

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGES OF COMPENSATION CLAIMS
SEBASTIAN/MELBOURNE DISTRICT OFFICE

Deborah L. Taylor,)	
Employee/Claimant,)	
)	
vs.)	
)	OJCC Case No. 12-018347DSR
Alphastaff, Inc./Tower Group Companies,)	
Employer/ Carrier/ Servicing Agent.)	Accident date: 5/18/2012

FINAL COMPENSATION ORDER

This cause was heard before the undersigned at Sebastian, Indian River County, Florida on February 1, 2013, upon the Claimant's claims for compensability of the cervical condition and authorization of medical care; costs and attorney's fees. The Petitions for Benefits were filed on August 9, 2012, and September 20, 2012. Mediation occurred on December 6, 2012, and the parties' pretrial compliance questionnaire was filed on November 20, 2012. Dennis D. Smejkal, Esq., was present on behalf of the Claimant. Paul Luger, Esq., and Julie Bixler, Esq., were present on behalf of the Employer/Carrier.

The defenses were the cervical spine care is denied as it was not a compensable body part injured on date of accident; major contributing cause; that no costs or attorney's fees were due or owing.

The following documentary items were received into evidence:

1. Pretrial Stipulation Sheet and Order dated November 20, 2012, together with the documentary items required by Rule 9.180 (Judge's Exhibit #1).
2. Deposition of Deborah Taylor taken on October 5, 2012 (Joint Exhibit #1).
3. Deposition of Richard Smith, M.D., taken on January 25, 2013 (Claimant's Exhibit #1).

4. Exhibits to Deposition of Dr. Richard Smith filed on January 29, 2013
(Claimant's Exhibit#2).
5. Deposition of Melissa Knight taken on October 2, 2012 (Claimant's Exhibit #3).
6. Deposition of Kenneth C. Sands, M.D., taken on January 27, 2013 (Claimant's Exhibit #4).
7. Exhibits to Deposition of Dr. Kenneth C. Sands filed on January 28, 2013
(Claimant's Exhibit #5).
8. Deposition of Jonathan Paine, M.D., taken on January 25, 2013 (Claimant's Exhibit #6).
9. Deposition of Johnny Benjamin, M.D., taken on January 30, 2013
(Employer/Carrier's Exhibit #1).
10. Deposition of Julie Askew taken on January 29, 2013 (Employer/Carrier's Exhibit #2).
11. Deposition of Lisa Sabattini taken on January 29, 2013 (Employer/Carrier's Exhibit #3).
12. Deposition of Susan Duffy taken on January 24, 2013 (Employer/Carrier's Exhibit #4).
13. Patient History form from Dr. Johnny Benjamin's office dated January 13, 2013
(Employer/Carrier's Exhibit #5).
14. Composite of forms (Employer/Carrier's Exhibit #6).
15. Intake form from Dr. Kenneth Sand's office (Employer/Carrier's Exhibit #7).

At the hearing, the Claimant, Deborah Taylor, appeared and testified before me. 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 witness' testimony

and may not refer to each piece of documentary evidence, I have attempted to resolve all of the conflicts in the testimony and evidence. Based on the foregoing and the applicable law, I make the following findings:

1. The items to which the parties were in agreement on the Pretrial Stipulation Sheet are accepted and adopted as findings of fact.

2. The parties stipulated that the Claimant suffered an industrial accident arising out of and in the course and scope of her employment on May 18, 2012, and suffered injuries to her back and leg. The Claimant was also asserting injuries to her cervical spine which have not been accepted as compensable.

3. The parties stipulated that average weekly wage and maximum medical improvement were not issues for determination at the hearing.

4. The parties stipulated that the claim is not governed by a managed care arrangement.

5. The Claimant agreed that the issues contained in Petition for Benefits filed August 9, 2012, had been resolved and that Petition could be closed.

6. The Claimant, is a 44 year old (DOB: 8/31/68) female who was hired at TimeSaver Food Stores on February 22, 2012, and was working as an Assistant Store Manager on May 18, 2012, when she had a work accident. She was stocking the store's walk in cooler standing on a step-stool. When she stepped off of the step-stool, she lost her balance, and landed on her right foot and leg. The Claimant testified that she actually fell onto the stool landing in a seated position on her rear-end. The Claimant completed the remainder of her shift on May 18, 2012, but after she went to Wuesthoff Medical Center with complaints of lower back, hip, and leg pain.

7. The Claimant was diagnosed with back pain and sciatica and referred to Space

Coast Orthopedic for follow up care. The Employer/Carrier was unable to get an appointment for the Claimant at Space Coast Orthopedic due to some prior bills of the Claimant. The adjuster, Julie Askew, testified that she was attempting to find an alternate orthopedic, but it does not appear that she communicated this to the Claimant.

