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

Manuel Cespedes, Jr., Employee/Claimant,	)	
	)	OJCC Case No. 11-009823TGP
vs.	)	
	)	Accident date: March 20, 2006
Yellow Transportation, Inc. (YRC)/Gallagher Bassett Services, Inc., Employer/ Carrier/Servicing Agent.	)	Judge: Thomas G. Portuallo

ORDER ON MEDICAL AND DISABILITY BENEFITS

After proper notice to all parties, this cause came to be heard before the undersigned Judge of Compensation Claims on December 13, 2011. The final hearing was conducted via video teleconference with the parties appearing in the Miami District Office, Dade County, and the undersigned Judge of Compensation Claims appearing in the Daytona Beach District Office, Volusia County. The Petitions for Benefits at issue were filed on May 2, 2011, and August 29, 2011. The Claimant, Manuel Cespedes, Jr., was represented by Attorney Martha D. Fornaris. The Employer/Carrier, Yellow Transportation, Inc./Gallagher Bassett Services, was represented by Attorney Scott B. Miller.

Statement of the Case

The Claimant, Manuel Cespedes, Jr., is a 40 year old male who worked for Yellow Transportation, the Employer herein, as a truck driver and dock worker. On March 20, 2006,

while making a delivery, the Claimant reached for the lift gate in the truck and felt a sharp pain in his lower back which began to radiate down his left lower extremity. The Employer/Carrier accepted the Claimant's low back injury as compensable and provided authorized treatment to the Claimant's lumbar spine with Concentra, Dr. Christopher Brown, Dr. Howard Popp, and Dr. Joel Salamon.

The Claimant's authorized treating orthopedist, Dr. Brown, diagnosed the Claimant with preexisting L5 spondylolysis and with work related L5- S1 disk herniation and radiculopathy. Following the industrial accident, the Claimant experienced recurrences of low back and radiating pain and returned to Dr. Brown on various occasions. The Claimant also received pain management treatment, including physical therapy and epidural injections with Dr. Salamon.

On March 17, 2011, Dr. Brown saw the Claimant and noted the Claimant was "significantly better" (Deposition Dr. Brown, December 5, 2011, page 32).

On March 20, 2011, the Claimant admitted himself to the emergency room at Kendall Regional Medical Center. The Claimant was examined for extreme low back pain radiating into the left lower extremity by neurosurgeon, Dr. Pablo Acebal. An MRI exam revealed a "massive herniated disc at L5-S1" (Deposition Dr. Acebal, page 6). Dr. Acebal performed surgery on the Claimant's low back on March 22, 2011.

The Employer/Carrier denied payment of the surgery and future medical or indemnity benefits on the grounds that the accident is no longer the major contributing cause of the current need for treatment as the Claimant underwent surgery with an unauthorized physician and that such surgery did not constitute emergency care.

Issues and Defenses

In the initial Pretrial Questionnaire, the Claimant set forth the following issues:

1. Temporary total disability/temporary partial disability from March 20, 2006, to present and continuing at correct compensation rate;

2. Correct determination of average weekly wage to include $21.73 per week, 40 hours per week, plus overtime and fringe benefits should they have been discontinued;

3. Authorization for continued treatment with Dr. Christopher Brown to the Claimant's lumbar spine;

4. Compensability of the Claimant's surgery of March 22, 2011, performed by Dr. Pablo Acebal at Kendall Regional;

5. Payment of Kendall Medical Center for admission date of March 20, 2011 in the amount of $101,850.88;

6. Attorney's fees, costs, and penalties.

These issues were defended by the Employer/Carrier in the initial Pretrial Questionnaire on the grounds that:

1. Accident is not the major contributing cause of temporary total/temporary partial;

2. AWW is correct;

3. Accident is no longer the major contributing cause or current need for treatment as Claimant underwent surgery with unauthorized physician;

4. Surgery unauthorized and does not constitute "emergency care";

5. Carrier not placed on timely notice of alleged "emergency care";

6. Surgery not medically necessary or causally related to the accident;

7. No penalties, interest, costs or attorney's fees due.

At the December 13, 2011, final hearing, the parties stipulated that the Petition for Benefits filed in this case on November 29, 2011, is not procedurally ripe to be determined at this time. Both parties noted that the Petition for Benefits filed on November 29, 2011, was not yet the subject of mediation. Likewise, the undersigned hereby finds that the Petition for Benefits filed November 29, 2011, is not procedurally ripe for determination at this time. This Court reserves jurisdiction to determine all claims and defenses related to the November 29, 2011, Petition for Benefits.

