

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGES OF COMPENSATION CLAIMS
ST. PETERSBURG DISTRICT OFFICE

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| James Clair, |) | |
| |) | |
| Employee/Claimant, |) | |
| |) | |
| vs. |) | OJCC Case No. 03-033718DSR |
| |) | |
| Gale Interior Solutions, |) | Accident date: 9/9/2002 |
| |) | |
| Employer, |) | |
| |) | |
| and |) | |
| |) | |
| St. Paul Travelers Insurance Company, |) | |
| |) | |
| Carrier/Servicing Agent. |) | |
| _____ |) | |

FINAL COMPENSATION ORDER

This cause was heard before the undersigned at St. Petersburg, Pinellas County, Florida on July 30, 2009, upon the Claimant's claims for compensability of the psychiatric condition and permanent total disability benefits from April 14, 2008, to date and continuing; penalties, interest, costs and attorney's fees. The Petition for Benefits was filed on January 14, 2009. Mediation occurred on May 6, 2009, and the parties' pretrial compliance questionnaire was filed June 1, 2009. Josh J. Stewart, Esq. was present on behalf of the Claimant. Tiffany Stanton Hawks, Esq. was present on behalf of the Employer/Carrier.

The defenses were that the Claimant does not meet the statutory requirements for permanent and total disability benefits as defined in Florida Statutes § 440.02 with regard to a catastrophic injury; there is no medical evidence that the Claimant is permanently and totally disabled; the Claimant's pain complaints are subjective in nature and outweigh the objective

findings as documented with the diagnostic tests results; the Claimant has not sustained a catastrophic injury as defined in Florida Statutes § 440.02(37); the Claimant does not qualify for SSD based upon the injuries from the industrial accident; the Claimant is capable of working within restrictions limitations and assigned by his authorized treating physicians; the Claimant worked for approximately five years after the accident in the position in which he was employed at the time of the injury; the Employer would have been able to accommodate the Claimant's restrictions, but for the fact that the Claimant was laid off due to economic reasons; the Claimant is voluntarily limiting his income; no entitlement to payment of penalties, interest, costs, or attorney's fees at the expense of the Employer/Carrier. The Employer/Carrier objects to the Court's consideration of any issues that have not been properly raised through a Petition for Benefits or mediated.

The following documentary items were received into evidence:

1. Pretrial Order and Notice of Final Hearing (Court's Exhibit #1)
2. Deposition of Steven R. Cooley, taken January 29, 2009 (Claimant's Exhibit #1)
3. Vocational Evaluation by Steven R. Cooley, dated January 7, 2009 (Claimant's Exhibit #2)
4. Copy of Disabled Person Parking Identification Permit (Claimant's Proffer A)
5. Deposition of Michael D. Slomka, M.D., taken on July 27, 2009 (Employer/Carrier's Exhibit #1)
6. Labor Market Survey (Employer/Carrier's Exhibit #2)
7. Deposition of James T. Clair, taken March 9, 2009 (Employer/Carrier's Exhibit #3)

8. Deposition of Patrick J. Horan, M.D., taken April 13, 2009 (Joint Exhibit #1)

At the hearing, the Claimant, James T. Clair, Muriel Clair and Steven R. Cooley appeared and testified before me. David Bubeck testified by telephone. In making my findings of fact and conclusions of law, I have carefully considered and weighed all the evidence presented to me. Although I will not recite in explicit detail the witnesses' testimony and may not refer to each piece of documentary evidence, I have attempted to resolve all of the conflicts in the testimony and evidence. Based on the foregoing and the applicable law, I make the following findings:

1. Those items to which the parties were in agreement on the pretrial stipulation sheet are accepted and adopted as findings of facts.
2. The parties stipulated that the Claimant suffered an industrial accident arising out of and in the course and scope of his employment on September 9, 2002, and that he injured his left knee and left shoulder as a result of the accident. The Claimant also asserts a psychiatric injury which the Employer/Carrier has not accepted as compensable.
3. The parties stipulated that average weekly wage was not an issue for determination at the hearing.
4. It was the Claimant's position that he reached maximum medical improvement on April 14, 2008. It was the Employer/Carrier's position that maximum medical improvement was reached on April 6, 2009, and that the Claimant has a 7% permanent impairment rating for the shoulder as found by Dr. Horan and a 4% permanent impairment rating for the left knee as found by Dr. Slomka.
5. The parties stipulated that this claim was not governed by a Managed Care Arrangement.

