

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

Larry Ricks,
Employee/Claimant,

OJCC Case No. 90-000930RJH

vs.

Accident date: 3/9/1990

First Coast Tractor and Mower/Sentry
Casualty Company, and Sentry Select
Insurance Company,
Employer/Carrier/Servicing Agent.

Judge: Ralph J. Humphries

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FINAL EVIDENTIARY ORDER GRANTING IN PART EMPLOYER/CARRIER'S CLAIM FOR REIMBURSEMENT AGAINST THE SPECIAL DISABILITY TRUST FUND

This cause came before me for hearing on September 9, 2015 on the claim filed by the employer/carrier seeking reimbursement from the Special Disability Trust Fund in the amount of \$350,740.87 for attendant care benefits paid by the employer/carrier for the period October 13, 2009 to July 8, 2012. Employer/carrier also seeks reimbursement of \$12,470.65 for payment for a power wheelchair with a date of service of March 7, 2012. Robert J. Osburn, Esquire, appeared on behalf of the employer/carrier. Cynthia A. Shaw, Esquire, appeared for the Special Disability Trust Fund.

For the reasons expressed hereinafter, it is my determination the employer/carrier is entitled to reimbursement of \$350,740.87 for payment of past attendant care benefits. It is also my determination the claim for additional reimbursement of \$12,470.65 argued as payment on a power wheelchair should be denied.

The documentary evidence presented for my determination is as set forth in the attached Addendum. Ana Vargas, Gwen McDaniels and Tom Krick testified telephonically.

SDTF has defended the claim seeking reimbursement for attendant care contending the E/C has not submitted documentation the attendant care was actually provided to the injured worker and that the Fund should only be required to reimburse properly documented expenses and not services or durable goods that have not been provided. Reimbursement for the wheelchair is defended on the basis that the bill presented appears to be a duplicate bill and the Fund should only be required to reimburse properly documented expenses for durable goods

that have been provided.

In my determination herein I have attempted to distill all the testimony and salient facts together with the findings and conclusions necessary to the resolution of this matter. I have not necessarily attempted to summarize the substance of the testimony of any live or deposition witness, nor have I attempted to state nonessential facts.

Because I have not done so should not be construed that I have failed to consider all of the evidence.

Based upon the evidence and testimony presented, I make the following findings of fact and conclusions of law:

1. A Compensation Order (the Order) was entered on October 16, 2001 awarding the claimant 24-hour non-skilled attendant care for 7 days a week. Consistent with the applicable statute, the Order limited the reimbursable attendant care by a family member to 12 hours per day.
2. The carrier has been paying attendant care benefits pursuant to that Order since 2001.
3. Payments for attendant care included payments to the injured worker's wife, Elizabeth Ricks. Payments to the wife discontinued as a result of her divorce from the injured worker in June 2008.
4. For the period of October 10, 2007 through September 30, 2009, the injured worker was in assisted living facilities. At the time of his discharge from the last of those facilities, he and the carrier reached an agreement whereby, rather than the carrier providing attendants through outside agencies, the injured worker would be responsible for securing his care providers and the carrier would pay those providers directly.
5. The individuals retained refused to submit sufficient billing and supporting documentation to the carrier in support of their attendant care services and, ultimately, quit providing services to the claimant.
6. As a result, the injured worker's attorney wrote the carrier on October 27, 2011 insisting the carrier fulfill its obligations under the Order.
7. In response to this letter, the carrier contacted agencies seeking private attendants for the injured worker. The least expensive private attendant was \$36 per hour which equates to \$12,096.00 biweekly, an amount in excess of \$7000 more biweekly than the E/C would be required to pay under its arrangement with the injured worker reached on February 2, 2012.
8. The employer/carrier and the injured worker entered into a stipulation on February 2,

2012 whereby it was agreed the Order would be fulfilled by paying the claimant directly the sum of \$2527.00 per week (\$5054.00 biweekly) with the claimant responsible for securing his own attendant care providers. Based upon calculations for 24 hour a day, 7 day a week attendant care, the payment of \$5054 every 2 weeks is the equivalent of \$15.04 per hour.

9. The carrier had submitted two prior reimbursement requests (SDF-2) for attendant care benefits paid by the carrier. Each time, SDTF reimbursed the requested amounts without requiring submission of attendant care logs. The prior reimbursement requests were paid based upon the submission of a payout ledger showing the amount of attendant care paid or copies of checks showing the attendant care paid.
10. The Fund did not deny reimbursement for attendant care based upon the lack of attendant care logs for either of the two prior reimbursement requests.
11. According to Tom Krick, SDTF manager, the Fund does not always require the submission of attendant care logs to support reimbursement of attendant care. As an example, logs are not required when family members are paid for less than 12 hours per day. Based upon the testimony of McDaniels and Krick, the determination when attendant care logs are required appears to be arbitrary and left to the discretion of the individual auditor.
12. The carrier relied, to its detriment, on the fact attendant care logs were not required on previous submissions when it did not require the injured worker or his attendants to submit logs to support the monies paid for attending care for the time frame at issue.
13. The carrier paid attendant care benefits totaling \$350,740.87 during the period October 13, 2009 to July 8, 2012.
14. Case law has established the burden is on the employer/carrier to prove each and every element of their claim seeking reimbursement from the Fund. *Special Disability Trust Fund v. Siesta Lago Mobile Homes*, 473 So.2d 8 (Fla. 1st DCA 1985). The Fund argues Florida Administrative Code Rule 69L-10.016 (1) requires the E/C to submit attendant care logs as part of their proof. That rule reads, in pertinent part, the "SDTF shall request additional information documenting expenditures by health care providers if necessary to prove that the benefits requested for reimbursement are related to the injury and are required to be provided under Section 440.49, F.S." It is my conclusion this rule is not applicable in this case. The persons who performed attendant care services for the injured worker are not health care providers. Accordingly, this rule does not apply. I also