Additionally, at the December 13, 2011, final hearing, the parties stipulated that the Claimant's base average weekly wage is $923.91. However, the Claimant asserted the average weekly wage should be increased by $225.70 per week based upon the value of fringe benefits. The Employer/Carrier argued that there is insufficient evidence in the Record to satisfy the Claimant's burden of proof for inclusion of any fringe benefits in the average weekly wage.

Also, at the December 13, 2011, final hearing, the Employer/Carrier sought to amend their defenses to include recoupment of an alleged overpayment of disability benefits if such disability benefits are awarded. The Claimant objected to this amendment on the grounds that it was not timely raised by the Employer/Carrier as an affirmative defense.

Documentary Evidence

At the final hearing in this case the following documentary evidence was admitted:

JCC's Exhibit # 1	Pretrial Questionnaire and Order by the undersigned dated September 26, 2011.
JCC's Exhibit # 2	Employer/Carrier's Amendment to the Pretrial Stipulation, filed November 2, 2011.

JCC's Exhibit # 3	Claimant's Trial Memorandum, admitted for argument purposes only.
JCC's Exhibit # 4	Employer/Carrier's Trial Summary and Memorandum of Law, admitted for argument purposes only.
Joint Exhibit # 1	Deposition Dr. Joel W. Salamon, taken October 27, 2011, with attachments.
Joint Exhibit # 2	Depositions Dr. Christopher A. Brown, taken December 5, 2011, and December 12, 2011, with attachments.
Joint Exhibit # 3	Deposition of Susan Huffine-Athanasopoulos, taken August 12, 2011, with attachments.
Joint Exhibit # 4	Deposition of Daniel Egeler, taken November 28, 2011, with attachments.
Joint Exhibit # 5	Deposition of Claimant, taken August 12, 2011.
Claimant's Exhibit # 1	Deposition of Mayra Muntaner, taken December 1, 2011, with attachments, admitted for factual purposes only.
Claimant's Exhibit # 2	Deposition of Catherine Corley, taken December 1, 2011, with attachments.
Claimant's Exhibit # 3	Deposition of Kathy Ann Butler, taken October 24, 2011, with attachments.
Claimant's Exhibit # 4	Deposition Dr. Pablo Acebal, taken November 28, 2011, with attachments, admitted over objection for factual purposes only.

Evidentiary Objections

At the final hearing, the Claimant offered to admit as evidence the medical opinions of Dr. Pablo Acebal (Claimant's Exhibit # 4) and the medical reports, including medical opinions contained therein, from Kendall Regional Medical Center (Claimant's Exhibit # 1). The

Employer/Carrier objected to the medical opinions contained in these exhibits on the grounds that these medical providers were not authorized physicians, independent medical examiners, or expert medical advisors and therefore, any opinions from these medical providers are not admissible pursuant to Florida Statutes §440.5(e) which states:

> No medical opinion other than the opinion of a medical advisor appointed by the judge of compensation claims or the Department, an independent medical examiner, or an authorized treating provider is admissible in proceedings before the judge of compensation claims.

Further, the Employer/Carrier argued that the Claimant's unauthorized surgery at Kendall Regional Medical Center performed by Dr. Acebal was not rendered on an emergency basis. Additionally, the Employer/Carrier argued that the medical opinions from these exhibits are not admissible under the authority of Parodi v. Florida Contracting, Inc. and Summit Holdings, 16 So. 3rd 958 (Fla. 1st DCA 2009). Also the Employer/Carrier argued that the treatment rendered at Kendall Regional Medical Center including surgery performed by Dr. Acebal, was not causally related to the industrial accident. The Employer/Carrier argued that at all times the Claimant had available to him an authorized treating orthopedist who was capable and available to perform necessary surgery that is casually related to the compensable industrial injury.

