

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGES OF COMPENSATION CLAIMS
FT. MYERS DISTRICT OFFICE

Coral Garcia,
Employee/Claimant,

OJCC Case No. 15-019636KAS

vs.

Accident date: 6/18/2015

Randstad US/ESIS WC Claims,
Employer/Carrier/Service Agent.

Judge: Kathy A. Sturgis

FINAL COMPENSATION ORDER

After proper notice to the parties the above captioned workers' compensation case came for final hearing before the undersigned on February 29, 2016, in Fort Myers, Lee County, Florida, on the petition(s) for benefits docketed on: August 25, 2015. The January 13, 2016 petition for this date of accident had not been mediated at the time of the final hearing and Claimant asked for a reservation of jurisdiction as to that petition and the January 13, 2016 petition filed for a different, but related, date of accident. The order reserving jurisdiction was entered February 29, 2016. At the final hearing Claimant was represented by Cora Molloy, Esq. and the Employer/Carrier ("E/C") was represented by Andrew Borah, Esq. The evidence closed on February 29, 2016.

CLAIMS

The following claims were the subject of this hearing:

Payment of temporary total/temporary partial disability ("TTD/TPD") benefits from 6/18/15 to the present and continuing at the correct AWW based on actual wages plus discontinued fringe benefits:

Authorization of an orthopedist as recommended by emergency room physicians at Gulf Coast Medical Center;

Authorization of a physiatrist as recommended by PCP physicians at Lee Convenient Care;

Authorization of physical therapy as prescribed by the PCP physicians at Lee Convenient Care; and

Penalties, interest, costs and attorney's fees.

DEFENSES

The defenses to the above claims were:

1. E/C denied all further benefits based on claimant violating the misrepresentation provisions of Florida Statutes 440.09 (4) and 440.105 (4);
2. Voluntary limitation of income;
3. Claimant has been paid all TPD benefits that are due and owing;
4. The major contributing cause of claimant's injury/disability/need for treatment, if any is not the industrial accident;
5. No further treatment is medically necessary;
6. No authorized doctor has recommended an orthopedist; and
7. Penalties, interest, costs and attorney fees are not due and owing.

EXHIBITS

The exhibits listed on Exhibit A attached hereto were received into evidence without objection except as noted.

STIPULATIONS OF THE PARTIES

I adopt as findings of fact the stipulations of the parties as set forth in the pre-trial stipulation (Exhibit #3). I make particular note of Claimant's February 1, 2016 amendment to the pretrial stipulation wherein claimant stipulated to an average weekly wage ("AWW") of \$ 304.31 pursuant to E/C's 13 week wage statement. The wage statement shows a corresponding compensation rate of \$ 202.87.

LIVE WITNESS TESTIMONY

The Claimant, Coral Garcia and employer representative Ellen Owens both testified live at the merits hearing.

BACKGROUND

Claimant filed her first petition for benefits about two months after the work accident. A few days later she filed for an advance due to an impending eviction. An evidentiary hearing on the motion for advance was held expeditiously on September 3, 2015. The following day E/C filed notice of its misrepresentation defense alleging misrepresentations by Claimant in the course of the hearing on the advance. The misrepresentation defense was amended following Claimant's deposition to include alleged misstatements made in deposition.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the foregoing stipulations, all the evidence presented, I hereby make the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. I have jurisdiction over the subject matter and parties.

2. Venue is properly in Lee County, Florida

3. It is undisputed that Coral Garcia, the Claimant, sustained a compensable left knee injury as the result of an industrial accident arising out of and in the course and scope of work performed in her covered employment on June 18, 2015 when her left knee was struck by a metal cart. She immediately reported the injury and was sent to Lee Convenient Care.

4. The physician at Lee Convenient Care placed Claimant on sedentary duty: "only sitting type job, walking as tolerated" on June 18, 2015. No work was offered to Claimant within those restrictions.

