

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGE OF COMPENSATIONS CLAIMS
MIAMI DISTRICT**

E. David Plescow,

Employee/Claimant,

OJCC No.: 00-005256SMS

vs.

JUDGE: Sylvia Medina-Shore

City of Miami Beach City Hall/Corvel,

D/A: 3/1/2000

Employer/Carrier.

COMPENSATION ORDER

THIS CAUSE came before the undersigned Judge of Compensation Claims for a final hearing on 6/22/15 regarding PFB filed 11/24/14. The claimant is represented by Paolo Longo, Esquire. The employer/carrier (E/C) are represented by Luis Estrada, Esquire.

Documentary Exhibits:

JCC-

1. Pre-trial stipulation filed 3/31/15 (DE#96) under the 8/16/1996 D/A (96-017542SMS).
2. Mediation settlement agreement entered 3/5/15 (DE#95) under the 8/16/1996 D/A (96-017542SMS).

Claimant-

1. Deposition of Catherine Reid filed 6/17/15 (DE#110) under the 8/16/1996 D/A (96-017542SMS).
2. Deposition of Dr. Louis Fernandez filed 11/24/14 (DE#74) under the 8/16/1996 D/A (96-017542SMS).
3. Deposition of Dr. Leonard Pianko filed 6/15/15 (DE#108) under the 8/16/1996

D/A (96-017542SMS).

4. Deposition of Magda Perez (adjuster) filed 6/15/15 (DE#107) under the 8/16/1996

D/A (96-017542SMS).

5. Trial Memorandum for I.D. purposes filed 6/18/15 (DE#111) under the 8/16/1996

D/A (96-017542SMS).

E/C-

1. Pre-trial stipulation filed 4/2/14 (DE#26) under the 8/16/1996 D/A (96-017542SMS).

2. PFB filed 11/22/13 (DE#13) and supporting medical records (DE#14) under the 8/16/1996 D/A (96-017542SMS).

3. PFB filed 11/24/14(DE#42) and supporting medical records (DE#43) under the 3/1/2000 D/A (00-005256SMS).

4. Deposition of Dr. Perloff filed 11/24/14(DE#73) under the 8/16/1996 D/A (96-017542SMS).

5. E/C's Trial Memorandum for I.D. purposes with case (DE#113 and 114) under the 8/16/1996 D/A (96-017542SMS).

Claims:

1. Interest and penalties on permanent impairment benefits.
2. Attorney's fees and costs.

Defenses:

1. Claim for penalties and interest not specific and none due or owing.
2. Attorney's fees and costs not due or owing.

Findings of Facts and Conclusions of Law:

1. At the inception 6/22/15 hearing, claimant made an ore tenus motion to amend date of accident 3/21/2000 (OJCC No.: 14-022518SMS). Specifically, the parties stipulate claimant did not suffer an accident on 3/21/2000 and that PFBs utilizing same date of accident were filed in error. The parties stipulate the correct date of accident is 3/1/2000 (OJCC No.: 00-005256). As E/C does not object to claimant's ore tenus motion, I grant same. The docket for date of accident 3/21/00 (14-022518SMS) shall be moved into date of accident 3/1/2000 (OJCC No.: 00-005256). The 3/21/2000 date of accident (14-022518SMS) shall be deleted from the OJCC computer system.

2. To complicate matters further, while there are two distinct dates of accidents 8/16/96 (96-017542SMS) and 3/1/2000 (00-005256) the parties and attorneys of record have utilized the consolidated OJCC No.: 96-017542SMS (D/A: 8/16/96) in most of their filings. Nonetheless, the claimed penalties and interest stem from impairment income benefits (IIBs) related to the 3/1/2000 date of accident. To that extent, the parties presented the documentary exhibits listed herein, relevant case law, and the attorneys made their respective closing arguments. No live testimony was offered at the 6/22/15 hearing.

