

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

EMPLOYEE:

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OJCC CASE NUMBER: 01-012330WJC

DATE OF ACCIDENT: 12/18/1999

Judge: W. James Condry, II

FINAL COMPENSATION ORDER

After proper notice to all parties, a final hearing was held and concluded on Tuesday, March 2, 2010 in Orlando, Orange County, Florida. Present at the final hearing was Attorney David E. Mallen for the claimant and Attorneys Rex A. Hurley and Kimberly C. De Arcangelis for the employer/carrier, hereinafter referred to as the E/C. Testifying at trial was the claimant Shawn Michael Simmons. The remainder of the evidence was received via deposition and other documents as detailed below.

This order addresses the Petition for Benefits dated 03/27/09 and filed with DOAH on 03/31/09.

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OVERVIEW

The claimant, a forty-three year-old former heavy equipment operator with the Orange County Solid Waste Department, sustained multiple injuries to his neck and upper back when he tripped and fell while dismounting equipment in the course and scope of his employment on December 18, 1999. The accident was accepted as compensable with certain workers' compensation benefits provided. In dispute is a claim for loss time benefits and further medical care.

The specific issues to be determined at the 03/02/10 final hearing were as follows:

1. Whether Mr. Simmons is entitled to the payment of temporary total (TTD) or temporary partial (TPD) disability benefits from the date of accident and continuing with interest and penalties as otherwise provided by law due to an incorrect calculation of his average weekly wage?
2. Whether Mr. Simmons is entitled to the authorization of a neurosurgeon for the evaluation and treatment of his compensable injuries?
3. Whether Mr. Simmons is entitled to the authorization of an orthopedic physician for the treatment of his compensable injuries in his geographical area?
4. Whether Mr. Simmons is entitled to the payment of his reasonable attorney fees and costs at the expense of the E/C?

The E/C defended the claim on the following grounds:

1. That no additional temporary total or temporary partial disability benefits are due.
2. That the claimant is at maximum medical improvement.
3. That the claimant has voluntarily limited his income.
4. That the industrial accident is not the major contributing cause of the claimant's loss of earnings.
5. That the claimant failed to file DWC-19 forms establishing his entitlement to the payment of temporary indemnity benefits.
6. That the claimant has waived his claim to an adjustment of this average weekly wage (AWW)

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based on concurrent employment due to the doctrine of *res judicata*.

7. That a neurosurgeon is not medically necessary and causally related to the industrial accident.
8. That the E/C has authorized two orthopedic physicians in the claimant's geographical area that remain authorized.
9. That no penalties, interests, cost or attorney fees are due.

STIPULATIONS OF THE PARTIES

1. That the Judge of Compensation Claims has jurisdiction over the parties and the subject matter.
2. That venue properly lies in Orange County.
3. That there was an employer/employee relationship at the time of the 12/18/1999 accident.
4. That there was worker's compensation insurance coverage in effect on the date of the accident.
5. That the employee gave timely notice of the accident.
6. That the accident was accepted as compensable.
7. That there was timely notice of the pretrial conference and the final hearing.

JUDGE'S EXHIBITS

1. The pre-trial stipulation and pre-trial compliance questionnaire approved by order entered on 08/31/09 and any timely amendments thereto.
2. A composite exhibit consisting of the hearing information sheets filed by the attorneys. The composite items and any submitted case opinions were considered for argument purposes only.

JOINT EXHIBIT

A composite exhibit consisting of the medical records of authorized treating providers. The composite includes the records from Centra Care and the records of Doctors James Bethea, Michael Broom, Thomas Ewart, Jeffrey Deren and J.E. Carnes.

CLAIMANT'S EXHIBITS

1. The 01/26/10 deposition transcript of Dr. Michael Broom and attachments.
2. The 12/03/09 deposition transcript of claims representative Tamara Mason and attachments.

E/C EXHIBITS

1. The 01/04/10 deposition transcript of Dr. Mark Beckner and attachments.
2. The 02/24/10 deposition transcript of Dr. James Bethea and attachments.
3. The 04/22/02 order approving the 04/18/02 mediation agreement.
4. A copy of the PFB dated 10/09/01 and filed with the Division of Administrative Hearings (DOAH) on 10/12/01.

