

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGES OF COMPENSATION CLAIMS
TAMPA DISTRICT OFFICE

Curtis R. Vetzal,)
Employee/Claimant,)
)
vs.)
)
Hillsborough County Fire and Rescue,)
Employer, and)
)
Johns Eastern Company, Inc.,)
Carrier/Service Agent.)
)

James Spears, Esq., Attorney for the)
Claimant)
Ann Robbins, Esq., Attorney for the)
Employer/Carrier)

OJCC Case No. 05-035308JEM

Accident date: 7/13/04

**ORDER ADDRESSING THE MERITS OF A PETITION, AND AMENDED PETITION,
FILED ON MARCH 20, 2009**

After due notice to the parties, a hearing on this claim was held in Tampa, Hillsborough County, Florida. The Parties were represented by Counsel as indicated hereinabove.

Claim was made for the following:

1. Determination that the claimant's date of accident is 4/16/01.
2. Compensation for Permanent Total Disability (PTD) from 2/11/09 to the present and continuing for the time and in the manner provided by law.

3. Payment of PTD supplemental benefits from 2/11/09, based upon the 4/16/01 date of accident.

4. Determination of the claimant's average weekly wage (AWW) and compensation rate to include all earnings in the 91 days prior to the 4/16/01 date of accident.

5. The employer/carrier's recoupment of an alleged overpayment asserted for the first time on 2/11/09 was improper.

6. Claimant does not agree with the employer/carrier's change of the date of accident and maintains that 4/16/01 is the correct date of accident.

7. The employer/carrier is precluded from challenging or changing the injury date pursuant to the pay and investigate provision of sec. 440.20(4) F.S.

8. The employer/carrier is precluded from challenging or changing the injury date by theories of waiver, estoppel, statute of limitations, and waiver.

9. There has been no overpayment as contemplated by sec. 440.15(12) F.S.

10. A reasonable attorney fee for the attorney for the Claimant.

11. Interest and penalties on all past due payments of compensation.

12. The cost of these proceedings.

The claim was defended on the following grounds:

1. PTD and PTD supplemental benefits are being paid appropriately and at the correct rate for a 7/13/04 date of accident.

2. Claimant's average weekly wage as of 7/13/04 was \$1,228.47 and the corresponding rate is the maximum rate of \$626.00.

3. An overpayment occurred based on the utilization of an incorrect date of accident and is being recouped at the rate of 10% per pay period per sec. 440.15(12).F.S.

4. An advance of \$1,000.00 was agreed to by the parties and was paid to the claimant.

5. The employer/carrier asserts that the date of accident for 7/13/04 is correct in this occupational exposure case because that is the date that disability began for claimant, and not the 4/16/01 date of exposure.

6. Claimant's accident and disease were accepted as compensable; however, the employer/carrier complied with FAC rules by correcting the date of accident.

7. Doctrines of estoppel, waiver, statute of limitations, and laches do not apply as the employer/carrier merely complied with the law and rule when correcting the date of accident.

8. There has been no prejudice to claimant by the correction as he was never entitled to benefits prior to his 7/13/04 date of disability.

9. The employer/carrier denies any liability to the claimant for the payment of penalties, interest, costs, or attorney's fees.

The parties entered into the following stipulations:

1. The Judge of Compensation Claims has jurisdiction of the parties and the subject matter of this claim.

2. Venue properly lies in Hillsborough County, Florida.

3. Notice of hearing and notice of injury were properly given as required by the Workers' Compensation Law.

4. On 7/13/04 the Claimant was employed by the Employer herein at an average weekly wage of \$1,228.47 per week resulting in the maximum compensation rate. He sustained an injury by accident arising out of and in the course of his employment. The parties agree that the claimant was employed by the employer herein in 4/16/01 and the parties stipulate that if said date is determined to be claimant's date of accident his average weekly wage was sufficient to qualify him to receive compensation based upon the maximum rate in 2001.

