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

Raymond Knight, Employee/Claimant, vs. Employee Leasing Solutions, Employer, and AmeriChase Services Company, EastGuard Insurance Company/AmeriChase Services, Carrier/Servicing Agent. _____	)	OJCC Case No. 08-011494EHL Accident date: 6/21/2007

FINAL COMPENSATION ORDER ON PETITION FOR BENEFITS OF 9/11/08, 10/16/08, 1/12/09, 1/20/09 and 1/28/09

THIS CAUSE was heard before the undersigned at Tampa, Hillsborough County, Florida on 5/14/09, upon the Claimant's claims for TTD/TPD, AWW, medical authorization, mileage and penalties, interest, costs and attorney's fees. The petitions for benefits were filed 9/11/08, 10/16/08, 1/12/09, 1/20/09 and 1/28/09. Mediation occurred on 5/11/09 and the parties' pretrial compliance questionnaire was filed 11/10/08 (order entered 11/12/08) and 2/24/09 (order entered 2/26/09). Claimant's counsel Bradley Buldalian, Esq., was present on behalf of Claimant. Gregory White, Esq., was present on behalf of the Employer/Carrier (hereafter "E/C**).** At the time of trial claimant voluntarily dismissed all petitions as they related to Stevens Roofing and agreed Employee Leasing Solutions was claimant's employer at the time of the accident with respect to his workers' compensation claims.

At the time of trial the parties entered into the following stipulations:

1. The Court had jurisdiction of the parties and of the subject matter of the petition/claim.
2. Venue properly lies in Tampa District.

3. The correct date of accident is 6/21/07.
4. There was an employer/employee relationship at the time of the accident.
5. There was workers' compensation coverage in effect by the carrier at the time of the accident.
6. The accident has been accepted as compensable.
7. The right ankle injury has been accepted as compensable.
8. There was timely notice of the accident and injury**.**
9. AWW is $1045.18 without inclusion of health insurance with a corresponding TTD CR of $696.82.

Exhibits received into evidence at the time of trial are listed on the evidence log at the end of this order. In addition to the exhibits, Claimant and William Davidson testified live.

The claims made at the time of trial were for determination of the following:

1. TPD from 8/20/08 to date and continuing until claimant has surgery, together with penalties and interest, with credit given for temporary benefits and impairment benefits paid and social security disability received.
2. In the alternative TPD from 9/10/08 to date and continuing until claimant has surgery, together with penalties and interest, with credit given for temporary benefits and impairment benefits paid and social security disability received.
3. In the alternative TPD from 3/9/09 to date and continuing until claimant has surgery, together with penalties and interest, with credit given for temporary benefits and impairment benefits paid and social security disability received.
4. Penalties and interest for late payment of TTD from 1/7/09 to 1/20/09.
5. Entitlement to costs and attorney's fees at the expense of the employer/carrier.

The defenses raised by the Employer/carrier to the claims were as follows:

1. All TTD/TPD due or owing has been paid.
2. Claimant at MMI.
3. There is no entitlement to penalties, interest, costs or attorney's fees at the expense of employer/carrier.

In making my findings of fact and conclusions of law in these claims and defenses, I have carefully considered and weighed all the evidence presented to me. I have resolved all conflicts in the testimony, both live and by deposition, presented to me. Although I may not reference each piece of evidence presented by the parties, I have carefully considered all the evidence and exhibits in making my findings of fact and in reaching my conclusions of law. Based upon the foregoing, the evidence and applicable law, I make the following findings of fact and draw the following conclusions of law:

1. I have jurisdiction of the parties and the subject matter of these claims.
2. The stipulations of the parties are accepted and adopted by me as findings of fact.
3. The evidence closed in this matter on 5/14/09 at the time closing arguments were made by the parties.

