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

Jackolyn Ford,	)	
	)	
Employee/Claimant,	)	
	)	
vs.	)	OJCC Case No. 08-025809TGP
	)	
Placita Supermaket, Inc.,	)	Accident date: 7/15/2008
	)	
Employer,	)	
	)	
and	)	
	)	
USIS,	)	
	)	
Carrier/Servicing Agent.	)	
	)	

ORDER DENYING COMPENSABILITY

After proper notice to all parties, this cause came to be heard before the undersigned Judge of Compensation Claims in Daytona Beach, Volusia County, Florida on August 6, 2009. The Petitions for Benefits at issue were filed on September 22, 2008, December 16, 2008, December 24, 2008, and January 20, 2009. The Claimant, Jackolyn Ford, was represented by Attorney Keith Warnock. The Employer/Carrier was represented by Attorney Michael Waranch.

The issues set forth by the Claimant in the initial Pretrial Questionnaire included: temporary total disability/temporary partial disability from July 15, 2008, to the present and continuing;

authorization for orthopedic physician for evaluation and treatment; compensability of all medical conditions related to the injury sustained from Workers' Compensation injury of July 15, 2008; payment of medical expenses identified on Pretrial Questionnaire; and penalties, interest, costs and attorneys fees.

The Employer/Carrier defended these claims at the initial Pretrial on the grounds that: no accident within course and scope of employment; no timely notice of alleged accident; even if accident occurred and timely notice provided, accident not the major contributing cause of Claimant's current condition, disability, and need for treatment; Claimant not temporarily totally disabled; any loss of earnings not due to the alleged accident; Claimant has voluntarily limited income; medical expenses claimed not related to any authorized treatment; and no penalties, interest, costs or attorney fees due.

The Claimant amended the Pretrial Questionnaire on August 3, 2009, to include the issue of authorization of physical therapy.

At the August 6, 2009, Final Hearing, the Claimant withdrew the issue of temporary total disability. Also at the Hearing, the Employer/Carrier withdrew all the defenses to the temporary total disability issue and withdrew the major contributing cause defense. The Employer/Carrier also withdrew any objection to the Claimant's amendment of the issues to include authorization of physical therapy.

At the Hearing, both parties stipulated to an average weekly wage of $200.00.

This case involves a forty year old female who alleged she hurt her neck and low back on July 15, 2008, while working at a supermarket. The Claimant alleged she lifted a tray of meat while twisting and felt immediate pain in her neck and low back. The Claimant testified she reported this

accident immediately to her supervisor, Angela Davis, who allegedly also witnessed the accident. The Claimant testified she continued working that afternoon despite the pain and returned back to work for several days until she was fired due to her industrial accident.

On August 1, 2008, the Claimant first received treatment for the alleged industrial accident. She presented herself to Halifax Medical Center and gave history of the alleged industrial accident and resulting symptoms to her neck and low back. She was diagnosed with cervical strain, lumbar strain, and right shoulder pain. A CT scan of the cervical spine showed a small cervical disc protrusion at C2 – 3. The Halifax Medical Center reports reveal that the Claimant has a history of cervical and lumbar spine disease secondary to a motor vehicle collision. The Claimant reported pain down her right leg which she had prior to the alleged industrial accident. The Claimant also has a history of right shoulder problems.

Following the Halifax Medical Center visit, the Claimant was referred to orthopedic surgeon, Dr. Malcolm Gottlich. Dr. Gottlich diagnosed cervical strain and lumbar strain and recommended conservative orthopedic care. Dr. Gottlich also diagnosed the Claimant as having cervical spine degenerative disc disease and lumbar spine degenerative disc disease.

The Claimant's immediate supervisor, Angela Davis, testified that she did not witness an industrial accident involving the Claimant and that the Claimant did not report an accident to her. The Employer/Carrier take the position that the industrial accident was not reported to the Employer or the Carrier until the evening of August 26, 2008, when the Claimant first mentioned the incident to Felix Peralta, an owner of the Employer. The Employer/Carrier argued that on August 26, 2008, the Claimant, for the first time, submitted medical reports and bills to the Employer. The

Employer/Carrier also take the position that the Claimant was fired from work for reasons unrelated to the industrial accident.

