

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

Jorge Correa,)	
Employee/Claimant,)	
)	
vs.)	OJCC Case No. 08-015229TGP
)	
MC Professional Window Cleaning, Inc.,)	Accident date: 4/29/2008
Employer,)	
)	Judge: Thomas G. Portuallo
and)	
)	
Broadspire,)	
Carrier/Servicing Agent.)	

ORDER DENYING DISABILITY BENEFITS

After proper notice to all parties, this cause came to be heard before the undersigned Judge of Compensation Claims in Daytona Beach, Volusia County, Florida, on June 24, 2010. The Petition for Benefits at issue was filed on September 28, 2009. The Claimant, Jorge Correa, was represented by Attorney Jesus Ravelo. The Employer/Carrier, MC Professional Window Cleaning, Inc./Broadspire, was represented by Attorney Zal Linder.

Statement of the Case

The Claimant is a 26 year old male who communicates through a Spanish interpreter. He was injured in a compensable accident on April 29, 2008. The Claimant was in the front passenger seat in a company vehicle traveling with several coworkers from Jacksonville towards South Florida

when they were struck in the rear by an eighteen-wheel tractor trailer. The impact forced the Claimant's vehicle into the cement lane divider and the Claimant's vehicle flipped over several times, landing on the opposite side of I-95. The Claimant was not wearing a seat belt at the time of the accident and was ejected from the vehicle. As a result of this accident, the Claimant alleged injuries to his head, neck, shoulders, back, knees, right foot and ankle, and head.

The Claimant was taken by ambulance to Halifax Medical Center and was discharged that day. The Claimant received authorized medical treatment from various providers including Dr. Evans, orthopedist, Dr. Herskowitz, neurologist, Dr. Ciliberti, neuro-ophthalmologist, Dr. Friedman, maxillofacial surgeon, Dr. Lozman, alternative orthopedist, and Dr. Arias, neuro-psychologist. The Claimant was also paid various disability benefits.

The present dispute in this case includes whether or not the Claimant is entitled to temporary total or temporary partial disability benefits from December 8, 2008, to date, along with penalties, interest, costs, and attorney fees. The Employer/Carrier has alleged that the Claimant reached overall maximum medical improvement with 0% permanent impairment rating and no work restrictions by December 8, 2008.

The Claimant has obtained an independent medical exam with Dr. Barry Burak, chiropractic physician.

Issues and Defenses

The initial issues as set forth by the Claimant in the initial Pretrial Questionnaire included:

1. Provision of follow-up appointment with Dr. Ciliberti, Dr. Herskowitz, or Dr. Friedman.
2. Temporary total disability and/or temporary partial disability benefits from December 8, 2008, to date and continuing.

3. Provision of payment of bill of Flagler Emergency Services in the amount of \$585.00 for date of service April 29, 2008.
4. Penalties, interest, and attorney fees.

The Employer/Carrier defended these claims at the initial Pretrial on the grounds that:

1. Dr. Ciliberti remains authorized and a courtesy appointment was scheduled for February 18, 2010.
2. No indemnity due or owing. Claimant was paid all appropriate indemnity through date of overall maximum medical improvement.
3. Bills from Flagler Emergency Services will be paid at fee schedule upon receipt on proper form.
4. No penalties, interest, costs, or attorney's fee owed.

At the Final Hearing on June 24, 2010, the Claimant represented to the Court that the issues identified on the Pretrial Questionnaire had been narrowed. The only remaining issues are the claim for temporary total disability and/or temporary partial disability benefits from December 8, 2008, to the present and continuing, along with penalties, interest, costs, and attorney fees. The Claimant represented that all other issues had either been resolved or withdrawn.