5. It appears there was a name change from Lee Convenient Care to Lee Physicians Group Occupational Health (same street address for both) but I will continue to use Lee Convenient Care as the name when talking about the authorized care. On June 25, 2015 Claimant reported to the physicians at Lee Convenient Care and was placed on light duty, "no lifting over 20 pounds and no prolonged standing or walking". Spherion notified Claimant that same day that she was being offered a transitional duty position at the Spherion office within those restrictions. Claimant did accept the offered position and worked until July 9, 2015 when she returned to Lee Convenient Care and was placed at maximum medical improvement ("MMI") without restrictions. Claimant was unable to return to her original job placement at LeeSar because her position had been given to another worker while Claimant was on out on restricted duty.

6. Spherion offered Claimant a full time position with another of their clients on Friday, July 10, 2015 (Exhibit #7 Exhibit email dated July 13, 2015 Re: I'm available for work tomorrow).

7. Also on July 10, 2015 Claimant testified she went to the emergency room at Gulf Coast Hospital with extreme stabbing pain in her left knee. The July 10, 2015 medical records show her pain was a dull aching pain with pain level of 3/10 that day (Ex. # 8 –exhibit 1). She was given a knee immobilizer brace and crutches. She brought the emergency room records to Spherion that day (Ex. 7 P 75) requesting a return to the authorized doctors. July 13, 2015 Claimant emailed Spherion telling them she was waiting for authorization ‘for to go to the doctor’ but that she was available to work the next day. Brandi at Spherion responded that the position offered to Claimant on Friday was no longer available and Claimant would be placed on the availability list. [Ex. 7 exhibits].

8. On July 21, 2015 Claimant received an automated email from Denise Gonnelli at Spherion thanking her for working a light duty assignment for Spherion which ended July 9, 2015. That email told Claimant she remained eligible to be placed on other assignments through Spherion and to contact the local office so she may be considered for future assignments. Ellen Owens testified that workers were instructed to call in to Spherion weekly to be considered for work assignments.

9. July 30, 2015 Claimant returned to the authorized workers’ compensation provider, Lee Convenient Care, for treatment for her left knee injury. She was referred for physical therapy and taken off of MMI. She was assigned work restrictions of “Limit walking to less than 30 minutes an hour. Must be able to sit down 30 minutes per hour”. The physician’s note indicates if no improvement an MRI may be needed at the next visit. At her next visit, August 14, 2015, work restrictions of “sit down 20 minutes per hour” were assigned. [Ex. # 13]

11. Claimant was offered a light duty assignment at the Spherion Offices on August 20, 2015, to start the next day. August 21, 2015 Claimant reported for work and

worked 5.25 hours. August 24, 2015 Claimant called off work because of a sick child (Ex. #7 P 63-64). Claimant worked 7 hours a day on August 25, and 26, 2015 and 2 hours on August 27, 2015, leaving early to attend physical therapy for her knee. Claimant called off work on August 28, 2015 and September 1, 2015. September 2, 2014 Claimant emailed Brandi at Spherion stating she needed the rest of the week off for chiropractor and insurance appointments and would be available to start again the following Monday.

12. Claimant was in a motor vehicle accident on August 27, 2015 and did not return to work that day. Claimant testified at the advance hearing on September 3, 2015 that her motor vehicle accident did not occur on a day she went to physical therapy (Ex. # 11 P 52). The other record evidence regarding the motor vehicle accident contradicts Claimant's advance hearing testimony [Ex. # 7 – Employer representative deposition; Exhibit # 12- Claimant's deposition; Ex. #8 – exhibit 3].

13. Claimant testified at the advance hearing that her left knee was not injured in the motor vehicle accident. She testified in deposition that the only body parts injured in the motor vehicle accident were her neck, left shoulder and spine. She testified she did not injure or hit her left knee in the auto accident, nor tell any doctor at the emergency room that she was having left knee pain as a result of the motor vehicle accident (Ex. # 12 P 36). Claimant testified she did complain to the doctor about her knees because she had already been suffering from knee pain for a few days before the accident. Claimant testified that the doctors at the emergency room took x-rays of her left knee because, " they saw me limping and so they were wanting to check, make sure there was nothing wrong".