At the August 6, 2009, Merit Hearing, the following documentary evidence was admitted in evidence:

JCC's Exhibit #1	Pretrial Questionnaire and Order by the Undersigned dated February 27, 2009.
JCC's Exhibit #2	Petitioner's Amendment to Pretrial Stipulation dated August 3, 2009.
JCC's Exhibit #3	Petitioner's Trial Memorandum of Law, admitted for argument purposes only.
JCC's Exhibit #4	Trial Memorandum admitted by the Employer/Carrier, admitted for argument purposes only.
Claimant's Exhibit #1	Deposition of Frank S. Alvarez, Jr. MD, taken April 30, 2009, with attachments.
Claimant's Exhibit #2	Deposition of Lynn Bowen, taken April 29, 2009, with attachments.
Claimant's Exhibit #3	Composite exhibit of various Employee Earnings Reports filed by the Claimant with attached earning records from subsequent employment.
Claimant's Exhibit #4	Composite exhibit of various Petitions for Benefits filed in this case, with attachments admitted for limited purposes only.
Employer/Carrier's Exhibit #1	Deposition of Narinder Aujla, MD, taken August 4, 2009, with attachments.

At the August 6, 2009, Merit Hearing, the Employer/Carrier re-asserted certain objections previously raised in the contents of Dr. Alvarez's deposition, Claimant's Exhibit #1. After reviewing each objection and listening to arguments of both parties, the undersigned hereby overrules each of

those objections. Also, at the August 6, 2009, Merit Hearing, the Claimant re-asserted certain objections raised within the contents of the deposition of Dr. Aujla, Employer/Carrier's Exhibit #1. After reviewing each objection and listening to the arguments of both parties, the undersigned hereby overrules each of those objections.

At the August 6, 2009, Merit Hearing, the Claimant attempted to admit in evidence a composite exhibit of medical bills identified for the Record as Claimant's Exhibit "A". The Employer/Carrier objected to this exhibit on grounds including hearsay, lack of authentication, and lack of foundation. The undersigned hereby sustains those objections. Additionally, I note that although medical bills were attached to various Petitions for Benefits identified as Claimant's Exhibit #4, the undersigned sustained similar objections raised by the Employer/Carrier to those medical bills. The medical bills contained in Claimant's Exhibit #4 were not admitted in evidence for substantive purposes except to show that they were attached to the Petitions for Benefits at the time they were filed.

In making my findings of fact and conclusions of law in this matter, I have carefully considered and weighed all the testimony and evidence presented to me including all the live testimony as well as the documentary exhibits and I have resolved any and all conflicts therein. After having carefully considered the arguments of the parties and all evidence presented in this case, I make the following findings of fact and conclusions of law:

1. The stipulations of the parties as listed above and as identified in the Pretrial Questionnaire are approved and adopted by me.

2. This Court has jurisdiction over the subject matter and over the parties.

3. In making the determinations set forth below, I have attempted to distill the testimony

and salient facts together with the findings and conclusions necessary for the resolution of this claim. I have not attempted to painstakingly summarize the substance of all the documentary evidence or the testimony of the witness nor have I attempted to state nonessential facts. Because I have not done so does not mean I have failed to consider all the evidence.

4. I find that the Claimant failed to satisfy her burden of proof, by a preponderance of evidence, that she sustained an accident within the course and scope of her employment on July 15, 2008. In making this finding, I reject the Claimant's testimony and description of an alleged injury occurring to her neck and back while lifting meat at work on July 15, 2008. I find the Claimant's testimony and description of the alleged accident is not credible and is not believable. I find that no such accident or injury occurred as described by the Claimant. I base this finding on the totality of evidence in the Record.

