

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

Andrew S. Davis,
Employee/Claimant,

OJCC Case No. 14-018100RJH

vs.

Accident date: 4/7/2010

City of St. Augustine/Preferred
Government Claims Solutions,
Employer/Carrier/Service Agent.

Judge: Ralph J. Humphries

/

FINAL COMPENSATION ORDER

This Cause came on for a merits' hearing before the undersigned Judge of Compensation Claims on **February 3, 2015** in Jacksonville, Duval County, Florida. The subject matter of this hearing was a petition for benefits filed on August 7, 2014. A mediation conference on the petition was held on October 24, 2014. The claimant, **Andrew Davis**, was present and represented by L. Stuart Griggs, Esquire. The employer/carrier, **City of St. Augustine/Preferred Government Claims Solutions**, hereinafter referred to as the "Employer" or as "E/C" was represented by George W. Boring, III, Esquire. Live testimony was received from the claimant. Additional testimony was received from Gil Spruance and John Roberts who are vocational experts testifying on behalf of the claimant and the employer/carrier respectively.

The following stipulations have been reached between the parties:

1. The court has jurisdiction of the parties;
2. Venue properly lies in Duval County, Florida;
3. The date of accident is April 7, 2010;
4. There was an employer/employee relationship at the time of the accident;
5. Workers' compensation insurance coverage was in effect on the date of accident;
6. The accident or occupational disease was accepted as compensable and authorized care and treatment has been provided to the claimant;
7. Timely notice of the accident, injury, or occupational disease was given by the claimant on the date of accident or was not at issue;

8. Timely notice of the final hearing has been given;
9. Dr. Kambach and Dr. Weiss, among others, are or were authorized providers, who provided medical treatment to the claimant;
10. The AWW was not in issue; and
11. The pay ledger may be stipulated into evidence.

The substantive claims for determination at the current merits' hearing are the following:

1. Permanent total disability benefits from March 16, 2011 and continuing; and
2. Penalties, interest, costs, and attorney's fees.

The defenses raised by the E/C were the following:

1. The claimant is not permanently and totally disabled per statute;
2. Claimant can perform at least sedentary work within a 50 mile radius of his residence;
3. No medical evidence of permanent total disability;
4. Penalties, interest, costs, and attorney's fees are not due or owing.

The following documents were admitted into evidence at the current hearing:

Judge's Exhibits:

1. Petition for Benefits filed with DOAH on August 7, 2014;
2. Response to Petition for Benefits, filed with DOAH on August 20, 2014;
3. Second Amended Pretrial Questionnaire completed by the parties and filed with DOAH December 22, 2014;
4. Employer/Carrier's Supplemental Pretrial Stipulation filed December 23, 2014
5. Claimant's Trial Memorandum admitted for purposes of argument only and not as evidence, filed with DOAH on January 28, 2015;
6. Employer/Carrier's Trial Memorandum admitted for purposes of argument only and not as evidence, filed with DOAH on January 28, 2015.

Claimant's Exhibit:

1. Job search records.

Employer's Exhibits:

1. Deposition of claimant;
2. Pay Ledger;
3. DWC 12 filed August 20, 2014;
4. John Roberts report dated November 19, 2014;
5. John Roberts report dated January 29, 2015 (Claimant's objections to any opinions expressed by Dr. Weiss contained within the report are excluded as hearsay and on due process grounds);
6. Bill England Report and Job Opening Letters.

Joint exhibits:

1. Deposition of Dr. Weiss with attachments;
2. Deposition of Dr. Kambach with attachments.

In my determination herein I have attempted to distill all the testimony and salient facts together with the findings and conclusions necessary to the resolution of this matter. I have not necessarily attempted to summarize the entirety of the claimant's testimony or the testimony of any live or deposition witness, nor have I attempted to state nonessential facts.

Because I have not done so should not be construed that I have failed to consider all of the evidence.

