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

Christopher Chase, Employee/Claimant, vs. The Health Center of Plant City/Premier Group Insurance Co., Employer/ Carrier/Servicing Agent.	)	OJCC Case No. 11-017604EHL Accident date: 3/30/2011

FINAL COMPENSATION ORDER ON PETITION FOR BENEFITS OF 8/2/11

I held final hearing in this case on 2/17/12 because claimant filed a petition on 8/2/11[1] seeking indemnity benefits, determination of the AWW and reimbursement of a co-payment. [2] Claimant was represented by Pat DiCesare, Esq., and E/C was represented by W. Rogers Turner, Esq.

After reviewing the testimony and the documentary evidence, I awarded claimant TPD benefits based upon an average weekly wage of $235.75 and reimbursement of a $10 co-payment and determined claimant reached MMI on 7/29/11.

[1] Claimant also filed petitions on 1/10/12 and 2/14/12 which had not been mediated. Accordingly, I reserved jurisdiction over those petitions and did not hear them at the time of the final hearing on 2/17/12.
[2] A more detailed list of the parties' pretrial stipulations, claims and defenses and my evidence log may be found at appendices 1, 2, and 3 at the end of this order.

INTRODUCTION

Claimant worked for the employer as a certified nursing assistant (CNA) for 11 years. Originally he worked full time but in 2005 or 2006, he voluntarily reduced his hours and worked only 4 days per week. In mid- to late 2010 he again voluntarily reduced his work schedule to 3 days per week.

On 3/30/11 claimant was injured when he was helping another CNA move a patient. Initially claimant experienced pain in his low back and subsequently developed pain in his thoracic spine. Claimant began medical care at Lakeside Occupational (Drs. Johnson/Trujillo) on 4/7/11 where he was diagnosed with a low back strain. Claimant continued to treat at Lakeside until 7/29/11. During that time period he was always on restricted duty work, except from 4/15/11 until 4/21/11, when he was released to work full duty. During his course of treatment at Lakeside, claimant also had two MRIs, one of his mid-back and one of his low back, which showed mild degenerative changes and an annular tear at L3-4. However the radiologist was unable to date the onset of the annular tear and the doctor at Lakeside did not feel that claimant's symptoms correlated with the finding of an annular tear. Dr. Trujillo placed claimant at MMI as of 7/29/11 (after rescinding an earlier MMI date of 5/6/11) and lifted all restrictions on claimant's work activities. During his course of treatment at Lakeside, claimant made a $10 co-payment for one visit.

Claimant requested a change of physician and the carrier authorized Dr. Band at Watson Clinic. Dr. Band saw claimant one time on 8/19/11 when he diagnosed claimant with delayed recovery from a lumbosacral strain and an annular tear. Dr. Band referred claimant to a spine

specialist and released him to work but with restrictions. Dr. Band did not place claimant at MMI.

Claimant had no medical care after seeing Dr. Band. He retained Dr. Martinez as his independent medical examiner and Dr. Martinez saw claimant on 11/14/11. Dr. Martinez diagnosed claimant with chronic thoracic and lumbar sprains with fibromyositis, disc bulges at L3-4, 4-5 and 5-S1, and an annular tear at L3-4 on the left side. Dr. Martinez felt the MRI findings were degenerative in nature but that the accident had made the degeneration symptomatic. He had no opinion as to whether the annular tear or fibromyositis were related to the accident. He agreed claimant was at MMI as of the time of his examination and believed claimant had permanent restrictions, similar to those assigned by Dr. Band, on his work activities. He did not believe claimant needed to see a spine specialist.

Claimant continued to work for the employer, working fewer hours than before the accident, until the middle of June 2011. At that time the employer told him they could no longer accommodate his restrictions and he stopped working. In August 2011 he received a letter from an insurance company informing him that he had been terminated by the employer on 8/21/11 and that he had the right to continue his group health insurance through COBRA if he paid approximately $700/month. He had been receiving group health and dental coverage with the employer and paid $82 every two weeks for that coverage. Claimant had asked about work at 6 or 7 grocery stores about jobs, telling those prospective employers about his restrictions, but had not filled out any applications. He had also applied for social security disability for reasons unconnected with his injury from the industrial accident. He was getting by on his savings and loans from a friend.

