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

Raymonde Etienne,
Employee/Claimant,

OJCC Case No.: 13-004248IF

vs.

Accident date: 5/31/2012

Randstad North America and
ESIS/Ace American Ins. Co.,
Employer/Carrier.

Judge: Iliana Forte

_____/

Rodrigo L. Saavedra, Jr, Esquire, Attorney for the Employee
Andrew R. Borah, Esquire, Attorney for the Employer/Carrier

---

**FINAL COMPENSATION ORDER**

---

This matter came before me, the undersigned Judge of Compensation Claims, for a Merits Hearing held on February 4, 2015. The adjudicated Petition for Benefits was filed on 6/19/2013.

CLAIMS AND DEFENSES

The claims presented before me were:

1. Payment of temporary total disability benefits or temporary partial disability benefits from 9/25/2012
2. Penalties, interests, attorney's fees and costs

The Employer/Carrier ("E/C") defenses were:

1. No TTD benefits due or owing as the claimant has never been placed on a no-work status by any authorized physician.
2. No TPD benefits due or owing as claimant was terminated for misconduct.

3. No PICA due or owing.

## DOCUMENTS RECEIVED

Claimant:

1. Depositions of Dr. Kenneth Jarolem (12/2/2014 & 1/27/2015)
2. Deposition of Dr. Jeffrey Simon
3. Deposition of Dr. Marvin Green
4. Deposition of Dr. Raul Aparicio
5. Deposition of Dr. Gregoire Garcon
6. Medical Reports of Dr. Jon D. Donshik
7. Rx script and DWC-25 from Care Spot (Proffer)

Employer/Carrier:

1. Deposition of Fabiola Fischbein

Joint Exhibits:

1. Deposition of Paul Robbins
2. Deposition of Jon D. Donshik
3. Medical Records of Concentra
4. Medical Reports of Dr. Kenneth Jarolem

Judges Exhibits and proffers, or for Identification only:

1. Pretrial Stipulation
2. Employee's Third Amendment to the Pretrial Stipulation
3. Employer/Carrier's Amendment to the Pretrial Stipulation

Live witness testimony:

1. Claimant
2. Mark McKenzie

## FINDINGS OF FACTS

*Testimony of the Claimant*

1. The Claimant was employed through Randstad North America, a staffing company, to work at Point Blank Enterprises. Point Blank manufactures bullet proof vests for

police and military personnel. The Claimant began working for Randstad in August of 2011 as a sewing machine operator.

2. The parking lot for employees who work at Point Blank is located away from the work premises. On 5/31/2012 while being transported to the parking lot, the van the Claimant was in was t-boned by another vehicle, which caused the van to flip over. Eleven people were injured in this accident, eight were employees of Randstad.

3. The Claimant testified that she was struck on the side of her head by a piece of the van and that she injured her back, right shoulder and her neck was swollen. She received initial treatment at North Broward Hospital. She testified that she was unable to talk when she was at the hospital and was discharged. The Claimant denied any prior injuries or problems with any of the injured areas.

4. She then sought treatment through her PIP carrier with an unauthorized chiropractor, Dr. Green, who treated her for two months and gave her many sessions of physical therapy. The Claimant continued working for Randstad at a different facility, doing lighter duty work, until 9/25/2012 when she was fired for using her cell phone. Randstad representative, Mark McKenzie, testified that using a cell phone is against company policy. The Claimant disputes having been using her cell phone or being disrespectful to her superiors – the basis for her termination.

5. She collected unemployment benefits in the amount of $194.00 per week from 11/21/2012 through 4/3/2013. During this time frame, the Claimant was not receiving any medical treatment.

6. In February 2013, she briefly worked for the Sheraton Suites in Plantation for three or four days. The Claimant testified that she was unable to do the work, due to having right

shoulder, back and neck pain. She reported this to her supervisor. On 2/25/2013, attorney Michael Pugliese, of Mr. Saavedra's office sent a letter to the Sheraton advising them of the Claimant's inability to work due to the lifting requirements.

7. The Claimant is presently employed with Alternative Home Health since 4/3/2013. She works as a companion with older clients. She earns $8.05 per hour and works between 20 and 40 hours per week. Interestingly, in her employment application with the Sheraton dated 2/1/2013, she listed Affinity Home Care, as being a present employer since November 2012. When questioned about this employment, the Claimant first stated that she actually never worked for Affinity, and later recanted and stated that she had worked for this facility from November 2012 through February or March of 2013 earning $9.00 per hour; where she was laid off.