After reviewing the totality of evidence and considering the arguments of both parties, the undersigned hereby sustains the objections raised by the Employer/Carrier to the medical opinions contained in Claimant's Exhibits 1 and 4. I note that at the final hearing, the deposition of Dr. Acebal was identified as Claimant's Exhibit "A". However, the deposition is now admitted for factual purposes only as Claimant's Exhibit # 4.

Having reviewed both Claimant's Exhibit # 1 and Claimant's Exhibit # 4 for factual purposes only, I also find that, even if Claimant's Exhibit # 1 and Claimant's Exhibit # 4 were admitted in their entirety, including all medical opinions contained therein, all decisions and findings of the undersigned Judge of Compensation Claims would remain the same in this case based upon the totality of evidence in the Record. As further described below, even if the medical opinion of Dr. Acebal was admitted into evidence, I find that the surgery performed by Dr. Acebal was not rendered on an emergency basis and that the Claimant failed to satisfy his burden of proof to establish that the medical treatment rendered by Dr. Acebal and Kendal Regional Medical Center was sufficiently causally related to the Claimant's compensable low back injury.

Findings of Fact and Conclusions of Law

In making my findings of fact and conclusions of law in this matter, I have carefully considered and weighed all the testimony and evidence presented to me including all the live testimony as well as the documentary exhibits and I have resolved any and all conflicts therein. After having carefully considered the arguments of the parties and all evidence presented in this case, I make the following findings of fact and conclusions of law:

1. The stipulations of the parties as listed above and as identified in the Pretrial Questionnaire are approved and adopted by me.

2. This Court has jurisdiction over the subject matter and over the parties.

3. In making the determinations set forth below, I have attempted to distill the testimony and salient facts together with the findings and conclusions necessary for the resolution of this claim. I have not attempted to painstakingly summarize the substance of all the

documentary evidence or the testimony of the witnesses nor have I attempted to state nonessential facts. Because I have not done so does not mean I have failed to consider all the evidence.

Low Back Surgery and Hospitalization

4. After reviewing the totality of evidence in this case, I find the Claimant failed to satisfy his burden of proof that the unauthorized low back surgery performed by Dr. Acebal constituted "emergency" treatment or that the Employer/Carrier received timely notice of the alleged "emergency care". Additionally, I find the Claimant was not entitled to avail himself of the "self-help provisions of the Act", as argued by Claimant's counsel, as the Claimant at all times prior to the surgery had qualified and capable authorized treatment available to him. Further, I find the Claimant failed to satisfy his burden of proof that the surgery performed by Dr. Acebal was causally related to the compensable industrial injury by way of major contributing cause.

- **No "Emergency Care"**

5. I note that Florida Statutes §440.13(3)(a) states that in order for a health care provider to be eligible for payment under Chapter 440, the health care provider must be a certified health provider and must receive authorization from the carrier before providing treatment. As set forth in the statute, Florida Statutes §440.13(3)(a) does not apply to "emergency care".

6. Based upon the totality of evidence in this case, including the medical evidence, I find that the surgery performed by Dr. Acebal and corresponding hospitalization at Kendall Regional Medical Center did not constitute "emergency care". I make this finding based upon

the acceptable medical opinion of Dr. Brown, the Claimant's treating authorized orthopedist, and the consistent testimony of the Claimant's pain management physician Dr. Salamon.

7. Further, as argued by the Employer/Carrier in their Memo of Law, I find that the Claimant failed to establish that his low back condition, as treated by Dr. Acebal and Kendall Regional Medical Center, constituted an "emergency medical condition" under Florida Statutes §395.002(8)(a). I find the Claimant has failed to establish, by a preponderance of evidence, that the Claimant sustained acute symptoms of sufficient severity, which may include severe pain, such that the absence of immediate medical attention could reasonably be expected to result in any of the following:

1) Serious jeopardy to patient health;
2) Serious impairment to bodily functions; or
3) Serious dysfunction of any body organ or part.

