

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

EMPLOYEE:

Enrique Rivera
9310 Fountainbleu Blvd., # 115
Miami, FL 33172

PO Box 226671
Miami, FL 33172

EMPLOYER:

Southeast Personnel Leasing, Inc.
2739 U.S. Highway 19 N.
Holiday, FL 34691

CARRIER/SERVICING AGENT:

Lion Insurance Company Serviced by:
Packard Claims Administration, Inc.
P.O. Box 1549
Tarpon Springs, FL 34688

ATTORNEY FOR EMPLOYEE:

Richard Zaldivar, Esquire
2600 SW 3rd Ave., Ste. 300
Miami, FL 33129

ATTORNEY FOR E/SI:

Robert S. Gluckman, Esquire
1280 SW 36 Ave., Ste. 100
Pompano Beach, FL 33069

OJCC No.: 08-006126SMS
D/A: 10/27/07

JCC: Sylvia Medina-Shore

COMPENSATION ORDER

THIS CAUSE came before the undersigned Judge of Compensation Claims for final hearing on 2/4/10 regarding petitions for benefits (PFBs) filed 11/17/08 and 8/10/09.

Claims:

1. TTD/TPD benefits from date of accident and continuing.
2. Authorization of alternate PCP/MCC.
3. Authorization of evaluation and treatment with an orthopedic surgeon and neurologist.
4. Authorization of chiropractic manipulation therapy, galvanic and kinetic therapy, myofascial release, ultrasound, massage, hot packs, MRI of the right knee and lumbar spine, lower extremity nerve conduction exam with SSEP and EMG per Dr. Burak.

5. Authorization for transportation to and from medical appointments.
6. Penalties, Interest, Costs, and Attorney's Fees (PICA).

Defenses:

1. Wage loss is not related to the industrial accident.
2. Claimant is not entitled to an alternate PCP/MCC.
3. No prescription from an authorized doctor requesting an orthopedist.
4. Orthopedic is not medically necessary.
5. The claimant refused medical care.
6. Claimant refused to take a drug test, therefore no benefits due.
7. Claimant is at overall MMI.
8. The requests for authorization of chiropractic care recommended by Dr. Burak, neurological and orthopedic care are not medically necessary or causally related to the industrial accident.
9. E/SI is entitled to an offset from any unemployment compensation wages collected.
10. No medical evidence supporting need for transportation.
11. PICA denied as not due or owing.

Stipulation:

1. Claimant's AWW is \$302.52 with a corresponding compensation rate of \$201.69.

Documentary Exhibits:

JCC-

1. Pre-trial stipulation e-filed 1/7/10.

Joint Exhibits-

A. Deposition of Tammy Wright.

Claimant-

1. Payout.
2. Adjuster's notes.
3. PFBs.
4. Metropolitan Hospital Records.
5. Deposition of Dr. Burak.
6. Deposition of Millie Fleitas.
7. Deposition of Alfred Cueli.

E/C-

1. Deposition of Chuck Szopinski.
2. Claimant's deposition taken 5/22/08.
3. Claimant's deposition taken 6/24/09.
4. Transcript of Final Hearing on OJCC No.: 06-014953SMS for impeachment purposes.
5. Deposition of Dr. Paul Meli.

Findings of Fact and Conclusions of Law:

1. The claimant testified in person at the final hearing. The Claimant was a day laborer working through Corporate Staffing as a leased employee of Southeast Personnel Leasing. We was not promised any jobs or a specific number of hours of work. Rather, Corporate Staffing would provide work to individuals, such as the claimant, whenever work was available.

2. On 10/27/07, claimant suffered a fall. Specifically, was working on a scaffold with another worker. The claimant and his co-worker were holding one of the railings when, the railing came apart. The claimant fell to the floor from a height of approximately 9 to 10 feet. The client company called rescue and claimant was taken to Metropolitan Health Hospital. As the accident occurred on a Saturday, Corporate Staffing was closed.

3. The claimant testified he injured his left shoulder and right leg. However, Claimant admitted and the records from Metropolitan Hospital reflect that claimant was only diagnosed with a lumbar strain and given one day of disability. Claimant returned to secure work at Corporate Staffing on the following Monday. On same date, claimant informed Corporate Staffing of the industrial accident.

4. After working on Monday, claimant was called in for a meeting. According to the claimant, two Corporate Staffing managers informed him that if he wanted to continue to work, he needed to sign paperwork. The paperwork was written in English. Claimant testified that neither of the managers explained the paperwork although he is unable to read English. Moreover, claimant testified that he was not asked to take a drug test. To that extent, claimant denied being provided the employer's drug policy. He denied being under the influence of any drugs. Further, although a workers' compensation clinic was mentioned within the meeting, neither manager offered claimant medical treatment.