8. The Claimant returned to work at TimeSaver, but again presented to Wuesthoff Medical Center on June 1, 2012, with complaints of right buttock, low back pain into the right thigh/groin area. X-Rays of her lumbar region were taken and the impression was L5-S1 discogenic disease. X-Rays of her hip did not show fractures or dislocation. She was again discharged to follow up with an orthopedic specialist.

9. The Claimant continued to work at TimeSaver, and subsequently returned to Wuesthoff Medical Center on July 2, 2012, with ongoing complaints of lower back, leg, and hip pain. All of these visits were authorized and paid for by the Employer/Carrier.

10. The Claimant testified that she began to notice numbness and tingling in her arms and hands approximately May 31, 2012, and that she discussed these problems with the physicians at Wuesthoff on June 1, 2012 and July 2, 2012. There is no mention of any upper extremity symptoms or neck pain in the medical records for either of those visits. The Claimant's handwritten intake sheets for those visits also does not indicate any neck or upper body pain or complaints and no diagnostic testing was done of her upper body on either of those visits.

11. The Claimant first treated with an orthopedic physician, Dr. Kenneth Sands, on July 12, 2012, with complaints of low back and neck pain. This is the first medical record that documents complaints of neck pain.

12. Dr. Sands' office set the Claimant up for MRI's of the neck and lumbar spine. Dr. Sands' office subsequently called the adjuster, Lisa Sabbatini, to apologize for setting the

Claimant up for MRI of the neck because it was not an authorized body part. The Employer/Carrier did not pay for the cervical MRI.

13. Dr. Sands testified that he doesn't do spine surgery, that he treats hips and knees, and as such, he did not think that he was the appropriate physician to be treating the Claimant since she had very few complaints with her hip. Dr. Sands placed the Claimant on a no work status on July 12, 2012, until she could be seen by a neurosurgeon. The Claimant followed up with Dr. Sands through August 14, 2012, but she had not been seen by a neurosurgeon as of that time and she remained on a no work status. In fact, Dr. Sands confirmed this to the Employer/Carrier in a letter August 20, 2012. When the Claimant returned to Dr. Sands on October 25, 2012, she had been seen by Dr. Paine, a neurosurgeon, but he only saw her for her low back. Dr. Sands again referred the Claimant to a neurosurgeon for both her low back and her neck on October 25, 2012, and he released her to return to work light duty until she could be seen by a spine surgeon for her neck.

14. The Claimant worked for the Employer and on her own cleaning houses from the date of the accident until she saw Dr. Sands on July 12, 2012, and he took her out of work

15. The Claimant was evaluated by Dr. Jonathan Paine, a neurosurgeon, on October 3, 2012. Dr. Paine was only authorized to treat the Claimant's low back. After reviewing the MRI, Dr. Paine had the Claimant undergo testing to see if she had an infection in her spine, which she did not have. Dr. Paine diagnosed the Claimant with degenerative disk disease of the low back and did not feel that she was a surgical candidate. Dr. Paine recommended pain management for the Claimant and placed her at MMI from a neurosurgical standpoint as of October 3, 2012.

16. When the Claimant returned to Dr. Sands on October 25, 2012, he again indicated that he was not the appropriate physician to handle the Claimant's care and he again referred her

to a spine specialist to manage her ongoing care.

17. The Claimant was finally authorized to treat with a spine specialist, Dr. Johnny Benjamin, and she saw him on January 16, 2013. Dr. Benjamin was authorized to treat the Claimant's lumbar spine only, but he did perform an evaluation of the Claimant's cervical spine in light of ongoing cervical complaints. Dr. Benjamin did not find the Claimant to be a surgical candidate. He recommended physical therapy and treatment with a physiatrist for the Claimant's lumbar condition. Dr. Benjamin has addressed the Claimant's cervical complaints and opined that the work accident of May 18, 2012, was not the Major Contributing Cause (MCC) of her cervical condition and headaches.

18. Dr. Richard Smith performed an Independent Medical Examination (IME) on the Claimant on January 11, 2013. Dr. Smith testified that the cervical MRI showed a disk osteophyte at C5-6 that was impinging on the cord. As for the lumbar MRI it was Dr. Smith's opinion that the Claimant had bulging at L4-5 also with some thecal sac pressure. Dr. Smith testified that he felt the Claimant's May 18, 2012, accident was the Major Contributing Cause (MCC) of her cervical and lumbar complaints. Dr. Smith supported his opinion based on the lack of records demonstrating any prior neck complaints or other injury. Dr. Smith did not feel that the Claimant was at MMI and thought that she needed pain management and epidural injections and could be released to return to work light duty.