Based upon the evidence, I make the following findings of fact and conclusions of law:

1. I have jurisdiction of the parties and the subject matter.
2. The stipulations of the parties are accepted and adopted by me as findings of fact.
3. The evidence closed in this matter on February 3, 2015 after which closing arguments were made by the parties.
4. The claimant suffered a compensable accident and injuries on April 7, 2010. The

compensable injuries include the claimant's low back.

5. At the time of the accident, the claimant was working as a police officer when he was injured while taking a person into custody, injuring his back. He reported the accident and received authorized treatment from Dr. Brandon Kambach and Dr. Howard Weiss among others.
6. **Andrew Davis testimony:** The claimant is 39 years old and a high school graduate. He attended one semester of college. Since that time, he has worked primarily as a mechanic initially working with tires and later adding various ASE certifications. He then attended police Academy following which he was hired by the city of St. Augustine where he worked as a patrol officer for 3 years before his injury. He has not worked since his accident.
7. The claimant was injured while assisting another officer in carrying a belligerent individual to a patrol car. While carrying him down steps, the claimant missed a step and hurt his back. He later reported the injury and was sent for treatment at the Townsend Clinic. He was later referred for treatment with Dr. Kambach who ultimately performed surgery in June 2010. While that surgery provided some relief initially, the claimant testified he never really got better and continued to have low back pain and pain in his leg extending down into his foot. He was released by Dr. Campbell docket maximum medical improvement in March 2011. He requires the use of a lumbar corset. His restrictions require that he stand and sit as necessary and lift less than 10 pounds. He is to avoid bending, stooping and twisting.
8. From there, his care was transferred to Dr. Howard Weiss who has remained his primary physician since that time. His treatment with Dr. Weiss included radiofrequency ablations, epidural injections, facet blocks and prescription medications to include Percocet and neurontin. He was also provided a TENS unit which he continues to use to this date. The claimant attended the trial wearing a lumbar corset and testified he wears it most of the time. Dr. Weiss released the claimant at maximum medical improvement in November 2011.
9. Davis applied for vocational rehabilitation through the State of Florida and was accepted into a retraining program beginning in the fall of 2012. He was attending organizational management classes at St. Johns River College and completed his first semester receiving A's in his classes. Unfortunately, however, by the end of the semester his pain was getting worse. The radiofrequency ablation that had provided some measure of the

relief was wearing off. Repeat ablations did not significantly help. Although he attempted to return to classes in January 2013, his pain was such that he could not sit in class. He described the pain as "horrible." As a result, he withdrew from the classes he had to attend on campus and was later dropped by the school from the other online classes.

10. In 2013, Davis returned to Dr. Weiss who, because of his increasing pain complaints as well as pain in his right leg, ordered an MRI. That test revealed a new herniated disc resulting in his return to see Dr. Kambach. Dr. Kambach recommended an additional surgery but the claimant decided against having another surgery. He tried additional injections in September 2013 but without any significant relief.
11. The claimant did not return to classes in the fall of 2013. He missed registration and reports he was in too much pain to attend class. As result, he began to look for work including "anything and everything" that was possibly doable. Most of his job search was online since that was the employers' preferences. He searched using various job websites. While he eliminated jobs the knew he was physically unable to perform, he applied for as many jobs as he could, even jobs for which he was not theoretically qualified. Placed in evidence before me are thousands of pages associated with his job search with the number of employers contacted in the hundreds.
12. He had some interviews as a result of his efforts and also some callbacks but was not offered any jobs. In addition to his own efforts, he received job leads from Bill England and has contacted 90-95% of the employers provided him by England. He did not apply with some because those jobs had already been deleted by the employer once he got the leads.
13. Throughout the course of his testimony, the claimant would sit for 20-30 minutes and then need to stand for 5 minutes or so. He testified that was his usual practice. He also lies down when possible or will sit in his recliner it home with his feet up and an ice pack on his back. He takes Percocet daily although he reports side effects to include fatigue, loss of focus and confusion. He takes neurontin but only at night because of confusion it causes. He declines to drive very much because of his medications. A friend drove him to the hearing before me.
14. Davis testified he has tried his best to secure employment but is concerned he could not maintain a job even if offered. He is unable to sit for lengthy periods of time and there are many days he will not get out of bed for half of the day due to pain.