Recitation of the factual evidence

4. The claimant testified at trial and in his deposition he was 42 years old. He attended high school through the 10th grade. He had always worked as a roofer. He began working for the Stevens Roofing in early 2003 as a leased employee of Employee Leasing Solutions. He was injured on 6/21/07 when he fell from a one-story roof and landed on a concrete slab injuring his right ankle. A co-employee took him to Citrus Memorial Hospital where he had surgery to his ankle. He then began treating with Dr. Herscovici. About a month after the accident Dr. Herscovici performed a second surgery. His recovery from the second surgery was delayed because of infections. Dr. Herscovici placed him at MMI on 6/11/08 with an impairment rating and told him he should not return to roofing. He attended a functional capacities evaluation but did not understand the results. He continued to have pain and difficulty walking and Dr. Herscovici recommended an ankle fusion which he understood would alleviate his pain and help his condition. On 8/20/08 he saw Dr. Herscovici and told the doctor he wanted to have surgery. Dr. Herscovici ordered additional x-rays and then scheduled surgery at Tampa General Hospital. The day before the surgery was to take place he was notified by Dr. Herscovici that he could not do the surgery as scheduled. Later he learned that the carrier did not want to pay what Tampa General Hospital wanted to charge for the surgery. He was then scheduled to see Dr. Segina in Melbourne about the surgery; he was not aware of an appointment being set in November 2008 with Dr. Segina and he never refused to go to this doctor. He saw Dr. Segina in January 2009. Dr. Segina did not spend much time examining his ankle and seemed to believe he was going to do the surgery. But claimant did not have confidence in Dr. Segina and asked the carrier for another doctor. In addition it was a long drive to Dr. Segina's office from his home in Ocala. The carrier then authorized Dr. Reeves who is in Orlando. As of the time of trial he had seen Dr. Reeves two times and was waiting for surgery to be scheduled. Dr. Reeves wanted him to stop smoking for a month before surgery but he had only stopped smoking two weeks before the trial. He was not aware that Dr. Reeves had just postponed the surgery because his blood work showed the presence of nicotine although he had a message to call the doctor's office the morning of trial. He had made a mistake and had not stopped smoking earlier but it was difficult to stop. He continued to have pain walking and pain at other times in his ankle. The ankle swelled if he was on his feet too long. He was not working and had not looked for any work. He could not return to roofing because he was unable to climb ladders or carry the amount of weight required. The employer never offered him a light duty job after the accident. He had just begun receiving social security disability. He applied for it based on his ankle injury but the doctor who was appointed by social security to examine him said he also had a back problem.
5. William Davidson, nurse case manager, attempted to get Tampa General Hospital to accept a fee schedule payment so that claimant could have his surgery there. Claimant needed a very complicated surgery and not just any doctor could do it at just any hospital. (I note that both Drs. Herscovici and Reeves provided the same testimony.) On 9/15/08 Mr. Davidson got the CPT codes for the surgery from Dr.

Herscovici's office and contacted Tampa General. He learned that the codes were wrong and got new ones from Dr. Herscovici on 9/23/08. He then called Tampa General and was told the total cost would be $575,000 which was far in excess of the fee schedule. On 9/25/08 he spoke with the hospital again and the charges were reduced to $219,000 plus other unspecified expenses. This was still in excess of the fee schedule and on 10/9/08 he sent a letter to Tampa General stating the carrier would authorize the surgery at that facility but would only pay the amount provided by the Florida fee schedule. On 10/15/08 Tampa General responded that the carrier would have to pay 75% of the actual charges and that it would not accept the fee schedule amount. Mr. Davidson then made an appointment for claimant to see Dr. Segina on 11/10/08 and sent a letter to both claimant and his attorney about the appointment. Claimant did not attend that appointment. On 1/7/09 claimant, his girlfriend and Mr. Davidson attended an appointment with Dr. Herscovici. Claimant's girlfriend said Dr. Segina was not a good surgeon and that claimant did not want to change doctors. Mr. Davidson believed Dr. Segina was a good surgeon and was competent to perform the surgery because Dr. Herscovici had suggested him. Dr. Herscovici suggested that Mr. Davidson meet with the CFO of Tampa General which he did on 1/8/09. The hospital agreed to accept 50% of the actual charges but this was still significantly more than the fee schedule. After that point another nurse case manager handled the file. As that nurse's supervisor, Mr. Davidson was aware that claimant saw Dr. Segina on 1/28/09 and that Dr. Reeves was authorized at mediation. Mr. Davidson never investigated using Shands for the surgery and believed that claimant only wanted Dr. Herscovici to perform the surgery.

6. Colleen Clark, vice-president of payroll for the employer, produced claimant's payroll records and personnel file at her deposition. Claimant's application for employment was not dated but his first paycheck was dated 12/28/03. Claimant was hired to work at Stevens Roofing. He was a roofer. If claimant had health insurance, Stevens Roofing provided it. Employee Leasing Solutions deducted monies from claimant's payroll for insurance with AFLAC but she did not know what type of insurance that was. The employer also made a deduction for uniforms and occasional for tools. This deposition was not relevant to any issues at trial.
7. Joanne Bell, adjuster, testified in her deposition the carrier accepted compensability of claimant's right ankle injury. Drs. Herscovici, Segina and Reeves all remained authorized. Tampa General Hospital was not authorized because it wanted to charge more than the fee schedule permitted for claimant's surgery. Claimant's AWW was $1045.18 with a TTD CR of $696.82. Claimant was paid TTD from 6/22/07 through 6/19/08. Claimant was paid impairment benefits from 6/20/08 through 12/22/08 based on an 100% impairment rating. TTD was paid again from 1/7/09 through 2/17/09 because Dr. Herscovici placed claimant back on TTD on 1/7/09. TTD was suspended on 2/17/09 because Dr. Herscovici stated claimant was able to work with restrictions and was at MMI after being provided with a questionnaire from E/C. Ms. Bell believed the employer had light duty work available for claimant but was not aware what the position was. The prior adjuster had noted this information from Robert Stevens. She could not determine that claimant had actually been offered a job. On 9/29/08 the adjuster at that time spoke with a representative of Tampa

