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

Dustin B. Duncan,
Employee/Claimant,

vs.

Peaden Air Conditioning/Amerisure Insurance,
Employer/Carrier/Servicing Agent.
_____/

OJCC Case No.: 17-005369JW

Accident date: 1/25/2017

Judge: Jonathan Walker

FINAL COMPENSATION ORDER

After proper notice to all parties, this cause came on to be heard before the undersigned Judge of Compensation Claims at final hearing, on August 30, 2017. The Claimant was in-person at the time of the hearing along with his attorney, Chris Cumberland, Esquire. The Employer/Carrier (hereinafter referred to as the "E/C"), was represented by Matt Bennett, Esquire, who was in-person at the time of the hearing. The Petition for Benefits filed on March 6, 2017 was the subject of the final hearing.

CLAIMS

1. Temporary total disability benefits from 1/25/17 to present and continuing;
2. Temporary partial disability benefits from 1/25/17 to present and continuing;
3. The injured worker requests authorization of a primary care physician for treatment of the low back injury as sustained on 1/25/2017;
4. Compensability;
5. Penalties, interest, costs, and attorney's fees.

DEFENSES

1. Although the claimant was in the course and scope of his employment on the alleged date of accident, the Employer/Carrier disputes that the claimant suffered a compensable injury.

2. The alleged accident has been denied due to claimant's failure to provide statutory notice as required within thirty (30) days of the alleged accident.
3. The alleged accident is not the major contributing cause of the alleged disability or need for treatment.
4. There are no penalties, interest, costs, and attorney's fees due or owing.
5. The Employer/Carrier seeks costs at the expense of the claimant if it prevails on the claim on the claims at issue.

JUDGE'S EXHIBITS

1. Petition for Benefits filed March 6, 2017, with Attachments (DN 1).
2. Final Evidentiary Order on Advance entered on May 24, 2017 (DN 20).
3. Response to Petition for Benefits, filed on June 15, 2017 (DN 30).
4. Uniform Pretrial Stipulation and Pretrial Compliance Questionnaire filed July 12, 2017 (DN 36).
5. Motion to Amend Pretrial Stipulation and Order Granting Motion to Amend Uniform Pretrial Stipulation, entered August 23, 2017 (DN 37, 38).
6. E/C Hearing Information Sheet, filed on August 25, 2017 (argument only) (DN 39).
7. Claimant's Trial Summary, filed on August 28, 2017 (argument only) (DN 45).

JOINT EXHIBITS

1. Deposition of Tina Hogan, taken June 15, 2017 (DN 41).
2. Deposition of Carl Brauer, taken June 26, 2017 (DN 42).
3. Deposition of Cheryl Stewart, taken June 26, 2017 (DN 43).
4. Deposition of Paul Prue, taken June 26, 2017 (DN 44).

CLAIMANT'S EXHIBITS

1. Medical Records of Dr. McLoughlin, filed August 29, 2017 (DN 46).
2. Deposition of Ryan Neese, taken August 17, 2017 (DN 40).

EMPLOYER EXHIBITS

1. None.

OBJECTION

The E/C objects to the opinions of Dr. McLoughlin being admitted that are contained within his records. However, the E/C does not object to the factual aspects of such records, pursuant to Office Depot v. Sweikata, 737 So. 2d 1189 (Fla. 1st DCA 1999). In reviewing the pretrial stipulation, the E/C did not notate any objections with this document, based upon opinion testimony or otherwise. The Claimant reasonably would have relied on the lack of any objections. Therefore, all aspects of Dr. McLoughlin's records, including his opinions, are admitted, so the objection is overruled.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. In making my findings of fact and conclusions of law, I have considered and weighed all the evidence presented to me. I have observed and assessed the candor and demeanor of the Claimant, who testified in person before me, and I have resolved all of the conflicts in the testimony. I have not written a detailed summary of all the facts and evidence presented. See Section 440.25(4)(e), Fla. Stat.; Garcia v. Fence Masters, Inc., 16 So. 3d 200 (Fla. 1st DCA 2009) (holding that a compensation order need only contain findings of ultimate material fact necessary to support mandate, rather than a recitation of all evidence presented). Although I may not reference or detail each item of evidence presented by the parties, I have carefully considered all the evidence and exhibits in the context of the arguments of counsel and appropriate statutory authority and case law in making the following findings of fact and conclusions of law.

