

**SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA**

SERGIO RAMIREZ,

Petitioner,

CASE NO.: SC15-1296

vs.

Lwr. Tribunal: 1D14-4708

**JORDA ENTERPRISES, INC.
and TECHNOLOGY
INSURANCE CO.,**

OJCC Case No. 11-019831SMS

Respondents. /

**APPENDIX
TO
PETITIONER'S REPLY
TO RESPONDENTS' RESPONSE
TO SHOW CAUSE ORDER**

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1. Compensation Order of
Judge of Compensation Claims
Sylvia Medina-Shore, dated September 15, 2014,
in the case of *Sergio Ramirez v. Jorda
Enterprises, Ind./Technology-Am Trust
North America*,
OJCC No. 11-019831SMS1-11

Certificate of Service

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGES OF COMPENSATION CLAIMS
MIAMI-DADE COUNTY DISTRICT**

Sergio Ramirez,
Claimant,

OJCC NO. : 11-019831SMS
D/A : 7/16/2011
JUDGE : Sylvia Medina-Shore

vs.

Jorda Enterprises, Inc./
Technology-Am Trust North America,
Employer/Carrier.

COMPENSATION ORDER

THIS CAUSE came before the undersigned Judge of Compensation Claims for a final hearing on 8/14/14 regarding petition for benefits (PFB) filed 2/19/14. The claimant is represented by Mark Touby, Esquire. The employer/carrier (E/C) are represented by William Goran, Esquire.

Claims:

1. TPD benefits from 9/18/12 and continuing.
2. Alternatively, TPD benefits from 11/6/12 and continuing.
3. Alternatively, TPD benefits from 11/19/12 and continuing.
4. Penalties, interest, costs, and attorney's fees.

Defenses:

1. The claimant is at MMI from a physical standpoint on 8/13/12 with a 6% PIR. Per 440.09(3), the E/C paid the claimant 6 months of TPD benefits from 11/7/13 per the psychiatrist's first report indicating the claimant was not at MMI from a psychiatric standpoint. The claimant is not entitled to any further TPD benefits at this time. Claimant's entitlement to TPD benefits is

capped at 104 weeks per statute.

2. E/C agree an attorney fee and taxable costs related to the pending PFB are due.

3. Penalties and interest were paid on the 6 months of TPD benefits noted above.

4. There is nothing further at issue and the pending PFB should be dismissed.

Documentary Exhibits:

JCC-

1. Pre-trial stipulation filed 6/11/14 (ID # 62).

Joint-

A. Deposition of Dr. Angel Diaz filed 8/12/14 (ID # 69, 70, and 75).

B. Deposition of Elizabeth Knorr filed 8/12/14 (ID # 66).

C. Deposition of Dr. Jorge Cabrera filed 8/12/14 (ID # 71-74).

D. Claim Transaction Detail Report (Payout) filed 8/13/14 (ID # 82).

Claimant-

1. Deposition of Dr. Albert Ray filed 8/12/14 (ID # 78).

Stipulation:

1. The parties agree to administratively handle payment of interest and penalties, for interest incorrectly paid and for interest and penalties awarded herein, if any.

Findings of Fact and Conclusions of Law:

1. Mr. Ramirez, the claimant, testified in person at the final hearing. He

is a 53 year old man who had been working as an air conditioning mechanic with Jorda Enterprises since March of 2011. On July 16, 2011, Mr. Ramirez was on a tall ladder reaching for a valve in a sub-ceiling when he came in contact with live electrical wires. The electrical shock jolted him. He fell to the ground injuring his right ankle and right side of his body. Mr. Ramirez was transported via fire rescue to Mercy Hospital where he underwent x-rays of the right ankle which revealed fractures. He was discharged from the emergency room with instructions to follow up with an orthopedist.

