

\$860.20 as calculated from the thirteen week wage statement³; that the Claimant sustained a contusion to his carpal metacarpal joint (CMC) in his left hand as a compensable injury in the compensable industrial accident, and, as a result, aggravated or accelerated the progress of pre-existing degenerative arthritis in that joint resulting in a present need for remedial medical care; and that the Claimant did not meet his burden of proof to establish entitlement to temporary disability benefits, either temporary total (TTD) or temporary partial (TPD) up to the date of the hearing. The reasons for these determinations follow.

BACKGROUND AND FINDINGS OF FACT

1. On the date of the accident, August 1, 2008, Paul Turner (Claimant) was 56 years old. He was employed by Beyel Brothers Crane Service (Beyel), a client company of Frank Crum, an entity described as a professional employer organization (PEO), which “employs” the workers and supplies payroll and insurance services for workers which the PEO assigns back to the client company. Claimant had become an employee with Beyel in April, 2008 and his job was described as a driver/rigger. His primary function was to drive a truck loaded with tools and materials to remote locations from Beyel’s Cocoa Beach yard and assist a crew when erecting or dismantling cranes used on construction sites. Claimant’s primary occupation before this job has been as a carpenter/framer. In the years prior to the current economic slowdown in the construction industry, he had owned a construction business in Palm Beach County. See Claimant’s deposition.

2. On August 1, 2008, he sustained a compensable injury involving his left hand and fourth (ring) finger on the left hand when, while in the process of removing a track from a crane in Miami-Dade County, the housing of the crane (main body) shifted forward and pinned his left hand to the track. Claimant’s injury happened to occur on the first date the employer and the Claimant began to fund his health insurance benefits. Although he became entitled to receive insurance benefits on his 90th day of employment, a couple of weeks before August 1, 2008, due to Beyel’s policy, the coverage did not become effective until the first of the following month.

3. The accident occurred late in the work day and, after Claimant’s hand was freed from the track, he was taken by a co-worker to a nearby hospital, Aventura Hospital, where he was evaluated and released after a few hours. The injury was triaged at Aventura Emergency and, after evaluating the entire hand and obtaining x-rays of the hand, the diagnoses included contusion to the left hand and a severely fractured ring finger. The finger was immobilized and

³ The amount determined by the E/C was \$860.19.

Claimant received pain medication and was discharged to receive further treatment in Cocoa Beach where Claimant lived.

4. On the following day, August 2, 2008, Claimant was authorized by Beyel Brothers⁴ to go to Wuesthoff Hospital for further care, specifically regarding the fractured finger, because the finger had not been set at Aventura the previous day. Due to the severity of the fracture, the finger was not set at Wuesthoff Emergency. The entire focus of the Wuesthoff record was regarding potential treatment on the fractured finger. Following the evaluation, Claimant was discharged from Wuesthoff with instructions to consult with an orthopedic surgeon for further care of the fractured finger.

5. On August 6, 2008, Claimant attended an appointment with Dr. Carlos Woodward which had been coordinated directly by Beyel Brothers. Dr. Woodward, based on his deposition testimony and record of the evaluation, was also focused on attempting to get the fractured finger effectively stabilized. The injury was described as severe; a crushing of the bone located immediately beneath the finger nail, and Dr. Woodward employed the services of another orthopedist, Dr. Hale⁵, who actually placed an immobilizing splint on the finger. According to Dr. Woodward, Claimant could return to his work at Beyel, with the only restriction being to wear the splint and avoid further injury to the finger. Dr. Woodward later did not recall, and his note does not reflect, discussing any other physical complaint regarding the injured left hand between himself and the Claimant, other than the fracture to the finger.

6. Claimant returned to work on August 11, 2008. He had not worked since the accident. When he returned to work, he was reassigned to the yard at Cocoa Beach and was no longer a driver, likely due to the splinted and fractured left ring finger. He continued to work in the yard until he was laid off on January 23, 2009 as part of an ongoing reduction in force that involved many other workers. Claimant was expected to and apparently did perform the duties of his position working in the yard which were described as general labor and involved loading and unloading cranes and rigging to and from trucks and positioning the equipment in the yard. There is no indication that Claimant sustained any reduction in earnings on a weekly basis that can be attributable to his injury as, with the exception of periods around the Thanksgiving Holiday and in January leading up to the reduction in force, Claimant earned full wages for every work period after August 11, 2008. The reduction of hours in January was directly attributable to the lack of

⁴ Medical care was initially coordinated and authorized by Beyel which seemed to be reimbursing Claimant for payments he made to medical providers for the care he was receiving. See records attached to Lowery deposition.

