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

Cynthia Neel,
Employee/Claimant,

vs.

Anderson Media Corp/Crum & Forster,
Employer/Carrier/Servicing Agent.
_____/

OJCC Case No. 13-017830NSW

Accident date: 6/13/2013

Judge: Nolan S. Winn

FINAL COMPENSATION ORDER

THIS CAUSE came on to be heard in Pensacola, Escambia County, Florida on 03-04-14 upon Claimant's claims for temporary total disability (TTD) benefits from 06-18-13 and continuing; temporary partial disability (TPD) from 06-18-13 and continuing; authorization of medical care and treatment; penalties, interest, costs and attorney's fees. The Petition for Benefits was filed 08-06-13. Mediation was conducted 10-24-13, seventy-nine (79) days after the Petition was filed. The parties' Pre-Trial Stipulation was filed 11-05-13. The Final Hearing occurred two hundred nine (209) days after the Petition was filed and this Order was entered seven (7) days thereafter. T. Rhett Smith, Esq. was present in Pensacola on behalf of the Claimant. Charles Robinson, Esq. was present in Pensacola on behalf of the Employer/Carrier (hereafter "E/C").

Submitted into evidence at the Final Hearing were the following documents, each accepted, identified and placed into evidence without objection except where noted, as Judge's Exhibits, Joint Exhibits, Claimant's Exhibits, or E/C Exhibits, as follows:

JUDGE'S EXHIBITS MARKED FOR THE RECORD:

#1. The parties' Pre-Trial Stipulation filed 11-05-13.
#2. E/C's Amendment to Pre-Trial Stipulation filed 11-08-13.
#3. Claimant's Objection to E/C Exhibits filed 11-14-13.
#4. Petition for Benefits filed 08-06-13.
#5. E/C Response to Petition for Benefits filed 08-16-13.
#6. Order entered 09-04-13 Granting Motion to Amend Date of Accident.

JOINT EXHIBITS:

None.

CLAIMANT'S EXHIBITS:

#1. Deposition of Dr. David Chandler taken 02-24-14.
#2. Deposition of Arlene Lawson taken 10-31-13.

E/C's EXHIBITS:

#1. Deposition of Dr. Christo Koulisis taken 02-18-14.
#2. Deposition of Brandy Pardue taken 01-30-14.
#3. Deposition of Cynthia Neel taken 10-03-13.
#4. Medical records of Dr. Colombo.
#5. E/C Hearing information Sheet. (Proffered)

In making the determinations set forth below, I have attempted to distill the salient facts together with the findings and conclusions necessary to resolve this claim. I have not attempted to painstakingly summarize the substance of the parties' arguments, nor the support given to my conclusions by the various documents submitted and accepted into evidence; nor have I attempted to state nonessential facts. Because I have not done so does not mean that I have failed to consider all of the evidence. In making my findings of fact and conclusions of law in this claim, I have carefully considered and weighed all evidence submitted to me. I have considered arguments of counsel for the respective parties, and analyzed statutory and decisional law of Florida.

Based upon the parties' stipulations and the evidence and testimony presented, I find:

1. The Judge of Compensation Claims has jurisdiction of the parties and the subject matter of this claim.

2. The parties' stipulations and agreements, set forth in the pretrial compliance questionnaire are accepted, adopted and made an order of the Office of the Judge of Compensation Claims. The parties stipulate Claimant's AWW/CR is $763.31/508.88.

3. Any and all issues raised by way of the Petitions for Benefits ("PFB"), but which issues were not dismissed or tried at the hearing, are presumed resolved, or in the alternative, deemed abandoned by the Claimant and, therefore, are Denied and Dismissed with prejudice. See, Scotty's Hardware v. Northcutt, 883 So.2d 859 (Fla. 1st DCA 2004).

