

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF JUDGE OF COMPENSATION CLAIMS
PORT SAINT LUCIE DISTRICT

EMPLOYEE:

Darline Sena
2574 Southeast Burton Street
Port Saint Lucie, Florida 34952

ATTORNEY FOR EMPLOYEE:

Unrepresented

EMPLOYER:

Parkway Health & Rehabilitation
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Stuart, Florida 34994

ATTORNEY FOR EMPLOYER/CARRIER:

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CARRIER:

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Bradenton, Florida 34208

JUDGE: Robert D. McAliley
OJCC#: 10-018627RDM
VENUE: Martin County
D/A: 6/21/2010

ORDER ON THE MERITS

Claimant, representing herself in these proceedings, slipped and fell on the job resulting causing pain primarily in her low back and left hip. I find the evidence insufficient to award claimant further medical care as sought in these proceedings.

Because the employer/carrier's (E/C) affirmative defenses would preclude any further workers' compensation benefits, they are also addressed in this order.

I find E/C does not meet its burden of proving the *Martin Company v. Carpenter* defense is applicable nor that claimant is barred from receiving further benefits due to falsehoods allegedly made to carrier personnel or healthcare providers.

These conclusions are further explained below.

JURISDICTION AND NOTICE

The parties agree, and I find, the Judge of Compensation Claims (JCC) has jurisdiction over the parties and subject matter. The parties were properly notified of the merits hearing.

STIPULATIONS

Claimant had a compensable industrial accident on the date indicated; there was an employer/employee relationship; workers' compensation insurance coverage applies; all issues pertaining to attorney's fees and costs may be reserved for subsequent hearing.

PETITIONS FOR BENEFITS

This order disposes of the only pending Petition for Benefits (PFB), which was filed February 15, 2011, except to the extent indicated.

CLAIMS AND DEFENSES

Claimant seeks continuing medical care specifically requesting Dr. Haas or Dr. Wosk, together with costs of litigation. The claim for penalties and interest was stricken

by a pretrial order entered May 11, 2011, inasmuch as no indemnity benefits are at issue.

E/C replies that claimant fails to present competent and substantial evidence that further medical care is warranted.

As an affirmative defense E/C asserts claimant falsely represented her prior disabilities or compensation from prior disability, impairment, anomaly or disease and that the employer detrimentally relied on that misrepresentation. Accordingly, claimant is in violation of Section 440.15(5)(a), *Florida Statutes* (2010)(hereinafter, *Martin Company v. Carpenter* defense).

E/C further maintains claimant violated section 440.105(4) in that she made false representations during the course of her medical treatment and communications with the carrier so as to be disqualified from receiving benefits pursuant to section 440.09(4)(hereinafter, statutory misconduct).

JUDICIAL NOTICE

On prior motion of E/C, I take judicial notice of prior claims having been filed with the Office of Judges of Compensation Claims (OJCC).

These include claims filed August 29, 2004, and November 2, 2004, which predate the present electronic record keeping system. Hence, these are identified by case number and date

only. According to the testimony one accident occurred at Ruby Tuesday causing an elbow injury.

A claim was made for an accident occurring April 1, 2005, identified as case number 05-014605RDM, in which claimant was allegedly kicked in the chest by a nursing home patient. Of interest is the adjuster in that case, Shaun Hackelberg, is the adjuster in the present case and testified in these proceedings. The case was eventually settled pursuant to section 440.20(11)(c)(hereinafter, "washout").

Case number 06-013151RDM involves an industrial accident allegedly occurring October 14, 2005, in which claimant was kicked in the groin by a nursing home patient. This case was washed out on December 18, 2006.

Case number 07-007366RDM involves a claim for injury due to an industrial accident occurring September 16, 2006. Again, claimant was accosted by a patient. She claims to have fallen backwards injuring the head, neck, back and shoulder. OJCC records indicate claimant received treatment from an orthopedic surgeon. A mediation agreement authorizes an evaluation by a neurologist. This case was also concluded by a washout settlement.