2. The undersigned Judge of Compensation Claims has jurisdiction over the parties and the subject matter.

3. Any and all issues raised by way of the petition(s) for benefits that are the subject matter of the final hearing, but which were not tried at the hearing or dismissed at trial, are presumed resolved, or, in the alternative, deemed abandoned by the Claimant and therefore are

denied and dismissed with prejudice. See Scotty's Hardware v. Northcutt, 883 So. 2d 859 (Fla. 1st DCA 2004); Betancourt v. Sears Roebuck & Co., 693 So. 2d 253 (Fla. 1st DCA 1997).

CLAIMANT TRIAL TESTIMONY

4. The Claimant is a twenty-six (26) year old former install helper, whose job duties were to help the lead install mechanic install new air conditioning systems. Before January 2017, the Claimant had back problems, but none that were "drastic," so he never saw the need to see a doctor. Prior to the alleged work accident, when he told his supervisor, Duip Dung, about earlier back complaints, he had been chastised by Mr. Dung and told to get back at work.

5. On January 23, 2017, the Claimant felt low back pain while moving an air conditioning unit up several flights of stairs. On this date, the Claimant told his lead mechanic, Paul, that he needed to take a break because of low back pain.

6. On January 26, 2017, the Claimant went to a softball game. He had been asked to attend the softball game by his roommate, Ryan Neese. While on the field, the Claimant began to "shag balls for approximately ten (10) minutes, when a ball came near him." The Claimant reached down for the ball, when he felt his back "go out." He did not have a glove on, nor was he hitting any balls. He had gone to the ballfield to "socialize," and not to practice or play a game. When the incident occurred on the field, he went onto his knees, and eventually made it over to the dugout, before being taken home by Mr. Neese.

7. The next day, on January 27, 2017, the Claimant texted his supervisor, Paul, to tell him of the incident at the softball field. The Claimant confirmed that he did check "sport," as to why he was seeing Dr. McLoughlin. It wasn't until after the medical visit that he believed that his back problems had been caused by the employment. The Employer indicated that light duty employment would have been available, but the Claimant was not sure why he was terminated.

8. On cross-examination, the Claimant indicated that he had told his supervisor "multiple times" that he had hurt his back in the past, but such injuries were not "drastic." The Claimant did not return to work after January 25, 2017.

RYAN NEESE TRIAL TESTIMONY

9. Mr. Neese is the Claimant's former roommate. He was living with the Claimant in

January 2017. On January 26, 2017, Mr. Neese took the Claimant to his softball practice. Before this date, the Claimant had, on multiple occasions, complained of his back hurting; however, he never said it was related to work. For these reasons, the Claimant had already stopped playing softball before the low back injury. Mr. Neese did not see the actual injury. Since the work accident, the Claimant has not played softball.

PAUL PRUE DEPOSITION TESTIMONY

10 Paul Prue is a lead install mechanic, which involves installing air conditioning systems and water heaters. The Claimant was a "helper apprentice." He did not have any specific memory of the Claimant being injured at a jobsite in Panama City Beach, in January 2017. Had the Claimant stated during any job that he had hurt his back, and that he could not continue working, Mr. Prue would have stopped the work and brought in another helper. However, he cannot recall anything like that happening. If the job had not been completed because of a work injury, then such an occurrence would have been an "event," which would have been remembered.

11. Mr. Prue received a text from the Claimant, stating that he had injured his back playing softball. Specifically, the text stated that Claimant injured his back "catching a ground ball…" The text was received on Friday, January 27, 2017. Later, the Claimant communicated to Mr. Prue that, "This whole softball thing is blown out of proportion."

CARL BRAUER DEPOSITION TESTIMONY

12. Carl Brauer is the Employer's operations manager. He hired the Claimant twice, as an install helper. The Claimant worked for the Employer a total of over two years. The Claimant never said that he had hurt his back on the job. The last time the Claimant worked was on January 25, 2017. In the month after the alleged accident, the Claimant was contacted by telephone message, text message and Facebook message, in order to get the Claimant to return to work. The Claimant was not terminated until February 27, 2017—a month after the Claimant last worked—because the Claimant was a "pretty decent employee when he worked." The Employer was willing to accommodate light duty restrictions before termination.