8. I find Dr. Brown as a board certified orthopedic physician, with a subspecialty in the spine, is particularly qualified to form an acceptable medical opinion on the material issues in this case. Further, I find Dr. Brown as the Claimant's treating physician since June 2006, is in the best position to form an opinion on the Claimant's need for treatment, including the Claimant's need for surgery, as he is most familiar with the Claimant's low back condition, history of low back problems, diagnostic test studies, and clinical examinations of the Claimant over a long period of time. I note Dr. Brown reviewed the MRI which was performed at Kendall Regional Medical Center on March 21, 2011 (Deposition Dr. Brown, December 5, 2011, page 38). I find that Dr. Brown was provided sufficient information and factual history surrounding the Claimant's hospitalization and symptoms in March 2011, to form an acceptable opinion on whether or not the surgery performed by Dr. Acebal constituted "emergency care". I accept Dr.

Brown's opinion over any contradictory opinion in the Record on this issue. Even if Dr. Acebal's opinions were admitted into evidence in this case, I specifically accept Dr. Brown's opinion over that of Dr. Acebal,

9. I find that Dr. Brown testified that he did not consider the Claimant's situation in March 2011, while hospitalized, as an emergency situation requiring immediate surgery (Deposition Dr. Brown, December 5, 2011, page 37). I accept Dr. Brown's opinion that, given the Claimant's symptoms at the hospital, the Claimant could have waited to see Dr. Brown, his authorized treating orthopedic physician, before going to forward with surgery (Deposition Dr. Brown, December 5, 2011, pages 37 and 38).

10. I find Dr. Brown clearly and without hesitation testified that, without loss of bowel and bladder control or additional cauda equina signs, there was no need for immediate emergency surgery (Deposition Dr. Brown, December 5, 2011, page 39). Based upon the totality of evidence, including the factual testimony of Dr. Acebal, I find that the Claimant was not suffering from cauda equina syndrome nor did he have any bladder or bowel incontinence symptoms at the time of surgery (Deposition Dr. Acebal, page 33).

11. Similarly, I accept Dr. Salamon's opinion from a pain management standpoint, that back pain alone does not constitute an emergency (Deposition Dr. Salamon, page 16).

12. In finding that the Claimant failed to sustain his burden of proof that the surgery performed by Dr. Acebal constituted "emergency care", I note portions of Dr. Acebal's own testimony on cross exam established that the Claimant's care, including surgery, could have been transferred to his authorized physician, Dr. Brown (Deposition Dr. Acebal, page 30 – 33).

13. Consistent with this finding, I note that prior to performing surgery, Dr. Acebal spoke with Dr. Brown on the telephone and offered to have Dr. Brown take over the case (Deposition Dr. Acebal, page 30 – 33). I find, however, it was the Claimant and the Claimant's family who indicated to Dr. Acebal that they did not want to wait to see Dr. Brown (Deposition Dr. Acebal, page 32).

- **Untimely Notice of Alleged "Emergency Care"**

14. Based upon the totality of evidence, I find that the Employer/Carrier did not receive timely notice of the alleged "emergency care" in this case. In making this finding, I note that Florida Statutes §440.13(3)(b) states:

> A health care provider who renders emergency care must notify the carrier by the third business day after it has rendered such care. If the emergency care results in admission of the employee to a health care facility, the health care provider must notify the carrier by telephone within 24 hours of initial treatment. Emergency care is not compensable under this Chapter unless the injury requiring emergency arose as a result of a work-related accident.

15. As shown by the medical records of Dr. Acebal and Kendall Region Medical Center, I find the Claimant was admitted to Kendall Regional Medical Center on March 20, 2011, and underwent surgery on March 22, 2011. I also find that Dr. Acebal testified that he did not seek authorization from the insurance company, adjuster, or employer, prior to his treatment of the Claimant (Deposition Dr. Acebal, page 21).

