

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

**DALE KROUTH,** )  
 )  
Employee/Claimant )  
 )  
vs. ) OJCC Case No. 11-015248-TWS  
 )  
**CEVA LOGISTICS** ) Accident date: 10/21/2009  
 )  
Employer )  
 )  
and )  
 )  
**GALLAGHER BASSETT SERVICES,** )  
**INC.** )  
 ) **Judge: Thomas W. Sculco**  
Carrier/Servicing Agent )  
\_\_\_\_\_ /

FINAL COMPENSATION ORDER

THIS CAUSE came before the undersigned Judge of Compensation Claims (JCC) at Orlando, Orange County, Florida on October 9, 2012 for a final merits hearing upon the petition for benefits (PFB) e-filed September 29, 2011 and March 9, 2012. Mediation was held on April 25, 2012. The parties' Uniform Pretrial Stipulation was e-filed May 7, 2012. Sean McCormack, Esquire was present on behalf of the claimant. William Rogner, Esquire was present on behalf of the employer/carrier.

The record remained open for five days, to allow counsel to file supplemental case-law.

This order addresses the Petitions for Benefits filed with DOAH on September 29, 2011 and March 9, 2012.

At hearing the evidence consisted of the testimony of:

Dale Krouth, Lawrence Stuart Cody, Richard DiBacco.

**DOCUMENTARY EVIDENCE:**

- #1 Claimant's: Trial Memorandum of Law
- #2 E/C's: Trial Memorandum of Law
- #3 E/C's: Supplemental Memorandum of Law
- #4 Judge's: Uniform Pretrial Stipulation  
May 14, 2012
- #5 E/C's: Composite - The FCE Report  
March 15, 2011
- #6 Claimant's: Deposition/attachments of Richard DiBacco  
February 10, 2012
- #7 E/C's: Deposition of Dale Krouth  
March 21, 2012
- #8 E/C's: Deposition/attachments of Richard L. Shure, M.D.  
March 23, 2012
- #9 Claimant's: Social Security Administration-Notice of Award  
**obj. Hearsay/Authentication - OVERRULED**

- #10 Claimant's: Composite - Job Search
- #11 E/C's: Deposition/attachments of L. Stuart Cody  
April 5, 2012
- #12 Claimant's: Deposition of Alan Christensen, M.D.  
February 13, 2012
- #13 Claimant's: Composite - Medicals  
Alan Christensen, M.D.
- #14 Judge's: Deposition/attachments Brian S. Ziegler, M.D.  
June 29, 2012

After hearing all of the testimony and evidence presented, and after having resolved any and all conflicts therein, the undersigned Judge of Compensation Claims makes the following findings of fact and conclusions of law: The issues for determination are claimant's claims for: 1-permanent total disability ("PTD") benefits, plus appropriate PTD supplemental benefits from 3/26/11 forward; and 2-penalties, interest, costs and attorneys' fees ("PICA"). The E/C took the positions that: 1-claimant is not permanently and totally disabled; 2-claimant is capable of at least part-time sedentary work which is available within 50 miles of the claimant's residence; 3-claimant has not performed a good faith lengthy, exhaustive job search;

and 4-no PICA was owed.

## **I. BACKGROUND**

Claimant is a 60 year old male who sustained several injuries while involved in a motor vehicle accident when working as a truck driver for CEVA. The accident took place on 10/21/09, and the injuries sustained were rib fractures, a right wrist injury and a knee injury. Claimant testified that his knee and rib injuries have resolved, but that he still is experiencing symptoms with his right wrist.

Claimant was treated by Dr. Alan Christensen for the wrist injury, and was placed at Maximum Medical Improvement ("MMI") on 3/25/11 with a 5% impairment rating and permanent work restrictions of no pulling, pushing, or lifting greater than 10 pounds, to wear a split for comfort, and limit repetitive stress. (Deposition of Dr. Alan Christensen, p.7).

Claimant underwent an independent medical examination with Dr. Richard Shure on 2/27/12. Dr. Shure did not assign claimant any permanent work restrictions as a result of the compensable injury. (Deposition of Dr. Richard Shure, p.22). Because of the conflict in medical opinions between Dr. Christensen and Dr. Shure, Dr. Brian Ziegler was appointed as an expert medical adviser ("EMA"). Dr. Ziegler assigned claimant permanent work

restrictions of no pushing, pulling or lifting more than 10 pounds with his right wrist. (Deposition of Dr. Brian Ziegler, 6/29/12, p. 7).

Claimant did not graduate high school and has not received his GED. His past relevant work experience has been as a truck driver for the past 38 years for various employers. (Id., p. 11).

## **II. CLAIM FOR PTD BENEFITS FROM 3/26/11**

To qualify for permanent total disability ("PTD") benefits, claimant must establish that he is not able to engage in at least sedentary employment, within a 50-mile radius of his residence, due to his physical limitations. Section 440.15 (1)(a), Fla. Stat.(2006). A determination of permanent total disability may be based on both physical restrictions and vocational factors. Ferrell Gas v. Childers, 982 So. 2d 36 (Fla. 1<sup>st</sup> DCA 2008).

