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

CLAIMANT:
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JUDGE: HON. TIMOTHY M. BASQUILL
OJCC NO.: 12-008444TMB
D/A: 2/17/2012

FINAL COMPENSATION ORDER

AFTER PROPER NOTICE this cause came before me, the undersigned Judge of Compensation Claims, on December 19, 2012 for a final hearing. The Claimant, Daniel Martinez, was represented by Jeffrey M. Friedman, Esquire. The Employer/Carrier, Devcon Security Services Corp. and Crum & Forster, were represented by Zal Linder, Esquire.

PROCEDURAL HISTORY

On December 11, 2012, two days prior to the original trial date, the Employer/ Carrier sought to amend the pretrial to include additional defenses of:

a.) Violation of F.S. 440.09 and F.S. 440.105, and

b.) Claimant failed to submit DWC-19 forms related to the claim for TTD/TPD benefits. The undersigned adjourned the hearing until December 19, 2012 to allow the

Employer/ Carrier to provide the specific dates the Employer/Carrier received the medical records sought to be included in evidence. When the hearing reconvened, I denied the motion as untimely in light of the fact that some medical records relied on by the Employer/ Carrier to support a misrepresentation of defense had been in the Employer/ Carrier's possession as early as October 16, 2012. See Isaac v. Green Iguana Inc., 871 So. 2d 1004 (Fla.1st DCA 2004).

Also on December 11, 2012, the Employer/Carrier sought to introduce various medical records from unauthorized medical providers, which records have previously been objected to by the Claimant, specifically, records of Dr. Prettelt, MedExpress, Chartis (Dr. Fishbane), and Dr. Waeltz. I sustained Claimant's objection as to Dr. Prettelt, MedExpress, and Chartis, but denied it as related to Dr. Waeltz and allowed Dr. Waeltz records for the limited purpose of the Employer/Carrier's apportionment defense.

Finally, Claimant sought a motion to strike all defenses based on the Employer/ Carrier's last minute attempt to include new defenses and medical records. I found that the Employer/Carrier did not act in bad faith and denied said motion.

STIPULATIONS

1. The undersigned has jurisdiction of the parties and of the subject matter.
2. Notice of hearing was timely given to the proper parties.
3. Venue lies in Palm Beach County, Florida.
4. There was an employer/employee relationship on the date of the accident.
5. Workers' compensation insurance coverage was in effect on the date of the accident.
6. The injury/occupational disease was accepted as compensable, specifically the neck and low back.
7. The Claimant's average weekly wage was $905.52, with a resultant compensation rate of $603.71 per week.

CLAIMS AND DEFENSES

The claims for benefits were as follows:

1. Payment of temporary total disability (TTD) and/or temporary partial disability (TPD) from February 17, 2012 to present and continuing, and

2. Penalties, interest, costs and attorney fees.

The Employer/Carrier raised the following defenses:

1. No indemnity is due or owing. There are no opinions from an authorized physician that the Claimant has any work restrictions. Further, the Claimant has been medically non-compliant with treatment. Claimant also refused a good faith job offer and is therefore voluntarily limiting his income.

2. Should this court find any benefits to be due and owing, the Employer/ Carrier seeks an offset for advance paid to Claimant as well as offset against any post-accident wages.

3. Alternatively, if the Court ultimately finds the Claimant is entitled to indemnity benefits for this claim, the Employer/Carrier asserts an apportionment defense as to medical costs (and corresponding indemnity for same) pursuant to F.S. 440.15(5)(b).

4. No penalties, interest, costs, or attorney fees are due or owing.

EVIDENCE

The following documentary matters were entered into evidence by the undersigned Judge of compensation claims:

1. Pre-trial stipulation and order, dated November 8, 2012, with Employer/Carrier's amendment filed November 13, 2012.

2. Order denying Employer/Carrier's motion to amend pre-trial dated December 19, 2012, and

3. Order on Claimant's motion to strike dated January 8, 2013.

The following documentary matters, offered by the Claimant, were admitted into evidence:

1. The deposition of Dr. Gerald Stashak, taken December 3, 2012, and

2. Composite of DWC-19 forms submitted to the Carrier.

The following documentary matters, offered by the Employer/Carrier, were admitted into evidence:

1. The deposition of the Claimant, Daniel Martinez, taken June 21, 2012;

2. The deposition of Brittany Duarte, taken November 30, 2012 (apportionment only);

3. The deposition of Eva Melissa Pickett, taken December 14, 2012, with attachments;

4. Copy of the Carrier payout, and

5. Composite of DWC-19 forms for the period June 1, 2012 through October 31, 2012.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In making my findings of fact and conclusions of law in this claim, I have carefully considered and weighed all of the evidence presented, whether by exhibit, deposition testimony, or live testimony offered at trial. I have carefully considered the trial memoranda and argument of the parties. I have observed the candor and demeanor of the live witnesses, and have resolved all conflicts in the evidence. In making the determinations set forth herein, I have attempted to distill the testimony and salient facts together with the findings and conclusions necessary for resolution of the claim. I have not attempted to painstakingly summarize the substance of the live testimony, the testimony of any deposition witness or documentary evidence presented nor have I attempted to state non-essential facts. Because I have not done so does not mean that I have failed to consider all the evidence presented before me at trial. Based on the foregoing, I hereby make the following findings of fact and conclusions of law.

1. The stipulations of the parties are consistent with the evidence presented and are hereby adopted as findings of fact.

2. The Claimant, Daniel Martinez, was employed as a service technician for the Employer. The Claimant's job entailed repairing alarm and camera security systems, and included occasional work in attics. The Claimant was injured on February 17, 2012 while employed by the Employer when he was rear-ended in a company vehicle injuring his neck and low back. The accident and injuries were accepted as compensable by the Employer/Carrier, however, the Claimant refused authorized medical care offered by the Employer/Carrier and chose to seek treatment on his own. Now the Claimant brings this cause for indemnity benefits incident to the compensable accident. While it seems incongruent that a Claimant can pick and choose various benefits offered under the Florida Workers' Compensation Law, in this case, indemnity benefits, I am constrained by Dramis vs. Palm Beach County School Board, 829 So. 2d 346 (Fla. 1st DCA 2002) to consider and award same if Claimant can prove entitlement.

3. Following the motor vehicle accident the Claimant, who was wearing a seat belt, continued to his residence without immediate medical attention. However, the Claimant soon developed pain in his neck, low back and shoulder and was seen that evening in the Palms West Emergency Room. Claimant then began a course of treatment with The Hope Chiropractic Clinic; was referred to Dr. Fernando, a pain management specialist for injections in his neck and back, and finally to Dr. Roush, an orthopedic surgeon who performed surgery on the Claimant on July 24, 2012. Following the surgery, the Claimant's back felt better and the radicular component of his lumbar problem seemed to improve. The Claimant does not deny that Hope Chiropractic, Dr. Fernando and Dr. Roush are unauthorized and is not seeking authorization or payment on behalf of any of those healthcare providers. Accordingly, I have sustained Employer/Carrier's objections to any and all medical records by those providers being admitted into evidence.

4. While undergoing treatment with Dr. Hope and Dr. Fernando, the Claimant was offered work on two occasions in June of 2012, specifically clerical work at the Employer's Hollywood, Florida, address for 25 hours per week at the Claimant's normal hourly rate of $21.63 per hour. The evidence established that the Claimant's primary service area was southern

Palm Beach County, however, the Claimant reported at least weekly to the Hollywood address for a regular Thursday inspection. Based on Dr. Hope's no work status (the Claimant continued to submit same to his Employer on a regular basis), the Claimant stated that he did not feel he could perform any work, and at the request of his counsel, sought Family Medical Leave Act (FMLA) benefits. Specifically, leave without pay, beginning on July 16, 2012 and continuing to October 8, 2012.