⁵ There are no records from Dr. Hale.

available work. See Lowery deposition and records attached.

7. Claimant returned for a follow up appointment with Dr. Woodward on October 17, 2008. Dr. Woodward recalled from records in his file that Claimant missed a follow up appointment in September, a fact that Claimant did not recall. On October 17, 2008, Dr. Woodward found and declared that Claimant's fractured ring finger was at Maximum Medical Improvement (MMI). He assigned no rating or permanent physical restrictions relating to the fracture. During that visit, however, Claimant clearly complained of increasing pain in the area of the carpal metacarpal (CMC) joints just above the left wrist. In order to investigate this, Dr. Woodward ordered a MRI examination which was completed on December 5, 2008. He interpreted the MRI as revealing degenerative arthritis in the CMC area of Claimant's left hand which he termed as post-traumatic in origin. However, he declined to state that the August 1, 2008 injury was the cause of the findings. Dr. Woodward gave two depositions and his opinions on the relationship of the origin of the post-traumatic arthritis are emphatic that the accident did not cause those findings. He based those opinions on his medical opinion that the degree of degeneration which was visible on the MRI could not have been developed in the relatively short time following the accident, that he never recalled Claimant complaining of an injury in that part of his hand, and his records likewise did not reflect any such complaints. This was significant to Dr. Woodward because, in his medical opinion, if Claimant had sustained an acute injury to that portion of the hand, the discomfort would have been significant enough to cause the Claimant to voice complaints earlier than he first did on October 17, 2008.

8. Claimant testified he complained of pain and injury to his entire left hand from the outset. Claimant described the mechanics of the injury as involving the housing of the crane falling forward and pinning his finger and the base of his gloved left hand beneath the house. Based on the Aventura record, the entire hand was involved. The fact that Dr. Woodward did not recall or note complaints were made by the Claimant regarding the back of the left hand does not mean those complaints were not actually made. The evidence is equally capable of different inferences, one of which is that, due to the severe nature of the finger injury, the original focus was on stabilizing that injury and complaints involving other less emergent injuries were simply not noted. See Dr. Hermansdorfer depositions February 18, 2011 and June 2, 2010. Claimant also recalls discussing surgery with Dr. Woodward at the last office visit on January 9, 2009 and described his view of a surgical procedure he discussed with him. There is no clear agreement on this from Dr. Woodward. However, Dr. Woodward did apparently discuss a medical procedure to treat the CMC joint with Beyel Brothers and sent a letter to them explaining the procedures on February 24, 2009. He indicated he expected to see the Claimant again in March, 2009 but

Claimant did not attend the expected appointment. The undersigned finds that, by the time Dr. Woodward sent the letter to Beyel Brothers, Claimant had been laid off. This, coupled with the evidence that suggests that Dr. Woodward may have worked closely with Beyel Brothers in coordinating treatment for the Claimant, causes the undersigned to not place total confidence in Dr. Woodward's opinions regarding the CMC joint injury and its relationship to the August 1, 2008 injury. However, Dr. Woodward's opinions as to MMI and permanent impairment and restrictions regarding the fractured left ring finger are not controverted by any other medical opinion offered in this case.

9. Following Claimant's lay off from Beyel on January 23, 2009, he received unemployment benefits. See Claimant's deposition. The exact amount of the weekly benefits and the duration of the benefits was not established. However, Claimant next became employed in October, 2009 when he was hired by Lane Construction as a framer at a rate of pay of \$15.00/hour. Within a few weeks, Claimant received a merit raise to \$16.00. He continued to work for Lane through January 30, 2010 full time with full pay and without physical difficulty. See Lane personnel and payroll records, and trial testimony of Anderson. The employment ended when the project for which he was hired was completed and he was laid off as part of a reduction in force. Anderson trial testimony.

