

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGES OF COMPENSATION CLAIMS
WEST PALM BEACH DISTRICT OFFICE

| | | |
|--|---|----------------------------|
| |) | |
| |) | |
| Employee/Claimant, |) | |
| Charles Koifman |) | |
| vs. |) | OJCC Case No. 07-030974SHP |
| |) | |
| |) | Accident date: 8/22/2007 |
| |) | |
| Employer, |) | |
| Ameritech |) | |
| and |) | |
| |) | |
| |) | |
| Providence Property Casualty Insurance |) | |
| Carrier/Servicing Agent. |) | |
| _____ |) | |

MERIT ORDER

AFTER DUE AND PROPER NOTICE, this cause came on to be heard in a Final Merits Hearing on 10/8/08 in Palm Beach County, Florida before the undersigned Judge of Compensation Claims (JCC). Present on behalf of the Claimant, Charles Koifman, was Lorri Kennedy, Esquire. Zal F. Linder, Esquire, was present on behalf of the Employer/Carrier, Ameritech Services, Inc./Providence Property & Casualty Insurance Company. The Claimant testified on his own behalf.

The issues presented for my determination as raised in Petitions For Benefits dated 11/5/07, 6/20/08, 6/26/08 and 7/13/08 were as follows:

1. Payment of Temporary Total Disability/Temporary Partial Disability from 8/22/07 through the present and continuing.
2. Attorney's fees, costs, penalties and interest.

All other claims listed on the Pretrial Stipulation were either resolved or withdrawn prior to the Final Hearing. On the record Claimant represented that he now accepts Dr. Barnea, who was timely authorized, as Claimant's one-time charge in authorized neurologist.

The Employer/Carrier raised defenses to the above claims as follows:

1. No indemnity due or owing from date of accident 8/22/07 through the present as no provider has indicated Claimant is unable to work. Claimant was terminated from the employment on 10/5/07 for threatening co-workers. Claimant has stipulated that he is not due any wages prior to 11/26/07.
2. No penalties, interest, costs or attorney's fees are due or owing.

The parties executed a Pretrial Stipulation which was approved by Order of 8/18/08. The Employer/Carrier filed an amendment on 9/5/08. The original Pretrial Stipulation and the amendment thereto were accepted and marked into evidence as the court's exhibit. The following documentary exhibits were marked and accepted into evidence as follows:

Joint Exhibit:

1. Medical Records - Dr. Zuniga
2. Deposition - Veronica Archibald, records custodian for West Boca Medical Center - 9/22/08 with attachments.

Employer/Carrier Exhibits

1. Claimant's payroll Records - Ameritech Services, Inc.
2. Settlement Agreement between Claimant and Ameritech Services, Inc. dated 11/26/07-Claimant objection - relevance-overruled.
3. Deposition - Peter Hardy-General Manager-Ameritech Services, Inc.-South Florida Office - 9/17/08.
4. Claimant Deposition-3/18/08.
5. Letter from Mr. Linder to Ms. Kennedy dated 6/27/08 with attachments.
6. Deposition-Dr. Goldberg-9/29/08 with attachments.

On 10/1/08, Claimant filed an Emergency Motion To Continue and Extend Time of Final Hearing. The grounds stated were as follows: contact with Dr. Stone's office on 8/15/08 to set the appointment for Claimant's IME; being informed of Dr. Stone's requirement of prior review of Claimant's medical records; forwarding the records on 8/20/08; several messages left with Dr. Stone's office to schedule the appointment-no return call received; contact by Dr. Stone's office on 9/12/08 advising that Claimant's medical records had not been received; faxing the records to Dr. Stone on 9/12/08; contact with Dr. Stone's office on 9/15/08 to schedule IME appointment and being informed that the IME would cost \$950.00 plus another \$950.00 for review of the medical records; that Claimant's counsel was in the process of setting an IME with Dr. Nunez; that an IME was necessary for the prosecution of the claim; and that opposing counsel/Carrier had no objection to the motion. Attached to the motion was Claimant's waiver pursuant to §440.25(4)(d), signed 9/11/08.

