STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGE OF COMPENSATION CLAIMS
MELBOURNE DISTRICT
JUDGE PAUL T. TERLIZZESE

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OJCC CASE NO.: 09-030483PTT
D/A: 3/19/2008

ORDER DENYING ALL WORKERS' COMPENSATION BENEFITS

THIS MATTER came on for a Final Merit Hearing before the undersigned Judge of Compensation Claims on Wednesday, April 6, 2011, on a Petition for Benefits filed with DOAH on November 23, 2010. On that same date, the parties later reconvened for Closing Arguments and a Ruling Conference, where detailed findings of fact and conclusions of law were announced by the undersigned, both of which are incorporated herein by direct reference. Present and representing the employee at the Merits Hearing were attorneys Wade Coye, Esquire and Salim Punjani, Esquire. Present and representing the Employer/Carrier was Derrick E. Cox, Esquire.

The issues presented for my determination were payment of Temporary Total Disability/Temporary Partial Disability Benefits from June 7, 2010, to the present and

continuing, authorization of Dr. Ware and authorization of a CT Scan/Myelogram prescribed by Dr. Ware, plus penalties, interest, costs, and attorney's fees.

The claims were defended on the grounds that the major contributing cause of the Claimant's disability, and need for further treatment, was unrelated to the industrial accident, and on the grounds that since the Claimant violated Florida Statute §440.105, all benefits should be barred and denied, pursuant to Florida Statute §440.09. The claim for Temporary Partial Disability Benefits was defended on the grounds that the Claimant failed to submit DWC-19 forms, and on the grounds that the Claimant's wage loss was not due to the March 19, 2008, accident. Finally, the Employer/Carrier asserted that no penalties, interest, costs, or attorney's fees were due and owing.

The following exhibits were admitted into evidence:

Judge's Exhibits:

1. The Notices of Hearing served on December 7, 2010, December 10, 2010, and December 21, 2010.

Joint Exhibits:

1. The Pretrial Stipulation, filed February 9, 2011;
2. The Joint Stipulation regarding the Average Weekly Wage, listing an Average Weekly Wage of $420.46 prior to April 1, 2009, and an Average Weekly Wage of $682.57 effective April 1, 2009.

Claimant's Exhibits:

1. The Claimant's Amendment to the Pretrial Stipulation;
2. The Claimant's Motion to Admit the Medical Records of Dr. Ware;

3. The Claimant's Memorandum of Law, which was marked for identification and argument purposes only;

4. The Claimant's Pre-Hearing Information Sheet, which was marked for identification and argument purposes only;

5. The deposition of Dr. Ware taken on March 8, 2011.

Employer/Carrier's Exhibits:

1. The surveillance DVD, and surveillance report dated January 25, 2010;

2. The Employer/Carrier's Hearing Information Sheet, which was marked for identification and argument purposes only;

3. The deposition of Dr. Funk taken on March 16, 2011;

4. The Employer/Carrier's Pre-Hearing Information Checklist, which was marked for identification and argument purposes only;

5. The Response to the Petition for Benefits dated December 2, 2010;

6. The Claimant's deposition taken on January 7, 2011. Pages 57 and 58 of this deposition were admitted for substantive purposes, and the rest of the deposition was admitted for impeachment, rebuttal, and memory refreshing purposes.

In making my additional findings of fact and conclusions of law in this claim, I have carefully considered and weighed all of the evidence that was presented to me. I have observed the candor and demeanor of the witnesses, and resolved all of the conflicts in the testimony and evidence. In writing this Order, I have attempted to distill the salient issues together with findings and conclusions necessary to their resolution. Even though I have not attempted to summarize the testimony of each witness or to state non-essential facts, this does not mean that I

have failed to consider all the evidence. After careful consideration of all of the evidence presented, and after having resolved any conflicts therein, I hereby additionally find as follows:

1. The written and verbal stipulations of the parties are factual, and incorporated by reference as if set out at length herein, including the stipulation that if any indemnity benefits were awarded, that the parties would handle the calculations administratively.

2. Based on all of the evidence that has been presented to me, I hereby deny all further Workers' Compensation Benefits to the Claimant, for the additional reasons outlined below.