CHERYL STEWART DEPOSITION TESTIMONY

13. Ms. Stewart is an install coordinator. When the Claimant was seen following the alleged work accident, he stated that he had hurt his back playing softball. Specifically, he reached down to catch a ground ball on January 26, 2017, and "went down on the ground and couldn't get up." Prior to the alleged low back accident, the Claimant had never had any back complaints.

ADJUSTER TINA HOGAN DEPOSITION TESTIMONY

14. Tina Hogan is the assigned adjuster, and received the claim following receipt of a March 6, 2017 Petition for Benefits. The adjuster filed an April 29, 2017 Notice of Denial, based upon the adjuster's investigation that included conferences with three managers. A doctor was not provided to determine the etiology of the Claimant's medical complaints, because the claim was denied.

RYAN NEESE DEPOSITION TESTIMONY

15. Ryan Neese is a former roommate of the Claimant. He has known the Claimant for approximately twelve (12) years. Before the date of accident, the Claimant would often "come home crying" with his back. During the softball game, the Claimant stated, "I bent over to go pick the ball up,... [and] my back went out on me." Thereafter, the Claimant would be seen "literally crying" because of back pain. At the game, Mr. Neese saw the Claimant picking up balls. Before the incident at the softball field, the Claimant had already sold "all of his stuff" pertaining to softball, because of back pain from work.

DR. JAMES C. MCLOUGHLIN MEDICAL RECORDS

16. On January 27, 2017, Dr. McLoughlin's records show that the Claimant, "heard a pop in his back last night," and had had increasing pain since that time. His chief complaint was low back pain. The orthopedist noted "evidence of degenerative disc disease..." The Claimant's "symptoms just began yesterday after a pop." In the records, the orthopedist noted that the Claimant has "chronic exposure to oral nicotine, which is likely his major risk factor for degenerative disc disease, in addition to his extreme heavy lifting at work." Attached to the

records is a January 27, 2017 "Patient Registration Form" from Southern Orthopedic Specialists, P.A. (Dr. McLoughlin's practice). In the form, the Claimant denies that he was at the doctor's office due to a work accident. The Claimant marked "sport" in regards to how his injury occurred on January 26, 2017. The Claimant also marked that his current episode began "less than two (2) weeks ago." He also admitted that his current episode "began suddenly."

17. The Claimant returned to Dr. McLoughlin on February 9, 2017. At this time, the orthopedist noted again, that there was evidence of degenerative disc disease, and a back brace was ordered.

ANALYSIS

18. Section 440.09(1), Florida Statutes, holds that an employer must pay workers' compensation benefits, "if the employee suffers an accidental compensable injury or death arising out of work performed in the course and the scope of the employment."

19. Applying the law to the facts, the preponderance of the competent, substantial evidence suggests that the Claimant's back injury did not happen at work. To begin, the text evidence shows that the Claimant hurt his back playing softball on the night of January 26, 2017. In this regard, the following text conversation occurred between the Claimant, and his co-worker, Paul Prue:

Prue:	"Headed there."
Claimant:	"No I'm out of commission."
Prue:	"What's up?"
Claimant:	"I f----- up my back last night playing ball like not even hustling or anything just went for a backhand in a ground ball and my lower back went out and got me standing crooked and can't breathe and I'm going to Panama City spine care at 8:30."

20. While the Claimant changed his position on causation following his appointment with Dr. McLoughlin, the texts had already been sent, and form a part of the record. Moreover, the Claimant also told Install Coordinator Cheryl Stewart, when he first saw her after January 26, 2017, that he had hurt his back playing softball.

21. Further, the medical records of Dr. McLoughlin support a finding that the injury occurred away from work. Here, the records show that a "pop" in the Claimant's back occurred on the softball field. Also, the Claimant, in an intake form, marked "sport," when asked how the injury happened. And, contrary to testimony of ongoing back pain in the weeks before January 26, 2017, the Claimant stated that his pain had "began suddenly."