10. On April 26, 2010, Claimant was authorized to be evaluated by Dr. John Hermansdorfer, an orthopedic surgeon, for his left hand complaints. Dr. Hermansdorfer agreed with Dr. Woodward that Claimant's fractured left ring finger had healed to the point of MMI as determined by Dr. Woodward and he deferred to the level of impairment and restrictions assigned for that injury. He also generally agreed with Dr. Woodward's assessment of the CMC joint condition, but disagreed about the origin of that condition. Dr. Hermansdorfer reviewed the Aventura records, the Wuesthoff records, Dr. Woodward's records, the December, 2008 MRI report, and Claimant's history of experiencing no left hand complaints before August 1, 2008, and the post-accident history of progressive complaints, and opined that the CMC condition was directly causally connected to the accident and injury. He noted that the Aventura records documented a definite contusion injury to the left hand. His recommendation for treatment was a debridement procedure initially, with possible more extensive surgery if necessary. Claimant hesitated to agree to surgery and he was released to full duty with no restrictions attributed to the CMC joint condition. On June 9, 2010, Claimant returned to Dr. Hermansdorfer with a two-week history of increasing complaints in the CMC joint and was considering the surgery recommended on April 26. Dr. Hermansdorfer noted that, without the surgery, Claimant was at a level of MMI for the CMC condition but, if surgery was going to be considered, MMI was not reached. He

assigned a 40-pound limitation on the use of Claimant's left hand. See Hermansdorfer depositions.

11. On approximately December 12, 2010, Claimant once again became employed with Brassfield Gorrie Construction as a carpenter/framer, his primary occupation. His rate of pay is \$17.87/hour and remained so employed as of the date of the hearing.

12. On February 9, 2011, Claimant was evaluated by Dr. Kenneth Hodor, a few days prior to the hearing. He was deposed the following day. Dr. Hodor is a highly credentialed physician who evaluated the Claimant and reviewed the entirety of the medical case following the August 1, 2008 accident and injuries. Dr. Hodor's final conclusions were that the fractured left ring finger healed as determined by Dr. Woodward. He agreed that the August 1, 2008 accident likely did not cause the degenerative arthritis identified in Claimant's CMC joints by the December, 2008 MRI, as it probably pre-existed the accident. However, he did opine that the contusion to Claimant's left hand, identified in the Aventura records, likely caused the arthritis to become symptomatic and active, noting the mention of edema on the MRI. He concluded, therefore, that the accident aggravated or accelerated the arthritis condition and that aggravation was directly connected back to the accident. He recommended conservative treatment for the Claimant's hand before definitely engaging in surgery. Accordingly, he declared that Claimant is not at MMI for the CMC condition and assigned temporary restrictions and assigned a 20-pound limitation on the use of Claimant's left hand. The undersigned accepts these opinions from Dr. Hodor to the extent they differ from other medical opinions because they are most complete, and consistent with the totality of the circumstances presented by the facts of this case. However, Dr. Hodor's opinion that the 20-pound limitation should be reasonably applicable back to the date of accident is not factually supported and is inconsistent with his own theory of a progressive arthritic condition following the injury.

ANALYSIS AND CONCLUSIONS OF LAW

Determination of Average Weekly Wage

13. The accident occurred on the exact day the Claimant's entitlement to health insurance as an employment benefit became effective. Claimant argued that a determination of the AWW should include the amount of contributions the E/C/SA would have to, and did actually, make to fund the health insurance coverage in the base AWW which would determine the rate of disability payments to be made to the Claimant. No disability has been paid up to this point in time. The facts are that Claimant became entitled to health insurance coverage on the 90th day of

employment but, due to Beyel's policy, coverage did not take effect until the first day of the month following the 90th day. The facts are that the employer and the employee both began to fund coverage on August 1, 2008, the date of the accident. Section 440.02(28), Florida Statutes (2008), includes the money rate for employer contributions for health insurance for employees within the definition of wages. Section 440.14 (1)(a), Florida Statutes (2008), determines the method for correct calculation of the AWW and states that the total amount of wages earned in the employment in the thirteen calendar weeks before the date of the accident is the basis for calculating AWW. The week during which the accident occurred is excluded. Using this provision, it is determined the relevant period would have ended with the calendar week which preceded the week containing August 1, 2008. No employer or employee contributions were paid during that period and, therefore, cannot be included in the wages used to calculate the AWW. Claimant's reliance on *Rosado v. J.C. Penny*, 647 So. 2d 987 (Fla. 1st DCA 1994), is misplaced because that case was based on a different statutory standard for calculating AWW. The correct AWW, as a matter of law, is that calculated from the Wage Statement or \$860.20. Since no disability has been paid to date, if and when any disability is paid in the future, the disability amounts shall be based on this AWW rate.

