U.S. Department of Labor

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Issue Date: 16 June 2009

CASE NO.: 2007-LHC-681

OWCP NO.: 07-177561

IN THE MATTER OF

M. T.,[1]
Claimant

v.

ISLAND OPERATING COMPANY, INC.,
Employer

and

LOUISIANA WORKERS' COMPENSATION CORP.,
Carrier

DECISION AND ORDER ON REMAND

Background

A formal hearing was conducted in this matter on August 7, 2007, wherein Claimant sought compensation and medical treatment for an alleged injury on January 6, 2006, to his knee when he stepped over pipes at work. Thereafter, a Decision and Order issued on November 29, 2007, dismissing Claimant's claim on the grounds no event at work had caused an injury to Claimant's knee. The Claimant appealed to the Benefits Review Board, who on September 28, 2008, issued a Decision and Order reversing the denial of benefits and finding that the knee injury as a matter of law was work related.

[1] Pursuant to a policy decision of the Department of Labor, the Claimant's initials rather than full name are used to limit the impact of the Internet posting of agency adjudicatory decisions for benefit claim programs.

The claim was then remanded for consideration of the nature and extent of Claimant's disability as well as his entitlement to Section 7 medical treatment. Both parties have filed briefs on remand, and the evidence to be applied is that developed at the previous formal hearing on August 7, 2007, and detailed in the Decision and Order of November 29, 2007.

Nature and Extent

Admitting that Claimant continued to perform light duty work from January 6, 2006, until May 12, 2006, but denying he received his full pre-injury wages, Claimant seeks temporary partial disability benefits for this period at a rate of $133.16 per week. Specifically, Claimant's stipulated average weekly wage as of January 6, 2006, was $1,089.40, but the light duty position paid only $889.63 on average leaving a difference of $199.73, two-thirds of which is $133.16.

Although arguing that Claimant's light duty job post-accident earnings were equivalent to his previous average weekly wage, Employer's Exhibit 2 does not bear that out. Clearly, Claimant's overtime was reduced, and consequently, I accept Claimant's position, and I find that from January 6, 2006 until May 12, 2006, Claimant is entitled to compensation of $133.16 per week.

Beyond that date, Claimant maintains he is entitled to total disability compensation, be it temporary or permanent, after Dr. Fairbanks presumably found him at maximum medical improvement on September 16, 2006. I do not agree with Claimant, and I find that except as to the period from August 9, 2006 when Dr. Fairbanks took Claimant off work until September 16, 2006 when Dr. Fairbanks released Claimant from his care, Employer has met its burden of suitable alternative employment and owes no other compensation.

Both prior and subsequent to January 6, 2006, Claimant worked away from home on a seven day on and seven day off basis. In fact, prior to January 6, 2006, Claimant testified he drove three hours each way at the beginning and end of every shift. In May 2006, his then treating physician, Dr. Schutte, returned Claimant to work,[2] and Claimant was offered a position essentially the same as his light duty job but in Belle Chasse, Louisiana, rather than Lafayette, Louisiana. Claimant declined the clerical job, though he understood Employer would provide his lodging.

At the hearing, Brooke Roy, Employer's then safety manager, testified in May of 2006 she offered Claimant the Belle Chasse job, with lodging, working seven days on and seven days off doing office clerical work, and Claimant said "no". The current safety manager, Lance LeBlanc, testified that he tried to contact Claimant seven or eight times

[2] Dr. Liles concurred in the assessment.

in May concerning job offers and left messages at three different phone numbers but Claimant never replied. Based upon company policy, Claimant was then terminated.[3] Consequently, with the exception of the few weeks Dr. Fairbanks had Claimant off work due to surgery, I find Claimant entitled to no other compensation beyond May 12, 2006.

As to Section 7 medical expenses, I find Claimant entitled to all treatment he received prior to that provided by Dr. Fairbanks, but no expenses incurred with Dr. Fairbanks.

Claimant was first seen by Dr. Carruth who released Claimant to regular work. Next, Claimant sought Dr. Stafford who released Claimant to light duty. Employer then referred Claimant to Dr. Schutte, an orthopedic surgeon, who treated Claimant until May 16, 2006 and who thought Claimant could return to light duty if not full duty. Unknown to Dr. Schutte, but with approval of Employer and at request of the Claimant, on April 21, 2006 Claimant also sought an opinion from another orthopedic surgeon, Dr. Liles, who believed Claimant, could return to regular work. After last seeing Drs. Schutte and Liles, Claimant, without requesting authority from Employer and at his own expense, sought out Dr. Fairbanks, yet another orthopedic surgeon, in June of 2006 who performed arthroscopy on both knees on July 27, 2006. However, Claimant kept complaining of pain and finally Dr. Fairbanks noted, "I can't seem to make any real sense of what is going on with him," and he informed Claimant there was nothing else he could do for him. (EX-11).

The reasonableness, work-relatedness and necessity of the surgeries performed by Dr. Fairbanks are very much in question. Both Drs. Schutte and Liles doubted the wisdom of such procedures, and Dr. Fairbanks himself upon undertaking the surgeries noted they were "solicited" by Claimant and there were no guarantees of success. (CX-11). Notwithstanding the question of necessity, however, Employer is not liable for Dr. Fairbanks for, as testified by Ms. Roy, Claimant never sought approval of this physician's treatment although he had previously been given approval to see Dr. Liles. Why Claimant did not seek approval for treatment from Dr. Fairbanks is unanswered, but for reasons known only to Claimant he chose to seek this third orthopedic surgeon and use his own insurance to pay for the treatment and have "solicited" surgeries. Consequently, in absence of some showing that Claimant was somehow refused reasonable and medical treatment, I find Employer not to be liable for treatment provided by Dr. Fairbanks or any expenses related thereto.

[3] Mr. LeBlanc testified the job he offered was seven days on and seven days off at 12 hours per day, which appears to be the same if not in excess of Claimant's pre January 6, 2006 earnings (EX-2).

Summary

Three Orthopedics have no explanation for Claimant's complaints of pain and no further treatment has been offered. Also none of the three have offered any impairment rating. Consequently, it is my finding that after being released by Dr. Fairbanks on September 16, 2006, Employer/Carrier had no further liability in this claim, for as stated in Dr. Fairbanks' opinion in his letter of March 28, 2007, while Claimant has arthritic disease in his knees "this does not keep him from work." (CX-7).

ORDER

1. Employer/Carrier shall pay to Claimant compensation for temporary partial disability from January 6, 2006 until May 12, 2006, at the rate of $133.16;

2. Employer/Carrier shall pay to Claimant compensation for temporary total disability benefits from August 9, 2006 until September 16, 2006 based on an average weekly wage of $1,089.40 per week;

3. Employer/Carrier shall pay for all Section 7 medical expenses incurred by Claimant prior to his treatment with Dr. Fairbanks which commenced in June of 2006;

4. As to Section 14(e) penalties, Employer/Carrier were advised of Claimant's alleged injury on January 6, 2006, but filed no notice of controversion until June 21, 2006, and are therefore liable for penalties under this section of the Act;

5. Employer shall pay interest on all of the above sums determined to be in arrears as of the date of service of this ORDER at a rate provided by in 28 U.S.C. §1961;

6. Claimant's counsel shall have twenty days from receipt of this ORDER in which to file a fully supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, Employer shall have ten (10) days from receipt of the fee petition in which to file a response;

7. All computations of benefits and other calculations which may be provided for in this ORDER are subject to verification and adjustment by the District Director.

So ORDERED this 16th day of June, 2009, at Covington, Louisiana.

A

C. RICHARD AVERY
Administrative Law Judge