22. I am aware that the Claimant contends that his back injury actually occurred on January 23, 2017 while moving an air conditioning unit up several flights of stairs with Paul Prue. While the Claimant contends he told Prue of a back injury during the move, Prue denies that any such discussion occurred. Further, Carl Brauer and Cheryl Stewart deny that the Claimant ever told them that he had hurt himself at work. Taken together, I find that the testimony of the co-workers and manager, accords with logic and reason, and is more credible than the testimony of the Claimant. Moreover, I reviewed carefully this Tribunal's May 24, 2017 Final Evidentiary Order, which awarded an advance. During cross-examination by the E/C counsel at the advance hearing, the Claimant denied ever having injured his back playing softball. But, during subsequent discovery, the E/C identified, and later moved into evidence, the softball texts between Prue and the Claimant, which contradicts the Claimant's previous sworn testimony. Thus, there exists competent, substantial evidence that the Claimant was less than credible with this Tribunal in the past, so his current testimony that he injured his back at work is not given significant weight. See Wintz v. Goodwill, 898 So. 2d 1089 (Fla. 1st DCA 2005) (holding that it is the responsibility of the judge of compensation claims to evaluate and weigh evidence).

23. I also find that the Claimant did not provide notice of a work injury within 30 days of the alleged January 23, 2017 work accident, as is required by Section 440.185, Florida Statutes. Again, the preponderance of the competent, substantial evidence indicates that the managers, in the month following the injury, understandably thought that the Claimant's back injury was caused by his softball activities. In brief, I accept the managers' testimony that the Claimant did not report the alleged work injury until after the 30 day time limitation had run.

24. Alternatively, the Claimant requests that this Tribunal order, at least, a medical evaluation to determine the cause for the Claimant's low back pain complaints. In support, the Claimant cites to case law, relied upon by me in previous JCC orders, regarding such

evaluations. The E/C responds that reliance on these cases is misplaced, because, in those cases, compensability had already been established. The E/C's argument is well-taken. As cited in the Claimant's trial summary, the Court in Grainger v. Indian River Transport, 869 So. 2d 1269 (Fla. 1st DCA 2004), did order a neurological evaluation to determine if migraine headaches were caused by the work injury. However, an authorized physician, following an authorized carpel tunnel surgery, had made such a referral. Id. at 1270. Similarly, in Ruiz v. Bellsouth Credit and Collections, 994 So. 2d 1220 (Fla. 1st DCA 2008), an authorized doctor, treating a compensable accident, had recommended a neurosurgical evaluation to address a claimant's headache complaints. Id. at 1221. Lastly, the claimant in Chance v. Polk County School Board, 4 So. 3d 71, 72 (Fla. 1st DCA 2009), had two authorized doctors who had recommended further testing to determine the etiology of a medical problem. In total, the E/C in the Claimant's cited cases, had already accepted compensability of the work accidents, even though they subsequently questioned the medical cause for later specialist referrals, or testing. In the instant case, the E/C never accepted compensability, and denied the claim. Thus, the cited cases are distinguishable from the instant claim, because compensability has not been established in the instant matter. In other words, before the Claimant can argue for an authorized medical evaluation, he must prove that he had a compensable accident. In this regard, I find, for reasons set for above, that the instant Claimant has not met his initial burden of proof that he suffered a compensable accident at work, so the holdings in Grainger, Ruiz and Chance are inapplicable.

CONCLUSION

The preponderance of the competent, substantial evidence, supports a finding that the Claimant's injuries did not arise from the employment, as is required under Section 440.09(1), Florida Statutes. In the alternative, I hold that the Claimant did not provide notice to his Employer within 30 days of his alleged work injury. Lastly, because the Claimant has not proven that he had a compensable injury, he is not entitled to an authorized medical evaluation to address low back pain complaints, or to various temporary indemnity benefits. Therefore, it is

ORDERED AND ADJUDGED that:

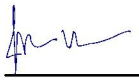
1. Compensability is DENIED.

2. Temporary benefits from 1/25/17 and continuing are DENIED;

3. Authorization of a primary care physician is DENIED;

4. Penalties, interest, costs and attorney's fees are DENIED.

DONE AND SERVED this 7th day of September, 2017, in Panama City, Bay County, Florida.



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