3. First, I find that the Claimant violated Florida Statute §440.105(4)(b). This section of the Statute states that it is unlawful for any person:

> "to knowingly make, or cause to be made, any false, fraudulent, or misleading oral or written statement for the purposes of obtaining or denying any benefit or payment under this chapter."

After reviewing the Claimant's deposition and the surveillance evidence, and after personally observing the Claimant at trial, I find that the Claimant knowingly made false, fraudulent, or misleading statements for the purposes of obtaining Workers' Compensation Benefits.

During the Claimant's deposition (pages 57 and 58), the Claimant was asked 15 questions regarding footwear as follows:

> Q. Do you have any shoes that you are unable to wear because of your ankle injury?
>
> A. I have special shoes on that were purchased from Wuesthoff. Actually, it's my second pair.
>
> Q. Is that what you're wearing?
>
> A. Yes.
>
> Q. If you don't mind, let me take a look. It looks like a tennis shoe to me.

A. Yeah, they are tennis shoes with inserts made to my foot.

Q. That's a New Balance shoe?

A. Yes.

Q. Is that the only type of shoe that you wear?

A. Yes.

Q. Are you able to wear any other type of shoe?

A. No.

Q. Have you worn any other type of shoe since your accident?

A. No, just slippers.

Q. When you say slippers, are you talking about bedroom slippers?

A. Yeah, slippers.

Q. That you wear around the house?

A. No, just get up and then I have to get in these.

Q. When you leave the house, have you ever worn anything other than these tennis shoes?

A. Right. Yes.

Q. You have?

A. No.

Q. Oh, you have not?

A. No.

Q. For example, have you worn flip flops?

A. No.

Q. Are you able to wear high heels?

A. No.

Q. Okay. Have you worn anything other than tennis shoes since your accident?

A. No, I have always had these on around the clock.

I find that the questions asked by counsel for the Employer/Carrier were straightforward and easily understandable. I further find that the answers given by the Claimant during her deposition, when compared to the surveillance, were false and certainly misleading. During her deposition, the Claimant gave the impression of only wearing bedroom slippers when she gets up and she then has to put on tennis shoes. The Claimant then testified that she wore her New Balance tennis shoes, "around the clock." The Claimant also specifically denied wearing flip flops.

Mr. Tom Flack, the surveillance investigator, testified live at trial, and both his report and surveillance DVD were admitted into evidence for substantive purposes, after proper authentication. Mr. Flack testified that he only performed surveillance activities of the Claimant on two days, January 21, 2010, and January 23, 2010. On both of those days, the surveillance shows the Claimant to be continuously wearing a leather sandal. Those shoes are certainly not tennis shoes, and they are certainly not bedroom slippers, in layman's terms.

I also find that the Claimant's live testimony at trial was not candid or credible. I had an opportunity to closely observe the Claimant, who was testifying approximately four feet away from me. During direct examination, the Claimant easily answered the questions asked by her own attorney. However, during cross-examination, the Claimant was very slow and evasive to the questions posed by counsel for the Employer/Carrier. The Claimant's mannerisms led me to

believe that she was attempting to conceal and manipulate answers to the questions posed during cross-examination. The Claimant also mixed her definitions when she was discussing her definition of slippers, flip flops, and slip-on shoes. I did not find the Claimant to be credible when attempting to explain away the inconsistent and misleading answers she gave during her deposition.

Finally, I find it significant that the Claimant testified that the New Balance tennis shoes she was wearing at trial were the same pair she had for the past 15 months. During the trial, I personally got up from the bench, and with Counsel present, examined the Claimant's tennis shoes, both tops and bottoms. The Claimant's tennis shoes were very white and clean. Moreover, the treads on the bottom of the Claimant's tennis shoes looked like they had barely been worn. Based on my personal observation of the Claimant's tennis shoes, I do not accept the fact that these tennis shoes had been worn "around the clock" for the past 15 months. The Claimant did testify that she had previously washed the shoes.