4. Claimant has worked for the Employer since 1995, at all times material hereto working as a merchandiser stocking shelves at Wal-Mart stores in the area. She testified while doing so on 06-18-13, she experienced a sudden

pain in the left side of her low back with numbness in her left leg down to her knee. She reported the accident and Dr. Colombo was authorized to treat her. He prescribed medication and physical therapy. She saw Dr. Colombo on several occasions and claimed therapy was not providing her any relief. On 07-25-13 Dr. Colombo released her from his care placing her at MMI. The following Monday she returned to work working that day and one-half day on Tuesday, but was unable to continue as a result of her pain. She has not worked since such Tuesday.

5. Dr. Colombo's medical records are in evidence and reveal he first saw Claimant 06-18-13 with her reporting she stood from a stooped position and felt pain in the left side of her low back radiating into the left leg to her knee. She advised that "years ago" she had injured her low back in a work related injury and underwent therapy, but such injury resolved and she had no significant problems again until this incident. Dr. Colombo diagnosed lumbosacral sprain/strain, prescribed medication and therapy, and released her to lite duty work. He saw her again on 06-25-13 and 07-09-13 with the only change being evidence of mild spasm in the low back. On 07-18-13 he ordered an MRI which revealed disc desiccation at L3-4 and a disc bulge at L5-S1. When Claimant returned on 07-25-13, based upon the MRI report and finding the major contributing cause of her injury pre-existed the industrial accident, he placed her at MMI with a 0% impairment and released her with no work related restrictions. He did however, recommend she follow-up with her personal physician.

6. Dr. Chandler is an orthopedic surgeon and was Claimant's IME in this matter. He saw Claimant 11-08-13 with her reporting when she stood from a squatting position on 06-18-13 feeling a sharp pain in her back, left buttock and thigh. At the time of examination however, she complained only of pain in her back. She advised him she had injured her low back 15 years prior in a work related accident while moving items from a pallet. Thereafter she missed several days of work but had no "significant back problem" until this injury. She also reported a second work related accident when hit in the head losing consciousness.

7. Dr. Chandler testified he was unable to detect any muscle spasm; found bilaterally equal motor examination; normal sensation in her lower extremities; symmetrical lower extremity reflexes; and no evidence of nerve root irritability on either her left or right side. While he noted in his report she had a moderate limitation of range of motion of the cervical spine, his notation in the lumbosacral spine examination stated "extension 10, finger to floor at knee" with no indication or testimony such was normal or abnormal.

8. According to Dr. Chandler, the MRI Dr. Colombo had obtained confirms Claimant has degenerative lumbar disc disease. He "assumed" she had not complained of problems or symptomatology related to her degenerative disc disease prior to the industrial accident on 06-18-13. As a result of his examination he diagnosed low back pain and lumbar strain, both work related, and lumbar disc degeneration, not work related. He was of the opinion she had not undergone an adequate course of physical therapy and was not at MMI. He believed her work restrictions to be no lifting greater than 10 pounds; no bending, stooping, twisting; and sitting, standing and walking 1 to 3 hours every 8 hours. Finally, when asked what her impairment rating might be should she not respond to additional treatment, he

stated the same would be a 3% but "without objective evidence of injury."

9. Dr. Koulisis is an orthopedic surgeon and was E/C's IME in this matter. He saw Claimant on 12-20-13 and she reported back pain, but no leg pain. With regards to the industrial accident she reported she was unloading objects from pallet but "doesn't recall any specific incident but feels that her pain was the result of the repetitive nature of her job over many years." She also advised him she had experienced back pain previously five (5) years ago while unloading a pallet at work and missing two (2) days thereafter.

10. Dr. Koulisis was of the opinion Claimant's physical examination was essentially normal with no spasm and no loss of range of motion. He diagnosed her as having suffered a lumbosacral sprain/strain on 06-18-13 which had resolved and that she was also suffering from preexisting degenerative lumbar disc disease. With regards thereto, Dr. Koulisis testified "a substantial portion of the population of her age, body habitus has degenerative discs and will have pain sometime throughout their life, just like she did..." and "she has some degenerative changes in her lumbar spine... It is nothing unusual for her age or body habitus..."