15. During cross-examination, claimant's job search was examined in some detail. He explained the reasons for making application with some employers for which he did not appear qualified or which appear to be outside his restrictions. It was his position Bill England sent him a number of jobs for which he was not qualified or jobs outside his restrictions. He does not think he could work at Tire Kingdom or other automotive positions due to his restrictions. Claimant admits he applied for jobs that might be considered "longshots" but was desperate for work and was hopeful his applications might lead to some type of job offer.
16. I found the claimant's testimony to be highly credible. His answers were directly responsive to the questions asked. He did not exaggerate and I accept his testimony as true in all respects.
17. **Gil Spruance testimony:** Mr. Spruance, along with John Roberts, are vocational experts well known to me and known to be highly qualified as experts in the field of vocational rehabilitation. Spruance met and evaluated the claimant on December 19, 2014 in a meeting lasting approximately one and a half hours. He reviewed the deposition of Dr. Weiss as well as the job search records maintained by the claimant. His ultimate opinion is that the claimant is unable to engage in regular, routine competitive employment. He described the claimant as being well-educated with a great work history in skilled employment. It is his physical limitations that are keeping the claimant from being employed. He describes those limitations as significant. The claimant is unable to sit or walk or stand without limitation. It is his opinion, based upon the restrictions as set forth in the deposition of Dr. Weiss that the claimant would be unable to find gainful employment. He is concerned about the significant pain level suffered by the claimant, a level verified in medical records and the testimony of Dr. Wwiss. Dr. Weiss testified the claimant's condition has deteriorated. Dr. Weiss also testified the claimant should not either drive or work within 8 hours of taking Percocet. It is noted that the claimant takes Percocet approximately every 5 hours.
18. Spruance also testified the claimant has, in effect, attempted to perform sedentary work by returning to school. In his opinion, no job offers the flexibility of attending college courses. The claimant would be able to sit and stand as needed in those classes more readily than he would be in a workplace setting. He also believes the length of time without employment is a detriment to the claimant. Statistically, individuals who have gone without working for 2 years are very infrequently hired. In the claimant's situation,

he would have to explain his 5 year absence from employment as well as the need to wear the lumbar corset, the need to change positions, the inability to work or drive to work when taking Percocet and other difficulties.

19. Spruance described the claimant's job search as extensive and diligent. He had no negative comments regarding the claimant's efforts. Ultimately, it is his opinion the claimant cannot perform a sedentary job and no job exists in the competitive labor market for which the claimant would be hired. Primary factors behind this opinion is the claimant's need to take Percocet on a regular basis, the frequency with which he requires position changes and his need to lie down or sit in a recliner in order to manage his pain.
20. Spruance reviewed the job leads provided by Bill England. Those leads included automotive service writer. Spruance thinks the claimant is unable to work in that position because he does not have the computer skills required in those jobs. The claimant is unable to do even entry level keyboard work according to Spruance.
21. Spruance conceded he did not review Dr. Kambach's records but just the records from Dr. Weiss. He agreed most of the jobs provided by Bill England were within the *sedentary* ~~secondary~~ classification although he felt there were some exceptions. Nevertheless, he described the claimant's capacity as "far below the full range of sedentary." According to his review of the records, the claimant looked for 35 jobs in December 2014, 20 in November, 61 in October, 41 in September, in August, 28 in July and 26 in June 2014. He conceded that while the claimant had good skills they were not for the most part transferable to a sedentary category of work.
22. **John Roberts's testimony:** Mr. Roberts was retained by the employer/carrier to perform a reemployment assessment. He met with the claimant on October 21, 2014. He also reviewed the deposition of the claimant, Dr. Weiss deposition and records, Dr. Kambach's deposition and records as well as the records of Dr. Townsend and Dr. Savarese. Like Mr. Spruance, he reviewed his employment history and skills. He described the claimant is very nice, personable and presents well.
23. In his opinion, the position of security guard is an obvious choice for the claimant. Because of his experience as a law enforcement officer, the claimant would be immediately eligible for a class D license. With that, Roberts recommends one of 2 jobs: either as a supervisor or as an entry level security guard such as a gate guard or security camera monitor. In those positions, he could sit or stand it will. Those jobs exist

