

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGES OF COMPENSATION CLAIMS
FT. MYERS DISTRICT OFFICE**

Kathleen Auman,)	
)	
Employee/Claimant,)	
)	
vs.)	OJCC Case No. 05-029287EDS, 05-003370EDS,
)	and 05-003394EDS
Leverock's Seafood House, Leverock's)	
Restaurant,)	Date of Accident: 7/11/2004, 10/17/2004,
)	and 10/27/2004
Employer,)	
)	
and)	
)	
Spectrum H R LLC, Providence Property &)	
Casualty Insurance Company,)	
)	
Carrier/Servicing Agent.)	
)	

COMPENSATION ORDER

THIS CAUSE was heard by the undersigned in Punta Gorda, Charlotte County, Florida on November 7, 2007 upon Claimant's claims for the worker's compensation benefits raised in Petitions for Benefits docketed variously between the dates of February 3, 2005 and May 10, 2007. A total of fifteen (15) petitions have been filed and all were set for determination in this hearing. The Employee was present at the hearing and was represented by her attorney, Brian O. Sutter, Esquire. The Employer/Carrier was represented by Gregory White, Esquire.

In addition to the pretrial stipulations entered into between the parties as reflected on the Uniform Statewide Pretrial Stipulation form, the parties announced several other key stipulations which greatly reduced and simplified the issues actually to be determined at the hearing. The parties agreed that the Average Weekly Wage and resulting Compensation Rate to be utilized were \$392.81 and \$261.81 respectively.

In addition the parties executed and filed as a matter of record (Joint Exhibit #3) a Joint Stipulation which was signed by all the parties and the claimant immediately before the hearing commenced. The claims specifically remaining for final hearing therefore were:

1. Authorization and payment for bilateral knee surgery as recommended by Dr. Heromin and Dr. Kagan.
2. Payment of Temporary Total and/or Temporary Partial Disability from the date of October 27, 2006 forward.
3. Payment of a medical bill in the amount of \$31.00 rendered by Dr. Chirillo for date of service of 1/24/05.
4. Authorization of and payment for medical care and specifically right elbow surgery as recommended by Dr. Thomas Green.
5. Penalties, interest, costs and attorneys fees.

The Employer/ Carrier defended these claims based on the following positions:

1. Both Dr. Green and Dr. Kagan have been authorized to provide all reasonable and necessary medical care the nature of the injuries and the process of recovery require.
2. Claimant has received or by virtue of the stipulation (joint exhibit #3) will receive 104 weeks of temporary disability benefits, and is not entitled to additional benefits.
3. No penalties interest costs or attorney fees will be found due.

The parties submitted this matter for adjudication upon a record that consists of:

COURT EXHIBITS

1. Composite Exhibit of Petition for Benefits, Pre-trial stipulation, Pretrial Order & Notice of Final Hearing.

EMPLOYEE EXHIBITS

1. Employee medical composite.
2. Medical bill from Dr. Chirillo in the amount of \$31.00. (Identified and proffered only. Not admitted based on objection from the Employer/Carrier that the document was not properly or timely identified on the pretrial stipulation form).
3. Memorandum of Law and Fact, received for argument only.

EMPLOYER/CARRIER EXHIBITS

1. Employer/Carrier memorandum of Law and Fact; received as argument only.

JOINT EXHIBITS

1. Deposition of Dr. John Kagan, M.D., completed on November 4, 2005.
2. Deposition of Dr. Thomas Greene, M.D., completed on December 13, 2005.
3. Joint Stipulation executed by the parties November 7, 2007.

The Claimant, Kathleen Auman appeared and testified at the hearing. In making my findings of fact and conclusions of law regarding these claims and defenses, I have carefully considered and weighed all the evidence presented to me. I have resolved all conflicts in the testimony presented to me. Although I may not reference each specific piece of evidence submitted by the parties, I carefully considered all the evidence and exhibits in making my findings of fact and rendering my conclusions of law.

