

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF JUDGES OF COMPENSATION CLAIMS
FORT LAUDERDALE DISTRICT OFFICE**

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OJCC No: 09-013287DAL

D/A: 3/2/2009

JUDGE: Daniel A. Lewis

FINAL COMPENSATION ORDER

AFTER DUE NOTICE to the parties, a Final Merits Hearing was conducted before the undersigned Judge of Compensation Claims (JCC) on April 15, 2010 in Lauderdale Lakes, Broward County, Florida. The petition for benefits which came on for adjudication was filed on May 21, 2009. The Final Hearing commenced at 9:30 a.m. and concluded at 4:30 p.m. The parties stipulated as follows:

- A. The undersigned has jurisdiction of the parties and of the subject matter.
- B. Notice of hearing was timely given to the proper parties.
- C. Venue lies in Broward County, Florida.
- D. The claimant's March 2, 2009 accident and resultant low back injury was initially accepted by the employer/carrier as a compensable occurrence, and the employer/carrier

authorized medical care and treatment for same. However, the employer/carrier takes the position the industrial accident no longer remains the major contributing cause of claimant's disability or need for treatment.

E. The date of the claimant's attainment of maximum medical improvement (MMI) was left as an issue for my determination.

F. Claim was made for:

1. Temporary partial disability benefits from April 26, 2009 to the present, plus interest and penalties thereon.

2. Also claimed were attorney's fees and costs.

G. The employer/carrier asserted as defenses that:

1. All temporary partial disability benefits due or owing have been paid. The claimant is not due any additional benefits.

2. The industrial accident is not the major contributing cause of any disability or need for treatment.

3. The claimant is voluntarily limiting his income.

4. The claimant abandoned his job by quitting; therefore, no indemnity is due or owing.

5. The claimant has been noncompliant with medical care.

6. Temporary partial disability is not due and owing as the claimant was incarcerated.

7. Attorney's fees, costs, interest and penalties are not due or owing.

8. The employer/carrier seeks costs pursuant to section 440.34, Fla. Stat.

After careful consideration and review of the testimony, documentary evidence and argument presented, the following are my findings of ultimate facts and conclusions of law:

1. This claimant is a 25 year old male, date of birth January 21, 1985, who sustained his compensable workers' compensation accident on March 2, 2009 while changing a tire on a police car which he had been dispatched to tow. Claimant worked for A & B Towing, Inc. as a tow truck driver and had been so employed for a period of approximately three (3) years prior to the work accident.¹ As the result of the accident, claimant injured his lower back.

2. Claimant testified that after the accident, he was seen at the Memorial Regional Hospital emergency room. According to the claimant, he was diagnosed with a back sprain. Claimant then received treatment at a medical facility known as Solantic. These providers were authorized by the employer/carrier to treat. Claimant testified he continues to experience pain in his lower back.

3. At this Final Hearing, claimant sought to admit the medical reports of his authorized treating health care providers, pursuant to section 440.29(4), Fla. Stat. That subsection provides such medical reports shall be received into evidence upon proper motion. However, to be admissible, the records "must be served on the opposing party at least 30 days before the final hearing." Claimant admittedly did not do so, but contends the employer/carrier was in possession of these records so there is no resulting prejudice to the employer/carrier. The employer/carrier, on the other hand, asserted that it was prejudiced. According to the employer/carrier, had it known which medical records the claimant was intending to admit, it would have deposed the providers regarding any opinions contained therein.

¹ The evidence reveals that FrankCrum, the named employer herein, is a professional employer organization (PEO) and handles payroll and workers' compensation insurance for A & B Towing, Inc.

4. Section 440.29(4) allows medical records of authorized treating providers to be admitted into evidence without the necessity of laying an evidentiary foundation through a medical records custodian or through the health care provider. However, the statute does require that the records themselves be served on the opposing party at least 30 days prior to the Final Hearing. That requirement obviates any uncertainty as to which medical reports the party intends to offer at time of trial. Since claimant failed to serve the records on the employer/carrier as mandated by the statute, I found claimant could not rely on section 440.29(4), Fla. Stat., to introduce the records. Claimant's Motion to Admit Medical Records was therefore denied.²

5. At this Final Hearing, a great deal of testimony and evidence was adduced concerning the events that took place on March 10, 2009. On that date, claimant returned to the premises of A & Towing, Inc., ostensibly to seek limited duty employment. While on the premises, an altercation or shouting match ensued between the claimant and the manager of A & B Towing, Inc., Robert Bazin, Jr. Claimant testified he was fired and essentially thrown off the property; Robert Bazin testified claimant lost his temper and quit. I find, however, that my adjudication of claimant's entitlement to the requested temporary partial disability benefits does not require me to resolve this factual discrepancy.