5. The parties agree that the claimant is entitled to benefits for permanent total disability.

At the trial of this cause, the following documents were admitted into evidence:

Judge's Exhibits:

1. Petition for Benefits filed 3/20/09.
2. Amended Petition for benefits filed 3/20/09.
3. Pretrial Stipulations filed 7/17/09.
4. Claimant's Amendment to Pretrial Stipulations, filed 8/25/09.
5. Employer/Carrier's Amendment to Pretrial Stipulations, filed 9/10/09.
6. Employer/Carrier's trial memorandum.
7. Claimant's trial memorandum.

Claimant's Exhibits:

1. Petition for benefits filed 11/22/05 pertaining to a 2001 date of accident.
2. Employer/Carrier response to 11/22/05 petition.
3. Claimant's notice of voluntary dismissal.
4. Petition for benefits filed 8/17/06.
5. Employer/Carrier response.
6. Claimant's notice of voluntary dismissal filed 11/6/06.
7. DWC-4 filed 1/2/08.
8. DWC-4 filed 1/17/08.
9. DWC-4 filed 2/11/09.
10. E/C response to 3/20/09 petition for benefits.
11. DWC-4 filed 1/3/07

After due consideration of this matter and after having the opportunity to review the documentary matters and having had the opportunity to observe the candor and demeanor of the witnesses who did appear and give live testimony before me, and having endeavored to resolve all conflicts of fact in the evidence presented herein, I do make the following findings of fact:

1. I have jurisdiction of the facts and the subject matter of this claim.
2. The stipulations as entered into by and between the parties are hereby adopted as

findings of fact and incorporated herein by reference.

3. The claimant is a 56-year-old male. He worked for 27 years as a firefighter for Hillsborough County. In 2001 he was directed to undergo testing for hepatitis. He said that he was told that if he didn't hear anything it meant he had tested negative. He never heard anything about the results until 2004 when he was notified by the hospital that they had somehow mislaid his test results and he had testified positive for hepatitis. The claimant immediately reported the results to the county. Approximately 3 or 4 months after receiving the notice that he did have hepatitis he began Interferon treatment; shortly thereafter he went off work.

4. On November 22, 2005 claimant, through counsel, filed a petition for benefits under the workers compensation laws of the State of Florida. Specifically, claimant sought the payment of benefits for permanent total disability for injuries arising from a 4/16/01 date of accident. On November 29, 2005 the employer/carrier filed its response to the petition advising that the employer/carrier voluntarily accepted the claimant as permanently totally disabled on July 4, 2005 and that he was being paid benefits based upon the maximum compensate rate [for 2001]. Claimant then voluntarily dismissed his petition.

5. Apparently there was a disruption in the payment of claimant's benefits in 2006 and claimant, therefore filed yet another petition, alleging a 2001 date of accident, seeking permanent total disability benefits. The e/c immediately responded indicating that the claimant had inadvertently fallen off their auto pay system; benefits were been reinstated and back benefits, along with penalties and interest, were paid. Once again the claimant voluntarily withdrew his petition for benefits.

6. On February 11, 2009 the e/c prepared and filed a Notice of Action/Change, DWC-4, in which they changed the claimant's date of accident to 7/13/04 from 4/16/01. As a result of the change in the date of accident the e/c determined that they had overpaid benefits to the claimant and informed him, via the DWC-4, that they would be recouping a \$5,924.64 overpayment by reducing his benefits 20% per period. The overpayment arose due to the difference in the PTD supplemental benefits calculated at 5% per year from the 2001 date of accident rather than the 3% per year calculated for a 2004 date of accident.

7. Claimant argues that the employer/carrier should be estopped from altering the date of accident because they had accepted him as PTD with the 2001 date of accident and always paid benefits under that date of accident. He alleges that he relied, to his detriment, on the e/c's acceptance of the 2001 date of accident when he withdrew his prior petitions for benefits. Claimant testified that had he known he would not receive benefits under the 2001 date of accident he would pursue his legal option of proceeding to a hearing on the prior petitions. Claimant testified that when he was accepted as permanently totally disabled he understood that he would receive PTD benefits for life and would enjoy 5% yearly increases in his PTD supplemental benefit. He argues that he relied to his detriment on the actions of the employer/carrier.

8. It is well settled in occupational disease cases that the date of accident is determined by the date of disability, and disability is defined as the date the claimant became incapable of performing work in the last occupation in which he was exposed to the hazards of the disease. Accordingly, the detection of an occupational disease does not necessarily coincide with the date of disablement from the disease." Michaels v. Orange County Fire/Rescue, 819 So. 2d 158.