6. The parties stipulated that the Claimant had filed a petition for benefits on July 9, 2009, that not been mediated and was not ripe for adjudication at the Final Hearing. As such, the parties agreed that the claims contained in the July 9, 2009, petition for benefits could be tried at a later date if necessary. The parties agreed that the claims contained in the March 6, 2009, and April 27, 2009, petitions for benefits had been resolved and that those petitions could be closed.

7. Following the industrial accident the Claimant initially went to the emergency room at University Community Hospital. He followed up with Ben Chiang, M.D., orthopedic surgeon, on September 12, 2002. Dr. Chiang recommended a left knee MRI, which was performed on September 16, 2002, and showed a medial meniscal tear. Dr. Alfred Desimone was authorized and the Claimant underwent an arthroscopic partial medial meniscectomy on October 10, 2002. Dr. Desimone then conducted an arthroscopic SLAP repair and arthroscopic debridement of the left shoulder on January 2, 2003.

8. The Claimant's care was then transferred to Ira Guttentag, M.D. Dr. Guttentag placed the Claimant at maximum medical improvement as of July 17, 2003 with 10% whole body impairment (4% for the left knee and 6% for the left shoulder) and he recommended a functional capacity evaluation. The FCE indicated that the Claimant could return to heavy-duty work and that his effort had been excellent in testing.

9. The Claimant moved to the east coast of Florida and continued medical treatment. When he moved back to the west coast, he began treating with Dr. Jorge Chaumont on November 7, 2005. At that time, the Claimant was diagnosed with status post-SLAP repair with persistent left shoulder impingement, degenerative osteoarthritis of the shoulder, status post-medial meniscus repair, chondromalacia patella and probable cervical spondylosis. On

December 15, 2005 Dr. Chaumont opined the Claimant was at maximum medical improvement and he agreed with the 10% permanent impairment rating assigned by Dr. Guttentag. The Claimant returned to Dr. Chaumont on March 28, 2006, requesting a repeat x-ray of his left shoulder, and he was instructed to discuss the problem with his new doctor since it is likely that the unrelated cervical spine issues were contributing to his shoulder pain. Dr. Chaumont then referred the Claimant to Dr. Patrick Horan.

10. The Claimant presented to Dr. Horan for an initial evaluation on October 23, 2006. Dr. Horan testified by deposition in this matter. Dr. Horan also provides medical care and treatment for the Claimant's unrelated medical conditions, which are covered by the Claimant's personal health insurance. He ordered an MRI of the shoulder and the knee. Dr. Horan prescribed a Valgus off-loader brace for the Claimant's knee. The Claimant continued to receive periodic medical care and treatment with Dr. Horan for his left knee and shoulder pain, along with receiving treatment for his unrelated back, neck, and right shoulder conditions. The Claimant had finished a course of Cortisone and a course of five injections of Hyalgan into his knee prior to seeing Dr. Horan. During his treatment the Claimant began discussing lumbar pain and in June of 2007 Dr. Horan recommended a lumbar MRI. Dr. Horan also recommended a cervical MRI and testified that often individuals with continuing shoulder complaints can have cervical problems. Dr. Horan testified that the MRI showed that the Claimant had a degenerative spine and he did appear to have an asymmetric bulge towards the left in his back. Dr. Horan was not able to causally relate the cervical and lumbar conditions to the industrial accident and could not state whether or not those areas were made worse by the industrial accident or were the natural

progression of the degenerative disease. Dr. Horan indicated that the Claimant did have pain pattern tracing down his arm consistent with radiculitis, but not with radiculopathy.