Specifically, claimant must prove: "(1) permanent medical incapacity to engage in at least sedentary employment, within a 50-mile radius of the employee's residence, due to physical limitation; (2) permanent work-related physical restrictions coupled with an exhaustive but unsuccessful job search; or (3) permanent work-related physical restrictions that, while not alone totally disabling, preclude Claimant from engaging in at least sedentary employment when combined with vocational

factors.” Blake v. Merck & Co., 43 So. 3d 882 (Fla. 1<sup>st</sup> DCA 2010). As discussed below, I find that claimant has failed to establish any of these alternative methods of proving entitlement to PTD benefits based on the evidence presented. As such, his claim for PTD benefits must be denied.

First, it is undisputed that no physician has indicated that claimant is incapable of performing sedentary employment within 50 miles of his residence. As such, claimant cannot establish entitlement to PTD benefits purely based on his medical limitations.

Second, I find that claimant has permanent work-related restrictions, based on the opinions of EMA physician Dr. Ziegler, which I accept. However, I am not persuaded that claimant’s restrictions, combined with vocational factors, preclude him from engaging in at least sedentary employment. Specifically, Stuart Cody, claimant’s vocational expert, testified that he identified several positions that fit within claimant’s medical limitations and were vocationally appropriate given claimant’s education and work history. He testified that claimant would be competitive for employment in the positions he identified, but that he believed it would be “difficult” for claimant to actually be hired.

The E/C’s vocational expert, Richard DiBacco, testified that in his opinion claimant is employable considering his

restrictions and vocational factors. It is questionable in my view whether Stuart Cody's testimony would be sufficient to establish that claimant's restrictions, combined with vocational factors, preclude him from engaging in at least sedentary employment. In any event, while both vocational experts are well qualified and provided logical and reasonable testimony, to the extent there is conflict I accept the opinion of Richard DiBacco that claimant is employable when considering his restrictions and vocational factors. I find Mr. DiBacco's opinions to be more logical and reasonable, when considering both the medical and other evidence presented.

Thus, the determinative issue is whether claimant has established permanent work-related physical restrictions coupled with a good faith, exhaustive but unsuccessful job search. On this question, it is clear that claimant has looked, unsuccessfully, for a number of jobs in the past year or so. However, considering all the evidence presented, I am not persuaded that claimant's job search was conducted in good faith, with the actual intent to obtain employment.

Specifically, I note that while claimant testified that he has looked for work since March of 2011, it appears that the earliest written documentation of his job searches is 10/2/11, just days after he filed his PFB requesting PTD benefits. In addition, claimant applied for many jobs that he would likely not

be able to perform given his restrictions. Claimant testified that he applied for work at various truck stops and convenience stores, which typically require lifting and carrying of items over ten pounds in order to stock shelves and replenish inventory. Also, I note that claimant applied for some security guard positions that were identified by the vocational experts as being suitable for claimant. However, claimant had not taken the online certification course that would make him eligible for those positions. Consequently, it is not surprising that he was not hired.

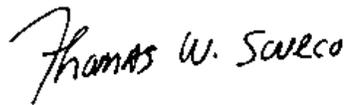
Moreover, claimant has been receiving social security disability benefits over the course of his work search. I recognize that SSD beneficiaries are permitted to have some earnings and still retain their SSD benefits. However, in my view the evidence as a whole, including my assessment of claimant's demeanor while testifying, suggests that claimant's work search was more an attempt to strengthen his claim for PTD benefits than it was an attempt to obtain employment. As I find that claimant has not conducted a good-faith, exhaustive job search, I find that he has not established entitlement to PTD benefits pursuant to the requirements of the statute and controlling case-law. See Blake, supra.

Finally, I reject claimant's alternative argument that his qualification for SSD benefits establishes a catastrophic injury

that entitles him to PTD benefits. Under the statute in effect for claimant's date of injury, a catastrophic injury is no longer defined as an injury that would qualify claimant to receive SSD benefits.

**WHEREFORE** it is hereby **ORDERED** and **ADJUDGED** that claimant's claims for permanent total disability ("PTD") benefits, plus appropriate PTD supplemental benefits, from 3/26/11 forward, and for penalties, interest, costs and attorneys' fees, are **DENIED** and **DISMISSED WITH PREJUDICE**.

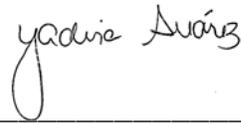
DONE AND ORDERED in Chambers at Orlando, Orange County, Florida this 15<sup>th</sup> day of November, 2012.



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Thomas W. Sculco  
Judge of Compensation Claims  
400 West Robinson Street, Suite 608N  
Orlando, Florida 32801-1701

This is to certify that a true and correct copy of the foregoing Order has been furnished by electronic or U.S. Mail to the parties and counsel listed below.



Digitally signed by Yadira  
Suarez  
Date: 2012.11.15 10:18:08  
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Yadira Suarez  
Assistant to Judge Sculco

Served by Electronic Mail:

counsel