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

Kim Arruda,
Employee/Claimant,

vs.

HCA Management Services,
L.P./Parallon/ESIS WC Claims, and
Broadspire,
Employer/Carrier/Servicing Agent.
_____/

OJCC Case No. 18-004403TSS

Accident date: 5/8/2016

Judge: Timothy S. Stanton

FINAL COMPENSATION ORDER

THIS CAUSE came on for a final hearing before the undersigned Judge of Compensation Claims on August 15, 2018. Claimant, Kim Arruda, was represented by Jesse Rowe, Esquire. The Employer/Carrier (E/C) was represented by Derrick Cox, Esquire. Mediation was conducted on June 28, 2018. On July 5, 2018, an order was entered which bi-furcated this final hearing so that the only issue heard at this hearing was for compensability. All other remaining issues in the PFB filed on March 23, 2018 will be heard a later final hearing. The PFB filed June 11, 2018 was not heard at this hearing and jurisdiction is reserved for future determination of that PFB. All live witnesses, exhibits and documents received into evidence are listed in the appendix. Also in attendance were Michael Arruda, Claimant's husband, and Carmen Velez Rios, employer representative.

Objection to Claimant's Composite Emails Exhibits

Claimant submitted a composite exhibit on July 27, 2018 (DN 34), which contained various emails between Claimant and employer representatives. The E/C objected on grounds

of hearsay and cumulative evidence. Claimant argued the emails were not being submitted for the truth of the matter asserted, but instead to show that email communications were exchanged at various times between Claimant and employer representatives. As the content of the emails are not being offered into evidence for truth of the matter asserted, I overruled the hearsay objection. I also overruled the cumulative evidence objection. The composite exhibit filed on July 27, 2018 (DN34), is accepted into evidence, subject to the restrictions as noted above.

Claimant also filed a composite exhibit of emails which was docketed on August 15, 2018 (DN 43), the day of the final hearing. The E/C objected to the exhibit, and after discussion, Claimant withdrew the composite exhibit.

Claims (for this final hearing):

1. Compensability of the accident.
2. Payment of costs and attorney fees.

Defenses:

1. Claim denied under §440.092(2).
2. Claim barred by the coming and going rule.

Findings of Fact and Conclusions of Law:

In making my findings of fact and conclusions of law I have carefully considered and weighed all the evidence presented to me. Although I will not recite in explicit detail the testimony, and I may not refer to each piece of documentary evidence, I have considered all of the testimony and evidence and I have attempted to resolve all the conflicts in the testimony and evidence. Based upon the foregoing and the applicable law, I make the following findings:

1. The undersigned has jurisdiction over the parties and the subject matter.

2. The stipulations agreed to by the parties in the Uniform Pretrial Stipulation filed on May 23, 2018 (DN 61) are accepted and adopted.

3. Claimant testified that the employer hired her as a nurse to fill temporary nursing positions for various hospitals. In essence, the employer would contract out its nurses to hospitals that were in need of temporary nursing staff. The employer offered two types of nursing positions: traveling nurses and per-diem nurses. The main differences between the two positions were the length of the assignment, rate of pay, and various other benefits. The traveling nurse assignment was typically for 13 weeks while the per-diem nurse assignment was a daily assignment. However, the per diem nurse could accept multi-daily assignments at the same hospital, such as Friday through Sunday. For some multi-daily assignments, the contracted hospital would provide the per-diem nurse with hotel accommodations. The employer did not provide any housing for the per-diem nurse.

4. In regard to payment of travel time and mileage, there is a disagreement between the employer and Claimant. Claimant testified that she was paid for travel time and it was included in her paycheck. Claimant further testified that the travel pay was put into various classifications of pay and not specifically listed as travel. However, Carmen Velez Rios (Ms. Rios), employer representative, testified in her deposition and at the final hearing that the employer never paid Claimant for travel time or mileage. Ms. Rios reviewed and discussed Claimant's time and pay records at the final hearing, which did not contain any travel time pay or odd pay classifications. I accept Ms. Rios's clear and logical testimony, and I find that Claimant was not paid for her travel time or mileage. I reject Claimant's testimony that she was paid for travel as the time and pay records did not support her testimony.

5. Claimant first started working for the employer as a traveling nurse, and then transferred to a per-diem nurse. She testified that she switched positions as she liked to have shorter assignments.