8. In regards to her medical treatment, there was a lapse in treatment between the last time she saw Dr. Green in 9/2012 and the next provider – Concentra in April 2013. At Concentra, she was evaluated and later discharged without receiving any physical therapy. She received her one time change of provider through Care Spot who referred her to an orthopedist.

9. The E/C authorized Dr. Donshik. Dr. Donshik offered her no treatment. Thereafter, the Claimant availed herself of her own orthopedic independent medical evaluation ("IME") that was performed by Dr. Aparicio. Ultimately, based upon the disputed medical opinions of Dr. Donshik and Dr. Aparicio, Dr. Jarolem was appointed as an expert medical advisor ("EMA") by Judge Kathryn Pecko.

*Testimony of Marc McKenzie*

10. Mr. McKenzie testified as the employer representative of Randstad. He has been employed with Randstad for ten years. Randstad is an international staffing company that

provides labor to companies. He manages over 200 employees that are staffed at Point Blank. Randstad maintains an office at Point Blank's facility. He testified that he made the decision to terminate the Claimant after being informed by the floor supervisors that the Claimant had been caught using her cell phone against company policy. The Claimant refused to sign the written warning and raised her voice to her supervisors; conduct which he felt was abusive and warranted termination. Mr. McKenzie testified that the Claimant had been warned before both verbally and in writing, however he did not bring any evidence of any prior written reprimands. He testified that the Claimant received unemployment because Randstad never challenged her unemployment appeal – due to poor advice. He testified that had the Claimant not been terminated for cause, she could have been accommodated in any of the 100 companies they staff.

*Documentary Evidence*

11. Sequentially, the Claimant sought treatment with Dr. Marvin Green, a chiropractor. Dr. Green was not authorized by the E/C, she saw this physician through her PIP carrier and as such, based on the E/C's objection, his testimony is only being considered as a fact witness. The Claimant first saw Dr. Green on 6/5/2012. She complained of pain in the right shoulder, neck and low back as a result of the motor vehicle accident. She received 37 sessions of physical therapy and was discharged on 9/20/2012 with a 10 percent permanent impairment rating based on the A.M.A Guides, 4% to the lumbar spine and 6% to the cervical spine.

12. On 7/21/2012, the Claimant underwent a lumbar and cervical MRI at South Florida Radiology referred by Dr. Green. This facility was not authorized by the E/C and the E/C objected to these records to the extent they should only be considered as fact. However, these MRI's were provided by both parties to the EMA without objection, so to the extent that the EMA physician considered their findings, the undersigned will allow them.

13. The MRI's were interpreted by Dr. Jeffrey Simon, a board certified radiologist who trained as a neuroradiologist at a fellowship at John Hopkins. Parenthetically, the actual lumbar films were unavailable for many years, which prevented the EMA from reviewing these films after the initial evaluation. However, Dr. Simon located the actual films, and they were later sent by the undersigned to Dr. Jarolem to review.

14. After treating with Dr. Green, the Claimant first received authorized care at Concentra. She was first seen on 4/17/2013. She was diagnosed with cervicalgia and prescribed ibuprofen. Physical therapy was recommended three times per week for two weeks. However, she only underwent a brief session of physical therapy on 4/25/2013, because she was twenty minutes late for her session. She was placed at MMI on 4/25/2013 by Dr. Fincke without restrictions or impairment.

15. The Claimant's care was transferred to Care Spot where she was referred to an orthopedic physician. The E/C authorized Dr. Jon Donshik, a board certified orthopedic surgeon. Dr. Donshik evaluated and treated the Claimant on five occasions between 6/1/2013 through 10/4/2013. Since the 7/31/2012 MRIs could not be located, he had her undergo new studies on 8/13/2013. The MRI of the cervical spine did not reveal any herniations. The lumbar spine MRI revealed two herniated discs. Dr. Donshik opined that the vehicular accident was not the major contributing cause of the lumbar disc heniations. Dr. Donshik testified that the most likely cause of the disc herniations was failure of the disk endplate junction, not as a result of an annular tear or trauma. He found support for his opinion on the fact that a new herniation appeared at the L3-4 level in the 8/13/2013 MRI that was not present in the 7/31/2012 report. He placed her at MMI as of 10/14/2013 with no impairment rating or any work restrictions. He relied on the fact that the Claimant, despite complaining of back pain, had no radicular

complaints, did not need epidural injections as a consequence, and the disc heniations were not caused by her accident.

