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

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OJCC CASE NUMBER: 10-001272WJC

DATE OF ACCIDENT: 01/19/2009

Judge: W. James Condry, II

FINAL COMPENSATION ORDER

After proper notice to all parties, a final hearing was held and concluded on this claim in Orlando, Orange County, Florida on the afternoon of Thursday, December 13, 2012. Present at the final hearing were attorneys Jeffrey J. Bordulis for the claimant and Scott B. Miller for the employer/carrier, hereinafter referred to as the E/C. Also in attendance and the only witness to testify live at the hearing was Cecil George Gilmore. The remainder of the evidence was received via deposition and documents as detailed below. Written closing arguments were received on December 17, 2012 at which time the trial record was formally closed.

This order addresses the Petition for Benefits filed with DOAH on 06/22/12.

The claim was unsuccessfully mediated on 10/17/12

A petition for benefits filed on 12/12/12 has yet to be mediated. Jurisdiction is specifically reserved to address the benefits that are the subject of that petition at a later time if required

OVERVIEW

The claimant, a former truck driver with Roadway Express injured among other things his right shoulder in a compensable motor vehicle accident on January 19, 2009. His accident was accepted as compensable with both indemnity and medical benefits furnished. In dispute is whether Mr. Gilmore is entitled to additional medical care for his right shoulder condition. In this regard the claimant maintains that the E/C has not complied with the requirements of my June 17, 2011 order that the E/C provide such care for the claimant's right shoulder as may be reasonable and medically necessary as a result of the industrial accident. For the reasons addressed below I find that the at least further evaluation is necessary to conclude that no further care for the shoulder is required.

The specific issues to be determined at the 12/13/12 final hearing were as follows:

1. Whether Mr. Gilmore is entitled to the authorization of medical care for his right shoulder per the JCC's order of 06/17/11?
2. Whether Mr. Gilmore 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 the employer/carrier authorized a return visit to Dr. Halperin pursuant to the order of 06/17/11.
2. That per Dr. Halperin, no further care is medically necessary or causally related to the accident of 01/19/09.
3. That no costs or attorney fees are due or owing.

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 01/19/09 accident.
4. That workers' compensation insurance coverage was in effect on the date of the accident.
5. That the employee gave timely notice of the accident.
6. 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 11/21/12.
2. A composite exhibit consisting of the claimant's trial memorandum dated 12/11/12 and the E/C's trial summary and memorandum of law dated 12/08/12. The composite exhibit and any attached case opinions are considered for argument purposes only.
3. The final compensation order entered on 06/17/11.
4. The parties' written closing arguments.

JOINT EXHIBIT

1. The 08/23/12 deposition transcript of Dr. Lawrence S. Halperin and attachments.

CLAIMANT'S EXHIBIT

1. The 05/09/11 deposition transcript of Dr. Robert L. Murrah and attachments.

EMPLOYER EXHIBIT

1. The 06/10/10 deposition transcript of Dr. Richard Shure and attachments.

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 only witness that testified live before me, and I have resolved all of the conflicts in the live 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 facts with mandate as required by *Section 440.25(4) (e), Florida Statutes (2008).*

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 having weighed and elected to reject as unpersuasive the evidence and inferences inconsistent with these findings:

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

2. I find that Mr. Gilmore sustained a compensable right shoulder injury among other things in a motor vehicle accident occurring in the course and scope of his employment on 01/19/09 wherein a semi-truck he was operating for the employer rolled over onto its side. Mr. Gilmore eventually came under the authorized care of Dr. Lawrence Halperin who performed arthroscopic shoulder surgery on Mr. Gilmore's on 06/26/09. The surgery was performed for a diagnosed acromioclavicular joint (A/C Joint) pathology.
3. Notwithstanding the surgery Mr. Gilmore's shoulder pain complaints continued. Dr. Halperin had recommended a second surgery in light of those continuing complaints. Subsequently questions arose as to whether the shoulder complaints were emanating from Mr. Gilmore's shoulder or from his cervical spine where significant degenerative changes with disc herniations and pinched nerves were discovered. The neck condition pre-existed the industrial accident. All of the physicians agree that Mr. Gilmore has signifant neck pathology that requires surgical intervention. They indicated that a greater degree of urgency for treatment of the neck condition existed than with regard to any treatment for the shoulder.
4. The claim eventually went to trial on 05/18/11 to determine whether Mr. Gilmore was entitled to continuing care and treatment for his shoulder because the carrier contended, among other things, that the industrial accident was no longer the major contributing cause of his disability or need for treatment.
5. Based on the evidence presented at that 05/18/11 final hearing that included testimony from an expert medical advisor, I found Mr. Gilmore had acromioclavicular joint and possible labrum pathology independent of his cervical condition, the latter of which I did not find to be compensable. That in regard to his accident related shoulder condition Mr. Gilmore had not yet reached maximum medical improvement and because of restrictions assigned by the EMA Mr. Gilmore was entitled to the payment of temporary partial disability benefits and the continued authorization of appropriate medical care for his right shoulder as the nature of his injury and process of recovery requires. The authorization of continuing care that had been denied also included the payment of diagnostic bills that were ordered at the direction of Dr. Richard Shure with dates of service of 04/20/10 and 04/29/10.
6. The claimant alleges that the E/C has failed to comply with my 06/17/11 order. I find that is not true.
7. There has been no showing by the claimant that the E/C failed to pay the specific diagnostic bills