19. The Employer/Carrier has denied compensability of the Claimant's cervical condition. There is no competent and substantial evidence to support an award of compensability of, or treatment for the Claimant's cervical condition and/or headaches. There has been no medical evidence at all presented that the Claimant's headaches are related to her work accident of May 18, 2012. The Claimant's only evidence presented to support the claim for compensability of her cervical condition is the opinion of Dr. Smith. I do not accept the

opinion of Dr. Smith that the Claimant's work accident of May 18, 2012, is the Major Contributing Cause (MCC) of her cervical condition. Dr. Smith only saw the Claimant on one occasion. Dr. Smith reviewed the records from Wuesthoff Medical Center and noted that there were no documented complaints of neck pain made by the Claimant at any of the three visits. In fact, it wasn't until reviewing the intake sheet completed by the Claimant on July 7, 2012, at Dr. Sands' office that Dr. Smith was even able to testify that the Claimant "sort of" made complaints of neck pain when she referenced pain in her "lower shoulders." At this point, on July 7, 2012, fifty-one (51) days had passed since the Claimant's accident on May 18, 2012.

20. At her deposition the Claimant was unable to explain why there were no complaints of neck or arm problems at Wuesthoff hospital, asserting that she told them about those complaints. When confronted at the Final Hearing, with the intake sheets that she filled out herself, the Claimant testified that she does not read or write well and that is the reason that she did not include those complaints on the intake forms. The Claimant had no explanation why the medical records made no mention of numbness and tingling in her hands and arms when she specifically told the doctor about those complaints.

21. During Dr. Smith's deposition, he testified that he had no notation as to or knowledge of when the Claimant began to experience neck complaints in relation to her accident on May 18, 2012. Dr. Smith was asked to assume that the Claimant's neck pain did not begin until May 31, 2012. Assuming such to be the case, Dr. Smith testified that he was able, within a reasonable degree of medical certainty, to relate the Claimant's neck complaints to her May 18, 2012, work accident, "assuming that she did not have another injury or accident." He felt that it was not unusual for it to sometimes take two to three weeks to "sort themselves out" before someone would realize what complaints they really had. Dr. Smith was also asked if he would still be able to relate the Claimant's neck condition to the May 18, 2012, accident if it was found

as a factual matter that the Claimant's neck complaints did not arise until early July, 2012, and Dr. Smith testified that a delay that long would be a "little bit long for the delay," but he could still relate the cervical condition to the work accident at that point. Again, Dr. Smith's basis to support his opinion is that in the absence of records showing neck complaints prior to May 18, 2012, or evidence of another injury there would be no other way to explain the Claimant's neck condition.

22. Dr. Smith reviewed the cervical MRI film of the Claimant obtained on July 12, 2012, and identified the relevant finding to be a disc osteophyte complex impinging on the cord at the C5-6 level. Dr. Smith was asked if this relevant finding, which he felt to be responsible for the Claimant's neck pain and upper extremity symptoms, predated the May 18, 2012, work accident. He testified that the finding "might have" been present prior to the accident on May 18, 2012, but he was not able to one way or other tell. I find that Dr. Smith's opinion that the relevant findings at the C5-6 level would explain the Claimant's complaints, and his opinion that there was no way to tell if that finding existed prior to May 18, 2012, does not rise to the level of medical evidence to support an opinion of MCC.

23. Dr. Kenneth Sands, the Claimant's initial orthopedic physician, was asked if he felt the Claimant's symptoms, to include neck pain, were coming from her accident, and he testified that the only thing he could say with any certainty was that the symptoms she presented to his office with, based on her history, did not start until after the work accident. Dr. Sands testified that he was unable to give an opinion within a reasonable degree of medical certainty whether the Claimant's May 18, 2012, work accident was the MCC of her cervical complaints and need for medical care.

24. Dr. Jonathan Paine, the Claimant's authorized neurosurgeon saw her on October 3, 2012. He performed a physical, neurological, and musculoskeletal examination at that time

and all findings were normal. He also tested the Claimant's strength, tone and coordination in both the upper and lower extremities. These findings were also normal. Further, deep tendon reflexes in both the upper and lower extremities were tested in order to assess whether the Claimant was suffering from a neurological injury and the results again were normal. Dr. Paine was hesitant to provide an opinion on causation of the Claimant's cervical complaints because he did not evaluate her neck. Dr. Paine did however testify that assuming the Claimant's neck complaints did not arise until May 31, 2012, that he would not be able within a reasonable degree of medical certainty to state that the Claimant's work accident was the MCC of her cervical complaints. Dr. Paine was informed that the Claimant had been seen by spine specialist, Dr. Johnny Benjamin, who had in fact examined the Claimant's cervical spine. Dr. Paine testified that he would defer to the opinions provided by Dr. Benjamin as to whether the Claimant's May 18, 2012, work accident was the MCC of her cervical condition and need for treatment. With Dr. Paine, as with Dr. Sands, he ultimately deferred to the causation opinions of Dr. Benjamin as to the relatedness of the Claimant's cervical condition.

