

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

Sally Vice,
Employee/Claimant,

OJCC Case No.: 14-014553IF

vs.

Accident date: 4/21/2014

La Place Du Soleil, LLP,
Tower Group Companies
Employer/Carrier

Judge: Iliana Forte

David Benn, 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 January 6, 2015. The adjudicated Petition for Benefits are as follows: 6/26/2014, 7/2/2014, 7/17/2014, 7/21/2014 and 8/11/2014. At Claimant's request, the undersigned reserved jurisdiction to adjudicate a pending Petition for Benefits filed on 12/3/2014, which has not been mediated to date.

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CLAIMS AND DEFENSES

The claims presented before me were:

1. Adjustment of the AWW to include overtime.
2. TPD from 7/14/14 per Dr. Baylis' restrictions, continuing
3. Physical therapy per Dr. Baylis.
4. Follow up with Dr. Baylis to review MRI results.
5. E/C is stopped from asserting the major contributing cause denial as to the left knee, pursuant to Elmer v. Southland Corporation/7/11, 5 So.3d 754 (Fla. App., 2009), Grainger v. Indian River Transport, 869 So.2d 1260(2004); Ruiz v. Bellsouth, 994 So.2d 1220, Watkins v. Resources Property Management, 596 S.2d 763, as well as 440.13(3)(d) and 440.13(3)(i).
6. Attorney's fees and costs.

The Employer/Carrier ("E/C") defenses were:

1. AWW is correct.
2. Claimant was at MMI and had no restrictions as of 7/14/14 so no TPD due and owing.
3. Unemployment offset.
4. No additional physical therapy or medical treatment of any kind is medically necessary pursuant to Dr. Baylis.
5. Dr. Baylis does not believe the claimant has a condition, which the industrial accident is the major contributing cause of.
6. Attorney's fees and costs are not due or owing.

DOCUMENTS RECEIVED

Claimant:

1. Deposition of Jon Donshik, M.D.
2. MRI of left knee
3. Composite Exhibit of all Petition for Benefits and Responses

Employer/Carrier:

1. Deposition of Sally Vice
2. Deposition of Paul I. Meli, III, M.D.
3. Deposition of Robert Baylis, M.D.

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4. Deposition of Lucille Jones
5. Medical Records of Coral Springs Medical Center

6. Medical Records of Med Express Clinic

Joint Exhibits:

1. Deposition of Lisa Sabattini

Judges Exhibits and proffers, or for Identification only:

1. Pretrial

Live witness testimony:

1. Claimant

PRELIMINARY MATTERS

Claimant's Motion in Limine to Strike the deposition testimony of Dr. Meli and Dr. Baylis was addressed at the inception of the hearing. Claimant argued that the opinions of Dr. Meli and Dr. Baylis were inadmissible under Section 90.702, otherwise known as the *Daubert* standard, because they were based on their review of records, history, physical examination and extensive experience as opposed to continuing education courses on major contributing cause, lectures, symposiums or written or consulted peer review articles on the subject.

In rejecting Claimant's rationale, the undersigned finds that Florida Statute s. 90.702 does not require that the expert must be a published author or constantly participate in peer review discussions in order to render an opinion under *Daubert*. Opinion testimony is allowed, so long as it is based on knowledge, skill, experience, training or education and the opinion is supported by sufficient facts or data, is based on reliable principles and methods and the witness has applied the principles and methods reliably to the facts of the case.

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I find that both Dr. Meli and Dr. Baylis fulfill the above requirements, by their examination of the Claimant, review of medical history and records, their certification in workers' compensation and their expertise as Board Certified Orthopedics. The case at hand is not complex in nature - it essentially involves injuries that these physicians treat in their offices routinely enough to be more than qualified to testify as expert witnesses.

The parties stipulated to an average weekly wage of \$313.54 and the E/C consented to the payment of penalties and interests should an adjustment be awarded.

The E/C also consented to try the issue of compensability of the lower back, although no specific claim per se was made for compensability. However, I find that the issue was addressed in portions of the pre-trial stipulation although not as a specific claim, but the E/C was fully aware of this issue and evidence was presented that would allow adjudication by the undersigned.

FINDINGS OF FACTS

Testimony of the Claimant

1. The Claimant is a 56 year old woman who moved to Florida five years ago from Wisconsin. She has a high school degree. Her work has primarily been in housekeeping. She was employed with "Sunrider" (the Employer), for three years prior to her accident as a housekeeper making beds, cleaning rooms, sweeping etc. After her accident, the employer closed the hotel and moved to a new location across the street, but she was never offered a position at the new location.