Claimant's counsel argued at trial that the false statements made by the Claimant during her deposition were not material, and also that the false statements were not made with the intent to obtain Workers' Compensation Benefits. I reject both of these arguments. At the time of the Claimant's deposition on January 7, 2011, there was a pending Petition for Benefits seeking Indemnity Benefits dating back to June 7, 2010, and seeking continued authorization of Dr. Ware, and additional testing. The Claimant knew that her deposition was being taken in connection with her request for over $10,000.00 in past Indemnity Benefits, and regarding her request for future medical care. The Claimant certainly knew and understood the significance of testifying to the ongoing nature of her disability. I find that the multiple answers given by the

Claimant, on pages 57 and 58 of her deposition, were made with the intent to amplify her ongoing disability so she could receive the requested indemnity and medical benefits.

Overall, I find that the Claimant violated Florida Statute §440.105(4)(b) by knowingly making false, fraudulent, or misleading statements for the purpose of obtaining Workers' Compensation Benefits, for the reasons stated above. Florida Statute §440.09(4) states that an employee is not entitled to compensation or benefits if a Judge of Compensation Claims determines that the employee has knowingly or intentionally engaged in any of the acts described in Florida Statutes §440.105, for the purpose of securing Workers' Compensation Benefits. Since I have found that the Claimant violated Florida Statutes §440.105, for the purpose of securing Workers' Compensation Benefits, I hereby deny all further Workers' Compensation Benefits per Florida Statute §440.09(4).

4. In addition to denying all further Workers' Compensation Benefits under Florida Statute §440.105 and §440.09(4), I also deny all further Workers' Compensation Benefits on the grounds that the Claimant's March 19, 2008, accident is no longer the major contributing cause of the Claimant's disability and need for treatment. In reaching this decision, I have considered the deposition testimony of both Dr. Funk and Dr. Ware, as well as the Claimant's trial testimony and the other evidence presented.

Dr. Ware was the Claimant's authorized treating physician, and he initially saw the Claimant approximately five and a half months after her accident. Dr. Ware was under the mistaken impression that the Claimant saw two doctors named Dr. Aziz and Dr. Beyling, before seeing Dr. Vara. Dr. Ware did not have any records of Dr. Aziz or Dr. Belying. Moreover, Dr. Ware did not have the records of Dr. Vara, who was the initial authorized treating physician

following the Claimant's accident. In fact, Dr. Ware could not recall if he ever reviewed Dr. Vara's records. The first record that Dr. Ware reviewed was the MRI, from August, 2008.

Dr. Ware diagnosed the Claimant as having posterior tibial tendon dysfunction (PTTD) of the right foot and he performed surgeries on September 27, 2008, and March 16, 2009. As of January 8, 2010, the Claimant stated that she was only able to walk 100 to 200 yards, and Dr. Ware assigned restrictions of no prolonged walking, standing, pushing, pulling or heavy lifting. However, surprisingly, Dr. Ware testified that the Claimant had no restrictions on shopping and he said that she could wear flip flops or sandals.

Finally, Dr. Ware testified that he treats people with PTTD at least one to two times per week, and that the majority of people who have PTTD are heavyset women over the age of 40 who acquire the condition over time. Dr. Ware agreed that the Claimant fit this profile, and that her symptoms and diagnosis were consistent with the majority of the other heavyset females that he has treated for PTTD. Dr. Ware's notes indicated in multiple places that the Claimant's flat foot condition was congenital. However, Dr. Ware testified that was a computer error.

Dr. Funk served as the Employer/Carrier's IME physician, and he saw the Claimant on April 15, 2010. Dr. Funk reviewed records from Dr. Ware and Dr. Vara, and he also reviewed MRI's, operative reports, x-rays, radiologist reports and other extensive records. After reviewing these records and performing a physical examination, Dr. Funk diagnosed the Claimant as having congenital pes planus deformity of the right foot, and a previously healed contusion of the right foot. Dr. Funk opined that the Claimant's contusion injury was due to the March 19, 2008 accident, and it resolved as of April 30, 2008. Dr. Funk agreed with Dr. Vara's opinion that the Claimant reached Maximum Medical Improvement for the contusion as of April 30, 2008, with a 0% impairment rating. Dr. Funk testified that after April 30, 2008, the Claimant required no

further care or treatment for the contusion injury, sustained as a result of the March 19, 2008, accident.

