

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGES OF COMPENSATION CLAIMS
WEST PALM BEACH DISTRICT OFFICE

Maria Alvarado,
Employee/Claimant,

OJCC Case No. 16-018976MAD

vs.

Accident date: 6/28/2016

Progressive Employer Management Co.
Inc. /AmTrust North America of Florida,
Employee/Carrier/Service Agent.

Judge: Mary A. D'Ambrosio

FINAL COMPENSATION ORDER

AFTER PROPER NOTICE TO ALL PARTIES, a Final Merits Hearing was held on March 1, 2017. Present for the hearing were Maria Alvarado, the Claimant, Joseph Bilotta, Esq., counsel for the Claimant and Andrew Borah, Esq., counsel for the Employer/Carrier.

The Petitions for Benefits filed on August 5, 2016 and November 17, 2016 were ripe for the Final Hearing. The Petition for Benefits filed on January 25, 2017 was dismissed by the claimant at the hearing. The Petition for Benefits filed on January 30, 2017 was not mediated, but the parties have requested the undersigned to rule on the January 30, 2017 Petition for Benefits.

CLAIMS

1. Compensability of injuries to neck, back, right arm, right leg, right shoulder and hip;
2. Payment of TTD from 6/28/16 to present at a compensation rate of \$306.68;
3. Payment of TPD from 6/28/16 to present at a compensation rate of \$294.40;
4. Authorization of a physician to evaluate and treat claimant's neck, back, right arm, right leg, right shoulder and hip injuries;
5. Reimbursement to claimant for mileage in the amount of \$96.12 for the period of 7/27/16 through 8/15/16;
6. Reimbursement to claimant for out of pocket expenses in the amount of \$468.27 paid

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- to Back in Action;
7. Penalties, interest, attorney's fees and costs.

DEFENSES

1. The Claimant did not sustain a compensable accident. The claimant has fabricated a work accident in retaliation for being terminated;
2. The claimant did not provide timely notice of an accident;
3. The treatment the claimant received was not medically necessary;
4. No penalties, interest, costs or attorney fees are due.

STIPULATIONS MADE AT TIME OF HEARING

1. ACK, LLC has been removed as a party to this claim. The parties agree that Progressive Employer Management Company, Inc. is the correct Employer.
2. The January 25, 2017 Petition for Benefits is dismissed by the Claimant.
3. The January 30, 2017 Petition for Benefits is being tried at the hearing by consent of the parties.
4. The parties agree to calculate past-due indemnity benefits and average weekly wage if the claim is found compensable.
5. The parties stipulate that no evidence is required to show the claimant's husband was in Bethesda East Hospital from June 25, 2016 through July 2, 2016.

EXHIBITS

1. Pretrial Stipulation and amendments – Judge's Composite Exhibit #1;
2. Medical Records- Helix Urgent Care (D#63) – Joint Exhibit #1;
3. Deposition of Gary Susser with exhibits (D#60) – Claimant's Exhibit #1;
4. Deposition of Dr. Purificati – Fact Witness Only (D#59) – Claimant's Exhibit #2;
5. Deposition of Dr. Krost (D#58) – Claimant's Exhibit 3;
6. Deposition of Alejandro Casas (D#57) – Claimant's Exhibit #4;
7. Deposition of Fina Licon (D#56) – Claimant's Exhibit #5;
8. Deposition of Kimberly Pavon (D#55) – Claimant's Exhibit #6;
9. Deposition of Martin Avila (D#54) – Claimant's Exhibit #7;

10. Deposition of Ramon Avila (D#53) – Claimant’s Exhibit # 8;
11. Complete Personnel File (D#65) - Claimant’s Exhibit #9
12. Unemployment records – 7/12/16 letter only (D#62) – Claimant’s Exhibit #10;
13. Warehouse Photographs - Claimant’s Exhibit #11;
14. Claimant Deposition taken 1/26/17 (D#48) – Employer/Carrier’s Exhibit #1;
15. Deposition of Michael Zeide (D# 49) – Employer/Carrier’s Exhibit #2;

I considered the testimony of Maria Alvarado, Jesus Ramon Avila and Wayne McAlister presented at the hearing. I have judged the credibility of all three witnesses and have resolved any conflicts in the live or deposition testimony in reaching my findings of fact and conclusions of law.

