

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

Yanelis Almenares,  
Employee/Claimant,

vs.

OJCC Case No. 12-026398ERA, 12-026399ERA

Demetech Corporation, and Demetech  
Corporation/Guarantee Insurance  
Company, Guarantee Insurance Company,  
Employer/Carrier/Service Agent.

Accident date: 5/28/2012

Judge: Edward Almeyda

FINAL COMPENSATION ORDER

This matter came before me, the undersigned Judge of Compensation Claims, for a Merits Hearing held on August 13, 2014. The Claimant was represented by Albert Marroquin, Esquire, and the Employer/Carrier by Andrew Borah, Esquire.

The adjudicated Petitions for benefits are dated 11/16/12 and 4/17/2013 on the 5/28/12 date of accident. This case was consolidated with a date of accident of 10/9/12, however the sole PFB on that date of accident was subject of a prior notice of voluntary dismissal, and no issues for adjudication on that accident/injury are before the undersigned. On the evidence presented, this Order ensues.

**CLAIMS/DEFENSES:**

Claims:

1. Determination of correct average weekly wage.
2. Temporary total/partial from date of accident and continuing (date of accident 5/28/12).
3. If Claimant is at MMI, payment of income impairment benefits.

4. Provision of an orthopedist.
5. Provision of nerve studies.
6. Provision of therapy.
7. Penalties, interests, costs and attorney's fees.

Defenses:

1. AWW is \$323.97 for 5/28/12 accident.
2. No temporary total/partial disability due as Claimant continued to earn at least 80% of her AWW, until terminated on 10/30/12.
3. No temporary disability due per EMA opinion that Claimant had no restrictions from this accident.
4. No IIB's due as no impairment assigned.
5. Alleged industrial accident not major contributing cause of Claimant's need for treatment.
6. No penalties, interests, costs or attorney's fees due for this accident.
7. Per EMA, Dr. Cummings, Claimant does not require further care for 5/28/12 accident.
8. Orthopedist, nerve studies or therapy not necessary per Dr. Cummings.
9. Industrial accident on 5/28/12 not major contributing cause of need for further care.
10. Claimant reached MMI on 6/20/12.

**DOCUMENTARY EVIDENCE PRESENTED:**

Claimant:

- a. PFB dated 11/16/12 (1\*).
- b. PFB dated 4/17/13 (37\*).
- c. Records attached to above PFB (38\*).
- d. Response to PFB dated 11/29/12 (4).
- e. Mediation report (29\*).
- f. Pre-trial dated 4/4/13 (33\*).
- g. EMA report dated 8/1/13 (56\*).
- h. Amended EMA report dated 10/16/13 (66).
- i. Dr. Moises records (73\*).
- j. Order admitting above records (79\*).
- k. Deposition Dr. Cummings 2/14/14 (93\*).
- l. Deposition Janet Turner(94).
- m. Dr. Langone's deposition (95\*).
- n. Payroll records (128\*).

Employer/Carrier:

1. Dr. Cummings 10/11/13 deposition (87\*).
2. Dr. Hamburger's deposition (120\*). Fact purposes only.
3. Praxis institute records (124\*).

Judges Exhibits and proffers, or for Identification only:

J1. Claimant's trial memorandum (127\*)\*\*\*

J2. E/C trial memorandum (119\*)\*\*\*

Proffers:

P1. Karla Arguello deposition (91\*).

Joint exhibits:

Jt.1. Claimant deposition (89\*).

Jt.2. Dr. Cummings updated report dated 4/25/14(116\*).

Live testimony:

Claimant

\*DOCKET ENTRY NUMBER

\*\* HARD COPY EXHIBIT

\*\*\* FOR IDENTIFICATION ONLY

Abbreviations used herein:

Claimant, Clt.