16. The Claimant then sought an independent medical evaluation with Dr. Raul Aparicio. Dr. Aparicio is also a board certified in orthopedic medicine. He performed his evaluation of the Claimant on 12/11/2013. He took the Claimant's history and performed a physical evaluation. He opined that both MRIs of the cervical spine were negative for disc injury. The lumbar MRI revealed disc herniation at the L4-L5 compressing the nerve root. He found her to have pain in the neck, right side of neck along the posterior shoulder, pain that radiated into the mid back region and pain in the low back. He found spasm in the lumbar spine upon palpation. Dr. Aparicio opined that the MRI findings showing herniations at the L3-4 and L4-5 causing irritation of the nerve roots on the right side were consistent with the motor vehicle accident. He opined that the accident was the major contributing cause of her injuries and MRI scan findings. He felt she was not at MMI and she would benefit from interventional pain management physician. He opined that she should have been on a no-work status immediately following the accident and as her leg symptoms improved she could work light duty. She should avoid lifting greater than 15 pounds, no repeated bending or stooping. He diagnosed her with tendonitis and recommended at least one injection of corticosteroid to the shoulder and a short course of physical therapy. Dr. Aparicio admitted that he found no radicular complaints related to the low back at the time he saw her.

17. As a result of the conflicting medical opinions between Dr. Donshik and Dr. Aparicio, Dr. Kenneth Jarolem was appointed to perform an expert medical evaluation. Dr. Jarolem is an orthopedic spine surgeon. Dr. Jarolem evaluated the Claimant on 5/9/2014 and rendered a written report on the same day. On 1/12/2015 he issued an addendum to his report

after he reviewed the actual MRI films of the lumbar MRI performed on 7/21/2012 read by Dr. Simon.

18. With regards to the shoulder and the cervical spine, Dr. Jarolem opined that the radiographic studies of these areas showed no findings whatsoever and no further treatment was needed.

19. With regards to the lumbar spine, he opined that while the MRI scan revealed two herniated discs, the discs were desiccated out of proportion to the other levels, which represents degeneration predating the accident of 5/31/2012. His opinion was also supported by the fact that initially, when the Claimant presented to the emergency room, she never complained of lumbar pain. His review of the medical records mutually compiled by the parties, revealed that on her E/R visit of 5/31/12 there were no complaints of back pain. The E/R physician felt the need to perform a scan of her brain and the cervical region, but not even an x-ray of the lumbar spine was performed. The E/R doctor evaluated the back and the records reveal no vertebral tenderness. She returned to the E/R on 6/19/2012, and again there was no tenderness noted in the lumbar spine. She complained of neck pain and another CT scan of the cervical spine was repeated. Again, no other studies were performed of the lumbar spine. At the time of his evaluation he did not find any radicular symptoms present in the lumber spine and her examination was essentially normal.

20. Dr. Jarolem opined that she had reached MMI as of the last time she saw Dr. Green on 9/20/2012, and she did not require any further treatment as it related to the industrial accident. He felt that she suffered from preexisting degenerative condition which included the herniations. He placed no work restrictions.

21. Dr. Jarolem's opinion did not change after review of the lumbar MRI of 7/21/2012. Dr. Jarolem testified that dessication and not trauma was responsible for the disc herniation at the L3-4 that appeared on the 8/13/2013 MRI scan. He testified that a desiccated disc over time will degenerate and possibly can herniate. If trauma would have caused the herniation at the L3-4 level he would have expected it to be present in the 7/21/2012 MRI. However, desiccation at the L3-4 was revealed in the 7/21/2012 MRI.

22. I reviewed the deposition of Fabiola Fischbein and Paul Robbins. Mr. Robbins was the Claimant's immediate supervisor on the floor who acknowledged having seen the Claimant on the phone on the day of her termination. He testified that on at least three or four occasions he had warned the Claimant of her cell phone use, but he had no recollection or evidence of any written reprimands, which would be the procedure. On this particular day, the Claimant was going to be given a written reprimand, but she became belligerent and refused to sign the written reprimand for which reason she was terminated. Point Blank's company policy prohibits the use of cell phones while on the premises.

## CONCLUSIONS

23. As a bar to the Claimant's request for TTD and TPD benefits, the E/C raised misconduct as an affirmative defense. The E/C maintained that the Claimant was on her cell phone, which is against company policy, and she became belligerent when presented with a written warning that she refused to sign, as evidence of misconduct. Mr. Robbins and Mr. McKenzie both testified that she had been given verbal and written reprimands beforehand about the use of the cell phone. However, the E/C did not present any evidence of any written reprimands previously given to the Claimant for this offense. The Claimant denied that she was on the phone or that she raised her voice to her supervisors.

