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

Karen Merger,
Employee/Claimant,

vs.

Spherion Staffing, LLC/Indemnity Insurance Co. of North America,
Employer/Carrier/Servicing Agent.
_____/

OJCC Case No. 17-006217MES

Accident date: 1/15/2017

Judge: Margaret E. Sojourner

AMENDED
(As to Certification Date Only)
FINAL COMPENSATION ORDER

This matter was heard at a Final Hearing before the undersigned in Orlando, Orange County, Florida on November 28, 2017. Present at the hearing were Claimant, Karen Merger and her attorney, Michael Clelland. Also present at the hearing were attorneys Rex Hurley and Robert Bowden on behalf of the Employer/Carrier (EC). Jurisdiction is reserved as to the Petition filed November 21, 2017 as it is not procedurally ripe.

Issues:

1. Temporary partial disability from January 15, 2017.
2. Temporary total disability from January 15, 2017.
3. Authorization of medical care and testing for claimant's finger injury.
4. Compensability of claimant's finger injury.

Defenses:

1. Not compensable.
2. Untimely notice.
3. No injury or accident on January 15, 2017.
4. No TT or TPD due to accident or injury.
5. Medical care not requested or authorized.
6. No penalties, interest, costs or attorney's fees are due.

At the hearing the following items were marked as exhibits:

Findings of Fact and Conclusions of Law

In making my findings of fact and conclusions of law in this claim, I have carefully considered

and weighed all of the testimony and evidence presented. I have resolved all of the conflicts in the testimony and documentary evidence. Based upon the foregoing, the evidence, and the applicable law, I make the following determinations:

1. I have jurisdiction over the parties and the subject matter of this claim.
2. Venue is in Lake County, Florida.
3. The stipulations of the parties are accepted and adopted by me as findings of fact.
4. The claimant alleges an injury which resulted in amputation of her fingertip. The EC has denied that claimant sustained an injury on the date of accident set forth and argues that claimant did not give timely notice of the injury. I find that claimant was injured on the job and did give timely notice of an injury for the reasons set forth below. I find that the claimant did not work on January 15, 2017 and could not have sustained an injury on that date. The remaining issue is whether or not there is sufficient evidence to support amendment of the date of accident without prejudice to the EC.[1] I find claimant has not established entitlement to temporary benefits, but is entitled to medical care and treatment.
5. The claimant was employed by Spherion, a staffing company, in August of 2016 and was placed at Artemis Plastic on January 12, 2017. The claimant's initial job consisted of reaching into a container of nails, placing the nails on a block and then pressing a plastic piece onto the nails so that the nails were inserted into slots on the plastic piece. The claimant testified that when she reached into the container of nails, the nails would go under her fingernail and pierce her skin. She testified that this happened on more than one date, that she complained of the pain to her co-workers and advised her supervisors of the issue. She said she was given tape to cover her fingers but that the tape did not help. She continued to work in this position until January 31, 2017 when this job came to an end. She returned to Spherion and was placed back with Artemis doing a different job on that same date. Her initial job was a first shift job and her new position was a second shift job. It was her testimony that she went to work for FedEx when her position changed and worked there for about three weeks. She left the job with FedEx due to the surgery to her finger as FedEx could not keep the position open. She testified that she had difficulty doing the job at FedEx as the boxes would come down a chute and slam into her hand causing pain in her injured finger. Her last day of work at Spherion was on February 26, 2017.
6. On February 27, 2017 the claimant went to the emergency room due to the pain in her finger and was diagnosed with gangrene. While there she sent a text message to Richard Dillman,

[1] This issue might have been avoided had the claimant moved to amend the petition but this was not done.

supervisor at Artemis, advising that she was having emergency surgery on her finger due to the infection caused by "those friggin nails." She underwent surgery to remove the gangrenous tissue. Unfortunately when claimant returned to her surgeon for a follow up visit it was determined that further surgery was required and the tip of the finger was removed.

7. According to Dillman he forwarded the text from claimant to his boss, Steve Peterson. He testified that he could not remember whether or not he gave claimant tape to use on her fingers. He said he did not remember her showing him her finger. Peterson testified that if the claimant had shown him her finger he would have used the first aid kit to clean it up and bandage the puncture, but he could not remember if he ever gave her tape to use on her fingers. He acknowledged that employees did use tape but said this was generally done when working with razor blades. He said that as soon as he received the text from Dillman he forwarded it on to Terri Otte at Spherion. Terri Otte testified that she wasn't able to reach the claimant until March 3, 2017 at which time she told the claimant to come in and fill out the necessary paperwork. Ms. Otte sent an accident report to Peterson who filled it out and returned it to her. Otte testified that claimant did not come in as instructed and sign the necessary paperwork.
8. The claimant bears the burden of establishing an accident and injury that occurred in the course and scope of employment. *Schafrath v. Marco Bay Resort, Ltd.*, 608 So.2d 97 (Fla. 1st DCA 1992). Claimant testified that she punctured her finger while working at the employer pulling nails from a box and pushing down on the piece of plastic. Dr. George White, claimant's IME physician, testified that the injury and subsequent infection sustained by claimant was consistent with the history of a puncture wound. The EC did not offer any evidence which establishes that the injury was caused by a different type of accident or occurred outside of the workplace. The EC suggested that perhaps the injury occurred while working at FedEx as boxes were "slamming" into claimant's finger but offered no evidence that a blunt force injury of this type could cause infection.
9. The claimant also has to provide notice of the injury within 30 days after the date of or initial manifestation of the injury. *Section 440.185, Florida Statutes (2016).* The EC argues that the claimant first gave notice on February 27, 2017 and that as this is more than 30 days from the accident date set forth on the petition it is not timely. I accept claimant's testimony that she advised her supervisors that her finger was being injured while grabbing the nails and that she was supplied with tape to prevent this from occurring. While Mr. Dillman and Mr. Peterson both denied knowing about any injury neither seemed to question claimant's text message

