STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGES OF COMPENSATION CLAIMS
WEST PALM BEACH DISTRICT OFFICE

Chris Darsow,
Employee/Claimant,

vs.

Baja Beach Club Lmtd./Bridgefield
Employers Insurance Company,
Employer/Carrier/Servicing Agent.
_____/

OJCC Case No. 13-003510MAD

Accident date: 7/28/2012

Judge: Thomas A. Hedler

FINAL COMPENSATION ORDER

This matter came before the undersigned Judge of Compensation Claims[1] on February 8, 2017, for final hearing in West Palm Beach, Florida. The hearing was held to adjudicate the petition for benefits filed on May 31, 2016. The claimant was represented by David Benn, Esq. The Employer/Carrier was represented by Jesse Price, Esq.

The following stipulations have been reached between the parties:

1. The undersigned has jurisdiction of the parties and of the subject matter.
2. Venue properly lies in Palm Beach County, Florida.
3. A mediation conference was held on September 20, 2016.
4. There was an employer/employee relationship at the time of the accident/claim.
5. The employer was properly insured with workers' compensation coverage at the time of the accident/claim.
6. The claim, resulting in injury to the lumbar and cervical spine, has been accepted as compensable.
7. Notice of final hearing was timely given to the parties.
8. The claimant reached maximum medical improvement on February 11, 2016 and was assigned a permanent impairment rating of 10%.

Claims

[1] While this claim is assigned to Judge D'Ambrosio, the undersigned Judge of Compensation Claims conducted the final hearing.

1. Determination of AWW of at least $1,500.00 per week pursuant to Section 440.14, Florida Statutes based upon Claimant's actual earnings at Baja Beach Club.
2. Payment of TPD benefits from date of accident through September 26, 2014.[2]
3. Payment of penalties and interest on past due temporary benefits and based upon late payment of impairment benefits.
4. Attorney's fees and costs.

Defenses

1. Claimant's AWW is $0 as he does not have wages as defined by F.S. 440.02(28) as there is no documentation that he has filed an Income Tax Return with the U.S. Government to report his purported earnings with Baja Beach Club (the insured employer) for the year 2012.
2. As Claimant is provided with a $0 AWW, he is not entitled to the payment of temporary benefits for any period of time following his accident up to 2/11/16 [in accordance with fn1 the period ending date is 9/26/14].
3. There is no medical documentation to support his entitlement to TPD benefits from the duration of the 7/28/12 accident to 2/11/16.[3]
4. Claimant's purported loss of earnings justifying his request for temporary benefits is not due to physical restrictions assigned by his authorized doctor(s). Rather, it is due to the nature of Claimant's line of work (economic reasons) completely unrelated to any physical restrictions that he has been provided. Thusly, there is no causal connection between Claimant's loss of earnings/request for temporary benefits and the industrial accident.
5. Claimant has received earnings from 7/28/2012 to 2/11/2016 which offsets any temporary benefits he would potentially be entitled to receive.[4]

[2] At the hearing, Claimant withdrew the claim for TTD benefits and narrowed the period of TPD sought as referenced.
[3] At the hearing, E/C conceded there was medical evidence of restrictions from 7/8/13-11/17/13 and from 2/28/14-9/26/14.
[4] At the hearing, Claimant stipulated that the E/C would be entitled to an offset for any and all Claimant's earnings during the period in question. Claimant submitted evidence of earnings for the years 2013 and 2014. While Claimant did not submit evidence of post-accident earnings in 2012, he acknowledged that he worked and had earnings, and further stipulated to administratively offset any award of TPD, whether such earnings were admitted into evidence or not.

