

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

Anne Marie Limith
Employee/Claimant,

OJCC Case No.: 11-024247IF

vs.

Accident date: 6/26/2011

F.T.M.I. Operator, LLC,
d/b/a Lenox on the Lake and
United States Fire Insurance Co.,
Employer/Carrier

Judge: Iliana Forte

_____/

Kevin R. Gallagher, Esquire, Attorney for the Employee
Andrew R. Borah, Esquire, Attorney for the Employer/Carrier

FINAL MERITS ORDER

This matter came before me, the undersigned Judge of Compensation Claims, for a Merits Hearing held on July 16, 2013. A status conference was held on July 17, 2014 to determine the correct Employer/Carrier, as the name of the Employer/Carrier in the exhibits and pleadings filed by the parties differed from the pre-trial stipulation.

ISSUES AND DEFENSES

The claim presented before me were: follow-up appointment with the authorized treating physician; penalties, interest; and, attorney's fees and costs.

The employer/carrier defended the claim for follow-up care on statute of limitations and that the major contributing cause of the claimant's need for care, evaluation, and/or treatment is not the 6/26/2011 industrial accident. Penalties, interests attorney's fees and costs were denied.

DOCUMENTS RECEIVED

Claimant:

1. Deposition of Eduardo Suarez, M.D.
2. Claimant's Response to E/C Motion to Vacate/Motion To Dismiss for Lack of Prosecution

Employer/Carrier:

1. Deposition of Seth Portnoy, D.O.
2. Deposition of Arlene Lawson
3. Deposition of Lisa Robinson
4. Employer/Carrier's Motion to Dismiss for Lack of Prosecution
5. Order on Motion to Dismiss for Lack of Prosecution
6. Motion to Vacate/Motion to Dismiss for Lack of Prosecution

Judges Exhibits and proffers, or for Identification only:

1. Pretrial
2. Claimant's Notice of Amendment to Pretrial
3. Claimant's Trial Summary – Identification only
4. Employer/Carrier's Trial Memorandum – Identification only
5. Petition for Benefits dated 10/16/2013
6. Response to Petition for Benefits dated 10/24/2013

Live witness testimony:

1. Claimant

FINDINGS OF FACTS

Testimony of the Claimant

1. The claimant testified before me that she injured her lower back while assisting an immobile patient. She described that while transferring a patient from the bed to the wheelchair, the patient began to fall, and in order to avoid the patient from falling she grabbed the patient

injuring her back. She was placed on light duty for two weeks and at some point thereafter she apparently was fired from her job. After the accident, she underwent two weeks of physical therapy and felt better. However, she testified that she was never actually pain free. She testified that initially her pain level was ten and that it has never decreased beyond an eight. At some point, the claimant underwent an MRI and more therapy was prescribed. The claimant denied any subsequent injuries or accidents.

Documentary Evidence

2. U.S. HealthWorks Medical Group was authorized to render treatment to claimant for the 6/26/2011 accident. She was initially seen on 7/5/2011 by Dr. Edwin Killinger. At that time, her main complaint was pain in the lumbar spine and some discomfort to the elbows. After the initial evaluation, she came under the care of Dr. Seth Portnoy, an occupational medicine and urgent care physician, board certified in family medicine. Dr. Portnoy first saw the claimant on 7/13/2011. He continued her on the treatment established by Dr. Killinger of anti-inflammatory medications and physical therapy. She was seen again by Dr. Portnoy on 8/15/2011 at which time she reported that her back was fine and there was no pain or deficits in any capacity. Dr. Portnoy testified that the claimant stated to him that she was fully healed and had no problems. He found no objective findings on physical examination and diagnosed her with a lumbar sacral strain. He placed her at maximum medical improvement with a 0% impairment rating and released her to full duty.