11. Dr. Koulisis was of the opinion Claimant was at MMI and in this regard concurred with Dr. Colombo such had been attained on 07-25-13. He assigned no impairment rating, no work restrictions and was of the opinion Claimant required no further care and treatment as a result of the industrial accident of 06-13-13. He also was of the opinion the 06-18-13 industrial accident was not the major contributing cause of her injury or her condition nor was the accident the major contributing cause of any current need for care and treatment.

12. Dr. Janet Lewis is Claimant's personal physician and her medical records from 10-13-06 through 2013 reveal the following:

10-13-11 referral to Pensacola Sleep Disorder Center with appointment on 10-28-11

10-28-11 Pensacola Sleep Disorder Center Polysomnogram Report notes Claimant reporting among other multiple complaints, "chronic back pain"

02-24-12 "having a great deal of stress at work... She would like a leave of absence due to stress and her health issues. She is to obtain the FMLA forms for us to complete."

03-26-12 "She is still having difficulty with sciatica-type pain right lower back radiating down lower extremities" Referred to Orthopedist.

05-02-12 "pt would like to speak to you about her records"

05-04-12 "Pt is wanting to get a copy of her records..." and advised of .25 per page cost.

05-24-12 "She is very interested in obtaining disability. Her husband is on disability."

07-23-12 "today she has had some lower back pain"

01-24-13 "she has been under workman's comp and takes Flexeril."

06-18-13 ((Industrial accident at issue herein))

07-31-13 Claimant calls office "asking... also for an ORTHO for her back problems." Faxed referral and diagnosis of arthritis to Dr Brown (rheumatology).

08-16-13 (first visit following industrial accident) "Patient would like to discuss pursuing the disability... works... as a merchandiser. This is a physically demanding job. She is interested in applying for disability and she will contact Social Security Services in order to fill out the paperwork... she has seen... (an Ophthalmologist)... reports he has diagnosed her with macular degeneration and states she cannot drive. She is presently being followed at Workman's Comp. due to back pain. She had an injury on the job and has a bulging disc as well as osteoarthritis of the LS-spine This prevents her from standing or sitting for a prolonged period of time."

09-13-13 (No recorded complaints of back problems).

10-25-13 "Her blood sugars have been doing better since she is no longer working." (No recorded complaints of back problems).

FRAUD

13. E/C contends Claimant has made false, fraudulent incomplete or misleading statements for the purpose of obtaining workers' compensation benefits. I find no evidence to support such defense. Claimant testified in deposition and advised each of the three physicians involved herein about her prior work related low back injury, that she missed several days of work as a result, and that she suffered no substantial back problems until 06-18-13. While Claimant may have described such event as having occurred several years ago, five years ago or 10 to 15 years ago, I do not find such sufficient evidence of an attempt of her part to mislead anyone. Nor do I find her failure to report she complained to Dr. Lewis on 03-26-12 she was having sciatica-type pain in the right lower back radiating down lower

extremities or that she had complained on 07-23-12 she was having some lower back pain as evidence of an attempt on her part to mislead anyone. Claimant never claimed she has had no back pain since the work related low back injury several years ago. What she testified to in deposition and what she reported to each of the physicians was she has had no significant back pain since such incident. E/C's misrepresentation/fraud defense is denied.