Documentary Evidence

At the June 24, 2010, Final Merit Hearing, the following documentary evidence was admitted:

JCC's Exhibit #1	Pretrial Questionnaire and Order by the undersigned dated April 2, 2010.
JCC's Exhibit #2	Claimant's Amendment to the Pretrial Stipulation signed May 13, 2010.
JCC's Exhibit #3	Composite exhibit of Employer/Carrier's Amendments to Pretrial Stipulation, signed May 4, 2010, and June 14, 2010.

JCC's Exhibit #4	Claimant's Trial Memorandum, admitted for argument purposes only.
JCC's Exhibit #5	Employer/Carrier's Trial Memorandum of Law, admitted for argument purposes only.
Joint Exhibit #1	Wage statement and itemization of post-accident earnings from MC Professional Window Cleaning, Cliffhanger Janitorial Services, and KB Professional Window Cleaners.
Claimant's Exhibit #1	Workers' Compensation Insurance payout sheet.
Claimant's Exhibit #2	Deposition of Barry Burak, DC, taken May 15, 2010, admitted over objection.
Claimant's Exhibit #3	Chiropractic Reports of Barry Burak, DC, admitted over objection.
Employer/Carrier's Exhibit #1	Deposition of Phillip R. Lozman, MD, taken April 6, 2010, with attachments.
Employer/Carrier's Exhibit #2	Deposition of Eric Ciliberti, MD, taken April 8, 2010, with attachments.
Employer/Carrier's Exhibit #3	Deposition of Kurt Friedman, DDS, taken May 4, 2010, with attachments.
Employer/Carrier's Exhibit #4	Deposition of Alejandor Arias, PSYPSyD, taken May 25, 2010, with attachments.
Employer/Carrier's Exhibit #5	Deposition of Brad Herskowitz, MD, taken May 25, 2010, with attachments.
Employer/Carrier's Exhibit #6	Deposition of Jorge Correa, taken August 29, 2008.
Employer/Carrier's Exhibit #7	Deposition Jorge Correa, taken April 23, 2010.
Employer/Carrier's Exhibit #8	Composite Exhibit including Mediation Settlement Agreement and Response to Petition for Benefits.

Findings of Fact and Conclusions of Law

In making my findings of fact and conclusions of law in this matter, I have carefully considered and weighed all the testimony and evidence presented to me including all the live testimony as well as the documentary exhibits and I have resolved any and all conflicts therein. After having carefully considered the arguments of the parties and all evidence presented in this case, I make the following findings of fact and conclusions of law:

1. The stipulations of the parties as listed above and as identified in the Pretrial Questionnaire are approved and adopted by me.
2. This Court has jurisdiction over the subject matter and over the parties.
3. In making the determinations set forth below, I have attempted to distill the testimony and salient facts together with the findings and conclusions necessary for the resolution of this claim. I have not attempted to painstakingly summarize the substance of all the documentary evidence or the testimony of the witnesses nor have I attempted to state nonessential facts. Because I have not done so does not mean I have failed to consider all the evidence.

TTD/TPD from December 8, 2008, To the Present and Continuing

4. I find that the Claimant failed to satisfy his burden of proof, by a preponderance of evidence, that he is entitled to temporary total disability or temporary partial disability benefits for the period of time from December 8, 2008, to the date of Hearing, June 24, 2010. I find there is a lack of acceptable medical evidence in the Record substantiating that the Claimant was taken out of work or was placed on work restrictions during this period of time. Additionally, I find that the Claimant reached overall maximum medical improvement on or before December 8, 2008, with 0% permanent impairment rating and no work restrictions.

5. I find that the Claimant failed to establish a causal relationship, by way of direct and proximate cause or major contributing cause, between any lost wages experienced by the Claimant for the period of time at issue and the industrial accident. I base this finding on the totality of circumstances in this case including the objective medical evidence in the Record. I find that the Claimant received appropriate indemnity benefits from his date of accident up through December 7, 2008, and that the Claimant was thereafter paid further indemnity benefits from December 8, 2008, up through January 6, 2009.