Counsel for the Employer/Carrier filed a Response in

opposition to the motion on 10/3/08 on the following grounds: the motion was untimely, was prejudicial to Employer/Carrier in that discovery had been completed, and failed to show good cause for the continuance sought.

The matter was argued on 10/3/08 along with Claimant's Ore Tenus Motion for post-hearing IME/Deposition of IME physician. Venue in this case was originally in Dade County. Claimant's first Petition For Benefits was filed on 11/5/07. Claimant failed to appear at Mediation on 2/14/08. Mediation was reset to 3/26/08. On 4/9/08, a Notice of Pretrial on 7/18/08 and Final Hearing on 9/23/08 was sent out to the parties. On 5/2/08, the Pretrial date was changed to 8/8/08. On 6/30/08 Venue was ordered changed to Palm Beach County. On 7/15/08, Pretrial Hearing was changed 9/11/08 and Final Hearing was changed to 10/6/08. On 7/22/08, Final Hearing was changed to 10/8/08. On 8/12/08, the Pretrial Stipulation was filed.

As can be seen from the foregoing, Claimant had ample time to secure his IME and determine the costs involved with same, as was accomplished by the Employer/Carrier. Finding Claimant failed to show good cause for the motions, same were denied.

At hearing on 10/8/08, Claimant renewed the motions, arguing that denial of the motions constituted an abuse of discretion by the undersigned. In support of the argument, Claimant cited the case of Thompson v. AwnClean USA, Inc., 849 So.2d 1129 (Fla. 1st DCA 2003). The Claimant in that case declined to pay an additional sum requested by the Employer/Carrier's IME physician before he would perform the IME in the presence of a court reporter accompanying the

Claimant. The Judge Of Compensation Claims (JCC) entered an order dismissing the Claimant's petition for benefits with prejudice. The Claimant appealed and the First District Court of Appeal reversed and remanded the case for further proceedings. (Emphasis supplied)

The court set forth the burden of proof required to be met by the party opposing the attendance of a court reporter at an IME examination. Pertinent to the instant case, the court cited City of Riviera Beach v. Napier, 791 So.2d 1160, 1161 (Fla. 1st DCA 2001), for the rule that an IME physician who charges a fee in excess of the maximum allowable fee under rules adopted by the Division of Workers' Compensation pursuant to legislative directive (then Rule 38F-7.020, Florida Administrative Code) is prohibited from testifying in a workers' compensation hearing. Id.

In the instant case, F.S. 440.13 (14) (b) (7/1/02), provides that the prohibition against paying medical fees in excess of the fee schedule does not apply to IMEs. The argument of the instant Claimant, unlike the Claimant in Thompson, is not that to pay the fees sought by Dr. Stone would constitute a violation of law. Rather, Claimant argued that the fees were outside of what he could afford to pay for an IME. Had Claimant timely gone about securing an IME, he could have obtained the services of a more reasonable physician (such as Dr. Nunez) and avoided the situation he found himself in on the eve of trial. I therefore find that Claimant's reliance on Thompson is misplaced. Accordingly, Claimant's renewed motions were denied.

Prior to the start of the trial, counsel for the Employer/Carrier made an ore tenus motion to dismiss

Claimant's claim for temporary partial indemnity benefits for Claimant's failure to comply with the 9/11/08 order of the undersigned compelling Claimant to produce completed DWC-19 forms (Employee Earnings Report). In that the Carrier is not obligated to pay TPD benefits if a Claimant is requested to, but does not return the DWC-19 forms, the motion was denied.