14. The medical records from the August 27, 2015 emergency room contradict Claimant's testimony regarding her left knee and the body parts allegedly injured in the

auto accident. The triage notes state that the patient states no pain at first but now has pain to the L arm, L knee, her neck and her head. Patient ambulated to triage. The history notes indicate the history was provided by the Claimant including complaints of left-sided neck and low back pain and, "She thinks maybe she had her left knee on the dashboard. No midline neck pain, radicular pain to the extremities, weakness of the extremities. She denied dislocation of the knee". There is no indication Claimant was limping in any of the emergency room notes. The physical examination notes bruising with a diagram and notes shows a small bruising medial aspect just distal to the left knee joint. The **description of her gait and coordination is normal**, not limping. The diagnosis is, "contusion left knee, doubt fracture or dislocation" and notes negative left knee x-rays. The medical notes show the x-ray exam was ordered due to motor vehicle crash and knee pain – not limping. [Ex. # 8 exhibit 3]

15. Upon Claimant's return to Lee Physicians Group on September 1, 2015 an MRI was ordered to rule out medial meniscal pathology or other internal derangement due to persisting medial area pain. The previous work restrictions were maintained. [Ex. 13]

16. September 3, 2015 Claimant appeared before me at the evidentiary hearing on her emergency motion for an advance. The hearing was held so quickly after the motion was filed (August 31, 2015) due to the notice of eviction attached to the motion and the representations in the motion that Claimant was a single mother with no other source of income.

17. At the emergency hearing for the advance Claimant's counsel informed the tribunal the statement about Claimant being a single mother was counsel's misunderstanding.

18. I found Claimant to be very intelligent. Although her English syntax was not perfect, she testified before me with an advanced vocabulary and demonstrated a good understanding of her medical conditions. However, while testifying under oath at the advance hearing Claimant made multiple statements that are contradicted by the record evidence in addition to those already mentioned above. I list them here for simplicity:

a. She said she had not received any job offers or even light duty offers since she last worked light duty in July 2015 (Ex. # 11 P 20 L15- P 21 L1). The last actual day of work in July was July 8, 2015; and she received payment for that week on July 17, 2015. This is contrary to the findings made in paragraphs # 6 and # 11 above.

b. When questioned by her own attorney she testified her Employer did not provide her with a light duty job within the doctor's restrictions in August 2015 (Ex. #11 P 23 L25 – P 24 L4). This is contrary to paragraph # 11 above.

c. When her attorney asked her if she had any earnings since July, 2015 Claimant testified, "No, I no receive any compensation and I no receive any offer for a light duty job" (Ex. #11 P 24 L16 -19). This is contradicted by paragraphs # 6 and # 11 above, as well as #18. d. below.

d. At the advance hearing Claimant presented the undersigned with a copy of an electronic record from Wells Fargo Bank stating she printed it off that morning, "with all the pay stuff for my husband and for me. Do you see all my pay stuff is for Spherion Staffing. And the last one is do you see is for July 17th, that is the last that I received". During the hearing I reviewed the bank record and noticed an August 28, 2015 deposit from Spherion Staffing and asked the Claimant about it. She testified it was for one day of light duty. She did not volunteer the information that she had worked light duty in August prior to my questioning; and her answer regarding the

offer of light duty made it appear it had only been that one day. [Ex. # 11 P 31 L4 - P32 L1].

e. Claimant testified in deposition about her August light duty work (two months after the advance hearing) saying she gave the judge the bank statement so the judge had the information regarding her checks (Ex. #12 P 41 L 21 – P 42 L11). At the merits hearing Ellen Owens testified Claimant was paid \$ 52.50 for the 5.25 hours she worked August 21, 2015; the one day of light duty Claimant admitted when I questioned her about the \$20.00 Spherion deposit on the electronic bank record she produced at the advance hearing.