6. Claimant seeks temporary partial disability benefits from April 26, 2009 to the date of this Final Hearing. Case law instructs us that, even after a termination from employment, a claimant may be entitled to temporary partial disability benefits if he can demonstrate his injury contributed to the temporary partial wage loss or loss of earnings after the termination. The test for whether physical limitations subsequent to an accident are a contributing causal factor is whether claimant's capabilities allow him to return to and adequately perform his prior job with the employer. Burger King vs. Nicholas, 580 So.2d 656 (Fla. 1st DCA 1991), Meek vs. Layne-

² The Motion itself was filed on April 13, 2010, two (2) days prior to the Final Hearing.

Western Co., 566 So.2d 31 (Fla. 1st DCA 1990) (holding the claimant is obligated to show that his compensable physical limitation was an element in the causal chain resulting in or contributing to his wage loss). Temporary partial disability benefits are compensation for disability, and "disability" is defined as the incapacity because of the injury to earn in the same or any other employment the wages which the employee was receiving at the time of the injury. Vencor Hospital vs. Ahles, 727 So.2d 968 (Fla. 1st DCA 1998), section 440.02(13), Fla. Stat.

7. I find that here, the claimant has failed to prove his loss of earnings was caused by his disability. Here, no medical evidence was presented that claimant was limited in his ability to perform adequately any job functions. Burger King vs. Nicholas, 580 So. 2d at 658. Section 440.09(1), Fla. Stat., provides that, "the injury, its occupational cause, and any resulting...
disability must be established to a reasonable degree of medical certainty, based on objective relevant medical findings..." (emphasis added). Claimant's subjective but medically unverified testimony regarding his inability to perform job related duties is insufficient to support an award of temporary partial disability benefits. Burger King vs. Nicholas, 580 So. 2nd at 658, Interim Services vs. Levy, 843 So.2d 915 (Fla. 1st DCA 2003). Consequently, claimant's claim for temporary partial disability benefits from April 26, 2009 to the date of this Final Hearing shall be, and the same is hereby, denied.

8. The employer/carrier also asserted that the accident no longer remains the major contributing cause of claimant's disability or need for treatment. Major contributing cause only applies if there are competing causes for a claimant's injuries; if there is only one cause, a claimant is not required to present evidence as to major contributing cause. Lanham vs. Department of Environmental Protection, 868 So.2d 561 (Fla. 1st DCA 2004). Here, however, the employer/carrier adduced evidence that claimant had been seen at the Broward General

Medical Center in 2007 for complaints of lower back pain and spasm after swimming. Thoracic and lumbar x-rays were taken and medication was prescribed. Claimant also testified he has a preexisting scoliosis condition.

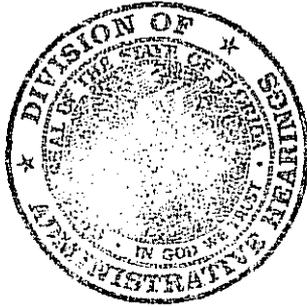
9. While claimant's accident was initially accepted as compensable by the employer/carrier, case law instructs us that the employer/carrier is not precluded from challenging claimant's entitlement to benefits by contending that the injuries from the accident no longer remain the major contributing cause of claimant's disability or need for treatment. Checkers Restaurant vs. Wiethoff, 925 So.2d 348 (Fla. 1st DCA 2006), St. Lucie County School Board vs. Richards, 973 So.2d 1162 (Fla. 1st DCA 2007) (holding that a claimant is entitled to benefits only so long as the industrial injury remains the major contributing cause of the disability or need for treatment). The claimant has the burden of proving major contributing cause. Mangold vs. Rainforest Golf Sports Center, 675 So.2d 639 (Fla. 1st DCA 1996). By statute, section 440.09(1)(b) Fla. Stat., major contributing cause must be demonstrated by medical evidence only.

10. Here, no medical evidence was presented that the accident remains the major contributing cause of claimant's disability or need for treatment. Since the burden of proof is on the claimant in this regard, and since claimant has not met that burden, claimant's claim for temporary partial disability benefits from April 26, 2009 to the date of this Final Hearing must be denied on this ground as well.

11. Based on the above determinations, I find I do not need to address the employer/carrier's remaining defenses, including voluntary limitation of income, job abandonment, noncompliance with medical care, and that no temporary partial disability is due or owing while claimant was incarcerated.

12. Claimant's claims for temporary partial disability benefits from April 26, 2009 to the present, plus attorney's fees, costs, interest and penalties, shall be, and the same are hereby, denied and dismissed.

DONE AND ORDERED at Lauderdale Lakes, Broward County, Florida this
19th day of April, 2010.



Honorable Daniel A. Lewis
Judge of Compensation Claims

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Final Compensation Order was furnished this 19th day of April, 2010 by electronic transmission to the parties' counsel of record and by U.S. mail to the parties.

Secretary to Judge of Compensation Claims