PROFERRED EXHIBITS

NONE

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In making my findings of fact and conclusions of law in this claim, I have carefully considered and weighed all of the evidence presented. I have observed and assessed the candor and demeanor of the witnesses that testified live before me, and I have resolved all of the conflicts in the live testimony, deposition testimony and documentary evidence. I have carefully considered all of the evidence admitted even though I have not commented on or summated every piece thereof. Nevertheless, in my ruling I have set forth my ultimate findings of fact with mandate as required by *Section 440.25(4) (e), Florida Statutes (1999)*.

Pursuant to *Section 440.015*, I have not interpreted the facts in this case liberally in favor of either the rights of the injured worker or the rights of the employer. I have, as required, construed the law in accordance with the basic principles of statutory construction. Based on the foregoing, the evidence, and applicable law, I make the following determinations:

1. I find that I have jurisdiction over the parties and the subject matter and I accept as true those

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matters for which the parties have stipulated.

2. I find from the testimony of the claimant as further corroborated by the medical evidence in the record that Mr. Simmons slipped and fell from heavy equipment in the course and scope of his employment with Orange County Solid Waste injuring his upper back and neck on 12/18/1999. That following his fall and with the approval of his employer Mr. Simmons received initial authorized medical care from Florida Hospital Centra Care Azalea Park on the day of his accident. That his pain complaints included upper back and neck pain with headaches. Those pain complaints soon evolved with radiating pain to his right shoulder and right arm to the elbow and hand.
3. Mr. Simmons eventually received orthopedic care with Dr. Mark Beckner and Dr. Michael Broom before moving to South Carolina in June of 2005. Orthopedic care was later authorized for Mr. Simmons in South Carolina, first with Dr. Thomas Ewart and later with Dr. James Bethea. Diagnosis varied between cervical/thoracic strains and cervical disc disease with disc protrusions or osteophytes at C5-6. Mr. Simmons testified that his pain complaints continued to progress and worsen over time. His authorized care has included physical therapy, the use of a tens unit and home traction device as well as steroidal injections. He seeks authorization of an evaluation and treatment if necessary with a neurosurgeon for possible surgical consideration.

WHETHER THE CLAIMANT IS ENTITLED TO THE PAYMENT OF TEMPORARY TOTAL OR TEMPORARY PARTIAL DISABILITY BENEFITS?

4. At the final hearing Attorney Mallen advised that the sole basis for the claim for temporary indemnity benefits was Mr. Simmons' belief that prior indemnity benefits were underpaid by using an AWW that did not include his concurrent employment earnings. Mr. Mallen stated that there is no wage loss claim unless there is an adjustment of the AWW (See position 4:03 through 4:30 of the recorded trial proceedings).
5. The E/C argued that the claimant waived his right to such an adjustment contending that the claim to such is now barred by the doctrine of *res judicata*. In so doing the E/C maintains that a prior 10/09/01 petition submitted by Mr. Simmons' previous attorney, Jack Keller, was filed seeking among other things the payment of temporary indemnity benefits from the date of accident and a correction of Mr. Simmons' AWW. That PFB proceeded to mandatory mediation conference on 04/18/02 whereupon all outstanding issues relating to it were reportedly resolved.

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I entered an order approving that mediation agreement on 04/22/02 (See E/C Exhibit #3).

6. Facts I consider significant in deciding the AWW issue are as follows:
 - a. That the 10/09/01 petition filed on 10/12/01 requested correction of the AWW but did not specifically request an adjustment based on concurrent employment income. I find that if the AWW was ripe for consideration at that time it likewise would have been ripe for determining what if any concurrent employment income needed to be included in its calculation.
 - b. That the 04/18/02 mediation agreement reported that all issues relating to the 10/09/01 PFB (including the AWW) were resolved. That agreement was approved by court order of 04/22/02 as referenced above.
 - c. That the 03/31/09 PFB that is the subject of this claim does not specifically claim an adjustment or correction to the AWW.
 - d. That pursuant to the procedural requirements in effect at the time the 3/31/09 PFB was filed; *Section 440.192(9)* requires that, “A petition for benefits must contain claims for all benefits that are ripe, due, and owing on the date the petition is filed.” Furthermore that, “Unless stipulated in writing by the parties, only claims which have been properly raised in a petition for benefits and have undergone mediation may be considered for adjudication by a judge of compensation claims.”
 - e. That the issue of concurrent employment was raised for the very first time on the pre-trial stipulation executed by the parties on 08/24/09.
 - f. That the E/SA challenged any new claim for an adjustment of the AWW on *res judicata* grounds. At the final hearing they also challenged it on the alternative ground that it was not claimed on the subject 03/31/09 PFB (See position 41:20 through 42:09 of the recorded trial proceedings).
 - g. That Mr. Simmons presented no actual testimony or other evidence at the 03/02/10 final hearing on his purported current employment income to otherwise allow a determination of such earnings on their merit.
7. I find the E/C’s argument well taken and that the average weekly wage question should have been and was indeed resolved at the 04/18/02 mediation conference where all issues on the 10/01 PFB were represented to be resolved. Therefore any new claim for the adjustment of the AWW would be barred by the doctrine of *res judicata*.

