

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

Mark Brownie)	
)	
Employee/Claimant,)	
)	
vs.)	OJCC Case No. 13-003648 EDS
)	
Charlotte County Sheriff's Office)	Accident Date: November 21, 2012
)	
Employer,)	
)	JUDGE: E. Douglas Spangler
and)	
)	
North American Risk Services)	
)	
Carrier/Servicing Agent.)	

COMPENSATION ORDER

This case came on for a Final Hearing before the undersigned on September 9, 2014, in Fort Myers, Lee County, Florida to consider the merits of a Petition for Benefits filed by the Claimant on February 18, 2014. Attorney Nancy Cavey represented the claimant; and attorney Rex Hurley represented the Employer/Servicing Agent (E/SA)

At issue was a demand made by the claimant that the E/SA correctly calculate and pay temporary partial disability benefits (TPD) to the claimant for the period covering February 18, 2013 through January 17, 2014 with penalties and interest for each bi-weekly period of late paid benefits; deduct from each bi-weekly period the maximum 20% of the TPD due; and calculate the penalties and interest due on each underpaid bi-weekly payment as a result of the underpayment of benefits; and pay attorney's fee and prevailing party costs. These demands were defended by the E/SA by alleging that the E/SA correctly reclassified benefits from impairment income benefits (IIB) paid to the claimant during the period of February 18, 2013 through January 7, 2014 to TPD benefits; and, timely paid interest and penalties on the underpayment on March 18, 2014. Therefore, no further benefits are due and no additional attorney's fees or costs would be due.

The parties filed the deposition of the adjuster, Kristal Varnes taken on March 27, 2014, with exhibits, as a joint exhibit. The claimant offered a DWC-4 form dated March 17, 2014 as an exhibit, and a Worker's Computation TPD Calculation Report was viewed by the undersigned as a demonstrative exhibit. The JCC's exhibits consisted of the February 18, 2014 PFB; a mediation report dated June 20, 2014, the Notice of Pretrial Hearing and Notice of Final Hearing; the Amended Pretrial Stipulations; the Pretrial order and Notice of Final Hearing; and, Order Granting Continuance of Final Hearing. Based on the evidence presented, the exhibits and document considered and the arguments of counsel made in the Memoranda submitted before the hearing and the arguments of counsel during the hearing the undersigned finds and concludes that the E/SA properly credited the IIB payments paid against TPD benefits due and properly calculated and paid penalties and interest thereon. Therefore all benefits due to the claimant had been paid and the PFB dated February 18, 2014 is denied and dismissed. The reasons for this determination follow.

Undisputed Material Fact

1. The claimant sustained compensable injuries which have been accepted by the Employer/ Servicing Agent (E/SA) as being the result of an industrial accident which arose out of and in the course and scope of the employee/claimant's employment on November 21, 2012.
2. After the claimant was placed at maximum medical improvement with a 23% permanent impairment rating (PIR) the E/SA began making payments of the impairment benefits to the claimant. Subsequently, the PIR increased to 27%. Impairment Benefits (IIB) were paid from December 12, 2012 through December 10, 2013.
3. The claimant underwent a cochlear implant on January 6, 2014 and the E/SA began payment of temporary total disability benefits.
4. The E/SA reclassified all previously paid IIB benefits as temporary partial disability (TPD) benefits, and issued payments to the claimant on March 18, 2014 representing the difference (as calculated by the E/SA) between the IIB

payments received by the claimant and the amounts the claimant would have received if the payments had been based on TPD rates, plus penalties and interest on the differences. The amount paid to the claimant by these adjustments was \$14,863.56.

Discussion

The claimant filed a PFB on February 18, 2014 demanding that the E/SA be required to make payment of all TPD from February 18, 2013 due and owing on a bi-weekly basis, together with penalties and interest on each late payment. Claimant argues that as required by Section 440.15 (12) F.S.(2012), the E/SA should be limited to recovery of the overpayment that would result, due to the claimant having already received IIB payments, by an adjustment of not more than 20% of all bi-weekly payments of temporary benefits made to the claimant, together with additional penalties and interest on the amounts not properly paid. In other words, the claimant is demanding that, in addition to the IIB payments already received, the E/SA should pay TPD to the claimant calculated in biweekly installments, together with penalties and interest, and then recover the resulting overpayment of benefits generated by the TPD payments by reducing the TPD due by 20% per payment due. Under claimant's theory the claimant would receive \$47, 200.65 additional to what has already been paid. And, because the IIB's are already paid, the resulting overpayment could only be recaptured by the E/SA by reducing future payment to the claimant by 20%.

The Adjuster, however, performed a reclassification of the already paid IIB benefits to TPD, calculated the difference due, plus penalties and interest, and paid that amount to the claimant.

The E/SA contends the procedure utilized by the adjuster is correct and that the statute relied upon by the claimant, Section 440.15(12) F.S., does not apply to this situation. The facts establish that the E/SA effected a reclassification of benefits paid to the claimant from IIB to TPD benefits; and, that the reclassification resulted in an under payment to the claimant, and not an over payment. Accordingly, the E/SA paid the difference owed to the claimant because of the reclassification, together with penalties

and interest on the underpayments and argued that nothing further is owed to the claimant.

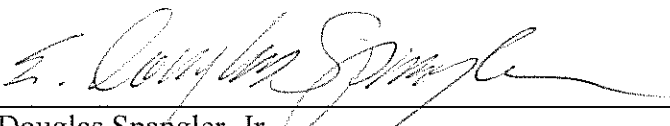
The undersigned agrees with the E/SA's legal position. Based on the actions of the E/SA there has been no overpayment to the claimant that needs to be repaid and Section 440.15 (12) F.S does not apply. In fact, an overpayment would only occur in this case if the undersigned were to adopt the claimant's arguments. This case is governed by *Swift & Co. v. Surrency*, 467 So.2d 740 (Fla. 1st DCA 1985). " Since the incorrect classification caused no economic detriment to claimant, the employer should have been permitted to credit the wage loss benefits against the PTD benefits in the same amount...Otherwise the claimant will receive double benefits during the period." id 742.

In this case, the claimant has suffered no economic detriment having already received IIB benefits throughout the period at issue. The E/SA properly credited the IIB payments against the TPD benefits, preventing the double payment of benefits to the claimant, and properly calculated and paid penalties and interest on the differences. All benefits due to the claimant have therefore been paid.

WHEREFORE it is Ordered and Adjudged:

The Petition for Benefits filed on February 18, 2014 is denied and dismissed with prejudice.

DONE AND ELECTRONICALLY FILED in Fort Myers, Florida, this 19th
day of Sept., 2014.



E. Douglas Spangler, Jr.
Judge of Compensation Claims