STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGES OF COMPENSATION CLAIMS
PORT ST. LUCIE DISTRICT OFFICE

Emilio Rosado,
Employee/Claimant,

vs.

Howard Leasing/Sunz Insurance,
Employer/Carrier/Servicing Agent.
_____/

OJCC Case No. 15-000030RDM

Accident date: 11/18/2014

Judge: Robert D. McAliley

ORDER ON THE MERITS

I find claimant's average weekly wage (AWW) is properly based on his actual pre-accident average earnings of $590.50 weekly. The evidence establishes claimant sustained a temporary disability, either total or partial, from his industrial accident beginning April 16, 2015, through June 18, 2015, a part of which has already been paid by the employer/carrier (E/C). Claimant is entitled to interest and penalties on that portion of a lump sum payment made in the past that was overdue as well as any adjustments to indemnity benefits based on an increased AWW. However, I find the evidence does not support the claim for temporary indemnity benefits from the date of accident through April 15, 2015.

JURISDICTION AND NOTICE

The parties agree, and I find, the judge of compensation claims (JCC) has jurisdiction over the parties and subject matter. The parties were properly notified of the final hearing.

STIPULATIONS

The parties agree an accident occurred on the date indicated while claimant was working in Martin County, Florida. There was an employer employee relationship. Workers'

compensation insurance coverage applies. Although the E/C initially contended claimant did not give proper notice of accident pursuant to section 440.185, they now agree that notice was timely.

Benefits payable under this order, if any, will be handled administratively with the JCC retaining jurisdiction to determine specific amounts payable, if necessary. All issues pertaining to attorney's fees and costs may be reserved for subsequent hearing.

ISSUES

Claimant seeks an upward adjustment in the average weekly wage (AWW) based on his actual earnings preceding the industrial accident. Claimant also seeks temporary partial disability benefits (TPD) from the date of accident through June 7 2015, and temporary total disability benefits (TTD) beginning June 8, 2015, through June 18, 2015. Claimant voluntarily dismisses the claim for TTD or TPD after June 18, 2015. Penalties and interest are sought on overdue indemnity benefits together with costs and attorney's fees.

E/C responds stating: the AWW is correctly based on a contract of hire; there is no evidence of claimant being TPD prior to April 16, 2015; general denial of all remaining claims. At the time of the hearing E/C concedes claimant was TTD from June 8, 2015, through June 18, 2015.

It is agreed claimant was paid TPD from April 16, 2015, through June 24, 2015, although claimant maintains this payment was based on an incorrect AWW. Credit may be taken for indemnity benefits paid by E/C after June 18, 2015.

PETITIONS FOR BENEFITS (PFB)

This order disposes of all pending PFBs including those filed April 29, 2015, and July 24,

2015, to the extent indicated.

EVIDENTIARY RULINGS

Records pertaining to claimant's criminal convictions are admitted into evidence pursuant to section 90.610. That said, the operative facts in this case are not markedly impacted by claimant's credibility so that this history is unimportant to my decision.

BACKGROUND

Claimant is a 52-year-old Puerto Rican national who moved to Florida in 1982. He graduated from high school in Puerto Rico and has one year of college. Claimant is literate in Spanish, can read and write in English but does not speak English fluently. His trial testimony is presented through a translator.

Claimant's health and litigation history are not important elements in reaching a decision.

Claimant applied for a job at a farm apparently having some connection with Del Monte near the end of October 2014. The exact starting date, which is important for making an AWW determination, is considered more closely below. Claimant interviewed with "Miguel" who instructed claimant to complete an employment application and that otherwise he was hired. Miguel remained claimant's supervisor.

The actual employer, Howard Leasing, is a professional employment organization. As is frequently the case in this type of arrangement, Howard Leasing had virtually no involvement with claimant except to issue paychecks. Claimant was employed as an equipment (tractor) operator.

Claimant and several fellow employees were assigned to bind together and move pipes. In the process claimant was struck in the head and knocked to the ground. This incident was

reported to Miguel. Claimant was not offered any medical care.

That evening claimant presented to the emergency room at Martin Memorial Hospital in Stuart, Florida. The following day claimant reported to work and gave Miguel some type of note from the hospital. Miguel advised claimant that the company was shorthanded and they needed claimant to work. He did continue working, albeit in pain, for the next 5 to 6 days. After the Thanksgiving break claimant reported to work with another supervisor but was advised he no longer had a job. Claimant has not worked since.

PROVISION OF MEDICAL BENEFITS

After initially rejecting the claim for workers' compensation benefits based on lack of notice pursuant to section 440.185, E/C altered its position and accepts the claim as compensable on April 14, 2015.

Medical care was initially furnished with Centra Care, an urgent care facility located in the Orlando area. Claimant initially presented to Centra Care on April 16, 2015. He is placed on limited duty by the treating doctor at that facility. By October 24, 2015, a Centra Care physician recommends consultations with a neurologist and an orthopedic surgeon.

