

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

Roberto Jimenez,  
Employee/Claimant,

OJCC Case No. 08-025523ERA

vs.

Accident date: 7/23/2008

FrankCrum, Inc., FrankCrum, Inc., Crum  
Services/Broadspire, and Broadspire,  
Employer/Carrier/Service Agent.

Judge: Edward Almeyda

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**FINAL COMPENSATION ORDER**

This matter came before me, the undersigned Judge of Compensation Claims, for a Merits Hearing held on October 16, 2014. The hearing commenced at 1:30 pm. The Claimant was represented by Martha Fornaris, Esquire, and the Employer/Carrier by Kate E. Albin, Esquire.

The adjudicated Petitions for benefits are dated 3/12/2013 and 1/07/2014, and in addition the Claimant filed a new petition on 10/16/14 at 9:22 am seeking benefits which are dovetailed with the existing issues. With the agreement of both parties, this petition will be adjudicated herein, in spite of the fact that it has not been mediated. A petition filed on 10/16/14 at 2:46 pm is not considered herein. On the evidence presented, this Order ensues.

**CLAIMS/DEFENSES:**

Claims:

1. Compensability of the Claimant's positive ulnar radiance/ulnar wrist pain.
2. Authorization of conservative treatment recommended by Dr. Easterling for ulnar wrist pain. Dr. Easterling recommended bracing, anti-inflammatory, activity modification, and cortisone injections.
3. Authorization for continued treatment with a PCP for Claimant's back injury.

4. Compensability of the Claimant's current back condition.
5. Penalties, interest, costs and attorney's fees.
6. MRI of the low back per Dr. Naranjo.

Defenses:

1. Claimant does not have a present low back condition per EMA Dr. Chiron.
2. The MCC of the Claimant's back pain and need for treatment is no longer the 7/23/08 accident.
3. The Claimant does not require any further treatment for his low back as it relates to his 7/23/08 accident per Dr. Chiron and Dr. Stein.
4. The MCC of the Claimant's ulnar wrist pain/ulnar positive variance is not the 7/23/08 industrial accident.
5. The Claimant does not require any further care for his wrist as it relates to the 7/23/08 industrial accident.
6. The MCC of the need for conservative treatment, including bracing, anti-inflammatory, activity modification and cortisone injections is not the 7/23/08 industrial accident.
7. No PICA due and owing.
8. Deny MRI of low back as Claimant does not have a low back condition, the MCC which is the 7/23/08 injury.

Affirmative defenses responses:

1. Estoppel- 120 day rule; no break in causal chain.

**DOCUMENTARY EVIDENCE PRESENTED:**

Claimant:

1. Dr. Narajo's deposition (246\*).
2. Dr. Basadre's records (183 & 184\*).
3. Ruby Arias' deposition (245\*).
4. Dr. Easterlings record (143\*).

Employer/Carrier:

- A. Dr. Easterlings deposition (239\*).
- B. Dr. Stein's deposition (240\*).

Joint:

- Joint 1. Records from Concentra (247\*).
- Joint 2. EMA report (244\*).

Judges Exhibits and proffers, or for Identification only:

- J1. Claimant's trial memorandum (248\*).
- J2 E/C trial memorandum (242\*).
- J3 Pretrial stipulation (237\*)
- J4 Pre-trial stipulation dated 4/27/14 (215)
- J5 PFB dated 10/16/14 (249\*).

**\*DOCKET ENTRY NUMBER**  
**\*\* HARD COPY EXHIBIT**  
**\*\*\* FOR IDENTIFICATION ONLY**

**Abbreviations used herein:**  
**Employer/Carrier, E/C**  
**Maximum Medical Improvement, MMI**  
**Income Impairment Benefits, IB**  
**Average Weekly Wage, AWW**

### **CONCLUSIONS OF LAW AND FINDINGS OF FACT:**

1. In making the determinations set forth below, I have attempted to detail the salient facts together with the findings and conclusions necessary to resolve the issues. I have not attempted to painstakingly summarize the substance of the parties' arguments, nor the support given to my conclusions by the various documents submitted and accepted into evidence; nor have I attempted to state non essential facts. Because I have not done so, does not mean that I have failed to consider all of the evidence. In making my findings of fact and conclusions of law in this claim, I have carefully considered and weighed all evidence submitted to me. I have considered arguments of counsel and the respective parties, and analyzed statutory and decisional law of Florida.