3. David Plescow was employed as a City of Miami Beach police officer. He began his employment with the City on September 25, 1986 and took a pre-employment physical which did not reveal any evidence of heart disease or hypertension. Officer Plescow was diagnosed with hypertension after his first cardiac event on August 16, 1996. That claim was accepted as compensable and he has treated for that condition ever since. He was placed at MMI for his hypertension By Dr. Scheib on 4/1/98 and assigned a 10% impairment rating. IIBs were paid on 11/23/1998.

4. Officer Plescow's condition worsened and he was diagnosed with coronary artery disease during a March 1, 2000 stay in the hospital. Officer Plescow ultimately underwent a cardiac catheterization which revealed triple vessel coronary artery disease for which he had four vessel coronary artery bypass graft surgery. That treatment for the 3/1/2000 accident was authorized but administered by the adjuster under the 1996 accident. Claimant treated with Dr. Scheib from 8/16/96 to 5/15/06. Following Dr. Scheib's retirement his care was transferred to Dr. Albert Ing, Mr. Plescow treated with Dr. Ing from 5/16/06 to 11/1/12 at which time Dr. Ing retired and his care was then transferred to Dr. Luis Fernandez. Mr. Plescow was placed at MMI, this time by Dr. Ing for his coronary artery disease on 6/12/06 and assigned an impairment rating of 55%-95%. A DWC-25 form was filled out and sent to the Employer/Servicing Agent on 6/12/06. This was the Employer/Servicing Agent's first notice of the impairment rating for Mr. Plescow's coronary artery disease following his bypass surgery. There were 16 DWC-25 forms submitted to the Employer/Servicing Agent between 6/12/06 and 10/20/2011 assigning a Class IV impairment rating of between 55%-95%. These benefits were not paid.

5. Dr. Fernandez's deposition was taken at which time he assigned a specific impairment rating of 85%. IIBs based on this impairment rating were also not paid. The Employer/Servicing agent retained Dr. Perloff as their IME who assigned an impairment rating of 22%. Likewise, IIBs on this impairment rating was not paid either. Due to a conflict in medical opinions, Dr. Pianko was appointed as an EMA. The EMA, Dr. Pianko assigned an impairment rating of 55% with a date of MMI of 3/21/2002.

6. Dr. Pianko's EMA report was provided to the parties in this matter on February 11, 2015. However, Employer/Carrier did not issue payment to Claimant for impairment benefits at Dr. Pianko's assigned MMI/PIR. The parties attended Mediation on March 5, 2015

wherein Employer/Carrier agreed to pay the impairment benefits at the 55% PIR and stipulated to the MMI date of 3/21/02, but E/C refused to pay any penalties, interest, or attorney's fees/costs. Employer/Servicing Agent issued a check to Claimant on March 6, 2015 for \$541.00 for the periods of 2/12/15 through 2/25/2015. This check was received twenty- three (23) days after the Employer/Carrier had notice of the MMI/PIR rating assigned by EMA Dr. Pianko.

Entitlement to IIBs-

7. Based on either date of accident (8/16/1996 and 3/1/2000), E/C argue that IIBs are not payable by operation of F.S. 440.15(3)(c). F.S. 440.15(3)(c) dealing with duration of temporary, impairment and supplemental income benefits-indicates "the employee's eligibility for temporary benefits, impairment income benefits, and supplemental benefits terminates on the expiration of 401 weeks after the date of injury." Since more than 401 weeks have passed since the claimant's accident, E/C point out that no IIBs are due and owing. Further, E/C argue claimant is bound to the 6/26/2006 MMI date per the pre-trial stipulation of 4/2/14.

8. While the undersigned is cognizant of F.S. 440.15(3)(c), I find it inapplicable to the issues in the instant case. Specifically, entitlement to IIBs is not the issue at hand. The parties agreed to payment of IIBs in the 3/3/15 mediation. Therefore, I find E/C cannot now take the position that penalties and interests are not due based on claimant's non-entitlement to IIBs. Further, F.S. 440.15(3)(c) deals with payment of temporary, impairment and supplemental benefits not penalties and interest.