11. On February 7, 2008, the Claimant returned to Dr. Horan with a tremendous amount of shoulder and knee pain. Dr. Horan injected both the left knee and the left shoulder on that visit. On April 10, 2008, the Claimant returned to Dr. Horan and indicated that he was lifting and felt a pop in his right shoulder. He had a limited range of motion and persistently painful right shoulder. Dr. Horan's impression was "likely a new rotator cuff tear" and an MRI was ordered on that date. The MRI of the right shoulder, which is the unrelated shoulder, was done on April 11, 2008. The MRI showed a full thickness tear of the rotator cuff.

12. On April 14, 2008, the Claimant went in for follow-up on his left shoulder and left knee indicating that he was still having pain in the left shoulder. Dr. Horan noted restrictions in the range of motion in the left shoulder with crepitus and a mild loss of full flexion and full extension with pain in the medial aspect of the left knee. Dr. Horan indicated that the Claimant could use his left knee as tolerated and his impression was that the Claimant had improved. On April 14, 2008, Dr. Horan wrote a letter addressed "To Whom It May Concern" indicating that the Claimant was permanently disabled and should not and could not engage in any active employment secondary to his upper and lower extremity conditions that have existed for over the past year.

13. On April 15, 2008, Dr. Horan performed a right open rotator cuff repair on the Claimant's right shoulder. The Claimant followed up with Dr. Horan subsequent to the right shoulder surgery through June 30, 2008. The next visit of August 14, 2008, indicates that the Claimant came in for his left knee and left shoulder complaints. The physical examination

revealed pain on palpation and crepitus in the knee and the shoulder was positive for pain in the deltoid. The Claimant complained of difficulty in taking the Celebrex medication and Dr. Horan recommended Voltaire cream to put on the shoulder and knee.

14. On January 12, 2009, Dr. Horan's records indicate that the Claimant had qualified for Social Security and that he was following him for the left shoulder and left knee pain. Dr. Horan indicated that the Claimant responded well to the anti-inflammatory cream and injections in the knee and shoulder. Dr. Horan recommended an additional MRI of the left shoulder which was done on January 19, 2009. Dr. Horan indicated that the MRI showed supraspinatus tendinosis and indicated that the labrum looked intact. The Claimant followed up on April 6, 2009, indicating that he was still having pain in his left knee. Dr. Horan noted that the Claimant does have degenerative arthritis in the knee and underwent a scope in November 2007, with obvious spurs, cartilage loss, and a meniscal tear. He intermittently wears a Valgus off-loader brace and Dr. Horan indicated that the Claimant would likely require intermittent bracing of the knee. The records of Dr. Horan show that he was being asked by the Employer/Carrier to give a permanent impairment rating, and he was unclear whether or not the osteoarthritis should be considered in the rating. It appears that Dr. Horan issued two reports on April 6, 2009. In the second report Dr. Horan indicates that he was seeing the Claimant for the left shoulder injury and that he was at maximum medical improvement. Dr. Horan indicated that the Claimant may require anti-inflammatories in the future as well as pain management and physical therapy, but he did not see a need for additional surgical intervention. After August 24, 2008, the Claimant told Dr. Horan that his neck was doing better and no additional treatment was rendered to the Claimant's neck. Dr. Horan last saw the Claimant on April 6, 2009 with persistent pain in his

left shoulder, loss of external rotation of the left shoulder, and pain in the left knee. Based on the limited range of motion of external rotation Dr. Horan rated the Claimant with a 7% permanent impairment rating as a result of the shoulder injury and indicated that the Claimant may require anti-inflammatory medications and pain management as well as physical therapy in the future, but he did not think that any additional surgical intervention would be needed to the shoulder. With reference to the knee it was Dr. Horan's opinion that the Claimant may need intermittent injections and may eventually require a total knee replacement.

