and September 22, 2008. The Employee was present at the hearing and was represented by her attorney, Joseph North, Esquire. The Employer/Carrier was represented by Jonathon Cooley, Esquire.

On October 14, 2008 the parties attended a mediation conference and entered into pre-trial stipulations. Those stipulations are accepted and approved and all factual matters agreed to therein are declared to be facts of this claim. The claims specifically remaining for final hearing were:

1. Temporary total/partial disability benefits from date of accident to date and continuing.
2. Determination that average weekly wage is \$490.00/ week.
3. Authorization of cervical disk replacement or cervical fusion surgery, recommended by Dr. Lin.
4. Penalties, interest, costs and attorneys fees.

These matters were defended by the Employer/Carrier on these arguments:

1. The industrial accident is not the major contributing cause of the need for treatment.
2. The recommended surgery is not reasonable or medically necessary.
3. The requested average weekly wage is excessive.
4. Temporary total and/or temporary partial disability benefits are not due or owing.
5. The industrial accident is not the major contributing cause of claimant's inability to earn.
6. If benefits are deemed due, the Employer/Carrier is entitled to apportionment.
7. Penalties, interest, costs and attorneys fees not due or payable.

The Employee specifically sought to avoid the apportionment defense by indicating that the defense had not been specifically plead and that the evidence would not support apportionment.

Prior to the start of the Merit Hearing, the pre-filed documents and exhibits were cataloged and marked for purposes of admittance as evidence. A complete listing of all admitted documents and exhibits were recited into the record of the hearing. In making my findings of fact and conclusions of law regarding these claims and defenses, I have carefully considered and weighed all the evidence presented to me. I have resolved all conflicts in the testimony presented to me. Although I may not reference each specific piece of evidence submitted by the parties, I carefully considered all the evidence and exhibits in making my findings of fact and rendering my conclusions of law.

Based upon the testimony contained in the depositions, testimony of witnesses, stipulations, and exhibits and after careful consideration of the arguments of counsel, I make the following findings of fact:

1. There is no question but that the Claimant, Theresa Clark, was injured by accident arising out of and occurring in the course of her employment on April 18, 2008 when she injured her left upper extremity/elbow and neck while lifting boxes. Following the injury Claimant has not returned to work. Claimant is 37 years old and had worked for DHL for only a few weeks before the accident. She had a motor vehicle accident in 2002 which resulted in neck and back pain for which she treated for less than a year, but contended had been resolved. She denied any symptoms or medical care for these injuries in the recent years before the accident in question. However, she admitted receiving oxycodone at some point in the two years preceding the industrial accident through her personal physician Dr. Aliose for her "back" complaints. In the 4 to 5 years before her

employment with DHL she had been employed in clerical positions in physicians' offices. Claimant described the incident in question as a specific accident which occurred when she lifted a heavy box and described a popping sensation followed by pain in her neck. Previously to that incident, in the week to week and a half leading up to that accident, she described having tingling sensations and reported numbness in her left elbow.

2. The Employer/Carrier provided medical care and evaluations for Claimant's complaints to her neck and left elbow. She was evaluated and treated by Dr. Bernstein at Lee Convenient Care on April 22 and April 29, 2008 and was diagnosed with cervical strain and left lateral epicondylitis. Dr. Bernstein provided work restrictions. He referred Claimant for further consultation with an orthopedist for her elbow complaints, and she was evaluated by Dr. John White, M.D. Dr. White, in turn recommended that a neurosurgeon should evaluate the cervical complaint. The records in evidence support a conclusion that Dr. White eventually determined the elbow injury was not significant and was not likely related to the work environment or accident.
3. The Claimant saw Dr. Lin, a neurosurgeon, on June 11, 2008. He referred her for a course of physical therapy which was not successfully completed. She remained physically restricted to lifting less than 10 pounds. Dr. Lin ordered additional diagnostics including an MRI with contrast, due to the earlier MRI being of questionable quality. The conclusions of the radiologist reading the MRI completed on June 19, 2008 suggested that Claimant had arthritic changes at several levels of her cervical spine, with some encroachment of the thecal sac at those levels. However, the specific findings of the report indicated that at the C5-6 level the encroachment was to the left side of the sac and to some extent the left lateral recess. No encroachment on the cord was noted.
4. When Claimant was next evaluated on July 2, 2008, Dr. Lin noted he interpreted the MRI from June 19, 2008 as indicative of a "broad based disk herniation at C5-6 eccentric to the left with left foraminal narrowing." He diagnosed a C6 radiculopathy with a disk osteophyte complex pushing on the nerve. He noted she had failed conservative care and Claimant declined a pain management referral. He suggested a C5-6 disk replacement, with a view toward decompression of the left C6 nerve root. However, he noted that the symptoms being expressed by Claimant were "less than classic" radicular symptoms and he expressed some doubt that such a procedure would produce a successful (pain reducing) result. As an alternative recommendation he suggested a more classic cervical

