

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

BRYON BISHOP,)	
)	
Employee/Claimant)	
)	
vs.)	OJCC Case No. 14-007837-TWS
)	
ARENA FOOTBALL LEAGUE and)	
ARENA FOOTBALL ONE, LLC)	Accident date: 07/31/2013
)	
Employer)	
)	
NONE)	
)	
Carrier)	Judge: Thomas W. Sculco
)	

FINAL COMPENSATION ORDER

THIS CAUSE came before the undersigned Judge of Compensation Claims (JCC) at Orlando, Orange County, Florida on September 9, 2015, for a final merits hearing upon the petition for benefits (PFB) e-filed with the OJCC. The parties' Uniform Pretrial Stipulation was e-filed July 31, 2015. The claimant is represented by Charles H. Leo, Esquire. The Employer is represented by Annie Shook, Esquire.

This order addresses the Petition for Benefits filed with the
OJCC on 04/04/14; 07/02/14; 09/09/14

LIVE TESTIMONY: Bryon Bishop

DOCUMENTARY EVIDENCE:

- #1 Joint:** * Entire Record from 11/19/14 Trial *
- *#1 Claimant's: Deposition/attachments of Paulette Mattia
September 16, 2014
- *#2 Claimant's: Deposition/attachments of James K. Shea, M.D.
September 8, 2014
- *#3 Claimant's: Deposition/attachments of Gerald Mattia, D.C.
June 16, 2014
- 9/9 OBJECTION/NOT AUTHORIZED IME - overruled**
- *#4 E/C's #1: Deposition/attachments of Rory Evans, M.D.
September 16, 2014
- *#5 E/C's #1: Deposition/attachments of Douglas Plank
June 19, 2014
- *#6 E/C's #1: Deposition/attachments of Sean Coughlin
November 7, 2014
- *#7 Joint: Deposition/attachments of Joseph Kleinsmith
July 1, 2014
- *#8 Joint: Deposition of Joseph Torres, M.D.
June 19, 2014
- *#9 Claimant's: Deposition/attachments of Eric Anderson
July 9, 2014
- *#10 Claimant's: Attachments of Eric Anderson
July 9, 2014
- *#11 Claimant's: Trial Memorandum
- *#12 Joint: Standard Player Contract
- *#13 Claimant's: Text string-composite
- *#14 Claimant's: Email string-November 6, 2013

- *#15 Claimant's: Pre-participation Medical Evaluation
- *#16 Claimant's: Jewett Orthopedic Clinic- Request/Release
- *#17 E/C's #1: Trial Memorandum/attachments
- *#18 E/C's #2: Trial Memorandum/attachments
- *#19 Joint: Pretrial Stipulation
- *#20 Claimant's: DVD
 - 9/9: OBJECTION/AUTHENTICATION**
 - overruled**
- *#21 Claimant's: Orlando Predators Team Roster
 - 8/8/2013

EXHIBITS: September 9, 2015 Final Hearing

- #2 Joint:** Final Compensation Order
December 23, 2014
- #3 Employer:** Supplemental Trial Memorandum
- #4 Claimant:** Supplemental Trial Memorandum/attachments
- #5 Claimant:** Additional Trial Memorandum/attachments
- #6 Joint:** Deposition of
Robert Murrah, M.D.
July 15, 2015
- #7 Claimant:** Cross Examination of Joe Kleinsmith
Deposition taken July 1, 2014
- #8 Claimant:** Standard Player Contract
- #9 Claimant:** Player Roster
OBJECTION/HEARSAY, AUTHENTICITY
SUSTAINED
- #10 Employer:** Deposition/attachments of
Joseph Kleinsmith
August 11, 2015
OBJECTION/RELEVANCE/PAROL-EVIDENCE
-overruled