5. Claimant continued to work for Corporate Staffing until 3/2/08, approximately 5 months post-industrial accident. Claimant was earning less monies after the accident specifically, \$7.50 per hour. Prior to the industrial accident, claimant earned \$9.00 per hour. Claimant testified that Corporate Staffing gave him less hours to work per day after the instant work accident. He has no idea why the employer stopped giving him work as of March of 2008.

6. Claimant was unemployed for approximately 5 weeks. In April of 2008, claimant secured a job with Big Lots. He works 25 to 30 hours stocking merchandise. He earns \$7.50 per hour. On 2/2/09, claimant's hours were significantly reduced to 2 to 4 hours per week. Claimant claims that his hours were reduced because he was unable to undertake his stocking duties. He was limping.

7. In 12/09, claimant also worked for approximately four weeks as a security guard on the weekends. He earned \$9.00 per hour. The job ended when the theater season finished.

8. Claimant does not own a car. He rides a bike which causes pain in his right leg and foot. He is currently looking for work. He is receiving food stamps and wants medical treatment for his right leg pain, pain in his back and left shoulder.

9. On cross-examination, claimant admitted to injuring his back approximately 12 years ago. He complained of back pain and sought medical treatment prior to the present industrial accident. He is a diabetic with history of pain to his foot. Claimant denied being terminated. He further denied soliciting work directly from Corporate Staffing client. Claimant was examined by three doctors for the instant accident: the hospital, his IME and E/C's IME. After viewing claimant's demeanor and taking into consideration the totality of the evidence, I find claimant not credible.

10. At the final hearing, claimant admitted that he did not request medical treatment from anyone at Corporate Staffing. Claimant did not do so because "he needed to work". While claimant had a documented industrial accident, I find he voluntarily and knowingly refused medical treatment for same accident when offered by Corporate Staffing. I find that the workers' compensation clinic would not have been mentioned at the Monday meeting but for the employer informing the claimant of same. I find claimant refused medical treatment for the present

accident. Moreover, I find claimant refused to take a drug test.

11. Mr. Alfredo Cueli, President of Corporate Staffing testified in person at the final hearing. Mr. Cueli explained that Corporate Staffing was in business to provide its customers with workers. Southeast Personnel was the company that provided payroll and workers' compensation services to Corporate Staffing. Claimant was an unskilled labor employee.

12. Claimant began employment with Corporate Staffing on 10/20/06 until his last paycheck of 3/7/08. Claimant was terminated for trying to solicit work from Corporate Staffing 's client. Specifically, Mr. Cueli was dispatching a job to another employee when claimant overheard same. Mr. Cueli received a call from his client advising him that claimant had appeared on his bike requesting work. As this was against company policy, the claimant was terminated for same. Mr. Cueli advised the claimant the exact reason for his termination.

13. Mr. Cueli became aware of claimant's Saturday accident. He instructed two Corporate Staffing employees to meet with the claimant in order to advise of the necessity of taking a drug test, reporting the industrial injury and offering any medical treatment, if requested. Mr. Cueli did not initially complete a report of injury as claimant refused medical treatment and "wanted to work". Claimant continued working at his regular warehouse duties. He was not placed on light duty nor did claimant request light duty work.

14. Mr. Cueli dispatched many jobs to the claimant subsequent to the industrial injury. During the 5 months of employment, claimant worked between 5.50 hours to 40 hours for 7 weeks after the industrial accident. He undertook general warehouse duties consisting of loading and unloading containers and other general less strenuous warehouse work. During the five months of employment with the employer herein after the industrial accident, claimant did not ever inform Mr. Cueli that he was unable to undertake any of the jobs because of alleged

injuries. Claimant never requested medical treatment during the five months of subsequent employment. After viewing Mr. Cueli's demeanor and considering all the evidence, I find Mr. Cueli credible. I accept his testimony that while claimant reported the accident, he never requested medical treatment. Rather, I find that claimant wanted to work (an admirable quality) and was able to do so in the same capacity as prior to the industrial accident. The evidence supports that claimant's accident did not cause of any impediments to his work. In fact, the evidence supports that the claimant desired more hours of work.

15. Further, I find that the claimant has failed to meet his burden of proving a disability requiring medical care or that any wage loss was related to any injury suffered from the accident. As stated above, the Claimant clearly went back to work two days after the accident. He continued to work in manually intensive jobs without once requesting medical care, complaining, going to a doctor, or anything. What is clear is that he was fired for trying to sneak onto a job site that he was not assigned to go to.

16. Dr. Meli's evaluation of the Claimant is clearly consistent with reason and all other factors including the Claimant's return to work for Corporate Staffing, his return to work as a security guard, and his current employment. Specifically, Dr. Meli opined, which opinion I accept, that the claimant did not suffer any permanent injuries as a result of the industrial accident. The industrial accident is not the major contributing cause of claimant's alleged injuries. Claimant is at MMI with no restrictions or need for further medical treatment.