fusion if the disk replacement was not authorized. At this juncture, Dr. Lin totally restricted Claimant from work pending approval of the surgical recommendations. While the E/C reviewed the requested surgical options, Dr. Lin continued to monitor Claimant and had office conferences with her on several more occasions, July 30, 2008, August 27, 2008, and September 10, 2008. In the note from September 10, 2008, Dr. Lin noted Claimant no longer wanted to consider the fusion option but remained interested in the disk replacement. On September 16, 2008 the surgery remained unauthorized, and in a DWC-25 filed with the E/C, Dr. Lin indicated he was placing Claimant at MMI from his perspective but not overall MMI. He recommended a referral to pain management and a return to work at light duty status. The E/C authorized a referral to Dr Preudhome for pain management. The evidence implied that E/C continued to provide conservative pain management care through the date of the hearing.

5. The E/C sent Claimant for an evaluation with neurosurgeon Dr. Jack E. Maniscalco in Tampa, FL. on August 25, 2008 for an IME. Dr. Maniscalco also provided a records review and was provided with all pertinent medical records of treatment and diagnostics provided for Claimant up to that date. Dr. Maniscalco opined that Claimant was not evidencing radicular symptoms, and interpreted the June 19, 2008 MRI as indicating an insignificant neurological compression, and minimal narrowing of the spinal canal. He stated the C5-6 disk did not comport with a true herniation, but was a bulging disk. His diagnosis was cervical spondylosis (arthritis) with neck pain secondary to exacerbation from the industrial accident, and left elbow pain of unknown etiology. He did not recommend approval of the surgery because the likelihood of recovery in light of the mild physical findings was unlikely.
6. During her testimony at the hearing, Claimant noted that her job with DHL was as a delivery driver which required her to lift and carry packages and boxes, some of which were heavy, on a daily basis. She provided testimony and documentation that she earned \$490.00 during the week preceding the accident and that her best recollection was that was her regular weekly pay. Following the accident she had never been fully released to return to work and had not worked since the accident. She had not received any disability payments since the accident, but the E/C was providing medical care. She desired to have the neck surgery Dr. Lin recommended as she believed it would relieve her pain, which she described as constant and never less than 4 out of 10, and allow her to return to work. The inference from her testimony is that she had no contact with the employer since the accident, and had never been advised to return to work, or look for work.

Based on the foregoing summary of the evidence, the undersigned makes the following findings of material facts, and conclusions of law:

7. The Claimant sustained an accidental compensable injury to her neck on April 18, 2008, which has resulted in a need for medical care which has been provided, except for the recommended surgery; and, a temporary disability for which no benefits have been provided. The E/C defended the lack of payment of indemnity by arguing that the accident is not the major contributing cause of the disability. In doing so, the E/C is ignoring the consequences of the injuries which have been accepted as compensable for provision of medical care, and seems to be in an inconsistent position in the application of the provisions of § 440.09(1) F.S. This argument is also inconsistent with the intent of the worker's compensation system as stated in Section 440.015, F.S., 2003. The E/C has clearly accepted the injuries as compensable and has provided conservative medical care up to the date of the hearing to treat the manifestations of those injuries, including the pain complaints. None of the specialists evaluating or treating the neck injury have stated that Claimant did not actually sustain an injury in the incident on April 18, 2008. Several degrees of injury have been noted. There is objective medical evidence that indicates some abnormality exists at C5-6 in the form of either a bulge or herniation of the disk at that level. The compensable injuries clearly have resulted in imposition of temporary limitations and restrictions that would have prevented Claimant from performing her usual and customary duties as a driver with DHL. There is no evidence DHL attempted to accommodate those restrictions or otherwise had work available consistent with the restrictions imposed. The restrictions are consistent with temporary partial disability from April 18, 2008 until July 2, 2008. Thereafter, the restrictions in place were consistent with temporary total disability until September 10, 2008. Claimant is not at overall MMI and following September 10, 2008 has been returned to temporary limitations and restrictions once again which were still in place on the date of the hearing.
8. The Claimant presented evidence that her earnings during the pay period preceding the injury date were \$490.00 for a regular week. The hours worked during that period were 40 regular hours and 20 overtime hours. The pay was based on a commission. Claimant testified that to the best of her ability to recall she was to receive \$490.00 every week. The E/C did not offer any evidence to counter this assertion, but merely argued that the total gross wages paid to date (\$1292.50) was not evenly divisible by \$490.00 indicating that could not possibly be the correct weekly wage (in fact it divides 2.6 times). This is

not inconsistent with the testimony that Claimant had worked for DHL for a few weeks before the accident.. The Claimant's testimony and evidence far outweighs the complete lack of testimony and evidence produced on this point by E/C and the undersigned concludes the evidence supports a finding that the AWW is \$490.00 per week. (This results in a compensation rate of \$326.68 and an 80/80 rate of \$313.60).