6. Penalties, interest, attorney's fees, and costs are not due or owing.

The parties submitted the pre-trial stipulation on October 10, 2016. The Judge of Compensation Claims entered an order approving same on October 10, 2016. On January 6, 2017, the employer/carrier filed its Amendment to Pre-trial Stipulation. On January 18, 2017, Claimant filed his Motion to Strike Affirmative Defenses raised in 1/6/17 Pretrial Amendment. On January 25, 2017, the Judge of Compensation Claims ordered the ruling would be deferred to the final hearing. The employer/carrier's amendment sought to raise an additional alternative defense to calculate the AWW under the seasonal employee method under F.S. 440.14(1)(c). Claimant cited Rule 60Q-6.113(6), "in no event shall an amendment or supplement be used to raise a new claim or defense that could or should have been raised when the initial pretrial stipulation was filed, unless permitted by the judge upon *motion for good cause shown*." [emphasis added]. The employer/carrier offered no substantive basis for introducing this new defense subsequent to the initial pretrial stipulation. The undersigned accordingly granted Claimant's motion to strike the defense under Rule 60Q-6.113(6) for the employer/carrier's failure to show good cause.

The employer/carrier's 1/16/17 amendment further sought to raise an additional defense that Claimant failed to execute and return the DWC-19 forms. The employer/carrier argued that it was not aware of the failure to return DWC-19 forms until the adjuster testified on January 5, 2017, and that the amendment was filed promptly on January 6, 2017. Of course, it would be more apt to state, defense counsel was not aware of the failure to return DWC-19 forms as the employer/carrier obviously would be able to assert whether it received the DWC-19 forms at the time the initial pretrial stipulation was completed. Again, the employer/carrier failed to show good cause as required under Rule 60Q-6.113(6). Accordingly, the undersigned granted Claimant's motion to strike this defense at hearing.

The employer/carrier withdrew the remnant of its 1/6/17 pretrial amendment at the hearing. Claimant filed an Amendment to Pretrial Stipulation on November 7, 2016, but at the hearing, Claimant withdrew same.

Exhibits

Judge:

1. Uniform Pre-trial Stipulation filed on October 10, 2016 [Docket#120].

2. Order Setting Pretrial Stipulation Filing Date and Final Hearing filed on September 28, 2016 [Docket#119].
3. Claimant's amended trial memorandum [Docket#159] and the employer/carrier's trial memorandum [Docket#150] were accepted for argument purposes only.
4. Claimant's Request for Judicial Notice filed on January 13, 2017 [Docket#128]. The parties sought the undersigned to take notice of the final evidentiary order entered on December 18, 2013.

Joint:

1. Composite of Petition for Benefits filed on May 31, 2016 [Docket#108] and Response filed on June 13, 2016 [Docket#111].
2. Deposition of Rob Smith, claims adjuster, [Docket#137] with attachments filed on 2/6/17 [Docket#138] and 2/7/17 [Docket#155].

Claimant:

1. Baja Beach Club Payment Ledger filed on 2/6/17 [Docket#146]. The employer/carrier objected on the grounds of hearsay and authenticity. The undersigned overruled the objection considering the employer/carrier also listed the payment ledger in its exhibit list filed on 1/10/17, and while the E/C withdrew its exhibit list at the hearing, such late objection and withdrawal prejudiced the claimant's ability to cure the defect.
2. IRS Payment Receipt for 2012 Tax Return filed on 2/6/17 [Docket#144]. The employer/carrier objected on the grounds of hearsay and authenticity. The undersigned sustained the objection, but allowed the document to be proffered in conjunction with the claimant's testimony.
3. Claimant's 2012 Tax Return with Schedule C filed on 2/8/17 [Docket#160]. The employer/carrier objected on the grounds of hearsay and authenticity. The undersigned sustained the objection, but allowed the document to be proffered in conjunction with the claimant's testimony.
4. Composite of Employee Earnings Report dated 1/18/17 filed on 2/6/17 [Docket#145] and Amended DWC-19 filed on 2/7/17 [Docket#158].
5. Payout Ledger filed on 2/6/17 [Docket#147].

6. Composite of medical records from Dr. Javier Centurion [Docket#140], CMI Imaging [Docket#141], Dr. Luis Escobar [Docket#142], and Dr. Randall Blinn [Docket#143].
7. Deposition of Dr. Randall Blinn taken January 27, 2017 filed on February 7, 2017 [Docket#156].