CAUSATION

14. Caputo v. ABC Fine Wine & Spirits, 93 So. 3d 1097, 1098-99 (Fla. App., 2012) addressed at least in part pertinent issues for adjudicate in the instant matter:

> "To be compensable, an injury must 'arise out of' one's employment and must occur 'in the course and scope of' that employment. Bryant, 672 So.2d at 630... The E/C in this case conceded that the injury to Claimant occurred in the course and scope of his employment, while performing his job duties on the Employer's premises. The dispute here is whether the injury 'arose out of' Claimant's employment.
>
> In Lanham v. Department of Environmental Protection, 868 So.2d 561 (Fla. 1st DCA 2004), this court, in addressing the term 'arising out of,' explained that two factors must come together for an accidental injury to be held compensable: '(1) the work must have been performed in the course and scope of employment, and (2) the work must be the major contributing cause of the accident or injury.' 868 So.2d at 562–63... In addressing the second factor, the Lanham court explained that if 'there was only one cause of claimant's injuries, rather than competing causes, claimant was not required to present additional evidence going to the issue of whether the work-related accident was the major contributing cause of the injuries.' 868 So.2d at 563.See also La. Pac. Corp. v. Harcus, 774 So.2d 751, 753 (Fla. 1st DCA 2000) (holding when there is only one cause of accident occurring in course and scope of employment, major contributing cause requirement is met).
>
> Here, in the absence of any evidence which could support a finding that there were competing causes of Claimant's accidental injuries, the JCC erred in ruling that his injuries were not compensable.
>
> ...
>
> When the E/C assert that an injury is the result of a personal risk such as an idiopathic pre-existing condition, they must carry the burden of proving the existence of such a condition.... [I]f the employee has no prior weakness or disease, any exertion connected with employment and causally connected with the injury as a medical fact is adequate to satisfy the legal test of causation."

15. As in Caputo, E/C in the instant matter does not dispute Claimant injured her back on 06-18-13 while in the

course and scope of her employment while performing work for the Employer. Rather, the dispute is whether such accident was the major contributing cause of her injury and/or need for treatment. E/C contends Claimant's pre-existing degenerative condition, not the industrial accident, was the major contributing cause of her injury and her need for treatment.

16. In order to prevail herein, each party must rely upon various records and opinions from each of the four (4) physicians who have seen Claimant herein.

17. For Claimant to prevail, one must ignore Dr. Colombo and Dr. Koulisis opinion the industrial accident is not the MCC of her injuries. One must accept Dr. Chandler's assumption Claimant's pre-existing degenerative condition was asymptomatic prior to the industrial accident and in doing so, one must ignore Claimant's complaints of back pain to Dr. Lewis on 03-25-13, Dr. Lewis' referral of Claimant to an orthopedist, and Claimant's report of continuing complaints on 07-23-12. And finally, despite Claimant's suggestion that all of Dr. Koulisis' opinions be disregarded, in order for Claimant to prevail, it is necessary that one accept Dr. Koulisis' opinion her pre-existing degenerative disc disease is age appropriate.

18. For E/C to prevail, one must accept Dr. Koulisis and Dr. Colombo's opinions that the 06-18-13 industrial accident was not the major contributing cause of her injury and is not the major contributing cause of any need for care and treatment. One must ignore Dr. Koulisis' opinion her degenerative condition is age appropriate or accept his opinion such condition was symptomatic prior to the industrial accident. In the event of the latter, one must also ignore that Dr. Koulisis appears to consider Claimant's work related back injury from several years ago as evidence of prior symptomology of her degenerative condition. One must also ignore Dr. Koulisis' opinion Claimant attained MMI on 07-25-13 as Dr. Colombo clearly did not believe such to be true and by adopting such erroneous finding as his own, brings into question the proper weight to be afforded Dr. Koulisis' testimony.

19. I do not find it appropriate or palatable to render adjudication by picking and choosing from amongst numerous medical opinions, accepting some and disregarding others as one may do when selecting food from a buffet. I believe it more appropriate to make such determination based upon the totality of the facts and circumstances.