9. The primary issue for determination is whether the surgery recommendation of Dr. Lin is reasonable or medically necessary. The parties specifically stipulated that the undersigned should make this determination from the medical evidence in the record as presented, and avoid appointing an EMA despite the apparent conflict between Dr. Lin and Dr. Maniscalco regarding this issue. In fact, the conflict may be more apparent than real. Dr. Maniscalco noted that the most obvious objective finding in the diagnostic testing was evidence of cervical spondylosis at several levels and was adamant that these findings were not caused by the accident. There is no evidence that Dr. Lin disagreed with that conclusion. However, both physicians noted that at C5-6 the disk was abnormal. Dr. Lin stated the disk was herniated based on the June 19, 2008 MRI report and his own interpretation included a nerve encroachment. The interpretation of that same MRI by the reading radiologist did not suggest cord encroachment. Dr. Maniscalco described that finding as a bulge with no displacement. Both physicians described that finding to be a mild neurological finding. Both physicians noted that the complaints attributed to the Claimant were an atypical neurological presentation. Dr. Lin's conclusion was that the elbow complaints and neck complaints were disconnected from each other; whereas typical radicular symptoms would have been continuously connected from the neck through the elbow into the hand. However, despite that observation, Dr. Lin concluded that the elbow pain was possibly connected to the cervical presentation because there was no other explanation for the elbow pain as described by the Claimant. Dr. Lin's opinion on this point was not couched in reasonable medical certainty, but was based on ruling out any other apparent cause. He admitted to observing this presentation on only a very limited number of persons previously. His recommendation for the disk arthroplasty at C5-6 was for the purpose of alleviating Claimant's elbow pain. The undersigned finds this conclusion to be a leap beyond the actual objective medical evidence and in this instance accepts the conclusions from Dr. Maniscalco that Claimant's atypical presentation, lack of radicular pain and her symptoms and complaints were more consistent with an exacerbation of the abnormality in her neck and is inconsistent with a surgical intervention. Dr. Maniscalco's opinions are couched in more certain terms and are more consistent with the objective medical evidence presented in

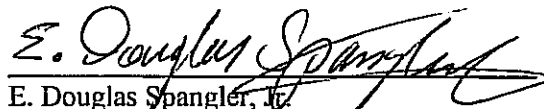
the June 19, 2008 MRI. Both surgeons agreed that it was very problematic that a disk arthroplasty would lead to alleviation of Claimant's symptoms. The recommended surgery is therefore not reasonable or medically necessary to treat Claimant's injuries sustained in the industrial accident.

10. The E/C have requested an apportionment of benefits. The E/C has an affirmative burden of establishing, by evidence, the elements that would allow apportioning the medical and disability benefits resulting from this industrial accident. The current wording of §440.15 (5)(b). F.S. indicates that compensable disability and medical care may exclude the degree of disability or medical conditions that existed when the accident occurred. The E/C is basing its apportionment claim on the testimony of Dr. Lin that he provided as to major contributing cause when he stated that the industrial accident was 51% responsible for his current recommendation for medical care. It was, however, necessary for the E/C to establish the degree of disability or medical conditions that existed at the time of the accident before the degree of apportionment can be determined. The E/C presented no evidence on this point and therefore has not met its burden in this regard.

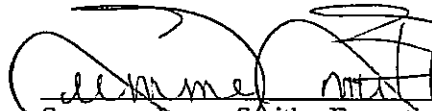
Wherefore, on the basis of the foregoing it is ORDERED and ADJUDGED:

1. The Employer/Carrier shall pay Claimant temporary partial disability benefits based on an average weekly wage of \$490.00/week from the date of accident until June 11, 2008, and again from the date of September 11, 2008 until the date of this Order and continuing until Claimant reaches maximum medical improvement. The Employer/Carrier shall also pay the Claimant temporary total disability benefits from June 12, 2008 through and including September 10, 2008 based on the average weekly wage of \$490.00/week.
2. Penalties and interest shall be paid on all past due benefits awarded in the preceding paragraph.
3. The Claimant's request for surgery as recommended by Dr. Lin, neurosurgeon, is denied.
4. The Employer/Carrier's claim for apportionment is denied.
5. The Claimant's attorney is entitled to a reasonable attorney's fee and costs in connection with the benefits awarded in this Order, and jurisdiction is reserved to allow determination of the amounts.

DONE AND ENTERED in the Chambers of Fort Myers, Lee County, Florida.


E. Douglas Spangler, Jr.
Judge of Compensation Claims

I certify that a true copy of the foregoing Order was served by mail on all parties and counsel this 27th day of June, 2009.


Summer Lynn Smith, Executive Secretary for
Judge E. Douglas Spangler, Jr.