6. Further, I find that the Claimant has voluntarily limited his income during the period of time at issue by refusing to work the full number of hours offered to him by the Employer herein.

7. In making all findings herein, I accept the position of the Employer/Carrier in its entirety. I find that the position of the Employer/Carrier is logical, reasonable, and most consistent with the totality of evidence in this case, including various medical opinions in the Record as well as the objective medical evidence.

Medical Evidence Presented by the Employer/Carrier

8. The Employer/Carrier admitted into evidence various medical depositions. I accept the evidence offered by the Employer/Carrier and find that each of the medical opinions admitted into evidence by the Employer/Carrier consistently support the finding that the Claimant reached overall maximum medical improvement on or before December 8, 2008, with 0% permanent impairment rating and no work restrictions.

9. The Employer/Carrier presented the medical opinion of Dr. Lozman, the Claimant's authorized, alternative, treating orthopedic surgeon. Dr. Lozman treated the Claimant for all orthopedic conditions related to the accident of April 29, 2008, including Claimant's right toe, neck,

shoulders, knees, thoracic spine, and lumbar spine. Dr. Lozman testified, without hesitation, that the Claimant attained maximum medical improvement for each of these conditions, from an orthopedic standpoint, on December 8, 2008, with no work restrictions and 0% permanent impairment rating. Dr. Lozman noted that the Claimant was released to return for treatment as needed, but that the Claimant has not followed up with any return visits for orthopedic treatment or palliative care since December 8, 2008.

10. The Employer/Carrier also presented the opinion of the authorized, treating neuro-ophthalmologist, Dr. Ciliberti, who treated the Claimant for various complaints, including abnormal vision in the right eye and post-concussion syndrome. Dr. Ciliberti noted that a MRI of the Claimant's brain was performed with a normal result. Dr. Ciliberti testified that the Claimant reached maximum medical improvement on September 4, 2008, with a 0% permanent impairment rating and no work restrictions. Dr. Ciliberti released the Claimant to full-duty work status. Dr. Ciliberti also confirmed that the Claimant did not treat at his office between November 13, 2008, and February 18, 2010, and that the Claimant made no attempts to call for an appointment. Dr. Ciliberti opined that the Claimant does not require any further care from a neuro-ophthalmic standpoint.

11. The Employer/Carrier also presented the testimony of Dr. Kurt Friedman, oral surgeon. Dr. Friedman was authorized to treat the Claimant for myofascial pain including complaints with his jaw. Dr. Friedman testified that the Claimant attained maximum medical improvement on September 9, 2008, with 0% permanent impairment rating and no work restrictions. I find that Dr. Friedman clarified his position at deposition and emphatically testified, without hesitation, that the Claimant's permanent impairment rating was 0% permanent impairment.

12. The Employer/Carrier also presented the psychological opinion of Dr. Alejandro Arias, who is authorized to treat the Claimant. Dr. Arias testified that the Claimant was given a provisional diagnosis of adjustment disorder and to rule out cognitive deficit associated with a traumatic brain injury. Dr. Arias noted that by August 28, 2008, the Claimant's pain had improved and that he was doing much better from a physical standpoint. As of August 28, 2008, Dr. Arias recommended that the Claimant be discharged without any work restrictions associated with the industrial accident. Additionally, Dr. Arias testified that there had been several attempts to schedule appointments with the Claimant after August 28, 2008, but the Claimant did not show up for appointments. I note that Dr. Arias emphatically testified at deposition that he did not believe a referral to a psychiatrist was necessary in this case. As a psychologist, Dr. Arias offered no opinion on maximum medical improvement, but referred to the medical physicians on this issue.