Dr. Funk reviewed Dr. Vara's records and noted that the Claimant complained of no pain as of April 30, 2008. When the Claimant returned to Dr. Vara on August 11, 2008, the Claimant gave Dr. Vara a history of pain "for the past one week," indicating a new onset and location of pain, on or about August 4, 2008. Dr. Funk testified that this new pain commencing in August, 2008, was due to the Claimant's PTTD. Dr. Funk testified that the Claimant has a congenital overpronation condition which is common in heavyset females, and which resulted in the collapsing of the foot and subsequent treatment for the flat foot condition. Dr. Funk persuasively testified that the contusion sustained on March 19, 2008, was not significant enough to cause the foot to collapse. Dr. Funk testified that with the Claimant's contusion/sprain injury, the tendons, bones, joints or something else would have had to have been broken, torn or collapsed completely to cause such significant damage, that would then result in the PTTD condition. Dr. Funk stated that the fact that the Claimant had no pain on April 30, 2008, and the fact that the MRI had minimal findings provided further evidence that the Claimant's treatment commencing in August, 2008, was unrelated to the March 19, 2008 contusion injury. Dr. Funk agreed with Dr. Ware's opinion that PTTD is a common problem among overweight females in their 40's. Dr. Funk testified that the major contributing cause of the Claimant's disability and need for treatment for the diagnosis of PTTD was due to her congenital pes planus condition, her weight, and her choice of shoes, but not the March 19, 2008, accident.

During the Claimant's testimony, she testified that she weighed 233 pounds when she first saw Dr. Vara on March 31, 2008. The Claimant testified that she believed her weight has increased since then. The Claimant also testified that following the March 19, 2008, accident,

she felt pain on top of her foot. The Claimant admitted that after she treated with Dr. Vara following her March 19, 2008 accident, she complained of no pain as of her Maximum Medical Improvement date of April 30, 2008. The Claimant admitted that when she returned to Dr. Vara, approximately three and a half months later on August 11, 2008, she gave Dr. Vara a history of having pain in her right foot for the past one week. The Claimant also testified to having fibromyalgia in both of her arms and legs dating back to 2002, and that she thought it was probably a genetic condition.

Having reviewed the deposition testimony of both Dr. Ware and Dr. Funk, and considering the Claimant's live testimony at trial, I find that the major contributing cause of the Claimant's disability and need for treatment after April 30, 2008, is unrelated to the Claimant's March 19, 2008 accident. I find that the Claimant sustained a contusion injury on March 19, 2008, which resolved as of April 30, 2008. I find that the Claimant had new complaints and locations of pain, which began on or about August 4, 2008, due to her congenital pes planus condition which developed into PTTD, a common problem among overweight women in their 40's. I accept Dr. Funk's opinion that the Claimant reached Maximum Medical Improvement as of April 30, 2008, with a 0% impairment rating for the March 19, 2008, accident. I accept Dr. Funk's opinion that the Claimant's disability and need for treatment, subsequent to April 30, 2008, is unrelated to the March 19, 2008 accident.

To the extent that Dr. Ware's testimony is inconsistent with the opinions rendered by Dr. Funk, I hereby reject Dr. Ware's opinions, and accept the opinions of Dr. Funk. I find that Dr. Ware's opinions were based on an incomplete history. Specifically, Dr. Ware did not have the benefit of Dr. Vara's records. Therefore, Dr. Ware was unaware that the Claimant had no complaints of pain as of April 30, 2008. Dr. Ware was unaware that the Claimant gave a history

to Dr. Vara on August 11, 2008, of a new onset of right foot pain for the past one week. Dr. Ware was under the mistaken impression that the Claimant saw two doctors, named Dr. Aziz and Dr. Beyling, before she saw Dr. Vara, and Dr. Ware referenced a nonexistent ultrasound, which he could not produce when questioned during cross-examination. Dr. Ware did not see the Claimant until almost six months after the accident, and the first medical record he reviewed was the MRI performed five months after the accident. Overall, it is clear that Dr. Ware was missing the Claimant's entire medical history for the first five months following her accident, and that Dr. Ware made assumptions on faulty information about her treatment during this same time period.