2. On 4/21/2014 she was cleaning the outside of the hotel when she tripped on an uneven pavement causing her to fall on both knees, and producing a laceration to her left knee.

Medical treatment was not provided by her supervisor and her husband took her to Coral Springs Hospital where sutures were required. She claims to have reported to Coral Springs Hospital that she injured her left knee and back. Thereafter, the E/C authorized medical treatment and she was evaluated at Med Express Clinic where x-rays were taken of the knee. She likewise admitted relating a back injury to the physicians at Med Express.

3. She later came under the care of Dr. Meli whom she related saw her for five minutes and never examined her. She admitted telling Dr. Meli that she had gone bowling the week before and that she had no pain whatsoever in the knee on that visit. However, she testified that she has not continued to be symptom free and continues to have good days and bad days where her pain is a five out of ten. Her symptoms are limited to pain which she relates as being “not a whole lot” and limited to one day per week.

4. She requested a change of physician from Dr. Meli and was offered Dr. Baylis. Dr. Baylis prescribed physical therapy and recommended an MRI of the left knee. She was seen by Dr. Baylis on two occasions and did not discuss the findings of the MRI with him. She acknowledges that the first time any medical records indicate any low back complaints was on 7/14/2016, the first time she saw Dr. Baylis, but she attributes this to the fact that the prior physicians were more concerned about the knee than the back. She has not received care for the low back. Bending at the waist and sitting for long periods of time increase her back pain.

5. Since her accident, she worked for five days at a Best Western in Boca Raton making continental breakfast. She has received unemployment compensation benefits that stopped in November. She attributes her inability to work to this accident.

Documentary Evidence

6. The Claimant was seen at Coral Springs Medical Center on 4/21/2014. She was treated for a 4 cm laceration of the left knee which required sutures. She returned to this facility on 4/26/2014 due to developing cellulitis and a skin infection of the left knee. She was prescribed antibiotics and placed on no work status for an additional three days. There was no mention of back pain or complaints of back pain under the review of symptoms in these medical records.

7. On 4/28/2014 she was evaluated at Med Express for the left knee and a referral for an orthopedist was made. On 5/1/2014 the sutures were removed and she was complaining of slight pain. She was told to return in one week and had restrictions of no climbing or squatting. These records are devoid of any mention of back pain.

8. Shortly thereafter, on 5/7/2014 she was evaluated by Dr. Paul I. Meli III. Dr. Meli is an orthopedic surgeon specializing in knees and shoulders. He is Board Certified, performs EMA's on behalf of State and instructs CEU courses for the compensation system.

9. Dr. Meli noted the Claimant's chief complaint to be limited to the left knee - he did not note any other areas of complaint. The Claimant related that she had no pain whatsoever and reported having gone bowling the week before. He examined the claimant and obtained x-rays. He diagnosed her with pre-existing patellofemoral chondrosis, arthritis. He opined that she had returned to her pre-injury level and was at maximum medical improvement with a 0% permanent impairment.

10. The Claimant expressed no complaints related to the back. Dr. Meli testified that while he is not a spine specialist, he is qualified as an orthopedic physician to treat back problems, so long as they do not involve surgery.

11. On 7/14/2014 she was offered Dr. Robert Baylis as her one time change of physician. Dr. Baylis is also Board Certified as an Orthopedic physician and specializes in knees and shoulders. On this visit, the Claimant complained of ongoing pain in the left knee, but admittedly, Dr. Baylis qualified that he did not ask her if the pain was every day or it had gone away for a while. She admitted to prior treatment at Coral Springs Medical Center and Med Express but omitted the evaluation with Dr. Meli. On this visit, is also the first time that any complaints of back pain are reported. Dr. Baylis performed a physical examination, which he described as normal other than for pain, but he prescribed medication and recommended physical therapy three times a week for three weeks. She was seen again on 7/18/2014 at which time he recommended an MRI to rule out a PCL injury and he sought authorization for treatment of her lumbar spine. She remained with restrictions of no kneeling or squatting on the left knee.

12. However, on 8/6/2014, Dr. Baylis had a conference with the attorney for the E/C where the report of Dr. Meli was provided to Dr. Baylis for review. Based on review of Dr. Meli's 5/7/2014 report, Dr. Baylis changed his opinion regarding the need for any additional treatment and opined that she had reached the point of maximum medical improvement on the date of the visit with Dr. Meli. He felt that based on the Claimant's admission to Dr. Meli that she was asymptomatic on that day, her symptoms had resolved and no further treatment was indicated or medically necessary. He was also provided by the E/C's counsel with the left knee MRI report performed on 7/25/2014, which Dr. Baylis had not reviewed. Dr. Baylis' opinion

after review of the MRI remained the same. He also opined that based on the lack of any back complaints in the history given to the other physicians that saw the Claimant, he opined that her back complaints are not related to her industrial accident. After this conference with the E/C's attorney, Dr. Baylis did not treat the Claimant again.

