STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGE OF COMPENSATION CLAIMS
Melbourne District

EMPLOYEE:
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EMPLOYER:
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OJCC CASE NO.: 06-037509PTT; 07-003158PTT
D/A: 8/2/2006,4/21/2006

FINAL ORDER

After due notice to all parties the Final Hearing on the Merits of this Claim came on for hearing before the Undersigned Judge of Compensation Claims on January 10, 2008, in Melbourne, Brevard County, Florida. The Court conducted and concluded a Merit Hearing on the August 27, 2007, August 27, 2007, September 21, 2007, and September 21, 2007 DOAH filed Petitions for Benefits. Following the close of the Merit Hearing the court announced verbal findings in fact and conclusions of law on the record which are directly incorporated into the written Order by reference.

The claims presented by the claimant were as follows:

1. Temporary total disability benefits from October 26, 2006 to the present, the date Dr. Amann placed the claimant at MMI from a neurosurgical standpoint and continuing the manner and for the period of time as provided by law. Dr. Amann has referred

the claimant to a pain management specialist, therefore, the claimant is not at overall MMI;

2. Temporary partial disability benefits from October 26, 2006 to the present, the date Dr. Amann placed the claimant at MMI from a neurosurgical standpoint and continuing in the manner for the period of time as provided by law. Dr. Amann has referred the claimant to a pain management specialist, therefore, the claimant is not at overall MMI;

3. Correction of AWW and resulting compensation rate to include any and all earnings and fringe benefits the claimant may have been entitled to during the 13 weeks prior to the date of injury;

4. Medical care and treatment as the nature of the injury and the process of recovery required including cortisone injections and physical therapy for lumbar strengthening as recommended by Dr. John Amann, MD in his prescription dated August 31, 2006, and off his report dated September 5, 2006;

5. The claimant requests authorization of pain management and a list of pain managers the employer/carrier will authorize to evaluate and treat in pursuant to the attached prescription from Dr. Amann;

6. Authorization of and payment of past and future psychiatric care pursuant to the records of Charles Walker, M.D.;

7. Penalties, interest, costs and attorney's fees;

8. Direct treatment towards either pain management or possible surgical intervention as

recommended by Dr. Keith Simon, M.D. in his report dated August 20, 2007.

The defenses raised by the employer/carrier were as follows:

1. No TTD/TPD due or owing;
2. Claimant is at MMI;
3. Voluntary limitation of income/deemed earnings;
4. Loss of income is not causally related to the industrial injury;
5. Apportionment;
6. AWW is correct;
7. Dr. Amann recently recommended an FCE be performed before determining medical necessity of pain management;
8. All medically necessary and causally related treatment as been authorized;
9. Florida Statute §440.09(4) for a defense;
10. Recommendation for pain management is not based on objective medical evidence;
11. Psychiatric treatment is not medically necessary or causally related;
12. Employer/carrier seek reimbursement of all costs;
13. No P.I.C.A. due or owing;
14. Pain management is not medically necessary.

However, the employer/carrier withdrew the §440.09(4) defense without any objection from the claimant's attorney.

The following documentary evidence was received into evidence at the request of both the claimant and the employer/carrier.

1. Pre-Trial Stipulation;

2a. Dr. Amann's deposition;

2b. Medical note of Dr. Amann dated 11/27/07;

3. Deposition of Ana Vargas.

The following documentary evidence was received into evidence pursuant to the request of the claimant:

1. Medical composite (proffered only, not accepted as evidence);

2. Notice of Filing;

3. Hearing information sheet for identification purposes only;

4. Composite of pleadings relating to the claimant's Motion to Continue;

5. Composite of pleadings relating to the claimant's Motion for a Psychiatric EMA;

6. Composite of pleadings relating to the employer/carrier's Motion for Protective Order;

7. Dr. Cassidy's report (proffered only, not admitted into evidence);

8. Dr. Walker's records (proffered only, not admitted into evidence).

The following documentary evidence was received into evidence pursuant to the request of the employer/carrier.

