

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGE OF COMPENSATION CLAIMS
MIAMI-DADE COUNTY DISTRICT**

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OJCC CASE NO.: 08-026857SMS
D/A: 9/12/2008
JCC: Sylvia Medina-Shore

COMPENSATION ORDER

THIS CAUSE came before the undersigned Judge of Compensation Claims for a final hearing on 4/28/10 regarding petitions for benefits (PFBs) filed 7/16/09 and 10/7/09. As the 4/22/10 and 4/26/10 PFBs have not been mediated, the undersigned reserved jurisdiction to adjudicate same for a future final hearing. Likewise, the parties stipulated that claimant's attorney claim for fees and costs associated with E/C Notice of Withdrawal of Motion to Tax Costs would be adjudicated at a future evidentiary hearing.

Claims:

1. Provision of treatment of claimant's cervical strain.
2. Authorization and provision of cervical MRI per Fast Care.
3. Authorization and provision of physical therapy per Fast Care.

4. Penalties, interest, costs, and attorney's fees.

Defenses:

1. Industrial accident is not the major contributing cause of the claimant's need for treatment, MRI, and physical therapy for cervical strain.
2. Claimant's compensable cervical strain has resolved.
3. Penalties, interest, costs and attorney's fees are not due or owing.

Documentary Exhibits:

JCC-

1. Pre-trial stipulation e-filed 11/23/09.

Joint Exhibits-

- A. Deposition of Meheime Legrand.
- B. Deposition of Dr. Matthew Korn e-filed 4/9/10.

Claimant's Exhibits-

1. 3/25/10 Amendment to Pre-trial Stipulation.
2. Deposition of Chiropractor Barry Burak.
3. 7/16/09 Mediation Settlement Agreement.
4. PFBs of 4/16/09 and 10/7/09.
5. 10/27/09 Response to PFB.
6. 10/20/09 Notice of Denial.
7. Adjuster Log Notes.
8. Notice of filing 3/10/10 Prescriptions for MRI and Physical Therapy.
9. Claimant's Trial Memorandum for I.D. Purposes.

E/C's Exhibits-

1. 3/29/10 Amendment to Pre-trial Stipulation.
2. Medical Records of Dr. Goldberg.
3. Claimant's deposition taken 11/23/09.
4. E/C's Trial Memorandum for I.D. Purposes.

Findings of Fact and Conclusions of Law:

1. On September 12, 2008 while working for the employer, the claimant was unloading heavy pieces of metal from a truck when one of the pieces of metal hit the claimant on her forehead. The claimant sustained a laceration near her hairline. The claimant first received treatment at Aventura Hospital wherein she underwent a CT scan of her head and neck.
2. Medical treatment was then authorized with Fast Care Clinic for claimant's complaints of dizziness, headaches, and neck pain. The claimant's main primary care physician at the Fast Care Clinic was Dr. Matthew Korn.
3. The claimant was seen at the Fast Care Clinic on September 15, 2008, September 18, 2008, September 23, 2008, and September 26, 2008. Claimant's diagnosis was scalp laceration, head contusion, and cervical strain.
4. At the September 26, 2008 visit, the claimant indicated that her neck was better as she was no longer experiencing any pain, but she still had dizziness, headaches, and blurry vision. (See Dr. Korn depo, page 8) Since the claimant no longer suffered from any neck pain, Dr. Korn found claimant's cervical strain had resolved and placed her at MMI with no work restrictions.
5. Dr. Korn did refer the claimant to a neurologist for her other complaints. Based on the neurologist referral, the E/C authorized Dr. Jeff Steinberg. After two visits with Dr.

6. After Dr. Goldberg placed the claimant at MMI, the next time the claimant saw an authorized physician for her industrial injuries was on September 15, 2009, when the claimant returned to the Fast Care Clinic and saw Dr. Korn. On September 15, 2009, the claimant told Dr. Korn that she woke up with neck pain approximately ten days prior. Due to the claimant's new complaints of neck pain, Dr. Korn recommended a cervical MRI as well as physical therapy.
7. The claimant had resigned from the employer on August 11, 2009, which was a little over a month before her new complaints of neck pain. Dr. Korn indicated at his deposition that he did not believe the claimant's new neck complaints were related to her industrial accident. (See Dr. Korn depo, pages 11-12). As such, Dr. Korn opined claimant did not need any further medical treatment for her cervical spine *as it related to her industrial accident*. (See Dr. Korn depo, page 12) Since the claimant stopped working for the employer over a month before her reoccurrence of neck pain, Dr. Korn also opined that claimant's current neck condition was not causally related to her employment. (See Dr. Korn depo, pages 12-13)
8. The claimant obtained a chiropractic IME with Dr. Barry Burak who testified that the claimant's September 12, 2008 industrial accident is still the major contributing cause of her neck condition. I reject Dr. Burak's opinion since same was based on an inaccurate history. Moreover, Dr. Burak did not review all the claimant's medical records. The only

medical records Dr. Burak reviewed were the claimant's September 2008 medical records from the Fast Care Clinic. Dr. Burak did not review the September 15, 2009 report from the Fast Care Clinic that indicated the claimant woke up with neck pain ten days prior.