Employer/Carrier, E/C

Maximum Medical Improvement, MMI

Income Impairment Benefits, IIB

Average Weekly Wage, AWW

### **CONCLUSIONS OF LAW AND FINDINGS OF FACT:**

1. In making the determinations set forth below, I have attempted to detail the salient facts together with the findings and conclusions necessary to resolve the issues. I have not attempted to painstakingly summarize the substance of the parties' arguments, nor the support given to my conclusions by the various documents submitted and accepted into evidence; nor have I attempted to state non essential facts. Because I have not done so, does not mean that I have failed to consider all of the evidence. In making my findings of fact and conclusions of law in this claim, I have carefully considered and weighed all evidence submitted to me. I have considered arguments of counsel and the respective parties, and analyzed statutory and

decisional law of Florida.

2. As a background, the Claimant suffered a compensable accident on 5/28/12, when as alleged in the petition for benefits she developed pain in her left wrist due to assembling of products. She came under the care of Concentra (a PCP clinic) for pain in her left wrist/hand. Thereafter following the request for alternate/one time change care she started treating with Dr. Moise.

3. A conflict arose in the opinions of the Concentra physicians and Dr. Moise over the Claimant's then hand/wrist condition, which resulted in the appointment of EMA Dr. Cummings. In his report Dr. Cummings referenced the need for an MRI of the arm/wrist, which resulted in an order dated 2/26/14 granting the Claimant's motion for the MRI. Dr. Cummings then rendered another report including this MRI's result on 4/25/14. Based upon Dr. Cumming's opinion the E/C is denying the major contributing cause of the Claimant's current condition, as well as asserting other defenses.

#### **SUMMARY OF EVIDENCE PRESENTED**

4. CLAIMANT: Ms. Yanelis Almenares testified live at the proceeding, and in addition her deposition was introduced in evidence. She is 32 years old, and while she said she spoke some English, testified through an interpreter. At the time of the subject claimed accident date she was employed by the Employer in the packaging of sutures. During her period of employment there, she performed various duties. First she was in the packing department which required constant movement of the hands. Then she went to the sealing department, again requiring constant hand movement. After that she went to the line department, at first winding

threads of suture and placing them in a pouch, and lastly threading 300 spools per hour, eight hours a day. All of this required movement of the hands, and the left wrist.

5. While working for the Employer, she also was studying to be a masseuse at the Praxis Institute. This started in March 2011. During the first year, apparently through calendar 2011 she gave about 57 massages as part of her training, in addition to other course work.

Commencing in 2012 she had terminated the massage training, but was still learning how to do lymphatic massages, which she said were done primarily with the right upper extremity. It is noted that the Claimant during her live testimony seemed confused as to the dates of this training, but this was later cleared up at the trial, and further cleared up by the deposition testimony.

6. The onset of the left hand/wrist/arm pain is also in question with a conflict in the Claimant's testimony. At the trial she originally stated that it started in May 2012, hence the alleged date of accident. Yet in deposition she admitted that these symptoms started in January or February 2012. Whenever these symptoms started, the Claimant testified that in May 2012 she had felt discomfort in the left arm/wrist for about two days, and that is when she reported it to the Employer.

7. Originally she was sent by the E/C to Concentra Clinic and received treatment there. In response to her counsel's question, she said that she was satisfied with their treatment. But then added that a new doctor was requested, and she came under the care of Dr. Moise.

8. At the time of the hearing the Claimant testified that the pain in the hand to arm was better, but still felt some tingling. She also testified that upon returning to work following the

initial period of the accident in May, she took one month vacation to get better. She did at one time return to work doing modified duty involving less work with the left hand/arm, and at a point took one month off on vacation to bet better. Upon the end of this period, according to her deposition she called to get a few more days off, could not reach her supervisor, and received a letter terminating her employment.

9. Since this termination she has had several other jobs in cutting the meat for pastry during December 2012 to January 2013 and later for a wholesaler where she worked six to eight months. She applied for unemployment compensation after the Employer terminated her, but was not granted any benefits.

10. DOCTOR CUMMINGS: He is the EMA appointed by Judge Kuker in this matter. He is an orthopedic surgeon with a specialty in hand and upper extremities, who examined the Claimant on July 22, 2013 and rendered three separate reports. The first dated July 22, 2013 was subsequently amended to correct a scrivener's error not affecting its conclusions. Upon the entry of these reports, which indicated a possible need for a wrist MRI, the Claimant's attorney moved to have the E/C pay for said MRI to allow a complete evaluation. This was granted by the undersigned on 2/26/14. Upon the completion of this MRI furnished to Dr. Cummings, he then entered a third short report dated April 25, 2014.