25. Dr. Johnny Benjamin is a board certified orthopedic physician and spine specialist. He is an authorized treating physician who first evaluated the Claimant on January 16, 2013. Dr. Benjamin was authorized to treat the Claimant's lumbar spine only, but at the time of the Claimant's visit, he performed a full examination of not only the lumbar spine, but also of the cervical spine. Dr. Benjamin performed an x-ray examination of the Claimant's cervical spine, obtaining six films and reviewing the Claimant's cervical MRI from July 12, 2012. Dr. Benjamin also had available (1) the Claimant's medical records from Wuesthoff Medical Center dated May 19, 2012, June 1, 2012, and July 2, 2012, (2) records from Dr. Sands, and (3) records from Dr. Paine. Dr. Benjamin recognized that the first documented complaint of neck pain after the Claimant's accident was not until her first visit to Dr. Sands on July 12, 2012. He also

acknowledged that the Claimant testified that her neck pain began on May 31, 2012, which is consistent with the information she directly provided to the doctor himself when she saw him.

26. The deposition of Dr. Benjamin was taken on January 30, 2012. Dr. Benjamin's diagnosis when he saw her was: low back pain, right greater than left lower extremity radiculopathy, L4-5 degenerative disk disease, increased signal at the L4 and L5 vertebral bodies; sacralization of the L5 vertebral body, lumbar facet arthropathy, C5-6 degenerative disk disease, left C5-6 neural foraminal stenosis secondary to disk/ osteophyte complex; overweight, NSAID abuse and smoker. Dr. Benjamin testified that the findings on the Claimant's July 12, 2012, cervical MRI pre-dated her May 18, 2012, work accident. He supported this opinion through the identification of a bony abnormality in the cervical spine which is consistent with a previously herniated disc. It is Dr. Benjamin's opinion that the bony abnormality of the cervical spine pre-dates the work accident because such an abnormality could not have formed from the accident on May 18, 2012, to when the MRI was obtained on July 12, 2012. Dr. Benjamin testified that the Claimant's May 18, 2012, work accident is not the MCC of her cervical condition or need for treatment. Dr. Benjamin disagreed with the opinions of Dr. Smith wherein he diagnosed the Claimant with disk osteophyte complex of the C5-6 level and pinching on the cord. Dr. Benjamin testified that there's no impingement on the cord.

27. I accept the opinions of Dr. Benjamin over the opinions of Dr. Smith. The opinions of Dr. Benjamin are supported by medical evidence as required by Fla. Stat. § 440.09(1)(2008). In furtherance of the opinion provided by Dr. Benjamin that the Claimant's cervical condition and need for treatment is not attributable to her May 18, 2012, work accident, he relied in part on the lack and delay of cervical complaints following her accident. Dr. Benjamin testified that the Claimant would have had an onset of cervical pain within seventy-two (72) hours of the accident if she had in fact sustained a cervical injury on May 18, 2012.

Accordingly, based on the medical records from Wuesthoff Medical Center dated May 19, 2012, June 1, 2012, and July 2, 2012, the Claimant's records from Dr. Sands which first document complaints of neck pain on July 12, 2012, a physical evaluation to the Claimant's cervical spine, and review of the Claimant's cervical MRI and x-rays, it is Dr. Benjamin's opinion that there would be no way within a reasonable degree of medical certainty to relate such complaints to the May 18, 2012, work accident.

28. Dr. Benjamin did not believe the Claimant was a surgical candidate for either her lumbar or cervical spine. Dr. Benjamin thought that the Claimant could benefit from additional care since she really hasn't had a great deal of care and recommended ongoing care with a physiatrist for her lumbar and cervical spine while still noting that the cervical injury was not related to the industrial accident.

29. Based on the totality of the evidence before me I find that the Claimant did not sustain a cervical injury as a result of her industrial accident on May 18, 2012. The claims for compensability of the cervical condition and treatment for same are hereby denied and dismissed.

30. Since the Claimant has not prevailed she is not entitled to reimbursement of the taxable costs of the proceedings and her attorney is not entitled to be paid a fee at the Employer/Carrier's expense.

WHEREFORE, it is hereby ORDERED and ADJUDGED that:

All pending claims are hereby denied and dismissed.

DONE AND ELECTRONICALLY SERVED ON COUNSEL this 15th day of February, 2013, in Sebastian, Indian River County, Florida.

Donna S. Remsnyder
Judge of Compensation Claims

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