

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

Tracey Peavy,)	
Employee/Claimant,)	
)	
vs.)	
)	OJCC Case No. 07-023663JEM
International House of Pancakes, Inc.,)	
Employer, and)	Accident date: 8/9/2007
)	
Zenith Insurance Company,)	
Carrier/Servicing Agent.)	
)	
Pat DiCesare, Esq., Attorney for the)	
Claimant)	
Robert J. Osburn, Jr., Esq., Attorney for the)	
Employer/Carrier)	

**ORDER ADDRESSING THE MERITS OF PETITIONS FOR BENEFITS FILED 8/23/07,
10/4/07, 10/8/07, 11/5/07, 1/8/08, AND 5/6/08**

After due notice to the parties, a hearing on this claim was held in Tampa, Hillsborough County, Florida. The Parties were represented by Counsel as indicated hereinabove.

Claim was made for the following:**

1. Compensation for temporary total (TTD) or temporary partial disability (TPD) from 12/27/07 (as amended at final hearing) to the present and continuing for the time and in the manner provided by law.

2. Authorization for home therapy, soft collar, back brace, lumbar bed wedge, and home cervical traction.

3. Authorization of a TENS unit and/or authorization of pain management and nerve blocks as recommended by Dr. Martinez.

4. Authorization for Mobic 15mg, Flexeril 5mg, and Topomax 25mg as requested by Dr. Martinez.

5. Such further medical treatment as the nature of the injury and the process of recovery requires, specifically, authorization of Dr. Jeanne McGregor as claimant's primary care provider. [This claim was the subject of an earlier petition which was voluntarily dismissed. The employer/carrier objected to the amendment of the claims to include this specific claim. The objection was sustained.]

6. Authorization of a psychiatrist. [This claim was voluntarily withdrawn at the outset of the proceedings.]

7. A reasonable attorney fee for the attorney for the Claimant.

8. Interest and penalties on all past due payments of compensation.

9. The cost of these proceedings.

****All other claims, raised by petition, were withdrawn or resolved prior to the commencement of the final hearing in this matter with the exception of claims for attorney's fees and costs at the expense of the employer/carrier.**

The claim was defended on the following grounds:

1. No TTD or TPD benefits are due and owing; claimant was paid appropriate benefits through 12/27/07.
2. The claimant has reached maximum medical improvement (MMI).
3. The claimant's lost wages are unrelated to the industrial accident.
4. The claimant has voluntarily limited her income.
5. Dr. Martinez' recommendations are not medically necessary, reasonable, or related to the industrial accident.
6. The industrial accident is no longer the major contributing cause of the claimant's lost wages or need for medical care and treatment.
7. The claimant is not entitled to benefits pursuant to sec. 440.09(4) F.S. for violation of sec. 440.105 F.S.
8. The employer/carrier seeks reimbursement for overpayments of benefits for TTD/TPD. [The employee/claimant objected to the defense on the grounds that it was not timely raised and was vague. The objection was sustained on the basis that the defense was vague and non-specific.]
9. The employer/carrier denies any liability to the claimant for the payment of penalties, interest, costs, or attorney's fees.
10. The employer/carrier seeks reimbursement for the costs of these proceedings.

The parties entered into the following stipulations:

1. The Judge of Compensation Claims has jurisdiction of the parties and the subject matter of this claim.

2. Venue properly lies in Hillsborough County, Florida.

3. Notice of hearing and notice of injury were properly given as required by the Workers' Compensation Law.

4. On 8/9/07 the Claimant was employed by the Employer herein at an average weekly wage of \$223.00 per week and on that date sustained an injury by accident arising out of and in the course of his employment.

At the trial of this cause, the following documents were admitted into evidence:

Judge's Exhibits:

1. Petition for Benefits (PFB) filed 8/23/07. [Withdrawn 11/6/07 by mediation settlement agreement.]

2. Response to PFB; prepared 8/29/07.

3. Petition for Benefits filed 10/4/07. [Petition withdrawn 11/1/07.]

4. PFB filed 10/8/07.[Withdrawn 11/6/07 following mediation.]

5. Response to PFB; prepared 10/10/07.

6. Response to PFB; prepared 10/10/07.

7. Notice of Voluntary Dismissal.

8. PFB filed 11/5/07.

9. Mediation Report dated 11/7/07 and Mediation Settlement Agreement.
10. Response to PFB; prepared 11/08/07.
11. PFB filed 1/8/08.
12. Response to PFB; prepared 1/7/08.
13. PFB filed 5/6/08.
14. Response to PFB; prepared 5/12/08.
15. Notice of Defense Under Section 440.105(4) and Section 440.09(4), Florida Statutes.
16. Pretrial Stipulations filed 5/21/08.
17. Amendment to Pre-Trial Stipulation filed 1/9/08.
18. Response to the Claimant's Amendment to Pre-Trial Stipulation.
19. Claimant's Trial Memorandum.
20. Employer/Carrier's Memorandum of Law.

