

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

<b>MARGARET McCOLLUM,</b>	)	
	)	
Employee/Claimant	)	
	)	
vs.	)	OJCC Case No. 09-000934TWS
	)	
<b>ORANGE COUNTY BOARD OF COUNTY</b>	)	Accident date: 08/22/2008
<b>COMMISSIONERS</b>	)	
	)	
Employer	)	
	)	
and	)	
	)	
<b>ALTERNATIVE SERVICE CONCEPTS,</b>	)	
<b>INC.</b>	)	<b>Judge: Thomas W. Sculco</b>
	)	
Employer/Carrier	)	

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COMPENSATION ORDER

After proper notice to all parties, a hearing was held on this claim in Orlando, Orange County, Florida on February 24, 2010. Present at the hearing was Attorney Laurie Miles for the employee and Attorneys Rex Hurley and Kimberly De Arcangelis for the employer/carrier, hereinafter referred to as the E/C.

This order addresses the Petition(s) for Benefits filed with DOAH on April 22, 2009 and August 4, 2009.

At hearing the evidence consisted of the testimony of: Margaret McCollum; William Rivera; Major Richard Anderson.

**DOCUMENTARY EVIDENCE:**

- #1 Claimant's: Trial Memorandum
- #2 E/C's: Trial Memorandum w/attachments
- #3 Judges': Uniform Statewide Pretrial Stipulation  
August 17, 2009
- #4 Claimant's: Order/Medical Records of Authorized Provider  
September 29, 2009
- #5 E/C's: Medical Reports  
August 26, 2000
- #6 Claimant's: Deposition of Fabio F. Fiore, M.D.  
February 3, 2010
- #7 Claimant's: Deposition of Thomas F. Winters, Jr., M.D.  
February 17, 2010
- #8 Claimant's: Deposition of Daniel T. Layish, M.D.  
September 4, 2009
- #9 Claimant's: Deposition of Robert Rio  
February 4, 2010
- #10 Claimant's: Deposition of Yvette Bohannan  
February 2, 2010
- #11 Claimant's: Deposition of Sharon L. Houston  
February 4, 2010
- #12 Claimant's: Composite
- #13 E/C's: Deposition of G. Grady McBride, M.D.  
November 11, 2009
- #14 E/C's: Composite

- #15 E/C's: Deposition of Margaret McCollum  
June 29, 2009
- #16 E/C's: Deposition of Margaret McCollum  
July 29, 2009
- #17 E/C's: Deposition of Margaret McCollum  
November 2, 2009
- #18 Claimant's: Return to Work/School  
February 23, 2009
- #19 Claimant's; Disability Statement/Tom Winters, M.D.

After hearing all of the testimony and evidence presented, and after having resolved any and all conflicts therein, the undersigned Judge of Compensation Claims makes the following findings of fact and conclusions of law: The issues for determination, as narrowed by the parties at the final hearing, are claimant's claims for: 1-temporary partial disability (TPD) benefits from 1/23/09 to 11/13/09; 2-medical care and treatment for the lower back; 3-additional permanent impairment benefits based on a 4% permanent impairment rating; and 4-penalties, interest, costs, and attorneys' fees ("PICA").

The E/C raised the following defenses: 1-claimant terminated for misconduct so no TPD owed; 2-any loss of earnings not due to the industrial accident; 3-claimant refused suitable employment; 4-DWC-19's not timely returned; 5-compensable injury is not the major contributing cause of low back condition; 6-

impairment benefits properly paid based on 3% permanent impairment rating; and 7-no PICA owed.

The parties agreed that if TPD was found due and owing, the exact amounts owed would be handled administratively, except for the issue of whether claimant's short-term disability benefits should be offset against benefits owed. The parties also agreed that claimant's fringe benefits were terminated on 1/24/09, and that the E/C would adjust claimant's AWW accordingly effective 1/25/09. Jurisdiction is reserved to determine claimant's entitlement to and amount of attorneys' fees for this AWW adjustment, and for any past benefits allegedly secured.