ordered under the 06/17/11 order. There was no claim that the E/C failed to pay the temporary indemnity benefits under the order and with the agreement of the parties allowing Dr. Halperin to resume the provision of medically necessary care for the shoulder I find the carrier took clear steps to comply with the compensation order of providing medical care as may be necessary.

8. The authorization of Dr. Halperin with party agreement appeared reasonable under the circumstances. It was Dr. Halperin who was previously authorized to treat and who performed the initial shoulder surgery. It was also Dr. Halperin's opinions the EMA substantially relied upon and agreed with in finding right shoulder pathology and the need for further treatment.
9. The basis of the current dispute centers around the fact that upon reevaluating the claimant again Dr. Halperin, based on the objective findings he discovered on 12/14/11, did not believe the 2nd surgery that he had earlier recommended or any other treatment specifically for the shoulder was medically necessary at this time. He believed because he did not find objective verifiable problems with the shoulder that the claimant's pain in his shoulder was in fact originating from his neck. In short Dr. Halperin changed his mind regarding required shoulder care based on the updated examination and the presentation of symptoms. Instead he opined that Mr. Gilmore needed to have his significant non-compensable neck condition taken care of.
10. I do not find that there was anything improper or sinister by the doctor changing his mind. I do not find that he was presented with any false or erroneous information to affect his opinions and I believe he forthrightly rendered the opinions based on his findings at the time and based on his expertise. I do not find that he was impermissibly influenced by the carrier or any other party in regard to this opinions and testimony based on the 12/14/11 evaluation.

WHETHER MR. GILMORE IS ENTITLED TO THE AUTHORIZATION OF CONTINUING MEDICAL CARE FOR HIS RIGHT SHOULDER?

11. *Section 44013(2)* 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 from my prior ruling in the 06/17/11 order and from the record evidence in this case that Mr. Gilmore did sustain a compensable right shoulder injury. That based on the testimony of Dr. Halperin that injury is of a permanent nature that warrants an undefined impairment rating

estimated at this junction to be approximately 2%. The doctor acknowledged that no more accurate impairment rating could be assigned without seeing Mr. Gilmore again. It is anticipated that the evaluation for such purposes will eventually take place as a pending petition for benefits claiming impairment benefits exists. Jurisdiction has been reserved to hear the subject of that 12/12/12 petition in the future if necessary.

13. To the extent the parties are seeking that I make a determination as to Mr. Gilmore's entitlement to care in the future, I decline to do so.
    a) First I find I do not have the jurisdiction to rule in such a manner since *Section 440.192* limits my ability to decide only those matters that are ripe due and owing at the time of trial. See also ***Bronson's Inc. v. Robert Mann, 70 so.3d 637 (Fla. 1st DCA 2011).***
    b) Secondly even if I were able to attempt to speculatively address entitlement to future care Mr. Gilmore's permanent injury from the A/C joint injury clearly creates the prospect that residual conditions related to that permanent injury might or might not require medical care in the future. Or there could be some other shoulder problem related to the industrial accident not yet identified. It is impossible to determine what the future will hold.
14. What I do find and accept at this time is that Mr. Gilmore has not satisfied his burden of proof based on this record that he requires specific medical care and treatment for his right shoulder that is due to his industrial accident.
15. The claimant alleges that I am bound completely by the EMA's opinions from the first hearing. I find EMAs are entitled to the presumption of correctness for matters that were in conflict at the time and for the purpose to which the EMA was appointed. I am unaware of any case or statutory authority that indicates that an EMA is entitled to a presumption of correctness on all opinions he or she may express. I conclude the EMA is entitled to the presumption only as to those specific issues he or she is specifically called upon to address based on the specific issues to be tried where there is a clear conflict in the evidence. Here Dr. Murrah was specifically asked in preparation for the initial trial to address whether the industrial accident was the major contributing cause of the need for shoulder treatment, whether the mumford procedure recommend by Dr. Halperin was reasonable and necessary, whether the claimant had reached maximum medical improvement and what if any restrictions or limitations existed.
16. The Dr. Murrah's opinions were based on his findings and examination at the time on 03/11/11. Reviewing his physical examination of Mr. Gilmore Dr. Murrah's EMA report also reported that

the compression of the claimant's A/C joint produced pain. Dr. Murrah has not seen Mr. Gilmore since, and presentation of pain at the A/C joint was not found by Dr. Halperin when he examined Mr. Gilmore on 12/14/11. We do not know if the EMA's opinions would change if there were no such presentation of symptoms at the A/C joint when he examined the claimant on 03/11/11 or if there are no such symptoms at the A/C joint at this time. The same is true with respect to the pain or crepitus at the subacromial space which Dr. Halperin also did not find at his subsequent examination of the claimant.