#11 EMPLOYER: Collective Bargaining Agreement
Effective date: August 10, 2012

#12 Joint: Pretrial Stipulation
July 31, 2015

#13 Claimant: Video Film Index

After hearing all of the testimony and evidence presented, and after having resolved any and all conflicts therein, the undersigned Judge of Compensation Claims makes the following findings of fact and conclusions of law: The issues for determination, as narrowed by the parties at the time of the final hearing, are claimant's claims for: 1-compensability of 7/31/13 injuries to right knee, left foot, left arm, back, and neck; 2-temporary partial disability ("TPD") benefits from 7/31/13 to present; 3-determination of average weekly wage ("AWW") of \$1,475.00; 4-authorization of medical care for claimant's right knee injury; 5-authorization of an orthopedic physician to treat claimant's back, neck, left arm, and left foot injuries; 6-authorization of a cervical spine MRI, EMG and nerve conduction studies, and MRI's of the right knee and left foot; 7-payment of outstanding medical bills of Dr. Mattia; 8-reimbursement to claimant of out of pocket expenses paid to Dr. Mattia in the amount of \$1,100.00; and 9-penalties, interest, costs, and attorney's fees.

AFL One raised the following defenses/took the following positions: 1- claimant was not an employee of the AFL; 2-No injury arising out of claimant's employment on 7/31/13; 3-The alleged injuries are not the major contributing cause of claimant's need for the requested medical and disability benefits; 4-claimant was a volunteer on 7/31/13; 5-claimant's injuries are preexisting; 6-claimant's claim is barred by the "professional athlete" exception to coverage contained in section 440.02(17)(c)(3), Fla. Stat. (2013); 6-AWW is \$0; 7-recommendations of Dr. Shea and Dr. Winters are claimant's responsibility as part of IME's; 8-Claimant reached MMI on 7/31/13; 9-no PICA owed.

The parties agreed that if claimant's injuries of 7/31/13 were found compensable, reimbursement of Dr. Mattia's bills from 7/31/13 - present and claimant's out of pocket expenses would be handled administratively.

BACKGROUND

The background facts identified in the order of 12/23/14, as well as the remainder of the order, are incorporated by reference into the present order. Following entry of the 12/23/14 order, Dr. Robert Murrah was appointed as an Expert Medical Advisor, and the parties were permitted to do additional discovery relating to

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the remaining claims, defenses, and issues, as well as regarding AFL One's motion for rehearing/reconsideration of the finding in the 12/23/14 order that AFL One was claimant's employer on 7/31/13. A supplemental deposition of Joseph Kleinsmith was introduced into evidence in relation to the employer/employee issue.

AFL ONE'S MOTION FOR REHEARING/RECONSIDERATION

AFL One argues that it is not bound by the standard player contract signed by claimant and Coach Plank on 7/30/13 because the contract had not been signed by Joseph Kleinsmith. For the reasons discussed below, and in the prior order of 12/23/14, I find that the contract was in effect and binding on AFL One on the 7/31/13 date of injury, and therefore that AFL One is liable for claimant's workers' compensation benefits. As such, AFL One's motion for rehearing/reconsideration is denied.

While both parties presented additional evidence on this issue in the form of a supplemental deposition of Joseph Kleinsmith, and other AFL One player contracts, I find that the actual terms of the standard player contract establish that the contract was in effect and binding on 7/31/13. Paragraph 21, titled; "EXECUTION OF CONTRACT", provides:

This Contract is valid and binding upon the Player and the league immediately upon execution. A copy of this

Contract, including any attachment, must be filed with the League in the League office within forty-eight (48) hours after execution. The Arena Football League Director of Football Operations will have the right to disapprove this Contract on reasonable grounds... Approval will be automatic unless, within seven (7) days after receipt of this Contract in the League office, the Arena Football League Director of Football Operations notifies the parties either of disapproval or of extension of this 7 day period for purposes of investigation or clarification pending his decision. On the receipt of notice of disapproval and termination, both parties will be relieved of their respective rights and obligations under this contract...