9. Dr. Burak testified at his deposition that it was his understanding that the claimant's neck pain was constant and something that she experienced on a daily basis. I find that this history is unsupported by the facts or even the claimant's own deposition testimony.
10. The claimant acknowledged at her November 23, 2009 supplemental deposition that her neck pain went away for awhile, only to return around the end of August, beginning of September. (See 11/23/09 claimant depo)
11. Since Dr. Burak bases his opinion on the claimant having constant daily neck pain since her industrial accident, I find Dr. Burak's opinion is also unreliable. Further, Dr. Burak is a chiropractor who saw the claimant only on one occasion. He did not have the opportunity to review all the claimant's medical records. In contrast, Dr. Korn is an authorized treating physician that treated the claimant from 9/16/08 to 10/13/09, for 12 visits. I accept the opinions of Dr. Korn over those of Dr. Burak as Dr. Korn treated the claimant a longer period of time and based his opinions on an accurate medical history.
12. The claimant has brought forth some legal arguments regarding the instant claims. Specifically, the claimant argues that E/C is estopped from taking the position that the physical therapy and MRI referral is medically necessary per F.S. 440.13(3)(d). In response, E/C agree that based on the medical evidence that the physical therapy and MRI referral are medically necessary. However, E/C point out that F.S. 440.13(3)(d) only alludes to "medical necessity for treatment" not causal relationship between the recommended treatment and the industrial accident.

13. After carefully considering the above arguments and chapter 440, I find that F.S. 440.13(3)(d) contains solely one penalty for an E/C untimely responding to a referral for medical treatment namely, consenting to medical necessity for same. Accordingly, I find that the claimant still bears the burden of proving that the referral for medical treatment is related to the industrial accident and injuries.
14. The claimant further points out that F.S. 440.13(2)(e) mandates that E/C must respond or object by the close of the tenth business day after notification by the physician for proposed course of treatment. If not, E/C must accept any proposed course of treatment. The claimant however fails to accurately cite to F.S. 440.13(2)(e). Specifically, same statute section deals with “*any initial examination and diagnosis* by a physician providing remedial treatment, care, and attendance, and *before a proposed course of medical treatment begins.*” In the case at hand, claimant had been treating with Dr. Korn for one year prior to the referral for the cervical MRI and physical therapy. I find F.S. 440.13(2)(e) inapplicable to the facts of the present case.
15. Finally, claimant argues that the MRI should be awarded because it was prescribed by an authorized physician. Citing to Ruiz v. Bellsouth Credit Collections, Case No. 1D07-6509 (11/17/2008 Opinion). I find that claimant’s argument is not supported by law. Specifically, case law is clear that whenever a diagnostic test is to determine the cause of claimant’s symptoms, which symptoms may be related to a compensable accident, the cost of the diagnostic test is compensable. See, Sanchez v. Security Sales Co., 522 So.2d 435 (Fla. 1st DCA 1988)(quoting Nealy v. City of West Palm Beach, 491 so.2d 585 (Fla. 1st DCA 1986). The correctness of an order refusing a medical evaluation “must be tested by whether the claimant adequately demonstrated that such benefits were reasonable

required by the nature of the injury” See, Smith v. James Pirtle Construction Co., 405 So.2d 290 (Fla. 1st DCA 1981).

16. In the present case, the claimant has failed to establish through medical evidence that the nature of her injury made the requested MRI reasonably necessary to determine whether the industrial accident is the cause of her symptoms. Specifically, Dr. Korn testified that the MRI was not necessary to render an opinion regarding causation of claimant’s neck complaints. (See, Page 27 of Dr. Korn’s deposition) Rather, Dr. Korn opined that claimant has degenerative disc disease which quite possible was exacerbated by the industrial accident. However, said exacerbation was resolved by claimant’s 9/26/08 visit, when claimant informed Dr. Korn that her symptoms were completely resolved. (See, Page 28 of Dr. Korn’s deposition)
17. To that extent, I accept Dr. Korn’s opinion that claimant’s cervical strain or exacerbation of her degenerative disc disease had resolved as of 9/26/08. I further accept Dr. Korn’s testimony that claimant’s 9/15/09 complaints were new and unrelated to the instant industrial accident or injuries for which the MRI was prescribed. I find claimant’s final hearing testimony that her neck pain never resolved, solely improved for a while due to taking medication unconvincing. I find claimant not credible.
18. The medical evidence reflects that claimant treated on three separate occasions in July of 2009 with Dr. Korn. She treated for a left arm laceration. None of the reports mention complaints of neck pain.
19. Further, on 7/16/09, claimant signed a Mediation Agreement wherein she was authorized to treat with Fast Care for any cervical complaints. The Mediation Agreement mediated the 4/16/09 and 4/20/09 PFBs. Claimant treated with Dr. Korn on 7/2/09, 7/10/09, and

7/16/09 but did not mention any cervical complaints. The claimant did not treat with Dr. Korn for any neck complaints until Claimant 9/15/09, one month after resigning from her work.

20. The claimant specifically complained on 9/15/09 of developing neck pain upon waking up 10 days ago. I find that Dr. Korn's opinions that claimant's 9/15/09 complaints are not causally related to either the industrial accident or claimant's subsequent work are supported by the evidence, medical protocols, and logic. I accept his testimony that the MRI and physical therapy are medically necessary but not related to claimant's industrial accident or injuries. I further accept Dr. Korn's opinion that no further treatment related to the instant industrial accident is medically necessary. (See, Page 12 of Dr. Korn's deposition)

WHEREFORE, IT IS ORDERED:

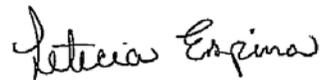
1. Claim for provision of treatment of claimant's cervical strain is denied.
2. Claim for authorization and provision of cervical MRI per Fast Care is denied.
3. Claim for authorization and provision of physical therapy per Fast Care is denied.
4. Claim for penalties, interest, costs, and attorneys fees paid by E/C is denied as it relates to the PFBs adjudicated herein.



Sylvia Medina-Shore

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the instant Compensation Order has been furnished by U.S. Mail to the parties at the above listed addresses and to the attorneys of record via e-mail on this 7th day of May, 2010.



Secretary to JCC