In making my findings of fact and conclusions of law in this claim, I have carefully considered and weighed all evidence presented. I have carefully considered the trial memoranda and argument of the parties. I have observed the candor and demeanor of the live witness and have resolved all conflicts in the evidence. I now make the following findings of fact and conclusions of law:

1. The undersigned Judge of Compensation claims has jurisdiction of the parties and subject matter of this claim:
2. The stipulation of the parties are approved and adopted by the undersigned.
3. There is no dispute that Claimant suffered a compensable accident/injury while employed by Ameritech Services, Inc. (hereinafter Ameritech). A dispute exists as to the exact date of same. The Employer/Carrier took the position that it occurred on 9/5/07. When deposed on 3/18/08, Claimant thought it occurred possibly between 8/25 and 8/28/07. At trial, Claimant testified that 8/22/07 was date of his work accident/injury.

Claimant testified that he was moving a commercial stove hood at a Wendy's in Hialeah, Florida at about 5 or 6:00a.m As he was passing through an area on his way to get his tools, an overhead light connected to a wire fell down from the ceiling

and hit him in the area ~~from~~ the middle of his neck to the top of his head, according to the Claimant. He denied any loss of consciousness. He testified that he just felt a little woozy, his head felt tender, and his neck hurt. He did not think anything of the incident, got his tools, finished work, and went home. According to the Claimant, Manny, the supervisor for the job, witnessed the accident.

At deposition, Claimant testified that following the accident there was a week of no work. Then, the Two Chefs job after that, he thought, but he really did not recall. He testified that the Two Chefs job involved installing a stove and some stainless shelves, and putting in gas lines.

At trial, Claimant was unclear as to when he requested medical treatment, but testified that he was given the run around by the employer. Eventually, he listened to his father and went to West Boca Medical Center approximately 1 ½ weeks after the accident, according to the Claimant. He testified that between 8/22 and 9/19/07, he continued working with difficulty, eating Advil non-stop.

4. The medical records of West Boca Medical Center document Claimant's walk-in to the emergency room on 9/19/07. He gave the following history: a large object (light panel) fell from the ceiling onto the top of his head on 8/24/07. He complained of a severe, constant headache in the occipital area, and sensitivity to light since the accident. He denied any care prior to the visit. A CT brain scan was obtained and was reported as showing no acute intracranial abnormality. The ER physician's impression was closed head injury. Percocet was prescribed and Claimant was discharged to home.

5. Subsequently per the parties, in 10/07 Claimant was authorized to treat with Choice Medical Center as his primary care facility. Claimant presented to the facility on 11/26/07 at which time a referral to a neurologist was made to rule out closed head injury. The Employer/Carrier authorized Dr. Zuniga as Claimant's neurologist.
6. The medical records of Dr. Zuniga document Claimant's first visit on 4/22/08. Claimant presented with complaints of headaches. Per Claimant's history to Dr. Zuniga, he was working as a welder on 9/5/07 when a light fixture fell and hit him on the back of his head. Claimant denied any loss of consciousness and related that he was dazed for 1-2 seconds. Claimant advised Dr. Zuniga that he finished the last hour of work for the day and went home. Claimant related that he developed a progressively severe headache. He reported that 1-2 weeks after the accident his headache was very severe and throbbing, he was unable to open his eyes, and he went to the emergency room. Claimant advised Dr. Zuniga that a CT scan was done, Percocet was prescribed, and he was told to rest for 1 week before returning to work. Claimant related that he called work the following day, and returned to work 1 week later. Dr. Zuniga's note documented Claimant's report of a problem getting his pay, then obtaining an attorney, and eventually being fired from the job.

Dr. Zuniga's note reflects Claimant's complaints since being fired as follows: daily continuous headache pain that starts as a throbbing in his neck and radiates up into his entire head, and a feeling at times as if something is poking in his eyes. Claimant related an inability to function due to

the headache, and the use of up to 12 Aleve per day at times, and the use of Ibuprofen or aspirin at times as well.

Claimant advised Dr. Zuniga that he had recently started a new job as a salesperson, but could not function well because of the headaches.