11. Dr. Cummings was twice deposed in a rather extensive manner questioning his conclusion that the claimant has a condition called ulnar carpal impaction syndrome, which is due to a congenital condition where the ulnar is longer than the radius in the forearm. While Dr. Cummings believed that the claimant's work activities aggravated or exacerbated her symptoms

associated with ulnar carpal impaction syndrome, he did not believe the claimant's work activities caused a severe progression of her ulnar carpal impaction syndrome. The aggravation would have cleared up within three months from the cessation of the offending use of the hand. Dr. Cummings did not believe that the claimant's work activities were the major contributing cause of her left wrist symptoms. Dr. Cummings did not believe the claimant's work activities were contributing that much to her symptoms, as the claimant continued to complain of symptoms, even after she stopped performing the work activities. Dr. Cummings indicated that after three months of no longer performing her work activities, the claimant's symptoms would no longer be related to work, but would be related to her underlying problem (ulnar carpal impaction syndrome). Dr. Cummings testified several times throughout his deposition that after three months of stopping the offending activity, the claimant should be better where she would be at MMI. Of most significance, Dr. Cummings did not recommend any restrictions for the claimant, even during the time period of the exacerbation, as he just recommended normal use with a protective brace.

12. Insofar as a date of MMI, Dr. Cummings said that she would have been at that medical stage as of the time he saw her, explaining that he does not opine as to date of MMI prior to his examination, and that while that may have been reached three months after the Claimant stopped the work using her hand, he was considering the examination date as that of MMI.

13. At the time of the second deposition of Dr. Cummings he further explained that repetitive type of motion of the wrist and hand and upper extremities do not cause ulnar variance.

Such ulnar variance is either caused congenitally, by fracture or by surgery. The Claimant did not have the latter two. He went on to testify:

“So when you have ulnar carpal impaction—I mean the type of work – yes, she is doing a lot of repetitive moving of her wrist and a lot of repetitive ulnar deviation, but just because she is doing that ulnar deviation does not mean that there is any tearing occurring.

You can have ulnar carpal impaction.

Could there be a pre-existing tear that was aggravated by those actions, that’s a possibility, also.

I cannot say that the activities at Demetech cause any specific tear.

I mean, I suspect that she may have a tear, but this has not been documented yet.

Her diagnosis is ulnar-sided wrist pain, secondary to ulnar carpal impaction syndrome” (Dr.

Cummings deposition 2/14/14, at pages 16-17).

14. Following the MRI Dr. Cummings entered a report stating that while the Claimant showed a tear involving the TFCC, which correlated to the clinical evaluation and findings, the MRI did not change any of his opinions previously rendered.

15. DOCTOR MOISE: He is the Claimant’s alternate treating physician, and his two DWC-25 forms are in evidence. These are dated 4/1/13 and 4/15/13. These forms reflect a diagnosis of left carpal tunnel and left hand tendinitis, related to the employment. The Claimant was referred to an orthopedic specialist, and not to be at MMI. There is an indication of no work on the first date, and no indication of work capability on the second date, just a mention that the Claimant was unemployed at this time.

16. DOCTOR MICHAEL LANGONE: He is the Claimant’s IME, and an orthopedic surgeon. He examined the Claimant on 12/16/13. His history as far as the employment duties is consistent with the Claimant’s testimony, but it lacks any mention of the hand use in 2011 as a masseuse.

Dr. Langone opined that the MCC of the TFC complex tear and the carpal tunnel syndrome

was the repetitive trauma at work. She was not at MMI as of the date of the examination, and needed further treatment and testing (the MRI was subsequently done). As far as work, he would minimize lifting and torquing the wrist and twisting of the wrist.