The first two sentences of paragraph 21, read together, establish that: 1-the contract is binding on the parties upon "execution"; and 2-"execution" occurs *before* the contract is filed with the league, in the league office. The requirement that the contract be filed "*in*" the league office suggests that the filing is done by someone *outside* the league office; i.e. the team and not Mr. Kleinsmith.

If, however, "execution" does not occur until the contract is sent by the team to the league office and *then* signed by Mr. Kleinsmith, as argued by AFL One, Mr. Kleinsmith would then be required to "file" the contract in the very league office where he is located, within 48 hours of his own execution of the contract -- a time period whose beginning is known and controlled *solely* by Mr. Kleinsmith, since only he knows and controls when he signs the contract. Such an interpretation is illogical, and renders the 48 hour filing deadline meaningless.

Or, perhaps, Mr. Kleinsmith could send the "executed" contract back to the team, so they could then "file" it within 48 hours by sending it right back to him, an even more illogical and ridiculous possibility.

A much more reasonable and logical interpretation is that: 1-the contract is valid and binding when signed by the player and team representative; 2-the team then files the contract in the AFL One league office within 48 hours for approval by the league representative (Mr. Kleinsmith); 3-who can disapprove the contract, for various reasons, within 7 days of it being filed in the league office by the team. This construction is consistent with the signature page of the agreement (page 12) which indicates that the signature of the team representative is "mandatory", while there is no such indication for the space provided for "league signature".

It is also consistent with the conduct of Coach Plank, an AFL One employee, who allowed claimant to practice with the team on 7/31/13 without signing a one-day liability waiver, as he had on 7/30/13 (before signing the contract). I would also note that as the contract language was created by AFL One, any ambiguities in construing the agreement should be interpreted in favor of the non-drafting party, i.e. Mr. Bishop.

While I generally accept the strictly factual testimony of Mr. Kleinsmith regarding the operation of AFL One, I reject his

legal interpretations of the standard player contract and other documents introduced into evidence. For the reasons discussed above, and in the order of 12/23/14, I find that claimant was under contract with AFL One on 7/31/13 at the time of his alleged injury. As such, he is eligible for workers' compensation benefits for any injuries suffered on that date.

COMPENSABILITY OF RIGHT KNEE, NECK, BACK, LEFT FOOT, AND LEFT ARM INJURIES.

Generally, the claimant bears the burden of proof to establish "every essential fact and element of [his] cause of action" -- in this case that he suffered an "accidental compensable injury or death arising out of work performed in the course and scope of employment". See *29 Am. Jur. 2d Evidence Section 178*. After considering the evidence and argument presented, I find that claimant suffered injuries arising out of and in the course of his employment on 7/31/13 to his right knee, neck, back, and left foot. However, I find that claimant has failed to establish a compensable injury to his left arm.

As noted above, Dr. Murrah was appointed as an EMA following the prior order of 12/23/14. Dr. Murrah testified, consistent with his EMA report, that claimant "definitely sustained injuries to the neck, low back, right knee, and left foot, using the date of injury, 7/31/13." After considering the other evidence

presented, including the claimant's testimony regarding how he was injured, which I accept, I find there is not clear and convincing evidence to reject the opinions of Dr. Murrah. As such, claimant has established the compensability of injuries to his neck, low back, right knee, and left foot. See *Checkers Restaurant v. Wiethoff*, 925 So. 2d 348 (Fla. 1st DCA 2006) (defining compensability as "an industrial accident resulting in some injury to the worker.")

With regard to the left arm, I find that there is insufficient evidence to establish that claimant sustained a compensable injury to that body part. Consequently, the claim for compensability of the left arm is denied.

ADMISSIBILITY OF DR. MATTIA'S MEDICAL OPINIONS AND PAYMENT OF DR. MATTIA'S MEDICAL BILLS/REIMBURSEMENT OF CLAIMANT'S OUT-OF-POCKET EXPENSES

It is undisputed that claimant requested authorization of Dr. Mattia, which AFL One never provided. Thus, for Dr. Mattia's treatment to be authorized by operation of law, which would make his medical opinions admissible, claimant was required to prove, independent of Dr. Mattia's medical opinions, that his treatment of claimant was compensable and medically necessary. See *Miller Electric Co. v. Oursler*, 113 So. 3d 1004 (Fla. 1st DCA 2013).