Employer/Carrier:

1. Medical Records of Dr. Richard Strain filed on 2/8/17 [Docket#163].

Live Witnesses

1. Chris Darsow – Claimant.

I have taken the time to carefully review and consider all of the evidence presented to me, including the documentary evidence, deposition testimony, and live testimony. While I do not recite in explicit detail each piece of evidence/testimony, I have attempted to resolve any and all conflicts in the testimony and evidence. The stipulations of the parties are adopted and shall become part of the findings of fact herein. The undersigned has jurisdiction of the parties and subject matter. Based upon the stipulations of the parties, evidence presented and legal review, I make the following findings of ultimate facts and conclusions of law.

Factual History

The claimant is a 48 year old gentleman who has had an interesting occupational history. Mr. Darsow essentially is a sole proprietor doing work as an artist, focusing on design as it pertains to architecture. Mr. Darsow designs and builds art props and sets. His jobs varied with respect to the nature of the work performed, the pay rate, and time for completion. Mr. Darsow testified that his jobs would range in daily pay rate from $300.00 to $500.00 and sometimes more. His jobs would also range from one-two day jobs to three-four week jobs. While Mr. Darsow characterized his pre-accident wages as consistent, he further elaborated that consistent did not mean steady weekly wages, but rather consistent over a longer period of time.

The claimant began a job for the Baja Beach Club in early July 2012. He was tasked with managing the design of a night club. The job was expected to last several weeks, and Mr. Darsow was paid $1,500.00 per week for the job. Mr. Darsow testified this rate of pay was lower than many of his other jobs because it did not require significant physical exertion – Mr. Darsow was primarily overseeing the project. On July 28, 2012, Mr. Darsow was asked to

remove soffit because another employee was out. Mr. Darsow ascended a ladder to cut the soffit, when he felt the ladder was about to fall, he was forced to jump off. Mr. Darsow suffered injuries to his head, neck and low back. An ambulance arrived at the site and transported him to Broward Health. While the employer did not immediately report the claim, which caused Mr. Darsow to go without medical care following the initial hospital visit, the claim was accepted as compensable. The parties did not present a medical dispute. The claimant was authorized to treat with Dr. Javier Centurion, Dr. Richard Strain and Dr. Randall Blinn. The parties stipulate that Mr. Darsow reached maximum medical improvement on February 11, 2016 and was assigned a 10% permanent impairment rating from Dr. Blinn.

The parties present a dispute concerning the claimant's average weekly wage, as well as payment of temporary partial disability benefits following the industrial accident and payment of penalties and interest. Mr. Darsow testified at the hearing. Mr. Darsow presented as a credible witness. He was interesting, patient, detailed and offered substantiation for most of the pertinent portions of his testimony. I find that the employer/carrier did not establish any credible, substantive inconsistencies in Mr. Darsow's testimony. As it pertains to the relevant factors in the necessary legal analysis, I incorporate my findings of fact at the point of dispute above and within the foregoing analysis.

Analysis – *average weekly wage*

The claimant bears the burden of proof to establish the average weekly wage. See Linderman v. Kirkland's Restaurant, 127 So.2d 888 (Fla. 1961). The methodology for calculating average weekly wage is found in Florida Statutes 440.14(1). Florida Statutes 440.14(1)(a) provides that if the injured employee worked "in the employment in which she or he was working on the date of the accident, whether for the same or another employer, during substantially the whole of 13 weeks immediately preceding the accident", the average weekly wage is calculated upon a weekly division of such wages.

In the instant case, Mr. Darsow categorized his work as design work pertaining to architecture. Accordingly, he designed and constructed art props and sets for various needs, whether they be in advertising, music videos, television shows, fashion magazines, as well as hotel and restaurant clubs. At the time of the accident, Mr. Darsow was working for the Baja Beach Club for which he was tasked with managing the design and construction of a nightclub.