20. Claimant suffered a work related low back injury at some time in the past whether such was several years or 15 years ago. She advised everyone in this matter of such accident as well as of the fact that her injury from such accident fully resolved within a few days. Claimant also suffers from degenerative disc disease/arthritis. I find her previous low back work injury and her arthritis are two separate and distinct conditions. Such finding is consistent with her own testimony that the work injury resolved shortly thereafter, but is also consistent with the fact that there is no medical evidence or opinion indicating her degenerative condition developed solely as a result of her prior work accident. Finally, such is also consistent with Dr. Koulisis' testimony her arthritis is age appropriate; i.e. something developed over a lifetime, not something that developed from an accident several years ago.

21. I find Claimant's pre-existing arthritis was symptomatic prior to the 06-18-13 industrial accident. She complained of back pain on 03-26-12 to Dr. Lewis and was referred to an orthopedist. Her back pains continued and she again complained to Dr. Lewis of such on 07-23-12. After the industrial accident and after Dr. Colombo released her from his care, Claimant called Dr. Lewis. She requested referral to an orthopedist. Nothing in the doctor's record indicates or suggests Claimant mentioned she had been in an industrial accident, only that she was requesting a referral to an orthopedist, such as the doctor had referred Claimant to previously on 03-26-12. The doctor did not refer Claimant to an orthopedist, but rather to Dr. Brown, a rheumatologist with a diagnosis of arthritis.

22. Unlike claimant's age appropriate arthritis in Bysczynski v. United Parcel Serv. Inc., 53 So.3d 328 (Fla. 1st DCA 2010) which did not require treatment independent of the two industrial accidents, Claimant's arthritis was symptomatic and did require treatment prior to her current industrial accident. Nor, as was the case in Bysczynski, was there any medical evidence in the instant matter that the cause of Claimant's injury or of her need for treatment as a result of her 06-18-13 accident was the natural sequela of her previous compensable work related accident or injury. As a result, her arthritis does not merely bespeak her age, but is a pre-existing condition which may be considered a contributing, legal cause of her injury and of her need for treatment subject to application of the major contributing cause standard. Considering the opinions of the healthcare providers herein it is Dr. Koulisis' opinion, and presumably Dr. Colombo's[1], that Claimant's pre-existing degenerative disc disease, not the industrial accident of 06-18-13, is the major contributing cause of her injury and of her need for treatment. While this may not be the opinion of Dr. Chandler, his opinion as to causation are based upon his erroneous assumption her pre-existing degenerative condition was asymptomatic prior to the accident and he expressed no opinion regarding causation were it ultimately determined Claimant was in fact symptomatic.

23. I accept Dr. Koulisis' opinion the industrial accident of 06-18-13 was not the major contributing cause of her injury or of her need for treatment. E/C therefore has carried its burden establishing both the existence of a pre-existing condition and that the major contributing cause of Claimant's injury was not the industrial accident, but rather her pre-existing degenerative disc disease. E/C having met its burden, it became incumbent upon Claimant to present additional evidence regarding causation beyond the mere fact she was injured while working. See, Caputo v. ABC Fine Wine & Spirits, 93 So.3d 1097 (Fla. 1st DCA 2012) and Urbina v. Kindred Hospital, 103 So.3d 244 (Fla. 1st DCA 2013). In this regard, Claimant presented the testimony of Dr. Chandler.

24. Claimant's own IME, Dr. Chandler testimony and records establish that Claimant complained when seen on 11-08-13 of pain during range of motion testing which evidenced 10 degrees of lumbar range of motion; he could not detect any muscle spasm; he found bilaterally equal motor examination, normal sensation in her lower extremities,

[1] Dr. Colombo has expressed no opinions within a reasonable degree of medical certainty. He simply wrote in the medical record of 07-25-13that the major contributing cause of Claimant's injury preexisted the industrial accident.

symmetrical lower extremity reflexes; and no evidence of nerve root irritability on either her left or right side. He did not believe she was at MMI. He did not believe she had not undergone an adequate course of physical therapy. He made three (3) relevant diagnoses: pre-existing disc degeneration, a low back strain and low back pain. He testified the degenerative condition was not work related, but the low back strain and her low back pain were "related" or "attributed" to the industrial accident. Finally, when asked what her impairment rating would be if she did not respond to additional treatment, he stated the same would be a 3% based upon an injury "without objective evidence of injury."