6. On the day of her accident, Claimant was working as a per-diem nurse on a regularly scheduled assignment. She testified that once she completed her assignment, she left the hospital for her home. She testified that on her way home, she was involved in a single car accident when the front of her automobile "exploded" and fell off. There is no evidence or testimony that anything foreign to the automobile caused the "explosion" and the front of the car falling off. Claimant also testified that she is involved in product liability litigation as a result of this accident. Claimant suffered multiple injuries from the accident.

Going and Coming Rule

7. An employee who is traveling to and from work is generally not a covered employee:

> Section 440.092 (2), Florida Statutes, GOING OR COMING.—**An injury suffered while going to or coming from work is not an injury arising out of and in the course of employment** whether or not the employer provided transportation if such means of transportation was available for the exclusive personal use by the employee, unless the employee was engaged in a special errand or mission for the employer… (emphasis added)
>
> Section 440.092 (4), Florida Statutes, TRAVELING EMPLOYEES.—An employee who is required to travel in connection with his or her employment who suffers an injury while in travel status shall be eligible for benefits under this chapter only if the injury arises out of and in the course of employment while he or she is actively engaged in the duties of employment. This subsection applies to travel necessarily incident to performance of the employee's job responsibility **but does not include travel to and from work as provided in subsection (2).** (emphasis added).

8. Claimant has argued that she was a traveling employee and sustained an injury while in travel status that was reasonably incidental to the conditions of her employment.

9. The E/C has argued Claimant does not meet the definition of traveling employee, in part, because she can accept or turn down assignments, and she is not required to travel.

10. I find the Claimant is not a traveling employee as she is not *required* to travel for her employment. Claimant is free to accept or decline any assignment. She may decide to accept only local assignments, or she may decide to accept assignments several hours from her home. Claimant has full autonomy over her schedule and assignments, and she is responsible for traveling to and from work (her assignment). The employer does not pay any travel expenses, and the hospital, not the employer, pays for and arranges any hotel accommodations. The employer pays Claimant only for the hours she works at the hospital.

11. However, whether or not Claimant is a traveling employee is not particularly relevant if Claimant was simply returning home after fully completing her work assignment as she was not in the course and scope of her employment per Section 440.092(2) and Section 440.092(4). Both of these sections exclude the travel to and from work.

12. I find that once Claimant left the premises of the hospital, she was no longer in the course and scope of her employment, and her accident and injuries are not compensable under the going and coming rule as she was returning home from work.

13. However, Claimant argued that her work day had not ended at the time she left the hospital. Instead, she argued that she was traveling to her second office which was located in her home. At this second office, Claimant would schedule her nursing assignments by using telephone calls and emails to and from the employer. Therefore, she argued, her accident was

compensable as she was still in the course and scope of her employment at the time of the accident.

14. Claimant cited to Florida Hospital v. Garabedian, 765 So.2d 987 (Fla. 1st DCA 2000), in support of her argument. In Garabedian, the claimant was a home health aide, who traveled to clients homes. In finding the automobile accident compensable, the JCC found that the claimant was returning to her second office which was located in her home. In making this finding, the JCC found that the claimant would return home every single night and call her office for her next assignments; she would process paperwork; she had done so for the full year of 1997; and she was paid by her employer for her work at home. In affirming the JCC, the court agreed with the JCC that the claimant had not completed her work day at the time of the accident.

15. In the instant case, while Claimant did call and email the employer from her home for her assignments, it was not on a routine, scheduled basis. Instead, Claimant had full and complete autonomy on when and where to contact the employer. Additionally, the employer did not pay her for this time. Therefore, I find that Claimant did not have a second office in her home. I also find that Claimant's accident is not compensable as she was simply returning home from work and the accident is excluded under the going and coming rule and traveling employee.

16. In the alternative, even if Claimant's home was a second office in addition to her home, I find Claimant had completed her work day once she left the premises of the hospital. As I found previously, Claimant's scheduling of her appointments occurred randomly and she was not required to contact the employer at any scheduled time and did not do so. Claimant testified that she was "probably" going to contact the employer for her next assignment after she returned home on the day of the accident. However, I find that her demeanor and testimony were uncertain and non-

comital, and as a result, I find that she was not returning home to continue her work. Therefore, I find that Claimant was not in the course and scope of her employment at the time of the accident as she was simply returning home from work.

