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

EMPLOYEE:
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CARRIER:
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Post Office Box 10790
St. Petersburg, FL 33733

OJCC CASE NUMBER: 10-008310WJC

DATE OF ACCIDENTS: 01/08/2010 & 03/11/2010

Judge: W. James Condry, II

FINAL COMPENSATION ORDER

After proper notice to all parties, a final hearing was held and concluded on this claim in Orlando, Orange County, Florida on the morning of Tuesday, September 6, 2011. Present at the final hearing were attorneys Bradley Guy Smith for the claimant and Robert J. Osburn for the employer/carrier, hereinafter referred to as the E/C. Also in attendance at the final hearing were the claimant, Crystal Chesnut and her daughter Katie Chesnut.

At trial testimony was received from the claimant only. The remainder of the evidence was received via deposition and other documents as detailed below.

This order addresses the Petition for Benefits (PFBs) filed with DOAH on 04/08/10, 09/17/10, 02/10/11 and 03/22/11. The claims were unsuccessfully mediated on 06/03/11.

OVERVIEW

The claimant, a fifty-two-year old pool technician with C & C Pool Service sustained a back injury while skimming a pool in the course and scope of her employment on January 8, 2010. The accident was accepted as a compensable with certain workers' compensation benefits furnished. In dispute is a claim for the payment of temporary indemnity benefits and the authorization of medical care recommended by the claimant's independent medical examiner. For the reasons stated below I find that Ms. Chesnut is entitled to some of the benefits sought.

The specific issues to be decided at the 09/06/11 final hearing were as follows:

1. Whether Ms. Chesnut is entitled to the payment of temporary partial disability benefits (TPD) from 03/11/10 to present and continuing with interest and penalties as otherwise provided by law?
2. Whether alternatively Ms. Chesnut is entitled to the payment of TPD benefits from 03/11/10 through 04/08/11 the assigned date of maximum medical improvement (MMI) according to authorized treating physician Dr. Marcus Kornberg?
3. Whether Ms. Chesnut is entitled to authorization of care recommended by her independent medical examiner, Dr. Jonathan Greenburg, which include a weight reduction program, swimming/aquatic therapy, non-steroidal left sided sacroiliac and facet blocks and lumbar traction?
4. Whether Ms. Chesnut is entitled to the payment of her reasonable costs and attorney fees at the expense of the E/C?

The E/C defended the claim on the following grounds:

1. That all appropriate TPD benefits have been timely paid.
2. That the medical care requested is not reasonable, medically necessary and/or causally related to the industrial accident.

3. That the request for the authorization of non-steroidal left sided sacroiliac and facet blocks and lumbar traction if weight program and aquatic therapy fail is premature and not ripe for consideration as is the request for an L4-5 discogram study and possible L4, L5, S1 instrumentation and fusion.
4. That in the alternative the E/C is entitled to apportionment pursuant to *Section 440.15(5) (b), Florida Statutes (2009)* in that the work accident is a result of an aggravation of a preexisting condition.
5. That no penalties, interest, costs or attorney fees are due.

STIPULATIONS OF THE PARTIES

1. That the Judge of Compensation Claims has jurisdiction over the parties and the subject matter.
2. That venue properly lies in Osceola County.
3. That there was an employer/employee relationship at the time of the 01/08/10 accident.
4. That there was worker's compensation insurance coverage in effect on the date of the 01/08/10 accident.
5. That the employee gave timely notice of the accident.
6. That the accident was accepted as compensable.
7. That there was timely notice of the pretrial conference and the final hearing.
8. That the claimant's average weekly wage is $337.19.