At the time of the hearing claimant continued to have back pain which became worse depending on his activities and he wanted to be seen by a specialist.

AVERAGE WEEKLY WAGE

Claimant argued that I should not calculate his average weekly wage (AWW) by dividing his total earnings, as reflected on the wage statement attached to the parties' pretrial stipulation for the time period 12/27/10 through 3/26/11, by 13 but should instead use his actual earnings over the that period divided by 11 so as to exclude the two weeks when claimant did not work.

F. S. 440.14(1)(a) required that I use the whole of the 13 weeks preceding claimant's injury to calculate claimant's AWW if he worked at least 75% of his total customary hours. Based on claimant's testimony, I determined that for at least 5 years before the accident, claimant had worked as a part-time employee and that for 6 to 9 months before the accident, he had worked only 3 days per week. I found, as a matter of fact, based upon this testimony that claimant had elected to work only part-time for the employer.

Upon review of the wage statement, I determined claimant worked a total of 252.75 hours during the relevant 13 week time period. I averaged those total hours over the 11 weeks claimant actually worked to determine the customary number of hours claimant worked. That figure was 22.97 hours/week. If I multiplied 22.97 by 13 weeks, then claimant would customarily have averaged 298.61 hours every 13 weeks. In the relevant 13 week period, claimant actually worked 252.75 hours or 84% of his customary hours (252.75 divided by 298.61). Another way of performing the calculation was to take 75% of claimant's customary hours (296.61), or 223.95 hours. In either case, claimant worked at least 75% of his customary hours and F. S. 440.14(1)

required that claimant's base AWW be calculated by using the entirety of his earnings over 13 weeks and not his actual earnings for 11 weeks. Accordingly, I concluded, as a matter of law, claimant's base AWW was $235.25, the amount asserted by E/C as the correct base AWW.

Claimant argued that he was entitled to include the premiums paid by E/C for his health/dental coverage in his AWW calculation after 8/21/11, when those benefits were terminated. As a general proposition, claimant was correct. But claimant's counsel never obtained the amount of the premiums from E/C and instead wanted me to determine what E/C paid based on claimant's testimony. Claimant argued I should do so because it was E/C's burden to prove the specific amount of premium paid inasmuch as the premium information was requested on the 13 week wage form. Since, in claimant's view point, E/C had failed to complete this portion of the wage statement, E/C had failed in its burden to prove what the figure should be and I was permitted to extrapolate this data from claimant's testimony. Claimant further proposed that I should do so by using claimant's testimony about what he thought a letter he received from a non-party regarding the amount he would pay under COBRA to continue the coverage and what claimant testified his premiums were when he was working for the employer to arrive at the amount E/C paid. [3] I rejected claimant's arguments.

I rejected claimant's argument that E/C had the burden to establish the value of its contributions to the cost of claimant's health insurance coverage; rather I concluded, as a matter of law, it was claimant's burden to establish those amounts because he was seeking to change the AWW used by E/C.

[3] After I commented at the final hearing that I thought there was an additional fee charged by the group health carrier, claimant's counsel conceded he believed there was a 2% additional fee paid by claimant under COBRA.

I also rejected claimant's argument that I could determine the amount of the employer's contribution through the use of claimant's testimony alone. Claimant's testimony was that he thought he was going to have to pay about $700/month under COBRA to continue his insurance. This information became known to him from a letter prepared by a non-party to the litigation. Claimant's argument asked me to use uncorroborated hearsay, vague in nature, to determine a fact not otherwise in evidence. To my knowledge the legal residuum rule has not been adopted by Florida courts or by statute and I cannot determine a fact as true simply based upon claimant's testimony about what he thought was said in a document created by some entity other than a party to this matter. Further, claimant was unable to identify a specific dollar amount and he failed to establish that this dollar amount was the same as what had been paid by the employer in the relevant 13 weeks before claimant's accident. Without properly admissible evidence before me and without specific figures regarding the amount of premiums paid by the employer in the relevant time period, I am without evidence as to the additional amount to be included in claimant's AWW calculations. I concluded, as a matter of law, claimant's AWW was $235.25 and that claimant failed to meet his burden to prove the value of the includable insurance coverage.