13. The claims adjuster, Lisa Sabattini, testified that on 8/8/2014 she procured a letter from Dr. Baylis indicating that the industrial accident was not the major contributing cause of the need for treatment and a Notice of Denial followed on 9/2/2014. Ms. Sabattini acknowledged that the first time she became aware the Claimant was alleging a back injury was pursuant to the report of Dr. Baylis dated 7/14/2014. Her file material reveals that the prior adjuster, Elaine Yargar, had made initial contact with the Claimant and she only reported an injury to the left knee.

14. The Claimant then sought an independent medical evaluation with Dr. Jon Donshik a Board Certified Orthopedic surgeon who limits his practice to spinal disorders. Parenthetically, Dr. Donshik testified (as did Dr. Meli and Dr. Baylis concerning treatment for the back), that as an orthopedic physician, he is qualified to evaluate and treat routine knee injuries. Dr. Donshik performed his evaluation of the Claimant's knee and back complaints on 11/18/2014.

15. As it concerns the left knee, Dr. Donshik found some tenderness to palpation, but admitted that her symptoms were better by the time he saw her and stated that there was a "paucity of objective data with respect to her left knee." He opined that some of the findings in the MRI (not the chondromalacia) appeared to be consistent with her mechanism of injury and appeared to be more acute than chronic in nature. He felt that she had not reached the point of

maximum medical improvement and required additional physical therapy. However, when presented by the E/C's counsel with the Claimant's lack of complaints to Dr. Meli and his own statement as to the paucity of objective data regarding the knee, Dr. Donshik seemed to have vacillated in his opinion as to maximum medical improvement and work restrictions.

16. As it concerns the low back, Dr. Donshik opined that the fall could have produced a twisting mechanism that could account for her pain, and he relied on her history to him that the pain originated immediately after the fall. He had three differential diagnoses for the lower back complaints – none of which were definitive. One would be a compression fracture, a second could be a Schmorl's nodes – that would be unrelated to the accident, and third, a lumbar strain. Dr. Donshik admitted that regardless of the diagnoses, she would have been more symptomatic initially and less as time passed.

17. The unemployment compensation records reveal that she began receiving benefits in the amount of \$165.00 on the week of 7/26/2014 through 10/11/2014.

CONCLUSIONS

18. In reaching this decision, I have carefully considered the candor and demeanor of the Claimant who testified live in these proceedings, the medical evidence presented by both parties as well as the testimony of the adjuster and other records introduced.

19. On the issue of compensability of the lower back, tried by consent of the parties, I find that the evidence does not support the Claimant's version of events that she injured her back immediately after the fall and that she reported this injury to all the physicians that treated her. In rejecting this assertion, I find that none of the medical records of the two facilities and the one physician that saw her closes to the accident noted any complaints of low back pain. While I

find that the Claimant is not the best historian and clearly appeared confused while testifying in these proceedings, I believe that had she injured her back she would have made sure that she would have been treated for same. Thus, not only are the records devoid of any such complaint, but also devoid of any treatment. The Claimant's IME physician, Dr. Donshik, admitted that regardless of which diagnoses she had, her back complaints had to have been worse immediately after the accident and less as time passed.

20. The first medical record that reveals any complaint of back pain is the initial report of Dr. Baylis of 7/14/2014. The adjuster testified that treatment was only offered for the left knee because the Claimant never reported a back injury, which is consistent with the medical records in evidence. Therefore, I accept the opinion of Dr. Baylis that the Claimant's back complaints are not causally related to the industrial accident. I reject the opinion of Dr. Donshik, as I find that his opinion is based on a history by the Claimant that is not supported by the evidence and lacks competence.

21. I find the claim for continuation of treatment for the left knee more problematic as presented by the parties. The claims made request physical therapy per Dr. Baylis and follow up with Dr. Baylis to review the MRI results - both claims are moot, based on Dr. Baylis' change of heart. The analyses then becomes, whether the Claimant is at maximum medical improvement.