Based on the medical opinions of EMA physician Dr. Murrah, I find

that Dr. Mattia's chiropractic treatment following the injury was compensable and medically necessary. Consequently, Dr. Mattia's medical opinions are admissible into evidence. However, based on my acceptance of Dr. Murrah's medical opinions, whether Dr. Mattia's medical opinions are admitted or excluded from evidence would not change my findings and conclusions in the case.

Given the above findings, pursuant to the agreement of the parties, payment of Dr. Mattia's medical bills after 7/31/13 and reimbursement of claimant's out of pocket co-pays to Dr. Mattia, will be handled administratively, with jurisdiction reserved to resolve any disputes.

CLAIMS FOR AUTHORIZATION OF MEDICAL CARE

As noted above, I accept the medical opinions of EMA physician Dr. Murrah. Dr. Murrah testified, consistent with his EMA report, that claimant should have a proper evaluation of his neck, including an MRI of the cervical spine. However, Dr. Murrah indicated that nerve-conduction studies and EMG's should be deferred until after the cervical MRI findings are known. Dr. Murrah also recommended further diagnostic studies and evaluation for the right knee and left foot, pursuant to the recommendations of Dr. Shea and Dr. Winters for MRI's of those body parts. Based on Dr. Murrah's medical opinions, I find claimant has established

entitlement to authorization of an orthopedic physician for evaluation of claimant's neck, right knee, and left foot, and MRI's of claimant's neck, right knee, and left foot.

I reject AFL One's argument that the requested diagnostic testing cannot be awarded based on Section 440.13(5)(a), Fla. Stat. (2013), which provides: "The party requesting and selecting the independent medical examination shall be responsible for all expenses associated with such examination, including...medically necessary diagnostic testing..." The diagnostic testing is being recommended by Dr. Murrah, the EMA physician, so this statutory section is not applicable. Moreover, well-settled case law establishes that an evaluation is, in fact, a form of medical treatment that is awardable under chapter 440. See *Bryant v. Elberta Crate & Box Co.*, 156 So. 2d 844, 845 (Fla. 1963); *Lombardi v. Southern Wine & Spirits*, 890 So. 2d 1128, 1129 (Fla. 1st DCA 2004), (holding that a "second opinion" is potentially awardable as medically necessary remedial treatment, care, and attendance). Consequently, the E/C is required to authorize evaluations with an orthopedic physician and MRI's of claimant's neck, right knee, and left foot. Based on Dr. Murrah's medical opinions, EMG's and nerve conduction studies are not medically necessary at this time.

With respect to claimant's back, while Dr. Murrah testified that treatment rendered was appropriate, medically necessary, and

causally related to the compensable injury, he indicated that no further treatment was medically necessary. As such, the claim for treatment for claimant's back is denied.

CLAIM FOR DETERMINATION OF AWW

As claimant did not work substantially the whole of the 13 weeks before the accident, no evidence was presented of a similar employee, and claimant has not elected to be treated as a seasonal worker, his AWW should be calculated pursuant to Section 440.14(1)(d), Fla. Stat. (2013), which provides that "the full-time weekly wages of the injured employee shall be used except as otherwise provided in paragraph (e) or paragraph (f)." Claimant is not a minor (paragraph (e)), and does not meet the specific statutory definition of "part-time worker" in paragraph (f) ("an individual who customarily works less than the full-time hours or full-time workweek of a similar employee in the same employment").

Here, the evidence establishes that claimant was not placed on the travelling squad for the game that was played the week of the accident. According to the testimony of Mr. Kleinsmith, if claimant was under contract (as I have determined above) he would have been paid inactive pay, which is \$625.00 per week.