5. I reject the Claimant's testimony, particularly her description of the alleged injury, based on this Court's observation of the candor and demeanor of the Claimant while testifying live at Hearing. I find that the Claimant was evasive and argumentative in her testimony.

6. I also reject the Claimant's testimony on the grounds that it is not logical and reasonable given the totality of circumstances in this case. For instance, I note that the Claimant testified at Hearing that Dr. Gottlich said she would not get any better and made her feel like she was going to be in a wheelchair. Yet, a review of Dr. Gottlich's reports shows that the Claimant had no pain traveling in her legs; the Claimant denied numbness and tingling. Further, the Claimant indicated her neck pain does not travel in her arms it is not associated with numbness, tingling, or complaints in her hands. Dr. Gottlich recommended conservative orthopedic care to include Aleve, one in the morning and one at night and physical therapy. Dr. Gottlich stated he believed the

Claimant can return to work. After listening to the Claimant's description of her impression of Dr. Gottlich's statements and comparing that impression to the actual reports of Dr. Gottlich, I reject the Claimant's testimony as inconsistent with the totality of evidence including the documentary evidence in this case.

7. I specifically reject the Claimant's testimony that her supervisor, Angela Davis, witnessed the accident. I specifically reject the Claimant's testimony that she reported the industrial accident numerous times and that Felix Peralta failed to act or respond to her notice of injury. Instead, I note that Angela Davis clearly testified she did not witness the alleged accident. Both Angela Davis and Felix Peralta consistently testified that no such industrial accident or notice of such accident occurred. I find that the testimony of Angela Davis and Felix Peralta is most logical, most reasonable, and most consistent with the totality of evidence in this case.

8. I accept the testimony of the Employer witnesses, both Felix Peralta and Angela Davis, over that of the Claimant based on this Court's observation of the candor and demeanor of the witnesses while testifying live. Felix Peralta and Angela Davis testified in a clear and convincing manner; their testimony was emphatic and sure. I note there was no hesitation or inconsistency demonstrated by these witnesses that would cause the undersigned not to accept their testimony in its entirety. Further, I note their testimony did not waiver under pointed cross-exam.

9. In weighing the testimony of the Claimant against the testimony of Angela Davis, I have considered that they both have felony convictions. However, with specific regard to the Claimant's illegal activities at the time of the alleged industrial accident and since then, I note that the attachments to the deposition of Dr. Alvarez, submitted in evidence by the Claimant as Claimant's Exhibit # 1, reveal that the Claimant admitted to "daily" marijuana use at the time of her

Halifax Emergency Room visit on August 1, 2008. Further, as revealed in Dr. Aujla's medical report attached to Employer/Carrier Exhibit #1, on June 12, 2009, the Claimant gave history to Dr. Aujla that she uses marijuana once a week. I note that the Claimant's admission to "daily" illegal narcotic use provided to Halifax Emergency on August 1, 2008, is in close proximity in time to the alleged date of accident. Further, I note that the Claimant's admission to continued weekly use of illegal narcotics to Dr. Aujla on June 12, 2009, is in close proximity in time to the date of the Final Hearing in this case. Although I find the Claimant's admission of illegal narcotic use is not determinative of the outcome of this case, such admission is consistent with this Court's acceptance of Angela Davis' testimony as more credible than that of the Claimant. Further, I find that even without evidence of the Claimant's chronic use of illegal drugs in close proximity in time to the industrial accident and Final Hearing, this Court would still reject the Claimant's testimony for other reasons as mentioned in the contents of this Order.

10. In making the findings herein, I have taken into account that the Employer witness, Angela Davis, did agree that the Claimant performed heavy meat wrapping activities for Placita Supermarkets immediately prior to the alleged date of accident. Further, I note that Angela Davis readily agreed that she probably did use profanity in front of the Claimant. Also, as previously mentioned, I note that Angela Davis does have prior felony convictions. Nevertheless, I find these points are not sufficient to cause the undersigned to reject Angela's Davis' testimony in favor of the Claimant's. Again, I find that Ms. Davis' testimony is most consistent with the totality of evidence in this case and I accept Ms. Davis' testimony based upon this Court's observation of her candor and demeanor while testifying live.