1. Deposition of Dr. Robert Martinez for historical purposes only;

2. Deposition of the claimant for impeachment/rebuttal purposes only;

3. Pre-Hearing checklist for identification purposes only;

4. Deposition of Dr. Munson;

5. Deposition of Dr. Chacko;

6. The employer/carrier's objection to the Notice of Filing;

7. Hearing Information Sheet for identification purposes only.

At the hearing, the claimant, Mark Burgess, appeared and testified live before me. He was the only witness to testify live at the hearing. In making my findings in fact and conclusions of law, I have carefully considered and weighed all the evidence presented to me. Although I may not recite in exclusive detail all the witnesses testimony and may not refer to each piece of documented evidence, I have observed the candor and demeanor of the live witnesses and have attempted to resolve all the conflicts in their testimony.

As to the issue of the average weekly wage, I find that the base AWW is $662.48 as outlined by the employer/carrier on the Pre-Trial Stipulation and that any fringe benefit would be $32.52. Furthermore, the claimant accepted the employer/carrier's average weekly wage.

The only admissible evidence presented before the Court regarding the claimant's medical condition were the depositions of Dr. Amann, Dr. Munson, and Dr. Chacko. It should be pointed out that while the claimant's attorney did try and admit other documents into evidence they were excluded based on several reasons announced by the Court at the Trial including, but not limited to the fact that they were unauthenticated hearsay and some were from unauthorized providers. Furthermore, as the Court noted, reports of IME physicians do not automatically come into evidence pursuant to Florida Statute §440.29. Specifically, §440.29(4) allows medical reports of authorized treating healthcare providers into evidence upon a proper motion. However, Dr. Keith Simon and Dr. Curtis Cassidy were IME physicians of the claimant, not authorized providers. Furthermore,

there was no motion served to even try and put these records into evidence. The claimant also indicated on his Notice of Filing Exhibits and Depositions with date of service 1/7/08 that he would call Dr. Keith Simon live, Dr. Charles Walker live, and Dr. Cassidy live. However, at trial, the claimant's attorney indicated that he was going to call them by phone and the employer/carrier objected. The court excluded any telephone testimony. The Pre-Trial Stipulation signed by the parties and accepted by the Court noted that telephone testimony would not be allowed absent an Order from the Court or prior Stipulation of the parties. There was no Stipulation of the parties and there was no Order from the Court allowing telephone testimony. Furthermore, the employer/carrier even noted on the Pre-Trial Stipulation that they objected to telephone testimony. Accordingly, these doctors were not allowed to testify by telephone. There was no attempt to elicit any live testimony from these doctors.

Dr. Amann is a board certified neurosurgeon that was authorized to treat the claimant. Dr. Amann noted that the claimant's MRI of 8/7/06 was of poor quality and he thought that the claimant's pain was muscular/soft tissue in nature. Dr. Amann did indicate that he placed the claimant at MMI on 10/26/06 and he assigned a 10% permanent partial impairment rating. Also, the totality of Dr. Amann's testimony indicated that his opinions and recommendations were based upon subjective rather than objective findings.

Prior to the industrial accidents of 4/21/06 and 8/2/06, the claimant was seen by Dr. Martinez on 11/10/03 for back problems. Dr. Martinez is a board certified neurologist that was seeing the claimant for back problems. The employer/carrier took the deposition of Dr. Martinez and his deposition was admitted for factual and historical purposes. Dr. Martinez diagnosed the claimant

in 2003 with chronic lower thoracic, lumbosacral strain with palpable fibromyocytis, chronic insomnia, and a degenerative disc bulge at L3-4. Additionally, Dr. Martinez, back in 2003, assigned the claimant permanent work restrictions of avoiding jumping or bouncing. Dr. Martinez also noted that the claimant could do low impact light duty such as walking, swimming, bike riding, rowing and not to lift greater than 20 pounds from a bent position or ten pounds repetitively. Dr. Martinez was also 100% adamant that he told the claimant about the work restrictions. Finally, Dr. Martinez noted that he assigned a 20% permanent partial impairment rating to the claimant.