3. The claimant returned to see Dr. Portnoy on 12/12/2011 complaining of pain radiating to her right gluteus that developed a month before the December visit. Dr. Portnoy testified that he was not 100 percent sure if the 6/26/2011 accident was still the cause of the claimant symptoms since the claimant had been asymptomatic for many months. However,

when asked by the E/C's attorney if he could state within a reasonable degree of medical certainty that the 6/26/2011 industrial accident was still the major contributing cause of the claimant's symptoms as of 12/12/2011, he said no. Claimant's counsel did not attend Dr. Portnoy's deposition despite evidence that he was timely notified of the deposition. Claimant's counsel did not reschedule the deposition of Dr. Portnoy to cross-examine him regarding his opinion.

4. I reviewed the deposition of the adjuster Arlene Lawson. I need not summarize her testimony, as I do not find that her testimony is particularly relevant to the issue at hand. I do however note, that the pay sheet attached as an exhibit to the deposition of Ms. Lawson reveals that the last payment of medical bills made to U.S. HealthWorks was issued on 9/20/2012 for a visit of 1/19/2012. Based on the carrier's pay sheet, it appears that 1/19/2012 was the last time the claimant received authorized medical care. I also note that the claimant was paid indemnity benefits from 7/6/2011 through 8/23/2011.

5. I have also reviewed the deposition of Lisa Robinson which was introduced by the E/C for the limited purpose of establishing that the carrier mailed to the claimant the workers' compensation pamphlet from the State of Florida. The claimant did not refute receipt of the pamphlet during these proceedings.

6. On 7/2/2014, Dr. Edward Suarez, a physical medicine and rehabilitation specialist (a physiatrist) performed an independent medical evaluation on behalf of the claimant. The E/C's counsel objected to the introduction into evidence of the medical records attached to Dr. Suarez's deposition on the basis of authenticity and hearsay, which is hereby sustained. The undersigned has only considered the deposition and report of Dr. Suarez in light of E/C's objection.

7. On July 2, 2014, the claimant complained to Dr. Suarez of low back pain into the right lower extremity radiating into her right leg and pain into her right elbow, right upper extremity, right shoulder as well but not as much as the low back. She reported that she has never been pain free. Her physical examination of the upper extremity revealed some discomfort to the right shoulder and the right elbow area and pain upon palpation of the lumbar spine. Straight leg raising test was negative bilaterally. Neurologically, she was able to heel walk on the left lower extremity, but she was not able to do it on the right; she complained of pins and needles; parasthesia to the hip and thigh area. Dr. Suarez reviewed the MRI disc of the lumbar spine performed on 12/21/2011, ordered by Dr. Portnoy. Dr. Suarez admitted that most of the claimant's complaints were subjective in nature other than for the appearance of a bulge at the L4-L5, revealed by the MRI

8. Dr. Suarez opined that the accident of 6/26/2011 was the major contributing cause of the objective findings. He recommended a new MRI due to her continued complaints and recommended an evaluation by a pain management physician. He restricted claimant's lifting to 20 pounds and to avoid excessive lifting. He testified that he relied on the claimant's history with regards to her continuation of symptoms in opining that the industrial accident is the major contributing cause of her symptoms. Dr. Suarez did not give an opinion as to whether the claimant was or was not at maximum medical improvement.

CONCLUSIONS

9. The E/C has vehemently argued that the statute of limitations ran on this case, but for the denial by the prior JCC of their motion to dismiss for lack of prosecution the petition for benefits dated 10/19/2011. The E/C filed a petition for Writ of Certiorari challenging the denial of their motion to dismiss. The writ of certiorari was dismissed by Order of the First DCA on

6/9/2014. In the course of this litigation, the E/C renewed their motion to dismiss the 10/19/2011 petition for benefits by filing a motion to vacate/motion to dismiss for lack of prosecution on 6/17/2014. For purpose of these proceedings, the order entered by Judge Pecko on 10/7/2013 denying the motion to dismiss for lack of prosecution is final as it pertains to the undersigned's ability to vacate said order. Additionally, even if the petition for benefits dated 10/19/2011 were to be presently dismissed, it would not serve as a bar to this proceeding because the current petition for benefits dated 10/16/2013 remains pending.