15. Dr. Horan testified that he thought that the Claimant is totally disabled "as a result of all the factors that are affecting him" (a bad knee, a bad shoulder, a second shoulder that underwent a rotator cuff reconstruction, a sore low back and a sore neck). As such, Dr. Horan filled out forms for the Social Security Administration indicating that the Claimant was disabled, and he did provide the Claimant with a handicapped sticker application. Dr. Horan testified that the Claimant's right shoulder has done amazingly well with full range of motion, and the only limitation placed on that area is to avoid extensive lifting. Dr. Horan thought that the low back would limit the Claimant's ability to lift and stand for extended periods of time and thought that it would continue to be an underlying debilitating problem for him. Dr. Horan indicated that the majority of the Claimant's limitations come from his bad knee and the chronic pain in the left shoulder.

16. Dr. Horan admitted that he had a difficult time finding that the Claimant's continued need for treatment to the left knee was from the industrial accident in light of the fact that there was such a short period of time between the Claimant's injury and the time the knee was "scoped". On arthroscopy the Claimant already had significant chondromalacia and

significant wear patterns in the knee. As such, Dr. Horan indicated there was a component of pre-existing degenerative arthritis in the knee. Dr. Horan did state that the major contributing cause of the aggravation to the left knee was the industrial accident. The issue with the knee was unclear whether or not the Employer/Carrier had accepted the degenerative arthritis as compensable or whether he would be rated purely on the meniscal tear. The Claimant would have a 2% permanent impairment rating as a result of the meniscal tear and an additional 5% to 7% if the degenerative arthritis was figured in. Dr. Horan did state that the degenerative arthritis condition was accelerated by the Worker's Compensation injury. Dr. Horan admitted that he was not able to accurately apportion out what portion of the left knee is related to the pre-existing degenerative changes versus the industrial accident. Dr. Horan indicated that he did have wear patterns that would qualify him for a total knee replacement and that the wear patterns were related to the degenerative changes. Dr. Horan admitted that if he were to assume that the Claimant had not had the industrial accident it was still possible based on the level of degenerative changes that he had that he would have eventually required a total knee replacement without the industrial accident.

17. Dr. Horan was the physician that performed the unrelated rotator cuff repair to the Claimant's right shoulder in April of 2008. Dr. Horan admitted that the Claimant would be capable of doing at least sedentary work if the consideration was only the compensable injuries to the left knee and the left shoulder. Dr. Horan thought that the Claimant's maximum lifting with his left shoulder should be 12 to 15 pounds. In terms of the left knee, it was Dr. Horan's opinion that the Claimant would get uncomfortable sitting for an extended period of time so he would need to be able to stand intermittently for relief. Dr. Horan would restrict the Claimant from any

repetitive overhead activity with the left shoulder. Dr. Horan has been prescribing glucosamine and chondroitin or Cosamine and he testified that the medication would have been prescribed based on the degenerative changes even without the industrial accident.

18. Dr. Horan admitted that he was not aware that the Claimant had ongoing back and neck complaints and treatment for his back dating back to 1969, or that he had returned to work after the accident in The Employer/Carrier is asserting that the Claimant did not reach maximum medical improvement until the April 6, 2009, evaluation by Dr. Horan and that his maximum medical improvement date only dealt with the Claimant's shoulder. Subsequent to that date, the Employer/Carrier had the Claimant evaluated by Dr. Slomka for his knee, and Dr. Slomka indicated that the Claimant also had a 4% permanent impairment rating for the knee. As indicated earlier, the Claimant had previously been placed at maximum medical improvement by various physicians who have treated him. It is the Claimant's position that he reached maximum medical improvement on April 14, 2008. It is noted that Dr. Horan subsequently issued the letter indicating that the Claimant was permanently disabled.