Based upon the testimony contained in the depositions, stipulations, and exhibits and after careful consideration of the arguments of counsel, it is found that:

1. The Stipulations of the parties as referenced above, and contained in the Uniform Pretrial Stipulation form and the Joint Stipulation (joint #3) are accepted and are deemed as facts of this proceeding.
2. The statements of the Employer/Carrier as to their intention to authorize medical care and attention as the nature of the injuries and the process of recovery requires with both Dr. Kagan and Dr. Green are accepted and are deemed as facts of this proceeding.

3. Claimant, now 56 years old, was employed through the Employer as a waitress at a Leaverock's Restaurant on all dates of accident alleged in this matter. On July 11, 2004 she was injured when she alleges she fell at work onto both knees. She was evaluated for these injuries at the Englewood Community Hospital. She described the symptoms from the fall as mild and did not lose time from work, continuing to work in her usual job as a waitress. On October 17, 2004 she again fell onto her knees. She was again evaluated for these injuries at the Englewood Community Hospital, but also returned to her job as a waitress at Leaverock's. Unfortunately, she suffered a third fall at work on October 27, 2004. In this accident she injured her right arm, eventually being diagnosed with a fracture of the right humeral head. She has not worked since this accident because she has never been fully treated for those injuries and released for work.
4. Medical care was initially authorized with Dr. Ronald Heromin who initially was Claimant on November 3, 2004. The focus of that examination was clearly on the injured right arm, but Dr. Heromin did evaluate the left knee as being contused. There was an indication that on November 24, 2004 Dr. Heromin issued a note that stated no work for the foreseeable time. In that same office note the doctor noted that he was no longer authorized to evaluate the knees. Therefore the restrictions and disability authorized by Dr. Heromin were strictly related to the right arm injury.
5. The parties stipulated during the hearing that temporary indemnity was initially paid from the date of October 28, 2004 until April 2006. By virtue of the terms of the Joint Stipulation (joint #3) the parties also agree that additional temporary benefits will be paid up to October 27, 2006. The Employer/ Carrier therefore states that the entire period of 104 weeks of temporary indemnity authorized by law have been or will be paid.
6. The undersigned finds that the accident of October 27, 2004 resulted in injuries to the claimant's right arm and elbow and that she has remained temporarily disabled as a result of those injuries since that date. Based on the Joint Stipulation it is clear that the parties intend that the entire 104 week period of temporary benefits authorized by law should be paid for the disability sustained by the claimant in that accident.
7. However, the Claimant contends that she is also entitled by the statute to additional temporary indemnity, even up to another 104 week period, because she was also injured in the accident on October 17, 2004, and has not received any indemnity resulting from those injuries up to this time.
8. Temporary total benefits and temporary partial benefits are payable to an injured worker "in case of disability" either total or partial in character, but temporary in quality. Sec 440.15 (2)(4) F.S. "Disability" is defined as "incapacity because of **the injury** to earn in the same or any other employment the wages which the employee was receiving at the time of **the injury**. Sec 440.02 (13) F.S. (emphasis added).
9. There is no question that as for the injuries sustained in the October 27, 2004 accident, notably a fracture to the right humeral head, the Claimant was disabled continuously from October 27, 2004 to the present time. However because of the provisions of Sec. 440.15 (4)(e) the payment of temporary benefits is limited to 104 weeks. That section states "(temporary) benefits shall be paid during the continuance of **such disability**, not to exceed 104 weeks..." The limitation applies to both total and partial temporary benefits.
10. In this case, because the claimant sustained different injuries in the accident of October 17, 2004, from those she sustained in the accident of October 27, 2004 she may be entitled to additional temporary benefits if those injuries resulted in a disability as defined in sec. 440.02 (13) F.S. The questions therefore become: What were the injuries sustained in the October 17, 2004 accident? Did those injuries result in a disability? What is the duration of that disability? If there is a disability what, if any, remaining entitlement does the claimant have to receipt of temporary

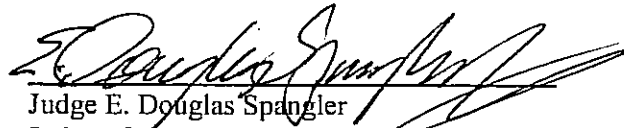
benefits in light of her receipt or potential receipt of 104 weeks of indemnity for the injuries sustained in the October 27, 2004 accident?