FINDINGS OF FACT

1. Final hearing and January 26, 2017 deposition testimony of Maria Alvarado:

She works in the warehouse “picking” merchandise. On **June 28, 2016** she was on a ladder standing three or four rungs up from the floor. She was reaching above the red level shown in the photographs when Alejandro called to her and she turned. Her hands were sweaty as it was warm in the warehouse. Her hand slipped off the ladder, and she fell sideways off the ladder onto the concrete floor on her right side. She tried to grab boxes to break her fall but could not because they were sticking out. She then got up and started picking up things from the ground. Her supervisor, Ramon Avila, came over and *she told him that she fell from the ladder.* She did not know the height from which she fell. She didn’t cry out because she lost her voice, because she was so scared. There were two people working on her side of the warehouse when she fell. She did not see any coworkers when she fell. She believes she was in aisle 20B, not shown in the photographs.

The accident occurred in the morning and she worked until Ramon Avila told her it was

time to go. Standard quitting time was 6:00 to 8:00 p.m. Her husband was in the hospital so she left earlier that day to visit him. When she left work, she was walking normally but had pain in her back and arms. She was in “a little” bit of pain and the pain may have affected her ability to walk. She went home first to cook to bring food to her husband. She visited him in the hospital but did not go to the Emergency Room herself to get examined, claiming she had no money to do so. Her symptoms worsened one day after the accident and her whole body began to hurt. The pain affected her ability to sleep. She took Tylenol and used an Icy Hot spray.

She worked on **June 29, 2016 and June 30, 2016**. She had pain after driving from her home to work. She worked in pain as she needed the income. She testified she was fired on **July 1, 2016**. She was not upset about the termination claiming “I’ve had better jobs”.

She was seen at Helix Urgent Care on **July 5, 2016** to have her blood drawn and did not mention her fall at work. She receives treatment at Helix Urgent Care for diabetes, thyroid and cholesterol testing. She went to an attorney in July for the primary reason of requesting the return of her Holiday Fund money held by the Employer. She called Human Resources to ask about her vacation pay, but she did not mention the accident because she did not speak English well enough. She did not request medical care from the Employer. She expected Ramon Avila to send her to a doctor.

On **July 28, 2016**, she received medical care from Dr. Purificati at Back in Action Chiropractic. She did not go sooner because she did not have enough money. She chose Dr. Purificati because his office was located next door to Helix Urgent Care.

She has a ninth grade education from El Salvador. She understands some English and can read and write in English “a little bit”. She was injured in an automobile accident in

approximately 2001 with injury to her back. She received chiropractic therapy for her back for one year. Several times during her deposition she answered a question in English rather than Spanish. She testified in deposition that Alejandro was walking toward her looking at a piece of paper and was asking her where an item was when her hand slipped and she fell. She testified that Alejandro didn't *see* her fall, he said he *heard* her fall. He told her he wasn't talking to her, but was talking to a different Maria.

2. Final Hearing and deposition testimony of Jesus Ramon Avila:

He is employed by ACK, LLC as a Warehouse Manager for 21 years. The company sells wholesale dog supplies including toys, treats, and clothing. He is responsible for filling orders and receiving merchandise. He manages over 20 employees in the warehouse on a daily basis. He has known the claimant for two years and she has been under his supervision in receiving merchandise. His employees, Kimberly Pavon, Martin Avila and Fina Licona are his family members. Other family members are employed at ACK LLC. The Claimant was hired on October 7, 2014 on the recommendation of his sister. She started as a temporary worker before being hired full time. She was described as a good worker. She typically worked more than 40 hours.

He terminated Maria Alvarado on **July 1, 2016** for failure to come to work without calling in by noon, against company policy. He confirmed that July 1, 2016 was the first day the Claimant did not show up to work and did not call in by 12 o'clock. She called in at approximately 12:30 p.m. - 12:40 p.m. and told him she had left her phone at home and she had been at the hospital. Approximately two weeks after her termination, she called him asking about her vacation pay. She did not report an injury to him at that time, nor did she request

medical care.

He has no information regarding the Claimant's allegation of an accident in the warehouse on June 28, 2016. She never reported an accident to him and he questioned all 20 employees in the warehouse and no one saw an accident. He became aware that she was alleging a work accident one and a half months after she was terminated when the Office Manager, Eren, advised him that someone was calling from workers' compensation about Maria's accident. Maria Alvarado never reported an accident to either him, another supervisor or her coworkers. She never requested medical care for an injury.