22. I am aware that the law allows for the E/C to discuss the conditions relating to the workplace injury with the medical providers. However, under these particular facts, I find that Dr. Baylis changed his opinion regarding the need for all treatment, including his recommendations for the Claimant to take prescribed medication, physical therapy and the need for an MRI to rule out a PCL injury, based on a conference with the E/C attorney relying on one

single report, without affording the Claimant the opportunity to explain any discrepancy. Dr. Baylis admitted that he was unaware and did not specifically ask her whether she was ever symptom free at any time when initially rendering his opinion. It appears that Dr. Baylis felt duped by Claimant's failure to relate to his staff and himself that she had been evaluated by Dr. Meli. This conference certainly had the appearance to the undersigned of the E/C conducting a mini-trial before Dr. Baylis and interference with the doctor/patient relationship. Nevertheless, the Claimant did not raise this as an issue; and Dr. Baylis has the right to change his mind. Dr. Baylis thus opined that the Claimant was at maximum medical improvement with a 0% impairment. Consequently, the E/C discontinued authorization of any further treatment and issued a Notice of Denial.

23. By the same token, the difficulty with Dr. Donshik's opinion related to the left knee is the lack of objective findings or any evidence that further treatment is expected to improve her present condition. Although Dr. Donshik testified that he limits his practice to the spine, I find that he is competent as an orthopedic physician to render an opinion in this case in relation to the knee. However, after carefully reviewing Dr. Donshik's testimony, I do not find that Dr. Donshik established a reliable basis for continued treatment. Dr. Donshik found that she only related having pain at times, and that the pain was definitely better. He opined that the findings in the MRI regarding the chondromalacia was preexisting; and while he opined that some of the other findings appeared to be more acute than chronic, he admitted that she had exhibited a paucity of objective findings, leaving only subjective complaints of pain.

24. When presented with Dr. Meli's medical report, Dr. Donshik became unsure as to whether he could opine that the Claimant had not reached the point of maximum medical

improvement or that he could state within a reasonable degree of medical certainty that she requires light duty work or restrictions related to her knee.

25. Based on the totality of the evidence, including the Claimant's live testimony, I find the most credible evidence regarding the Claimant's complaints and symptoms, physical examination, history and related medical conditions to be that of Dr. Meli. The Claimant admitted during these proceedings that she did tell Dr. Meli that she had no pain whatsoever and had gone bowling. I reject her testimony that Dr. Meli only saw her for five minutes and never actually examined her as being against the manifest weight of the evidence. Dr. Meli's report establishes a physical examination and the taking of X-rays.

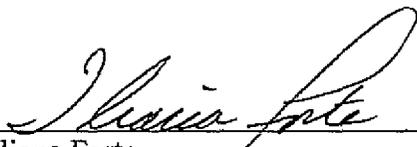
26. I accept the testimony of Dr. Meli that she reached the point of maximum medical improvement on 5/7/2014 with a 0% impairment rating and that as of said visit she had returned to her pre-injury level. I reject the Claimant's position that the E/C has the burden to establish a break in causation in order to deny future medical treatment, as the Claimant herein fully recovered with no residual permanent impairment. *Checkers Restaurant v. Wiethoff*, 925 So.2d 348 (Fla. 1st DCA 2006); *Amoco Container Company v. Singh*, 418 So.2d 395 (Fla. 1st DCA 1982).

27. On the remaining issue of the adjustment of the average wage, both parties acknowledged that the E/C did not make any payment to the Claimant when the average weekly wage was adjusted by \$13.54, because she had actually been paid more during said periods than she would have been due even after the adjustment. Therefore, no additional payments were due and no penalties and interest applied.

WHEREFORE, IT IS ORDERED AND ADJUDGED THAT:

1. TPD from 7/14/2014 and continuing per Dr. Baylis' restrictions is DENIED.
2. Physical therapy per Dr. Baylis is DENIED.
3. Follow up with Dr. Baylis to review MRI results is DENIED.
4. Compensability of the low back is DENIED.
5. Penalties and Interests based on the adjustment of the average weekly wage is DENIED.
6. Attorney's fees and costs are DENIED.

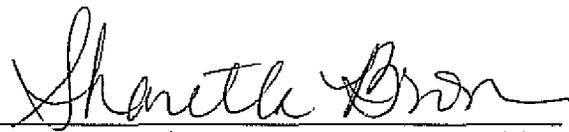
DONE AND ORDERED in Chambers, on January 13, 2015, at Ft. Lauderdale, Broward County, Florida.



Iliana Forte
Judge of Compensation Claims
Division of Administrative Hearings
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Order was entered by the Judge of Compensation Claims and a copy was served by electronic transmission on January 14 2015 to the parties' counsel of record or by mail if parties are unrepresented


Secretary to the Judge of Compensation Claims

COPIES FURNISHED

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