## **FINDINGS, ANALYSIS, AND CONCLUSIONS**

### **I. BACKGROUND**

Claimant is a 52 year old woman who worked for Orange County since 1989 as an administrative assistant. On August 22, 2008, while walking into work on a rainy morning, claimant fell and injured her left ankle, left arm, right knee, and right leg in the parking lot. She initially treated at Centra Care, and was referred to Dr. McCleary, an orthopedic physician.

Dr. McCleary began treating claimant on September 9, 2008.

He diagnosed her with a right knee contusion and prescribed her a

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short walking boot, physical therapy, right knee brace, and injections to the right knee. Due to claimant's complaints of persistent right knee pain, Dr. McCleary ordered an MRI, which revealed osteoarthritis and possible tears. On 1/7/09 Dr. McCleary had claimant on restrictions of no climbing, kneeling, squatting, or twisting. On January 8, 2009, he placed claimant at maximum medical improvement ("MMI") with no impairment and no restrictions due to the work injury.

Claimant requested a surgical opinion, and Dr. Schwartzberg was authorized. He saw claimant on January 29, 2009 and indicated he did not feel there was significant tearing. He stated he believed that her right knee condition was due to preexisting osteoarthritis, and agreed with Dr. McCleary's assessment concerning MMI and full duty with zero impairment. He referred claimant for an evaluation for her back complaints.

Major Richard Anderson, claimant's direct supervisor, and William Rivera, HR manager, testified regarding claimant's job duties. Both testified that several accommodations had been made to claimant's job before the 8/22/08 injury. These included providing an claimant an air purifier, providing claimant's husband a "gate pass" so claimant would not need to walk as far going to and coming from work, and providing claimant with an assistant who helped claimant with things like going to and from the copier and moving things in the office. Both Major Anderson

and Mr. Rivera testified that claimant's job duties did not require her to climb, squat, or lift anything over 20 pounds.

Claimant continued to experience pain, and requested her one-time change in orthopedic physician, which led the carrier to authorize Dr. Thomas Winters. On February 23, 2009, Dr. Winters injected claimant's right knee, and indicated he would release her to work in a "sit-down" position as of March 2, 2009. (Dr. Winters deposition, at 8). In the 2/23/09 report, Dr. Winters stated:

It is a difficult problem with her large size. I feel she may have had some preexisting arthritic changes certainly, and she may have had some tearing of the cartilage noted from this injury. Thus, I would have her on some restrictions related to the work injury certainly.

Orange County terminated claimant from her employment on February 27, 2009. The termination notice specifically noted that Dr. Winters' restriction of "sit-down position", and claimant's request for a golf cart from the parking lot to the Booking and Release Center, were unreasonable requests. (Corrections Department Memo 2/27/2009).

On 3/30/09, Dr. Winters changed claimant's restrictions to lifting no more than twenty pounds, and limited squatting and climbing. He placed her at MMI on November 13, 2009 with a two to three percent permanent impairment rating. (Dr. Winters deposition, at 8-11). Dr. Winters testified that he believed the

accident caused the cartilage tears. He related the impairment rating and limited squatting and climbing restrictions to the cartilage tears, but related the twenty pound lifting restriction to claimant's preexisting condition.

The E/C eventually authorized a back evaluation by Dr. Grady McBride, which took place on March 5, 2009. Dr. McBride determined that the claimant suffered from degenerative disc disease, which was not related to the industrial accident. (Dr. McBride deposition, at 9). Claimant was also evaluated by her IME, Dr. Fabio Fiore, on August 25, 2009. Dr. Fiore diagnosed a medial meniscus tear of the right knee, which he related to the industrial accident, and he assigned a 4% impairment rating for the right knee. When asked about the relationship between the compensable injury and claimant's back complaints, Dr. Fiore stated:

...On the low back, the findings of degenerative changes were chronic, yet she had no history of back pain and was working up to the moment of the accident. So it could be that the current back pain may be attributed to the asymmetric gate, and she has also a stiff back because of previous degenerative changes, so it's hard to split that out. In either way, it's not something that would require direct treatment at this point. (Dr. Fiore deposition, at 11).

