

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

Katherine MacGill,  
Employee/Claimant,

OJCC Case No. 16-029118EDS

vs.

Accident date: 8/10/2016

PsychSolutions Corp/Comp  
Options/AmTrust North America of  
Florida, Associated Industries Insurance  
Company, and AmTrust North America of  
Florida,  
Employer/Carrier/Servicing Agent.

---

Judge: Mark A. Massey

**FINAL COMPENSATION ORDER**

This matter came before the undersigned Judge of Compensation Claims for a final merit hearing on 05/02/18. Claimant was present along with her attorney Robert Rivera, Esquire. Present and representing E/C was Andrew Borah, Esquire. The hearing was held to adjudicate the petition for benefits filed 10/04/17. Jurisdiction was reserved by agreement on the petition filed 05/02/18 as it has not been mediated and is not procedurally ripe for adjudication.

Claimant claims she sustained a compensable injury to her right shoulder due to her work activities, based on a repetitive trauma theory. For the reasons outlined below, I find that claimant has not carried her burden of proof and find in favor of the employer and carrier.

**CLAIMS**

1. Authorization and provision of a primary care physician.
2. Payment of attorney's fees and costs.

## **DEFENSES**

1. Compensability of the accident and injury to the right shoulder is denied.
2. The alleged industrial accident is not the major contributing cause of the claimant's injuries/need for treatment, if any, to the right shoulder.
3. Claimant's right shoulder condition is pre-existing/personal in nature.
4. Attorney's fees and costs are not due or owing.

## **JUDGE'S EXHIBITS**

1. Petition for benefits filed 10/04/17 (D-27)
2. Response to petition filed 10/26/17 (D-28)
3. Pre-Trial Stipulation filed 01/18/18 (D-40)
4. Claimant's Trial Memorandum, for argument only (D-62)
5. E/C's Trial Memorandum, for argument only (D-59)

## **JOINT EXHIBITS**

1. Deposition of records custodian for Dr. Carvajal with attachments (D-54), for fact and historical purposes only
2. Deposition of records custodian for Dr. Naranjo with attachments (D-53), for fact and historical purposes only
3. Deposition of records custodian for Dr. Thamarajah with attachments (D-55-58), for fact and historical purposes only

## **CLAIMANT'S EXHIBITS**

1. Deposition of Dr. Langone with attachments (D-50)

## **EMPLOYER/CARRIER'S EXHIBITS**

1. Deposition of Dr. Sher with attachments (D-51)
2. Deposition of claimant (D-52)

## **FINDINGS OF FACT**

Claimant worked for the employer as a mental health counselor and therapist. She began working at this job in July 2015. As part of her job, claimant was required to travel to patient's homes, covering a large geographical area. Therefore, she spent a considerable amount of time (typically about half of her work day, according to her) on the road driving. She also carried with her a bag of supplies including a laptop computer, books, toys, and other implements of her work (many of her clients were children). When she arrived at the patient's home, she would lift the bag out of the car and carry it into the home, then repack it and carry it back out to the car when leaving. While driving, she would often hold her phone in one hand, to utilize the GPS function, while steering with the other hand.

Claimant has a history of right shoulder problems prior to her employment with the employer herein. In 2009 she was diagnosed with chronic impingement tendonitis. In April 2009, she underwent a right shoulder acromioplasty with subacromial decompression and right open distal clavicle resection. According to claimant, her right shoulder symptoms resolved completely after the 2009 surgery, until 2015.

Claimant was also involved in a motor vehicle accident in which she sustained a whiplash type injury to her neck. This apparently occurred in 2011, although the exact date is unclear. In the years following the motor vehicle accident, claimant continued to have neck pain for which she received pain management treatment including physical therapy, injections and medication. On 08/10/15, she complained to Dr. Thamarajah, her personal primary care physician, of a recurrence of neck pain. Dr. Thamarajah referred her to Dr. Naranjo for continued pain management.

Claimant saw Dr. Naranjo on 08/17/15 with complaints of neck pain with radiation to both shoulders, and a “long history of progressive neck pain” following the motor vehicle accident. She continued to follow up with Dr. Naranjo on 11/05/15, 01/25/16, 02/18/16, 05/12/16, and 07/18/16, at which time she was complaining of cervical pain radiating to the right shoulder and hand with associated numbness.