The workers' compensation claim immediately preceding the present case is identified as OJCC case number 07-033456RDM pertaining to an accident occurring April 6, 2007. In her

initial PFB, claimant contends she felt pain in her low back and abdomen resulting from lifting a patient and prompting a miscarriage. One of the PFBs in that matter seeks an orthopedic evaluation. The claim was controverted in its entirety. The case was concluded on June 17, 2008, again by a washout.

Claimant admits to sustaining injuries of some nature in an automobile accident. There is no evidence regarding any associated litigation.

BACKGROUND

Claimant is a 38 year old Haitian national who immigrated to the United States in 2000 and is a U.S. citizen. She is married and has seven children. Claimant obtained a certified nursing assistant certificate in 2004.

As indicated above, claimant worked at multiple nursing homes since that time. It appears she began employment with Parkway Health & Rehabilitation Center in late 2007, although the exact date is uncertain.

Subsequent to her employment with Parkway, claimant completed health background forms on multiple dates. The reason for doing so on multiple occasions is unexplained. In each instance, claimant gives a "No" indication to the question "Have you ever had back surgery or treatment."

The human resource director is asked, "If Ms. Sena's responses to those forms had been correct and true, would you

have possibly placed her in a different position?" To which the witness answered "Yes."

Claimant contends her English skills are quite limited. Although unexplained in these proceedings, claimant's personnel records contain written quizzes that may very well have been completed by claimant utilizing reasonably good English grammar. Some documents, however, were filled out in a more grammatically correct fashion in a different hand.

Claimant presented her testimony through an interpreter. On one occasion, she responded promptly and logically to a question using excellent English. I suspect her English ability is considerably better than claimant indicates as would be consistent with someone who has worked as a CNA for seven years in the United States dealing with largely English speaking patients and supervisors.

THE INDUSTRIAL ACCIDENT

Claimant contends she slipped and fell as a result of stepping on lotion that had spilled onto the floor. She landed on her buttocks and left side claiming to have injured her left hip, low back and, to a lesser extent, her neck.

MEDICAL CARE

Claimant was taken by ambulance to a local emergency room. Subsequently, treatment was authorized with George J. Haas, M.D., known to me as a board certified orthopedic surgeon.

Claimant is subsequently treated by John S. Hruska, M.D., also a board certified orthopedic surgeon. The reason for the change of physicians is unclear. The questioning indicates claimant, or at least her husband, had some type of verbal altercation with Dr. Haas prompting him to refuse further treatment.

In response to the present PFB, Ms. Hackelberg files a reply indicating claimant was scheduled to see Dr. Hruska for evaluation to determine if she had sustained an injury to her low back as a result of the industrial accident.

Although vague, claimant testifies Dr. Haas made the referral to Dr. Hruska in the due course of treatment.

MEDICAL EVIDENCE

No medical documents of any nature are placed in evidence except the deposition of Dr. Hruska and its attachments. Dr. Haas' records are not in evidence. Neither are those of the emergency facility treating claimant.

Likewise, no party places any medical records in evidence which predate June 2010. Although there were several indications indicated above of claimant either seeing or requesting to be seen by an orthopedic surgeon, there is no clear documentation as to the nature of claimant's prior orthopedic problems.

Claimant initially presents to Dr. Hruska on August 20, 2010. Claimant contends she was in so much physical distress that her husband had to complete a "Health History Questionnaire." The form indicates the reason for claimant's visit was "hip and back pain." The "No" box is checked in response to the query "Have you previously been treated for this problem." I accept claimant's testimony that she did not complete the form based on the manner in which dates are indicated (Compare "6/21/10" to "8-20-10").

Another document entitled "Injury Questionnaire" was completed by a third party. This form does not make reference to claimant's health history.

Dr. Hruska himself is asked if claimant described any history of prior injuries. When queried if he asked about prior injuries, the doctor responds, "It's documented in our notes that she had no previous history." In effect, Dr. Hruska either sidesteps the question or, at best, his answer is uncertain. Suffice it to say there is no note in the records completed by personnel at Dr. Hruska's office commenting on claimant's medical history.

Dr. Hruska testifies that given his diagnosis and the treatment provided that she does not require any further medical care. This is the only medical testimony whatsoever bearing on the claims in the PFB at issue.