8. Furthermore I find that even if the adjustment claim was not barred on *res judicata* grounds, the failure to include the AWW claim on the pretrial stipulation precludes my hearing the matter over the E/C's objection pursuant to *Section 440.192(9), Florida Statutes (2008)*. Said section governs the procedural handling or litigation of petitions filed at the time the subject petition was filed in this case.
9. Finally, I find that Mr. Simmons failed to provide any testimony or other documentary proof in support of his concurrent employment claim. For all of the forgoing reasons, I find that the claim for the adjustment of Mr. Simmons' AWW to include concurrent employment income should be denied with prejudice.
10. I find that with the denial of the AWW adjustment, based on the claimant's counsel's own representation as addressed on page five (5) of paragraph four (4) above, the claim to TTD or TPD benefits from the date of the accident through the date of the 03/02/10 final hearing is denied with prejudice.

WHETHER THE CLAIMANT IS ENTITLED TO THE AUTHORIZATION OF AN EVALUATION WITH A NEUROSURGEON?

11. *Section 440.13(2)(a)* provides that, "subject to the limitations specified elsewhere in this chapter, the employer shall furnish to the employee such medically necessary remedial treatment, care, and attendance for such period as the nature of the injury or the process of recovery may require . . . "
12. I find that there is conflicting medical testimony in the record before me as to whether a referral for Mr. Simmons to be evaluated by a neurosurgeon is reasonable and medically necessary in light of his compensable industrial injuries.
13. Dr. Mark Beckner had treated Mr. Simmons from 09/28/00 through 01/15/02 having diagnosed him with a cervical strain. An MRI taken on 09/20/01 revealed an osteophyte at C5-6 and very mild narrowing of the opening to the neural foramen. He felt the findings were primarily degenerative in nature and not significant enough to warrant injections or surgery (See 01/04/10 deposition transcript of Dr. Mark Beckner at pgs 12-14). It was noted that Mr. Simmons complained of pain radiating down the arm that would be roughly the distribution of his fifth cervical nerve (Id at pg 12). However with the objective findings in his opinion being primarily degenerative, at least with respect to the bony spur, he did not think a referral to a neurosurgeon was medically necessary (Id at pgs 17-18). Dr. Beckner acknowledged that he had not seen Mr.

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Simmons in eight years and that Dr. Broom who had treated him later and reviewed his most recent medical records and a 2009 MRI would be in the better position to comment on the claimant's current condition (Id at pg 21).

14. Dr. Michael Broom assumed treatment of Mr. Simmons from Dr. Beckner as a one-time change in medical provider. He treated Mr. Simmons for almost five years from 05/22/02 through 03/13/07 last preparing a 10/15/09 addendum report after reviewing a cervical MRI dated 09/02/09. Dr. Broom initially diagnosed Mr. Simmons with a disc protrusion at C5-6 (See 01/26/10 deposition transcript of Dr. Michael Broom at pg 6). Review of the 2009 MRI revealed a marked degree of right foraminal narrowing at C5-6 with compression of the exiting C6 nerve root (Id at pg 12). There were also some degenerative changes at the C5-6 level and noted bulging at C3-4 and C6-7 but with no associated compression of the neural elements resulting from those bulges.
15. Dr. Broom testified that he thought the results of the 2009 MRI were enough to justify surgery. However, he felt that if Mr. Simmons indeed was having the radicular symptoms in his upper extremity bad enough for him to say he is ready for surgery, that he (Dr. Broom) would consider him a surgical candidate (Id at pg 13).
16. Dr. Broom testified that if Mr. Simmons were not allowed to continue under his care, it would be reasonable and medically necessary based on the industrial injury for Mr. Simmons to be evaluated by a neurosurgeon (Id at pg 14 & 36). Because of the initial MRI that demonstrated disc pathology on the right at C5-6 and the fact that there had been a continuity of symptoms consistent with that that have progressed, Dr. Broom still related Mr. Simmons' ongoing need for treatment to the original industrial injury in 1999 (Id at pgs 15-16).
17. Dr. Thomas Ewart diagnosed Mr. Simmons with cervical spondylosis with intermittent radiculitis (See 05/09/07 report from Palmetto Orthopaedic Clinic). He placed Mr. Simmons at MMI on 03/26/08 with a 5% ppi under the AMA guidelines and with no physical restrictions. On what he considered to be deficient objective findings, he felt Mr. Simmons' reported symptoms could not be remedied medically (Id).
18. Dr. James Bethea first saw Mr. Simmons on 05/29/09 and last on 10/02/09. He diagnosed Mr. Simmons with cervical disc disease. After complaints of increasing neck pain with radiation to the right elbow and occasionally with radiation to the right hand another cervical spine MRI scan was ordered. The 09/02/09 scan showed a diffused disk bulge with osteophytes at C6-7 according to the report of the radiologist who was not able to exclude a right foraminal