He was present in the warehouse at the time the photographs in evidence were taken. The warehouse is approximately 55,000 square feet with approximately 30 aisles. When the pictures were taken at approximately 10:00 a.m., some of the employees were on break. He described Aisle 20 as having constant activity with at least two or three people picking merchandise. He has 20 people in the warehouse and described constant movement throughout the day. He described Aisles 18-23 as the busiest aisles.

3. Final hearing testimony of Wayne McAlister:

He is the Operations Manager and supervises 25 warehouse employees. The claimant is one of his employees whom he saw daily. He believes the claimant was terminated on July 1, 2016. He testified that he personally observed the claimant on **June 28, 2016, June 29, 2016 and June 30, 2016**. On **June 30, 2016**, he left the warehouse at the end of the day with the claimant. She was the last one to clock out at 5:00 PM. He did not observe her to be limping and she gave no indication of an injury. She was acting normally and she did not appear to be in pain. He did not notice any bruises or scratches. At no time did she report a work accident to him, nor did she

request medical care.

4. Deposition testimony of Attorney Gary Susser:

Maria Alvarado appeared at his office unannounced on **July 22, 2016**. She was tearful. Mr. Susser had represented family members of Ms. Alvarado years before. He enlisted the aid of his paralegal to translate in Spanish. The claimant brought a check and told him she had been fired from her work. She told him that on July 1, 2016, she had to pick up her husband at the hospital, was late for work and was fired. She came to him for her concern over the money that was held in her Holiday Club Fund. She was owed \$1,400.00 and wanted her money. She gave him a copy of a check from ACK, LLC dated July 8, 2016. She complained to him about her employers being “nasty”. She then described being up on a ladder and falling and hurting herself. At that point Mr. Susser chose to refer her to Joseph Bilotta. Maria’s main reason for coming to him was the Holiday Club money.

5. Records of Helix Urgent Care:

Maria Alvarado was seen on **July 5, 2016** for follow up of her lab results. She treats at Helix for hyperlipidemia, weight issues, Type 2 diabetes and hypothyroidism. There is no mention in the records of any work injury, accident, or complaints of any pain in any parts of her body. The report states the claimant had a normal physical examination. The next follow up record is dated September 25, 2016. There is no report of an injury or accident. A musculoskeletal examination is negative for arthralgia or back pain.

6. Deposition testimony of Michael Purificati, D.C. (fact purposes only):

He is a chiropractor at Back in Action Chiropractic in Lake Worth. The claimant’s first visit was on **July 27, 2016**. She complained of whole body pain. Her presentation was “very

frantic” and her English was not very good. In reference to the history form, he testified the claimant was not very forthcoming with a lot of specifics. She said she was hurt at work and when the doctor told her they may have to handle it differently, she told him *she did not want to*. She offered to pay for her own visits and paid him a total of \$360.00. She did not give him a good history on what had happened. After his examination, he referred her to Dr. Peredes, a native Spanish speaker. There is no outstanding balance with his office.

On cross-examination, he testified that all she was willing to give him at that point was that *something* had happened at work without any specifics. Each time she came in she was very frantic and complained of a lot of pain. He did not know that she was alleging she fell seven feet from a ladder. She had positive findings on testing to the neck.

The Registration and History Form attached to the deposition shows the claimant stated “pain in my body” was due to an accident on June 28, 2016 at work.

7. Deposition testimony of Dr. Stewart Krost:

He specializes in physical medicine, rehabilitation and pain management. He performed an independent medical examination for the claimant on **January 19, 2017**. The Claimant reported that she was *seven feet up on a ladder* at work when another employee spoke to her and she turned to talk, lost her balance and fell, landing on her right side. She had *immediate pain* in the neck, back, right arm, right leg, right shoulder and right hip. She reported receiving treatment at the Urgent Care Center with therapy and medication. She has not worked since the accident.

She complained of constant aches and stabbing neck pain with radiating symptoms down the right arm to the fingers with numbness and tingling. She had constant aching and stabbing lower back pain with radiation down the right leg to her toes with numbness and tingling. Her

pain was aggravated with bowel movements and physical activities.

