

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

**MARTHA NOGUERA,  
Claimant,**

**OJCC Case #10-000499DEJ  
Judge: Doris E. Jenkins**

**v.**

**Date of Accident: 5/11/07**

**FRANK CRUM and BROADSPIRE,,  
Employer/Carrier.**

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**Monica De Feria Cooper, Esq., for Claimant  
Andrew R. Borah, Esq., for Employer/Carrier**

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**COMPENSATION ORDER**

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This cause came on for hearing before the undersigned judge of compensation claims on December 8, 2011. Pursuant to petitions for benefits filed on July 27, 2010 and June 3, 2011, Claimant seeks: (1) temporary partial disability benefits from May 11, 2007; (2) authorization of an ophthalmologist for evaluation and treatment of her eye complaints; (3) authorization of an MRI of the lumbar spine; (4) authorization of a neurologist for further diagnostic evaluation of her head injury; (5) authorization of a neurosurgeon for further diagnostic evaluation of her neck and low back complaints; (6) authorization of a psychiatrist for diagnostic evaluation of her anxiety and depression; (7) authorization of a neuropsychologist for evaluation and treatment; (8) penalties and interest on any period of indemnity awarded; and, (9) an attorney's fee and taxable costs.

Employer/Carrier assert the following defenses: (1) no temporary total or temporary partial disability is due or owing; (2) Claimant is at MMI; (3) Claimant voluntarily limited her income; (4) the medical treatment requested is not medically necessary and/or needed as it relates to the industrial accident; (5) the requested treatment is not related to the industrial accident; and, (6) no penalties, interest, costs or fees are due or owing.

### **WITNESSES**

Claimant was the sole witness to testify live at the final hearing.

### **DOCUMENTARY EVIDENCE**

Uniform Pre-Trial Stipulation and Order dated 8/16/11	Joint Exhibit #1
Deposition of Tekoah Meredith taken on 8/19/11	Claimant's Exhibit #1
Deposition of Dr. Allen Garcia taken on 7/20/11	Claimant's Exhibit #2
Deposition of Bernard Gran, M.D. taken on 6/21/11	Employer/Carrier Exhibit #1
Composite of payroll records	Employer/Carrier Exhibit #2
Composite of records from Occupational Health Center	Employer/Carrier Exhibit #3
EMA Report of Dr. Kenneth Fischer	Judge's Exhibit #1

The undersigned took judicial notice of her compensation order entered on December 16, 2010.

### **ADDITIONAL STIPULATIONS**

In addition to those matters set forth in the Uniform Pre-Trial Stipulation, the parties advised the undersigned that they had reached agreement with respect to

Claimant's AWW. The parties agree that Claimant's AWW is \$480.00, with a corresponding compensation rate of \$320.02.

The parties also agree that the petition for benefits which was filed on December 8, 2011 is not ripe for determination as of the date of the instant final hearing.

**Background**

1. Claimant suffered a work-related injury on May 11, 2007 while attempting to move some boxes. She fell backward and struck her head against a file cabinet.

2. According to the deposition testimony of Tekoah Meredith, the adjuster on the file, Employer/Carrier accepted the injuries to Claimant's head and neck as compensable. Initially, Claimant was authorized to receive medical treatment under the direction of Dr. Jana Gordon Bunsic at Occupational Medical Center. Subsequently, Claimant requested a one-time change in physicians and was authorized to seek treatment from Dr. Allen Garcia at Affiliated Health Care Center. No indemnity has ever been paid to Claimant in connection with the instant industrial accident.

3. As the undersigned found in a previous compensation order, the records from Occupational Health Center reflect that Claimant was seen at that facility on three occasions. On May 22, 2007, she was diagnosed with a minor head trauma and a subconjunctival hemorrhage. The May 22, 2007 DWC-25 clearly indicates that Claimant should be seen by an ophthalmologist for co-management. No action was ever taken by the Carrier. The two subsequent DWC-25s contained no such recommendation. On June 13, 2007, Claimant was placed at MMI with no impairment. Following her discharge from Occupational Medical Center, Claimant continued to work for Victoria & Associates until her employment was terminated in June 2007. At no time does it appear that Claimant was

ever taken off work nor was she given any work restrictions. Further, it is unclear whether the referral for a consult with an ophthalmologist was related to the industrial accident.