2. As a result of the referral, Mr. Ramirez came under the care of Dr. Jorge Cabrera starting July 19, 2011. Dr. Cabrera ordered a CT scan and MRI of the right ankle on an emergency basis and placed the claimant on a no work status. The CT scan and MRI of the right ankle revealed displaced fractures and ligamentous tears. Dr. Cabrera recommended surgery consisting of an open reduction and internal fixation at Coral Gables Surgical Center on July 29, 2011. According to Dr. Cabrera's operative report, the surgery was complicated and required extensive time in the operating room. The post operative diagnosis was right ankle fracture and dislocation with syndemosis tear, lateral malleolar comminuted fracture with possible deltoid ligament tear, open reduction and internal fixation. Once discharged, Mr. Ramirez required non-professional attendant care for assistance with activities of daily living as well as professional attendant care for treatment of the surgical wounds. Dr. Cabrera recommended H-wave electrical stimulation for home use. Mr. Ramirez had multiple office visits/evaluations with Dr. Cabrera post surgically. Dr.

Cabrera recommended physical therapy and prescribed medications.

3. On August 13, 2012, Dr. Cabrera placed Mr. Ramirez at maximum medical improvement (MMI) and while the doctor completed the DWC-25 form indicating that Mr. Ramirez was able to work on a full duty basis, the doctor noted that Mr. Ramirez's employment would have to be commensurate with this ambulatory capabilities. The doctor's report of that same date indicated that Mr. Ramirez could not return to work at major construction sites nor could he climb ladders nor negotiate uneven surfaces. On the date Dr. Cabrera placed Mr. Ramirez at maximum medical improvement, Mr. Ramirez had persistent stiffness and tenderness in the right ankle as well as loss of range of motion and complaints of ongoing pain. Mr. Ramirez further complained of his inability to walk over 20 minutes or run, and also complained of difficulty standing for more than 10 minutes. Dr. Cabrera indicated that the loss of range of motion was permanent in nature.

4. Dr. Cabrera further noted that Mr. Ramirez had sustained a significant injury to the ankle above and beyond the regular issues of an ankle fracture. The doctor assigned a six percent (6%) impairment rating.

5. The timeline for the paid benefits is as follows:

- a. TTD paid from 7/24/11 to 1/16/12
- b. Orthopedic MMI per Dr. Cabrera 8/13/12
- c. TPD paid from 1/17/12 to 9/17/12
- d. TPD periods 8/14/12 to 9/17/12 reclassified to reflect 6% PIR (12 weeks), as offset payments

e. IIBs balance paid to November 5, 2012.

6. On September 12, 2012 Mr. Ramirez continued to receive follow up care with Dr. Cabrera due to ongoing pain complaints and physical limitations who then recommended that Mr. Ramirez commence H-wave electrical stimulation therapy. Mr. Ramirez was noted to have quadriceps atrophy and walk with a limp. The doctor once again stated that Mr. Ramirez was able to work on a full duty basis, with the employer taking into consideration claimant's ankle limitations. Mr. Ramirez was experiencing depression and anxiety resulting from his pain and physical limitations due to the accident of July 16, 2011.

7. On or about October 3, 2012, Mr. Ramirez attended a meeting with Jorda Enterprises. The claimant was advised that he no longer had a position with the company due to his physical inability to perform the job for which he had been hired.

8. On November 19, 2012, Dr. Cabrera referred Mr. Ramirez to a psychiatrist as Mr. Ramirez's psychiatric symptoms continued. E/C did not authorize a psychiatrist.

9. On April 16, 2013, a PFB was filed on behalf of Mr. Ramirez seeking authorization of a psychiatrist.

10. On June 19, 2013, a Response to Petition for Benefits was issued by the Carrier denying authorization of a psychiatrist.

11. Meanwhile, Mr. Ramirez continued to be seen by Dr. Cabrera. At the March 4, 2013 appointment, Dr. Cabrera also diagnosed Mr. Ramirez with

patella chondromalacia of the right knee. The doctor also recommended that Mr. Ramirez use the H-wave electrical stimulation at home, prescribed gel and medication. Claimant's restrictions were no kneeling, squatting, or climbing, and no standing for more than 45 minutes. When claimant was seen again on May 20, 2013, Dr. Cabrera reiterated the work restrictions per the prior March 4, 2013 evaluation, and prescribed additional medication.

12. On November 19, 2012, the Claimant exercised his right to an IME since E/C denied authorization of the psychiatrist recommended by Dr. Cabrera.

