

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

**WILLIAM NUNES,  
Claimant,**

**OJCC Case #12-017491DEJ  
Judge: Doris E. Jenkins**

**v.**

**Dates of Accident: 5/24/12**

**TROJAN BATTERY COMPANY and  
CRUM & FORSTER INSURANCE CO.,  
Employer/Carrier/Servicing Agent.**

\_\_\_\_\_  
**Brian Rothman, Esq., for Claimant  
William Rogner, Esq., for Employer/Carrier**

---

**COMPENSATION ORDER**

---

This cause came on for hearing before the undersigned judge of compensation claims on April 2, 2013<sup>1</sup> and September 12, 2013. Pursuant to petitions for benefits filed on July 30, 2012, September 12, 2012 and February 28, 2013, Claimant seeks: (1) a determination of the compensability of his lumbar spine condition; and, (2) costs and an attorney's fee. Employer/Carrier assert the following defenses: (1) Claimant's lumbar condition is personal, pre-existing and unrelated to the industrial accident; (2) Claimant's

---

<sup>1</sup> At the final hearing, Employer/Carrier renewed their motion to appoint an EMA which had previously been denied on March 27, 2013, due to the lack of any evidence setting forth the alleged conflicting opinion of one of the doctors. The renewed motion to appoint an EMA, which was uncontested, was granted for the purpose of resolving conflicting medical opinions on the issue of the major contributing cause of Claimant's current lumbar complaints and the nature and major contributing cause of any further treatment. By order entered on April 8, 2013 the undersigned appointed Dr. Fabio Fiore.

need for lumbar surgery is personal, pre-existing and unrelated to the industrial accident; (3) Claimant's industrial accident is not the major contributing cause of his current lumbar spine condition and need for treatment; and, (4) no costs or fee are due or owing.

Claimant has requested the undersigned reserve jurisdiction as to the 2/28/13 PFB, as well as the issue of medical mileage.<sup>2</sup> There was no objection from Employer/Carrier.

### **WITNESSES**

Claimant testified on his own behalf. Employer/Carrier called no witnesses at the final hearing.

### **DOCUMENTARY EVIDENCE**

Uniform Pre-Trial Stipulation with amendment	Joint Exhibit #1
Deposition of Chandra Esser taken on 10/11/12	Joint Exhibit #2
Deposition of Fabio F. Fiore, M. D. taken on 8/20/13	Joint Exhibit #3
EMA Report by Dr. Fiore dated 5/14/13	Joint Exhibit #4
Deposition of Violet Clarke taken on 3/19/13	Claimant's Exhibit #1
Deposition of Robert Kowalski, M.D. taken on 3/20/13	Claimant's Exhibit #2
Composite of the Records of Dr. Kowalski	Claimant's Exhibit #3
Composite of Nurse Case Manager Notes	Claimant's Exhibit #4
Deposition of Jane Sherman taken on 1/23/13	Employer/Carrier's Exhibit #1
Deposition of George Companioni, M.D.	Employer/Carrier's Exhibit #2

---

<sup>2</sup> Originally, the request for reservation of jurisdiction included determination of Claimant's correct AWW; however, the parties' stipulation to Claimant's AWW has resolved this issue.

taken on 2/26/13

Composite of Records from Dr. Glenn  
R. Fuoco

Employer/Carrier's Exhibit #3

Report of IME by Dr. George Companioni  
dated 2/4/13

Employer/Carrier's Exhibit #4

Medical Records Summary

Employer/Carrier's Proffer #1

### **STIPULATIONS**

The parties stipulate to an AWW of \$712.84 through September 30, 2012 and \$798.74 from October 1, 2012.

#### **Background**

1. Claimant was employed with Safe Start/Trojan Battery on May 24, 2012, when he was involved in a motor vehicle accident which resulted in a high-impact collision. Claimant maintains he suffered severe injury to his cervical and lumbar spine. The accident was accepted as compensable. It was not until May 29, 2013, that Claimant sought treatment for his injuries. He was seen initially at Lakeside Occupation clinic where he was diagnosed with cervical and lumbar sprain/strain. His symptoms did not appreciably improve despite physical therapy, anti-inflammatories and being placed on light duty. On June 8, 2012, Claimant requested MRIs be performed. These were done on June 20, 2012 and revealed herniations and bulges in the lumbar spine from L3/4 through L5/S1, facet arthropathy with displacement and compression of the left L4 nerve root and compression of the right L4 nerve root. In addition, the MRI of the cervical spine revealed multiple disc bulges with a C3/4 superimposed disc herniation and disc herniations at T5/6 and T6/7. On June 22, 2012, Lakeside Occupational referred Claimant to a neurosurgeon.