13. The Employer/Carrier also offered the deposition of Dr. Brad Herskowitz, neurologist. Dr. Herskowitz was authorized to treat the Claimant for the industrial accident and diagnosed the Claimant with post-concussive symptoms. Dr. Herskowitz noted visual blurring in the Claimant's right eye, complaints of memory loss, and back pain which was followed by the orthopedic physician. Dr. Herskowitz initially took the Claimant off of work, but by July 2, 2008, the Claimant provided history to Dr. Herskowitz that his headaches and dizziness were better and that overall he was in better condition. Dr. Herskowitz modified his diagnosis to improved post-concussion symptoms and also noted that the MRI of the brain was normal. Dr. Herskowitz testified that by July 2, 2008, the Claimant could return to work with no restrictions and for his minor symptoms he could be treated with medications as needed. Dr. Herskowitz placed the Claimant at maximum medical improvement on July 2, 2008, with 0% permanent impairment and no work

restrictions. Dr. Herskowitz released the Claimant on an as needed basis for follow-up neurological care. Since July 2, 2008, the Claimant has not attempted to return to see Dr. Herskowitz. I note that Dr. Herskowitz deferred to Dr. Lozman with regard to orthopedic maximum medical improvement being reached on December 8, 2008. Also, Dr. Herskowitz deferred to Dr. Ciliberti, for a neuro-ophthalmological maximum medical improvement date, September 4, 2008.

14. Again, I accept the Employer/Carrier's position that the Claimant attained overall maximum medical improvement by December 8, 2008, with 0% permanent impairment rating and no work restrictions. This finding is supported by the bulk of the medical evidence in the Record including the opinions of doctors Lozman, Ciliberti, Friedman, Arias, and Herskowitz. I find that each of these physicians testified in a consistent manner, based upon the objective medical evidence in this case and the history they received from the Claimant. Despite pointed cross-exam by Claimant's counsel, I find that each of these physicians clearly identified a maximum medical improvement date and expressed an opinion that the Claimant was released to work without restrictions. I find that each of these physicians testified in a clear, emphatic manner, most consistent with the totality of evidence presented in this case, including the objective medical evidence. I find that each of these physicians presented a logical and reasonable opinion, supported by the total circumstances of this case.

Chiropractic Evidence Presented By the Claimant

15. The Claimant offered the chiropractic records and deposition of Dr. Burak, DC, as an Independent Medical Examiner. I note that Dr. Burak did not see the Claimant for chiropractic evaluation until May 6, 2010. Dr. Burak, based upon his one-time examination, testified that the Claimant had not reached a point of maximum medical improvement and recommended future

chiropractic care, two times a week, for twelve weeks, then reevaluation (Deposition Dr. Burak, pages 18 and 19). Additionally, I note that Dr. Burak testified that the Claimant did have work restrictions as a result of the industrial accident and that the Claimant should be limited to twenty-five to thirty hours per week, minimum bending, lifting, stairwells, and no lifting more than ten pounds. Dr. Burak testified that these restrictions or similar restrictions would apply for the past two years since the time of the industrial accident.

16. After reviewing the totality of evidence in this case, I reject Dr. Burak's opinions in their entirety and particularly with regard to: (1) the applicable diagnoses related to the industrial accident; (2) whether or not the Claimant has attained maximum medical improvement; and (3) whether or not the Claimant has any work restrictions. I reject Dr. Burak's opinions in all places where it conflicts with the Employer/Carrier's position in this case. Based upon the totality of circumstances, I find that Dr. Burak's chiropractic opinions are not logical, not reasonable, and are inconsistent with the totality of evidence in this case including the medical evidence and objective diagnostic test studies.

17. I find that Dr. Burak has provided an illogical and unreasonable explanation for his chiropractic opinions, particularly in light of the numerous medical physicians who have testified in this case after performing diagnostic studies and treating the Claimant over a period of time. I reject Dr. Burak's opinion on the grounds that he only examined the Claimant on one occasion, over two years following the accident date. I note the remaining physicians whose opinions are in evidence were authorized to treat the Claimant and did, in fact, treat the Claimant over a long period of time prior to rendering their opinions that maximum medical improvement was reached with no permanent impairment or work restrictions as of December 8, 2008.