13. On September 9, 2013, Mr. Ramirez was evaluated by Dr. Albert Ray, psychiatrist. Dr. Ray diagnosed Mr. Ramirez with major depression and pain disorder. Dr. Ray recommended cognitive behavioral therapy, a trial of Cymbalta and noted that Mr. Ramirez was not at MMI from a psychiatric standpoint. The doctor further indicated that Mr. Ramirez was unable to work from a psychiatric standpoint.

14. On September 23, 2013, E/C authorized Dr. Angel Diaz, a psychiatrist, although only for an evaluation. The evaluation took place on November 7, 2013. Dr. Diaz diagnosed adjustment disorder with mixed emotional features, chronic type, and pain disorder, chronic type with both psychological factors and medical conditions, for which the July 16, 2011 was and continues to be, the major contributing cause. Dr. Diaz indicated that Mr. Ramirez was not at maximum medical improvement from a psychiatric standpoint and the doctor recommended psychotherapy and

psychopharmacological management.

15. On November 19, 2013, Dr. Diaz sent a specific request for authorization of the psychotherapy and psychopharmacological management to the carrier. E/C did not authorize the recommended psychiatric treatment.

16. On December 4, 2013, a PFB was filed seeking provision of the psychiatric treatment. On December 30, 2013, a Response to Petition for Benefits was issued indicating that the carrier could not authorize the treatment because the Claimant had advised Dr. Diaz that he had moved to Naples, Florida the week prior to the evaluation, and that the Carrier needed the Claimant's address and phone number to arrange for said care in the Claimant's new area of residence.

17. On January 17, 2014, a Notice of Claimant's Change of Address was e-filed with DOAH which was e-served on the E/C and their counsel.

18. On February 5, 2014, Dr. Diaz reiterated this request for authorization of psychiatric care. In response, E/C indicated on February 11, 2014 that psychiatric care had not been authorized as E/C was not in possession of claimant's new address in Naples.

19. On February 19, 2014, a Petition for Benefits was filed seeking payment of temporary partial disability benefits, penalties and interest as Mr. Ramirez had not been provided with any indemnity benefits once the IIB's had been exhausted on November 5, 2012.

20. On March 19, 2014, Mr. Ramirez commenced psychiatric treatment with Dr. Diaz.

21. On June 6, 2014, the carrier issued a Response to Petition for Benefits indicating that TPD benefits for the period from November 7, 2013 through May 7, 2014 would be paid, plus penalties and interest. The Claimant does not agree that this payment satisfies the Employer/Carrier's obligations for indemnity pursuant to the Petition for Benefits of February 19, 2014.

22. Temporary partial disability benefits are due and owing if the Claimant is not at MMI and there is a causal connection between his injury and subsequent wage loss. See e.g. Nickolls v. University of Florida, 606 So. 2d 410 (Fla. 1st DCA 1992); Betancourt v. Sears, Roebuck & Co., 693 So. 2d (Fla. 1st DCA 1997); Vencor Hospital v. Ahles, 727 So. 2d 968 (Fla. 1st DCA 1998); Arnold v. Florida Blood Centers, Inc., 949 So. 2d 242 (Fla. 1st DCA 2007). Mr. Ramirez is not at overall MMI. Although Mr. Ramirez was placed at MMI by Dr. Cabrera on August 13, 2012 for his physical injuries, Mr. Ramirez was not at overall MMI as of November 6, 2012 as evidenced by the subsequent referral for psychiatric care on November 19, 2012, which resulted in the provision of authorized psychiatric treatment. Dr. Ray testified that Mr. Ramirez was not at psychiatric MMI when he evaluated Mr. Ramirez. (Deposition of Dr. Albert Ray, page 23) Dr. Diaz testified that from the date of the psychiatric referral by Dr. Cabrera, Mr. Ramirez was not at MMI from a psychiatric standpoint.

23. Mr. Ramirez's wage loss is a result of his work injuries sustained on July 16, 2011. The Claimant was terminated from his position with Jorda Enterprises due to his physical inability to perform his pre-accident employment. Dr. Cabrera had advised that Mr. Ramirez is precluded from

returning to his pre-injury employment. The Claimant has sought alternative employment, but he has been unsuccessful.