General Hospital to authorize surgery at the facility. Tampa General wanted a total of $575,000. There were many attempts to get Tampa General to agree to a reduced fee and then the parties agreed at mediation to Dr. Segina. The carrier authorized Dr. Segina on 1/22/09; he saw claimant on 1/28/09. She did not know what opinion Drs. Segina or Reeves had regarding MMI. She was aware that Dr. Segina released claimant to return to work with restrictions. She did not know why Dr. Segina was not authorized to perform claimant's surgery. Dr. Reeves was authorized to perform surgery.

8. The carrier's payment records indicated claimant was issued a check for a three week period from 1/7/09 through 1/20/09 together with interest on 1/28/09. The carrier is required to pay temporary benefits biweekly. According to Ms. Bell's testimony TTD was reinstated after receipt of Dr. Herscovici's DWC-25 for the visit of 1/7/09 indicating claimant was again TTD. Ms. Bell did not testify when she received the DWC-25 notifying her that claimant was again TTD.
9. Dr. Herscovici, orthopedist, testified in his deposition he treated claimant from 6/27/07 through 1/7/09 for a bad injury to his right ankle that occurred when he fell off a roof. Claimant had a comminuted fracture of the articular surface of the right ankle joint as a result of the fall. Claimant required two surgeries, the first to straighten the bone out and the second to stabilize the fracture. The first surgery was done immediately. Claimant was TTD at the time of the first visit. The second surgery was performed 7/9/07 when Dr. Herscovici performed an open reduction and internal fixation of the fracture site, using a bone graft. Claimant remained TTD. Dr. Herscovici continued to see claimant in his office for routine follow-up visits. On 9/5/07 Dr. Herscovici started claimant on physical therapy. Claimant completed therapy at the end of November 2007. On 6/11/08 Dr. Herscovici discussed a third surgery to remove the implants and fuse the ankle because of the development of arthritis with claimant. Claimant wanted to think about surgery and Dr. Herscovici placed him at MMI with a rating of 11% of the body as a whole. Dr. Herscovici did not release claimant to return to work until after his functional capacities evaluation in September 2008. Dr. Herscovici later referred to an FCE of April 2008. I note that the medical records attached to the doctor's deposition indicated the FCE was performed on 4/22/08 and indicated claimant could perform light medium work with some lifting restrictions of 20 to 35 pounds. Claimant returned on 8/20/08 because of pain and swelling and they discussed surgery again but claimant was still not ready to proceed with it. Dr. Herscovici later testified in his deposition claimant decided to have the surgey this date but I believe that testimony was in error because the chart note for 8/20/08 did not state claimant agreed to the surgery but the chat not for 9/10/08 did. Claimant returned on 9/10/08 and asked to schedule surgery. Dr. Herscovici attempted to schedule the surgery at Tampa General Hospital but could not do so. Claimant returned on 1/7/09 with his nurse case manager. The nurse case manager told him that the carrier was refusing to pay the amount Tampa General wanted to charge and that was why the surgery could not be scheduled. Claimant remained at MMI as of 6/11/08 because the proposed surgery would improve his pain but would claimant would lose range of motion in his ankle and would never have a normal ankle. Claimant would be able to walk better after surgery so in that sense his

function would improve. There would be a period of time after surgery when he would not be able to work but his overall condition should not be significantly different once he recovered from surgery, although he should have less pain. The primary reason for doing the fusion was to relieve claimant's pain. Claimant's work restrictions would be based on the results of the functional capacities evaluation. The fusion surgery was medically necessary to control claimant's pain. The only hospital equipped for the fusion surgery that gave privileges to Dr. Herscovici was Tampa General. He had privileges at other hospitals but could not do the surgery at them. There were other hospitals in Tampa that were equipped for that type of surgery. Claimant was capable of working within his restrictions until the date of surgery.