He began this project around the beginning of July 2012. There is certainly no dispute that Mr. Darsow did not work substantially the whole of 13 weeks immediately preceding the accident for the Baja Beach Club. Mr. Darsow did acknowledge he worked fairly consistently prior to this project doing various other art design work. However, neither party submitted any evidence or even presented an argument as to the calculation of the average weekly wage in accordance with F.S. 440.14(1)(a). Further, the claimant's testimony acknowledged that while he generally worked consistently, such consistency wasn't measured on a week to week basis. Therefore, there is no definitive evidence that Mr. Darsow worked substantially the whole of 13 weeks immediately preceding the accident. Finally, the nature of work performed by Mr. Darsow was sufficiently varied in task, pay and duration to conclude that he wasn't "in the employment in which…he was working on the date of accident." Accordingly, the method prescribed in section 440.14(1)(a) is not applicable.

The statute's next method of calculating average weekly wage is to use the wages of a 'similar employee' who has worked substantially the whole of such 13 weeks. See Florida Statutes 440.14(1)(b). The evidence very clearly reflects there is no such similar employee in the instant case.

The next method of calculating average weekly wage is utilized "[i]f an employee is a seasonal worker and the foregoing method cannot be fairly applied in determining the average weekly wage, then *the employee may use*…the calendar year or the 52 weeks immediately preceding the accident." See Florida Statutes 440.14(1)(c). Again, the instant case offered no evidence that Mr. Darsow was a seasonal worker, and the claimant did not seek to utilize such method.[5] Additionally, the employer/carrier's late amendment to utilize this method as a defense was stricken.

If the foregoing methods "cannot reasonably and fairly be applied, the full-time weekly wages of the injured employee shall be used." See Florida Statutes 440.14(1)(d); Davidson Lumbar Company v. Smith, 390 So.2d 1221 (Fla. 1st DCA 1980). The claimant argues that this method of calculation is the applicable method to the instant case. The employer/carrier's position doesn't necessarily dispute this is the proper method, but rather is premised upon the

[5] The plain language of the statute suggests it is the claimant's prerogative to utilize this method.

assertion that Mr. Darsow did not meet his burden to show the amount or that such wages fall within the statutory definition of same.

As to the amount of the claimant's *full-time weekly wages*, it must be noted that only the claimant presented testimony. The employer did not testify in this matter. Mr. Darsow confidently and consistently testified that he was paid $1,500.00 per week for the Baja Beach Club project. The parties sought for the undersigned to take judicial notice of a final evidentiary order entered on December 18, 2013. In this order, among the findings of fact was that the claimant testified he was paid $1,500.00 per week for the Baja Beach Club. So, in a hearing more than three years ago, and again, at the final hearing on February 8, 2017, Mr. Darsow testified he was paid $1,500.00 per week. The employer/carrier offered no credible evidence to dispute Mr. Darsow's assertion. Furthermore, the Baja Beach Club payment journal was admitted into evidence. This payment journal was produced by the employer/carrier. While the journal does not offer detail, it references payment to Chris Darsow on July 21, 2012 in the amount of $3,850.00 and another payment to Chris Darsow on August 1, 2012 in the amount of $3,500.00. Therefore, Mr. Darsow's testimony appears to absolutely be supported by documentation from the employer concerning payment made. As to the amount of the weekly wages, I find Mr. Darsow's testimony is credible. His testimony was presented without a hint of doubt, he has consistently testified in such manner, and his testimony is not refuted by the payment journal, but rather it appears the journal confirms his testimony.

The next question is whether Mr. Darsow's weekly wages with the Baja Beach Club complies with the statutory definition of 'wages'. In Florida Statutes 440.02(28), the legislature defines 'wages' as "the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury and *includes only the wages earned and reported for federal income tax purposes* on the job where the employee is injured." [emphasis added]. The employer/carrier contends that the claimant did not report the wages for federal income tax purposes and therefore, his average weekly wage is $0.