protrusion of the disk (See 02/24/10 deposition transcript of Dr. James Bethea at pgs 7-9). After obtaining the MRI results Dr. Bethea recommended that Mr. Simmons see a neurosurgeon, Dr. Holbrook, to be evaluated for possible surgery.

19. Dr. Bethea clarified that he was not recommending surgery but rather recommending that Mr. Simmons be evaluated for such. Moreover he believed Mr. Simmons' degenerative condition was more than 50 % responsible for any need for surgery (Id at pg 11).
20. Dr. Bethea also made it clear that he did not perform spine surgery and that if Mr. Simmons required such it would have to be performed by a different physician. For that reason he believed it was reasonable and medically necessary for Mr. Simmons to be evaluated by a neurosurgeon (Id at pg 13). He had reservations about whether Mr. Simmons actually required surgery particularly since he was continuing to work full duty operating heavy equipment (Id at pg 15). Dr. Bethea further testified that he could not rule out that the disk degeneration at the C5-6 level was advanced by the 1999 work injury. In fact he believed the work injury was a factor but he, "can't say to what extent it was a factor." (Id at pg 19).
21. I find that there is a clear conflict in the opinions of the medical providers as to whether it is medically necessary that Mr. Simmons be evaluated by a neurosurgeon in accessing appropriate treatment for his compensable neck injury to include surgery. Dr. Beckner and Dr. Ewart did not express opinions that a neurosurgical evaluation was reasonable and medically necessary although Dr. Beckner did expressed a willingness to defer to Dr. Broom who, in his opinion, was in a better position to access the claimant's current medical status. Dr. Broom and Dr. Bethea both opined that such an evaluation was reasonable and necessary, but Dr. Bethea believed that the major cause for such an evaluation was due to pre-existing degenerative disease and not due the industrial accident.
22. Notwithstanding their knowledge of these conflicting opinions, neither party requested the appointment of an expert medical advisor pursuant to *Section 440.13(9) (c)* even though they had the opportunity to do so. In that the parties elected to bring this matter to me to trial under these circumstances I specifically decline to appoint an EMA on my own authority and conclude that the parties have waived their right to pursue one in resolving the medical issues that are the subject of this hearing. It has been held that such a decision by a judge of compensation claims' will not constitute fundamental error. See **Palm Beach County Sheriff's Office v Bair, 965 So.2d 1210 (Fla. 1st DCA 2007)** and **U.S. Agri-Chemicals Corp v Camacho, 975 So.2d 1219 (Fla. 1st DCA 2008)**.