10. Dr. Reeves, podiatrist, testified in his deposition he examined claimant on 3/9/09 and 3/30/09 for complaints of pain in his right ankle. He was authorized by E/C. On examination claimant had significant pain and limited range of motion in the ankle. At the first visit Dr. Reeves ordered a CT scan and administered an injection to try to reduce the pain and also for diagnostic purposes. Dr. Reeves diagnosed claimant with post-traumatic arthritis, retained painful fixation and reduced range of motion in the ankle (equinus deformity). Dr. Reeves recommended surgery. Claimant called and said the injection helped for a day or two and then his pain returned. Because the injection provided pain relief, Dr. Reeves was able to determine which joint he needed to fuse. Dr. Reeves assigned the same limitations as in the FCE, occasional stair and ladder climbing, occasional kneeling and crawling with minimal weight on the right leg, and occasional right and continuous left foot controls. Dr. Reeves would not have allowed claimant to work usually a regular ladder, only a 3-step ladder. Claimant should not have been working on roofs. When claimant returned on 3/30/09, Dr. Reeves reviewed the CT scan which showed significant changes and arthrosis of the ankle. Then changes in claimant's ankle and the conditions Dr. Reeves diagnosed were caused by the accident. Dr. Reeves recommended a fusion of claimant's ankle. Claimant had not reached MMI. Dr. Reeves also wanted claimant to stop smoking for three months before the surgery. However Dr. Reeves would do the surgery even if claimant did not stop smoking after warning claimant of the possible complications on the healing of the fusion. Claimant was capable of working within his restrictions until he had the surgery. Claimant would be at MMI if he did not have the surgery. Dr. Reeves testified the surgery would improve claimant's condition and was not solely palliative in nature.
11. On 5/14/09 Dr. Reeves sent a letter indicating claimant's surgery was postponed for "another 3 weeks" because he tested positive for nicotine. The letter did not indicate when claimant's surgery had originally been scheduled or what the new date for surgery was. The letter also said that claimant would have to be tested for nicotine use again in 3 weeks which implies that surgery would be occur no earlier than the first week of June 2009.
12. Correspondence from claimant's attorney dated 11/10/08 stated claimant would not attend the appointment "on Monday with the new doctor. The claimant insists on remaining with Dr. Herscovicci (sic)." Based on the chronology of events testified to by claimant and Mr. Davidson, I infer that the new doctor referred to in this letter was Dr. Segina. On 2/2/09 claimant's counsel wrote to the defense attorney stating that

his client was dissatisfied with Dr. Segina and wanted Dr. Herskovici (sic) to perform the surgery and that claimant was dissatisfied with Dr. Segina because he believed that the nurse case manager used to work with Dr. Segina.

Findings of fact and conclusions of law

13. There are two arguments for my consideration with respect to the petition for TPD. Claimant argued he was never truly at MMI and therefore remained entitled to TPD benefits because there were restrictions on his employment and he was not able to return to work. E/C argued that claimant was at MMI as of 6/11/08 and would remain at MMI until he had the proposed surgery to his ankle, relying upon case law that provides for payments of temporary disability after MMI. E/C additionally argued that if I accepted claimant's position that he had never reached MMI, claimant had caused delays in his surgery and was not entitled to TPD benefits on that basis.
14. I have carefully reviewed Dr. Herscovici's deposition and medical reports. I find that on 6/11/08 Dr. Herscovici determined claimant was at MMI and assigned a permanency rating. He did not offer claimant any further remedial treatment that day and instead discharged claimant to return on an annual basis unless claimant had problems before that. Dr. Herscovici's chart note for that day stated, "I have told him that long term he may need to have the plates and screws removed but the real long-term problem is posttraumatic arthritis and for that, he may need an arthrodesis as a salvage procedure." Dr. Herscovici did not recommend arthrodesis (fusion) that day and, at least in June 2008, anticipated that the surgery might be necessary only in the long term. As it turned out, claimant needed the surgery in a much shorter term than Dr. Herscovici seemed to contemplate in June 2008 and recommended it in August 2008 and claimant made up his mind to have it in September 2008. Because Dr. Herscovici's chart made it clear to me that he had no further remedial care to offer as of 6/11/08, then the evidence supports a conclusion that claimant was at MMI as defined in Chapter 440.
15. There is no question that a claimant who reaches MMI and then requires surgery which causes him to have a temporary period of disability is entitled to TTD benefits during his/her period of recuperation. Delgado v. LaQuinta Motor Inns, 457 So.2d 572 (Fla. 1st DCA 1984). E/C essentially agreed at trial it would reinstate such benefits once claimant had the surgery. Since surgery had not occurred by the date of trial, however, I cannot award such benefits in this order. I must consider then whether claimant remained at MMI in the face of surgery that may take place at some point in the future.
16. Claimant's argument was that Dr. Reeves said claimant was not at MMI and therefore claimant was not at MMI. However Dr. Reeves stated that claimant was not at MMI because he was going to have surgery which would improve his condition. Dr. Reeves did not state that claimant's condition, without surgery, was improving. To the contrary it was evident from both doctors that claimant's condition was deteriorating which would indicate that in fact, claimant was at MMI without surgery.
17. MMI is not a retroactive concept. It is determined by a treating physician when he decides that claimant is not likely to get any better and that all efforts at remedial