regarding the infection from the nails causing her need for surgery. Despite EC suggesting that the "nails" might refer to claimant's finger nails and not the hardware used, no witness testified to this understanding. In fact they immediately sent the email along the chain of command to Spherion as required for a work injury. Mr. Turner testified that he didn't know claimant had hurt her finger, he also testified that he didn't remember if he gave her tape. He said he didn't have access to the tape and would have to get it from a supervisor but he did could not remember if he had given her any. Mr. Dillman described claimant as a good employee and also said he did not remember whether or not he gave her tape to use. Mr. Peterson denied knowing about the injury but agreed that tape is used by the employees as well as gloves.

10. Even if the first notice was given on February 27, 2017 I find no prejudice to the EC in conforming the date of injury to the evidence presented. The claimant worked a total of 14 actual days in the position at issue. The employer was on notice of this injury within 43 calendar days of the listed injury date and was able to commence an investigation of the same. The EC knew when they deposed that claimant that she was approximating the date of accident and that she was claiming multiple punctures while working at the employer. Given the limited span of time worked in the position the EC should have had no difficulty investigating this incident. The EC could not point to any witness who was now unavailable, any investigation they were unable to pursue or any prejudice other than the fact that the entire defense was based upon the claimant not being at work on the day listed on the petition a fact the claimant did not contest.
11. Dr. White testified that the treatment provided to claimant by her PCP and at the hospital was reasonable and medically necessary. He testified that the cause of the need for the treatment was the puncture wounds which occurred at work. He noted that the information provided to the doctors who treated claimant was consistent with the information provided to him. He noted that there was no evidence of prior injury, infection or propensity for infection. He testified that claimant requires a revision amputation to smooth the bone and to trim the nerve fibers so that the end of the finger is not extremely sensitive. He opined that as she requires more treatment that she is not at MMI. However, if she chooses not to undergo the revision amputation she would then be at MMI.
12. I find that the claimant has not established entitlement to temporary benefits. *Section 440.12, Florida Statutes (2016)* states compensation is not allowed for the first 7 days of the injury unless the injury results in disability of more than 21 days. Claimant was in a no work status

while in the hospital but no evidence was offered as to how long the hospitalizations lasted. Dr. White was not asked nor did he say whether the claimant had any work restrictions as a result of the injury. Absent restrictions no TPD benefits are due. *Section 440.15 (4), Florida Statutes (2016).* As claimant has not established the time periods for which she was disabled benefits are not due and owing.

13. Claimant is entitled to ongoing medical care and treatment as she has established entitlement to the same through the testimony of Dr. White.
14. The claimant is entitled to attorney fees and costs at the expense of the EC for the obtaining of the above benefits.

Wherefore it is ordered and adjudged as follows:

1. The claims for temporary total and temporary partial benefits are denied.
2. The EC shall authorize a physician to provide appropriate care and treatment for the claimant's compensable injury.
3. The EC shall pay an attorney's fee and costs for the benefits obtained.
4. Jurisdiction is reserved to determine the amount of attorney's fees and costs in the event the parties are unable to resolve the same.

DONE AND SERVED this 12th day of December, 2017, in Orlando, Orange County, Florida.

Margaret E. Sojourner

Margaret E. Sojourner
Judge of Compensation Claims
Division of Administrative Hearings
Office of the Judges of Compensation Claims
Orlando District Office
400 West Robinson Street, Suite 608-North
Orlando, Florida 32801-1701
(407)245-0844
www.fljcc.org

COPIES FURNISHED:

Michael P. Clelland
mclelland@forthepeople.com,mhampton@forthepeople.com

Rex A. Hurley
rhurley@hrmcw.com,sperez@hrmcw.com

Judge's Exhibits:

1. PFB filed at docket number (DN) 1.
2. Response to PFB filed at DN 4.
3. Mediation conference report filed at DN 3.
4. Pretrial Stipulation filed at DN 4.
5. Claimant's Trial Memorandum filed at DN 5, for purposes of argument only.
6. EC's Trial Memorandum filed at DN 6, for purposes of argument only.

Joint Exhibits:

1. Transcript of the deposition of Terri Otte filed at DN 29.
2. Transcript of the deposition of Stephen Peterson filed at DN 27.
3. Transcript of the deposition of Richard Dillman filed at DN 28.

Claimant's Exhibits:

1. Deposition of Dr. George White filed at DN 32.

Employer/Carrier Exhibits:

1. Medical records of Dr. Lyon filed at DN 34 and 35.
2. Deposition of Thomas Turner filed at DN 38.
3. Deposition of Karen Merger filed at DN 31.
4. Composite of claimant's wage records and time sheets filed at DN 22.