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23. In declining to appoint an EMA I have thoroughly considered the testimony of the physicians in this case and in the context of the claimant's trial testimony which I find to be very credible. To the extent there is a conflict in the opinions of the medical providers I find Dr. Broom's testimony more persuasive in light of the extent of time to which he has rendered treatment to Mr. Simmons. He provided longer ongoing treatment of Mr. Simmons for his industrial injuries than any of the other medical providers in this case. Furthermore in reviewing this record I do not find evidence of Mr. Simmons having pre-existing neck pain with radiation into his right arm and elbow before his 1999 accident. Although Mr. Simmons may have had preexisting degenerative changes in his neck before his industrial accident, he was apparently asymptomatic with respect to precise problems he began to suffer following his accident. Moreover, Dr. Brooms testimony makes it clear that the level of abnormality at the C5-6 level is consistent with Mr. Simmons' radicular complaints and that those complaints have been long standing and increasing over time.
24. Although there is a dispute between Dr. Bethea and Dr. Broom with regard to the extent to which the industrial injury contributes to the continuing degenerative process, the testimony nevertheless is that the industrial injury does contribute to the progression of Mr. Simmons radicular problems. Under such circumstances I accept Dr. Broom's opinion that it is reasonable and medically necessary for there to be at least an evaluation with a neurosurgeon to access what medical care if at all is required to treat Mr. Simmons for which the industrial accident is the major contributing cause.
25. I find that the request for the authorization of an evaluation with a neurosurgeon should be granted accepting the opinion of Dr. Broom over the other medical providers in this case. I find Dr. Broom's opinion to be more logical, consistent and persuasive in light of the record evidence as a whole. In reaching this conclusion I am not persuaded that there were any altered, erroneous or improperly evaluated MRI studies that otherwise invalidate the opinions that Dr. Broom has rendered. Nor am I persuaded of any purported intervening accidents of a significant nature to otherwise invalidate his opinions. I find that the evidence he relied upon in rendering his opinions was reasonably sound, liable and trustworthy.
26. Because Dr. Bethea is uncertain as to the degree to which the industrial injury contributes to the progression of the degenerative processes in Mr. Simmons' neck and because Dr. Broom thinks the longstanding nature of his problems following the industrial accident makes the accident responsible for the need of a neurosurgical evaluation, such evaluation I find should be

awarded. I find that the claimant has satisfied his burden of proof in obtaining such an evaluation consistent with the requirements of *Section 440.13(2) (a)* and the case of *Morrow v Sam's Club, 17 So.3d 763 (Fla. 1st DCA 2009)*.

WHETHER THE CLAIMANT IS ENTITLED TO THE AUTHORIZATION OF AN ALTERNATIVE ORTHOPEDIC PHYSICIAN IN HIS GEOGRAPHICAL AREA?

27. In that the E/C has authorized an orthopedic physician to provide treatment to Mr. Simmons in South Carolina as the nature of his injury and process of recovery requires, I find authorization of an alternative orthopedic physician at this time is premature as there has been no decision made as to whether Dr. Bethea, who is currently authorized, is incapable of providing appropriate care. Although Dr. Bethea testified that if the claimant required cervical surgery he would not be able to provide such surgery, a determination as to whether surgery is medically necessary to treat the compensable injury has not yet been made.
28. Dr. Broom made it clear that he had not yet specifically decided that surgery is required (See 01/26/10 deposition transcript of Dr. Broom at pgs 22-23). Dr. Bethea was also uncertain whether surgery was required.
29. The decision under this order is only with respect to whether a neurosurgical evaluation should be authorized which will otherwise allow an evaluation as to the appropriateness of surgery and whether the industrial accident would be the major contributing cause for such. Therefore the request for the authorization of an alternate orthopedic surgery at this time is respectfully denied where there is otherwise no showing of inadequacy of the care offered by Dr. Bethea.

WHETHER THE CLAIMANT IS ENTITLED TO THE PAYMENT OF HIS REASONABLE ATTORNEY FEES AND COSTS AT THE EXPENSE OF THE E/C?

30. As Mr. Simmons was successful in securing the authorization of a neurosurgical evaluation I find that he should be entitled to the payment of his reasonable attorney fees and costs associated with securing said benefit.

WHEREFORE it is hereby **ORDERED** and **ADJUDGED** that:

1. The request for the payment of TTD or TPD benefits from the date of accident based on an adjustment of the claimant's AWW for concurrent employment income is denied with prejudice.
2. The request for the authorization of a neurosurgeon for evaluation is granted.
3. The request for the authorization of an alternative orthopedic physician for the treatment of Mr. Simmons' compensable injuries in his geographical area is denied.
4. The request for the payment of Mr. Simmons' reasonable attorney fees and cost at the expense of the E/C is granted. Jurisdiction is reserved to determine the amount.
5. All benefits ripe at the time of trial not otherwise reserved by stipulation of the parties or the undersigned in this order are hereby waived.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida.

W. James Condry, II
Judge of Compensation Claims
400 West Robinson Street, Suite 608-North
Orlando, Florida 32801-1701

I HEREBY CERTIFY that the Judge of Compensation Claims entered the foregoing Compensation Order. A true and accurate copy of the order has been furnished by e-mail on the date attested to below to the parties' attorneys of record and to all other parties by U.S. Mail.

Susan Berman
Assistant to Judge of Compensation Claims