The employer/carrier got an IME with Gregory Munson. Dr. Munson is a board certified orthopedic spine surgeon. Dr. Munson was able to review the actual films of an MRI performed on 10/22/07. He also had the benefit of Dr. Martinez deposition outlining the prior care that the claimant had for his low back in November of 2003. Dr. Munson noted that the MRI films from 10/22/07 indicated that the claimant's spine was within normal limits for his age. Dr. Munson didn't feel like he could find any specific damage or injury based upon the objective studies. Dr. Munson also noted that he had reviewed the prior records from Dr. Martinez. Dr. Munson then commented that the claimant's condition now was better than it was back in 2003 when he saw Dr. Martinez. Dr. Munson was then asked if he could find any evidence of symptom-magnification during his examination of the claimant. Dr. Munson noted that with the lack of being able to tie in anything objective that he could see in the MRI and other materials to the claimant's pain complaints he would say that there was some inconsistency. Dr. Munson noted that there was no objective evidence to support the claimant's subjective complaints. Dr. Munson then noted that the claimant did not need any further workup as far as his industrial accident. Dr. Munson also agreed with Dr. Amann that

the claimant reached MMI on 10/26/06.

I accept the opinions of Dr. Munson in their totality. I find that they are more consistent with logic and reason. To the extent that they are the same, I also accept the opinions of Dr. Amann. However, to the extent that they disagree I accept the opinions of Dr. Munson and reject those of Dr. Amann. I find that both Dr. Munson and Dr. Amann agree that the claimant reached MMI on 10/26/06. I find that pursuant to Dr. Munson's testimony the claimant does not need any further medical care.

As far as the claim for temporary indemnity goes, I find that the claimant did in fact reach MMI on 10/26/06 and that he is not due any further TTD or TPD. The Court would note that there was no claim for impairment ratings, permanent total disability or any other type of permanent benefits that can occur after the date of MMI.

I find that the claimant lacked credibility regarding his inability to recall his restrictions from Dr. Martinez that were assigned in November 2003. I find that the close proximity of time from 2003 to the claimant's first industrial accident in April 2006 does not seem consistent with logic and reason. I accept the opinion of Dr. Martinez that he remembers telling the claimant of these restrictions.

I deny the claimant's request for medical care and treatment as the nature of the injury and the process of recovery required including cortisone injections and physical therapy for lumbar strengthening as recommended by Dr. Amann. I also deny the claimant's request for authorization of pain management and a list of pain managers that the employer/carrier would authorize to evaluate and treat the claimant pursuant to the prescription of Dr. Amann. I also deny the claimant's request

for direct treatment towards either pain management or possible surgical intervention as recommended by Dr. Keith Simon. I find that these benefits are not medically necessary or causally related. Again, to the extent that it differs with any other opinion the Court accepts the opinion of Dr. Gregory Munson. Dr. Munson was unequivocal in noting that the claimant had no objective findings and did not need any further care for his 4/21/06 and 8/2/06 industrial accident. The Court does not need to address the employer/carrier's apportionment defense. That is because there is no further medical care and treatment that the claimant needs as it relates to the industrial accident.

The Court denies the claimant's request for psychiatric care. The uncontroverted testimony of Dr. Chacko indicates that the claimant does not have any psychiatric condition causally related to the industrial accident. I find that Dr. Chacko did a thorough examination of the claimant and took a detailed history of the claimant's complex history. Again, the Court accepts Dr. Chacko to the extent of any other doctor or records and find that the claimant does not have any psychiatric condition causally related to the industrial accident and that there is no need for psychiatric care.

I find that the claimant had a pre-existing condition to his back. I find that the industrial accident was a temporary exacerbation of the claimant's pre-existing condition. Based on the testimony of Dr. Munson, I find that the claimant has no objective findings of any further problems and that the claimant's ongoing condition is no longer related to either the 4/21/06 or 8/2/06 industrial accident. I find that the claimant does not have any psychiatric conditions causally related to the industrial accident.

ACCORDINGLY, IT IS ORDERED AND ADJUDGED as follows:

1. The claimant reached MMI on 10/26/06;

2. The claimant has no ongoing objective findings and his condition is no longer related to the industrial accident;

3. The employer/carrier have provided all appropriate medical care to the claimant;

4. The claim for all benefits outlined by the claimant in the Pre-Trial are hereby denied and dismissed with prejudice;

5. The claim for penalties, interest, costs and attorney's fees filed by the claimant are hereby denied and dismissed with prejudice;

6. The employer/carrier is entitled to reimbursement for taxable costs, jurisdiction is reserved as to the amount.

DONE and ORDERED in Melbourne, Florida, this 28 day of January, 2008.

Honorable Judge Terrizzese
Judge of Compensation Claims