Claimant's Exhibits:

1. Transcript of the deposition testimony of Robert Martinez, M.D. taken 5/5/08.
2. Supplemental Motion to Admit/Receive Medical Records.
3. 2nd Supplemental Motion to Admit/Receive Medical Records.
4. Letter Re: Appointment with Dr. Jeanne McGregor.
5. Transcript of the deposition testimony of Jennifer Brooks taken 7/14/08.
6. Employee Earnings Report Forms for the period 8/9/07 through 12/31/08.

Employer/Carrier Exhibits:

1. Transcript of the deposition testimony of Larry Fishman, M.D. taken 1/18/08.
2. Transcript of the deposition testimony of Arthur Forman, M.D. taken 7/14/08.
3. Transcript of the deposition testimony of Tracey peavey taken 10/24/07.
4. Supplemental Pretrial Stipulation dated 8/7/08.
5. Supplemental Notice of Defense Under Section 440.105(4) and Section 440.09(4) Florida Statute filed 2/1/08.

Joint Exhibits:

1. Medical Records from Lakeland Regional Medical Center.

After due consideration of this matter and after having the opportunity to review the documentary matters and having had the opportunity to observe the candor and demeanor of the witnesses who did appear and give live testimony before me, and having endeavored to resolve all conflicts of fact in the evidence presented herein, I do make the following findings of fact:

1. I have jurisdiction of the facts and the subject matter of this claim.
2. The stipulations as entered into by and between the parties are hereby adopted as findings of fact and incorporated herein by reference.
3. The claimant is a 42-year-old female. She had worked as a server at the International House of Pancakes on and off over the course of several years. Her most current period of

employment began a few months prior to the date she states she was injured, August 8, 2007. The claimant has testified that she was in a cooler preparing a salad for a customer and that as she went to exit the cooler she slipped, fell backward, and struck her head. She believes she was unconscious for an indeterminate period, though to one physician she suggested that she may have been unconscious for as much as 30 minutes. She stated that no one witnessed her accident nor was anyone aware of the accident until she was coming out of the cooler. She was told to sit down and the manager was summoned. Apparently the manager was upset about the accident and expressed some suspicion regarding the accident; nonetheless, the appropriate accident paperwork was completed. The employer made not effort to get the claimant medical. The claimant had her daughter drive her to Lakeland Regional Medical Center. Based upon the claimant's statement that she had suffered a loss of consciousness from a head injury the hospital admitted her to its intensive care unit for observation and testing. The claimant was complaining of headaches, as well as neck and back pain. After three and a half days of observation and testing the claimant was released from the hospital and was advised to follow up with a neurosurgeon.

4. The claimant was seen by neurosurgeon Larry Fishman, M.D. on August 29, 2007. She complained of numerous problems including low back pain, shoulder pain, neck pain, as well as problems with her vision. Dr. Fishman testified that he specifically asked claimant if she had any symptoms of back pain prior to the industrial accident. He testified that she had said no. As far as diagnosis, Dr. Fishman thought claimant may have sustained a soft-tissue injury for which he recommended some physical therapy. He could not understand, based upon his one-time evaluation

of the claimant and subsequent review of all of her diagnostic testing, why she would continue to have complaints.

5. On September 12, 2007 the claimant was seen by her medical expert, neurologist Robert Martinez, M.D. When she saw Dr. Martinez the claimant was complaining of headaches, neck, mid, and low back pain, left lower extremity pain with numbness, and insomnia. She was also displaying signs that caused Dr. Martinez to recommend that she have a psychiatric evaluation. According to the testimony of Dr. Martinez the claimant gave him a negative history for prior back problems. Also, with regard to her headaches, the claimant did tell Dr. Martinez that she had migraines in the past but that the headaches she was now having were different and in a different area.

6. The employer/carrier have offered evidence to rebut the representations the claimant made to the medical providers, and in her deposition, to the effect that she had never had prior back problems; that her headaches now were different than what she'd previously experienced; that her need for psychiatric care was related to the industrial accident.