Compensability of and Treatment for the Left Hand CMC Joint Condition

14. The undersigned accepted the opinions of Dr. Hodor as to the nature of the injury to Claimant's left hand CMC joint which was caused by the August 1, 2008 industrial accident. Dr. Hodor determined that, when the Claimant's left hand was trapped beneath the housing of the crane on August 1, 2008, the hand sustained a contusion in addition to the fractured ring finger and that the contusion, in turn, aggravated or accelerated an underlying degenerative arthritic condition in the hand which now needs medical care and attention. He has recommended conservative care before surgical remedies are feasible. Based on Dr. Hodor's opinion as to the nature of the injury and both Dr. Hodor's and Dr. Hermandorfer's opinions as to why the current CMC joint condition is causally related to the industrial accident as the major contributing cause of the need for treatment, the undersigned finds the Claimant's left hand CMC joint condition compensable and that treatment as suggested by Dr. Hodor should be provided by the E/C/SA.

Temporary Total/Partial Disability Benefits

15. Claimant is arguing that he should receive temporary partial disability benefits (TPD) covering two distinct periods of time since this accident: January 24, 2009 to October 23, 2009 and again from January 31, 2010 to December 13, 2010. Claimant makes no argument as to why

any temporary total disability benefits should be paid to the Claimant and the undersigned infers that the Claimant has abandoned any claim for TTD. The facts in the case would also not support the award of TTD.

Claimant is relying exclusively on *Wyeth/Pharma Field Sales v. Toscano*, 40 So. 3d 795 (Fla. 1st DCA 2010), to argue his entitlement to TPD benefits. In *Toscano*, the Court distinctly set out to clarify the legal standards governing payment of TPD benefits pursuant to current law, Section 440.15 (4), Florida Statutes (2008). *id* at 798. An employee's entitlement to TPD benefits is predicated on the ability to work, but with restrictions. TPD benefits are payable only when the employee has been released to work with restrictions. TPD benefits are intended to compensate an injured worker who has returned to some type of restricted work, is still in recovery from the injuries, and has sustained a temporary displacement from pre-injury employment and wages. *id* at 798. Based on restrictions imposed, the claimant must demonstrate a disability or incapacity to earn in the same or any other employment the wages the claimant was earning at the time of the injury. *id* at 799. In short, the claimant must prove a causal connection between the injury and a loss of earning ability. A prima facie case of lost earning capacity must include evidence that demonstrates a connection between the loss of employment at pre-injury wages and the industrial accident. The burden is clearly on the claimant to connect the economic disruption to the compensable injuries. *id* at 799. It is not until the claimant establishes a prima facie case that the burden shifts to the E/C to prove that, during the period claimed, the claimant refused work or voluntarily limited his income. *id* at 800. In a situation where, as here, a claimant returns to work within restrictions and establishes a post-injury earning capacity at a rate of pay that precludes payment of TPD benefits but later becomes unemployed for reasons unrelated to the injury, the claimant must present some evidence to prove a causal connection between the compensable injury and the subsequent period of diminished earnings, and a typical way of accomplishing that is with evidence of a good faith and unsuccessful job search. *id* at 803. Unless a claimant is able to make such a connection, the inference will remain that the cause of the loss of earnings will be the unrelated loss of the earning capacity. *id* at 803. The cause of the displacement of a claimant from loss of wages and employment, once established, will remain the cause unless an intervening cause is established. *id* at 803.

In this case the Claimant was able to return to full employment and wages immediately after the accident. He was medically released, at MMI and without restrictions, by Dr. Woodward on October 17, 2008, and he continued to work with full wages until laid off as part of a reduction in force on January 23, 2009. He remained unemployed with no changes in his medical status until October 23, 2009 when he became employed by Lane Construction, again in full employment and with full wages. He worked at Lane, with no change in his medical status, until

