

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

Phyllis A. Crispin,
Employee/Claimant,

OJCC Case No. 12-009053MES

vs.

Accident date: 4/18/2011

Orlando Rehabilitation Group dba
Clermont Nursing & Rehab
Center/Gallagher Bassett Services, Inc.,
Employer/Carrier/Service Agent.

Judge: Margaret E. Sojourner

FINAL COMPENSATION ORDER

This matter was heard at a Final Hearing before the undersigned in Altamonte Springs, Seminole County, Florida on February 12, 2019. Present at the hearing were Claimant, Phyllis Crispin and her attorney, William G. Berzak. Also present at the hearing was attorney Scott B. Miller on behalf of the Employer/Carrier (EC).

Issues:

1. Reclassification of PTD to TTD/TPD for the period of October 24, 2014 to January 4, 2015 the date claimant reached MMI following her right shoulder surgery.
2. Continued payment of PTD benefits from the date of suspension of May 26, 2017 to on or about August 6, 2017 until the full five years of PTD has been paid.
3. Penalties, interest, costs and attorney's fees.

Defenses:

1. All indemnity benefits have been paid at the correct rate.
2. No penalties, interest, costs or attorney's fees are due.

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 testimony and evidence presented. I have resolved all of the conflicts in the testimony and documentary evidence. Based upon the foregoing, the evidence, and the applicable law, I make the following determinations. I have jurisdiction over the parties and the subject matter of this

Crispin v. Orlando Rehabilitation Group

OJCC Case No.: 12-009053

Page 1 of 5

claim. Venue lies in Lake County, Florida. The stipulations of the parties are accepted and adopted by me as findings of fact.

The claimant was injured in the course and scope of her employment on April 18, 2011. The claimant was accepted as permanently and totally disabled on May 26, 2012. At the time of the accident the claimant was 73 years old. Subsequently on October 22, 2014 Dr. Nowicki performed a right shoulder surgery. He rescinded MMI from the date of the surgery until January 4, 2015. The EC paid PTD benefits continuously until May 25, 2017 which was 5 years from the date of acceptance.

The claimant maintains that the PTD benefits should have been suspended and temporary benefits paid during the period that MMI was rescinded by Dr. Nowicki. The claimant argues that PTD benefits should have been reinstated after MMI was reached on January 4, 2015 and then paid for a period which when added to the weeks paid prior to October 22, 2014 would equal 5 years or until August 6, 2017. In other words the claimant views PTD as a bank of benefits to be used while in a PTD status not to exceed a total of 5 years while EC views PTD to be paid for 5 calendar years from PTD acceptance.

I find that the language restricting the payment of PTD to a period of 5 years after PTD acceptance is clear and limits payment of PTD to 5 calendar years rather than to 5 cumulative years of benefits for the following reasons.

Section 440.15 (1) (b) provides that entitlement to PTD shall cease when an employee reaches age 75. This section goes on to state, "If the accident occurred on or after the employee reaches age 70, benefits shall be payable during the continuance of permanent total disability, not to exceed 5 years following the determination of permanent total disability." Where a statute's words are clear and unambiguous the words should be given their plain and ordinary meaning and it is not necessary to resort to the rules of statutory construction. *Hinzman v. Winter Haven Facility Operations LLC.*, 109 So.3d 256 (Fla. 1st DCA 2013).

While there are no cases involving this specific language, the courts have addressed similar statutory provisions in the past. In *Winn Dixie v. Resnikoff*, 659 So.2d 1297 (Fla. 1st DCA 1995) the issue was whether wage loss benefits set out in Section 440.15 (3)(b)4.d.(III), Florida (1991) were payable for 78 calendar weeks without interruption or whether this was a cumulative limitation. The court held that the JCC, in holding these benefits were cumulative, properly compared the general grant of eligibility in Section 440.15 (3)(b)4.d.(III) with the more restrictive language found in Section 440.15(3)(b)4 b and c which expressly terminates the right to wage loss after the expiration of a specific number of weeks after maximum medical improvement. A similar analysis was used in *School Board of Lee County v. Huben*,

165 So.3d 865 (Fla. 1st DCA 2015) in determining that TTD benefits for a psychiatric injury are strictly limited to the calendar period of six months after the date of physical MMI. The statutory section at issue in that case states “in no event shall temporary benefits for a compensable mental or nervous injury be paid for more than 6 months after the date of maximum medical improvement for the injured employee’s physical injury or injuries...”


The First District Court has held that eligibility for 104 weeks of temporary benefits found in Section 440.15 was cumulative in nature rather than limited by a calendar.¹ *Wright v. City of Rockledge*, 813 So.2d 283 (Fla. 1st DCA 2002). The language at issue in the *Wright* case is found in Section 440.15 (2)(a) and stated benefits would be paid during the continuance of disability “not to exceed 104 weeks ...” The court held that this language, like the language regarding the 78 weeks of eligibility in *Winn Dixie v. Resnikoff*, was a general grant of eligibility rather than a restrictive grant tied to the happening of a calendar event.

The language setting forth the eligibility for PTD benefits when PTD occurs after age 70 is restrictive in nature as it terminates eligibility 5 years after the happening of a specific event – the determination of MMI. This restriction is akin to the limiting language regarding payment of psychiatric TTD and wage loss benefits restricted to a period of weeks after the claimant reached MMI. It is different from the general grant of eligibility found in the sections setting forth eligibility for temporary total benefits and wage loss benefits not tied to a specific period after MMI.

Wherefore it is ordered and adjudged as follows:

1. The claim for reclassification of PTD benefits and payment of PTD benefits on a cumulative basis is denied.
2. The claim for penalties, interest, costs and attorney fees is denied.

DONE AND SERVED this 20th day of February, 2019, in Altamonte Springs, Seminole County, Florida.



Margaret E. Sojourner
Judge of Compensation Claims
Division of Administrative Hearings
Office of the Judges of Compensation Claims
Orlando District Office
225 South Westmonte Drive, Suite 3300

¹ While the 104 week limitation was subsequently to be unconstitutional in *Westphal v. City of St. Petersburg*, 194 So.3d 311 (Fla. 2016) the analysis utilized to determine if the benefits were cumulative or calendar is still valid.
Crispin v. Orlando Rehabilitation Group
OJCC Case No.: 12-009053
Page 3 of 5

Altamonte Springs, Florida 32714
(407)961-5805
www.fljcc.org

COPIES FURNISHED:

William G. Berzak
williamberzak@aol.com,cmcallister.berzak@aol.com

Scott B. Miller, Esquire
smiller@hrcw.com,pbronson@hrcw.com

EXHIBITS

Judge's Exhibits:

1. Petition for benefits filed September 14, 2018 at DN 33
2. Response to PFB filed September 13, 2018 at DN 38.
3. PFB filed December 4, 2018 at DN 45.
4. Response to PFB filed December 13, 2018 at DN 46.
5. Mediation Conference report filed December 18, 2018 at DN 47.
6. Pretrial Stipulation filed December 21, 2018 at DN 48.
7. Claimant's Final Hearing Memorandum filed February 11, 2019 at DN 54.
8. EC Trial Memorandum filed February 8, 2019 at DN 53.

Joint Exhibits:

1. Deposition of Dr. Nowicki filed February 7, 2019 at DN 51.

EC Exhibits:

1. Deposition of Phyllis Crispin filed February 7, 2019 at DN 50.
2. Functional capacity evaluation filed February 7, 2019 at DN 49.