The claimant testified that he stopped filing federal income tax returns in 1990 "when we invaded Iraq." Mr. Darsow explained that he did not want to support bombing people, and so he became a conscientious objector. He refused to file federal income tax returns from 1990 until recently. Mr. Darsow further testified that while he still objects, he felt compelled to 'follow the

rules' after the birth of his daughter approximately two years ago. He testified that he filed his 2012 tax return in the middle of 2015, and that he paid the taxes owed for 2012 in November 2015. The tax return was subject to hearsay and authenticity objections since it was prepared by Carla Neufeld, who did not testify. Nevertheless, Mr. Darsow was able to testify that he reported the wages from Baja Beach Club (and other employers during 2012) and the manner in which the figures were calculated. Specifically, Mr. Darsow advised that all of the 1099's received for 2012 were provided to Ms. Neufeld to reflect total revenues. Mr. Darsow reviewed the 2012 tax return and noted that the total business revenue in Schedule C from the Baja Beach Club (World Entertainment LLC) was $3,000.00, and that such amount was an error. Mr. Darsow concluded that the employer did not properly report the wages considering the payment journal reflected a total of $7,350.00. I accept the testimony of Mr. Darsow that he reported wages from the Baja Beach Club for federal income tax purposes. The question that remains is the effect of the fact the claimant's tax return only reflected $3,000.00 in revenue as opposed to the actual total of $7,350.00.

In Fast Tract Framing v. Caraballo, 994 So.2d 355 (Fla. 1st DCA 2008), the First District Court of Appeal reviewed F.S. 440.02(28) and confirmed the definition of wages requires reporting of same for federal income tax purposes in order to be calculated as the average weekly wage. In Rene Stone Work Corporation v. Gonzalez, 25 So.3d 1272 (Fla. 1st DCA 2010), the First District Court of Appeal accepted a claimant's reporting only the 13 weeks of wages immediately preceding the accident was sufficient to establish an average weekly wage. In Rene Stone, the 1st DCA agreed with the JCC that F.S. 440.02(28) did not require that the tax return be precisely correct. In Garcia-Lopez v. Affordable Plumbing, 66 So.3d 1024 (Fla. 1st DCA 2011), the First District Court of Appeal held that a claimant does not have to introduce the tax return to satisfy the requirements of F.S. 440.02(28).

In the instant case, the claimant testified that he earned $1,500.00 per week, and he testified that he reported the wages from the insured for federal income tax purposes. As to these two facts, I accept the claimant's testimony and find that such testimony is supported by documentary evidence. As to the fact that the tax return apparently did not reflect the correct amount, I note that the employer/carrier objected to the tax return on the basis of hearsay and authenticity. I sustained those objections. Accordingly, I am not reviewing the tax return *for the*

truth of the matter asserted. Furthermore, I note that Rene Stone held the claimant did not have to report all wages, but rather only those for determination of the average weekly wage, and that the tax return did not have to be precisely correct. Accordingly, the inadmissible tax return likely reflecting an incorrect amount does not overcome the claimant's credible and substantiated testimony concerning the amount of his full-time weekly wages, and that same were reported for federal tax purposes. I feel compelled to note that I do not condone or even appreciate Mr. Darsow's prior decision not to report his federal income taxes. However, as to the matter at hand, his refusal to report federal income taxes for any year other than 2012 is not relevant. While such action would possibly reflect upon credibility, which is always relevant, I find there is no basis to diminish Mr. Darsow's testimony as it was detailed, forthcoming, and substantiated. The claimant has met his burden to establish an average weekly wage of $1,500.00 based upon the calculation delineated in section 440.14(1)(d) and that such amount constitutes wages as defined in section 440.02(28). For this date of accident, the corresponding compensation rate would be $803.00.

Additionally, while I have not relied upon same in making my conclusion, I do note that the adjuster's deposition testimony supports the conclusion of the average weekly wage. The adjuster, Robert Smith, testified on January 5, 2017. Mr. Smith testified the average weekly wage was initially $0. See Smith deposition, page 9. On June 14, 2016, the carrier filed a DWC-4 amending the average weekly wage to $1,500.00. Id. The carrier paid impairment benefits to the claimant at that AWW calculation. Id. On December 16, 2016, the carrier filed another DWC-4 amending the average weekly wage to $353.77. Id. at page 11. Mr. Smith testified that he calculated the average weekly wage at this rate because "it was determined that the injured worker was an independent contractor for the employer, and we utilized the total earnings, all 52 weeks for 2012, to determine his average weekly wage." Id. at page 12. Again, I have not relied upon the carrier's various AWW calculations, but rather find it is noteworthy that the carrier has previously acknowledged and accepted the claimant's assertion that he earned $1,500.00 per week, and that it has acknowledged and accepted the claimant reported his wages for federal income tax purposes. I conclude the carrier's most recent position is not supported by the law because section 440.14(1)(c) is the section that provides for a 52 week calculation, but this section is not applicable as there is no evidence the claimant is a seasonal worker. The carrier's