ANALYSIS

There is no objective medical evidence supporting the claim for further medical care to claimant's left hip or low back as a consequence of the industrial accident. Claimant's testimony alone is insufficient. *See, § 440.09(1), Fla. Stat. (2010).*

Claimant does not present any other vehicle for allowing an additional evaluation such as contending entitlement to a one time change of physicians. Moreover, the possibility exists that Dr. Hruska was the one time change of physicians.

Even if permitted to do so, I am not inclined to give claimant the benefit of any doubt given her questionable veracity.

Although the foregoing finding is conclusive of the claim before me, since either affirmative defense, if successful, would preclude any further possibility of claimant obtaining benefits, I will address these issues.

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I do not believe claimant's testimony that she did not understand the questions asked on multiple occasions as to her prior health. I do not believe she confused "injury" with "surgery" as claimed in these proceedings.

The statute, however, requires that claimant falsely represent herself "...as not having previously been disabled or

compensated because of such previous disability..."

§ 440.15(5)(a), *Fla. Stat.* (2010)

The present record does not provide an evidentiary basis for determining whether claimant had been either previously disabled or compensated for a low back injury. I decline to guess.

Moreover, the human resource director's testimony that she would have "possibly placed" claimant in a different position is insufficient to show detrimental reliance particularly when claimant's accident was a slip and fall that could have occurred regardless of the assigned position.

Consequently, I find E/C fails to meet its burden of proof that the *Martin Company v. Carpenter* defense is applicable.

STATUTORY FRAUD

There are two basic episodes forming the basis of this affirmative defense. E/C contends claimant lied to the carrier's field representative, name and position unknown, regarding her prior medical history. Evidence of this contention is presented through the claims adjuster, Ms. Hackelberg.

The problematical aspect of this testimony (and cases involving unrepresented claimants in general) is claimant's lack of sophistication at making an objection that would have surely been sustained.

Although under the circumstances I might be permitted to accept this testimony, I decline to do so. There is no explanation in these proceedings why the person hearing the allegedly false statement could not testify nor are any investigation notes placed in evidence. The medical reports, as discussed above, are quite scanty.

The second basis for the statutory fraud defense is claimant's alleged conduct upon presenting to Dr. Hruska. Again, I have substantial doubt as to what it was, precisely, claimant did report to this physician or his staff.

Moreover, I find claimant's industrial accident history and repeated washout settlements, however tempting, may not be the basis for assessing claimant's credibility. Certainly claimant is quite unlucky when on the job.

In the final analysis, I make a determination based on E/C having the burden of proving statutory fraud by competent and substantial evidence. I find E/C has failed to do so.

It bears emphasizing this an exercise in weighing the evidence and in no way suggests approval of what plainly appears to be a lack of forthrightness exhibited by claimant in these proceedings and in her relations with her employer.

CONCLUSION

BASED ON the foregoing determinations it is
ORDERED AND ADJUDGED as follows:

a. The claim for further medical care as a result of claimant's accident of June 21, 2010, is denied and dismissed.

b. The affirmative defense that claimant is in violation of Section 440.15(5)(a), *Florida Statutes* (2010), so as to be barred from receiving further workers' compensation benefits is denied.

c. The defense that claimant violated section 440.105(4)(b) so as to be precluded from receiving workers' compensation benefits pursuant to section 440.09(4)(a) is denied.

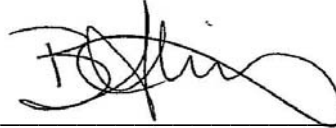
d. Jurisdiction is retained to determine all issues pertaining to attorney's fees and costs which survive the foregoing findings.

DONE AND ORDERED in chambers, in Port Saint Lucie, Saint Lucie County, Florida, this 29th day of July, 2011.



Robert D. McAliley
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I HEREBY certify that a true and correct copy of the foregoing has been mailed via U.S. Mail to all of the parties and e-mailed to the attorneys listed on this 29th day of July, 2011.

A handwritten signature in black ink, appearing to be "T. J. [unclear]", written over a horizontal line.

Assistant to the Judge