17. JANET TURNER, ADJUSTER: This deposition testimony covered this date of accident, as well as the dismissed eye injury in 10/9/2012. The subject, 5/28/12 injury was accepted compensable to the left wrist, and Concentra was authorized.

18. The adjuster said the AWW was \$499.70 based upon a 13 week wage statement. After an exchange referencing this subject, where neither side could find the average weekly wage statement the attorney's stipulated to this sum.

19. Temporary indemnity was being denied as the Claimant only had some restrictions which the Employer could accommodate, and the E/C was using an MMI date of 6/20/12, with no impairment rating.

20. MISCELLANEOUS EXHIBITS: The records from Praxis were reviewed and it appears as if the Claimant was enrolled in massage training from March 2011 through mid 2012.

21. The PFB's for benefits and the response reflect that in November 29, 2012 the E/C authorized a onetime change, and otherwise did not deny the compensability of this claim. Similarly the pre-trial originally entered on 4/4/13 reflects an E/C position of \$323.97 for the AWW, and the Claimant seeking at least \$360.00, but does not raise any other defenses to total compensability.

22. The pre-trial entered on 12/19/13 again reiterates the E/C's position of an AWW of \$323.97 and the Claimant asserts that to be at least \$360.00. In this pretrial several defenses are

raised, as stated in the list of defenses, above.

### ANALYSIS

23. AS TO AWW: It is the Claimant's position that the stipulation at the time of the adjuster's deposition on 2/12/13 concerning an AWW of \$499.70 is binding on the parties. The E/C, on the other hand, asserts that such stipulation was entered in error, and that the actual records reflect an AWW of \$323.97. Because of the mistake in the stipulation, that should not be binding, and that it should be set aside to determine the actual amount.

24. Herein we have two subsequent pretrial stipulations where the Claimant *did not* mention any prior AWW stipulation, and only asserted "at least \$360.00". The E/C remained consistent in stating that the AWW was \$323.97. As shown from the payroll records, the Claimant's earnings during the thirteen weeks prior to this alleged date of accident average to \$323.97. It is noted that on both pretrial's entered after the adjuster's deposition where the parties agreed to a higher AWW, the Claimant apparently rescinded that agreement alleging at least \$360.00, and never mentioning this prior higher number. The E/C likewise always asserted the \$323.97 AWW. Therefore, the Claimant cannot allege surprise in this E/C submitted AWW contrary to that in the adjuster's deposition.

25. The Judge of Compensation Claims has the authority to reject an erroneous stipulation of an AWW if the facts otherwise reflect the contrary. *See Salinas v. C.A.T. Concrete, LLC*, 46 So3d 300 (Fla. 1<sup>st</sup> DCA, 2010). Here the evidence supports the AWW of \$323.97. The Claimant at the pretrial never raised claimed \$499.70 as a proper number, and continued to claim at least \$360.00. Therefore, the undersigned finds that the prior agreement of the parties at

the adjuster's deposition, erroneous and not supported by the evidence, and waived at the time of the pretrial is unenforceable. The AWW is found to be \$323.97 in accordance with the payroll records.

26. MCC OF CURRENT CONDITION AND AGGRAVATION OF PRE-EXISTING CONDITION: This was the subject of the dispute leading up to the EMA appointment. Dr. Cummings gave a thorough and detailed explanation of his conclusion that the Claimant's current condition was related to non-industrial causes, and therefore not caused by the "accident" or work activities. He even gave the Claimant the benefit of the doubt in requesting a further study, an MRI, which was then obtained and presented to him. After analysis, he finally concluded that the claimant's work activities were not the major contributing cause of her left wrist symptoms.

27. Dr. Cummings is a specialist in hand/upper extremity orthopedics. His opinions were well presented and explained. The contrary opinion of Dr. Langone, an IME for the Claimant was not as persuasive or well explained. The same lack of persuasiveness is with the reports of Dr. Moise. Even without the burden needed to overcome an EMA, clear and convincing evidence, the undersigned finds that Dr. Cummings opinions are consistent with logic and reason and would be found to be credible and accepted by the undersigned. Added to this the fact that the Claimant must overcome this medical opinion by clear and convincing evidence, which neither the testimony of Dr. Langone or the medical reports of Dr. Moise achieved, the opinion and conclusions of Dr. Cummings are accepted and adopted as a finding of fact.