- at such places as country clubs and hotels. If assistance is needed it should be available by making a call and get help from a co-employee.
24. Roberts also believes the claimant could work in the automotive industry. Again, it was his opinion the claimant could get help as needed if, for example, he had to lift 20 pounds.
 25. Roberts described the claimant's work history as a vocational strength and his willingness to continue with his education as a positive factor. He was concerned, however, the claimant had to alternate sitting and standing frequently, this could impact his employability. Nevertheless, he opined the claimant could work as a cashier where he could sit or stand alternately or as a monitor of security alarms. He conceded, however, he would not be able to do that if he was required to walk around regularly.
 26. Roberts considered the various job leads provided by Bill England to be appropriate from a vocational standpoint but thought additional positions by way of security guard or management would have been appropriate. He considered many of the job contacts performed by the claimant to be inappropriate. As for jobs the claimant was not eligible to perform. Roberts testified the claimant would benefit from appointment assistance and it was his opinion the claimant has a lot to offer potential employers.
 27. During his cross-examination, he agreed the job placement as provided for by the Kambach restrictions would be difficult. When asked if employers would accommodate the claimant having to lie down at work, Roberts conceded most employers could not accommodate that. He testified if the claimant would need to lie down at random times throughout the day that would be disruptive but if he could lie down during breaks or at lunch that would not be disruptive.
 28. **Dr. Brandon Kambach testimony:** Dr. Kambach recounted his treatment history to include the surgery performed in 2010. He most recently saw the claimant in May 2013 after a new MRI examination had been performed. That examination showed a central right-side disc herniation that was worse than previous examinations revealed and which resulted in a fair amount of stenosis. This herniation resulted in an onset of symptomatology in the claimant's right leg. Dr. Kambach's restrictions included placing him at light duty but with restrictions of lifting no more than 10 pounds and sit and stand as needed. He also limited the claimant from ladder or climbing activities.
 29. **Dr. Howard Weiss testimony:** Dr. Weiss is a board-certified physiatrist and specialist in the field of physical medicine and rehabilitation. He has been treating the claimant since

April 2011 and continues to be his treating physician. Although his individual visits with the claimant including his findings, treatment recommendations and related information were described in detail during the course of the deposition, I will not recount that detail here. I find significant, however, the opinions Dr. Weiss expressed regarding restrictions and the legitimacy of the claimant's complaints. Dr. Weiss describes the claimant in very positive terms. It is clear to me the claimant has tried very hard to get better. He has undergone multiple injections, radiofrequency ablations and other treatment options during the course of his care with Dr. Weiss. Despite his efforts to get better, regrettably the claimant's condition has worsened according to Dr. Weiss. That is consistent with the claimant's testimony. I conclude it is not coincidental his pain got worse after several months of attending college courses.