Anthony A. Shydohub, M.D., a neurologist, examines claimant on June 15, 2015. This physician diagnoses claimant as having a minor head injury but has no work restrictions. Dr. Shydohub places claimant at maximum medical improvement (MMI) from a neurological standpoint as of May 29, 2015.

Medical treatment was also provided by Wadih S. Macksoud, M.D., an orthopedic surgeon specializing in upper extremity care. Claimant presented with constant headaches and pain in the trapezius muscles on the left. Dr. Macksoud believed the *left* shoulder pain was

radiating from claimant's neck and recommended a neck specialist. Claimant was at MMI relative to any orthopedic injury to the left shoulder. However, Dr. Macksoud places claimant on a no work status until he sees a neck specialist.

Claimant presents to Mark A. Beckner, M.D., on June 18, 2015. Dr. Beckner is an orthopedic surgeon specializing in spinal injuries. At the time of this examination claimant's *right* arm was in a sling. Dr. Beckner recommends therapy and an MRI. Claimant was not placed on any restrictions relative to any neck injury.

Both physical therapy and a MRI were provided. Claimant returns to Dr. Beckner on August 25, 2015. The MRI was unremarkable. This physician places claimant at MMI as of that date relative to any neck injury.

Claimant was injured on June 9, 2015, when he fell and sustained some type of fracture in the right shoulder area. An open reduction was performed and a plate utilized to reduce the fracture. Claimant does not contend this injury stems from the subject industrial accident.

I find claimant reaches overall MMI for injuries sustained in the November 2014 industrial accident on August 25, 2015. Also find that as a result of injuries from this industrial accident, claimant is able to return to full duty employment as of June 18, 2015. There are no pending claims relative to a permanent physical impairment.

PROVISION OF INDEMNITY BENEFITS

A lump sum payment of TPD benefits is made on July 2, 2015, in the total amount of $2,304.00 for the period between April 16, 2015 and June 24, 2015. (A deduction is taken for overdue child support payments and paid by the carrier directly to child support authorities.). This reflects 10 weeks of benefits. No interest or penalty payments are indicated in the carrier's

payment record.

The insurance adjuster testifies, without objection, that she reviewed the emergency room records from Martin Memorial Hospital. According to the adjuster nothing is mentioned in these records relative to claimant's work status on discharge from the emergency room. The foregoing record is not placed in evidence.

PERIOD OF TEMPORARY DISABILITY

Claimant seeks TPD from the date of accident until April 16, 2015, when he was accepted as TPD.

It is noted that for the period beginning November 17, 2014, through November 23, 2014, claimant worked 69 hours. During Thanksgiving week of 2014, wherein claimant's testimony suggests he did not work beyond Wednesday, November 26, 2014, claimant worked 20.5 hours.

There is no medical evidence confirming claimant's physical complaints and asserted limitations for the time span at issue as required by law. See, *Massey Servs. v. Knox*, 131 So. 3rd 797 (Fla. 1st DCA 2013). Under our decisional law, disability can be established by medical evidence making a retroactive assessment. See *Kenney v. Juno Fire Control Dist.*, 506 So.2d 449 (Fla. 1st DCA 1987).

The uncontroverted evidence is that claimant worked full-time from the date of accident until approximately Wednesday, November 26, 2014, the day before Thanksgiving. Hence, pursuant to any argument made in these proceedings claimant was not TPD for this interim.

No case is cited for the proposition that E/C be required to pay TPD as an adjunct for enforcing the self-executing provisions of the Workers' Compensation Law or to discourage employers from refusing to pay benefits or reporting an accident to their insurance carrier. The

law contains penalty provisions for non-reporting but not the relief requested by claimant in these proceedings.

I find from the evidence (and E/C's stipulation) that claimant was TPD beginning April 16, 2015 through June 7, 2015, and TTD beginning June 8, 2015 through June 18, 2015.

However, I also find that E/C utilized an incorrect AWW in formulating the compensation rate.

CALCULATING THE AWW

Claimant was not employed for several months before being hired by Howard Leasing. At the time of his industrial accident, claimant had not been employed for substantially the whole of the 13 weeks immediately preceding that accident. Hence, section 440.14 (1) (a) is not applicable for determining the AWW.

There is no evidence establishing there was a similar employee for the applicable 13 week time span. To the contrary the evidence is that no such similar employee exists. Accordingly, section 440.14 (1) (b) may not be utilized.

The seasonal worker provision may be considered only at claimant's instigation, an option he does not exercise. See §440.14 (1) (c), Fla. Stat. (2014) ("If the employee is a seasonal worker and the foregoing method cannot be fairly applied… *then the employee* may use… the 52 weeks immediately preceding the accident.") (emphasis added).

