

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

Suky Ugarte,  
Employee/Claimant,

OJCC Case No. 17-002365SMS

vs.

Accident date: 1/8/2017

Vintro Hotel South Beac/Technology  
Insurance Company, and AmTrust North  
America of Florida,  
Employer/Carrier/Servicing Agent.

Judge: Sylvia Medina-Shore

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**COMPENSATION ORDER**

**THIS CAUSE** came before the undersigned Judge of Compensation Claims for a final hearing on 1/3/2018 regarding petitions for benefits (PFBs) filed 5/26/17 and 6/2/17. The claimant is represented by Michael Goldstein, Esquire. The employer and carrier (E/C) are represented by Andrew R. Borah, Esquire.

**Claims:**

1. Compensability.
2. Temporary partial disability benefits from 1/8/2017 to present and continuing.
3. Authorization of therapy.
4. Penalties, interest, costs, and attorney's fees (PICA).

**Defenses:**

1. No TPD due or owing as claimant never had restrictions.
2. Claimant is at MMI.
3. Industrial accident is no longer the major contributing cause (MCC) of claimant's right hand condition and need for treatment.

4. PICA not due or owing.

**Claimant's Affirmative Defense:**

1. E/C is estopped to deny compensability and all benefits based on E/C's failure to properly comply with the 120 day pay and investigate statute.

**Documentary Exhibits:**

JCC-

1. Pre-trial stipulation filed 10/20/17 (DE#35).

Claimant-

1. Deposition of Michelle Jameson (the adjuster) filed 12/21/17 (DE#60).
2. Motion to admit medical records filed 10/27/17, medical records of Dr. Phillip Cummings, and 11/15/17 Order approving motion (DE#37, 39).
3. Mediation Agreement of 5/23/17 (DE#12).

E/C-

1. Deposition of Dr. Cummings (claimant's objections to opinion testimony overruled) filed 12/1/17 (DE#50).
2. Claimant's deposition filed 12/21/17 (DE#61).

**Findings of Facts and Conclusions of Law:**

1. Suky Ugarte, the claimant testified via deposition. She is 29 years of age and had a baby in September of 2016.
2. In November of 2016, claimant was employed as a housekeeper for the instant employer (hotel). She worked six days a week. Claimant's work duties included cleaning the hotel rooms (the floors and furniture), changing the beds, lifting the mattresses and cleaning the bathrooms.

3. Claimant started experiencing pain in her right hand after working for one month. She did not report it to her employer then rather, continued working.
4. In January of 2017 (two months on the job) claimant's supervisor, Javier advised claimant she was not working up to par. At that time, Claimant explained her difficulties undertaking the work duties due to right hand pain. At the end of that day, claimant was terminated.
5. Thereafter, claimant received medical treatment through Medicaid from her PCP, Dr. Conchita.
6. Claimant briefly attempted to work as a waitress at a pizzeria. However, as the claimant was unable to hold the plates with her right hand, she did not last long at the job.
7. On 1/30/2017, claimant filed a PFB requesting compensability and a PCP.
8. On 2/16/17, E/C filed their response accepting compensability under the 120-day rule and authorizing Dr. Cummings. The E/C also accepted same on 5/23/2017 per mediation agreement.
9. E/C scheduled an appointment for claimant with Dr. Cummings for 3/1/17 however the 3/1/17 doctor appointment did not take place. The evidence presented does not address the reason for same.
10. On 5/24/17, Claimant attended an appointment with Dr. Cummings. Dr. Cummings diagnosed Radial styloid tenosynovitis (de Quervain) right and provided a cortisone injection, protective splint and medication. Dr. Cummings also recommended home exercise program. Claimant was to follow-up in two weeks however, she did not do so.

11. On the 5/24/17 visit, Dr. Cummings opined the MCC of claimant's disability and need for medical care was work related. He assigned work restrictions of no lifting more than 5 pounds with the right hand. Claimant was advised she was on light duty.
12. On 5/26/2017, claimant filed a PFB for TPD benefits from 1/8/17 and continuing. No indemnity was paid.
13. On 6/2/2017, claimant filed a PFB requesting the injection and therapy.
14. On 6/14/17, Dr. Cummings completed a questionnaire (after a conference with E/C attorney) opining claimant's medical condition and need for treatment was 80% non-work condition/motherhood and 20% work related.
15. On 6/14/2017, E/C filed responses to the PFBs denying the requested benefits as the work duties are not the MCC of claimant's current condition and need for treatment (per Dr. Cummings).

