

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGE OF COMPENSATION CLAIMS
MIAMI-DADE COUNTY DISTRICT**

EMPLOYEE:

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**ATTORNEY FOR
EMPLOYER/CARRIER:**

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CARRIER:

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OJCC NO.: 07-027939SMS

D/A: 3/3/2006

FINAL COMPENSATION ORDER

THIS CAUSE came before the undersigned Judge of Compensation Claims for a final hearing on 8/31/09 regarding petitions for benefits (PFBs) filed 10/1/07, 10/26/07, 2/7/08, and 11/25/08.

Claims:

1. TTD/TPD benefits from the date of accident and continuing at the correct rate
2. Penalties, Interest, Costs, and Attorney's Fees (P.I.C.A.).
3. Provision and authorization of cervical MRI, lumbar MRI, EMG/NCS, and orthopedic follow up.
4. Provision of alternate treating physician.

Defenses:

1. Wage loss is not related to the industrial accident.
2. Claimant has no wage loss.
3. No medical evidence to support disability.
4. Claimant has never been referred to an orthopedist by any authorized treating physician.
5. AWW is correct or too high.
6. Industrial accident is no longer the major contributing cause of any disability and need for treatment.
7. PICA not due or owing.
8. Claimant has previously been provided with a one-time change in physicians.
9. Costs to the Employer/Carrier per section 440. 34(3).

Documentary Exhibits:

JCC-

1. Pre-trial Stipulation dated 3/30/09.

Joint Exhibits-

- A. Deposition of Dr. Monica Grinberg.

Claimant-

None.

Claimant's Proffer-

A. IME Report of Dr. Randall Blinn. Claimant sought to introduce the report of Dr. Blinn into evidence however, E/C objected to same based on lack of authenticity and hearsay. The undersigned sustained E/C's objection and notes that claimant has had almost 2 years to secure his IME from the filing of the first PFB on 10/1/07--which PFB was voluntarily dismissed only as it applies to the carrier.

E/C-

1. Deposition of Ms. Ruth Chapman.
2. Depositions of Lisa Sabattini (9/15/08 and 8/28/09).
3. Deposition of Dr. Kenneth Jarolem.
4. Deposition of the Claimant taken 7/8/08.

Findings of Fact and Conclusions of Law:

1. The Claimant testified in person at the 8/31/09 final hearing. He was involved in a compensable motor vehicle accident on 3/3/06 in which the claimant alleged injuries to his low back and then eventually numerous other body parts including his neck, elbow, knee, ankles and wrists. He received treatment at a hospital but was released that same night. We was out of work for approximately 10 days after the accident. However, claimant returned to work for the employer herein. He worked for the employer herein until August of 2007 when he was laid off due to unavailability of work.

2. Claimant retained an attorney by the name of Jaime Suarez, Esquire and filed a personal injury claim. Mr. Suarez referred the claimant to a chiropractor, Dr. Cereceda and an orthopedic physician, Dr. Zaslow. Claimant treated with these physicians under the PIP claim eventually undergoing back surgery on 2/15/07. These physicians and treatment provided by them were not authorized by the instant carrier.

3. When the Claimant decided to eventually pursue benefits under workers compensation after settling his bodily injury claim, the E/C authorized Dr. Monica Grinberg. Dr. Grinberg opined that claimant was at full duty on the initial visit of May 5, 2008 and believed he had reached MMI with no impairment by May 14, 2008. In her deposition she acknowledged that he probably had attained MMI as of 3/28/07.

4. E/C obtained their IME with Dr. Kenneth Jarolem, orthopedic spinal surgeon. On 8/27/08, claimant complained of severe low back pain and neck pain associated with the car accident. Dr. Jarolem noted the inconsistent histories provided by the claimant to him and that provided to Dr. Zaslow subsequent to the lumbar surgery. Claimant's physical examination raised questions of symptom magnification or malingering on claimant's part. After conducting a physical examination, Dr. Jarolem did not find any objective findings supporting claimant suffered a neck injury. Likewise, Dr. Jarolem testified that there were no objective findings to define the need for any further medical treatment. While Dr. Jarolem desires to review the lumbar MRI to determine the initial causation of claimant's lumbar condition, he did not change his opinion that presently, there is no further need for medical treatment as to claimant's lumbar spine. Finally, Dr. Jarolem opined that claimant can work in his present capacity as a driver.

5. Claimant is working as an interstate truck driver--often driving to New York and New Jersey. He takes a break from driving every 5 to 6 hours. He lost his health insurance coverage when his wife lost her job. He currently complains of continued problems with his back and all over this body. He desires continued care with a physician.

Claim for TTD/TPD benefits-

6. It is the claimant's burden to prove that any wage loss is related to the industrial accident. See, Vencor Hospital v. Ahles, 727 So. 2d.968 (Fla. 1st DCA 1998); See also, Interim Services and Specialty Risk Services v. Levy, 843 So. 2d 915, 916 (Fla. 1st DCA 2003). I find that claimant has not satisfied his burden of proof. Simply, claimant failed to present any medical evidence substantiating assignment of work restrictions after the industrial accident. Further, he has failed to prove that his alleged wage loss is related to the instant industrial accident.