19. In reviewing the documentary evidence while writing this order I looked for an answer as to why Claimant only received \$ 20.00 when her employer said her gross earnings were \$ 52.50. I found two electronic paystubs in the exhibits to Ellen Owens' deposition showing Claimant's earnings from her August, 2015 light duty work. Significantly, the figures **do not match** the Wells Fargo bank record produced by Claimant at the advance hearing, or Claimant's testimony in that regard. The paystubs show the amounts direct deposited by Spherion to the bank **accounts (plural)** of Coral Garcia. Both paystubs show \$20.00 from each check being deposited into one checking account **with the balance of the check being deposited to a different Coral Garcia checking account**. Only the bank record for the \$ 20.00 deposit account was produced by Claimant for the advance hearing. The net August 28, 2015 paystub was for \$ 52. 50 with net to Claimant of \$ 48.49: for the 5. 25 hours Claimant worked on August 21, 2015; the \$ 20.00 discussed at the advance hearing. The pay stub shows \$20.00 deposited into one checking account and \$ 28.49 into a different account - but both were payable to Coral Garcia. The September 4, 2015 paystub, for the three days Claimant worked light duty the week before the advance hearing, shows a net deposit of \$ 147.76 into the two

Coral Garcia checking accounts: \$20.00 to the same account as produced for the advance hearing; and \$ 127. 76 to the other checking account.

20. Claimant testified that the physical therapist told her she had an inflamed ligament at her last physical therapy appointment and that when she told her physician that on September 1, 2015 he ordered the MRI. Claimant did not mention the motor vehicle accident of the previous week until questioned about it by defense counsel. Claimant then volunteered that the last day to (sic) her physical therapy was before the accident. There was some confusion as to whether she had the auto accident before or after physical therapy and I specifically asked her twice whether the accident was the same day as her physical therapy and both times she responded "no" (Ex. # 11 P 52).

21. I am aware there are facts in the record which could possibly be construed to reach different findings. I have not referenced all the testimony and evidence presented, but summarized testimony and evidence I found probative in regard to the pending issues. After evaluating the candor and demeanor of witnesses testifying live, and review and consideration of all the testimony and evidence, I reach the findings and conclusions set forth in this order.

CONCLUSIONS OF LAW

E/C defended the claims on the grounds that Claimant was not entitled to any benefits at all due to her alleged misrepresentations made at the advance hearing and in deposition. At the advance hearing I gave Claimant the benefit of the doubt; the circumstances of the impending eviction hearing were dire, and based on her testimony there the advance was ordered. The findings and conclusions made in this order are not made lightly.

At the merits hearing Claimant's attorney very ably argued that Claimant's alleged misrepresentations were nothing more than her lack of understanding of English and the confusing questioning of defense counsel at the advance hearing in part due to his telephone appearance for that hearing. However, as additional information came to light regarding work offered Claimant by Spherion among other evidence, those arguments did not prevail. I spent considerable time carefully reviewing all of the evidence presented to me. Based on the findings above I find that Claimant did indeed make numerous misrepresentations, and or misleading statements for the purpose of obtaining the emergency advance as well as the benefits sought at the merits hearing.

Had it only been a question of whether or not she was ever offered a job or light duty, after hearing only Claimant's testimony, Claimant's counsel's arguments might have been ultimately persuasive. Having had the opportunity to observe both Claimant (two times) and the employer representative Ellen Owen, I found Ms. Owen to be direct, and candid and to the extent her testimony conflicts with the Claimant's I fully accept her testimony and reject the Claimant's. To accept the Claimant's testimony and the able argument of her counsel I would have to find that virtually every other person who touched this case – employer, nurse, doctor, hospital, was either lying or mistaken. Logic, reason, and assessment of the live testimony and the large body of documentary evidence compel me to find otherwise. The documentary evidence in the medical records; job and light duty work offers; evidence regarding the post July 8, 2015 work actually performed by Claimant; and all the other conflicts between Claimant's testimony and the other evidence clearly support the finding that Claimant did violate Section 440.105 (4).