Dr. Zuniga documented Claimant's physical exam findings as follows: head tenderness in temporalis muscle, neck spasms with decreased range of motion-all directions, and tenderness of the sternocleidomastoid and trapezius muscle, with normal strength on neurological exam. Dr. Zuniga's impression was post-traumatic severe analgesic rebound headache, possible vascular or post-traumatic transform migraine (because of frequency and duration), and photophobia. Dr. Zuniga's treatment plan was: medical protocol for analgesic rebound headache (zanaflex, topamax, and naproxen), and an MRI of the brain.

Claimant did not appear for his scheduled 6/3/08 visit. When Claimant came in next on 7/17/08, he reported that he missed the 6/3/08 appointment because he had an appointment with his attorney. He also advised that the medication did not help him, the muscle relaxant gave him spasms in his back, and he was still the same. Dr. Zuniga told Claimant that his MRI of the brain done on 4/23/08 was unremarkable. Dr. Zuniga advised that there was no record of Claimant notifying the office of his reaction to the medication. At that point, Claimant became verbally abusive and physically threatened Dr. Zuniga. As a result, Dr. Zuniga contacted the adjuster regarding the incident and that he was discharging Claimant. He gave Claimant a letter of discharge based on Claimant's non-compliance with an appointment and his abusive behavior in

the office.

7. Claimant requested a change of neurologist from Dr. Zuniga. The carrier responded by authorizing Dr. Barnea as Claimant's one time change of physician. At the time of the final hearing Claimant had not presented to Dr. Barnea, but indicated that he accepted the physician and with-drew his claim for a change of neurologist.
8. The Employer/Carrier had Claimant undergo an IME with Dr. Goldberg, neurologist, on 9/3/08. Dr. Goldberg was deposed on 9/29/08. He testified that he reviewed Claimant's medical records and reports of diagnostic studies, and conducted a physical examination. According to Dr. Goldberg, the Claimant had undergone the two main tests used to evaluate head injuries, a CT scan of the brain and an MRI of the brain, and both were normal. The findings of both studies were consistent with his exam findings, according to Dr. Goldberg. His impression was residual headache after a closed head injury, the major contributing cause of which was the work accident.

Dr. Goldberg opined that within a reasonable degree of medical certainty, Claimant had reached MMI prior to 9/3/08, had no permanent partial impairment as a result of the injury, had no work restrictions, and no further injury-related neurologic case was necessary.

Based on his review of the medical records and diagnostic test results, his own physical exam, and the absence of any objective findings of impairment, Dr. Goldberg opined that Claimant could have worked unrestricted duty on a full time basis since the work accident.

9. The Claimant seeks temporary total/temporary partial

disability benefits from 8/22/07 to the present and continuing.

10. Claimant testified that between 8/22/07 and 9/19/07 he continued working for the Employer with difficulty, having to take large quantities of Advil for his severe headache. Claimant did not present himself for any medical treatment until 9/19/07. As there is no medical evidence to support a claim for temporary total disability benefits during this period, Claimant's mere complaints of pain alone are not enough to show temporary total disability entitlement.

Claimant testified that the ER physician at West Boca Medical Center on 9/19/07 told him to rest at home for 1 to 1 ½ weeks, and see a neurologist. However, there is no support for Claimant's testimony of having been placed on a no-work status in the records of the facility for his 9/19/07 visit. Lacking medical evidence that proves temporary total disability, the Claimant cannot show entitlement to said benefits.

The Employer's payroll records document the following work history for the Claimant:

0 hours worked 8/17/07-8/23/07
27 hours worked 8/24/07-8/30/07
38.5 hours worked 8/31/07-9/6/07
32.5 hours worked 9/7/07-9/13/07
6.5 hours worked 9/14/07-9/20/07
0 hours worked 9/21/07-9/27/07
16 hours worked 9/28/07-10/4/07
51 hours worked 10/5/07-10/11/07

I find that no medical evidence was presented to substantiate a claim of causal connection between any loss of

wages sustained by Claimant during the foregoing periods and Claimant's work accident. Vencor Hospital v. Ahles, 727 So.2d 968 (Fla. 1st DCA 1998); Betancourt v. Sears Roebuck & Co., 693 So.2d 680 (Fla. 1st DCA 1997). There is no medical evidence placing Claimant on a restricted/modified duty status as a result of the work accident/injury as is required for eligibility for temporary partial disability benefits.