2. Claimant's history of medical treatment for his low back pre-dates his industrial accident. Dr. Glenn Fuoco is board-certified and specializes in interventional physiatry and physical medicine and rehabilitation. His office notes reflect that he first saw Claimant on September 13, 2011 for low back pain of two months duration. Notably, Claimant complained to Dr. Fuoco of pain traveling down into both legs, as well as numbness and tingling into his feet. Fuoco formed impressions which included: lumbar degenerative disc disease; possible lumbar disc herniation; possible lumbar radiculopathy; possibly some sacroiliitis; and, right shoulder rotator cuff impingement syndrome and inflammation. According to the September 13<sup>th</sup> office note, Fuoco observed moderate degenerative disc disease at the L5/S1 level and mild grade 1 spondylolisthesis at the L4/5 level. He had Claimant undergo an MRI of the lumbar spine on September 26, 2011. When Claimant returned to Dr. Fuoco on October 4, 2011, he was still complaining of ongoing back pain of a level of eight on a scale of one to ten. The MRI revealed L5/S1 moderate disc bulging, facet arthropathy and moderate left and mild right foraminal stenosis. There were similar findings at L4/5 and L3/4. Claimant was advised by Dr. Fuoco that his options were to live with the pain, attempt to alleviate the pain with injections or undergo evaluation for possible surgical intervention.

3. Dr. Robert Kowalski is a board certified neurosurgeon and Claimant's authorized treating physician in connection with Claimant's work-related injuries to the cervical and thoracic spine. Claimant was initially seen by Dr. Kowalski on June 29, 2012, at which time his chief complaints were neck pain, numbness in both hands and low back pain of one month duration. From his deposition testimony, it appears that Dr. Kowalski was unaware of Claimant's significant history of low back symptoms:

A. At that time it was my opinion that lacking any preexisting symptoms or treatment, it was my medical opinion

within a reasonable degree of medical certainty that the work injury was the proximate cause of his symptoms and the major contributing factor to both his cervical, thoracic and lumbar spondylosis.

Most importantly was the cord compression in both the cervical and thoracic spines, which I thought would require relatively urgent cervical decompression. His lumbar symptoms, although significant, would potentially benefit from conservative treatment, which would include pain management with medications and possible steroid injections.

I noted that he might ultimately require surgery on his lumbar spine if those treatments were to fail, correcting his symptoms.

It was noted that he did have a previous motor vehicle accident back in 1996. But per his description, he suffered only vague internal injuries, per his wording, and had no significant symptoms or treatment prior to this most recent accident. *Deposition of Robert Kowalski, M.D.*, p. 10, lines 1-24.

Dr. Kowalski determined that Claimant required surgical decompression from C3 through C/7 of the cervical spine as well as decompression at T5/6 and T6/7 of the thoracic spine. On September 11, 2013, Claimant underwent the cervical decompression followed by the thoracic decompression on December 18, 2012. When asked whether the cervical cord compression was caused by the industrial accident, Dr. Kowalski testified in the following manner:

A. Again, from the facts that I had at the time and to this day, I haven't had anything to -- any information to the contrary. But based on a couple of things, based on the lack of symptoms or treatment in the relatively immediate preceding period to the accident and the degree of symptoms and cord compression upon our evaluation, it was my assessment that it was more likely than not that the accident was a major contributing factor. *Id.*, p. 14, lines 1-9.

Kowalski gave a similar response when he addressed Claimant's thoracic and lumbar symptoms. Again, he was under the impression that Claimant was "...by all accounts, asymptomatic and not requiring active, ongoing treating in the preceding months to the accident..." *Id.*, p. 15, lines 17-19.