justification to utilize this method upon the claimant being an independent contractor does not comport with the statute.

Analysis – *temporary partial disability*

The claimant contends he is entitled to temporary partial disability benefits from the date of accident to September 26, 2014. Again, the claimant bears the burden to prove entitlement to temporary partial disability benefits. Specifically, the claimant must prove that his post-accident earnings are less than 80% of the average weekly wage, and that such post-accident reduced earnings are causally connected to his compensable injury. See Florida Statutes 440.15(4); Wyeth/Pharma Field Sales v. Toscano, 40 So.3d 795 (Fla. 1st DCA 2010). In Toscano, the First District Court of Appeal held that "[g]enerally, 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 her to return to and adequately perform her prior job with the employer, and whether the workplace injury caused a change in employment status resulting in a reduction of her wages." Id. at 799. The 1st DCA expressly rejected the notion that claimant had to prove that her restrictions prohibited her from performing all other potentially available employment. Id. at 800. The Toscano opinion further held that once a claimant meets her initial burden of establishing a prima facie showing of a causal connection between the compensable injury and the subsequent loss of income, the burden shifts to the employer/carrier to prove that during the period TPD is claimed, the claimant refused work or voluntarily limited his income, or some other affirmative defense. Id.

In the instant case, the parties presented no dispute concerning the claimant's injuries and medical treatment received. The employer/carrier concedes there is medical evidence to support the claimant had physical restrictions caused by the compensable injuries from 7/8/13-11/17/13 and from 2/28/14-9/26/14. The claimant's initial medical care was provided on the date of accident at Broward Health Medical Center. There were medical records from Broward Health admitted into evidence, but none of those records clearly reflect the claimant was assigned work restrictions. Thereafter, the claimant was authorized to treat with Dr. Javier Centurion with the initial visit occurring on July 8, 2013. Dr. Centurion did assign work restrictions. Then, the claimant came under the care of Dr. Richard Strain. He saw Dr. Strain on November 18, 2013 and on January 13, 2014. On both occasions, Dr. Strain did not assign any work restrictions.

The claimant began treating with Dr. Randall Blinn on February 28, 2014. Dr. Blinn assigned work restrictions. Considering the employer/carrier concession, it is clear there is no dispute as to the period the claimant began treating with Dr. Centurion (July 8, 2013) until the claimant began treating with Dr. Strain (November 18, 2013) and then again when the claimant began treating with Dr. Blinn (February 28, 2014) to the ending point stipulated by the parties – September 26, 2014, the date Dr. Blinn removed work restrictions.

With respect to the disputed periods of medical restrictions, it should be stated that the only provider to offer testimony was Dr. Randall Blinn, who was deposed on January 27, 2017. So, from the date of accident to July 8, 2013, the claimant was not under the care of any authorized providers, with the exception of the initial hospital visit at Broward Health on the date of accident. Again, the records from Broward Health did not specifically reference work status. Dr. Blinn was asked if Mr. Darsow "should have been on a restricted duty status from the date of accident up until your date of service." See Dr. Blinn, page 7. Dr. Blinn testified that the claimant should have been restricted from the time of the accident until the time that he first saw him – February 28, 2014. Id. At the risk of stating the obvious – Dr. Blinn is, therefore, the only medical provider who offered a medical opinion concerning Mr. Darsow's work status from the date of accident to July 8, 2013. I accept the testimony of Dr. Blinn in this matter. I find that Dr. Blinn offered reasonable and credible medical opinions. I further note that such finding is supported by the fact that Mr. Darsow was assessed with cervical and lumbar disc herniations with evidence of cervical radiculopathy, and that such injuries were sufficiently significant to warrant a 10% permanent impairment rating. Accordingly, I find there is credible evidence to support medical restrictions from the date of accident to November 18, 2013.