24. I accept Dr. Diaz' opinion that claimant has not reached psychiatric MMI. I further accept Dr. Diaz' opinion that claimant has no limitations from a psychiatric standpoint. Notwithstanding the lack of psychiatric restrictions, I find that Claimant is still entitled to TPD benefits. This lack of psychiatric work restrictions issue entitling the claimant to TPD was previously decided in Rojas v. United Sheet Metal, 832 So.2d 174 (Fla. 1st DCA 2002); see also, Sapp v. Berman Brothers, 884 So. 2d 1080 (Fla. 1st DCA 2004).

25. The Employer/Carrier argue that Mr. Ramirez is only entitled to six months of temporary indemnity pursuant to F.S. 440.093(3) and on June 6, 2014, the Employer/Carrier paid Mr. Ramirez 26 weeks of TPD for the period from November 7, 2013 through May 7, 2014. (Deposition of Elizabeth Knorr, Claims Adjuster, pages 17-18). However, I find this statutory provision is inapplicable to Mr. Ramirez's case. In W.G. Roe & Sons v. Razo-Guevara, 999 So. 2d 708 (Fla. 1st DCA 2008), the court stated, "...the six-month limitation on temporary psychiatric benefits is conditioned upon the payment of permanent benefits for the associated physical injury. This means the limitation does not apply unless permanent benefits *are being paid*." (Emphasis added)." Similar to the claimant in Razo-Guevara, Mr. Ramirez was not, and is not, being paid permanent benefits during the period of temporary indemnity being claimed, after November 6, 2012. Id. As such, I find that the six month limitation in F.S. 440.093(3) is inapplicable to Mr. Ramirez's case.

26. Mr. Ramirez was not paid impairment or any other type of indemnity benefits from the period of November 6, 2012 through November 6, 2013. (Deposition of Elizabeth Knorr, Claims Adjuster, page 27). No impairment benefits or any other classification of indemnity benefits have been paid to Mr. Ramirez from the period of May 8, 2014 through the present. (Deposition of Elizabeth Knorr, Claims Adjuster, page 27).

27. The undersigned has considered E/C's argument that F.S. 440.093(3) applies to the case at hand because claimant was paid permanent benefits (IIBs) based on his physical PIR. I find whether permanent benefits were paid in the past is inconsequential based on the plain meaning F.S. 440.093(3) which states in pertinent part, "Subject to the payment of permanent benefits under F.S. 440.15...." Using the plain meaning of the statute, the Court in Razo-Guevara construed "subject to" as meaning "dependent on some act or condition" and in so doing, the Court held that this meant that the six month limitation did not apply unless permanent benefits were being paid. Razo-Guevara, 999 So. 2d 708.

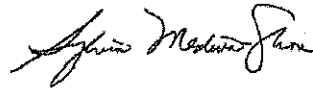
28. E/C point out that a strict 6 month reading of 440.093(3) is necessary as to interpret it otherwise, would encourage an injured worker to delay requesting psychiatric care. I am not convinced by E/C's argument especially, as in the present case, I find that it was E/C who delayed for almost one year in authorizing the recommended psychiatric evaluation, delaying the Claimant's ultimate overall MMI.

WHEREFORE, IT IS ORDERD:

1. E/C shall pay claimant TPD benefits from 11/6/12 until the exhaustion of 104 weeks of temporary disability paid, less credit for 26 weeks of TTD benefits previously paid.

2. Claimant's attorney is entitled to an E/C paid attorney's fee and costs for securing the benefits herein. Jurisdiction is reserved for determination of amount of the fee and costs for a future hearing, in the event the parties are unable to amicably resolve it.

DONE AND E-MAILED TO THE ATTORNEYS OF RECORD AND THE CARRIER THIS 15TH DAY OF SEPTEMBER OF 2014. THE ATTORNEYS SHALL PROVIDE A COPY OF THE INSTANT COMPENSATION ORDER TO THEIR RESPECTIVE CLIENTS UPON RECEIPT OF SAME.



Sylvia Medina-Shore
Judge of Compensation Claims

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by e-mail this 23 day of July, 2016, to: Rayford H. Taylor, Esquire (rtaylor@gilsonathans.com), Gilson Athans, P.C., 980 Hammond Drive, Suite 800, Atlanta, GA 30328.


Richard A. Sicking