## **II. CLAIM FOR TREATMENT FOR LOW BACK**

Both Dr. Fiore and Dr. McBride indicated that claimant

suffered from preexisting degenerative changes to her back. Consequently, claimant is required to prove, by medical evidence only, that her compensable injury is the major contributing cause of her back problems. See Section 440.09(1)(b), Fla. Stat. (2008). The opinion of Dr. McBride is clear that claimant's compensable injury is not related at all, let alone the major contributing cause, of her back problems and symptoms. Dr. Fiore's opinion that: "it could be that the current back pain may be attributed to the asymmetric gate, and she has also a stiff back because of previous degenerative changes, so it's hard to split that out" simply does not establish the required causal connection to a reasonable degree of medical certainty, as required by the statute. See *Family Dollar Stores v. Henderson*, 718 So.2d 931 (Fla. 1<sup>st</sup> DCA 1998). Even if Dr. Fiore's opinion could be construed as being sufficient to satisfy claimant's burden of proving major contributing cause, I accept the unequivocal opinion of Dr. McBride as more logical and reasonable in this case. Consequently, claimant's claim for care and treatment for her low back is denied.

### **III. CLAIM FOR ADDITIONAL IMPAIRMENT BENEFITS**

The evidence establishes that the E/C has paid impairment benefits based on the 3% rating assigned by Dr. Winters. This

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issue is essentially a factual dispute between the authorized treating physician Dr. Winters, who assigned a 3% impairment rating to claimant's right knee, and claimant's IME physician, Dr. Fiore, who assigned a 4% rating. After considering all the evidence and argument presented, I accept the opinion of Dr. Winters as more reasonable under the circumstances of this case. Dr. Winters is more familiar with claimant's condition, and he is an orthopedic specialist in treating knee injuries. As such, claimant's claim for additional impairment benefits is denied.

#### **IV. CLAIM FOR TPD BENEFITS FROM 1/23/09 - 11/13/09**

##### **A. 1/23/09 - 2/23/09**

To be entitled to TPD benefits, claimant must establish that her physical limitations from the compensable injury preclude adequate performance of her pre-injury job. See *Interim Services v. Levy*, 843 So.2d 915 (Fla. 1<sup>st</sup> DCA 2003). Here, the evidence establishes that claimant was paid TTD benefits from 2/23/09 - 3/1/09, so she would not be entitled to an award of TPD benefits for that period. From 1/23/09 - 2/23/09, claimant had been released to work with no restrictions attributable to the compensable injury by Dr. McCleary. Even if Dr. McCleary's previous restrictions of no climbing, kneeling, squatting, or

twisting are considered, I find that these restrictions do not preclude claimant from performing her pre-injury position as administrative assistant. I accept as credible and truthful the testimony from Major Anderson and William Rivera regarding the physical demands of claimant's job, as well as their testimony regarding the pre-injury accommodations that were made as a result of claimant's preexisting medical issues. Based on all the evidence presented, I find that claimant has not established a causal connection between her compensable injury and her loss of wages between 1/23/09 and 2/23/09, and therefore that she is not entitled to TPD benefits for this period.

B. 3/2/09 - 3/30/09

Between 3/2/09 and 3/30/09, claimant was allowed to work by Dr. Winters in a "sit-down" position. It is clear from the 2/27/09 termination notice that this restriction precluded claimant's ability to do her old job, as that restriction was determined to be "unreasonable". However, Section 440.09(1), Fla. Stat. (2008) requires claimant to establish that her disability results from the compensable injury to a reasonable degree of medical certainty. Based on my review of Dr. Winters' medical records and testimony, along with the other evidence presented, I find that claimant has failed to establish that her

"sit-down" work restriction is due to the compensable injury within reasonable medical certainty. Consequently, claimant is not entitled to TPD benefits between 3/2/09 and 3/30/09.

Specifically, in his 2/23/09 note, immediately after assigning the sit-down restriction, Dr. Winters states:

It is a difficult problem with her large size. I feel she may have had some preexisting arthritic changes certainly, and she may have had some tearing of the cartilage noted from this injury. Thus, I would have her on some restrictions related to the work injury certainly.