Thus, a determination of the AWW must be based on "the full – time weekly wages of the injured employee" as provided by section 440.14 (d). Full-time wages are determined either by the contract of hire or claimant's actual earnings depending on the facts of the case. *Penuel v. Central Crane Service*, 232 So.2d 739, 742 (Fla. 1970). This choice should be based on

competent substantial evidence "reasonably and fairly applied to the facts proven." *Id* at 742.

The only "contract" at the time of hire was that claimant be paid $9.00 per hour. He was not hired with the understanding either by the employer or claimant that he was to work a certain number of hours weekly. There is simply no evidence that claimant was hired to work a 40 hour week and every indication to be drawn from claimant's work history was that he was expected to work many more hours in a given week if there was work to be done. This is the very nature of agricultural work.

The devil is in the details. During the second full week of claimant's employment, November 3, 2014, to November 9, 2014, he worked 62.5 hours and made $562.50. (This is apparently considered to agricultural job not subject to Federal or State overtime provisions.) For the period between November 10, 2014, and November 16, 2014, claimant worked 63 hours and was paid $557.00. These two pay periods plainly calculate into the AWW determination.

The employer's records show claimant started on October 31, 2014, and worked through November 2, 2014, earning $652.50 based on 72.5 hours work. Inasmuch as there were only 72 hours in this time span it is obvious claimant began working before October 31, 2014.

Claimant is not certain as to his date of hire. Claimant testifies that to his recollection he started working at this facility about one week before the end of daylight savings time. Since daylight savings time ended on Sunday, November 2, 2014, I find claimant began approximately October 27, 2014. This approximation is consistent with the number of hours claimant worked each complete workweek during his tenure with the employer.

Hence, I find for the 3 complete weeks preceding claimant's industrial accident he earned $1, 771.50 ($652.00 + $562.50 + $557.00) so as to establish an AWW of $590.50 forming the

basis of the weekly compensation rate.

INTEREST AND PENALTIES

When the carrier made a lump sum payment on July 2, 2015 in the amount of $2,304.00 for the period between April 16, 2015, and June 24, 2015, this did not include a payment for interest or penalties as provided by section 440.20 for that portion of this lump sum payment that was overdue. There is no showing or even a contention this nonpayment was due to circumstances beyond E/C's control so as to avoid responsibility for paying a penalty.

Claimant is also entitled to interest and penalties on the further net adjustment to the compensation benefits which claimant is entitled stemming from the increased AWW as determined by this order after taking credit for those payments made for the period after June 18, 2015.

As an aside, if claimant continues to have child support obligations, any additional payments made pursuant to this order, including payments for penalties and interest, should be made and disbursed on a pro rata basis between claimant and child support enforcement authorities.

CONCLUSION

BASED ON the foregoing analysis, it is

ORDERED AND ADJUDGED as follows:

1). Claimant's average weekly wage is $590.50.

2). The claim for temporary partial disability benefits from the date of accident through April 15, 2015, is denied.

3). The employer, through its carrier, shall pay claimant temporary partial disability

benefits beginning April 6, 2015, through June 7, 2015, at a compensation rate based on an average weekly wage of $590.50.

4). The employer, through its carrier, shall pay claimant temporary total disability benefits beginning June 8, 2015, through June 18, 2015, based on an average weekly wage of $590.50.

5). The carrier may take credit for any indemnity benefits paid after June 18, 2015, against any payments due under paragraphs 3 and 4 above.

6). The carrier shall pay penalties and interest on that portion of the lump sum payment made July 2, 2015, which was overdue, as well as the net amount payable to claimant after adjusting the compensation rate to reflect an average weekly wage of $590.50.

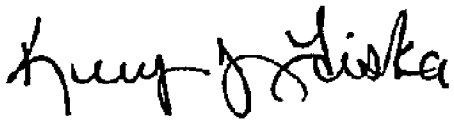
7). Jurisdiction is reserved to determine specific amounts payable, if necessary, as well as to determine all issues pertaining to attorney's fees and costs.

DONE AND ORDERED this 9th day of November, 2015, in Port St. Lucie, St. Lucie County, Florida.

Robert D. McAliley
Judge of Compensation Claims
Division of Administrative Hearings
Office of the Judges of Compensation Claims
Port St. Lucie District Office
WestPark Professional Center, 544 NW University Blvd., Suite 102
Port St. Lucie, Florida 34986
(772)873-6585
www.fljcc.org

CERTIFICATE OF SERVICE

I HEREBY certify that a true and correct copy of the foregoing has been e-mailed to Counsel on November 9th, 2015.



Secretary to Judge of Compensation Claims

Michael J. MacDonald
The Law Office of Michael J. MacDonald, P.A.
628 E. Pine St. # B
Orlando, FL 32801
mmacdonald1919@yahoo.com,lcolombey@yahoo.com

Matthew J. Troy
Hurley Rogner Miller Cox Waranch & Westcott P.A.
1560 Orange Ave., Suite 500
Winter Park, FL 32789
mtroy@hrmcw.com,sperez@hrmcw.com