30. Dr. Weiss consistently found objective evidence of injury. The claimant had muscle atrophy, positive straight leg tests and other objective findings.
31. Dr. Weiss has routinely completed DWC-25 reports placing the claimant in the sedentary level of activity and opines he can work an 8 hour day. As Dr. Weiss described, he hopes his patients can make the effort to perform at whatever level of restrictions he imposes. When asked if the claimant should at least try sedentary employment, Dr. Weiss testified: "He could. I think -- I think he may have some difficulty. I mean, he does definitely have significant pain. He does definitely have trouble being in the same position for a long time.... When he comes to visit me, he can't sit for long time, he can't stand up for a long time." Dr. Weiss ultimately agreed the claimant would need to be in a position where he could sit and stand as necessary and change positions frequently.
32. When asked to review a series of suggested job leads that described the work a sedentary, Dr. Weiss conceded that, generally speaking, the claimant could perform sedentary work but clarified there are different categories of sedentary. As to whether the claimant could perform those jobs, Dr. Weiss testified he would have to try and see if they could be performed.
33. Dr. Weiss agreed the claimant's condition has gotten worse while under his care. The claimant told him he declined a 2nd surgery because he could not take getting any worse. Dr. Weiss never saw any indication the claimant was exaggerating his symptoms, malingering or engaging in symptom magnification. He believes the claimant in all respects.

34. Dr. Weiss testified the Percocet he prescribes the claimant can cause drowsiness, decreased cognition and awareness as well as decreased memory. Claimant would not be allowed to drive or work within 8 hours of taking Percocet. If, for example, the claimant were to get up in the morning and take a Percocet to relieve pain, Dr. Weiss would not recommend he go to work. He essentially is homebound if he were to take Percocet before work. Even if he could get to work, he would be unable to work as long as he was taking the medications.
35. He notes the claimant religiously wears his lumbar corset brace and agrees he requires that due to his condition. He would not doubt the claimant might need to lie down during the day as a result of his condition. Dr. Weiss testified he would have trouble performing an 8 hour day job if he needed to lie down or if he needed to sit in his recliner with his feet elevated. When asked if he believes the claimant might have trouble walking more than 50 yards, Dr. Weiss testified: "He's a very honest person. Like I said, every conversation I've had with him he's been very straightforward. If he says that's what's happening, then I would believe him." He also agreed the claimant is very uncomfortable when he comes to see him and he believes the claimant might have difficulty standing for any period longer than 15 or 20 minutes. He believes the claimant if he says he has to change positions constantly to stay comfortable. He agrees his efforts in the classroom would be a pretty good test for whether the claimant might be able to perform a sedentary job.
36. Under the authority of *Blake v. Merck & Co., Inc.*, 43 So.3d 882 (Fla. 1st DCA 2010), a claimant can establish entitlement to permanent total disability benefits by establishing medical evidence he/she is unable to engage in at least sedentary employment within a 50 mile radius of his home due to his physical limitations; evidence of permanent work-related restrictions coupled with an exhaustive job search or evidence of permanent physical work restrictions which, while not alone disabling, when coupled with vocational factors preclude the claimant from working at least a sedentary level position on an uninterrupted basis.
37. The parties agree there is no medical evidence the claimant is unable to engage in at least sedentary employment within a 50 mile radius of his home due to his physical limitations. While the testimony of Dr. Weiss can be construed, when taken as a whole, to suggest it would be quite difficult for the claimant to secure sedentary employment, he does not express any ultimate opinions he would be unable to do so.