7. The Claimant treated on an authorized basis with Dr. Monica Grinberg on May 5,

2008. As part of that treatment, the Claimant completed history forms and conversed with Dr. Grinberg regarding his injuries, treatment, and current complaints. The Claimant specifically denied any subsequent injuries or accidents involving his back. (The deposition of Dr. Monica Grinberg, Page 14, Lines 2-9.) As a result of reviewing records, Dr. Grinberg determined that the Claimant had played tennis for two hours and was lifting 200 lbs. (Deposition of Dr. Grinberg, Page 16, Lines 3-21 and Page 18, Lines 10-20.). Dr. Grinberg did not assign any work restrictions to the claimant which would be related to the instant industrial accident. She doubted that claimant's complains in 2008 was causally related claimant's back problems to his 3/3/09 accident given the excellent results from the surgery.

8. Additionally, the Claimant was evaluated by Dr. Jarolem, the Employer/Carrier's IME on 8/27/08. Again, the Claimant described a history of low back pain following a motor vehicle accident with surgical intervention performed by Dr. Zaslow. The Claimant indicated to Dr. Jarolem that he had severe low back pain and secondary complaints of neck pain. Additionally, the Claimant stated that following the accident, he could not run, lift weights or swim. (Deposition of Dr. Jarolem, Page 9, Lines 1-8.) He stated that if he walks for more than 20 minutes at a time, he is unable to walk the next day. The Claimant was very specific regarding his inability to do any activities following the accident. Again, this is directly in contrast to what the Claimant told Dr. Zaslow on 3/28/07 where the notes indicate that the Claimant played tennis for two hours and was bench pressing greater than 200lbs. (See IME Report of Dr. Jarolem and Deposition of Dr. Jarolem, Page 15, Lines 14-21.). As to work status, Dr. Jarolem deferred until he sees the lumbar MRI. However, based on claimant's history to Dr. Zaslow post-surgery, he wouldn't expect there to be restrictions. Certainly, claimant can continue his work as a driver (Pgs. 25 of Dr. Jarolem's deposition).

Claim for provision and authorization of cervical MRI, lumbar MRI, EMG/NCS, and orthopedic follow up-

9. Both Dr. Jarolem and Dr. Grinberg indicated that the alleged industrial accident is not the major contributing cause of the Claimant's need for treatment. (Deposition of Dr. Grinberg, Page 31, Lines 15-18 and of Dr. Jarolem Page 17, Lines 13-24.) The Employer/Carrier is responsible for treatment so long as the industrial accident remains the major contributing cause of the disability and need for treatment. Section 440.09(1). The Claimant has come forward with no admissible evidence that the employment is the major contributing cause of the need for further treatment.

Claim for AWW upward adjustment-

10. The Employer/Carrier is basing the Claimant's average weekly wage upon payroll records. The Employer/Carrier is using \$800.00 as the average weekly wage, which is in fact I find is higher than the Claimant's actual earning. (Deposition of Lisa Sabatini 9/15/2008, Page 9 Line 21 .Page 10 Line 6.) The burden is on the Claimant to prove a higher average weekly wage than that used by the Employer/Carrier. Jackson v. Hochadell Roofing Company, 657 So.2d 1266 (Fla P' DCA 1995). I find that the Claimant has failed to prove a higher weekly wage than that used by the Employer/Carrier.

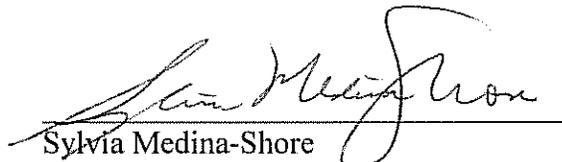
Claim for Provision of Alternate PCP-

11. A request for alternate PCP/one-time change was made by Petition for Benefits filed 11/17/08 and received by E/C on 11/25/2008. I find that the Employer/Carrier timely responded to the PFB by authorizing Occupational Heath Clinic (a walk-in clinic) located at 3399 NW 72 Ave, Ste. 101, Miami, FL 33122 on 11/26/2008 (See Deposition of Lisa Sabattini taken August 28, 2009 and Response to Petition for Benefits 12/1/2008). As the authorization occurred with 5 days (actually the very next day), I find that the authorization is timely and the

claimant may still avail himself of the one-time change physician. However, the Claimant never presented to Occupational Health for treatment.

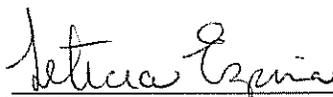
WHEREFORE, IT IS ORDERED:

1. Claim for TTD/TPD benefits plus penalties and interest from the date of accident and continuing at the correct rate is denied.
2. Claim for provision and authorization of cervical MRI, lumbar MRI, EMG/NCS, and orthopedic follow-up is denied.
3. Claim for provision of alternate treating physician is denied as E/C timely authorized alternate treating physician. Claimant may still avail himself of the authorized alternate treating physician.
4. Jurisdiction is reserved as to determination of entitlement to and amount of attorney's fees and costs for a future hearing, in the event the parties are unable to amicably resolve it.


Sylvia Medina-Shore
Judge of Compensation Claims

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the instant Final Compensation Order has been furnished by U.S. Mail to the parties and via e-mail to the attorneys of record this 22nd day of September, 2009.


Secretary to JCC