9. Clearly there are significant ramifications to the alteration of the claimant's injury date. Instead of lifetime permanent total disability benefit eligibility the claimant's PTD benefits, under the law in effect in 2004, would cease at age 75. Also, as noted above, PTD supplemental benefits are significantly lower under the 2004 date of accident than they would have been under a 2001 date of accident. Nonetheless, claimant's date of accident must be established pursuant to law. The fact that he was mistaken in his understanding of the law and the fact that he relied upon the belief that he was being accepted permanently totally disabled with a 2001 date of accident does not alter the fact that the claimant was not disabled until 2004. In claimant's case the date of diagnosis does not coincide with the date of disablement. The fact that the claimant chose to forgo concluding his earlier litigation, similarly, does not alter the fact that the law would have demanded a finding that the claimant's date of accident was the date he became disabled. "This court has interpreted "disability" as occurring "only when [a claimant] becomes actually incapacitated, partially or totally, from performing his employment.'" Jacksonville Sheriff's Office v. Shacklett, 34 Fla. L. Weekly D 1519 (Fla App 1DCA July 29, 2009). I find that the claimant's date of accident is 7/13/04, his date of disablement.

10. If anything the claimant's reliance on the acceptance of the 2001 date of accident was beneficial as he received benefits that exceeded those to which he was otherwise entitled. It is found, however, that the employer/carrier by their actions is barred from recouping the monies they overpaid to claimant. If detrimental reliance can be found anywhere it is in claimant's reliance that the monies paid to him by the employer/carrier were rightfully his. His family's finances were

budgeted according to the income he was receiving, including his PTD and PTD supplemental benefits. He made expenditure and incurred obligations based upon his understanding of his expected income. He had no reason to believe that there would be any diminution of his income by the employer/carrier. It was only through the employer/carrier's initial acceptance of a 4/16/01 accident date that his benefits were calculated as they were. The employer/carrier knew when the claimant first went off work and should have known that was his date of disability. They, not the claimant, should suffer the consequences of their failure to properly establish the date of accident. It is enough that the claimant will have his future benefits reduced, he should not have them reduced further to correct the mistake of the employer/carrier. It is found that by their very actions prior to 2/11/09 the employer/carrier should be estopped from recouping their overpayment of benefits. It is found that by their failure to correct the date of accident at an earlier time they also waived their right to recoup the overpayment of benefits.

11. I find that Counsel for the Claimant has performed a valuable service and is entitled to a reasonable fee at the expense of the employer/carrier. Jurisdiction is reserved to determine the quantum of the fee in a subsequent proceeding.

IT IS, THEREFORE, ORDERED that the Employer/Carrier do:

1. Cease the reduction of benefits they initiated to recoup benefits.
2. Pay the reasonable taxable costs of these proceedings.
3. Pay to counsel for the claimant a reasonable attorney fee.

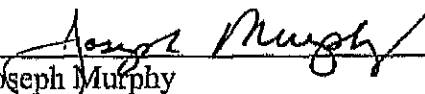
4. Jurisdiction is reserved to determine the quantum of fees and costs in a separate proceeding in the event the parties cannot so agree.
5. The claim to establish 4/16/01 as the claimant's date of accident, with the payment of PTD supplemental benefits based upon said date, is denied and dismissed.
6. The claim to determine the claimant's AWW and compensation rate to include all earnings in the 91 days prior to the 4/6/01 date of accident is denied and dismissed.

The parties are herewith notified that the court file relating to the instant claim will be destroyed six (6) months from the date this order becomes final, if not appealed, or six (6) months after the date of mandate or other order of final disposition if appeal is taken

A party desirous of retaining any portion of the closed file must so notify this office not less than 30 days prior to the destruction date.

DONE AND ORDERED in chambers in Tampa, Hillsborough County, Florida.





Joseph Murphy
Judge of Compensation Claims
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THIS IS TO CERTIFY that the foregoing MERIT ORDER was entered and that a copy was sent by U.S. Mail this 30th day of September 2009 to each of the following:


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Wanda Keenan, Deputy Clerk