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

Rosa Albina Socorro, Employee/Claimant, vs. Southeast Personnel Leasing (Golden Corral of Punta Gorda,) Employer, and Packard Claims Administration, Inc.. Carrier/Servicing Agent.	)	OJCC Case No. 08-18332EDS Date of Accident: 3/12/2007

COMPENSATION ORDER

THIS CAUSE was heard by the undersigned in Fort Myers, Lee County, Florida on December 16, 2009 upon Claimant's claims for the worker's compensation benefits claimed in the Petitions for Benefits docketed on June 5, 2009 and December 15, 2009. A previous Compensation Order had been entered by the undersigned on May 4, 2009 as a result of a merit hearing on April 6, 2009. The Employer/ Carrier responded to the June 5, 2009 petition on June 11, 2009. The petition was mediated on September 22, 2009 and the parties submitted pretrial stipulations on October 9, 2009. On December 15, 2009, one day before the presently scheduled hearing, Claimant filed a Petition for Benefits which claimed entitlement to indemnity benefits both temporary total and temporary partial benefits from April 6, 2009 forward. The undersigned called attention to this late filed petition and the parties stipulated that the issues brought in that petition could be adjudicated at the December 16, 2009 hearing without the necessity of those issues being mediated. In effect the parties stipulated the issues raised in the December 15, 2009 Petition for Benefits could amend those listed in the pretrial stipulations previously filed by the parties. Due to the unusual nature of this procedure which allowed the addition of the indemnity issues to those set for trial, and the interaction of the instant issues and the previously entered Compensation Order, the parties were permitted to complete a post hearing memoranda regarding the effect of the prior Compensation Order on the present proceedings. These memoranda were submitted by the parties by close of business on

December 24, 2009, and the record was deemed closed at that time. The Employee was present at the hearing on December 16, 2009 and was represented by her attorney, Victor Arias, Esquire. The Employer/Servicing Agent was represented by Jonathon Cooley, Esquire.

The claims specifically remaining for final hearing were:

1. Temporary total or partial disability from April 6, 2009 to date and continuing.
2. Authorization of a neurologist as recommend by authorized physician Dr. Islam.
3. Authorization of continued treatment by Lee Convenient Care.
4. Penalties, interest, costs, and attorney's fees.

These matters were defended by the Employer/Carrier on these arguments:

1. The industrial accident is not the major contributing cause of claimant's alleged need for treatment.
2. No further medical care is reasonable or medically necessary.
3. Claimant has reached overall maximum medical improvement with a 0% impairment rating.
4. Claim is barred by Res Judicata.
5. No penalties, interest, costs, or attorney's fees are due and owing.

The parties submitted the claim for hearing upon the following record:

COURT EXHIBITS

1. Composite of Petitions for Benefits, Notice of Final Hearing, Pretrial Stipulation, and Order Approving Pretrial Stipulation and Notice of Final Hearing.

EMPLOYEE EXHIBITS

1. Deposition of Dr. Saiful Islam, M.D. completed on December 2, 2009.
   Claimant's Trial Memorandum and Amended Trial Memorandum received as argument only.

EMPLOYER/CARRIER EXHIBITS

1. Deposition of Dr. Lance Kreplick, M.D. dated April 1, 2009.
   Employer/Carrier's Trial Memorandum and Memorandum of Law, received as argument only.

The Employee appeared and testified live 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, testimony of witnesses, stipulations, and exhibits and after careful consideration of the arguments of counsel, I make the following findings of fact:

1. The Claimant is presently a 38 year old Hispanic woman, born in Peru, who sustained a compensable injury on March 12, 2007 while employed at Golden Corral restaurant in Punta Gorda, Florida. (The Employer, Southeast Personnel Leasing, is the PEO that leased employees to Golden Corral). The injury occurred when Claimant bent at her waist and attempted to remove a tray of approximately a dozen chickens from a food cart. She reported an immediate onset of low back pain. She began treatment for those complaints the next day March 13, 2007 at Company Care, an occupational health clinic associated with Fawcett Memorial Hospital in Charlotte County, Florida. She was treated at Company Care under the supervision of Dr. Lance Kreplick, M.D. from March 13 until released without restrictions on May 22, 2007, when Dr. Kreplick determined she had reached maximum medical improvement (MMI) from her injuries. She continued to work for the employer following MMI until she left her employment on June 18, 2008 following a dispute with the employer while at work. The undersigned found from the previous hearing that Claimant voluntarily walked out of her job on that date. Her testimony at the present hearing is that she has not worked since that date.