2. As a background, this 36 year old Claimant on 7/23/08 suffered a compensable accident injuring his low back and right wrist. He was initially treated then by Concentra and as

of 8/16/08 was released with zero impairment and no work restrictions. On 6/26/10 is seen again by the Clinic with a further complaint of back pain and is release again without work restriction on 7/16/10. In this case there are three separate body parts at issue: the back, the ganglion cyst, and the ulnar variance.

3. As the case progressed the Claimant was seen by his IME, Dr. Naranjo, and by the E/C's IME, Dr. Stein. An apparent conflict of medical opinions then existed, and the parties stipulated on 7/22/14 that an EMA was appropriate, hence the appointment by the undersigned of Dr. Chiron, who rendered his report on 8/25/14.

#### **ANALYSIS:**

4. CONCENTRA MEDICAL RECORDS: These records indicate that the Claimant was seen by this Clinic from 7/28/08 on a regular basis until 8/16/08. His initial complaints were to the LS region as well as a lump in the dorsal aspect of the right wrist. The initial diagnosis was of lumbar strain and a ganglion cyst of the wrist. He was referred to a hand surgeon "as soon as possible."

5. At the time of the second visit on 7/30/08 his back pain was 4/10. The right wrist exam did not reveal any median, radial or ulnar nerve dysfunction. On 8/16/08 he returns to the Clinic and states that "he feels the pattern of symptoms is better with no pain." The pain intensity is 0/10. No wrist pain is noted in the record. He was then released as MMI and zero impairment, with no limitations noted for his activities.

6. The next entry is dated 6/26/10. At that time he states the he has had low back pain since the accident on 7/2008. He admits to some b/1 lower extremity parasthesia, but denied

numbness, weakness or incontinence. While his exam was negative the release on this date limited his activities to no lifting over 20 pounds or bending.

7. At a follow-up with the Clinic on 7/9/10 he states that he is no better. The pain which is given to the Clinic is to the lumbar region in 8/10 intensity. The diagnosis is of lumbar strain, and again the same limitations are imposed.

8. At the time of the visit on 7/16/10 the Clinic states that it is not clear that the Claimant has any injury. The exam was normal. He is again release to return to work without limitations. The DWC-25 noted that the Claimant's condition was not work related.

9. DR. JULIAN NARANJO: He is the Claimant's IME who examined him on 7/9/14. Dr. Naranjo is an interventional pain specialist. The examination found chronic inflammation in the left side of lower back and gluteal area, some sacroiliac joint disease and painful areas in the left ischial tuberosity bursa, which are objective findings.

10. The main diagnosis was of low back pain, sacroiliac joint disease and muscle spasms. There was no MRI performed for his evaluation. Dr. Naranjo opined that "when there is pain, any pain could be triggered by different elements." He recommended anti-inflammatory, muscle relaxants and therapy. This treatment would be both palliative and remedial. The Claimant is at MMI. The Claimant is at zero percent based upon his exam and the Florida Guide for Evaluation of Impairment, but if an MRI showed something different, he would have to reevaluate this.

11. JAY STEIN, MD.; Dr Stein is the E/C's IME and an orthopedic physician. He examined the Claimant on 5/30/2013. At the time of his examination he reviewed records from Dr. Basadre, Coral Gables MRI, Dr. Easterling, an operative report dated 10/13/09 and 5/18/10

as well as other records. He rendered a report relating to the wrist on 5/30/13 with an addendum relating to the back on 6/10/2013.

12. He examined the Claimant's back with a normal result, without any objective findings. Insofar as the low back, the Claimant was at MMI with zero impairment and no work restrictions, agreeing with Concentra's conclusion as of 8/16/08. He found no evidence that the Claimant had sustained either an aggravation or exacerbation of his 2008 lower back injury in 2010. He required no further treatment to the low back resulting from the industrial accident. No x-rays were taken in this examination.