JUDGE'S EXHIBITS

1. The pre-trial stipulations and pre-trial compliance questionnaires approved by orders entered on 09/13/10, 10/29/10 & 6/17/11.
2. A composite exhibit consisting of the claimant's trial memorandums dated 04/15/11 and 09/01/11 and the E/C's memorandums of law and memorandum of law supplement dated 04/14/11, 04/15/11 and 09/02/11. The composite items and any submitted case opinions were received and considered for argument purposes only.
3. The 10/26/10 order amending the claimed 02/01/10 and 02/15/10 accident dates to 03/11/10.
4. The 11/18/10 order consolidating the claims using the 03/11/10 date of accident under case

number 10-008310WJC.

JOINT EXHIBITS

1. The 01/11/11 deposition transcript of Dr. Markus Kornberg and attachments.
2. The 04/15/11 deposition transcript of Dr. Markus Kornberg and attachments.

CLAIMANT'S EXHIBIT

1. The 02/04/11 deposition transcript of Dr. Jonathan Greenberg and attachments.

E/C EXHIBITS

1. The 09/02/11 order approving the motion to admit medical records of Dr. Steven Weber and the doctor's five page 04/28/11 medical report.
2. The 09/02/11 order approving the motion to admit the 04/08/11 FCE report from the authorized treating facility.
3. The 10/22/10 deposition transcript of employer Joseph Clem Clark and attachments.

PROFERRED EXHIBITS

NONE

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 admitted evidence. I have observed and assessed the candor and demeanor of the witness that testified live before me, and I have resolved all of the conflicts in the live testimony, deposition testimony and documentary evidence.

I have carefully considered all of the evidence admitted even though I have not commented on or

summated every piece thereof. Nevertheless, in my ruling I have set forth my ultimate findings of fact with mandate as required by *Section 440.25(4) (e)*.

Pursuant to *Section 440.015,* I have not interpreted the facts in this case liberally in favor of either the rights of the injured worker or the rights of the employer. I have, as required, construed the law in accordance with the basic principles of statutory construction. Based on the foregoing, the evidence, and applicable law, I make the following determinations having weighed and elected to reject as unpersuasive the evidence and inferences inconsistent with these findings:

1. I find that I have jurisdiction over the parties and the subject matter and I accept as true those matters for which the parties have stipulated.
2. I find that Ms. Chestnut sustained a compensable back injury on 01/08/10 while skimming a pool as a pool technician working for C & C Pool Service. While skimming a pool for a customer on that date she made a quick turn to her right and experienced a sharp pain in her lower back. Her accident was timely reported to her employer pursuant to the requirements of *Section 440.185.* She received authorized care with Dr. Markus Kornberg within ten days of her accident on 01/18/10.
3. In light of the duration of treatment Dr. Kornberg has provided Ms. Chestnut, I accept his testimony over that of doctor's Weber and the claimant's independent medical examiner, Dr. Jonathan Greenberg. I find the opinions expressed by Dr. Kornberg to be sound, logical and reasonable in light of the record evidence as a whole. I find Dr. Kornberg is more acquainted with the claimant's medical status in light of the duration of involvement and care that he has provided. The other physicians whose testimony I am less impressed with only saw Ms. Chestnut once.

WHETHER THE CLAIMANT IS ENTITLED TO TEMPORARY PARTIAL DISABILTY BENEFITS?

4. *Section 440.15(4) (a)* provides that, subject to subsection (7), in the case of temporary partial disability, compensation shall be equal to 80 percent of the difference between 80 percent of the employee's average weekly wage and the salary, wages, and other remuneration the employee is able to earn post-injury as compared weekly. The compensation cannot exceed 66 and 2/3 percent of the employee's average weekly wage at the time of accident and is payable under the subsection only if:

a. Overall maximum medical improvement has not been reached; and,
b. The medical conditions resulting from the accident create restrictions on the injured employee's ability to return to work.