38. It is my finding, however, the claimant has established through an exhaustive job search in the presence of physical restrictions imposed by both Dr. Weiss and Dr. Kambach that the claimant is unable to secure or at least sedentary employment within a 50 mile radius of his home. I find the claimant's job search to be exhaustive. He contacted hundreds of potential employers and consistently and persistently made an effort to secure employment. While the employer/carrier correctly points out the claimant sought a number of jobs for which he was not qualified, I conclude the claimant was casting a wide net hoping to find something he might be able to do. As Mr. Spruance points out, sedentary jobs make up less than one percent of the available jobs in the open labor market. Davis made a conscientious and good faith effort to secure employment on his own and to contact the potential employers provided him by Bill England. It is my finding the claimant was unable to secure a job despite his efforts as a result of the severely limiting restrictions resulting from his workplace accident.
39. I also find the claimant has permanent physical restrictions which, while not alone are totally disabling, when coupled with vocational factors preclude the claimant from working at least a sedentary level position on an uninterrupted basis. In this regard, I accept the testimony of Gil Spruance over that of John Roberts to the extent there was any disagreement in their testimony. I find the testimony of Mr. Spruance comported more with logic and reason than that of Mr. Roberts. Indeed, Mr. Roberts agreed that if the claimant was as restricted as proposed by claimant's counsel, finding a job would be quite difficult. In that regard, I accept the testimony of the claimant that he requires the regular use of Percocet to help control his pain. I accept his testimony that he is unable to get out of bed many days. I accept his testimony that he must either lie down or sit in his recliner on a frequent basis to tolerate his pain. I accept his testimony that he can only sit 15-20 minutes at a time and can only stand 5 minutes or so. I accept his testimony he must change positions frequently. I am persuaded of these factors not only from my observations of the claimant and my conclusion that he was truthful but in reading the testimony of Dr. Weiss who is of the opinion the claimant's condition has gotten worse over the last several years and who believes the claimant's complaints of pain. I am persuaded the claimant is unable to work as a security guard because of his unsuccessful efforts at securing employment and because I accept the testimony of Mr. Spruance that no employer is going to hire him given the restrictions as I find them to be. I also find the claimant would be unable to work as an automotive service advisor or

otherwise work in the automotive industry. Even the testimony of John Roberts vacillates somewhat. Roberts concedes that, in order to perform these jobs, other employees would have to help. I am not at all persuaded that under the facts and circumstances of this case any employer would offer to hire and train the claimant knowing that he takes prescription pain medication that causes drowsiness, confusion and cognitive difficulties or knowing that he might have to lie down at random times throughout the day or change positions constantly as I have concluded is necessary. Reduced to the essence, I accept the testimony of Gil Spruance that the claimant is unable to engage in regular, routine, competitive employment. I find he is permanently and totally disabled per the *Blake* requirements.

40. Although the claim seeks permanent total disability benefits from the date of maximum medical improvement as opined by Dr. Kambach, claimant concedes he did not reach overall MMI until released at maximum medical improvement by Dr. Weiss on November 17, 2011. Thus I find permanent total disability benefits should be awarded as of November 17, 2011.
41. I find that the claimant's attorney has performed a valuable service and is entitled to an award of an attorney's fee and taxable costs against the employer for securing the benefits being awarded by this order.
42. Any and all issues raised by way of the petition for benefits, but which issues were not dismissed or tried at the hearing, or which were ripe, due and owing but not raised at the hearing, are presumed resolved, or in the alternative, deemed abandoned by the claimant, and therefore, are denied and dismissed with prejudice.

Wherefore, It Is CONSIDERED, ORDERED, and ADJUDGED as follows:

1. The claim for permanent total disability benefits and supplements from November 17, 2011 to date and continuing plus penalties and interest is hereby granted.
2. The E/C shall pay an attorney's fee and taxable costs to the claimant's attorney for securing the benefits being awarded by this Compensation Order. Jurisdiction is hereby reserved to determine the amount thereof if the parties are unable to amicably resolve this issue.

DONE AND ORDERED in Chambers at Jacksonville, Duval County, Florida on this 17th day of February, 2015.



Ralph J. Humphries
Judge of Compensation Claims
Division of Administrative Hearings
Office of the Judges of Compensation Claims
Jacksonville District Office
1809 Art Museum Drive, Suite 200
Jacksonville, Florida 32207-2840
(904)348-2790
www.jcc.state.fl.us

COPIES FURNISHED:

Preferred Government Claims Solutions
PO Box 958456
Lake Mary, FL 32795
OJCCmail@pgcs-tpa.com

L Stuart Griggs
The Griggs Firm, P.A.
4940 Beach Blvd
Jacksonville, FL 32207
stuart@griggfirm.com

George W. Boring, III
George A. Helm, III, P.A.
P.O. Box 958464
Lake Mary, FL 32795
gboring@pelsusa.com, mprotasevich@pelsusa.com