13. In the report dated 5/30/13 Dr. Stein noted that the Claimant stated that his only injury was to the right wrist region. The x-rays of the wrist revealed no degenerative changes, a positive ulnar variance, and a widening of the distal radial ulnar joint.

14. On examination of the wrist the Claimant after a light touch to the area of the dorsal incision complained and withdrew, which Dr. Stein found to be incompatible with the physical findings. There was no recurrence of the ganglion cyst (previously removed). The Claimant was at MMI as determined by Dr. Easterling on 7/23/08.

15. DR. KENNETH EASTERLING: Dr. Easterling is a treating physician (orthopedist) who cared for the Claimant after a request for a one-time change from Dr. Basadre. He first saw the Claimant on 4/25/10 and the treatment lasted until 7/28/10.

16. Dr. Easterling was authorized to treat the Claimant's right wrist, for which she had been treated by Dr. Basadre. He was authorized to treat whatever was attributable to the injury on 7/23/08. He had the opportunity to review a report of an MRI done on 1/25/10 of the right

wrist. He was asked specifically upon the review of the MRI and the x-rays of the right arm a question about the ulnar discrepancy:

*“Q. ...You do initial x-rays on the first time that you see him, and in those x-rays which showed on April 9, 2010, you generate a radiology report stating that there are three millimeters of ulnar positive variance and no degenerative changes.*

*Can what the Claimant describes as an accident have caused those changes that show up in the x-ray that you did on April 9<sup>th</sup>, 2010 on the MRI that was done by Dr. Basadre or Dr. Basadre prescribed on January 25<sup>th</sup>, 2010?*

*Q. ...Do you understand what I’m trying to ask you?*

*A ... Yes, and the short answer is no.*

*Q. ...Why not?*

*A. ... Because ulnar positive variance is a term that refers to a discrepancy between the length of the radius and the length of the ulnar. This is an anatomic anomaly (sic) that’s congenital. It is not caused by trauma. (Dr. Easterling deposition at pp. 7-8).*

17. Dr. Easterling went on to explain his treatment as follows:

*A...When he presented to me, he had undergone already a surgical excision of a ganglion cyst that was considered by Dr. Basadre to be post-traumatic, which is completely plausible. When he came to me, he had a recurrence of that cyst and he had pain around the area of the ganglion cyst.*

*He, at that time, did not have pain on the ulnar side of the wrist or physical finding suggestive of an acute or sub-acute problem on the ulnar side of the wrist, which is where that ulnar positive variance occurs.*

*So, I treated him for what was wrong with him in terms of symptoms when he came to me.” (Dr. Easterling deposition at p. 9).*

18. When further asked whether the rolling of the tent cause pain to the ulnar wrist, repetitive rolling of the tent? He responded “Conceivably it could cause ulnar wrist pain in

somebody that has the pre-existing anomaly.” (Dr. Easterling deposition p. 12).

19. In dealing with the ulnar variance, Dr. Easterling testified that he really could not tell within a reasonable degree of medical certainty whether it was age or trauma or anything of that nature that precipitates the pain.

20. Dr. Easterling opined that the Claimant was at MMI from the ganglion cyst as of 7/28/10 with no impairment, and on a full duty status.

21. DR. HARLAN CHIRON: He is the appointed EMA in this case, and rendered a report dated 9/9/14. The extent of his examination was focused on the low back. Dr. Chiron noted in the records provided to him that the Claimant was discharged by Concentra on 8/6/08 with full painless range of motion and was returned to full duty. When the Claimant returned to Concentra on 6/26/10 he denied any intervening accidents, and on 7/16/10 the exam was within normal limits. Dr. Gonzalez then concluded that the Claimant’s symptoms were not work-related and that he demonstrated significant symptom magnification. Dr. Chiron also reviewed Dr. Naranjo’s deposition as well as that from Dr. Stein.