However, at the time the contract was executed on 7/30/13, I

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find there was a reasonable expectation that claimant would be on the active roster - that is why he was signed in the first place. Consequently, he would be entitled to \$875.00 per week pursuant to paragraph 2 of the contract. See *Buono v. Orange Co. of Florida, Inc.* 789 So. 2d 1243 (Fla. 1st DCA 2001).

I reject claimant's argument that his wages from his employment at The Methadone Clinic should be included in his AWW. Claimant did not begin working for The Methadone Clinic until after his accident, and I find it would be speculative that he would have worked both as a professional football player and full-time at The Methadone Clinic at the same time. Consequently, I find claimant's AWW is \$875.00.

CLAIM FOR TPD BENEFITS

To be entitled to TPD benefits, a claimant must not be at overall MMI and must establish a causal connection between his compensable injury and any subsequent loss of earnings. The standard for determining entitlement to TPD benefits was discussed in the case of Pharma Field Sales v. Toscano, 40 So. 3d 795 (Fla. 1st DCA 2010). In Toscano, the court stated that "Generally, the test used to determine whether physical limitations after an accident are a contributing causal factor to a loss of wages is whether a claimant's capabilities allow [him]

to return to and adequately perform [his] prior job with the employer, and whether the workplace injury caused a change in employment status resulting in a reduction of [his] wages below 80% of her pre-injury AWW." Id.

Here, EMA physician Dr. Murrah indicated that claimant would be restricted from playing professional football pending resolution of his neck, right knee, and left foot issues. Dr. Murrah also indicated that claimant is not yet at MMI. As noted above, I accept the medical opinions of Dr. Murrah in this case. As such, I find claimant has established entitlement to TPD benefits from 7/31/13 - present, plus statutory penalties and interest, subject to the statutory 104 week cumulative limitation on temporary disability benefits.

WHEREFORE it is hereby **ORDERED** and **ADJUDGED** that:

1. Claimant's claims for compensability of injuries to his neck, low back, right knee, and left foot are GRANTED.
2. Pursuant to the agreement of the parties, payment of Dr. Mattia's medical bills after 7/31/13 and reimbursement of claimant's out of pocket expenses will be handled administratively.
3. AFL One is ordered to authorize evaluations with an orthopedic physician and MRI's of claimant's neck, right knee, and left foot.

4. Claimant's claim for authorization of EMG's and nerve conduction studies is DENIED AND DISMISSED.
4. Claimant's claim for treatment for his low back is DENIED AND DISMISSED WITH PREJUDICE.
5. Claimant's Average Weekly Wage is \$875.00.
6. AFL One is ordered to pay claimant TPD benefits from 7/31/13 to present, plus statutory penalties and interest, subject to the statutory 104 week cumulative limitation on temporary disability benefits.
7. Claimant's Motion for Rehearing, which is treated as a Motion for Reconsideration, is DENIED.
8. Claimant is entitled to attorney's fees and costs from AFL One, pursuant to Section 440.34(3), Fla. Stat. (2013), for securing the above benefits. Jurisdiction is reserved to determine the amount of attorney's fees and costs owed.
9. AFL One is entitled to costs, pursuant to Section 440.34(3), Fla. Stat. (2013), for prevailing on the claims for treatment for claimant's low back and for EMG's and nerve conduction studies. Jurisdiction is reserved to determine the amount of costs owed.

DONE and ORDERED in Orlando, Orange County, Florida.

This 7th day of October, 2015

Thomas W. Sculco



Thomas W. Sculco

Judge of Compensation Claims
Division of Administrative Hearings
Office of the Judges of Compensation Claims
Orlando District Office
www.jcc.state.fl.us

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that the Order was entered by the Judge of Compensation Claims and electronically served on the carrier and parties through their respective attorneys.

Marla Miller

10/07/2015

Marla Miller
District Clerk
Orlando District Office