TTD/TPD

Claimant had the burden of proving he was entitled to either temporary total (TTD) or temporary partial (TPD) disability.

Claimant provided no medical evidence of TTD and I concluded, as a matter of law, he was not entitled to this benefit for any period of time.

Claimant argued that he was entitled to TPD because he had not reached MMI and continued to have work restrictions resulting from his injury. I reviewed the medical evidence, surveillance and testimony and made the following findings of fact regarding entitlement to TPD:

1. Lakeside provided claimant with remedial treatment from 4/7/11 to 7/29/11 and the staff there placed restrictions on claimant's work abilities from 4/7/11 to 4/15/11 and from 4/21/11 to 7/29/11, when Dr. Trujillo placed claimant at MMI.

2. Dr. Band did not place claimant at MMI when he saw claimant on 8/19/11. Dr. Band did not provide claimant with any medical care, remedial or otherwise, and simply referred claimant to a specialist.

3. Dr. Martinez agreed claimant was at MMI as of 11/14/11, the date of his examination.

4. Based on claimant's testimony, he worked fewer hours after his accident date because of his restrictions until he stopped working altogether in mid-June 2011.

5. Based on claimant's testimony, claimant stopped working in mid-June 2011 because the employer would no longer accommodate his restrictions.

4. Based on the surveillance, claimant was not exceeding Dr. Trujillo's restrictions when not at work.

5. Based on the surveillance, claimant was not having a great deal of back pain because he did not hesitate to repetitively bend, squat and kneel to perform tasks he volunteered to do.

6. Based on the surveillance, while claimant complained of back pain to Dr. Trujillo on 4/21/11 and 4/29/11, he had no difficulty repetitively bending, kneeling and squatting on those days.

7. Based on the surveillance and the notations by Dr. Trujillo's staff that claimant was not using the medications prescribed to him by Dr. Trujillo as instructed, claimant's pain was only sporadically interfering with his life.

8. Based on claimant's testimony, the medical reports, Dr. Martinez' deposition and the surveillance, claimant's condition did not change or worsen in between the last time he saw Dr. Trujillo and his examination by Dr. Martinez.

9. Based upon the medical records and claimant's testimony, he received no remedial medical care after 7/29/11, when he last saw Dr. Trujillo.

10. Based on the statements of the attorneys, there was no dispute that E/C had not paid claimant any compensation benefits.

Based upon the above facts, I concluded, as a matter of law, claimant reached MMI on 7/29/11. I further concluded, as a matter of law, claimant proved he was eligible to receive TPD from 4/7/11 to 4/15/11 and from 4/21/11 to 7/29/11 because he had injury imposed restrictions during that time period that led to reduced earnings. I further concluded, as a matter of law, E/C was entitled to calculate these benefits using claimant's actual earnings during the time period

the employer accommodated claimant's restrictions and to pay him full TPD benefits at the rate of $150.56/week when claimant was no longer working for the employer and until he reached MMI. I lastly concluded, as a matter of law, claimant was entitled to penalties and interest on any payments of TPD made pursuant to this order.

Based upon the above facts, I concluded, as a matter of law, claimant's entitlement to temporary benefits ceased on 7/29/11, the date of MMI.

CO-PAYMENT

Claimant testified that he made one $10 co-payment to Lakeside for treatment there. Because I have found that claimant did not reach MMI until his last visit at Lakeside, I concluded as a matter of law he should not have been required to make a co-payment. Accordingly, I concluded as a matter of law claimant was entitled to be reimbursed $10 for the co-payment.