11. Further, with regard to the credibility of Angela Davis, I accept the

Employer/Carrier's argument that whether or not Ms. Davis knew the Claimant had seen a doctor at the time the Workers' Compensation insurance company first began investigating this matter, after the injury was reported on August 26, 2008, is not material to the determinations herein. I find the Claimant has failed to successfully impeach Ms. Davis' testimony to any extent that would cause the undersigned not to accept her testimony particularly with regard to whether or not an industrial accident occurred on July 15, 2008, and whether or not timely notice was provided by the Claimant.

12. I note the Claimant attempted to impeach Felix Peralta, an owner of Placita Supermarket, with regard to the reasons he terminated the Claimant and whether or not those reasons included missing work on one or more days including on one day when the Claimant requested leave to attend a funeral. However, after reviewing the testimony in its entirety and listening to Mr. Peralta's explanations, I find that the Claimant did not successfully impeach Mr. Peralta in any way that would cause the undersigned not to accept his testimony in its entirety. I accept Mr. Peralta's testimony with regard to the reasons he terminated the Claimant. I find that the Claimant's termination was not related to the alleged industrial accident in this case. Both Mr. Peralta and Ms. Davis provide a logical and reasonable explanation for the Claimant's termination from employment. Both Felix Peralta and Angela Davis detailed the manner in which the Claimant continued to misprice various packages of meat even though the Claimant received repeated instructions otherwise from her Employer.

13. In making this finding, I have taken into account the testimony of Angela Davis, the Claimant's immediate supervisor, indicating that she did not agree with Felix Peralta's decision, as an owner, to terminate the Claimant in this case. Nevertheless, Ms. Davis' opinion on this issue does not cause the undersigned to find that the Claimant was terminated as a result of the industrial

accident. I note that Ms. Davis, even though she did not agree with the decision to terminate the Claimant, did describe the Claimant's repetitive inability to price packages of meat as instructed by the Employer. I find that the Employer/Carrier has set forth substantial evidence demonstrating a reasonable and logical explanation for the Claimant's termination for failure to perform her work duties properly.

14. Consistent with this Court's rejection of the Claimant's testimony regarding the onset of acute neck and back pain on July 15, 2008, I note that the Claimant did not seek medical treatment as a result of the alleged July 15, 2008, accident until August 1, 2008, following the Claimant's termination from employment and following her denial of unemployment compensation benefits. However, I find that even absent the evidence in this case indicating the Claimant did not seek medical treatment as a result of the alleged industrial accident until following her termination from employment and following her denial of unemployment compensation benefits, the rulings in this case would be the same based upon the totality of remaining evidence in the Record.

15. I cannot find that the objective medical evidence and diagnostic test studies in this case support the Claimant's position that she sustained an accident with resulting injuries on July 15, 2008, while at work. Although I note the Claimant has presented medical evidence revealing the existence of a small protrusion in the cervical disc area and consistent medical opinions establishing that the Claimant has a low back and cervical soft tissue injury related to the alleged accident at work, I also note that it is not disputed that the Claimant sustained a prior injury to her neck and low back in an automobile accident. Additionally, I note the Claimant has been diagnosed with degenerative disc disease in the Claimant's cervical and low back areas as revealed on the CT tests preformed on August 1, 2008. Because the diagnostic studies and medical evidence revealed the

presence of preexisting cervical and lumbar disease in precisely in the same area of the body which was allegedly injured on July 15, 2008, and precisely in the same area of the body which was injured in the prior automobile accident, I cannot find that the objective medical evidence and diagnostic test studies in this case supports the Claimant's position that she sustained an accident with resulting injuries at work on July 15, 2008. I find there is a lack of acceptable medical evidence in the Record to suggest a temporal relationship exists between the objective findings shown on the diagnostic studies and CT test, such as the small cervical disc protrusion at C2 – 3, and the alleged industrial accident.