With respect to the period November 18, 2013 to February 28, 2014, I accept the medical opinion of Dr. Blinn. Again, Dr. Blinn generally testified that Mr. Darsow should have been under restriction from the date of accident to his initial visit of February 28, 2014. During cross-examination, Dr. Blinn generally deferred to prior treating provider's opinions on work status. See Dr. Blinn, page 10. However, when Dr. Blinn was specifically asked to assess the medical reports from Dr. Strain, Dr. Blinn definitively asserted the claimant should have been under work restrictions. Id. at pages 13-16. Dr. Blinn elaborated by stating Dr. Strain did not have the results of the MRI's, "therefore he did not have all the information necessary at the time to make

that call, and therefore I do believe that I would be correct." Id. at page 20. Again, I find that Dr. Blinn's opinion concerning work status for 11/18/13-2/28/14 is credible and well-reasoned. I accept his opinion over that of the medical reports of Dr. Strain. Accordingly, I find there is credible evidence to support medical restrictions from November 18, 2013 to September 26, 2014.

The question remains as to whether Mr. Darsow suffered economic loss and, if so, whether such loss was causally connected to the compensable injuries. The claimant filed an employee earnings report for the global period of 1/1/13-12/31/14 dated January 18, 2017, and then amended on February 7, 2017. In the original DWC-19, the claimant referenced wages for the two year period totaling $8,829.23, but he attached revenue/expense sheets for 2013 and 2014, as well as the 1099 information received from the IRS. The amended DWC-19 reflects wages for the two-year period totaling $25,579.08. The disparity in wages in the DWC-19 forms is premised upon the revenue/expense sheets, which included many personal expenses among 'business expenses'. Specifically, Mr. Darsow testified that he received total revenue in 2013 of $41,289.00, but that he had to pay labor in the amount of $23,000.00 and materials ('art dept.') in the amount of $4,923.61. For 2014, he received total revenue of $69,274.00 but paid $42,715.00 in labor and $14,345.31 in materials. Therefore, it is clear that Mr. Darsow suffered economic loss following the accident considering his average weekly wage is $1,500.00.

Mr. Darsow testified the industrial accident had a big negative effect upon his earnings. Mr. Darsow explained that prior to the industrial accident, he was able to perform most of the physical labor required for his projects. Therefore, he was able to enjoy a much greater profit margin. Also, Mr. Darsow testified that his jobs vary in rates, often due to the extent of the physical requirements as opposed to jobs where he mainly oversees or supervises. In fact, Mr. Darsow advised that the Baja Beach Club project was a lower paying job ($300.00 daily) because he was primarily tasked to direct. The accident occurred as the result of another worker calling out sick, which required Mr. Darsow to climb the ladder to remove the soffit. Mr. Darsow provided numerous examples of the type of jobs he was capable of performing before the accident compared to the type of jobs he was constrained to after the accident, and though he continued to accept his typical work requests, his overhead increased due to the physical limitations imposed by the compensable injuries. Mr. Darsow provided credible, well-reasoned

testimony that was supported by numerous examples to verify that he suffered economic loss following the accident and that such loss was causally connected to the compensable injuries. The employer/carrier did not provide any credible evidence to dispute Mr. Darsow's allegations. I accept Mr. Darsow's testimony, and find that he met his burden to prove entitlement to temporary partial disability benefits in accord with the requirements of F.S. 440.15(4) as analyzed in Toscano. The employer/carrier did not present any credible evidence of affirmative defenses. The employer/carrier's contention that Mr. Darsow's financial loss was due to the economy is not supported by any credible evidence.

