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

Henry Crist,
Employee/Claimant,

vs.

Hillsborough County Sheriff's Office,
Employer,

Commercial Risk Management, Inc.,
Carrier/Servicing Agent.
_____/

OJCC Case No. 16-005054SLR,
16-008263EHL

Accident date: 1/20/2015

Judge: Stephen L. Rosen

FINAL ORDER

This Cause came on for hearing before the undersigned Judge of Compensation Claims on August 16, 2016. The claimant, Henry Crist, was represented by Christopher L. Petruccelli, Esq. The employer, Hillsborough County Sheriff's Office and the carrier, Commercial Risk Management, were represented by L. Gray Sanders, Esq. and Kristen Emerson, Esq. This case was heard through the video teleconferencing system with the parties in Tampa, Florida and the undersigned in St. Petersburg, Florida.

For purposes of this order, the employee will be referred to as "employee" or "claimant". The employer/carrier will be referred to as "employer" or "carrier" or "employer/carrier".

This Final Order resolves the petition for benefits filed March 1, 2016. During the course of the final hearing, the attorney for the claimant withdrew all other claims for repetitive trauma as well as the petition for benefits filed April 7, 2016.

All evidence was received and the record was closed on August 16, 2016.

Claim was made for the following:

1. Payment of temporary disability, either total or partial, from January 20, 2015 to the present

and continuing.

2. Authorization of a physician for treatment of the claimant's back.

3. Authorization of Weems Hollowell, D.O. to treat the claimant's back.

4. Determination of compensability of the accident of January 20, 2015.

5. Penalties, interest, reimbursement of costs, and reasonable attorney's fees at the expense of the employer/carrier.

The claim was defended on the following grounds:

1. No temporary disability benefits, either total or partial as there is no evidence of total disability beginning January 20, 2015.

2. Failure to give timely notice and report the accident of January 20, 2015.

3. There are no injuries suffered as related to the alleged accident of January 20, 2015.

4. Accident of January 20, 2015 is not the major contributing cause of the claimant's back problems.

5. Orthopedic referral and treatment is not reasonable or medically necessary as a result of an industrial accident.

6. Claimant's back condition is pre-existing and personal in nature.

7. Entire claim for alleged accident of January 20, 2015 is denied.

8. Claimant has violated F. S. 440.105 and all benefits should be denied pursuant to F. S. 440.09.

9. No entitlement to penalties, interest, reimbursement of costs of litigation, or reasonable attorney's fees at the expense of the employer/carrier.

The parties entered in the following stipulations:

1. I have jurisdiction of the parties and the subject matter of this claim.

2. Venue lies in Hillsborough County, Florida where the accident occurred.

3. On the date of the alleged accident there existed an employer/employee relationship with

workers' compensation coverage as noted.

4. There is timely notice of the final hearing given to the parties.

5. On the alleged date of accident there was not a managed care arrangement in place.

6. If indemnity benefits are due, the parties will administratively determine the correct average weekly wage and compensation rate including the value of all fringe benefits.

7. The petition for benefits was filed on March 1, 2016 and the employer filed notices of denial March 10, 2016 and March 1, 2016.

The following documents were offered into evidence:

Judge's Exhibits:

1. Petition for benefits filed March 1, 2016.

2. Response to petition for benefits filed March 10, 2016.

3. Order granting motion for consolidation of dates of accidents filed May 18, 2016.

4. Order granting employer/carrier's motion to amend responses filed June 2, 2016.

5. Outgoing correspondence from the undersigned regarding scheduling, filed August 11, 2016.

6. Claimant's trial memorandum (for argument only).

7. Employer/carrier's trial memorandum (for argument only).

8. Order denying separate appearances of the parties for trial filed August 15, 2016.

9. Uniform pretrial stipulation form filed and signed by the parties June 14, 2016. Through inadvertence, an order approving that stipulation form was not entered but at the final hearing on August 16, 2016, the parties agreed that I could accept the stipulations of the parties, sua sponte, and they are so accepted.

Claimant's Exhibits:

1. Motion in limine to strike the opinions of Dr. Maniscalco filed August 15, 2016. The motion is denied on the basis that there is no current law in place that would totally strike the opinions of the medical expert based on the fees charged for an independent medical examination. The

objection is overruled.

2. Deposition of Andrew Maser, D. O., Claimant's independent medical examiner, taken August 3, 2016, with exhibits.

3. Deposition of Donald Mitchell taken June 30, 2016, with any attachments.

4. Deposition of Stephen Mitchell taken June 30, 2016, with any attachments.

5. Medical records of Tony Belisle, M. D., physician authorized to evaluate the claimant after he officially reported his injury to the employer.