**Claim for Therapy-**

16. On 6/2/17, claimant filed a PFB for authorization of therapy. Attached to the PFB is the DWC-25 completed by Dr. Cummings. Dr. Cummings checks off the box under Section III, 20(c) entitled Physical Medicine. Dr. Cummings prescribed therapy and handwrote "HEP only." In his 5/24/17 medical report, Dr. Cummings prescribed a home exercise program for the claimant. As the claimant was instructed in a home exercise program at the 5/24/17 medical appointment, I find the claimed therapy benefit was already provided by E/C. Claimant was expected to perform the exercises at home. There is no medical evidence claimant was prescribed and therefore, entitled to any other form of therapy. Accordingly, the only remaining benefit at issue is the claim for TPD benefits from date of accident and continuing.

**When the 120-Day Period of F.S. 440.20(4) Begins-**

17. Section 440.20(4) provides: “If the carrier is uncertain of its obligation to provide all benefits or compensation, the carrier shall immediately and in good faith commence investigation of the employee's entitlement to benefits under this chapter and shall admit or deny compensability within 120 days after the initial provision of compensation or benefits as required under subsection (2) or s. 440.192(8). Additionally, the carrier shall initiate payment and continue the provision of all benefits and compensation as if the claim had been accepted as compensable, without prejudice and admitting liability. Upon commencement of payment the carrier shall provide written notice to the employee that it has elected to pay the claim pending further investigation, and that it will advise the employee of claim acceptance or denial within 120 days. A carrier that fails to deny compensability within the 120 days after the initial provision of benefits or payment of compensation as required under subsection (2) or s. 440.192(8) waives the right to deny compensability, unless the carrier can establish material facts relevant to the issue of compensability that it could not have discovered through reasonable investigation within the 120-day period.”

18. In the instant case, E/C accepted compensability and authorized Dr. Cummings under the 120-day provision on 2/16/17. As claimant did not attend the 3/1/17 appointment with Dr. Cummings, it was rescheduled to 5/24/17. No compensation has been paid to claimant.

19. Claimant's first authorized medical treatment was on 5/24/17 with Dr. Cummings. E/C paid Dr. Cummings for the visit and paid for cortisone injection provided to claimant on same date. Therefore, I find the 120 day period began to run as of 5/24/17. See, Osceola

County School Board v. Arace, 884 So.2d 1003 (Fla. 1<sup>st</sup> DCA 2004). E/C had until 9/20/17 to deny compensability of the accident, if they so desired.

**Waiver Provision of F.S. 440.20(4) 120-Day Pay and Investigate-**

20. Claimant argues the E/C are estopped to deny compensability and all benefits based on their failure to properly comply with the 120 day pay and investigate statute. Specifically as E/C failed to pay the TPD benefits during the pay and investigate period, which claimant alleges is from the date of accident to the 6/14/17 denial, claimant argues E/C is on the hook for payment of TPD benefits. I reject claimant's argument as not supported by the facts of the instant case and case law.
21. Case law has held that "a distinction exists between the concept of compensability and a worker's entitlement to either compensation or benefits. An E/C who pays compensation or intentionally provides benefits, but fails to deny compensability within 120 days waives its right to contest an injury arose out of, and occurred within the course and scope of claimant's employment." See, City of Ocoee and PGCS v. Trimble, 929 So.2d 687, 689 (Fla. 1<sup>st</sup> DCA 2006), citing to North River Ins. Co. v. Wuelling, 683 So.2d 1090 (Fla. 1<sup>st</sup> DCA 1996)(en banc). An E/C therefore has not waived the right to contest that the workplace injury is the MCC of the condition for which treatment is sought. Id. citing to Checkers Rest. & Specialty Risk Servs. Inc. v. Wiethoff, 925 So.2d 348, 349 (Fla. 1<sup>st</sup> DCA 2006)(en banc).
22. E/C, in the present case, has always accepted the accident (repetitive trauma claim) as compensable. In other words, E/C has accepted claimant suffered a repetitive trauma injury at work as claimed in the PFBs. However, the E/C assert claimant's work duties (accident) are not the MCC of her condition, need for treatment and disability.