11. Claimant sustained bilateral knee injuries in the accident of October 17, 2004. However, those injuries were not disabling as of October 27, 2004 when the claimant sustained her disabling injury to her right arm.
12. When claimant returned to Dr. Heromin on January 3, 2005, she evidenced bilateral knee complaints and an MRI was ordered. The results of that MRI were interpreted on January 12, 2005 as demonstrating "bilateral patellar chondrosis, secondary to trauma" and surgery was recommended. The office note of that date indicated "she will be off work 3-6 weeks for healing" this is the first notation that the knee injuries sustained on October 17, 2004 were potentially disabling independent of the right arm injuries.
13. The claimant testified, and the undersigned accepts as fact, that the \$31.00 bill she received from Dr. Chirillo was the result of a pre-surgical cardiology work up for surgery on her knees, which surgery was abruptly cancelled immediately prior to its commencement.
14. Dr Kagan eventually became the authorized treating physician for the claimant's knee injuries. Dr. Kagan concurred with the diagnosis provided by Dr Heromin and in the recommended surgical procedures to treat those injuries. Dr. Kagan attributed the knee injuries to the accident of October 17, 2004. He also stated that he believed that it was reasonable for Dr. Heromin to recommend that the claimant limit her work activity because of the knee injuries as he apparently had done. Kagan deposition, p.22. (Joint exhibit 1).
15. On the basis of these medical opinions and recommendations the undersigned concludes that the Claimant began a second period of disability as a result of the knee injuries sustained in the October 17, 2004 accident on January 12, 2005, and that the period of disability remains through the date of the hearing as claimant has yet to receive all the remedial care necessary to treat those injuries. However, this period of disability ran contemporaneously with the period of disability caused by the right arm injuries, at least up to October 26, 2006. Unfortunately for claimant the law does not permit double payment of benefits when periods of total disability run concurrently with each other, and she does not request that relief directly.
16. Claimant argues that she should be entitled to another full period of 104 weeks entitlement. That would have the same effect of a double payment. Instead, the undersigned believes that she should be eligible for additional temporary benefits up to 104 weeks from the date the disability for her knees began, or in this instance from to January 12, 2005. Having been compensated or having received a stipulation to provide compensation up to October 26, 2006, the claimant therefore is eligible for additional temporary benefits until January 11, 2007.

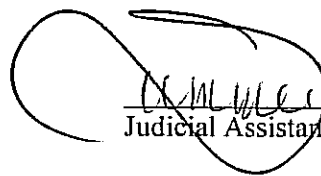
WHEREFORE based on the foregoing it is ORDERED and ADJUDGED:

1. The Parties shall comply with the provisions of the Joint Stipulation, Joint Exhibit # 3.
2. The Employer/Carrier shall authorize medical care for the injuries sustained in the accidents of October 17, 2004 and October 27, 2004 as the nature of the injuries and the process of recovery requires with Dr. Kagan and Dr. Green respectively.
3. The Employer/Carrier shall pay the employee additional temporary total benefits from October 26, 2006 through the date of January 11, 2007 at the stipulated compensation rate of \$261.81, plus penalties and interest on the amounts paid.
4. The Employer/Carrier shall pay the \$31.00 bill to Dr. Chirillo.
5. The attorney for the claimant is entitled to a reasonable attorney's fee and costs for securing the benefits awarded in this Order, and jurisdiction is retained to determine the amounts.

DONE AND ENTERED in the Chambers of Fort Myers, Lee County, Florida.


Judge E. Douglas Spangler
Judge of Compensation Claims

9th I certify that a true copy of the foregoing Order was served by mail on all parties and counsel this
day of December, 2007.


Judicial Assistant to Judge E. Douglas Spangler