16. In finding that the Employer/Carrier did not receive timely notice of the alleged emergency treatment in this case, I accept the testimony of the workers' compensation adjuster, Susan Athanasopoulos, that Dr. Brown remained authorized during this period of time and that she received no phone call from Kendall Regional Medical Center seeking authorization prior to

treatment (Deposition Susan Athanasopoulos, page 19). I accept Ms. Athanasopoulos' testimony that she did not receive a phone call from Dr. Acebal asking to be authorized to perform the surgery (Deposition Susan Athanasopoulos, page 19). Further, although I note Ms. Athanasopoulos testified she did receive a phone call on March 23, 2011, following the surgery, she was not informed of the location of the Claimant or the name of the hospital he had been admitted to (Deposition Susan Athanasopoulos, page 20).

17. In making these findings, I note that Ms. Athanasopoulos did receive some medical records faxed to her by the Claimant's wife on March 25, 2011 (Deposition Susan Athanasopoulos, page 13). However, I cannot find this contact satisfied Florida Statutes §440.13(3)(b) or constituted timely notice by the health care provider within 24 hours of the initial treatment or within 3 days of the March 20, 2011, hospitalization.

- **No Referral**

18. Based upon the totality of evidence, I find that the Claimant has failed to satisfy his burden of proof that the surgery performed by Dr. Acebal at Kendall Regional Medical Center was the result of a referral by an authorized physician. I find the surgery was not performed at the direction of an authorized physician. I accept the Employer/Carrier's argument that the factual situation presented in the case at bar is sufficiently distinguished from facts appearing in Florida Hospital v. Wagner-Vick, 940 So. 2nd 588 (Fla. 1st DCA 2006) and Crego v. Southland Corporation, 638 So. 2nd 572 (Fla. 1st DCA 1994).

- **Appropriate Authorized Treatment Available**

19. Based upon the totality of evidence, I find that Dr. Brown, as the authorized spine specialist, was appropriately qualified and capable of treating the Claimant and was available as

an authorized physician during the period of time the Claimant underwent surgery by Dr. Acebal and was hospitalized at Kendall Regional Medical Center.

20. I find that medical treatment for this workers' compensation case was not denied by the Employer/Carrier until March 23, 2011, following the unauthorized surgery. In making this finding, I accept Ms. Athanasopoulos' testimony that the denial of medical care in this case was filed on March 23, 2011 (Deposition Susan Athanasopoulos, page 9). I find Ms. Athanasopoulos' testimony on this issue is clear and consistent with the totality of evidence in this case and is, therefore, accepted over any contrary evidence in the Record.

21. Accordingly, I find that the Employer/Carrier did not deny responsibility for the compensable injury at any time prior to the surgery performed by Dr. Acebal and corresponding hospitalization. Furthermore, I find that the Claimant, at all times prior to surgery, had qualified, capable, authorized medical treatment available for him if he so desired. Consequently, I also find that the Claimant was not entitled to the "self-help provisions of the Act" as argued by the Claimant's counsel at the final hearing.

- **Major Contributing Cause of the Need for Surgery**

22. Based upon the totality of evidence, I find the Claimant failed to prove by a preponderance of the evidence that the compensable industrial injury was the major contributing cause of the need for the surgery performed by Dr. Acebal or the medical treatment and associated disability sustained during the period of time from the Claimant's hospitalization in March 2011, up to the date of the final hearing.

23. In making this determination, I find that the Claimant in this case suffered from a preexisting non-industrial related disease, spondylosis at L-5 bilaterally (Deposition Dr. Brown,

December 5, 2011, page 8 and 9). Dr. Brown emphasized that the spondylosis condition was preexisting, not causally related to the industrial accident, and was a permanent condition for the Claimant (Deposition Dr. Brown, December 5, 2011, pages 8 and 9). Dr. Brown testified in his deposition of December 12, 2011, page 10, that the Claimant's preexisting spondylolysis continues to be a contributing factor to the Claimant's low back symptoms.