4. Despite having been found to have no impairment, Claimant maintains she continued to be symptomatic over the next few years. She reported numerous symptoms such as headaches, dizziness, nausea, sensitivity to light, hypertension, vomiting, difficulty concentrating, neck pain, low back pain and stiffness and depression. Nevertheless, it was not until January 10, 2010 that Claimant filed her first petition for benefits, more than two and one-half years after date of injury and the last provision of medical treatment.<sup>1</sup>

5. Claimant obtained a one-time change in physicians and was authorized to treat with Dr. Allen Garcia, a chiropractor. Dr. Garcia, who apparently continues to provide chiropractic treatment to Claimant, initially saw Claimant on April 6, 2011. At that time, Claimant's complaints included headaches, neck pain and lower back pain, nervousness, tension and anxiety. In addition, Claimant seems to have told Dr. Garcia that she has noticed changes in her temperament and short-term memory. *See, Claimant's Exhibit #2, p. 15, lines 15-19; p. 16, lines 9-15.* It is noteworthy that Dr. Garcia indicated that Claimant was working part-time when he began treating her. Garcia diagnosed post concussion syndrome<sup>2</sup>, cephalgia, head pain, cervical/brachial radiculitis, lumbar sprain/strain and thoracic sprain/strain. He recommended physical therapy sessions with chiropractic treatment for nine weeks. Claimant completed the prescribed physical therapy.

6. Due to Claimant's failure to experience any real improvement in her various complaints, Dr. Garcia recommended an MRI of the lumbar spine and one of the brain, examination by a neurologist, a neurosurgeon, a psychiatrist and a neuropsychologist. As

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<sup>1</sup> In an earlier final hearing, the undersigned ruled that Employer/Carrier were estopped from relying upon the statute of limitations to justify denial of any of the requested benefits.

<sup>2</sup> According to Dr. Garcia this would include blurred vision, dizziness and various neurological dysfunctions following a blow to the head. *See, Claimant's Exhibit #2, p. 12, lines 11-12.*

for work restrictions, Dr. Garcia advised against lifting more than 15-20 lbs and no “complex” work. During his deposition, Garcia expressed the opinion that Claimant has reached MMI and that he would need diagnostic studies before he could determine if she had reached MMI. Dr. Garcia concluded that the industrial accident was the major contributing cause of Claimant’s neck, shoulder and low back condition. He acknowledged that he reached this conclusion primarily based on the history given to him by Claimant.

7. Employer/Carrier arranged to have their IME performed by Dr. Bernard Gran, a neurologist. Dr. Gran performed his evaluation on May 17, 2011. According to Dr. Gran, Claimant’s exam was entirely normal. He did emphasize that Claimant appeared to be angry during the entire examination, however. Based upon his examination and his review of Claimant’s medical records, Gran formed a diagnostic impression of head trauma and a right subconjunctival hemorrhage which resolved. He opined that Claimant had reached MMI as of June 13, 2007 with no permanent impairment, the point at which she was placed at MMI by the physician at Occupational Health Center. Gran rejected the notion that Claimant’s complaints of numbness in her hands or pain in her low back and neck were related to her industrial accident. He does not feel that Claimant requires any further treatment in connection with her industrial accident.

8. Pursuant to Employer/Carrier’s motion, an EMA was appointed to address numerous issues:

- a. whether the industrial accident is the major contributing cause of any neck, shoulder or low back condition which Claimant may have;
- b. whether Claimant is at MMI;
- c. whether she has physical restrictions as a result of her industrial accident;

d. whether it is medically necessary that Claimant undergo an MRI of her lumbar spine and evaluations by a neurologist, a neurosurgeon, a psychiatrist as well as a neuropsychologist; and,

e. whether Claimant requires any future neurological care.