22. The following questions were asked at the time of the EMA appointment and responses were given by him:

*“1. Does the Claimant have a present back condition, the major contributing cause being the compensable accident on 7/23/10?”*

*1A. No. the patient’s examination of low back pain reveals full painless range of motion. There was no spasm, swelling, or area of tenderness. The straight leg raising test was inconsistent in that on two occasions the straight leg raising test was negative and on the one time positive on the left...*

*1B. the major contributing cause was not the accident of 7/28/08.”*

23. He went on to add that the only palliative treatment that the Claimant may need in the future is anti-inflammatory agent of choice for pain for a short period of time.

24. RUBY ARIAS: She is the adjuster on this case. The accepted body part is the right wrist, but the Carrier provided evaluation of the low back. She is not disputing that the Claimant was also provided therapy and treatment to the low back at Concentra in 2008 and 2010. A notice of denial of compensability to the low back was never provided.

25. DR. BASADRE'S RECORDS: Those records reveal treatment on 1/18/10 and 2/4/10 for an excision of a ganglion cyst of the right wrist. An MRI was performed which Dr. Basadre reported as painful TFC pathology, unrelated to initial surgery.

26. CLAIMANT'S TESTIMONY: Mr. Roberto Jimenez testified live at trial and the undersigned had the opportunity of observing his candor, deportment and demeanor. He said that he injured himself on 7/23/08 when employed by the Employer while lifting a heavy tent. The injury caused initial pain to his right wrist and low back. He stated that he always told the Concentra doctors of continued pain, and denied that he ever said that he was pain free.

27. According to the Claimant, Dr. Stein never examined his back, and only examined his hand. He did not recall seeing Dr. Chiron (the EMA), and only recalls seeing one doctor in calendar 2014, Dr. Naranjo.

28. The Claimant is currently employed by All-Flex, a tenting company, working without any restrictions. Sometimes in November 2013 he reported pain in his back following a lifting incident (a fact he originally denied in his testimony, later corrected himself), and said it did not cause him to miss any work, nor did he ever receive any treatment. In response to his counsel's

inquiry he stated that Dr. Naranjo did not speak Spanish, and the Claimant does not speak English.

29. Currently the Claimant testified that he wakes up with pain in the low back and right wrist, when the body is still cold.

30. The undersigned questions the credibility and accuracy of the testimony of this Claimant for several reasons. First he is sure that he never saw Dr. Chiron, whom according to the records he just saw three months ago. Second, his recollection of the facts is vague as to what happened six to four years ago, yet he asserts without any equivocation that he always told the doctors at Concentra that he had pain. Thus, the Claimant's testimony contrary to the facts as contained in the Concentra records is not accepted by the undersigned. It is also noted that when he returned to Concentra in 2010 he gave a history of only been seen there once in 2008, which again is not borne by the factual evidence.

### **ANALYSIS**

31. PRETRIAL ISSUES: At the commencement of the hearing the attorney's could not agree as to the exact nature of the issues to be litigated, in spite of the fact that two separate pretrial's were filed which are almost identical except for the addition of Dr. Chiron as an EMA. The Claimant is disputing the defense that all treatment to the right wrist is being denied because of inconsistencies in the E/C's position, as later explained; and the E/C stated that their position is clear that pursuant to Dr. Easterling all further treatment to the right wrist was being denied.

32. The pretrial clearly in defense number 5 stated "The Claimant does not require any further care for his wrist as it relates to the 7/23/08 industrial accident." In response the

Claimant states that the compensability of all the injuries to the right wrist was never petitioned, or at issue; particularly since the E/C in section 9 of the pretrial agreed that the back and right wrist conditions are related to the accident, with the exception of the ulnar variance, which is unrelated to the accident.

33. Given the fact that the compensability of the entire right wrist condition was never put at issue by the Claimant, but rather the ulnar variance and not the ganglion cyst, and in fact the E/C in the pretrial in section 9 limits the denial of compensability to only the ulnar variance; the undersigned finds that the sole issue to be litigated pertaining to the right wrist is that resulting from the ulnar variance.