18. I find that as a chiropractor, Dr. Burak did not testify as to any particular body part, condition alleged by the Claimant, or modality of treatment that was not sufficiently addressed by the various medical physicians whose opinions appear in the Record. As such, I reject Dr. Burak's conclusions and opinions in their entirety in favor of the various medical physicians who testified in behalf of the Employer/Carrier in this case.

19. Further, I reject Dr. Burak's opinions to the extent that Dr. Burak relies on the history and subjective complaints described by the Claimant at the time of his physical examination in May 2010. As further described in the contents of this Order, I cannot accept the Claimant's description of ongoing physical and cognitive complaints presented to Dr. Burak as accurate. Instead, I accept the various physicians who consistently testified that they observed improvement in the Claimant's condition, recorded history from the Claimant himself of improvement, and that the Claimant failed to schedule follow-up medical appointments with these authorized physicians despite being released on an as needed basis. I note that each of these physicians treated and evaluated the Claimant during a period of time much closer to the date of the accident than Dr. Burak's one-time evaluation in May 2010. Accordingly, I find the medical evidence presented by the Employer/Carrier to be more logical, reasonable, and consistent with the totality of evidence than the Chiropractic IME opinion of Dr. Burak.

Claimant's Testimony

20. Although I accept the portion of the Claimant's testimony where he described the mechanism of injury and events surrounding the industrial accident, as noted above, I reject the portion of the Claimant's testimony where the Claimant attempts to describe continuing and ongoing physical and mental complaints as a result of the industrial accident. I reject this testimony as

inconsistent with the totality of evidence, including the medical evidence.

21. In making this finding, again, I note various treating physicians, from a variety of medical or psychological modalities, consistently testified that the Claimant's symptoms improved over time, particularly over the summer of 2008. I find that it is logical and reasonable, when looking at this case in its entirety, to accept these opinions even though they contradict the Claimant's live testimony at Hearing and the opinion of the Chiropractic IME physician.

22. I reject the Claimant's testimony with regard to his ongoing physical and cognitive complaints following December 8, 2008, based upon this Court's observation of the candor and demeanor of the Claimant while testifying live at Hearing.

23. Accordingly, based upon the totality of evidence and this Court's observation of the live testimony of the Claimant, I find that the Claimant's subjective history and complaints provided to Dr. Burak were not accurate and cannot support any chiropractic opinion rendered by Dr. Burak in this case.

24. Additionally, I find that the Claimant was not under the impression that he was provided with any work restrictions from any physician from December 8, 2008, to the present. Instead, I note that the Claimant testified clearly and emphatically at the Final Hearing that it was his understanding that he had no work restrictions in place following December 8, 2008.

25. Further, based upon this Court's observation of the candor and demeanor of the Claimant's live testimony, I reject the Claimant's testimony in response to the Employer/Carrier's question as to whether or not the Claimant knew it was improper to receive lost wages from the Employer/Carrier for periods of time when he also received post-accident earnings. I find the Claimant's response to this question was not logical, reasonable, or believable.

Voluntary Limitation of Income

26. I find the Claimant refused full-time employment offered by the Employer herein during the period of lost wages at issue. This finding is supported by the Claimant's own testimony and the totality of evidence in this case. As such, I find that the Claimant voluntarily limited his income following December 8, 2008.

WHEREFORE it is ORDERED and ADJUDGED as follows:

1. The claim for temporary total disability or temporary partial disability benefits from December 8, 2008, to June 24, 2010, is **DENIED**.

2. The claims for penalties, interest, costs, or attorney fees are **DENIED**.

DONE AND ORDERED this 30th day of June, 2010, in Daytona Beach, Volusia County, Florida.



Thomas G. Portuallo
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Order has been electronically transmitted via email to the attorneys of Record and sent by U.S. mail to the parties as listed below on this 30th day of June, 2010:

Debra Smith

Executive Secretary to the Judge of
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