4. On or about October 5, 2012, Crum & Forster Claims Examiner Chandra Esser wrote to Dr. Kowalski soliciting his opinion relative to the major contributing cause of Claimant's need for cervical and thoracic treatment and surgery. Kowalski responded by stating that 100% of Claimant's need for cervical and thoracic treatment and surgery is due to the industrial accident of May 24, 2012, based upon the absence of prior symptoms or treatment of significance. (Claimant's Exhibit #3, p.5)

5. On cross-examination, it is clear that Dr. Kowalski was unaware of Claimant March 2001 motor vehicle accident which resulted in low back pain, bilateral hip pain with radiation into the left leg and thigh, leading to a diagnosis of lumbosacral sprain/strain with sciatic, neuralgia and spasm. Nor was Kowalski aware of the treatment rendered to Claimant by Dr. Fuoco, including the September 26, 2011 MRI of the lumbar spine. It also appears that Dr. Kowalski was unaware of the treatment that Claimant received at Family Care Clinic on March 26, 2012 (when he complained of right hip pain and pain in the back of his calf) or on April 2, 2012 (when he was seen for complaints of back pain, diabetes and hypertension). Despite being shown evidence of significant prior treatment, Dr. Kowalski stated, "It still would be my opinion that this is a different level of severity, both in pathology and the treatment required for it." *Deposition of Robert Kowalski, M.D.*, p. 62, lines 12-14. Ultimately, Kowalski attributed 75% of the cause of Claimant's lumbar condition to the industrial accident. Claimant was last seen by Dr. Kowalski on January 7, 2013 at which time he noted that although Claimant realized that he would probably need lumbar surgery, he opted to try epidural steroid injections first. Kowalski opined that the industrial accident is the major contributing cause of the damage done to Claimant's lumbar spine and that he is 100% certain that Claimant will need lumbar surgery.

6. On February 4, 2013, Claimant underwent evaluation by Employer/Carrier's IME, Dr. George Companioni, a board-certified orthopaedic surgeon. Unlike Dr. Kowalski, Dr. Companioni had access to diagnostic studies which were done both before and after Claimant's industrial accident, as well as medical records. These were reviewed by him after he completed his examination. At the time of the examination, Claimant was complaining of pain across his low back, going down into the calves and feet, numbness in the feet and . Claimant gave a history which included a 1979 truck accident in which he sustained a pelvic fracture and some leg shortening, as well as a 1996 accident which resulted in a splenectomy. Claimant also reported tingling and numbness down his leg and into his feet. Claimant denied any other treatment for back complaints.

7. Dr. Companioni found no appreciable difference between the September 26, 2013 and June 20, 2013 MRIs of Claimant's lumbar spine:

A. The MIR demonstrated both the September MRI and the June of 2012 MRI demonstrated degenerative disc disease, grade 1 at L4-L5, multi-level degenerative disc change at L4-5, 3-4, 2-3 and stenosis at those three levels.

He also had noted some congenital congenital spinal stenosis at all of those levels combined with his spondylitic of degenerative changes, he had some significant central and foraminal stenosis at L2-3 and slightly left sided L3-4, 4-5 and less so at L5-S1. *Deposition of George Companioni, M.D.*, p. 12, lines 15-24.

Dr. Companioni concluded that Claimant suffers from lumbar spondylosis and had a long history of low back difficulties prior to his industrial accident and was unable to find anything on the imaging studies that demonstrated any evidence of significant post-traumatic worsening. He also found the major contributing cause of Claimant's current lumbar condition and his need for treatment is pre-existing degenerative disc disease. Dr. Companioni remained steadfast in his opinion that there was no objective evidence of any post-traumatic worsening of Claimant's low back.

By order entered on April 8, 2013, Dr. Fabio Fiore, an orthopaedic surgeon, was appointed to serve as expert medical advisor for the purpose of assisting the undersigned in resolving the conflicting opinions of Drs. Kowalski and Companioni on the issue of the major contributing cause of Claimant's current lumbar complaints.<sup>3</sup> The evaluation took place on May 14, 2013. Just as did Dr. Companioni, Dr. Fiore reviewed the June 20 and September 26, 2013 MRIs and found them to be comparable. Fiore opined there was no way to determine that there was a change. In his deposition, Fiore was asked to give his opinion of what is wrong with Claimant's lumbar spine. He answered as follows:

A. The patient has back pain with a long history of cervical, thoracic and lumbar pain. He has had previous motor vehicle accidents, 1979, 1996, that were of great severity. And he's now had cervical fusions and thoracic fusions. So I would just say he's complaining of back pain. *Deposition of Fabio F. Fiore, M.D.*, p. 15, lines 17-21.