16. Because I reject the Claimant's testimony with regard to whether or not an industrial accident actually did occur on July 15, 2008, I find that any medical opinion establishing causal relationship of a medical condition to the alleged date of accident is rejected as based upon an improper set of facts and improper hypothetical situation. I find the totality of circumstances in this case fail to demonstrate that the Claimant sustained even a temporary aggravation or exacerbation of her pre-existing problems in both her neck and low back areas. Further, I find that the totality of evidence in this case fails to establish that the Claimant's sustained any injury as the result of work activities performed on the date of accident.

17. More specifically, with regard to whether timely notice of accident was provided, I again find that the testimony of Felix Peralta was not successfully impeached or diminished by the Claimant. I accept Felix Peralta's testimony that he received no notice of an alleged industrial accident until the evening prior to the day he faxed the notice of injury to the Employer/Carrier. I find this line of testimony is consistent with the insurance adjuster's testimony and is consistent with the fact that the First Report of Injury or Illness is dated August 27, 2008. I accept the

Employer/Carrier's position that notice of the industrial accident was not provided to the Employer or Carrier in this case until the evening of August 26, 2008. I find this position is most consistent with the totality of evidence, including the testimony of Felix Peralta, Angela Davis, and the documentary evidence in the Record. Again, I find the testimony of Ms. Davis and Mr. Peralta is accepted based upon this Court's observation of the candor and demeanor of the witnesses while testifying live.

18. I find that the Claimant has failed to sustain her burden of prove, by a preponderance of evidence, that timely notice of accident was provided as required by Florida Workers' Compensation Law I find that the employer did not have actual notice of the injury within thirty days after the July 15, 2008, alleged date of accident. I also find that the cause of the alleged injury could be identified without a medical opinion within thirty days of the industrial accident. In making this finding, I note the Claimant's testimony that she was momentarily paralyzed and experienced a sudden episode of back and neck pain while performing repetitive heavy lifting activities. The Claimant described an acute onset of pain on the alleged date of accident. Further, I find that the Employer did, in fact, put his employees on notice of the requirements of Florida Statute §440.185. For reasons set forth in the contents of this Order, I accept the testimony of Felix Peralta over that of the Claimant with regard to the posting of the required Workers' Compensation notice pursuant to Florida Statute §440.055. I find that the Employer herein posted clear written notice in a conspicuous location at the job site, particularly next to the punch-in time clock. Additionally, I find that no exceptional circumstances exist in this case which would justify failure to advise the Employer within thirty days of the alleged date of accident.

19. I find that all arguments or issues not raised at the time of Hearing are considered waived.

WHEREFORE it is ORDERED and ADJUDGED as follows:

1. The claim for a determination of compensability of the alleged July 15, 2008, accident is **DENIED** with prejudice.

2. The Claimant has failed to provide timely notice of the alleged accident.

3. All requests for medical benefits, disability benefits, penalties, interest, costs, and attorney fees are **DENIED** with prejudice.

DONE AND MAILED this 14th day of August, 2009, in Daytona Beach, Volusia County, Florida.

Thomas G. Portuallo
Judge of Compensation Claims
Division of Administrative Hearings
Office of the Judges of Compensation Claims
Daytona Beach District Office
444 Seabreeze Boulevard, Suite 450
Daytona Beach, Florida 32118
(386)254-3734
www.jcc.state.fl.us

Jackolyn Ford
846 Derbyshire Road
Daytona Beach, Florida 32117

USIS
Post Office Box 616648
Orlando, Florida 32861

Placita Supermaket, Inc.
1110 Mason Avenue
Daytona Beach, Florida 32117

Keith C. Warnock
435 S. Ridgewood Ave.
Daytona Beach, Florida 32114
kc_kcwarnock@bellsouth.net

Michael S. Waranch, Esquire
Hurley, Rogner, Miller, Cox, Waranch & Westcott, P.A.
1560 Orange Avenue, Ste 500
Winter Park, Florida 32789
mwaranch@hrmcw.com