

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

Marie Celeide,
Employee/Claimant,

OJCC Case No. 16-015413WJH

vs.

Accident date: 5/28/2016

Treasure Isle Care Center/Gallagher
Bassett Services, Inc.,
Employer/Carrier/Service Agent.

Judge: Walter J. Havers

COMPENSATION ORDER

THIS CAUSE came before the undersigned Judge of Compensation Claims for a final hearing on December 18, 2017 regarding the Petitions for Benefits (PFB) filed on July 28, 2017 and August 1, 2017. Attorney Nathaniel Green appeared on behalf of the Claimant. Attorney Andrew Borah appeared on behalf of the Employer/Carrier (E/C).

CLAIMS:

1. TPD from 6/22/2016 to 5/13/2017.
2. Medical treatment from D/A to 5/13/2017.
3. Penalties, interest, costs and attorney's fees.

DEFENSES:

1. Employee reached MMI on 6/22/2016.
2. Employee had no work restrictions as of 6/22/2016.
3. No TPD due or owing for time period from 6/22/2016 to Employee's death.
4. E/C cannot provide medical care for a time period in the past.
5. Injured worker is deceased so E/C cannot provide medical care in the present and future.
6. Penalties, interest, costs, and attorney's fees are not due or owing.

LIVE TESTIMONY:

1. Berntz Celeide (Claimant and deceased Employee's son)

DOCUMENTARY EVIDENCE:

JCC:

1. Uniform Statewide Pretrial Stipulation filed on 11/22/2017 (DE 194).
2. E/C's Amendment to Pretrial Stipulation filed on 11/22/2017 (DE 195).

Joint:

1. Deposition of Victor Krestow, M.D. and attachments filed on 5/8/2017 (DE 113).
2. Deposition of EMA, David Ross, M.D., filed on 6/5/2017 (DE 160).
3. Deposition of E/C IME, Harish D. Thaker, M.D., and attachments filed on 5/8/2017 (DE 115).

Claimant:

1. Deposition of Employee's IME, Nicholas David Alexander Suite, M.D., and attachments filed on 5/9/2017 (DE 123 & 124).
2. Deposition of Maria Mustelier, M.D. and attachments filed on 5/9/2017 (fact purposes only) (DE 120).
3. Deposition of Irene Leung (records custodian) and attachments filed on 5/10/2017 (fact purposes only) (DE 143 & 144).
4. Deposition of Marie Celeide (Employee) filed on 5/8/2017 (objection overruled) (DE 112).
5. Deposition of Frantz Labonte filed on 5/9/2017 (objection overruled) (DE 127 & 133).
6. Deposition of Andrea Jackson-Knott filed on 5/9/2017 (objection overruled) (DE 138 & 139).
7. Deposition of Ulrick Theoc filed on 5/9/2017 (objection overruled) (DE 140, 141 & 142).
8. Deposition of Louna Pierre Philippe filed on 5/9/2017 (objection overruled) (DE 134 & 135).
9. Unsworn statement of Raina Tousey filed on 5/9/2017 (DE 121 & 122).
10. Deposition of Santilia Preval filed on 5/9/2017 (objection overruled) (DE 136).
11. Petition for Benefits filed on 8/1/2017 (DE 170).
12. Notice of Defense filed on 8/11/2016 (objection overruled) (DE 6).
13. Petition for Benefits filed on 6/28/2016 (objection overruled) (DE 1).
14. Deposition of Carlos Sanchez, M.D. and attachments filed on 5/8/2017 (fact purposes only) (DE 114).

E/C:

1. EMA report of David Ross, M.D. filed on 5/9/2017 (DE 125).
2. EMA appointment correspondence filed 3/1/2017 (DE 90).

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

1. The Employee testified by deposition on September 8, 2016.
2. The Employee worked as a certified nursing assistant (CNA) for Treasure Isle Care Center (Employer), a nursing home. The Employee worked for the Employer for 33 years.
3. On May 28, 2016, the Employee fell and hit her head on the floor.
4. The Employee was transported to North Shore Hospital by ambulance.
5. The Employee alleged that she was pushed down by a resident while attempting to bathe him.
6. The E/C contends that the Employee was not pushed down by a resident, but fainted instead.
7. The E/C authorized Dr. Victor Krestow, and the Employee's initial visit with Dr. Krestow was on June 6, 2016.
8. The Employee had follow-up visits with Dr. Krestow on June 10, 2016, June 15, 2016 and June 22, 2016.
9. On June 22, 2016, Dr. Krestow placed the Employee at maximum medical improvement (MMI) with a 0% permanent impairment rating (PIR), and discharged her from further care.
10. The Employee was terminated on June 22, 2016 for allegedly providing a false description of her accident.
11. In response to the initial PFB filed on June 28, 2016, the E/C filed a Notice of Defense on August 11, 2016, asserting the misrepresentation defense alleging the Employee intentionally provided a false description of the accident.
12. The Employee died at the age of 68 years-old on May 13, 2017.
13. The June 28, 2016 PFB was dismissed without prejudice by an order entered on June 6, 2017 upon the filing of a Suggestion of Death by the Claimant's counsel.
14. The pending PFBs were filed on behalf of the Claimant, Berntz Celeide.
15. The E/C did not assert the misrepresentation defense in response to the pending PFBs.
16. The parties stipulated that the accident is compensable.