24. I find there is insufficient evidence in the Record in this case to establish that the Claimant suffered from any subsequent industrial accident that would contribute to the Claimant's lower back condition. I find the Claimant was very specific and clear at the final hearing when he testified he suffered no other industrial accidents or injuries to his low back. I accept the Claimant's testimony on this issue as logical, reasonable, and consistent with the totality of evidence in this case. I find there are no other identifiable industrial causes for the Claimant's low back condition, only his pre-existing, non-industrial, spondylosis and the compensable injury of March 20, 2006. I reject any medical opinion in evidence in this case that was procured in response to a hypothetical question assuming that the Claimant did suffer a subsequent industrial accident or injury to his back on the grounds that any such medical opinion is not supported by the factual evidence in this case and is based on an improper hypothetical question.

25. In making this finding, I note the argument of Claimant's counsel that the Claimant sustained further injury to his back while working for various employers subsequent to the date of accident in this case and that it would be appropriate for the Employer/Carrier herein to file a claim for contribution against the Claimant's subsequent employers and their workers' compensation insurance carriers. However, I reject this argument and find there is insufficient

evidence in the Record to contradict the Claimant's own credible and believable testimony that he suffered no additional workers' compensation accidents or injuries to his back.

26. Accordingly, I accept the Employer/Carrier's argument that it was incumbent upon the Claimant in this case to prove that the disputed medical and indemnity benefits at issue were causally related to the industrial injury by way of major contributing cause. I find the Claimant did not meet this burden with regard to the medical treatment and alleged disability benefits presently at issue which were incurred or sustained during the period of time from the Claimant's hospitalization and surgery in March 2011, up to the date of the final hearing.

27. I accept Dr. Brown's opinion that the surgery performed by Dr. Acebal was not causally related to the March 20, 2006, industrial injury by way of major contributing cause (Deposition Dr. Brown, December 5, 2011, page 41). I find that Dr. Brown, as the Claimant's long-term treating physician, is most familiar with the Claimant and his low back condition over a long period of time. I find Dr. Brown's opinions are logical, reasonable, and consistent with the totality of evidence in this case. I find Dr. Brown is particularly qualified to form opinions on the material issues in this case. I accept Dr. Brown's medical opinion for all reasons previously stated in the contents of this Order. I also note there is no medical opinion in the Record to contradict Dr. Brown's opinions and that the Claimant did not avail himself of an Independent Medical Examination in this case.

28. Further, even if Dr. Acebal's medical opinions were admitted into evidence in this case, a position I reject, I note that Dr. Acebal testified that he had no opinion on whether or not the industrial accident was the major contributing cause of the need for surgery (Deposition Dr. Acebal, pages 38 and 39). Dr. Acebal testified on pages 38 and 39 as follows:

Q. So if it's continuum, is there any way for you to say, within a reasonable degree of medical certainty, that greater than 50 percent of this need for surgery in March 2011, is due to what happened in 2006?

A. I don't know how to decide what percentage of it. You know, how to decide that. I mean, I have no opinion about that…

29. Additionally, I note Florida Statutes §440.13(3)(b) states:

> …Emergency care is not compensable under this Chapter unless the injury requiring emergency arose as a result of a work-related accident.

30. Accordingly, even if it is determined that the Claimant's surgery and hospitalization in March 2011, constituted "emergency care", a position I reject, I find that such care was not the result of the work-related accident and is, therefore, not the responsibility of the Employer/Carrier.

31. Likewise, I cannot find that the Claimant appropriately availed himself of the "self-help provisions of the Act", as argued by Claimant's counsel, due to my finding herein that the Claimant's surgery and hospitalization in March 2011 were not sufficiently causally related to the 2006 compensable injury.

Temporary Total/Temporary Partial Disability Benefits

32. I find the Claimant failed to prove by a preponderance of the evidence that he is entitled to any additional temporary total or temporary partial disability benefits as claimed in this case.