According to Dr. Fiore, there is no objective data to support Claimant's claims of a markedly worsening back pain. He does conclude that it is likely that Claimant suffered some type of injury to his low back which resulted in a sprain/strain. He also went so far as to concede that Claimant may have suffered a temporary aggravation of his pre-existing lumbar condition:

A. Okay. I would agree that I would at least yield on the temporary aggravation of the lumbar spine because that is the common pattern for this pattern of injury, for this type of accident. Seat belted, rejected emergency services, complained of -- was able to drive his own vehicle, went to work, then was seen and then was evaluated. So I agree with that.

As far as evidence for permanent aggravation of the lumbar spine, I don't have -- I do not have that. *Id.*, p. 33, line 19 through p. 34, line 2.

---

<sup>3</sup> The order also indicated that Dr. Fiore was to address the nature and major contributing cause of any further treatment that Claimant may require; however, as no additional treatment has been requested, it is not necessary to address that aspect of the EMA's opinion.

In fact, it is not clear from this record whether Dr. Fiore was able to identify any objective medical evidence of a sprain/strain or a temporary aggravation of any kind following Claimant's industrial accident.

### Analysis

8. Comparing Dr. Fiore's deposition testimony to his findings and opinions set forth in his written report, one is compelled to the conclusion that the industrial accident of May 24, 2013 may well have been a contributing cause of Claimant's post-accident low back complaints; however, it was not the major contributing cause of those complaints. Rather, if anything, Claimant suffered only a temporary aggravation of his pre-existing degenerative disc disease. This temporary aggravation would have manifested as a lumbar sprain/strain. This concession by Dr. Fiore is somewhat troublesome in that he does not identify any objective findings. In truth, he merely seems to concede the likelihood of a temporary aggravation as a consequence of repeated questioning by Claimant's counsel. In any event, Dr. Fiore does opine that, as to any further treatment Claimant may require, his pre-existing conditions are the major contributing cause of the need for any such treatment. As previously noted, the undersigned has not been asked to award any medical treatment, here. Accordingly, it is not necessary to address whether Claimant is entitled to any further treatment.

9. It is well-established that the opinion of the EMA is presumed to be correct unless there is clear and convincing evidence to the contrary. *Jacaranda Manor v. Randolph*, 755 So.2d 781(Fla. 1<sup>st</sup> DCA 2000); *Collins v. Mosaic Fertilizer, LLC.*, \_\_\_\_ So.3d \_\_\_\_, 38 Fla. L. Weekly D1791 (Fla. 1st DCA opinion filed Aug. 22, 2013). Dr. Fiore's conclusions are substantially in line with those expressed by Dr. Companioni. Only Dr. Kowalski's opinions conflict with Dr. Fiore's. Given the record in this case, the undersigned cannot make the

finding that clear and convincing evidence exists to support rejection of Dr. Fiore's opinions as expressed in his written report and his deposition.

10. Section 440.02(1), Fla. Stat. (2012) states in pertinent part:

...Subject to s. 440.15(5), if a preexisting disease or anomaly is accelerated or aggravated by an accident arising out of and in the course of employment, only acceleration of death or acceleration or aggravation of the preexisting condition reasonable attributable to the accident is compensable....

As provided in §440.02(36), Fla. Stat. (2012) an accidental injury arises out of employment if work performed in the course and scope of employment is the major contributing cause of the injury. In the case at bar, there is no objective medical evidence establishing that Claimant actually suffered a lumbar strain/sprain. As noted above, Dr. Fiore conceded that Claimant could have suffered a temporary aggravation of his pre-existing condition on May 24, 2012; however, Dr. Fiore identified no objective relevant medical findings which correlating to Claimant's subjective complaints. This being so, it undersigned finds that Claimant's lumbar spine condition is not compensable.

### **CONCLUSIONS**

11. While the industrial accident may have been a contributing cause of Claimant's post-accident complaints of lumbar pain, it was not the major contributing cause. It is Claimant's pre-existing degenerative disc disease which is the major contributing cause of Claimant's current low back complaints. As to any possible aggravation of Claimant's pre-existing lumbar degenerative disc disease, there are no objective relevant medical findings which correlate to Claimant's subjective complaints of pain in his lumbar spine.

12. The claim for a determination that Claimant's current lumbar condition is compensable is denied.

13. The claim for an attorney's fee and costs is denied.

Done and ordered in Tampa, Hillsborough County, Florida this 1st day of  
October, 2013.

---

Doris E. Jenkins  
Judge of Compensation Claims