24. Section 440.02(18), Fla. Stat. defines misconduct as:

(a) Conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of the employee; or

(b) Carelessness or negligence of such a degree or recurrence as to manifest culpability, wrongful intent, or evil design, or to show an intentional and substantial disregard of an employer's interests or of the employee's duties and obligations to the employer.

25. While an isolated incident may constitute disqualifying misconduct, if sufficiently egregious, such single incident cases involved unexcused, unequivocal, and deliberate disobedience. *McCarty vs Florida Unemployment Appeals Commission,* 878 So. 2d 432 (Fla. 1st DCA 2004). Otherwise, the case law provides that while a violation of an employer's policy may constitute misconduct, repeated violations of explicit policies, after several warnings, are usually required. "A single isolated act of negligence does not constitute disqualifying misconduct." *Thorkelson v. NY Pizza & Pasta, Inc.* 956 So. 2d 542 (Fla. 1st DCA 2007).

26. I do not find that the E/C has carried its burden on the misconduct defense. While I find Mr. McKenzie credible as well as Mr. Robbins, they failed to present any written proof that she had received prior warnings of this offense – in light of her denying said warnings. The Claimant denied being on the phone. If she had previously signed other reprimands, I find no explanation as to why she would become belligerent and refuse to sign this reprimand. Thus, I do not find misconduct as a basis to deny her benefits.

27. By the same token, I do not find that the Claimant presented clear and convincing evidence that the opinion of Dr. Jarolem should not be given the statutory presumed air of correctness. See, *Mobile Medical Industries v. Quinn*, 985 So. 2d 33 (Fla. 1st DCA 2008). In fact, I find the most logical explanation as to causation, or lack thereof, between the vehicular accident and the Claimant's lumbar disc herniations to be that of Dr. Jarolem. I find that Dr.

Jarolem's explanation that the Claimant's disc at the L4-5 to be disproportionately desiccated when compared to her other levels as the cause for the herniation, to comport more with logic and reason; especially, coupled with the fact that on two separate occasions within a month of the accident she presented to the E/R without any complaints of pain to the lumbar spine. Such was the case that not even an x-ray was taken of the lumbar spine – despite multiple studies being performed for the head and neck.

28. I find that the explanation given by Dr. Donshik, that the most likely cause of the disc herniations was failure of the disk endplate junction not as a result of an annular tear or trauma, as well as his tone during his deposition, to not comport with logic and reason when compared with that of Dr. Jarolem.

29. Likewise, the explanation given by Dr. Aparicio, that absent any pre-existing treatment or complaints associated with the areas of injury in particular the back, account for the disc herniations to be related to the vehicular accident, to not comport with logic and reason when compared with that of Dr. Jarolem.

28. Dr. Jarolem was actually in a better position to opine regarding the cause of the disc herniations – having been the only physician to have had the benefit of reviewing both the 7/21/2012 and 8/13/2013 actual MRI films of the lumbar spine. I also found his explanation for the presence of a new disc at the L3/4 as evidence by the more recent MRI of August 2013, to comport with logic and reason and to be worthy of the presumption of correctness.

29. Dr. Jarolem opined that the Claimant reached the point of maximum medical improvement as of 9/20/2012, when she was released from care by Dr. Green after receiving 37 sessions of physical therapy. He opined that she had no work restrictions and that she did not require further treatment to her right shoulder, cervical or lumbar spine as a result of this accident.

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

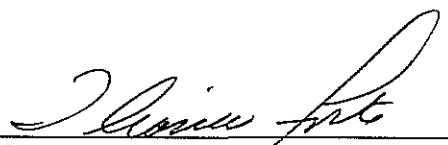
1. TTD from 9/25/2012 to the present is DENIED.

2. TPD from 9/25/2012 to the present is DENIED.

3. Penalties and Interests are DENIED.

6. Attorney's fees and costs are DENIED.

**DONE AND ORDERED** in Chambers, on February 16, 2015, at Ft. Lauderdale, Broward County, Florida.



Iliana Forte
Judge of Compensation Claims
Division of Administrative Hearings
Office of the Judges of Compensation Claims
Ft. Lauderdale District Office
4500 North State Road 7, Building 1, Suite 200
Lauderdale Lakes, Florida 33319
(954) 714-3400

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that the above Order was entered by the Judge of Compensation Claims and a copy was served by electronic transmission on the 16th day of February 2015, to the parties counsel or by mail if parties are unrepresented.

Secretary to the Judge of Compensation Claims

Copies Furnished to:

Andrew Borah, P.A. aborah@hrmcw.com
Rodrigo Saavedra, P.A. rsaavedra@rsaavedralaw.com