The undersigned appointed Dr. Kenneth Fischer to serve as EMA. He evaluated Claimant on October 19, 2011. In his report, Dr. Fischer stated:

Ms. Noguera had a mild closed head injury with a subsequent right subconjunctival hemorrhage 4.5 years ago. She has a multitude of residual symptoms which are described above. Her neurological examination is completely normal and there is no evidence of any residual neurological dysfunction stemming from the work injury of 5-11-07. The patient has achieved MMI with a 0% PPI rating and able[sic] to return to full-time work with restrictions without the need for any additional treatment related to the accident in question. *Judge's Exhibit #1, p. 3.*

Clearly, Dr. Fischer does not agree with the opinions and recommendations expressed by Dr. Garcia. Rather, his opinions are more in line with those of Dr. Gran and Dr. Bunsic.

9. As noted elsewhere, herein, Claimant testified at the final hearing. She testified that she continued to work for approximately two to three weeks following her industrial accident. She was fired in June 2007, however, and did not work again for two years. At several points in her testimony, Claimant expressed some resentment because she did not feel that she had been given credit for her accomplishments at work.

10. Claimant stated that she feels dizzy at times and not wanting to do anything. She described once having found herself at a co-worker's desk and performing that person's job without knowing why. While this may well cause one to be concerned, Claimant never adequately tied this event to her industrial accident. She admits to having limited herself to doing no lifting because she is afraid to do so. She testified that her back feels as if it is going to "break". Unfortunately, while the undersigned is persuaded that Claimant believes

she has suffered numerous injuries as a result of her industrial accident, her testimony did little to clarify the bases of that belief.

### **Analysis**

11. The opinion of the EMA is presumed to be correct in the absence of clear and convincing evidence to the contrary. §440.13(9)(c), *Fla. Stat. (2007)*. In the instant case, Dr. Fischer clearly feels that Claimant has recovered from the effects of her industrial accident with no permanent impairment and no work restrictions. Nothing in the record of this proceeding supports Claimant's assertion that she was temporarily partially disabled for the period from May 11, 2007 through May 11, 2009 (the date on which the statutory 104 weeks of temporary benefits would have expired). Although Dr. Garcia advised her not to lift more than 15-20 lbs and not to perform any "complex" work, there is no reliable evidence establishing a nexus between the restrictions which were given to her by Dr. Garcia and Claimant's industrial accident. Accordingly, the undersigned must conclude there is a lack of evidence establishing that Claimant's loss of earnings was due to an inability to return to work due to restrictions resulting from the effects of the industrial injury. Rather, based on Claimant's own testimony, the undersigned concludes that Claimant's loss of earnings was due to termination of her employment (the reason for which is not clear) and her decision not to look for work because she did not feel she could safely perform any type of work due to her perception of the effects of her industrial accident.

12. The undersigned accepts the opinions of the EMA physician, Dr. Fischer as no evidence rising to the level of "clear and convincing" exists to reject the opinions of the EMA physician. This being so, the undersigned concludes that Claimant is not entitled to further treatment in connection with her industrial accident neither is she entitled to any indemnity benefits.

## CONCLUSIONS OF LAW

13. Based upon the foregoing, all claims asserted, here, must be denied. Claimant is not entitled to: temporary partial disability benefits from May 11, 2007; authorization of an ophthalmologist for evaluation and treatment of her eye complaints; authorization of an MRI of the lumbar spine; authorization of a neurologist for further diagnostic evaluation of her head injury; authorization of a neurosurgeon for further diagnostic evaluation of her neck and low back complaints; authorization of a psychiatrist for diagnostic evaluation of her anxiety and depression; or, authorization of a neuropsychologist for evaluation and treatment.

14. Penalties and interest are denied.

Jurisdiction is retained over the claim for an attorney's fee and taxable costs in light of the parties' stipulation as to the calculation of Claimant's AWW.

Done and ordered in Tampa, Hillsborough County, Florida this 9<sup>th</sup> day of December, 2011.



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Doris E. Jenkins  
Judge of Compensation Claims