

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

Edward Appleton,)	
Employee/Claimant,)	
)	
vs.)	
)	OJCC Case No. 10-003645MES
Arrmaz Custom Chemicals/Crum & Forster,)	
Employer/ Carrier/Servicing Agent.)	Accident date: 7/26/2009
_____)	
)	Judge: Margaret E. Sojourner

FINAL COMPENSATION ORDER

This matter was heard at a Final Merit Hearing on January 7, 2011 in Lakeland, Polk County, Florida before the undersigned. The issues arose from Petitions for Benefits filed February 16, 2010, March 30, 2010 and July 29, 2010. A Voluntary Dismissal was filed on August 9, 2010 of the claim for authorization of an orthopedic physician for evaluation, care and treatment raised in the Petition for Benefits (PFB) dated February 16, 2010. Mediation was held on May 28, 2010 and on October 27, 2010. Pretrial stipulations were filed on June 3, 2010 and on October 28, 2010. At the time of the Final Merit Hearing the undersigned reserved jurisdiction as to any claims for medical bills or co-payments incurred during treatment with Dr. Reckord in December of 2010 as these claims were not ripe. The claimant, Edward Appleton, his wife, Linda Jordan, and his attorney, Pat DiCesare were present at the hearing. Also present at the hearing was attorney Teri Bussey on behalf of the Employer/Carrier (EC).

Issues:

1. Compensability of claimant's neck and back condition.
2. Authorization of a primary care provider, claimant seeks authorization of Dr. Reckord.
3. Authorization of a chiropractor to evaluate and treat claimant's neck and back.
4. Authorization of chiropractic care and treatment with Dr. Newberry.
5. Authorization of cervical and thoracic x-rays as recommended by Dr. Gary Newberry.
6. Payment of medical charges of Dr. Reckord for date of service July 26, 2010.
7. Reimbursement to Claimant for co-payments made to Dr. Reckord for date of service July 26, 2010.
8. Costs and attorney fees.

Defenses:

1. Claimant's back and neck condition did not arise from an accident within the course and scope of employment.

2. The accident of July 26, 2009 is not the major contributing cause of the claimant's injuries or need for treatment.

3. There is no objective medical evidence which supports the medical necessity of the requested care.

4. No costs or attorney fees are due to the claimant.

5. The EC seeks costs should the claimant not prevail.

Judge's Exhibits:

1. Petition for Benefits filed February 16, 2010.
2. Petition for Benefits filed March 30, 2010.
3. Response to Petition for Benefits filed April 26, 2010.
4. Petition for Benefits filed July 29, 2010.
5. Response to Petition for Benefits filed August 5, 2010.
6. Pretrial Stipulation filed October 28, 2010 with attachments.
7. EC Amended Pretrial Stipulation filed December 8, 2010.
8. EC Trial Memorandum filed January 5, 2011 for argument only.
9. Claimant Trial Memorandum filed January 5, 2011 for argument only.
10. Pretrial Stipulation filed June 3, 2010 with attachments.

Joint Exhibits:

1. Deposition of Edward Appleton taken April 19, 2010 and filed January 5, 2011.

Claimant's Exhibits:

1. Deposition of Dr. Newberry taken August 4, 2010 and filed January 5, 2011 with exhibits, however Dr. Reckord's report is admitted as to facts only.¹

EC Exhibits:

1. Deposition of Chandra Esser with exhibits taken January 4, 2011 and filed January 5, 2011.
2. Deposition of Dr. Maluso with exhibits taken August 2, 2010 and filed August 6, 2010.
3. Deposition of Dr. Maluso with exhibits taken November 12, 2010 and filed January 4, 2011.

Proffered Exhibits:

Claimant:

¹ An objection was made to the Exhibit of Dr. Reckord's records. As the undersigned finds that the accident is not the major contributing cause of the injuries, the opinion testimony contained in these records is excluded as hearsay.

1. Medical Records of Dr. Reckord.

EC:

1. Recorded statement of Claimant taken February 10, 2010 and filed July 7, 2010.

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 deposition testimony and documentary evidence. Based upon the foregoing, the evidence and the applicable law, I make the following determinations:

1. I find that I have jurisdiction over the parties and the subject matter of this claim.
2. Appleton testified in his deposition, and I accept this testimony, that he did not experience any symptoms following the accident in July of 2009 until October of 2009. In October, according to his testimony, he awoke one day with a stiff neck and then developed pain in his neck and across his shoulders. At that time he told his supervisor that he was experiencing neck stiffness, but attributed this to the way that he slept on his neck. The adjuster, Chandra Esser and Dr. Maluso, both testified that Appleton told them that he had no symptoms from July until October.
3. I reject Appleton's testimony that he has a high tolerance for pain and that this is why he did not report symptoms until October. I note that Appleton testified several times during the Final Hearing that he did not have pain symptoms at the time of the accident. He testified very clearly that while he may have had an occasional stiff neck during the period from July to October that it wasn't until October that the stiff neck became chronic and that the pain complaints developed. In fact when he experienced the chronically stiff neck in October, he advised his supervisor of the stiff neck, but told his supervisor the stiff neck was due to the way he slept. He did not seek medical care from the employer until nearly three months later, in January.
4. I reject the testimony of Appleton's wife, Linda Jordan. I did not find Ms. Jordan to be credible. She initially testified, in her deposition, that Appleton told her only that he had an accident and explained that he was not one to talk about his ailments. She then contradicted this testimony and stated that he told her he hurt his neck on that date. This testimony is inconsistent with Appleton's testimony as he continually testified that his first symptom was stiffness in his neck, not pain. Jordan testified in her deposition, taken in July 2010, that Appleton sometimes slept in the recliner at night due to neck pain and that he would take Aleve. When asked when this occurred she stated she didn't know the dates, but that it had been recently. However at the final hearing she testified that this occurred immediately after the accident.

5. Dr. Maluso reviewed the x-rays of Appleton's neck and diagnosed him with pre-existing degenerative disc disease. It was Dr. Maluso's opinion that Appleton's current symptoms were not related to the accident of July 26, 2009. Dr. Maluso stated that if Appleton had sustained an injury on July 26, 2009, he would have expected Appleton to have pain at that time and to have continuation of that pain from July forward. I note that Dr. Newberry agreed that if Appleton had been asymptomatic from July 2009 to October 2009, he would agree that the accident was not the cause of the pain complaints. I reject the opinions of Dr. Newberry as to causal relationship as these opinions assume Appleton's symptoms began in July 2009 and gradually increased until October of 2009 and thus his opinions are not based on a firm foundation of fact. *Gold Coast Paving Co., Inc. v. Fonseca*, 411 So.2d 259 (Fla. 1st DCA 1982).

6. As I have found that Appleton's injuries were not caused by the industrial accident of July 26, 2009 the remaining issues are moot.

7. The EC is the prevailing party and thus is entitled to the recovery of costs.

Wherefore it is **Ordered and Adjudged** as follows:

1. The claim for compensability of the claimant's injuries is denied.
2. All remaining claims made by the claimant are denied.
3. Jurisdiction is reserved to determine the amount of reasonable taxable costs recoverable by the EC.

DONE AND ELECTRONICALLY MAILED this _____th day of January, 2011, in Lakeland, Polk County, Florida.



Margaret E. Sojourner
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