2 The undersigned at the previous hearing also accepted the assessment of Dr. Kreplick over Claimant's IME, Dr. Liebowitz, who had examined Claimant on March 24, 2009 only a few days before the previous hearing date, and found that Claimant sustained a lumbar strain in the

industrial accident and reached MMI for that condition on May 22, 2007 without any physical restrictions. The undersigned found that Claimant voluntarily quit and left her employment in June 2008. The undersigned determined that Claimant did not present sufficient medical evidence to establish that her injuries were contributing in any way to her being unable to regain suitable gainful employment since June 18, 2008.

3. As is also reflected in the previous Order, the E/C agreed on the date of the hearing to allow Claimant a one time change of physicians from Dr. Kreplick to Lee Convenient Care. Ironically, Claimant first presented to Lee Convenient Care on April 6, 2009 or the same day as the previous hearing. She was first examined by Dr. Bernstein and subsequently on April 20, 2009 she saw Dr. Islam. Both physicians are associated with the Lee Convenient Care clinic. As a matter of law once the one time change of physicians was accomplished, Dr. Kreplick the previous authorized treating physician was de-authorized and Lee Convenient Care became authorized. Based on the records attached to Dr. Islam's deposition from December 2, 2009, the undersigned concludes that Dr. Islam reviewed the same MRI from April 2007 which had been seen by Dr. Kreplick regarding claimant's low back, and based solely on Claimant's complaint's of low back pain recommended that Claimant be evaluated for future care by a neurologist. Although the E/C in this matter has argued strongly that it is no longer obligated to provide the employee with this referral based upon the findings in the previous Order that Dr. Kreplick, the previously authorized physician, had found Claimant to have sustained a lumbar sprain in the industrial accident, and had reached a point of maximum medical improvement without restrictions in May 2007, the undersigned believes that the E/C must be bound by the stipulations made immediately before the previous hearing to allow Claimant to receive an evaluation and care from another authorized physician. The Claimant actually was initially evaluated by the new authorized physician on the day she testified at that previous hearing. The evidentiary record in that hearing was not closed until after the deposition of Dr. Liebowitz was taken and the transcript filed into the record, and both parties had submitted additional written closing arguments on or before April 24, 2009. As the evidence admitted into the record of this hearing indicates, Dr. Islam evaluated the Claimant on April 20, 2009 and made his recommendation for the neurological referral for care in a DWC-25 issued to the carrier on that same date. The Order from the April 6 hearing was not issued until May 4, 2009. Despite these circumstances, neither party sought to re-open the record of the previous hearing before that Order became final, even though the import and potential impact of this evidence on the issues being determined at that hearing should have been obvious to the parties. The undersigned believes it would be

inappropriate for either party to gain an advantage as a result of these procedures.

4. As stated above, the E/C is bound by the stipulation of a one time change of a treating physician made on April 6, 2009. On April 20, 2009, according to the DWC-25 completed on that date, the new authorized treating physician recommended that Claimant be referred to a neurologist for care. While there is no evidence of exactly when the E/C became aware of this recommendation by Dr. Islam, the records attached to his deposition indicate that he made that recommendation in the required DWC 25 dated April 20, 2009. The Claimant filed her Petition for Benefits which attached this record into the docket on June 5, 2009. The E/C did not file a response until June 11, 2009. The undersigned finds that this issue is controlled by the provisions of § 440.13 (3)(d) F.S. and that the E/C's response made on June 11, 2009 was not timely. The evidence supports an inference that the E/C was likely aware of this recommendation before the date the Petition was filed on June 5, 2009 by virtue of the April 20, 2009 DWC-25. The E/C cannot avoid its responsibilities to provide medical care to the Claimant based on the technical arguments made in this case. The E/C should provide the Claimant with the requested neurological evaluation and care as necessary as requested by the treating physician.