Dr. Krost diagnosed a cervical and lumbar injury and right shoulder injury as a result of the work-related fall on June 28, 2016. He diagnosed mechanical neck and back pain with reactive myofascial spasm with clinical symptoms suggestive of cervical and lumbar radiculopathy and facetogenic pain. His objective findings include spasm of the lumbar spine. He recommended MRI scans of the cervical and lumbar spine and consideration of injections for diagnostic and therapeutic purposes. The claimant would be off-duty until his recommendations were completed. He opined that the major contributing cause of the claimant's injuries was the work-related accident of June 28, 2016.

Dr. Krost testified he did not review any medical records concerning the claimant's alleged injuries; however, he opined the treatment at Back in Action was reasonable and related to the work injury. He was unaware of *when* the claimant first sought medical treatment for her alleged injuries. He could not describe the claimant's body shape and did not know her height and weight until he was advised in cross examination.

He testified on cross-examination that *it was not possible that the claimant's complaints would have been delayed more than seven days after the accident and that she would have been without any symptoms*. Dr. Krost testified that the claimant's weight at 212 pounds with a height of 4 foot 10 would be considered morbidly obese.

8. Deposition of Michael Zeide, M.D.:

He is a board certified orthopedist. He conducted an independent medical examination for the Employer/Carrier on January 30, 2017. He conducted the examination in English and felt she understood his questions as she responded appropriately and followed his directions during

the examination. Her chief complaint was neck and back pain. She reported that on June 28, 2016 she was on a ladder inside a house when she fell, landing on the right side. She got up by herself and continued working. She sought medical care for neck, right shoulder and lower back ten days later and received therapy and medications. She reported no improvement with medical care. She reported working in receiving.

His physical examination revealed restrictions in range of motion of the neck and back. She had no reflex sensory motor deficits. He could not measure atrophy or spasm due to her size, described as morbidly obese, claiming it was impossible to palpate. Relying on the lack of findings or history in the Helix Urgent Care and Back in Action records and his examination, he opined there was no objective finding of any injury or aggravation. He assigned MMI with no permanent impairment rating. He did not recommend any future medical care.

In his report, he notes under “history” that she was on her ladder, inside a warehouse, when she fell landing on the right side.

9. Deposition of Alejandro Casas:

He testified with the assistance of a Spanish translator. He has been employed with ACK, LLC since 2014. He had no information as to whether Maria Alvarado was injured while working on June 28, 2016. He learned from Ramon Avila that she was alleging a work accident. He believes he was working on June 28, 2016. He has no recollection of working with the claimant on that day.

10. Deposition of Fina Licona:

She testified with the assistance of a Spanish translator. She goes by the name Fina Guzman Alvarez. She has known the Claimant since 2014 or earlier. She has no information

regarding whether the Claimant was injured on June 28, 2016. Ramon came to her and asked her whether she had any information regarding the Claimant being injured. He told her she was going to have to give a deposition.

11. Deposition of Kimberly Pavon:

She testified with the assistance of a Spanish translator. She has worked at ACK LLC for one year. She is the niece of Jesus Ramon Avila. Other family members work at ACK including her mother, sister, aunts and two cousins. She has known the Claimant the entire time she worked there. She has no information regarding whether the Claimant was injured on June 28, 2016.

12. Deposition of Martin Avila:

He testified with the assistance of a Spanish translator. He has known the Claimant for three years. He has worked at ACK LLC for five years. He has no information regarding whether the Claimant was injured on June 28, 2016.

13. The Claimant's **personnel file** is in evidence. She was hired on October 7, 2014 as a Warehouse Associate full time earning \$11.00 hourly for 40 hours. She received a raise to \$11.50 per hour on October 30, 2015. She enrolled in health insurance with United Healthcare. She was also enrolled in the Holiday Club and authorized \$100.00 to be deducted from each paycheck. The file contains an Employee Separation Form dated July 1, 2016 indicating she violated company policy for not coming in to work or calling to excuse the absence.

14. The Claimant was approved for Unemployment Compensation benefits as of July 11, 2016 in the amount of \$275.00 per week.

CONCLUSIONS OF LAW

1. Florida Statute 440.185(1) requires an injured employee to provide notice of an accident or injury within 30 days. The Claimant alleges she reported her fall to Ramon Avila immediately, and Mr. Avila denies having any knowledge of a fall until his company heard from the lawyers and workers' compensation.