11. Mr. Hardy, general manager of Ameritech's south Florida office, was deposed on 9/17/08. He testified that Claimant worked as a technician/welder since hired in approximately 10/06. He also worked as a helper as needed, when not welding or assembling things, according to Mr. Hardy. He described Claimant's job performance as average until towards the end of the employment when Claimant's work became pretty Shoddy. Mr. Hardy testified that on 3 occasions at 3 different Wendy's he had to send someone out to repair work not done to code by Claimant. Mr. Hardy also testified that towards the end of the employment Claimant was uncooperative, he would not go to a lot of jobs, he had limited availability for work.

Mr. Hardy related that towards the very end of Claimant's employment he learned that Claimant came in to the office and confronted the project manager and sales manager about some payroll concerns. Specifically, Claimant was reported as having said the following: "What do I have to do? Shoot up the place to get a hold of somebody about my pay?" Mr. Hardy testified that he took Claimant's words as credible. He testified that Claimant seemed like a "loose cannon" type, aggressive in nature, unreliable. He testified that he got this impression of Claimant from his general demeanor, the way he carried himself, and the way Claimant talked. For these

reasons, Mr. Hardy discussed Claimant's threat with the president of the company and human resources. It was agreed that Claimant was a threat to the company, that the matter should be placed on record, and a police report filed. Mr. Hardy filed a police report with the Miramar Police Department.

Mr. Hardy testified that the basis of Claimant's termination was as follows: shoddy work not done to code requiring repair by others, refusal to go to certain jobs- Claimant wanted to pick and choose the jobs he would do, and Claimant's threat to shoot up the place regarding his pay concerns. Mr. Hardy testified that Claimant's actions exhibited a blatant disregard for the company's interests and Claimant's job duties/obligations.

Mr. Hardy testified that a settlement agreement was entered into between the Claimant and Ameritech regarding the percentage of reserve money owed to Claimant and Claimant's final paycheck. The agreement resolved any disputes Claimant had over his entitlement to past due wages up to 11/26/07 for the sum of \$1,369.26.

According to Mr. Hardy, approximately two weeks after the police report was filed he learned about Claimant's work accident and complaints of headaches. He confirmed that Claimant continued working the night of the accident, and did jobs thereafter in subsequent weeks. Claimant finally reported the accident and an incident report was made. The Employer then referred Claimant to the Workers' Compensation Clinic. Mr. Hardy had no knowledge of any physical limitations Claimant may have had that prevented him from performing his job duties. Mr. Hardy testified that he had no reason to

believe that Claimant would be unable to continue his job duties had he not been terminated in 10/07.

12. Assuming arguendo that medical evidence established that the medical condition resulting from Claimant's compensable accident created restrictions on his ability to return to work, (a fact which I expressly do not find), and his earnings are less than 80% of his pre-injury average weekly wage, §440.15 (4)(e) and §440.02 (18) must be looked to under the facts of this case. The former provision states that TPD benefits are not payable if the employee is terminated from post-injury employment based on the employee's misconduct. The latter provision defines misconduct to include "...conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of the employee; or carelessness...of such a degree or recurrence...as to show an intentional and substantial disregard of an employer's interest or of the employee's duties and obligations to the employers."

In the instant case, on 3 separate jobs Claimant's work was not done to code and had to be corrected by others; Claimant refused job assignments; and Claimant made a verbal threat to "shoot up" the Employer's premises. Clearly, these acts rise to the level of misconduct so as to preclude entitlement to TPD benefits assuming Claimant otherwise satisfied the criteria for eligibility for same.

13. By his own testimony, Claimant engaged in gainful employment since termination from Ameritech. When deposed on 3/18/08, Claimant testified that Ameritech was the last job he had had "on the books". He testified that since then he cooked

at a friend's pizzeria, did computer work for a friend's auto transport company, invested in a pressure washing company with a friend, installed a camera system for a friend, and at times did odd jobs like paintwork here and there.