treatment have been exhausted. The fact that the injured employee's condition later deteriorates and warrants additional surgery does not change the original MMI date. If that were the case and original MMI date became a nullity, then the holdings in Delgado, *ibid*, Atkins v. Greenhut Construction Co., 447 So.2d 268 (Fla. 1st DCA 1983), Palm Beach Bd. Of County Commissioners v. Robertson, 500 So.2d 180 (Fla. 1st DCA 1986) and all of the cases discussing payment of permanent total disability when a claimant is not at MMI but when two years of temporary benefits have been exhausted are unnecessary.

18. Because claimant's condition cannot be expected to improve until he has surgery, then his condition meets the definition of MMI and I cannot award him the temporary benefits claimed.
19. One aspect of the claimant's argument was that he would have had the surgery earlier if the carrier had simply agreed to pay more than the Florida fee schedule to Tampa General Hospital and that claimant had done nothing to delay surgery.
20. I could not have required E/C to pay more than the fee schedule to Tampa General and it was unfortunate that the hospital would not allow the surgery to have taken place and then disputed the bill payment with AHCA. It did not appear to me that E/C caused unnecessary delay in providing another surgeon and hospital. I did not find it unreasonable that claimant did not want to have surgery in Melbourne and the carrier could have authorized Dr. Reeves when it received the letter from Mr. Cohen on 11/10/08 although that letter stated that only Dr. Herscovici was acceptable to claimant. And if claimant had simply stopped smoking when Dr. Segina prescribed Chantix (as claimant testified had occurred), he would have been able to schedule the surgery when he first saw Dr. Reeves. In short there is blame all around. But I cannot award/deny benefits to the person who is the least blameworthy. I can only award benefits when entitlement is supported by competent and substantial evidence. Because I have found that claimant is at MMI as of 6/11/08 and that his MMI status will not change until he has surgery, I cannot award temporary benefits. I deny the petitions seeking TPD benefits.
21. Claimant also sought penalties for payment of TTD benefits for the time period 1/7/09 through 1/20/09. Because I have determined claimant reached MMI 6/11/08, claimant was not entitled to TTD benefits and I cannot award penalties for the payment of benefits claimant was never entitled to.
22. At trial claimant indicated all other claims in the petitions were resolved.
23. Because I have not awarded claimant the benefits he sought, I deny the claim for attorney's fees and costs at the expense of E/C.

WHEREFORE, IT IS ORDERED AND ADJUDGED:

1. Claimant's petitions are DISMISSED on their merits.

DONE AND MAILED to the parties and ELECTRONICALLY MAILED to the attorneys this 15th day of May, 2009, in Tampa, Hillsborough County, Florida.

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EVIDENCE LOG Raymond Knight OJCC # 08-011494EHL

TRIAL DATE 5/14/09

COURT EXHIBIT	JOINT EXHIBIT	CLAIMANT EXHIBIT	E/C EXHIBIT
1. Pretrial stipulations and orders entered 11/12/08 and 2/26/09 and claimant's amendments to pretrial stipulation electronically filed 3/2/09 and 4/14/09 and E/C's amendment to pretrial electronically filed 4/13/09	1. Deposition of Colleen Clark electronically filed 5/12/09	1. Deposition of Dr. Reeves electronically filed 5/13/09.	1. Composite of correspondence from claimant's attorney to E/C's attorney, electronically filed 5/11/09.
2. Claimant's trial memo		2. Deposition of Joanne Bell electronically filed 5/13/09	2. Deposition of claimant electronically filed 5/11/09.
3. E/C's trial memo		3. Functional Capacities Evaluation	3. Deposition of Dr. Herscovici electronically filed 5/11/09.

4. Petitions for benefits		4. Carrier payment records.	4. Dr. Reeve's letter of 5/14/09
5. Responses to petition		5. DWC 4 forms	

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