23. On 6/14/17, Dr. Cummings opined that 80% of claimant's condition and need for treatment was due to non-work condition/motherhood and 20% work-related. Dr. Cummings 6/14/17 opinion, admittedly different than his 5/24/17 opinion, is based on the fact claimant had not worked as a housekeeper since January of 2017. I accept Dr. Cummings opinions. I find Dr. Cummings reliance on claimant not working as a housekeeper since January of 2017 is supported by claimant's deposition testimony. Therefore, I find Dr. Cummings relied on an accurate history as to claimant's employment history.
24. According to case law, E/C has not waived their right to challenge the industrial injury is the MCC of claimant's condition and disability.

**TPD time period of 1/8/17 to 5/23/17-**

25. I accept Dr. Cummings unrefuted opinion that claimant's accident (work duties) is not the MCC of her right wrist tenosynovitis. Accordingly, I find claimant's accident (work duties) is not the MCC of her disability or work restrictions assigned by Dr. Cummings.
26. Moreover, there is no medical evidence claimant had any physical restrictions impeding her from undertaking her work duties prior to 5/24/17.

**TPD time period of 5/24/17 to Present-**

27. On 5/24/17, Dr. Cummings opined claimant's work duties were the MCC of her medical condition and physical restrictions. He did so incorrectly assuming claimant worked as a housekeeper from January of 2017 to the 5/24/17 office visit. Nonetheless, claimant was provided with the work restrictions which were undisputed from 5/24/17 to 6/14/17. Claimant briefly worked at a pizzeria but was unable to continue with said employment due to her right wrist condition.

28. When the adjuster was questioned as to why claimant was not paid TPD benefits from 5/24/17 to 6/14/17, the adjuster did not know why.
29. F.S. 440.20(4) requires the carrier initiate payment and continue the provision of all benefits and compensation as if the claim had been accepted as compensable under the 120-day pay and investigate provision. Clearly, claimant was not provided with TPD benefits during any time period, including 5/24/17 to 6/14/17.
30. F.S. 440.20(4) also allows an E/C to admit or deny compensability within 120 days after the initial provision of compensation or benefits as required under subsection (2) or s. 440.192(8). F.S. 440.192(8) deals with requested benefits (compensation and/or medical) in a PFB. Subsection (2) of F.S. 440.20(4)(a) deals with the time frame of payment of total disability or death benefits and refers to F.S. 440.15.
31. F.S. 440.15(4)(a) indicates as follows “ . . . Benefits shall be payable under this subsection only if overall maximum medical improvement has not been reached and the medical conditions resulting from the accident create restrictions on the injured employee’s ability to return to work.”
32. According to Dr. Cummings, 80% of claimant’s right wrist condition resulted from her motherhood activities not work duties. I accept Dr. Cummings opinions and find the MCC of claimant’s medical condition in not work related. I further find the work restrictions resulted from claimant’s motherhood duties not her work duties/accident. Accordingly, I find claimant failed to satisfy her burden that the claimed wage loss (TPD benefits) is attributable to her work accident (work duties).

**WHEREFORE, IT IS ORDERED:**

1. Claim for temporary partial disability benefits with interest and penalties from 1/8/2017 to present are denied.
2. Claim for authorization of therapy is denied.
3. Jurisdiction is reserved on entitlement to and amount of attorney's fees and costs for a future fee hearing, in the event the parties are unable to resolve it.
4. PFBs filed 5/26/17 and 6/2/17, excluding fees and costs, are dismissed with prejudice.

**DONE AND E-MAILED TO THE ATTORNEYS OF RECORD AND THE CARRIER  
THIS 11<sup>TH</sup> DAY OF JANUARY OF 2018. THE ATTORNEYS SHALL PROVIDE A  
COPY OF THE INSTANT COMPENSATION ORDER UPON RECEIPT OF SAME.**



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Sylvia Medina-Shore  
Judge of Compensation Claims

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