19. The Claimant underwent an independent medical examination for his left knee by Michael Slomka, M.D., an orthopedic surgeon, on June 29, 2009. Dr. Slomka testified by deposition in this claim. It was Dr. Slomka's opinion that the Claimant suffered from pre-existing arthritis which he found in both of the Claimant's knees. Dr. Slomka indicated that the Claimant did suffer an aggravation to the pre-existing arthritis as a result of the industrial accident and that the major contributing of the aggravation was the industrial accident. It was Dr. Slomka's opinion that the Claimant may at some point in the future require a total knee replacement to both knees. Dr. Slomka indicated that the need for that surgery to the right knee

was not causally related to the industrial accident, but that 25% of the need for the total knee replacement to the left knee would be as a result of the industrial accident. Dr. Slomka was of the opinion that the Claimant had reached maximum medical improvement prior to his examination and that he had a 4% permanent impairment rating to the left knee as a result of the industrial accident.

20. Based of the totality of the evidence before me I find that the Claimant did reach overall maximum medical improvement on April 14, 2008. The treatment that the Claimant received subsequent to April 14, 2008, does not appear to have been remedial in nature. As will be more fully discussed herein, I find that the Claimant has established that he is permanently totally disabled and that the date of total disability was April 14, 2008, pursuant to the opinion of Dr. Horan.

21. Steven R. Cooley, a vocational rehabilitation specialist performed a vocational evaluation on the Claimant on October 23, 2008. Mr. Cooley's report was received into evidence, and he testified both by deposition and live at the Final Hearing. Mr. Cooley indicated that when he did the evaluation the Claimant was 59 years old which for Social Security purposes makes him of advanced age and impairs his ability to find gainful employment. Mr. Cooley found that the Claimant did not have any transferable skills which would enable him to do sedentary work and as such he thought that the Claimant would meet the definition of disabled under the Social Security guidelines. Mr. Cooley found the Claimant to be motivated and found that his continuing to work after the accident showed his motivation as did the fact that he tried to continue working and found subsequent employment after he was laid off from the Employer herein. Mr. Cooley accepted the Claimant's testimony that he was motivated, and he continued

to work probably beyond his capabilities until he could no longer do the jobs. Mr. Cooley did go through the Social Security requirement and the five step sequential analysis and did find that the majority of the Claimant's disability was due to his left knee and left shoulder injuries, even though the Claimant did list the low back pain and right shoulder injuries when he filled out the Social Security application for disability. It was Mr. Cooley's testimony that the Claimant is not employable in the open labor market as a result of his age, restrictions, and vocational limitations, and as such, he would be found qualified for Social Security disability benefits.

22. The Employer/Carrier had a vocational evaluation performed by David Bubeck who was working with Re-Employability, Inc. which done a labor market survey. Mr. Bubeck was of the opinion that the Claimant could find suitable, gainful employment if consideration was only given to his left knee and left shoulder injuries. Mr. Bubeck reviewed the job leads that were sent to the Claimant and indicated that it was his position that the Claimant was capable of performing those jobs. It appears that three positions were found which were sent to the Claimant, and the Claimant testified that he tried to apply for at least for at least two of those positions. The three positions were a delivery company van driver position, a customer service position, and a security officer position. Mr. Cooley was of the opinion that the Claimant could not actually do any of these positions given his age limitations and lack of transferable skills. Based on the totality of the evidence before me I find that the opinions of Mr. Cooley should be given more weight than the opinions of Mr. Bubeck. Mr. Cooley personally met with the Claimant and interviewed him and appears to have education and training in excess of the education and training obtained by Mr. Bubeck. I find Mr. Cooley to be more qualified as a vocational evaluator so that his opinions are entitled to greater weight. I accept the opinions of

Mr. Cooley that the Claimant cannot be gainfully employed based on his age, education, physical limitations as a result of the accident and lack of transferable skills. As such, I find that the Claimant has established that he is permanently totally disabled.