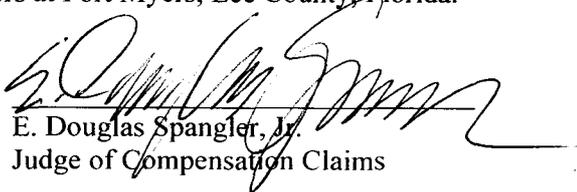
January 30, 2010 when he was again laid off due to a reduction in force. He remained unemployed until December 13, 2010 when he was re-employed in a full duty and full wages position, which he remained in up to the date of this hearing. His medical status did change on June 9, 2010 when Dr. Hermansdorfer stated he restricted Claimant's use of his left hand to a 40-pound use limit. Applying the legal principles stated above to these facts, it is clear that the cause of the displacement from wages was due to the disruption in employment at Beyel and Lane caused by economic conditions. After the Claimant received restrictions from Dr. Hermansdorfer for his CMC joint condition on June 9, 2010, economic conditions will continue to be determined to be the cause of his loss of earnings capacity unless the Claimant introduces evidence of a supervening or intervening cause. The fact that the Claimant was able to find a third job in December, 2010 which provided wages that exceeded those he was receiving on August 1, 2008 enhances that his injuries did not create a disruption in his earning capacity. Therefore, the Claimant did not prove that he is entitled to TPD benefits for any period since the date of accident.

Wherefore, on the basis of the foregoing it is ORDERED and ADJUDGED:

1. The AWW in force in this case should be \$860.20.
2. Claimant sustained a compensable injury to the CMC joint in his left hand and the E/C/SA shall provide medical care for the injury as defined by Dr. Hodor and as recommended by Dr. Hodor.
3. Claimant's demand for TTD and/or TPD benefits is denied and dismissed.
4. Claimant is entitled to an award of reasonable attorney's fees and costs in connection with the benefits awarded in this Order, and jurisdiction is reserved for determination of the amounts.

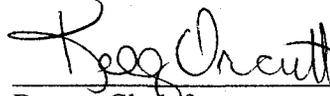
DONE AND ENTERED in the Chambers at Fort Myers, Lee County, Florida.




E. Douglas Spangler, Jr.
Judge of Compensation Claims

Certificate of Service

I certify that a true copy of the foregoing Order was served by mail on all parties and counsel this 21st day of March, 2011.



Deputy Clerk for
Judge E. Douglas Spangler, Jr.

APPENDIX 1

ISSUES AND DEFENSES

ISSUES

- 1) Medical care for Claimant's carpal metacarpal joint on the left hand
- 2) Surgery as recommended by Dr. John Hermansdorfer
- 3) Temporary total disability and/or temporary partial disability from the date of accident to the present date.
- 4) Determination of the correct Average Weekly Wage to include Employer contributions for health insurance.
- 5) Penalties, interest, costs, and attorney's fees

DEFENSES

- 1) The industrial accident is not the major contributing cause of any disability and/or need for treatment
- 2) The condition is personal and/or pre-existing in nature
- 3) All TT/TPD due and owing has been timely and appropriately paid
- 4) The Claimant is voluntarily limiting his own income
- 5) Restrictions, if any, and any lost wages are not causally related to the industrial accident
- 6) AWW is correct as calculated
- 7) Employer/Carrier is entitled to an offset for post accident earnings or unemployment benefits
- 8) Claimant is at MMI from 10/17/2008 forward
- 9) Treatment is not reasonable or medically necessary
- 10) Penalties, interest, costs and attorney's fees are not due and owing

APPENDIX 2

DOCUMENTS AND EXHIBITS

JOINT EXHIBITS

- 1) Deposition of Dr. John Hermansdorfer dated June 2, 2010
- 2) Deposition of Tania Munster, Records Custodian, Aventura Hospital
- 3) Deposition of Sherri Fluit, Records Custodian, Frank Crum Payroll
- 4) Deposition of Lisa Spalding, Adjuster, dated January 31, 2011
- 5) Deposition of Beth Lowry dated January 13, 2011 with exhibits
- 6) Deposition of Dr. Kenneth Hodor dated February 10, 2011 with exhibits

CLAIMANT EXHIBITS

- 1) Deposition of Donna Turner, Records Custodian, Atlantic Orthopedic Group, dated December 22, 2010

EMPLOYER/CARRIER/SERVICING AGENT EXHIBITS

- 1) Deposition of Paul A Turner dated February 2, 2010
- 2) Deposition of Dr. Carlos Woodward dated May 24, 2010
- 3) Deposition of Dr. Carlos Woodward dated December 8, 2010
- 4) Lane Construction payroll and personnel records
- 5) Deposition of Dr. John Hermansdorfer dated February 9, 2011
- 6) Deposition of Carmen Agosto, Records Custodian, Wuesthoff Hospital

JCC EXHIBITS (COMPOSITE)

All pending Petitions for Benefits, responses of record, mediation reports, Pre-Trial Stipulations, Order Approving Pre-Trial Stipulation, and Amendments to Pre-Trial Stipulations