Analysis – *penalties/interest on impairment benefits*

The claimant contends he is entitled to payment of penalties and interest for the late payment of impairment benefits. The facts concerning this claim are not in dispute. The parties stipulate the claimant reached maximum medical improvement as of February 11, 2016 and that he was assigned a 10% permanent impairment rating. The adjuster, Robert Smith, testified that the carrier received notice of the MMI from Dr. Blinn on February 18, 2016. See Smith deposition, page 7. On April 13, 2016, the carrier filed a DWC-4 indicating the claimant reached MMI with a 10% rating. Id. at page 11. The impairment benefits for the period of 2/12/16-6/2/16 were paid on June 14, 2016.[6] See payout ledger and Smith deposition, page 9. Mr. Smith testified that the carrier did not initially pay the impairment benefits because the claimant had an AWW of zero. See Smith deposition, page 9. Therefore, it is clear the employer/carrier's defense of this claim was based upon its position concerning the average weekly wage. However, at hearing, the employer/carrier argued there was no legal basis to pay penalties and interest on impairment benefits because IB's are medical benefits, and thus, penalties and interest do not attach.

While I appreciate the employer/carrier's novel argument, the First District Court of Appeal has addressed this issue. In Turner v. Miami-Dade County School Board, 941 So.2d 508 (Fla. 1st DCA 2006), the 1st DCA reversed a JCC denial of penalties and interest on impairment benefits. The Court noted the claimant reached maximum medical improvement on January 4, 2002 and that impairment benefits were paid on July 23, 2002. The Court stated, "[t]hus, it

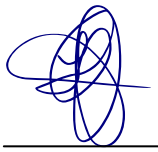
[6] The payout reflects the impairment benefits for 6/3/16-6/16/16 were paid on June 16, 2016 and the period of 6/17/16-6/30/16 were paid on June 23, 2016.

would appear that claimant is entitled to penalties and interest for late payment" citing the statute that provided the carrier was to pay impairment benefits within 20 days after the carrier has knowledge of the impairment.[7] Accordingly, I conclude that Mr. Darsow is entitled to penalties and interest for the late payment of impairment benefits from 2/12/16-6/2/16.

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

1. The claim for determination of average weekly wage of $1,500.00 per week is **GRANTED.**
2. The claim for payment of temporary partial disability benefits from date of accident to September 26, 2014 is **GRANTED.** The employer/carrier is entitled to any and all lawful offsets, including the stipulation of the claimant to administratively offset all wages during the period in question (including wages earned post-accident in 2012) and for payment of the advance previously awarded.
3. The claim for payment of penalties and interest on past due temporary benefits (from 1/1/13 to 9/26/14[8]), and for late payment of impairment benefits from 2/12/16-6/2/16 is **GRANTED.**
4. The claim for attorney's fees and costs is **GRANTED**.

DONE AND SERVED this 3rd day of March, 2017, in West Palm Beach, Palm Beach County, Florida.



Thomas A. Hedler
Judge of Compensation Claims
Division of Administrative Hearings
Office of the Judges of Compensation Claims
West Palm Beach District Office
One Clearlake Centre, 250 S. Australian Avenue, Suite 200
West Palm Beach, Florida 33401

[7] The current statute – F.S. 440.15(3)(a) provides that impairment benefits are due and payable within 14 days after the carrier has knowledge of the impairment.
[8] The claim for payment of penalties and interest for late payment of temporary benefits from the date of accident to 1/1/13 is DENIED, as the claimant did not provided a DWC-19 for this time.

(561)650-1040
www.fljcc.org

COPIES FURNISHED:

David Scott Benn
Benn, Haro & Isaacs, PLLC
1580 Sawgrass Corporate Parkway, Suite 130
Sunrise, FL 33323
david@accidentlawyerfl.com

Ernesto de la Fe, ATTORNEY
Morales & Cerino, P.A.
158 East 49th Street
Hialeah, FL 33013
edelafe@mcpalegal.com

Jesse Colin Price
Miller, Kagan, Rodriguez & Silver, PA
515 N. Flagler Drive, Suite 1425
West Palm Beach, FL 33401
jessep@mkrs.com,khadiijuar@mkrs.com