25. All physicians agree Claimant has pre-existing degenerative disc disease. All physicians agree Claimant suffered a low back strain and experienced low back pain as a result of the industrial accident of 06-18-13. All physicians agree her low back strain and low back pain may be "related" or "attributed" to the industrial accident. However, the relevant question is to what extent is it "related" or "attributed". Dr. Koulisis and Dr. Colombo agree while Claimant's low back strain and pain may be "related" or "attributed" in part to the industrial accident, the major contributing cause of such strain and pain and her need for treatment is the degenerative disc disease not the industrial accident. Dr. Chandler on the other hand rendered no opinion as to the major contributing cause of her strain, pain and need for treatment.

26. There are no "magic words" a physician must use in order to convey an opinion as to causation provided the totality of evidence from such physician's testimony demonstrates the necessary causal relationship between the injury and the employment. See, Hunt v. Exxon Co USA, 747 So.2d 966, 973 (Fla. 1st DCA 1999) citing Claims Management, Inc. v. Drewno, 727 So.2d 395, 399 (Fla. 1st DCA 1999). Thus while Dr. Chandler could have testified that within a reasonable degree of medical probability he believed the industrial accident was the major contributing cause of Claimant's injuries and/or need for treatment or could have said her industrial accident was more likely than not the cause of her injury and/or need for treatment, he did neither. There may be an endless variety of words and phrases Dr. Chandler could have employed to convey an opinion that he believed the industrial accident was the major contributing cause of her injuries and/or need for treatment, but testifying her injury and/or need for treatment is "related" or "attributed" to the industrial accident is not sufficient. Had they been asked Dr. Colombo and Dr. Koulisis would have agreed with Dr. Chandler that Claimant's injuries and need for treatment are "related" and "attributable" to the industrial accident, but only to some extent less than 50%.

27. Finally, Ch. 440.09(1), F.S. provides:

> "The employer must pay compensation or furnish benefits required by this chapter if the employee suffers an accidental compensable injury... arising out of work performed in the course and the scope of employment. The injury, its occupational cause, and any resulting manifestations or disability must be established to a reasonable degree of medical certainty, based on objective relevant medical findings, and the accidental compensable injury must be the major contributing cause of any resulting injuries... Pain or other subjective complaints alone, in the absence of objective relevant medical findings, are not compensable. For purposes

of this section, "objective relevant medical findings" are those objective findings that correlate to the subjective complaints of the injured employee and are confirmed by physical examination findings or diagnostic testing..."

28. Try as he might, Dr. Chandler's records and testimony fail to identify any objective relevant medical findings from physical examination or diagnostic testing which correlated with Claimant's subjective complaints of pain other than her pre-existing non-work related degenerative disc disease. Dr. Chandler even acknowledged there was no objective evidence of injury to substantiate her subjective complaints with his testimony should she receive additional care and treatment and should such fail to improve her condition any assigned impairment would be "without objective evidence of injury."

It is,

ORDERED AND ADJUDGED that:

1. Claimant's claim for temporary total disability (TTD) benefits from 06-18-13 and continuing is **DENIED.**

2. Claimant's claim for temporary partial disability (TPD) from 06-18-13 and continuing is **DENIED.**

3. Claimant's claim for authorization of medical care and treatment is **DENIED.**

4. E/C's defense of misrepresentation/fraud is **DENIED.** Claimant is entitled to attorney's fees and taxable costs for successful defense hereof and the same are **GRANTED**. Jurisdiction is reserved for determination of the appropriate amount of such fees and costs.

DONE AND ORDERED this 11th day of March, 2014, in Pensacola, Escambia County, Florida.

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