At the very least Claimant violated Section 440.105 (4) (b) (2) by presenting or causing to be presented written and oral statements as part of, or in support of, a claim for payment or other benefit pursuant to a provision of chapter 440, knowing that such statement contains false, incomplete (emphasis added), or misleading information concerning any fact or thing material to such claim. In that regard I find Claimant's production of the bank statement from only one of the two checking accounts her checks were direct deposited into by Spherion alone constitutes such a violation. She clearly presented incomplete information to the judge and her related testimony was misleading at best. Thereafter Claimant continued to rely on those bank records even in her deposition testimony, in support of her alleged candor at the advance hearing. The sole purpose of the advance hearing was to determine if Claimant should receive an emergency advance from E/C. Part of that inquiry was to look into all assets and sources of monies available to Claimant to meet her expenses to determine whether \$ 2,000.00 or some lesser amount should be paid to her. I find the non-disclosure of the second bank account, or at the very least the non-disclosure of the fact that the \$ 20.00 on the bank record was not the full amount of her earnings received from Spherion for her day of light duty to be factually material to the claim for the advance.

I also find Claimant's testimony regarding the body parts injured in the August 27, 2015 auto accident have been intentional and knowing misrepresentations in support of her claims for continued medical care and indemnity benefits in violation of 440.105 (4) (b) (1.). The advance hearing was only one week after the motor vehicle accident so her memory of her injuries should have been very fresh in her mind. Also, Claimant was working light duty for Spherion, her employer, the week before the

advance hearing but she did not mention it. She had already denied under oath any offers of work and earnings since mid July. The findings made in finding # 18 above discuss some of Claimant's misrepresentations. All of the foregoing statements, incomplete statements and misrepresentations I find to be knowing and intentional and for the purposes of securing benefits under Chapter 440.

IT IS HEREBY ORDERED AND ADJUDGED THAT

Claimant is not entitled to any benefits for this workers' compensation case pursuant to Section 440.09 (4) (a).

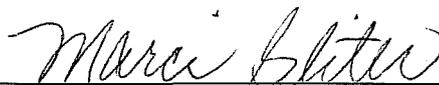
DONE AND ORDERED in Fort Myers, Lee County, Florida on the 24 day of March, 2016.



Kathy A. Sturgis, Judge of Compensation Claims
Division of Administrative Hearings
Office of the Judges of Compensation Claims
4379 Colonial Boulevard Suite 200
Fort Myers, Florida 33966
(239) 938-1159

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Order was entered and a true copy furnished by regular U. S. Mail to the Claimant and Employer at the addresses set forth below and by e-mail to the carrier and attorneys of record at the e-mail addresses posted on the DOAH website on this 24th day of March, 2016



Deputy District Clerk to Judge Sturgis

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CORAL GARCIA
OJCC#15 – 019636KAS

EXHIBIT A

JCC EXHIBITS

- Exhibit #1: August 25, 2015 Petition for benefits medical exempt records and response to Petition for benefits.
Exhibit #2: Mediation conference report.
Exhibit #3: Uniform pretrial stipulation, E/C's amendment to pretrial stipulation, Claimant's amendment
To pretrial stipulation, and pretrial order.
Exhibit #4: Order requiring additional documentation.
Exhibit #5: Employer/Carrier's trial memorandum for purposes of argument only.
Exhibit #6: Claimant's trial summary/memorandum for purposes of argument only.

JOINT EXHIBITS

- Exhibit #7: Deposition of employer/representative, Ellen Owens.
Exhibit #8: Deposition of medical records custodian for Lee Memorial Health System, and exhibits 1 – 3.

CLAIMANT'S EXHIBITS

- Exhibit #9: Audio recording of 9/3/15 hearing
Exhibit #10: Claimant's motion to reserve JCC jurisdiction for two (2) subsequently filed PFB's dated
1/13/16.

E/C's EXHIBITS

- Exhibit #11: Transcript of 9/3/15 hearing on Claimant's emergency motion for \$2,000.00 advance over
Claimant's best evidence objection. Will include both the transcript and the video recording.
Exhibit #12: Claimant's deposition.
Exhibit #13: Medical records of Lee Convenient Care.
Exhibit #14: E/C's supplemental notice of defense.
Exhibit #15: Claimant's emergency motion for \$2,000.00 advance and exhibits 1-5 of motion.
Exhibit #16: Evidentiary Order granting motion for advance.
Exhibit #17: Payout ledger.
Exhibit #18: Claimant's August 2015 attendance and payroll records from Spherion.