On 04/11/16, claimant complained to Dr. Thamarajah of right shoulder pain. Dr. Thamarajah referred her to orthopedic Dr. Carvajal, who first saw the claimant on 04/21/16. Dr. Carvajal noted the history of neck pain radiating to the shoulder and hand but stated: “She has now developed isolated right shoulder pain which recurs at night and also when she tries to throw a ball.” There was no mention at that time of driving being an aggravating factor. Dr. Carvajal noted the previous history of shoulder surgery, and ordered medication and physical therapy. In a follow-up visit on 07/11/16, he recommended a shoulder MRI. After reviewing the results of the MRI, Dr. Carvajal recommended shoulder surgery, which was performed on 09/23/16 and included arthroscopic rotator cuff repair, chondroplasty, labral tear debridement, and subacromial decompression. Claimant saw Dr. Carvajal in follow-up on 09/26/16, 10/10/16, 11/02/16 and 12/07/16, at which time she was noted to be doing quite well with excellent range of motion and strength. Dr. Carvajal recommended home exercise and “did counsel her on the arthritic changes of her shoulder as well.”

Claimant argues that her increased shoulder problems began shortly after starting her job with the employer herein, after several years of being asymptomatic. She attributes the current shoulder problems to the amount of driving the job required her to do, as well as the lifting and carrying of the bag she took to her appointments.

## ANALYSIS

Claimant is proceeding under a repetitive trauma theory, which requires proof of (1) prolonged exposure; (2) the cumulative effect of which is injury or aggravation of a pre-existing condition; and (3) exposure to a hazard greater than that to which the general public is exposed. In the alternative, the claimant must demonstrate a series of occurrences, the cumulative effect of which is injury. Festa v Teleflex, Inc., 382 So. 2d 122 (Fla. 1<sup>st</sup> DCA 1980). Both causation and sufficient exposure to support causation must be proven by clear and convincing evidence. Section 440.09(1), Fla. Stat.

I find, and E/C more or less concede, that claimant meets the first prong of Festa (prolonged exposure) based on the case law.

However, I find that claimant has not met her burden of proving the second prong of Festa, nor does she meet the alternative test.

The only medical evidence in support of the “cumulative effect of which is injury” element (under either the second prong or the alternative test) is the testimony and report of Dr. Langone, which I have carefully reviewed along with the testimony and report of Dr. Sher. I find that Dr. Langone’s opinion is based almost entirely on the subjective history given to him by the claimant. “She’s complaining of shoulder pain. She relates to her work activity. I take it on face value.” (Langone deposition p.27). “Q: So your understanding right now that there was a work-related injury or aggravation that’s based entirely on the history that she gave you? A: Yes.” (p.37) And, that history was less than accurate. For example, Dr. Langone believed the prior surgery was twenty years ago, when actually it was only six years between that surgery in 2009 and the alleged recurrence of symptoms in 2015. Dr. Langone was not able to quantify the

amount of driving claimant did, either before or after her driving territory was restricted (p.12). Most notably, Dr. Langone admitted that he had a “very scant”<sup>1</sup> or “minimal” amount of records. (p.15) He apparently had “two or three” pages from Dr. Caraval (including blood work and pre-op labs, p.15) and “that was it.”(p.22). Although he was provided with Dr. Sher’s report *during* the deposition, he admitted that he did not have the MRI reports or films (p.27), he did not have any operative reports (p.27), and he did not have the records of Dr. Naranjo, Dr. Thamarajah, or Dr. Caraval (except the two or three pages mentioned) (p.35, 37). He further acknowledged that it would be useful, and in fact optimal (p.36), to have these records before forming any conclusive opinions. In fact, he specifically stated in his report that a review of prior medical records “would be informative,” and reiterated this in deposition (p.37). And, he admitted that if the records contained information differing from what the claimant told him (which they do), it could very well make a difference in his opinions. (p.22-25)

It should also be noted that Dr. Langone, while arguably uttering, or at least agreeing with, the “magic words” of major contributing cause, when asked directly whether “increased” (again with no quantification) driving was the MCC, he merely stated “That’s a plausible mechanism of aggravation, correct.” (p.11) Plausibility is not the standard; reasonable medical certainty is the standard, and Dr. Langone’s testimony does not reflect this. Similarly, he merely agreed that carrying a bag with books, toys and folders “could” cause an aggravation, while at the same time admitting that the bag was of “unknown weight.” (p.20) But he also acknowledged that activities performed outside of employment (which he did not ask her about) “could” also cause such an aggravation. (p.25-26) Interestingly, Dr. Langone then backtracked

---

<sup>1</sup> Misspelled in the transcript as “scan.”

and attempted to downplay the potential significance of non-work activities by stating “I mean, basically she’s not throwing a 90 mile an hour fastball.” (p.27). This is ironic because, as noted, the first thing claimant told Dr. Carvajal is that the shoulder pain recurs at *night* and *when she tries to throw a ball*, with no mention of driving as an aggravating factor.