Payment Due Date on Impairment Income Benefits-

9. "Once the employee has reached the date of maximum medical improvement, impairment benefits are due and payable within **20** days after the carrier has knowledge of the impairment." Fla. Stat. § 440.15(3)(a) (2000). While the parties stipulated to Dr. Pianko's

3/21/2002 MMI date, there is no evidence E/C was made aware of same MMI date in 2002.

10. Therefore, I find the proper query is on what date did E/C first became aware claimant reached MMI related to the 3/1/2000 accident. Based on the evidence, I find E/C was first made aware of Claimant's MMI/PIR on or about **6/12/06** when they received the DWC-25 form assigning a 55%-95% impairment rating from Dr. Ing.

11. E/C argues that Dr. Ing's 55%-95% permanent impairment range did not place them on notice of "the impairment" or a specific permanent impairment rating. See, F.S. 440.15(3)(a)(2000). Even if E/C wanted to pay the IIBs per Dr. Ing's 2006 MMI/PIR, they would not know the specific PIR to pay out.

12. I reject E/C's arguments as delineated above. The law provides IIBs are due when E/C has knowledge of the impairment. It is the statutory duty of E/C, not the injured worker, to secure an MMI and PIR and to timely place appropriate IIBs in the hands of the injured workers. *Dollar Gen. v. McCoy*, 927 So. 2d 169, 170 (Fla. 1st DCA 2006). In fact, F.S. 440.15(4)(2000) mandates the treating doctor to evaluate and assigned an PIR upon reaching MMI or 6 weeks before the expiration of temporary benefits. E/C (not the injured worker) has the burden of informing the doctor of the requirements of F.S. 440.15(4)(2000) and securing an PIR.

13. Case law has made it very clear that the Workers' Compensation Act is designed to the self-executing and the Act in its day-to-day operation is intended to be-beyond all else-quintessentially an employer/carrier monitored system. Permanent impairment benefits are designed to result in an automatic payment of benefits with no participation from the claimant. See, *Gauthier v. Florida International University*, 38 So.3d. 221, 224-225 (1st DCA 2010). See also, *Wood v. McTyre Trucking Co., Inc.*, 526 So. 2d 739 (Fla. 1st DCA 1988) where the Court stated ". . . An employer is to offer or furnish benefits when the employer knows, or reasonable

should know from facts properly and diligently investigated, that such benefits are due." Here, the Employer/Carrier was made aware Mr. Plescow had a Class IV PIR rating in 2006. Yet, E/C failed to investigate or pay out the IIBs.

14. To that extent, E/C had at its disposal several methods to secure the necessary PIR information yet, did not do so. E/C could have clarified the PIR with Dr. Schieb or Dr. Ing. However, E/C never contacted Dr. Schieb or Dr. Ing to inquire as to the exact rating. The Employer/Servicing Agent was put on notice no less than 16 times from 2006 to 2011 that Mr. Plescow's impairment rating was between 55%-95% for his coronary artery disease and they never made one inquiry as to the actual specific rating. (See deposition of Magda Perez pages 18-29).

15. E/C could have sought a specific PIR from another physician, if unsuccessful with Drs. Schieb or Ing. Also, E/C could have begun paying IIBs while investigating and securing a specific PIR or just paid out IIBs upon an accepted PIR between 55% and 95% and litigate any claimed and unpaid IIBs. E/C took absolutely no course of action. Rather, E/C did not pay any IIBs although having knowledge claimant sustained a PIR.

16. The Employer/Carrier further argues that when a statute is clear and unambiguous such courts must not look behind the plain language of the statute to construe the statutory provision unless this leads to an unreasonable result or a result which is contrary to the legislative intent, See *State v. Burns*, 875 So.2d 408 (Fla. 2004). I find E/C's rationale based on the facts in the present case leads to an unreasonable result and is contrary to the legislative intent of Chapter 440 which is to timely place appropriate benefits in the hands of injured workers. Moreover, I find to do otherwise permits the Employer/Servicing Agent to shirk its responsibilities and obligations. Accordingly, I find E/C was first placed on notice of claimant

attaining MMI and a PIR on 6/12/06. Therefore, I find IIBs became due 20 days from 6/12/06 or on 7/4/06.