6. Medical records of Weems Hollowell, M. D., for the period of February 20, 2015 through March 2, 2016. This physician was not authorized in his reports will be limited to history only.

7. Employer/carrier's response to claimant's request to produce dated June 1, 2016.

Employer/Carrier's Exhibits:

1. Motion to admit medical records into evidence filed July 15, 2016.

2. Records from Valrico Brandon Medical Group. This entity was not authorized and these reports are admitted in evidence for history only.

3. Records of Guarov Malhotra, M. D. Claimant's personal physician. This physician was not authorized and his reports are admitted for history only.

4. Records of Natassa Quinn, D. O. and Brandon Area Primary Care. This facility or physician was not authorized and these records are admitted for history only.

5. Records from Oak Hill Hospital. This facility was not authorized and these records are admitted for history only.

6. Composite of 4 volumes of the claimant's personnel files from the employer.

7. Claimant's recorded statement.

8. Claimant's timecards for the period of January 20, 2013 through February 26, 2016.

9. Claimant's timecards for the period of January 18, 2015-March 4, 2016.

10. Deposition of Marlene J. Somogye taken June 14, 2016, with any attachments.

11. Deposition of Percival Brown taken June 30, 2016, with any attachments.

12. Deposition of Jack Maniscalco, M. D., Employer/carrier's independent medical examiner, taken August 2, 2016, with attachments of Dr. Maniscalco's records.

13. Response to claimant's motion in limine to strike the opinions of Dr. Maniscalco filed August 15, 2016.

Joint Exhibits:

1. Deposition of the claimant taken April 4, 2016, with attachments.

2. Deposition of Calista Capitano taken July 14, 2016, with attachments.

After reviewing all documentary evidence, hearing live testimony, and otherwise being fully apprised of the applicable case and statutory law, I find:

1. I have jurisdiction of the parties and the subject matter of this claim.

2. Venue lies in Tampa District, Florida

3. The documentary exhibits offered by the claimant are admitted into evidence and shall become a part of the record herein.

4. The claimant, Henry Crist, is 55 years old with a high school education. He has completed training in air conditioning repair, welding, automotive repair, and automotive body repair. He became employed with his employer in 1988 in the Fleet Maintenance Department. From the day he was hired until the date of his termination in 2016, the claimant repaired and serviced share department cars, motorcycles, trucks, and vans. This includes balancing and mounting tires and wheels, replacing engine components, changing oil, and break jobs. He can be required to lift up to 100 pounds along with some bending, twisting, pushing and pulling.

5. The claimant alleges that in the morning of January 20, 2015 he was required to replace a rear tire on the back of a motorcycle and that while he was balancing the tire on a jig, it fell off. The claimant reached out and grabbed the wheel and didn't feel any significant pain or discomfort

immediately following the incident. However, while he felt some discomfort in the evening, he did not have any significant pain until the next morning. He did not relate the back pain to the tire lifting incident, and returned to work on January 21, 2015 at his regular duties.

6. The back pain persisted and he called in sick on January 22, 2015. Although he stated this was because of his back pain, the claimant admits that he did not report this to the employer as the reason for being out of work.

7. On January 23, 2015 he returned to work and mentioned his back pain to a supervisor, Mr. Donnie Mitchell. Again, the claimant did not report a specific back injury on January 20, 2015 and left work early that day because of the persistent pain.

8. The claimant reported to his primary physician, Dr. Malholtra, on January 23, 2015. The record reflects that this physician did not ask the claimant what caused the lower back pain and the claimant does not recall telling this physician about the tire incident on January 20, 2015. Claimant received a shot of pain medication and muscle relaxers along with anti-inflammatory medication.

9. The claimant stayed out of work the entire week of January 26, 2015 and returned to his position on January 27, 2015. An x-ray was ordered of the low back. On January 30, 2015, the claimant was seen by Dr. Howell, Dr. Malholtra's assistant. He was told that the x-rays were normal. The claimant returned to work on February 2, 2015 and performed his regular job duties.

10. On February 5, 2015 the claimant's back pain was worse and he called in sick. He returned to Dr. Malhotra and an MRI of the low back was ordered. At this point, the claimant was referred to a neurosurgeon, Dr. Hollowell and the claimant remained off work because of lower back pain.