I find that Dr. Langone’s opinions are not competent substantial evidence, much less clear and convincing evidence, of causation. In contrast, I find Dr. Sher’s opinions to be objective, well supported, and based on a complete history with complete records. Dr. Sher’s report and testimony demonstrate beyond a doubt that he performed a thorough and detailed review of the many records provided to him, as well as a thorough examination of the claimant. His ultimate diagnosis of degenerative arthritis, unrelated to employment, is logical, fact-based, and consistent with the records and claimant’s history. Claimant has not put forth any valid or persuasive reason to reject Dr. Sher’s opinions, which I hereby accept in full over those of Dr. Langone. In further support of this, I note that Dr. Langone himself admitted that he is not a fellowship-trained shoulder specialist, and that such a specialist would be better qualified and experienced to address the causation issue here. Dr. Sher is fellowship trained in the shoulder.

I also find that claimant fails to meet the element of exposure to a hazard greater than that to which the general public is exposed. Although claimant testified that she spent half and sometimes more of her workday driving, I find this is not unusual in today’s society. Further, the actual number of driving hours involved per day or per week was never really established with any degree of certainty. It is also interesting to note that on 08/29/13, prior to her employment with the employer, claimant told Dr. Thamarajah that she was achy and tired after having just returned from a vacation in which she and her husband drove about 8,000 miles all around the

country in three weeks. I find claimant's testimony standing alone, or in conjunction with Dr. Langone's testimony based on her history, is not competent substantial evidence, much less clear and convincing evidence, of sufficient exposure to support causation.

In sum, I find that claimant has not carried her burden of proving a compensable injury under a repetitive trauma theory. In the alternative, I find that there is no competent substantial evidence to support a claim for the specific benefit sought, which is authorization and provision of a primary care physician. There is no medical evidence or testimony -- including that of Dr. Langone, who only recommended physical therapy -- that authorization of a primary care physician is medically necessary. Even in compensable cases, claimant maintains the burden of proving the medical necessity of requested care. Echevarria v Luxor Investments, 159 So. 3d 991 (Fla. 1<sup>st</sup> DCA 2015); Perez v Southeastern Freight Lines, Inc., 159 So. 3d 412 (Fla. 1<sup>st</sup> DCA 2015). Claimant has not carried that burden here.

**WHEREFORE it is hereby ORDERED AND ADJUDGED:**

1. The claim for authorization of a primary care physician is denied.
2. The claim for costs and attorney's fees is denied.

DONE AND SERVED this 9th day of May, 2018, in Tampa, Hillsborough County, Florida.



---

Mark A. Massey  
Judge of Compensation Claims  
Division of Administrative Hearings  
Office of the Judges of Compensation Claims  
Tampa District Office  
6302 E. Dr. Martin Luther King Jr. Blvd., Suite 460  
Tampa, Florida 33619  
(813)664-4000  
www.fljcc.org

COPIES FURNISHED:

Comp Options/AmTrust North America of Florida  
4800 Deerwood Campus Parkway, DCC8/1  
Jacksonville, FL 32246  
FLWClegal@amtrustgroup.com

Associated Industries Insurance Company  
PO Box 94574  
Cleveland, OH 44101  
FLWCLegal@amtrustgroup.com,

AmTrust North America of Florida  
PO Box 94574  
Cleveland, OH 44101  
FLWCLegal@amtrustgroup.com,

Robert M. Rivera, Attorney  
The Law Offices of Richard E. Zaldivar  
2600 SW 3rd Avenue, Suite 900  
Miami, FL 33129  
rivera@zaldivarpa.com,zaldivaresquire1@gmail.com

Richard E. Zaldivar  
2600 SW THIRD AVENUE SUITE 300  
Miami, FL 33129  
MAXZZ@BELLSOUTH.NET, ZALDIVARPA@GMAIL.COM

Andrew R. Borah, Esquire  
Hurley, Rogner, Miller, Cox, & Waranch, P.A.  
700 W. Hillsboro Blvd., Suite #2-107  
Deerfield Beach, FL 33441  
aborah@hrmcw.com,sfournier@hrmcw.com