5. The Claimant filed her petition requesting temporary total disability and/or temporary partial disability from April 6, 2009 forward on December 15, 2009 or one day before the present hearing. Because the claim is not for the exact same calendar period as adjudicated at the hearing on April 6, 2009, the undersigned rejects the argument of the E/C that Res Judicata controls. It is true however that the determination that Claimant was at MMI from her work related injuries as of May 22, 2007 as determined in the May 4, 2009 Compensation Order applies to this issue, unless the evidence presented herein is sufficient to modify that conclusion[1]. The undersigned concludes that the evidence from Dr. Isalm does not support a finding that there has been any change in the Claimant's medical condition from the state that her condition was in on April 6, 2009. A review of the Compensation Order dated May 4, 2009 indicates that the undersigned did not accept the conclusions of claimant's own IME Dr. Liebowitz, a specialist, who had examined Claimant only two weeks before the hearing on April 6, 2009 because Dr. Liebowitz could not express an opinion within reasonable medical certainty as to whether the physical complaints the

[1] Even though the Claimant's petitions are not per se couched in terms of seeking a modification of the findings of the previous Order, the provisions of § 440.28 F.S constrain the undersigned to consider the medical evidence submitted herein to determine if there has been a change in the condition of the claimant sufficient to merit a modification of the finding of MMI.

Claimant exhibited in his examination were causally related to the industrial accident which had occurred two years before the date of his evaluation. When Claimant saw Dr. Bernstein at Lee Convenient Care on April 6, 2009, she complained of both neck and low back pain which complaints were attributed by Claimant's history alone to the industrial accident in 2007 by the physician. He ordered and obtained an MRI of the cervical spine which was objectively normal in its interpretation. When she saw Dr. Islam on April 20, 2009, Claimant no longer complained of neck pain and Dr. Islam again noted a complaint of low back pain, again attributed by history supplied by the Claimant to the industrial accident. Dr. Islam in his deposition, and in the records attached to that deposition, apparently relied on the interpretation of an MRI completed on April 19, 2007 on request of Dr. Kreplick the previously authorized treating physician, for his present diagnosis of disc bulges, which was nothing more than a reiteration of the conclusions of the radiologist in the MRI report dated April 19, 2007. It was also clear from Dr. Islam's deposition that he was not aware of the records or opinions of Dr. Kreplick or Dr. Liebowitz when he testified on December 2, 2009. Consequently, Dr. Islam did not testify about differences in Claimant's condition nor was he asked to testify on that issue by the Claimant. Dr. Islam's opinions were based strictly on the 2007 MRI findings and the assertion made by the Claimant that she had low back complaints continuously from the date of accident. The undersigned cannot accept the conclusion of Dr. Islam that the state of Claimant's physical presentation when he evaluated her on April 20, 2009 was related to an accident that occurred in excess of two years previously when it was clear from his deposition that he was grossly uninformed about the date and circumstances of the accident and the medical evaluations and treatment provided to claimant subsequent to that accident.. There is, in short, nothing in the records admitted into evidence from Lee Convenient Care or the deposition of Dr. Islam that would support a finding of any change in Claimant's condition as it existed on April 6, 2009. Therefore, there is no objective evidentiary basis for a modification of the findings made in the May 4, 2009 Compensation Order as to the nature of the injuries sustained by the claimant in the industrial accident and the date of maximum medical improvement.

6. Claimant did not present any evidence that would support a finding that she was totally disabled before or after April 6, 2009. Therefore, she is not entitled to any total disability benefits and will not be so entitled until she presents competent substantial medical evidence that her injuries which were received in the industrial accident on March 12, 2007 have rendered her unable to work.

Her testimony at the December 16, hearing was that she was not working but had made

some efforts to obtain work. The testimony presented at this hearing regarding Claimant's efforts to find work subsequent to leaving her job in June 2008 mimicked the testimony presented at the April 6 hearing. As at that hearing, the testimony lacked quality and quantity. Even if the undersigned concluded, based on Dr. Islam's testimony, that Claimant's condition had changed, and that she was limited to light duty work only, Claimant's testimony concerning her efforts to obtain suitable gainful employment is inadequate to demonstrate a good faith effort to return to work. As such Claimant was unable to meet her burden of proof that she is entitled to temporary partial disability benefits from April 6, 2009 forward.

Wherefore, on the basis of the foregoing it is Ordered and Adjudged:

1. The claims for temporary total disability and/or temporary partial disability from April 6, 2009 forward to the date of the hearing are denied and dismissed with prejudice

2. The Employer/Carrier shall authorize an evaluation and treatment as necessary for the Claimant with a neurologist as recommended by Dr. Islam.

3. The Claimant's attorney is entitled to a reasonable attorney's fee and costs in connection with the award in this Order, and jurisdiction is reserved for purposes of a determination of the amounts.

DONE AND ENTERED in chambers, Fort Myers, Lee County, Florida.

E. Douglas Spangler, Jr.
Judge of Compensation Claims

I certify that a true copy of the foregoing Order was served by mail on all parties and counsel of record this 13 day of Jan., 2010.

Karl Hayes
District Deputy Clerk