7. a) It was the claimant's testimony on 10/24/2007 that she had no had injuries in the past that led her to seek medical treatment (Peavy dep. p.14). She denied ever having been seen at Lakeland Regional, prior to the industrial accident, for anything other than her migraine headaches (Peavy dep. P.18). She denied having any other injuries in the past involving her low back (Peavy dep. P. 21). She denied ever seeing any doctor in prior to the industrial accident for low back complaints (Peavy dep. P. 21).

b) The claimant described the headaches she would have before the industrial accident as being located in her eyes and up front in her skull. Now, she states, the headaches are right above her ears and they go back behind the ears and down into her neck.

c) As to her claim for psychiatric care, withdrawn at the time of the final hearing, the claimant represented that as a result of her industrial injury she had been evicted from her home. Although she freely admitted a long history of treatment for psychological problems her current need for care was attributed to her eviction, which she said occurred because she couldn't work after her accident (Peavy dep. P.45, 46). The claimant gave no history of pre-existing mental illness according to the 8/10/07 Lakeland Regional Medical Center psychological assessment.

8. A review of the claimant's medical records reveals that her medical history has been significantly misrepresented. The records and testimony reveal an individual who has clearly had a very difficult life and also one filled with many bad choices. Although the claimant denied at final hearing having been convicted of any felony involving dishonesty her earlier testimony and statements to medical providers make clear that she has been convicted and imprisoned for grand theft and dealing in stolen property. This misrepresentation may be ascribed to a misunderstanding at the outset of her cross examination. The others clearly cannot.

a) On July 26, 2007, just 14 days prior to her industrial accident, the claimant was seen at Lakeland Regional Medical Center with complaints of back pain. At that time x-ray studies were made of her lumbar spine. This fact was never revealed by the claimant until she

was seen by Dr. Forman on 7/14/08 well after she had become aware that it had been discovered by the employer/carrier.

b) As to her headaches, the records of Lakeland Regional Medical Center present a picture of the nature and location the headaches the claimant suffered from prior to the industrial accident; a picture that is contrary to that being portrayed by the claimant. In fact, the claimant's headaches prior to the industrial accident were of such a severity that they required multiple visits to the hospital, including three visits over a period of 8 days in early January 2007. On visits of 12/8/06, 1/12/07, 1/14/07, 1/20/07, and 4/19/07 the claimant's complaint presentation was identical to that which she now presents, her symptoms not being limited to pain in the eyes and front of the skull as she testified to in her deposition and at trial.

c) The facts reveal that eviction proceedings had been initiated by the claimant's landlord well before the date of her industrial accident. In fact, the Motion for Final Judgment for Possession was filed at 10:25 a.m. on August 9,, 2007, the date of the claimant's accident, and the Default Final Judgment for Possession was issued by the court the following day.

9. I conclude that the claimant made multiple misrepresentations in connection with her claims for benefits under the workers' compensation laws of the State of Florida. I conclude that the misrepresentations were intentional and were made for the express purpose of securing workers' compensation benefits. Having so concluded, it is the finding of the court that the claimant is not

entitled to compensation or benefits otherwise payable under Chapter 440.01 et seq. F.S.


IT IS, THEREFORE, ORDERED that the Employee's claims for benefits under the workers' compensation laws of the State of Florida, as raised by petitions, should be and are hereby denied and dismissed with prejudice.

The parties are herewith notified that the court file relating to the instant claim will be destroyed six (6) months from the date this order becomes final, if not appealed, or six (6) months after the date of mandate or other order of final disposition if appeal is taken

A party desirous of retaining any portion of the closed file must so notify this office not less than 30 days prior to the destruction date.

DONE AND ORDERED in chambers in Tampa, Hillsborough County, Florida.





Joseph Murphy
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THIS IS TO CERTIFY that the foregoing Merit Order was entered and that a copy was sent by U.S. Mail this 29th day of JANUARY 2009 to each of the following:

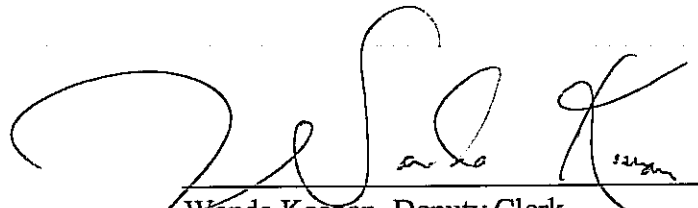
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