The most reasonable interpretation of Dr. Winters' opinion, in my view, is that the sit-down restriction is due to a combination of the preexisting problems and the compensable injury, and that the compensable injury alone would warrant some unknown, presumably lesser, restrictions. For whatever reason, neither party asked Dr. Winters to clarify what restrictions claimant would have during this period attributable to the compensable injury. As the claimant bears the burden of proof on this issue, this lack of evidence is fatal to claimant's TPD claim for this period. See *Pyram v. Marriott International*, 687 So.2d 351 (Fla. 1<sup>st</sup> DCA 1997).

A similar situation was addressed in *Nordic Track v. Zimmerman*, 744 So.2d 1121 (Fla. 1<sup>st</sup> DCA 1999). In *Nordic Track*, the claimant was awarded PTD benefits based on medical restrictions that were "mostly" due to the compensable injury,

but were also due in part to a non-related chest-wall injury. The appellate court reversed the PTD award, stating that the evidence "was inadequate to establish the required causal relationship between the added restrictions and the compensable injury to a reasonable degree of medical certainty." *Id.* at 1122.

The evidence here connecting the sit-down restriction to the compensable injury is even weaker than the evidence was in *Nordic Track*, as it is not clear whether the compensable injury is a small or large consideration in Dr. Winters' assigning of the restriction. Consequently, just as in *Nordic Track*, claimant has failed to satisfy her burden of proof pursuant to section 440.09(1).

Moreover, because the evidence establishes that claimant's preexisting arthritic condition combined with her compensable knee injury to cause claimant's disability, claimant was required to establish, by medical evidence only, that her compensable injury was the major contributing cause of her disability. See Section 440.09(1)(b), Fla. Stat. (2008). As noted above, it is unclear from Dr. Winters' 2/23/09 note how much of a contributing cause the compensable injury was to the sit-down restriction. Consequently, I find that claimant has failed to satisfy her burden of proof to prove major contributing cause as required by Section 440.09(1)(b).

C. 3/31/09 - 11/13/09

Between 3/31/09 and 11/13/09, claimant was under restrictions from Dr. Winters of lifting no more than twenty pounds, and limited squatting and climbing, on 3/30/2009. (Dr. Winters deposition, at 9). As noted above, I accept the testimony from Major Anderson and William Rivera regarding the physical demands of claimant's job, as well as their testimony regarding the pre-injury accommodations that were made as a result of claimant's preexisting medical issues. Based on their testimony, I find that claimant's restrictions of lifting no more than twenty pounds, and limited squatting and climbing did not preclude adequate performance of her pre-injury job. Consequently, claimant has not established a causal connection between her compensable injury and her loss of wages, and is therefore not entitled to TPD benefits between 3/31/09 and 11/13/09.

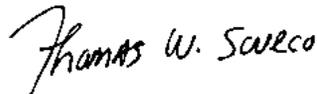
#### **V. OTHER CLAIMS AND ISSUES**

As I have determined that claimant has not established entitlement to TPD benefits, it is not necessary for me to address the defenses raised by the E/C to the TPD claim. In addition, it is not necessary to address the short-term

disability offset issue raised by the parties, as no benefits were awarded to offset.

**WHEREFORE** it is hereby **ORDERED** and **ADJUDGED** that claimant's claims for temporary partial disability (TPD) benefits from 1/23/09 to 11/13/09, medical care and treatment for the lower back, additional permanent impairment benefits based on a 4% permanent impairment rating, and penalties, interest, costs, and attorneys' fees, are **DENIED AND DISMISSED WITH PREJUDICE**.

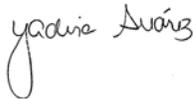
DONE AND ORDERED in Chambers at Orlando, Orange County, Florida this 1st day of April, 2010.



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Thomas W. Sculco  
Judge of Compensation Claims  
400 West Robinson Street, Suite 608N  
Orlando, Florida 32801-1701

This is to certify that a true and correct copy of the foregoing Order has been furnished by electronic or U.S. Mail to the parties and counsel listed below.



Digitally signed by Yadira  
Suarez  
Date: 2010.04.01 10:18:39  
-04'00'

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Yadira Suarez  
Assistant to Judge Sculco

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