10. The attorney for the E/C conceded during the proceedings that the 10/19/2011 petition was not voluntarily dismissed by the claimant. Thus, like in *Longley v. Miami Dade County School Board* 82 So.3d 1098 (Fla. 1st DCA 2012), the claimant only filed a notice of resolution of issues reserving on attorney's fees and costs. Therefore, the 10/19/2011 remains unresolved and the 10/16/2013 petition is not barred by the statute of limitations.

11. Based on the totality of the evidence, I do not find the claimant credible that she has never been pain free following the 6/26/2011 accident or that her pain has remained at a level of eight. According to the testimony of Dr. Portnoy, the claimant herself reported to him that she was fine, was pain free and had actually healed. More importantly, I find that Dr. Portnoy on physical examination found no objective findings. It was not until 12/12/2011, four months after being fully released with no functional limitations that the claimant returned to Dr. Portnoy complaining of pain of a month's duration.

12. Moreover, while it appears from the evidence that the claimant last sought medical treatment on 1/19/2012, there does not appear from the record that any requests was made by the claimant to return to Dr. Portnoy until 10/16/2013 when a new petition for benefits was filed. I do not find any justification in the record as to why the claimant waited over a year

and nine months to request to return to Dr. Portnoy, particularly if her pain had consistently remained at a level of eight out of ten. However, I do note that it was not until the E/C sought to dismiss the 10/19/2011 petition that the 10/16/2013 petition was filed.

13. While I am cognizant that Dr. Suarez has opined that the claimant's 6/26/2011 accident remains the major contributing cause of her symptoms, I find that Dr. Suarez relied on the claimant's history of never being pain free following the accident when giving his opinion. Dr. Suarez acknowledged that his opinion would change regarding major contributing cause if the claimant's history was not accurate regarding the consistency of her symptoms. To the extent that Dr. Suarez's opinion was based on an inaccurate history by the claimant, I reject his opinion regarding major contributing cause.

14. I accept the opinion of Dr. Portnoy that the 6/26/2011 accident is no longer the major contributing cause of the claimant's injury or need for further treatment. In this case, it appears that the claimant made a full recovery after undergoing physical therapy, a medication regimen and having the benefit of an MRI. Dr. Portnoy did not find that she had any objective findings on physical examination and placed her at maximum medical improvement on 8/15/2011, after the claimant reported being pain free and healed. Dr. Portnoy released the claimant with no restriction, no need for further treatment and assigned a 0% impairment rating. I find that Dr. Portnoy's opinion comports with logic and reason and I accept same.

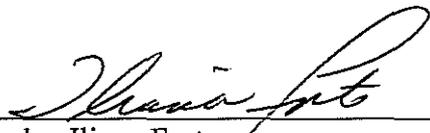
15. I find that the claimant has failed to prove that the accident of 6/26/2011 remains the major contributing cause of her need for further treatment. I find that the E/C met its burden that the 6/26/2011 is not the major contributing cause of the claimant's need for further care. The evidence clearly supports the conclusion that the claimant fully recovered from her injuries

by being symptom free for three consecutive months after reaching maximum medical improvement with no residual impairment.

WHEREFORE, IT IS ORDERED AND ADJUDGED THAT:

1. The follow-up appointment with the authorized treating physician is hereby denied.
2. Penalties, interest; and, attorney's fees and costs are denied.

DONE AND ORDERED this 18th day of July 2014, in Ft. Lauderdale, Florida.



Judge Iliana Forte
Judge of Compensation Claims

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 this 18th day of July, 2014, to the parties counsel or by mail if parties are unrepresented.



Secretary to the Judge of Compensation Claims

COPIES FURNISHED:

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