28. In conclusion, the undersigned accepts Dr. Cummings opinion that after his

examination on 7/22/13 the major contributing cause of the Claimant's hand/wrist condition is not the work activities with the Employer, and she was at MMI as of that date.

29. DATE OF MMI: The E/C asserts that is 6/20/2012. Yet no record evidence could be found to support that date. Dr. Moise on his visits on April 1, 2013 and April 15, 13 did not find the Claimant to be at MMI. Dr. Cummings, as of 7/22/13 opined the Claimant to be at MMI. Dr. Langone, as of his visit on 12/16/13 did not find MMI to have been reached.

30. Previously, having accepted the opinion of Dr. Cummings, the EMA, over the contrary opinions of Dr. Moise and Dr. Langone, this date of MMI from Dr. Cummings is accepted for two reasons. First is that it is consistent with logic and reason, particularly considering his very extensive testimony and testing and thorough explanation of the Claimant's condition and how it relates to the accident. Second, the contrary opinions of Drs. Moise and Langone do not overcome the statutory presumption of correctness of an EMA.

31. In arriving at this conclusion, it is noted that Dr. Cummings repeatedly indicated that he Claimant had an aggravation of this non compensable condition by the work activities. He also clearly explained that such aggravation would have been of limited duration of about three months after the repeated use of the hand stopped.

32. The Claimant has taken an alternate position that because the E/C failed to deny the claim within 120 days pursuant to F.S. 440.20(4) it is now prevented from denying the major contributing cause of the Claimant's condition to be due to the work accident. However, said approach fails for two reasons, first the E/C is not denying the compensability of the claim ab initio, and (2) the denial is over the major contributing cause of the current condition. See

*School District of Hillsborough County v. Dickson*, 67 So3d 1080 (Fla. 1<sup>st</sup> DCA, 2011).

33. PAYMENT OF TEMPORARY TOTAL/PARTIAL DISABILITY: The Claimant has claimed TTD/TPD from the date of accident, 5/28/12 to present and continuing. Insofar as the TTD claim is concerned, this is denied as there is no evidence to support the same.

34. Dr. Cummings did not give the Claimant any specific work restrictions during the period of the aggravation/exacerbation, just the normal use of the extremity with a brace. His opinion in this regard is likewise accepted, and the undersigned finds that the evidence does not support an entitlement to temporary partial disability.

35. INCOME IMPAIRMENT BENEFITS: Having accepted the opinion of Dr. Cummings that the Claimant's current condition is not resulting from the accident and that she is at MMI, with a zero percent impairment, that claim is likewise denied.

36. CLAIM FOR THERAPY, NERVER STUDIES AND ORTHOPEDIST: Again, this claim is predicated upon not having accepted Dr. Cummings opinion. As that is not the case, and it has been found previously herein that the Claimant's current condition is not as a result of the work injury, and is at MMI with a zero percent impairment, this claim is likewise denied.

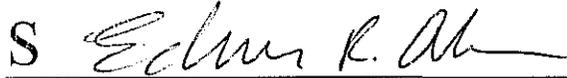
37. ATTORNEY'S FEES AND COSTS: The issues of fees and costs were not litigated at the time of these proceedings; therefore adjudication is reserved until they become ripe by the filing of a Verified Motion for Fees and Costs.

**WHEREFORE, IT IS ORDERED AND ADJUDGED THAT:**

1. The AWW is \$323.97.
2. The claim for TTD/TPD is DENIED AND DISMISSED WITH PREJUDICE.

3. The claim for income impairment benefits IS DENIED AND DISMISSED WITH PREJUDICE.
4. The claims for provision of an orthopedist, nerve studies and therapy are DENIED AND DISMISSED WITH PREJUDICE.
5. The claims for penalties and interest ARE DENIED AND DISMISSED WITH PREJUDICE.

DONE AND ORDERED this 15th day of August, 2014, in Miami, Dade County, Florida.



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