17. Dr. Meli noted that claimant had degenerative changes in his lumbar spine consistent with his prior back injury 35 years ago, with surgery. Physical examination of claimant's shoulder was normal. I find Dr. Meli's opinions conform with the evidence in the present case. Claimant has chronic claw toeing consistent with long-standing diabetes.

18. Accordingly, I find that the major contributing cause and need for any medical care is no longer this industrial accident and deny all future medical and indemnity benefits. Major contributing cause is not an affirmative defense that the E/C needs to raise. It is the Claimant's burden to prove that any need for medical care or wage loss is that the industrial is and remains the major contributing cause.

19. I find claimant's claim for an alternate PCP is not substantiated by the evidence or the law. Metropolitan Hospital does not constitute a PCP. Metropolitan Hospital constituted emergent care. 440.13(1)(f) defines emergency services and care to mean emergency services and care as defined in 395.002. 395.002 defines emergency services and care. 440.13(1)(h) healthcare provider means a physician or any recognized practitioner who provides skilled services pursuant to a prescription or under the supervision or direction of a physician and who has been certified by the Department as a health care provider. The term health care provider includes a health care facility. Metropolitan Hospital is a health care facility.

20. F.S. 440.13(1)(q) physician or doctor means a physician licensed under Chapter 458... each of whom must be certified by the Department as a health care provider. 440.13(2)(f) provides that upon the written request of the employee, the carrier shall give the employee the opportunity for one change of physician during the course of treatment for any one accident... 440.13(2)(f) contemplates change of physicians, not health care providers. Therefore, an emergency medical facility is not a physician or doctor and is not a PCP. Further, under 440.13(2)(f), it states upon the granting of a change of physician, the originally authorized physician in the same specialty as the changed physician shall be come the authorized upon written notification of the Employer or Carrier. (Emphasis added.) An emergency room is not a specialty. I find that the legislature is speaking in terms of orthopedists, neurologists, or the like.

As the Claimant has not had a primary care physician, nor was one medically necessary after his care at Metropolitan Hospital, I find claimant is not entitled to a change in primary care physicians. The case law is clear you are not entitled to a change in physicians until you have actually had one. See, Florida Transport 1982. Inc., v. Quintana, 1 So.3d. 388 (Fla. 1st DCA 2009).

21. The undersigned is cognizant of the adjuster's deposition testimony. However, I find that the evidence in the present case supports that the care provided by Memorial Hospital was emergency care. Specifically, claimant was taken to the hospital via rescue. Corporate Staffing was not aware of same until the following Monday after the accident. I find that the client company correctly called rescue and that E/C appropriately paid for the emergency room hospital visit. However, the evidence fails to support that any authorized medical treatment, other than the one-time emergency room visit, was authorized by E/C.

22. Further, claimant has requested medical care pursuant to Dr. Burak's recommendation. However, the evidence reveals that claimant had a prior accident with Brightstar Corporation requesting care for his back and failed to advise Dr. Burak of same. I find any opinions Dr. Burak has are rendered unfounded as he did not have the benefit of all the facts. I do not accept claimant's testimony that he did not tell Dr. Burak of any prior accident because he (Dr. Burak) did not ask him and not important.

WHEREFORE, IT IS ORDERED:

1. Claim for TTD/TPD benefits from date of accident and continuing is denied.
2. Claim for authorization of alternate PCP/MCC is denied.
3. Claim for authorization of evaluation and treatment with an orthopedic surgeon and neurologist is denied.

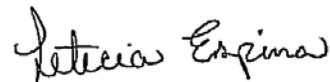
4. Claim for authorization of chiropractic manipulation therapy, galvanic and kinetic therapy, myofascial release, ultrasound, massage, hot packs, MRI of the right knee and lumbar spine, lower extremity nerve conduction exam with SSEP and EMG per Dr. Burak is denied.
5. Claim for authorization for transportation to and from medical appointments.
6. Claim for Penalties and Interest is denied.
7. The undersigned reserves jurisdiction to determine entitlement to and amount of , Costs and Attorney's Fees for a future hearing, in the event the parties are unable to amicably resolve it.
8. The 11/17/08 and 8/10/09 PFBs are hereby dismissed.



Sylvia Medina-Shore
Judge of Compensation Claims

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Compensation Order was mailed to the parties at the above listed addresses and e-mailed to the attorneys of record at: Richard Zaldivar, Esquire, ZaldivarPA@gmail.com and Robert Gluckman, Esquire, zzevallos@hrmcwbroward.com this 19th day of February of 2010.



Secretary to JCC