23. The Employer/Carrier has asserted that the Claimant has not established a catastrophic injury in light of the fact that he continued to work for this employer as a cabinet installer from the industrial accident in 2002 until he was laid off in 2007 for economic reasons. The Claimant then went to work for JCPenney installing window blinds, but testified that he could not maintain that position due to difficulty with his shoulder and knee.

24. The Claimant's uncontroverted testimony is that the only way he was able to continue working with the Employer herein after the accident was that the Employer hired the Claimant's son to assist him in installing the cabinets. I accept the Claimant's testimony that without the assistance of his son, he would not been able to have maintained that position as a cabinet installer with the Employer herein subsequent to the industrial accident.

25. The cabinet installation that the Claimant was engaged in is a medium duty work position. The Claimant has worked as a cabinet installer since he was 23 years old. According to the testimony of Mr. Cooley, the Claimant cannot return to work in that position and that position does not leave the Claimant with any transferable skills.

26. I find based on the totality of the evidence before me that the Claimant has established that he is permanently totally disabled. The Claimant has not performed an extensive or exhaustive job search subsequent to terminating his employment, but I find that the job search would be futile in light of the opinions of Mr. Cooley and the fact that his authorized treating physician has found him permanently disabled and unable to work. It is clear that the Claimant

may be in need of a total knee replacement at some point in the future to his left knee and Dr. Slomka has indicated that 75% of the knee would be due to the pre-existing degenerative disease and 25% as a result of the industrial accident. The physicians have not indicated that he needs to have the total knee replacement at this time, and the Claimant is not seeking authorization for the total knee replacement at this time. The testimony of Dr. Horan and Dr. Slomka both substantiate that the major contributing cause of the Claimant's disability and inability to be gainfully employed is the left knee and left shoulder injuries. As indicated earlier, I accept the testimony of Mr. Cooley that the Claimant does not have any transferable job skills and even if he was medically released to work light duty or sedentary duty that he is not employable based on the age, education, restrictions and lack of transferable vocational skills and the fact that the only type job the Claimant has done is install cabinets since he was 23 years old.

27. The Claimant has claimed compensability of a psychiatric condition which the Employer/Carrier has not accepted as compensable. There is no evidence before me that the Claimant has a psychiatric condition that is causally related to the industrial accident, and as such, that claim is hereby denied and dismissed.

28. Since the Claimant has prevailed he is entitled to reimbursement of taxable costs at the Employer/Carrier's expense. Jurisdiction is reserved on the amount if the parties are unable to agree.

29. Since the Claimant has prevailed after hiring an attorney and securing the benefits herein, his attorney is entitled to be paid a fee at the Employer/Carrier's expense. Jurisdiction is reserved on the amount if the parties are unable to agree.

WHEREFORE, it is hereby ORDERED and ADJUDGED:

1. That the Employer/Carrier shall pay to the Claimant permanent total disability benefits from April 14, 2008, to the present and continuing and for so long as he remains permanently totally disabled and statutorily entitled to same.

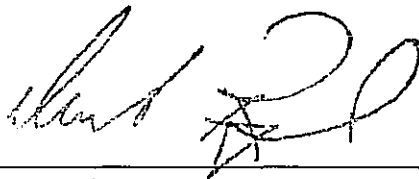
2. The claim for the compensability of the psychiatric condition is hereby denied and dismissed.

3. That the Employer/Carrier shall pay to the Claimant penalties and interest on the unpaid compensation benefits

4. That the Employer/Carrier shall pay to the Claimant's attorney a reasonable fee for securing the benefits herein. Jurisdiction is reserved on the amount if the parties are unable to agree.

5. That the Employer/Carrier shall reimburse the taxable costs of these proceedings. Jurisdiction is reserved on the amount if the parties are unable to agree.

DONE AND ORDERED IN CHAMBERS this 10th day of August, 2009, in St. Petersburg, Pinellas County, Florida.



Donna S. Remsnyder
Judge of Compensation Claims

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