accept the argument advanced by the carrier that this rule was not in effect on the date of accident and is therefore not controlling according to Florida Statute 440.49(12) which states: "The applicable law for the purposes of determining entitlement to reimbursement from the Special Disability Trust Fund is the law in effect on the date the accident occurred." Lastly, SDTF conceded attendant care for the claimant was medically necessary and the Order has established the benefits at issue were necessary. Thus it would appear the purpose behind the cited rule has been met. Furthermore, I note there is no uniform requirement by STDF when attendant care logs might be required. This rule, if applicable, is arbitrarily applied.

15. Even were there an obligation under the rule to provide the Fund with attendant care logs, I conclude the SDTF is estopped from requiring those logs in an effort to avoid reimbursement in this case. As the party claiming estoppel, the burden is on the employer/carrier to prove the essential elements of estoppel. *See Mandarin Paint & Flooring, Inc. v. Potura Coatings of Jacksonville, Inc.*, 744 So. 2d 482, 485 (Fla. 1st DCA 1999). Those elements are (1) a representation by the party to be estopped to the party claiming estoppel as to some material fact which is contrary to the position later asserted by the estopped party; (2) a reasonable reliance on the representation by the party claiming estoppel; and (3) a detrimental change in position by the party claiming estoppel caused by the representation and reliance thereon. *Mobile Med. Indus. v. Quinn*, 985 So. 2d 33, 35 -36 (Fla. 14 DCA 2008) (citing *LaCroix Constr. Co. v. Bush*, 471 So. 2d 134, 136 (Fla. 1st DCA 1985)). The representation relied upon by the party seeking estoppel may be made by words or conduct. *Head v. Lane*, 495 So.2d 821 (Fla. 4th DCA 1086).
16. I find SDTF, in not requiring attendant care logs in accepting and paying the previous two SDF-2 submissions, represented by its conduct attendant care logs were not necessary. I find the carrier reasonably relied on the Fund's prior conduct by not requiring the injured worker to obtain or submit attendant care logs. I find the carrier relied, to its detriment, on the prior course of conduct by the Fund in not requiring the submission of attendant care logs. I therefore find the Fund is estopped from requiring the carrier to submit attendant care logs in support of the benefits paid before February 2, 2012.
17. I conclude the employer/carrier is entitled to reimbursement of all attendant care services paid beginning on October 13, 2009 and continuing through July 8, 2012. I

therefore find the employer/carrier is entitled to reimbursement in the amount of \$350,740.87.

18. While the carrier alleges it paid \$22,873.67 to purchase a new wheelchair for the claimant, the carrier's failed to establish by competent evidence the necessity of this wheelchair. No prescription or medical record was submitted to establish medical necessity.
19. The carrier has failed to establish through competent evidence the basis for spending \$22,873.67 for a new wheelchair or that \$22,873.67 was spent for a new wheelchair on March 7, 2012. The records submitted are susceptible to multiple interpretations and I am not satisfied the E/C has satisfied its burden of proof on this issue.
20. Because I find the employer/carrier has failed to present sufficient evidence to warrant additional reimbursement of \$12,470.65, I find the employer/carrier is not entitled to any further reimbursement for the motorized wheelchair it provided the injured worker on or about March 7, 2012.

Wherefore, it is **ORDERED**:

1. The claim seeking reimbursement of \$350,740.87 for attendant care benefits paid by the employer/carrier from October 13, 2009 to July 8, 2012 is granted and the Special Disability Trust Fund shall reimburse the employer/carrier \$350,740.87.
2. The claim seeking reimbursement of \$12,470.65 for payment of a power wheelchair on or about March 7, 2012 is denied.

DONE AND ORDERED this 7th day of October, 2015, in Jacksonville, Duval County, Florida.



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Addendum

The following documents were admitted into evidence at the hearing:

Judge's Exhibits:

1. Application for Hearing filed at docket number 259;
2. Special Disability Trust Fund Pretrial Questionnaire completed by the parties and filed at docket number 269;
3. Employer/Carrier Trial Memorandum which I accept as argument only and not as evidence filed at docket number 283;
4. Special Disability Trust Fund Trial Memorandum which I accept as argument only and not as evidence filed at docket number 282.

Employer/carrier exhibits:

1. Payout ledger filed at docket number 279;
2. Attendant care schedule filed at docket number 277;
3. Supplies schedule filed at docket number 278;
4. Ana Vargas deposition including attachments filed at docket number 280.

Special Disability Trust Fund Exhibits:

1. SDF-2 filed as part of docket number 281;
2. Attendant care schedules filed as part of docket number 281;
3. Supporting attendant care documentation filed as part of docket number 281;
4. Audited SDF-2 filed as part of docket number 281;
5. Summary prepared by fund specialist filed as part of docket number 281;
6. Letters from SDTD to counsel for E/C filed as part of docket number 281.