17. I am also aware that Claimant may have called the employer the night of the accident. She initially testified that she had called the employer on the day of the accident to report the accident, but later testified it may have been a day or so later as she was "fuzzy" on the timing of the call. If the call did occur on the day of the accident, I find the main purpose of this call was to report the accident and not as a routine working assignment call. Therefore, this call was not relevant to her work status at the time of the accident.

18. For completeness, I further find that Claimant is not entitled to any other exception to the going and coming rule or traveling employee as she was not on a special errand for the employer, there was no dual purpose of her travel home, and there was no special hazard connected to her employment. In regard to her accident, I find the accident was personal in nature as the only evidence submitted about the cause of the accident was that there was an "explosion" and the front of her car fell off. There is no evidence that the accident was caused by any road condition, foreign object, or any other cause outside of her personal car. Evidence was presented that Claimant is involved in product liability litigation for her personal car. Additionally, the employer did not require Claimant to have a car, did not require her to travel by her personal car, and did not reimburse Claimant for her travel time or mileage.

Timely Reporting of the Accident

19. Although I am denying compensability on the going and coming rule, I will address the defense that the accident was not timely reported. An injured employee must give notice of an injury in accordance with Section 440.185:

> (1) An employee who suffers an injury arising out of and in the course of employment shall advise his or her employer of the injury within 30 days after the date of or initial manifestation of the injury. Failure to so advise the employer shall bar a petition under this chapter unless:
> (a) The employer or the employer's agent had actual knowledge of the injury;
> (b) The cause of the injury could not be identified without a medical opinion and the employee advised the employer within 30 days after obtaining a medical opinion indicating that the injury arose out of and in the course of employment;
> (c) The employer did not put its employees on notice of the requirements of this section by posting notice pursuant to s. 440.055; or
> (d) Exceptional circumstances, outside the scope of paragraph (a) or paragraph (b) justify such failure.

20. Claimant testified that she informed Barbara, a representative of her employer, she had been in an accident on the day of the accident. Clamant also testified that she later called and informed Barbara that she needed surgery after she went to the hospital. Ms. Rios testified that she received an email from Barbara on May 11, 2016 that Claimant had been in a motor vehicle accident. I find that Claimant did report her injury to the employer (Barbara) within 30 days of the manifestation of her injury when Claimant informed Barbara that she needed surgery after she went to the hospital.

WHEREFORE it is ORDERED AND ADJUDGED:

1. The claim for compensability of the accident is denied.

2. Payment of costs and attorney fees are denied.

3. The portion of the PFB for compensability is dismissed, with prejudice.

DONE AND SERVED this 11th day of September, 2018, in Gainesville, Alachua County, Florida.

Timothy Stanton
Judge of Compensation Claims
1900 S.W. 34th Street, Suite 202

Gainesville, Florida 32608
(352)955-2244; www.fljcc.org

ESIS WC Claims; TamWCClientFNOL@esis.com
Broadspire; tampa@choosebroadspire.com
Jesse Rowe; jrowe@forthepeople.com,cdunn@forthepeople.com
Derrick E. Cox; dcox@hrmcw.com,canderson@hrmcw.com

APPENDIX

Judge Exhibits:

1. PFB filed 03/23/2018 (DN6).
2. Response to PFB filed 04/02/2018 (DN9).
3. Motion to Bifurcate filed 06/08/2018 (DN17).
4. Pre-trial Stipulation filed 06/13/2018 (DN21).
5. E/C's Amended Pre-trial Stipulation filed 06/22/2008 (DN30).
6. Order granting motion to bifurcate filed 07/05/2018 (DN36).
7. E/C's trial memorandum– argument only filed 08/13/2018 (DN40).
8. Claimant's trial memorandum – argument only filed 08/13/2008 (DN41).
9. Claimant's case law-argument only filed 08/15/2018 (DN44).

Joint Exhibits

1. Payout ledger (DN130).
2. Composite medical records of Dr. Reddy (DN116).
3. Composite medical records of Dr. Valentine, Dr. Stevenson, Invision Highfield MRI, Orthopedic Institute Radiology, and Suwannee Bend Services (DN117).

Claimant Exhibits:

1. Composite exhibit for emails (DN34). **OBJECTION**
2. Deposition of Carmen Valez-Rios taken 07/31/2018 (DN39).

E/C Exhibits:

None.

Live witnesses:

1. Jecomiah Walker.
2. Carmen Valez-Rios.