ATTORNEY FEE AND COSTS

I found, as a matter of fact, that claimant was the prevailing party. I concluded, as a matter of law, that claimant's counsel was therefore entitled to a guideline fee on the benefits awarded in this order and to taxable costs at the expense of E/C. I reserved jurisdiction to determine the amount of said fee and costs if the parties are unable to come to an agreement.

WHEREFORE, IT IS ORDERED AND ADJUDGED:

1. Claimant's AWW was $235.25.

2. E/C shall pay claimant TPD from 4/7/11 to 4/15/11 and from 4/21/11 to 7/29/11, taking credit for claimant's actual earnings during those time periods the employer accommodated claimant's restrictions, and paying claimant TPD benefits at the rate of $150.56/week when claimant was no longer working for the employer through 7/29/11, together with interest and penalties.

3. E/C shall reimburse claimant $10 for the co-payment he made to Lakeside.

4. E/C shall pay claimant's counsel a guideline fee on the benefits awarded in this order and taxable costs. I reserved jurisdiction to determine the amount of fee and costs if the parties were unable to come to an agreement.

5. Those portions of the petition seeking TTD and seeking TPD after 7/29/11 and continuing were DISMISSED on their merits.

6. Counsel shall provide their clients with copies of this order.

DONE AND ELECTRONICALLY MAILED to the attorneys this 20th day of February, 2012, in Tampa, Hillsborough County, Florida.

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Appendix 1: The parties' prehearing stipulations

At the time of final hearing the parties entered into the following stipulations which I accepted and adopted as findings of fact:

1. I had jurisdiction of the parties and of the subject matter of the petition/claim.

2. Venue was in Tampa District.

3. The correct date of accident was 3/30/11.

4. There was an employer/employee relationship at the time of the accident.

5. There was workers' compensation coverage in effect by the carrier at the time of the accident.

6. The accident was accepted as compensable.

7. The low back injury was accepted as compensable.

8. There was timely notice of the accident and injury.

Appendix 2: Claims and defenses

The claims made at the time of trial were for determination of the following:

1. TTD/TPD from the date of accident and continuing at the correct CR.

2. Determination of correct AWW/CR.

3. Reimbursement of co-payment claimant made for medical care prior to MMI.

4. Entitlement to penalties, interest, costs and attorney's fees at the expense of the employer/carrier.

The defenses raised by the Employer/carrier to the claims were as follows:

1. There was no medical evidence to support entitlement to TTD/TPD.

2. The accident was not the major contributing cause of the claimant's disability.

3. The AWW/CR used by the employer/carrier was correct.

4. Claimant reached MMI on 7/29/11 with a 0% impairment rating.

5. Employer accommodated claimant with light duty through date of MMI.

6. There was no entitlement to penalties, interest, costs or attorney's fees at the expense of employer/carrier.

Appendix 3: Evidence log

EVIDENCE LOG Christopher Chase OJCC # 11-017604EHL

TRIAL DATE

COURT EXHIBIT	JOINT EXHIBIT	CLAIMANT EXHIBIT	E/C EXHIBIT
1. Pretrial stipulation filed 10/27/11		1. Medical records of Dr. Band filed 2/13/12 admitted over objection of E/C.	1. Three surveillance DVDs filed 2/16/12
2. Claimant's trial memo filed 2/15/12		2. Deposition of Dr. Martinez filed 2/14/12	2. Medical records of Dr. Trujillo filed 11/28/11 as attachments to motion to admit
3. E/C's trial memo filed 2/15/12.		3. PROFFER ONLY Earnings report filed	3. PROFFER ONLY Surveillance reports filed 2/16/12.
4. Petition for benefits filed 8/2/11		4. PROFFER ONLY 2011 W-2 form filed	
5. Response to petition filed 8/17/11		5. PROFFER ONLY Wage information filed	
		6. PROFFER ONLY Bank statement filed	
		7. Composite of petition for benefits filed 8/25/11 and its attachment and mediation report filed 11/5/11.	

In addition to the documentary evidence, claimant testified live at the final hearing.