5. The only admissible medical evidence before me is the deposition testimony of Dr. Gerald Stashak, Claimant's IME physician who examined the Claimant on October 10, 2012. Dr. Stashak reviewed The Hope Health and Wellness Center medical records, various physical therapy notes, MRI reports, and the medical reports of Dr. Roush. Dr. Stashak noted that Dr. Roush performed an L4-5 and L5-S1 laminotomy and microdisectomy on July 24, 2012. His examination of the Claimant revealed spasm in both the lumbar and cervical spine. Dr. Stashak diagnosed cervical sprain/strain with a herniated disc at C5-6, 6-7, and a lumbar sprain/strain with the lumbar disc at L4-5, L5/S1, status post lumbar laminectomy. Dr. Stashak opined that the major contributing cause of the Claimant's need for treatment of the lumbar and cervical spine was his February 17, 2012 motor vehicle accident. Dr. Stashak opined that the surgery performed by Dr. Roush was medically necessary, and even after reviewing Dr. Waeltz's medical records, Dr. Stashak did not change his opinions. .Dr. Stashak opined that the Claimant would be in a no-work status for six weeks immediately following his July 24, 2012 surgery, thereafter the Claimant would have six additional weeks of sedentary restrictions, and finally the Claimant would be in a light-duty status, specifically, lifting twenty pounds occasionally or ten pounds repetitively and would have limitations on his ability to walk or sit for one to two hours at a time. No driving restrictions were imposed on Claimant It should be noted that I sustained the Claimant's objections to hypotheticals based on the medical records of Dr. Prettelt and Dr. Fishbane, as I had previously denied the admissibility pursuant to Claimant's Motion to Strike.

6. After Claimant was offered light-duty work on two separate occasions in June of 2012, the Claimant still chose to avail himself of the FMLA benefits and sought twelve-weeks of unpaid leave. Under either the offer of work, or the FMLA provisions of an unpaid leave, I find the Claimant voluntarily limited his income for the period of July 16, 2012 to October 8, 2012. The Claimant's employment was terminated by the Employer on October 8, 2012 due to

the Claimant's inability to return to work as a service technician, and thereafter the Claimant was not offered work by the Employer.

7. As stated above, the only admissible medical evidence was offered by the Claimant through Dr. Stashak. Dr. Stashak specifically opined that the industrial accident was the major contributing cause of the Claimant's need for his medical treatment and that the Claimant would have been in a no-work status for the first six weeks following his July 24, 2012 surgery. Thereafter the Claimant would be in a sedentary status for the next six weeks and finally in a light-duty status. Although there was an initial light-duty job offer, the Employer/ Carrier, having terminated the Claimant as of October 8, 2012, can no longer avail itself of that defense. I find the Claimant has established that the limitations imposed by the compensable injury caused the change in employment status sufficient to entitle the Claimant to TPD benefits as of October 9, 2012. Wyeth / Pharma Field Sales v. Toscano , 40 So. 3d 795 (Fla. 1st DCA 2010),

8. The Employer/Carrier's defense of apportionment raised in an amendment to the pretrial stipulation fails for two reasons. First, prior lumbar problems the Claimant may have sustained appeared to have resulted from a 1998 industrial accident while the Claimant was employed by Pepsi-Cola. The Claimant testified that the accident with Pepsi-Cola in 1998 was compensable and, in fact, that he received approximately $14,000.00 in settlement of that case. Pizza Hut v. Proctor, 955 So. 2d 637 (Fla. 1st DCA 2007), and Pearson v. Paradise Ford, 951 So. 2d 12 (Fla. 1st DCA 2007). Second, there is no competent medical evidence of an anatomical impairment rating attributable to the Claimant's pre-existing condition. As I sustained objections to the medical records of Dr. Prettelt and/or use of those records in hypotheticals asked of Dr. Stashak, Dr. Stashak's opinion as to apportionment of Claimant's lumbar or cervical condition is not competent evidence of same. Eaton vs. City of Winter Haven, ___ So.3d ___ (Fla. 1st DCA 2012).

9. By order dated June 12, 2012, the undersigned awarded a $2,000.00 advance to the Claimant. The Employer/Carrier is entitled to an offset of said amount from the TPD benefits awarded herein.

WHEREFORE, it is **ORDERED** and **ADJUDGED** that:

1. The claim for temporary total disability benefits is **DENIED;**

2. The claim for temporary partial disability benefits is **GRANTED,** beginning October 9, 2012, together with penalties and interest (subject to an offset of the $2,000.00 advance), and

3. The claim for attorney fees and taxable costs is **GRANTED,** jurisdiction is reserved as to the amounts thereof.

DONE AND ORDERED at West Palm Beach, Palm Beach County, Florida on this 16 day of January, 2013.

HONORABLE JUDGE TIMOTHY M. BASQUILL
Judge of Compensation Claims

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing order was entered and a true and correct copy was furnished by electronic transmission on this 16th day of January, 2013 to counsel of record or the parties by regular U.S. Mail, if unrepresented.

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