34. ULNAR VARIANCE ISSUE: Thus, this issue of ulnar variance is now addressed. Nowhere in the Concentra records is there any mention of this problem. Notably, however, the records do not reveal the Claimant was given tests that would have shown this anomaly. The records do show that the Claimant at the time of the last visit on 2008 is free of wrist pain, and had been working regular duty. When he returns on 6/26/10 he only references back pain, and no mention is made of the wrist. At the time of the last visit that year, he again is silent as to any wrist pain.

35. Dr. Basadre does not mention any complaints attributable to this condition of the disparity in the arm bones. He does note TFC pathology, unrelated to the injury. The next treatment for the right wrist comes from Dr. Easterling who then following an MRI finds the ulnar variance disparity. He clearly states that this condition is congenital, and the undersigned accepts and adopts that testimony as a finding of fact.

36. With regards to whether this ulnar variance is causing symptoms to the Claimant, Dr. Easterling does not positively make that conclusion, nor does he attribute any particular work activity to whatever symptoms the Claimant may have had. He testified that the repetitive rolling, etc. of tents “Conceivably it could cause ulnar wrist pain in somebody that has the pre-existing anomaly.”

37. This speculative testimony, coupled with the Claimant’s lack of findings of symptoms regarding this congenital variance does not rise to the level of reasonable medical certainty to establish by his testimony a causal connection between the wrist pain and the congenital variance.

38. Dr. Stein likewise does not tie this condition to the accident. In fact, on examination of the wrist the Claimant after a light touch to the area of the dorsal incision complained and withdrew, which Dr. Stein found to be incompatible with the physical findings.

39. Given this testimony, the undersigned finds and concludes that the ulnar variance is not related or resulting from the subject accident, and that the Claimant’s wrist complaints insofar as that variance are likewise not related to this subject accident. It is noted and so found that the estoppel provisions of the “120” rule do not apply to this separate condition of the ulnar variance, as no treatment was ever afforded to the Claimant for this denied condition, and it was an incidental finding of testing while treating the compensable ganglion cyst condition.

40. Therefore, the claims compensability of the Claimant’s positive ulnar variance, the bracing, anti-inflammatory, activity modification, and cortisone injections prescribed by Dr. Easterling are denied.

41. COMPENSABILITY OF THE CLAIMANT'S CURRENT BACK CONDITION: It is noted that this claim seeks compensability of the Claimant's current back condition. In order to determine this issue, together with the collateral issues of a PCP for the back injury, and an MRI of the low back per Dr. Naranjo, a two step analysis must be made. First, it must be determined if the Claimant has a current low back condition. Second, if there is such a condition, whether the major contributing cause of such is the subject accident. It is noted that the original back condition was accepted as compensable and benefits provided in 2008 and 2010.

42. The records from Concentra indicate that in 2008 when discharged, the Claimant was free of pain, and was assigned no impairment following the attainment of MMI. He returns two years later, and complains of back pain again, which Concentra found not to be related to the subject injury, but still the E/C furnished care. On discharge in July 2010 this Clinic stated that it was unclear that the Claimant in fact had an injury, he had a normal exam, and was released to regular duties, which from the Claimant's testimony is apparent that he is currently doing.

43. Fast forward to 5/30/2013, the next medical contact reference to the low back. There Dr. Stein examines the Claimant, and finds a normal result without any objective findings. In fact, in the report dated 5/30/13 Dr. Stein stated that the Claimant had only complaints to the wrist area.

44. The next back examination is that of the Claimant's IME Dr. Naranjo, which may have had a language barrier as the Claimant said he only spoke English. This examination takes place in July 2014. He found chronic inflammation of the muscles in the left side of the lower

back, some sacroiliac joint disease, and a painful area in the left ischial tuberosity bursa. His report adds that the Claimant's pain is related to the work level of activity, without any significant limitations either at work or at home. There are no motor or sensory deficits or motor deficits. He concludes in this report "At this point the complaints are not severe and the patient had been able to stay functional. The patient should be at MMI at this time. Impairment rating is 0%."

45. The EMA, Dr. Chiron on 8/25/2014 found no spasm, contrary to Dr. Naranjo. There was no atrophy, gait was normal. The straight leg raising was negative, except for one of three tests, which Dr. Chiron discarded as inconsistent. The motor and sensory reflexes were normal.