Claim for Penalties on IIBs-

17. "Section 440.20(6), *Florida Statutes*, provides that, if the E/SA fails to make payment of impairment benefits within seven days after those benefits become due, the E/SA shall pay penalties unless such nonpayment results from conditions over which the E/SA had no control.

18. E/C argue they first became aware of Dr. Pianko's PIR on 2/ 11/15 and the parties stipulated within the 3/5/15 mediation agreement that IIBs would be paid based on same PIR. While the parties stipulated that IIBs would be paid pursuant to Dr. Pianko's 55% PIR rating, the mediation settlement agreement reveals the claim for penalties and interest was left unresolved.

19. The Employer/Carrier's position is that they timely paid the income impairment benefits and therefore, they do not owe any monies to the Claimant for penalties and interest. This position is based on 440.15(3)(a)(1) which states that "Once the employee has reached the date of maximum medical improvement, impairment benefits are due and payable within 20 days after the carrier has knowledge of the impairment". They base this logic on the fact that their first notice of an exact rating was when they received the opinion from Dr. Pianko on 2/11/15. However, for the reasons already stated herein, I reject E/C's position that 2/11/15 was the first notice of claimant sustaining a permanent impairment rating.

20. Furthermore, E/C argue their nonpayment of IIBs resulted from conditions over which they had no control over. I reject this argument also. Clearly, E/C at the very least could have availed themselves of "the pay and investigate" provision and did not do so. See, F.S.

440.20(4). For purposes of entitlement to penalties, E/C was required to pay the IIBs beginning 7/11/2006. E/C began paying IIBs in the present case nine years later, in March 2015.

Therefore, as the IIBs were untimely paid, I find statutory penalties are due on the full amount of IIBs based on the 55% PIR.

Claim for Interest on IIBs-

21. "In addition to any other penalties provided by this chapter for late payment, if any installment of compensation is not paid when it becomes due, the employer, carrier, or servicing agent shall pay interest thereon at the rate of 12 percent per year from the date the installment becomes due until it is paid, whether such installment is payable without an order or under the terms of an order. The interest payment shall be the greater of the amount of interest due or \$5." Fla. Stat. § 440.20(8).

22. As the IIBs were due on 7/4/2006 and E/C's first partial payment was on 3/6/15, I find E/C owes statutory interest from 7/4/2006 to 3/6/15 and thereafter until the date the IIBs are paid. See, *Greenberg v. Cardiology Surgical Assoc.*, 855 So.2d 234 (Fla. 1st DCA 2003).

23. I find E/C failed to pay the impairment benefits within twenty (20) days of having knowledge of the MMI and PIR as required by F.S. 440.15(3)(a). They knew, since at least 2006, that Mr. Plescow had a Class IV rating of between 55%-95% impairment rating and never made one inquiry as to the exact rating. Although the statute is clear on this requirement, the Employer/Carrier failed to provide a reason for its failure to timely pay the IIBs benefits due. Accordingly, I find statutory penalties and interest are due. *Turner v. Miami-Dade County Sch. Bd.*, 967 So. 2d 315 (Fla. Dist. Ct. App. 1st Dist. 2007); and *Mieses v. Applebee's & Chubb Group of Ins. Co.*, 14 So. 3d 1228 (Fla. Dist. Ct. App. 1st Dist. 2009).

WHEREFORE, IT IS ORDERED:

1. The docket for date of accident 3/21/00 (14-022518SMS) shall be moved into date of accident 3/1/2000 (OJCC No.: 00-005256). The 3/21/2000 date of accident (14-022518SMS) shall be deleted from the OJCC computer system.
2. E/C shall pay claimant statutory penalties on IIBs based on 55% PIR.
3. E/C shall pay claimant statutory interest on IIBs based on 55% PIR until such time as the IIBs are paid.

**DONE AND E-MAILED TO THE ATTORNEYS OF RECORD AND THE
CARRIER, MAILED VIA US MAIL TO THE EMPLOYER AND INJURED WORKER
ON THIS 6TH DAY OF JULY OF 2015.**



Sylvia Medina-Shore
Judge of Compensation Claims

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