I also question Dr. Ware's testimony that the Claimant could wear flip flops and go shopping in January, 2010, despite the fact that the Claimant told Dr. Ware on January 8, 2010, that she could only walk 100 to 200 yards. I also find it odd that Dr. Ware diagnosed the Claimant as having a congenital flat foot condition for over two years in his reports, but his deposition testimony was that the Claimant's condition was not congenital. Dr. Ware's explanation was that the congenital flat foot diagnosis was due to a computer-generated error. If so, then I wonder why this error was not caught and corrected during the multiple visits the Claimant had with Dr. Ware over that same two-year period. For all of these reasons, the testimony of Dr. Ware is rejected, in favor of the testimony of Dr. Funk.

I also find it significant that the Claimant testified at trial that she had pain on top of her foot following the March 19, 2008 accident. This testimony is consistent with the diagnosed contusion injury on top of her foot, rather than the congenital pes planus/PTTD diagnosis on the bottom of her foot. I find that this testimony further supports Dr. Funk's opinions regarding diagnosis and major contributing cause. Overall, I find that the Claimant's contusion due to the

March 19, 2008 accident resolved as of April 30, 2008, and that the major contributing cause of the Claimant's disability and need for treatment after April 30, 2008, is unrelated to the March 19, 2008, accident. I find that the Claimant requires no further medical treatment for the March 19, 2008, accident. Therefore, and in alternative findings, all further Workers' Compensation Benefits are denied.

5. In addition to denying all further Workers' Compensation Benefits for the multiple reasons stated above, I also specifically deny the claim for Temporary Total Disability Benefits because the Claimant was not taken off work during the time periods at issue, namely from June 7, 2010, to the present. Therefore, I deny the Claimant's request for payment of Temporary Total Disability Benefits during this time period.

6. In addition to the reasons stated above, I also deny the Claimant's request for Temporary Partial Disability Benefits, from June 7, 2010 to the present, on the grounds that the Claimant failed to complete required DWC-19 forms for these relevant time periods. During the hearing, Claimant's counsel acknowledged that the Claimant previously received multiple DWC-19 forms, but no forms were submitted at trial. Moreover, during the Claimant's testimony, she gave inconsistent testimony about receiving the DWC-19 forms. At one point, the Claimant testified that she received forms and did not send them in. At another point, the Claimant testified that she kept copies of the forms, and sent in the DWC-19 forms. At another point, the Claimant testified that she did not receive forms for the time periods in question. Since no DWC-19 forms were admitted into evidence at trial, the Claimant's claim for Temporary Partial Disability Benefits is denied.

I also deny the claim for Temporary Partial Disability Benefits on the grounds that the Claimant's wage loss is not due to her industrial accident. The Claimant admitted at trial that

light-duty work was provided to her for approximately one year following the accident. When the Claimant's light-duty assignment ended, the Claimant testified that she only searched for three jobs, during June of 2010. The Claimant conducted no further job search from June of 2010, until after her deposition was taken on January 7, 2011. During cross-examination, the Claimant initially testified that she made phone calls to potential employers during this time period. However, after being presented with her deposition testimony, the Claimant changed her story, and testified that she did not make any phone calls or contact employers during this time period. For these additional reasons, I find that the Claimant's wage loss is not due to her accident, and I hereby deny the Claimant's request for payment of Temporary Partial Disability Benefits.

WHEREFORE, it is the Order of the undersigned Judge of Compensation Claims as follows:

1. Based on the evidence presented in this case, I hereby deny all further Workers' Compensation Benefits, with prejudice.

2. Since all benefits have been denied, the Claimant attorney's request for costs and attorney's fees is also denied and dismissed with prejudice.

3. Finally, since the Employer/Carrier prevailed in this proceeding, I hereby find that the Employer/Carrier is entitled to reimbursement of costs pursuant to Florida Statute §440.34(3). I hereby retain jurisdiction to determine the amount of costs payable to the Employer/Carrier, for the proceedings in this case.

DONE and ORDERED in Melbourne, Brevard County, Florida, this 13th day of April, 2011.

Honorable Paul T. Ierlizzese
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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that the foregoing Order was entered and a true and correct copy was furnished by electronic mail on this 13th day of April, 2011, to counsel.

Assistant to Judge of Compensation Claims