33. As set forth above, I find the Claimant failed to establish that the Claimant's compensable back injury is the major contributing cause of any temporary disability at issue allegedly sustained during the period of time from the Claimant's hospitalization in March 2011,

up to the date of the final hearing. I again note that Dr. Brown clearly testified that the major contributing cause for the need for surgery in this case was not the 2006 industrial accident. I accept this opinion over any contradictory evidence in the Record for all reasons previously set forth in the contents of this Order.

34. With regard to any alleged temporary disability at issue sustained prior to March 2011, I accept the uncontradicted testimony of the insurance adjuster, as confirmed by additional evidence in the Record, including documentary evidence, as to the amount of disability benefits paid by the Employer/Carrier during various time periods throughout the history of this case.

35. Further, as shown by the closing arguments of both parties and the testimony of Ms. Butler, the payroll supervisor for the union, I find that according to the union contract applicable to the Claimant that, while the Claimant is on "transitional duty" or "modified duty", the Employer paid to the Claimant 85% of his wages (Deposition Ms. Butler, pages 17 and 18). I note Claimant's counsel admitted at closing arguments that the amount of disability benefits initially claimed by the Claimant in this case failed to consider that 85% of the Claimant's wages were paid to the Claimant, pursuant to the union contract, during the time periods at issue. As such, I find the Claimant also failed to satisfactory specify what gap periods, if any, of temporary disability benefits are owed.

36. Based on the totality of circumstances in this case, and even assuming that all past disability benefits paid by the Employer/Carrier in this case should be re-classified as temporary disability benefits, I find the Claimant failed to satisfy his burden of proof to establish he is entitled to any additional payment of temporary disability benefits for the time period from the date of accident to the date of the final hearing as claimed in this case.

Average Weekly Wage

37. I note that the parties in this case have stipulated to the base average weekly wage of $923.91. The Claimant claimed an increase in the AWW should be made based on the value of fringe benefits, including health insurance, contributed by the Employer. After reviewing the totality of evidence in this case, I find the Claimant failed to present a preponderance of evidence to establish the value of any fringe benefit that should be included in the average weekly wage.

38. In making this determination, I note it is not disputed in this case that the Claimant received health and welfare benefits, under union contract, as part of his wages while working for the Employer herein and that these benefits included health insurance, vision, dental, prescription, life insurance, and short term disability (Deposition Ms. Butler, page 9). Ms. Butler, the payroll supervisor for the union, testified that the Employer herein contributed $225.70 per week for the health and welfare fund as a whole (Deposition Ms. Butler, page 10). However, I find Ms. Butler could not testify to the amount of money that was contributed by the Employer specifically for health insurance for the Claimant or his dependents or for any fringe benefit that should be included in the AWW as "wages" under Florida Statutes §440.02(28). (Deposition Ms. Butler, pages 10 and 11).

39. I find the Record in this case failed to include a reasonable value of the health insurance contribution made by the Employer towards health insurance for the Claimant or his dependents. I also find that health insurance is the only fringe benefit received by the Claimant that would qualify for "wages" under Florida Statutes §440.02(28).

40. Because there is a lack of evidence in the Record suggesting a reasonable value of the health insurance contribution, this Court is reluctant to assume or determine that any certain

portion of the health and welfare fund contributed by the Employer in this case should be includable as "wages" under Florida Statutes §440.02(28). Based upon the insufficient evidence in the Record before me, I find that any such determination by this Court would be speculation or conjecture.

41. Additionally, I accept the Employer/Carrier's argument that the Employer/Carrier in no way obstructed, impeded, or hampered the Claimant's discovery of facts surrounding the AWW, fringe benefit issue in this case. Instead, I note Ms. Butler clearly suggested that an employer representative named "Jeri Ellison" and the "Central States Fund" may be able to provide information to the Claimant setting forth the monetary portion of the Employer health and welfare contribution that is used for each category of fringe benefits, including health insurance (Deposition Ms. Butler, pages 9 to 12).