11. Claimant saw Dr. Hollowell on February 20, 2015. The undisputed testimony is that Dr. Hollowell questioned the claimant in depth about the cause of the back pain. Claimant thought his back pain was due to an abscess that he had suffered but the physician said that was not the cause. The claimant went backwards through his history and between the claimant and Dr. Hollowell, the physician suggested that the claimant's low back complaints were the result of the

workplace injury catching the falling tire. He sent the claimant for another MRI and physical therapy.

12. The evidence is undisputed that, for the first time, the claimant specifically reported the tire incident to his employer on February 23, 2015. The employer immediately sent the claimant for an authorized evaluation with Dr. Belisle at the employer's Occupational Clinic. This physician reviewed the MRI of February 17, 2015 and diagnosed a lumbar strain/sprain and disc displacement without myelopathy. Her reports are unclear with regard to major contributing cause but she did place restrictions on the claimant's activity to light-duty work and prescribed physical therapy and anti-inflammatory medications. He remained on the light duty status when he saw her again on March 3, 2015.

13. On March 6, 2015, the employer/carrier denied the claim for failure to give notice in accordance with the requirements of the Florida Workers' Compensation Law.

14. After the denial, the claimant continued to work for the employer and see his unauthorized personal physician, Dr. Hollowell. While Dr. Hollowell had placed some restrictions on the claimant's physical activity, the claimant's own testimony is that on or about April 2, 2015, he requested this physician to take all restrictions off him so that he could do his regular job with the employer.

15. The claimant worked for the employer doing his regular job and returned to Dr. Hollowell on November 5, 2015. The history of this visit indicates that the claimant was asymptomatic from the last time he saw Dr. Hollowell on April 2, 2015 until November 5, 2015.

16. Claimant stopped working for the employer on November 2, 2015. He is paid combined medical leave, "no pay", or short-term disability until he was terminated on March 3, 2016 for exceeding the allowed days of a "no pay" status and 180 days over an aggregate two-year period in other than full duty status.

17. The claimant underwent an independent medical examination with Dr. Maser on June 29, 2016. Dr. Maser was of the opinion that the claimant suffered an occupationally related

unresolved strain/sprain, lumbar disc herniation and lumbar radiculopathy. He recommended additional therapy, possibly epidural injections, and possible L4-5 laminectomy with discectomy. Further, he felt the claimant had not reached maximum medical improvement and would be restricted to 10-15 pounds lifting and avoid overhead reaching.

18. The employer/carrier retained Jack Maniscalco, M. D., who performed an independent medical examination on August 2, 2016. Dr. Maniscalco reviewed the records and MRI films, and he believed that the MRI findings were age-related and pre-existed the accident of January 20, 2015. Further, Dr. Maniscalco was of the opinion that, based on the claimant's history and mechanism of injury, the claimant should have known he was injured immediately after the incident with the tire if he suffered a herniated disc. Dr. Maniscalco opined that the accident January 20, 2015 was not the major contributing cause of the claimant's lumbar spine complaints and need for treatment.

19. With regard to the employer/carrier's defense of misrepresentation, I have had the opportunity to review depositions of coworkers, medical records, the claimant's own deposition, and evaluate the claimant in his testimony before me. Claimant answered questions posed to him in deposition and at the hearing as best he could. I do not find that the claimant attempted to avoid questions regarding his past medical conditions. I accept his testimony that he simply did not remember any medical records containing back complaints and while back problems may appear in medical records, I accept the claimant's testimony that he was never directly told that he had low back issues prior to January 20, 2015. While the claimant may be detail oriented in his work repairing automotive issues, I find that he is not a detail oriented person with his life in general. In his deposition, he did not recall how long he had been married or how long he had owned his home. In testimony before me regarding his past history, he did not dodge the questions but simply indicated under oath that he did not recall certain incidents. I do not find the claimant, in his presentation, to be so creative in order to weave a story of lies and deceit for the purpose of obtaining workers' compensation benefits. Therefore, the misrepresentation defense of the employer/carrier is **DENIED**.

20. With regard to late notice of injury, as noted above, the claimant had used significant time off

in the year prior to the accident date of January 20, 2015. Certainly, he could have reported the injury immediately had he wanted to preserve his time off from personal or non-work related to temporary disability from a Workers' Compensation injury. F. S. 440.185(1) requires an injured employee to advise the employer within 30 days after the date of the initial manifestation of the injury. Failure to so advise the employer shall bar a petition under this chapter unless (b) the cause of the injury could not be identified without a medical opinion and the employee advised the employer within 30 days after obtaining a medical opinion indicating that the injury arose out of and in the course of employment.