I find that the Claimant did not timely report any injury to her employer within the 30 days after the alleged fall. I accept the testimony of Mr. Avila and Mr. McAlister, her supervisors. There are no corroborating witnesses to her version of what occurred. I find it unlikely that there would not have been any witnesses to the fall or that the Claimant would not have told anyone of the fall in a warehouse described as having constant movement, with twenty employees. I also find it to be unlikely that the claimant would not have had any evidence of injury, such as bruising or limping after falling from a ladder onto a concrete floor, regardless of whether the height was 4 foot, 5 foot, 6 foot or 7 foot.

2. In judging the credibility of the claimant, I have seriously considered her position that many of the employees who testified in this case are relatives of Mr. Ramon Avila, her boss. Because of the potential for bias, I have considered the records of Helix Urgent Care. Ms. Alvarado went there of her own volition on July 5, 2016, just 4 days after her termination, and 7 days after her injury. She was examined by the doctors and she had the opportunity to report an injury to them, despite being there for lab follow up. She was a patient of the practice for at least two years and logic would dictate that she would report the pain she was experiencing to them, if nothing else. There is no evidence that she was unable to communicate in Spanish or English to the doctors at Helix. The claimant's own testimony is that she began experiencing pain by June

29, 2016, was taking Tylenol and Icy Hot, was not sleeping, was having difficulty driving, and was having pain in her neck, entire back, right shoulder and right leg.

3. The claimant visited her husband at Bethesda Hospital on the night of the alleged accident and could have asked to be examined at the Emergency Room that night. She did not.

The claimant called Mr. Avila approximately two weeks after her termination to request her vacation pay. She could have reported the injury on that date. She did not.

The claimant saw Attorney Susser on July 22, 2016 and told him about falling from a ladder at work. He referred her to an attorney. She could have reported the injury on that date. She did not.

The claimant went to Back in Action Chiropractic on July 28, 2016 and reported falling from a ladder. She could have reported the injury on that date. She did not. Instead, she told Dr. Purificati she did not wish to handle the case under workers' compensation and insisted on paying his bills herself.

Even if I were to accept the claimant's version of events that she immediately reported the fall to Ramon Avila when it occurred, which I do not, it does not stand to reason that if he ignored her, she would not have reported it to him again after July 1, 2016. I also accept the testimony of Mr. McAlister, the Operations Manager, that he observed Ms. Alvarado working on June 28, 29 and 30 without exhibiting any sign of injury or physical discomfort. Mr. McAlister is not related to Mr. Avila or any of the warehouse employees and I accept his testimony as credible.

4. Dr. Krost and Dr. Zeide have both been retained by counsel as an IME in this case and I find that both of them are biased in their opinions. What they both agree upon, however, is

the fact that the claimant could not have waited almost 30 days before receiving medical treatment with a fall from a ladder to the concrete floor, regardless of the exact height. They both agree that based upon the claimant's height and weight, there should have been some type of sign of injury following the fall. Dr. Krost opined *it was not possible that the claimant's complaints would have been delayed more than seven days after the accident and that she would have been without any symptoms.* Dr. Zeide relied on *the lack of findings or history in the Helix Urgent Care and Back in Action records and his examination.* Taking this testimony in combination with the records of Helix Urgent Care which are silent on any injury or complaints, I find that the Claimant has not met her burden of proof that she sustained an injury arising out of work performed in the course and scope of employment. I reject Dr. Krost's opinion as to the major contributing cause of the injuries being related to a fall from a ladder as he did not review any medical records which would have provided him with a past history of treatment. I find his opinions to be lacking in evidentiary support. His opinion as to the medical necessity and reasonableness of the treatment from Dr. Purificati and Dr. Peredes lacks evidentiary support as he did not review their records.

5. I accept the testimony of the Employer and the claimant's coworkers over that of the claimant in determining that the claimant did not sustain a fall from a ladder on June 28, 2016. Alternatively, had the claimant sustained a fall, she failed to report it to the employer within 30 days of the accident under F.S. 440.185(1). I find that the exceptions listed in F.S. 440.185 do not apply in excusing the late reporting. I find that the employer did not have actual knowledge of the injury until approximately one and one-half months later when the Office Manager, Eren received a call from workers' compensation.

WHEREFORE, it is

ORDERED AND ADJUDGED that the Petitions for Benefits filed on August 5, 2016, November 17, 2016 and January 30, 2017 are denied and dismissed.

DONE AND SERVED this 28 day of March, 2017, in West Palm Beach, Palm Beach County, Florida.



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