Overpayment

42. At the final hearing, the Employer/Carrier asserted recoupment of overpayments made to the Claimant for past disability benefits paid at an improper, high rate. Among other points, the Employer/Carrier argued that past indemnity benefits were overpaid due to the Claimant's failure to inform the Employer/Carrier of subsequent earnings during periods of time disability benefits were paid by the Employer/Carrier. The Claimant objected to this assertion on the grounds that it was not timely plead as an affirmative defense by the Employer/Carrier.

43. After reviewing the totality of circumstances in this case, I accept the Claimant's position that the Employer/Carrier failed to timely identify recoupment of any overpayment in this case as an issue to be decided by the undersigned in conjunction with the final hearing on December 13, 2011. I find the first time the Employer/Carrier asserted recoupment of an

overpayment was in the contents of the Employer/Carrier's Trial Summary and Memorandum of Law, filed December 9, 2011. Based on the totality of circumstances of this case, I find it would be unfairly prejudicial to the Claimant for this issue to be determined in the contents of this Order.

Authorization for Continued Treatment with Dr. Brown

44. Although this Court finds that there is insufficient evidence to establish that medical treatment received by the Claimant during the period of time from the date of his hospitalization with Kendall Regional Medical Center to the date of hearing in this case is causally related to the March 2006 industrial accident by way of major contributing cause, I do not find that the Claimant is no longer entitled to future medical treatment that is sufficiently related to the March 2006 industrial accident. Instead, I find that the Claimant is entitled to continued treatment with Dr. Christopher Brown for the Claimant's lumbar spine condition so long as such treatment is causally related to the compensable March 20, 2006, industrial injury by way of major contributing cause and is medically necessary.

45. In making this finding, I note that Dr. Brown testified specifically with regard to the major contributing cause and the need for surgery in his deposition (Deposition Dr. Brown, December 5, 2011, page 41). I cannot find that Dr. Brown testified that there is no need for future treatment causally related to the March 2006 compensable injury. Although I note Dr. Brown testified he could not give us an opinion as to whether the massive herniated disk that showed up on the MRI of March 21, 2011, was causally related to the March 20, 2006, industrial accident, I do not find that there is sufficient evidence in the Record to support the Employer/Carrier's position that the accident is no longer the major contributing cause of the

need for treatment, including future treatment, in this case.

46. In making this finding, I note the Employer/Carrier has agreed, and did stipulate in the contents of the Pretrial Stipulation, that the Claimant's low back condition, as causally related to the March 2006 industrial accident, is considered compensable.

WHEREFORE IT IS ORDERED AND ADJUDGED as follows:

1. The claim for temporary total disability from March 20, 2006, to the present is **DENIED**.

2. The claim for temporary partial disability benefits from March 20, 2006, to the present is **DENIED**.

3. The claim for a correct determination of the average weekly wage to include fringe benefits is **DENIED**. The Claimant's average weekly wage is determined to be $923.91.

4. Claimant's claim for penalties and interest is **DENIED**.

5. The claim for compensability of the Claimant's surgery of March 22, 2011, performed by Dr. Pablo Acebal at Kendall Regional Medical Center is **DENIED**.

6. The claim for payment of Kendall Regional Medical Center bills for admission date of March 20, 2011, in the amount of $101,850.88 is **DENIED**.

7. The Employer/Carrier's claim for recoupment of overpayment of past disability benefits is **DENIED**.

8. The claim for authorization for continued treatment with Dr. Christopher Brown for the Claimant's lumbar spine is **GRANTED** insofar as treatment is sufficiently causally related to the industrial accident and medically necessary.

9. This Court reserves jurisdiction to determine the claim for payment of taxable costs by the Employer/Carrier.

10. This Court reserves jurisdiction to determine the claim for payment of attorney's fees by the Employer/Carrier.

11. Any arguments or issues not raised at the time of this hearing are considered waived.

DONE AND ELECTRONICALLY TRANSMITTED VIA EMAIL to the attorneys listed below this 9th day of January, 2012, in Daytona Beach, Volusia County, Florida.

Thomas G. Portuallo
Judge of Compensation Claims
Division of Administrative Hearings
Office of the Judges of Compensation Claims
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