46. Dr. Chiron concluded that the Claimant did not have a present low back condition attributable to the subject accident.

47. The undersigned rejects the opinion of Dr. Naranjo contrary to those of Dr. Stein and Dr. Chiron for several reasons. First, is that Dr. Naranjo is the only physician who found any muscle spasm, contrary to other physicians who treated the Claimant contemporary with the injury, and as recent as two months ago. Second, Dr. Naranjo seems to digress from his report in the deposition testimony. Upon seeing the Claimant, he opined that the Claimant was at MMI without an impairment, which he somewhat retracted at deposition upon inquiry by the Claimant's attorney. Second, the history that the Claimant gave Dr. Naranjo is also suspect, as he showed lack of clear memory as to past events in his trial testimony, as well as the history given Concentra in 2010 about the only one visit in 2008.

48. In light of this analysis, the undersigned does not find that the Claimant met his

burden in overcoming Dr. Chiron's conclusion, and finds that the claimant presently does not have a low back condition attributable to the subject accident.

49. It is noted that the Claimant is relying on Cespedes v. Yellow Transport, Inc., 130 So.3d 243, (Fla. 1<sup>st</sup> DCA, 2013) with reference to the back issue. In Cespedes the Claimant suffered a clear injury which ultimately required surgery, one of the issues litigated. He was given an accepted impairment of 6%, and was clearly still showing signs of the injury at the time of the litigation. Such are not the facts here. Mr. Jimenez was as early as 2008 released with zero impairment. He thereafter did not show any objective signs of a continued medical low back condition in examinations in 2010 (Concentra) or 2013 (Dr. Stein). The same remains true into 2014 (Dr. Chiron) with the exception of the rejected testimony of Dr. Naranjo, who in spite of supposed findings of spasm, still found the Claimant to be at MMI with zero impairment.

50. Herein, the Claimant has been found to have only subjective complaints of pain. F.S. 440.09(1) states: "Pain or other subjective complaints alone, in the absence of objective relevant medical findings are not compensable."

51. The Claimant is raising the affirmative defense that the E/C failed to deny the compensability of the low back within 120 days; therefore they are estopped from denying the same now. The E/C is not denying herein the compensability of the low back injury. Rather they are denying that the accident is the MCC of the current back condition however it exists. Such denial is permitted. See School District of Hillsborough v. Dickson, 67 So3d 1080 (Fla. 1<sup>st</sup> DCA, 2011).

52. Having accepted the opinion of EMA Dr. Chiron as to the MCC of the current

condition, the claim for a PCP for the low back and an MRI are denied. While the MRI is a diagnostic test that does not require that it be tied by MCC to a compensable accident, it is done to determine whether there is a condition that would relate to the accident. Herein, the findings and conclusions are that the Claimant's current condition, whatever it may be, only subjective in nature, is not related to the accident in 2008; therefore, the claim for an MRI is denied.

53. ATTORNEY'S FEES AND COSTS: The issues of fees and costs were not litigated at the time of these proceedings; therefore adjudication is reserved until they become ripe by the filing of a Verified Motion for Fees and Costs.

**WHEREFORE, IT IS ORDERED AND ADJUDGED THAT:**

1. The compensability of the Claimant's positive ulnar radiance/ulnar wrist pain is DENIED.
2. The authorization of conservative treatment to the wrist recommended by Dr. Easterling for ulnar wrist pain is DENIED.
3. Authorization of continued treatment for the Claimant's low back by a PCP is DENIED.
4. Compensability of the Claimant's current low back condition is DENIED.
5. MRI of the low back is DENIED.
6. Issues of attorney's fees and costs are reserved until ripe by the filing of a verified motion for such.
7. Except for fees and a cost, the PFB's filed on 3/12/13, 1/7/14 and 10/16/14 at 9:22 am. are dismissed with prejudice.

DONE AND ORDERED this 17th day of October, 2014, in Miami, Dade County, Florida.



Edward Almeyda  
Judge of Compensation Claims

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