At trial, Claimant testified that in connection with his friend's business, he rode with the friend to New York to transport a car, worked at Septic Savior Sales doing phone work, worked for Pinnacle Base Inc., a time share business, and from 9/1/08 to present, worked for Debt Remedy Solutions as a debt consultant.

Claimant has failed to respond to the Employer/Carrier's Request To Produce documentation of all earnings received since the date of accident, and failed to complete and return DWC-19 forms provided to him.

Lastly, having attained MMI per Dr. Goldberg, Claimant has no entitlement to TPD benefits. F.S 440.15(4)(a) (2006).

14. Whether a Claimant has demonstrated a casual connection between his compensable injury and loss of earning capacity is a question of fact to be determined by the Judge of Compensation Claims (JCC) upon a consideration of the totality of the circumstances. Stewart v. CRS Rinker Materials Corp., 855 So.2d 1173 (Fla. 1st DCA 2003).

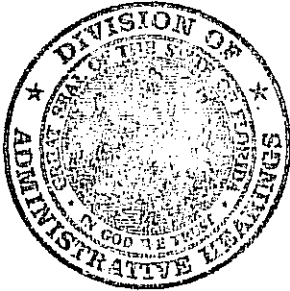
15. I find that in the instant case based on the totality of the circumstances, Claimant failed to show by competent, substantial evidence that any reduction in earnings was caused by work restrictions that were in turn caused by the compensable accident.

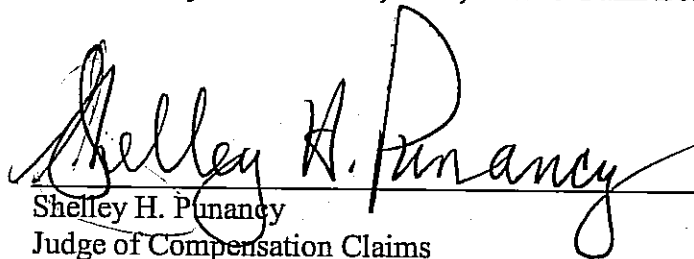
F.S 440.15(4)(a) (2003).

WHEREFORE, it is

ORDERED AND ADJUDGED that the claims for temporary total disability/temporary partial disability benefits from 8/22/07 through the present, penalties, interest, costs and attorney's fees are denied.

DONE AND MAILED this ^{4th}~~7~~ day of November, 2008, in West Palm Beach, Palm Beach County, Florida.

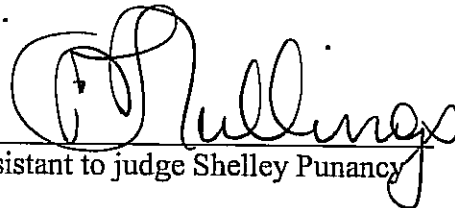



Shelley H. Punancy
Judge of Compensation Claims
Division of Administrative Hearings

Office of the Judges of Compensation Claims

West Palm Beach District Office
5405 Okeechobee Boulevard, Suite 200
West Palm Beach, Florida 33417-4552
(561)640-2827
www.jcc.state.fl.us

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to the above parties by U.S. Mail on this ^{4th}~~7~~ day of November 2008.


Assistant to judge Shelley Punancy

Claimant:
Charles Koifman
14401 S. Military Trail
Apartment E-110
Delray Beach, Florida 33484

Employer:
Ameritech
11420 Interchange Circle North
Miramar, Florida 33025

Carrier/Servicing Agent:

Providence Property Casualty Insurance
P.O Box 2769
Frisco, TX 75034

Attorney for Claimant:
Lorri Kennedy Esquire
580 Village Boulevard
Brandywine Center-Suite 225
West Palm Beach, Florida 33409

Attorney for Employer/Carrier:
Zal Linder Esquire
1180 S.W. 36th Avenue
Pompano Beach, Florida 33069