Claim for Temporary Partial Disability (TPD)

17. On June 6, 2016, Dr. Krestow diagnosed the Employee with a head contusion and cervical sprain as a result of her work accident. He also diagnosed her with hypertension cardiovascular disease and adult diabetes, which he opined were not work related. He prescribed Theramine, an all-natural medication for anti-inflammatory effect; Trepadone, an all-natural medication for pain relief; Sentra PM for sleep; and a cream for her neck pain. Dr. Krestow stated that he placed the Employee at MMI with a 0% PIR, and discharged her from care, on June 22, 2016 because she was essentially asymptomatic. Dr. Krestow opined the Employee was not suffering from post-concussive syndrome, cervicocranial syndrome, or cervical myofascial pain syndrome.
18. Dr. Thaker performed the E/C's independent medical examination (IME) on February 1, 2017 and opined the Employee's neurologic exam was essentially normal. He also opined that she had indication of orthopnea and congestive heart failure which may cause dizziness and some of her current and previous symptoms. He said that she was at MMI with a 0% PIR from a neurologic point of view. Dr. Thaker opined that there was no evidence of post concussive syndrome, cervical cranial syndrome, or cervical myofascial pain syndrome.
19. The Expert Medical Advisor (EMA), Dr. Ross, examined the Employee on April 18, 2017 and diagnosed the Employee with "a memory disorder of unknown origin; chronic headaches and neck pain most likely of myofascial origin." He opined that the work-injury was not the major contributing factor for the diagnoses, and there is no work-related biological explanation for the Employee's increasing complaints six months post-injury. He did not diagnose post-concussive syndrome, and opined if she had a concussion it would fit the criteria of an extremely mild traumatic brain injury. He also said "he would not [sic] use the diagnoses of closed head injury or concussion only after more serious entities had been more thoroughly investigated. For example, congestive heart failure is associated with a significant increased risk of recurrent syncope and sudden death that warrants thorough evaluation." He accepted Dr. Krestow's assignment of MMI on June 22, 2016 as accurate. The E/C argues that the Employee's unfortunate death less than 30 days after the EMA's evaluation demonstrates the accuracy of the EMA's opinions. In the Claimant's trial memorandum, he contends that the EMA improperly bolstered his opinion by including 4 footnotes in his EMA

report, which referencing articles regarding cognitive impairment in congestive heart failure; symptoms distress and quality of life in patients with advanced congestive heart failure; differential diagnosis; and syncope in congestive heart failure. In *Linn v. Fossum*, 946 So. 2d 1032 (Fla. 2006), the Supreme Court of Florida held that it was improper on direct examination for an expert to testify that the expert consulted with colleagues or other experts in formulating opinion. The EMA did not initiate the testimony relating to the articles. Claimant's counsel elicited testimony regarding each footnote, one by one, while examining the EMA. Additionally, Claimant's counsel did not raise an objection when the EMA report was issued, during the EMA's deposition, nor in the Uniform Statewide Pretrial Stipulation. Therefore, the objection to bolstering is overruled.

20. Dr. Suite performed the Employee's independent medical examination (IME) and diagnosed the Employee with post concussive syndrome, cervicocranial syndrome, cervical herniated disc (clinical diagnosis as there was no MRI); and cervical myofascial pain syndrome. He opined that the Employee was not yet at MMI at the time of the examination on January 12, 2017, and the Employee was not yet ready to resume her duties in a nursing home setting. He recommended a functional capacity evaluation; psychological support; retraining into a different type of occupation; and home based exercises. He placed limitations regarding her ability to look up and down and work at heights. He also recommended that she avoid stressful situations. The *Daubert* objections raised during the course of the deposition are overruled as insufficient.
21. "The opinion of the expert medical advisor is presumed to be correct unless there is clear and convincing evidence to the contrary as determined by the judge of compensation claims." Section 440.13(9)(c), Fla. Stat. "Such evidence must be of a quality and character so as to produce in the mind of the JCC a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established." *McKesson Drug Co. v. Williams*, 706 So. 2d 352, 353 (Fla. 1st DCA 1998). Dr. Ross accepted Dr. Krestow's MMI date of June 22, 2016 after a comprehensive review of the medical records and examination of the Employee. The opinion of Dr. Ross is contradicted only by the opinion of Dr. Suite. The evidence does not leave the undersigned with a firm belief, without hesitancy, that the presumptively correct opinion of Dr. Ross should be rejected. I accept the opinion of Dr. Ross. I find the Employee

reached MMI on June 22, 2016. Therefore, TPD benefits from June 22, 2016 to May 13, 2017 are not due, and penalties and interest are not due.

Claim for Medical Treatment from Date of Accident to 5/13/2017

22. The August 1, 2017 PFB claims the following: “Employee/Claimant requests determination for continued medical care on account of headaches, bump on her head and neck pain until her death on 5/13/2017.” Medical bills were not filed along with the PFB. At final hearing, Claimant’s counsel seemed to explain that he was seeking payment for the medical treatment the Employee obtained on her own after June 22, 2016. There is no testimony establishing that specific treatment the Employee obtained on her own was medically necessary and causally related to the work accident. Medical bills for such treatment were not introduced into evidence. Therefore, this claim is denied. *Thomas v. Yoder Brothers, Inc.*, 882 So. 2d 442 (Fla. 1st DCA 2004).

WHEREFORE, IT IS ORDERED:

1. All claims are denied with prejudice.
2. All pending Petitions for Benefits are dismissed with prejudice.
3. Jurisdiction is reserved on entitlement to and amount of E/C paid attorney’s fees and costs for a future hearing, if necessary.

DONE AND SERVED this 17th day of January, 2018, in Miami, Dade County, Florida.



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