21. The evidence is undisputed that the claimant did not report the injury within 30 days of January 20, 2015. It is also clear that he suffered continuous pain and sought medical help but did not tell any of his physicians about the job injury on January 20, 2015. I accept the claimant's testimony that it was not until Dr. Hollowell questioned him in depth on mechanics regarding the onset of back pain after he told the claimant that it was not the result of an abscess to which the claimant had related his back pain after January 20, 2015. This conversation occurred on or about February 20, 2015 and on February 23, 2015, the claimant immediately reported the mechanics of the tire lifting incident to his employer who, in turn, sent the claimant for an authorized medical evaluation.

22. I find that, based on the totality of the evidence, the claimant's failure to report his injury within 30 days of January 20, 2015 should be excused because in the claimant's mind, he could not identify the cause of injury without the medical questioning of Dr. Hollowell and once he tied the back pain to the tire incident, he timely reported the nature of the injury to his employer within 30 days after February 20, 2015.

23. Therefore, I find that the claimant suffered injury by accident arising out of and in the course of his employment with the employer herein on January 20, 2015 and gave timely notice pursuant to the exception in F. S. 44.185(1)(b).

24. The employer/carrier shall provide the claimant with an authorized treating physician of the employer/carrier's choice.

25. While the only authorized physician, Dr. Belisle, restricted the claimant's work activity, I find that a causal relationship between the accident January 20, 2015 and these restrictions is not clearly proven by the claimant. Additionally, while I accept the claimant's testimony that Dr. Hollowell initially restricted his work activity, I further accept the claimant's testimony that he specifically asked this physician to take away any restrictions so that the claimant could continue his regular work duties with the employer. Greater weight or preponderance of the evidence with regard to the claimant's work restrictions do not come until his independent examination with Dr. Maser on June 29, 2016.

26. I accept the testimony of Dr. Maser over that of Dr. Maniscalco and find that the claimant suffered a low back injury while lifting a tire on January 20, 2015 and that as of Dr. Maser's report of June 29, 2016 the claimant's restrictions were such that I find he could not do his regular work for the employer. While I find that the claimant has not reached maximum medical improvement from that accident based on the testimony of Dr. Maser, I also find that there is no evidence that the claimant is temporarily and totally disabled as of June 29, 2016.

27. I find that the claimant has satisfied the eligibility requirements for temporary partial indemnity benefits as of June 29, 2016. I find that the work accident has kept him from fulfilling his regular physical duties as of that date. The employer/carrier shall furnish the claimant with temporary partial disability DWC 19 forms, which the claimant shall complete and return to the employer/carrier for processing. The parties have agreed that any offsets to which the employer/carrier is due as a result of other benefits paid to the claimant after June 29, 2016 will be handled administratively along with the calculation of the average weekly wage in compensation rate.

28. Penalties and interest are due on all past payments of indemnity compensation to which the claimant may be entitled for temporary partial disability compensation.

29. The attorney for the claimant, Christopher Petruccelli, Esq., has performed a valuable service for his client by establishing compensability and claimant's entitlement to medical and indemnity

benefits flowing from the establishment of compensability and is entitled to reimbursement of costs of litigation plus a reasonable attorney's fee at the expense of the employer/carrier.

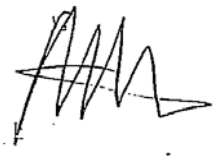
WHEREFORE, it is ordered that:

1. The employer/carrier shall provide the claimant with temporary partial disability DWC-19 forms for a period beginning June 29, 2016. Claimant shall return these forms. Employer/carrier shall be entitled to all offsets to which it may be entitled beginning June 29, 2016. Penalties and interest are due on all past payment of indemnity benefits from June 29, 2016.

2. The employer/carrier shall furnish the claimant with an authorized treating physician of its choice. Of course, the parties are free to agree on the choice of treating physician.

3. The employer/carrier shall pay to the attorney for the claimant, Christopher Petruccelli, Esq., reimbursement of costs of litigation and reasonable attorney's fees. Jurisdiction is reserved to determine the quantum of either, or both, if the parties are unable to agree.

DONE AND ORDERED this 18th day of August, 2016, in St. Petersburg, Pinellas County, Florida.



Stephen L. Rosen
Judge of Compensation Claims
Division of Administrative Hearings
Office of the Judges of Compensation Claims
St. Petersburg District Office
501 1st Avenue, North, Suite 300
St. Petersburg, Florida 33701
(727)893-2321
www.fljcc.org

COPIES FURNISHED:

Christopher L. Petruccelli
Chris@bichlerlaw.com
Leslie@bichlerlaw.com

L. Gray Sanders, Esquire
gsanders@barbaslaw.com
ycastro@barbaslaw.com