17. The EMA's opinion in the earlier trial cannot be said to be binding on this trial as conditions have changed. Moreover the record evidence does support the distinct possibility that the current generalized pain complaints are related to the cervical spine condition. Therefore I find the claimant's argument that the E/C has failed to establish any other cause for the claimant's shoulder pain complaints is simply not true.

18. I also disagree with the claimant's argument that the carrier is obligated to authorize another physician to perform the surgery recommended by Dr. Murrah. There was no claim for surgery and no order directing surgery was entered. The order did not direct the carrier to provide the care recommended by Dr. Murrah. The order merely confirmed that there was a shoulder injury and that care as reasonably and medically necessary should be provided. It is clear that the provision of care in workers' compensation cases is dynamic, not static. As a claimant's condition changes over time, so too may be the nature of care required. In this context it is not unprecedented that a physician may change his or her opinion as to whether surgery he or she originally recommended is still required as was done in this case. As surgery was not specifically pled in either the first trial or this trial, I do not find the evidence supports nor do I have the jurisdiction to order such as the claimant now requests.

19. Furthermore I find there is competent substantial evidence in the record supportive of Dr. Halperin's opinion at this time that the surgery is not required. The original recommendation of surgery was made based on the presentation of symptoms at the A/C joint and Dr. Halperin's belief that the first surgery he performed failed because of continuing pain complaints at the A/C joint. During the reexamination in December 2011 Mr. Gilmore was not tender over the A/C joint, the rotator cuff or back or the front of the shoulder. X-rays of the right shoulder taken on that day indicated that the mumford procedure resection looked good. There were complaints of generalized shoulder pain but the doctor could not find the source. Again, his surgery

recommendations were previously based on the claimant's pain complaints pointing to the A/C joint as their source. This time they did not. In all of the claimant's prior visits with Dr. Halperin according to the doctor Mr. Gilmore hurt on one very specific structure and not surrounding structures. On his latest visit he was not and there was no objective evidence to otherwise warrant the surgery.

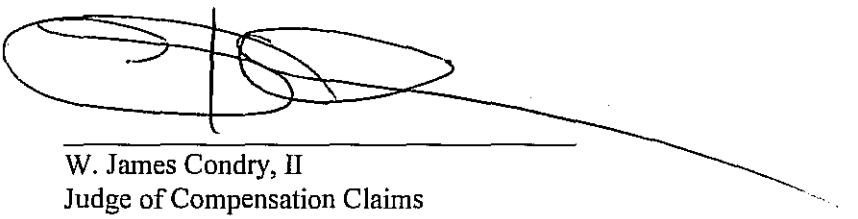
20. The claimant requests care on two general grounds. First the request that the E/C comply with my 06/17/11 order. I find that the E/C did by offering continuing care as the nature of the injury required. The doctor found no specific care for the shoulder was required as of the time he evaluated the claimant and the carrier acted accordingly.
21. The second ground is apparently a general request for medical care in the future. As stated before I am only authorized to provide such care as reasonable and medically necessary at the time of trial. As no specific care has been recommended this general request is also denied. This ruling is in no way intended to be construed as denying any future care that may subsequently be demonstrated to be required. The specific authorization of care per the order of 06/17/11 is denied as I find that the E/C complied with the order as supported by the evidence that exists at this time.

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

1. The request for the authorization of medical care for the right shoulder per the JCC's 06/17/11 order is denied.
2. The request for the payment of Mr. Gilmore's reasonable attorney fees and costs at the expense of the E/C is denied.

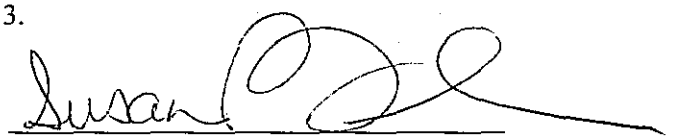
*It is noted that Gallagher Bassett Services has not registered an email address for service as required by Rule60Q-108(11) of the Rules of Procedure for Workers' Compensation Adjudications. The Carrier is admonished to comply with the provisions of Rule 60Q-6.108(11) and register a central delivery email address by contacting the Deputy Chief Judge of Compensation Claims at david_langham@doah.state.fl.us. *

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 foregoing Compensation Order was entered by the Judge of Compensation Claims. A true and accurate copy of the order has been furnished to the parties' attorneys of record by e-mail on this the 11th day of January 2013.



Susan Berman
Assistant to Judge of Compensation Claims