5. I find that Ms. Chestnut from her 01/08/10 accident suffered an **aggravation** of a preexisting L5-S1 grade one spondylolisthesis with degenerative changes at the L4-5 and L5-S1 levels. This accidental injury has produced mechanical back pain because of degenerative disease involvement. This diagnosis is consistent with all of the doctors' opinions with the exception of Dr. Steven Weber. Dr. Weber believes Ms. Chestnut only suffered an **exacerbation** of her preexisting condition and has now returned to her pre-accident status. He believes that the major contributing cause of her condition right now and any applicable restrictions going forward would be her pre-existing condition (See 04/28/11 medical report of Dr. Weber at pg 5).
6. For the reasons previously stated, I reject Dr. Weber's opinion because of his limited involvement with Ms. Chestnut. Furthermore his opinions were not closely scrutinized or tested as were the other doctors who were deposed. Only Dr. Weber's 04/28/11 medical report was offered and received into evidence. Dr. Weber's opinions also seem to overlook the fact that Ms. Chestnut's back symptoms exceed that which existed prior to her 01/08/10 accident. For these reasons I accept the opinions of doctors Kornberg and Greenberg over his that an aggravation and not simply an exacerbation of the claimant's preexisting condition resulted from the industrial accident.

I find Ms. Chestnut has reached maximum medical improvement:

7. I accept Dr. Kornberg's opinion over that of Dr. Jonathan Greenberg that Ms. Chestnut reached maximum medical improvement on 04/08/11 for the aggravation injury she sustained from her 01/08/10 accident. In doing so I also accept Dr. Kornberg's opinion that Ms. Chestnut sustained a 5% permanent physical impairment as a result of said accident. (See 04/15/11 deposition transcript of Dr. Kornberg at pg 10).
8. Based on Ms. Chestnut's trial testimony, the deposition testimony of employer, Joseph Clark, and the history that Ms. Chestnut furnished to her doctors, I do not find that Ms. Chestnut sustained a separate, new and independent accident and injury on 03/11/10. I find that all of her current residual problems as confirmed by Dr. Kornberg flow or result from the 01/08/10

accident.

9. Because I find Ms. Chestnut did not reach maximum medical improvement until 04/08/11, her eligibility for temporary indemnity benefits exists up through that date.

I find Ms. Chestnut has medical conditions from the industrial accident that create restrictions on her ability to return to work:

10. I find that while under Dr. Marcus Kornberg's care, Ms. Chestnut was under physical restrictions attributable to her industrial back injury that ranged from no lifting greater than 10 to 30 pounds and limited bending, stooping and twisting (See 01/11/11 deposition transcript of Dr. Kornberg at pgs 6, 11 and the 04/15/11d deposition transcript of Dr. Kornberg at pg 9).
11. I find the above restrictions precluded Ms. Chestnut from performing her normal pre-injury duties as a pool technician.
    a. Her normal duties involved repetitive lifting and bending activities in order to clean 10-20 pools a day. Said duties entailed testing the water, cleaning filters, and brushing and skimming the pools. Limitations on her bending, stooping and twisting activities as well as her lifting requirements adversely impacted her ability to perform her normal job.
    b. My finding that she was unable to perform her full pre-accident duties is buttressed by the employer's deposition testimony that they offered her no modified work and in fact filled Ms. Chestnut position after she was taken off of full duty work again in August of 2010. The employer representative testified that they filled the position out of necessity and that they did not have light duty work available (See 10/22/10 deposition transcript of Joseph Clem Clark at pg 9).
12. I find that during all times pertinent to the disability periods claimed up through the date of MMI, Ms. Chestnut was assigned light-duty work restrictions attributable to her industrial accident.
    a. Although Ms. Chestnut was initially released to return to full-duty and unrestricted work by Dr. Kornberg on 02/18/10, she in good faith attempted to go back to work in her old position with the employer and established that she could not meet the physical demands of the job. Because of resumed pain following her return, she sought follow up care and treatment with Dr. Kornberg. The follow up office visit was not ultimately arranged through what I find to be no fault of the claimant until 08/12/10. Upon that follow-up visit

Dr. Kornberg immediately returned Ms. Chestnut to a light duty work status and she has remained in such a status until the present time. The doctor has assigned permanent restrictions of no lifting greater than 30 pounds after placing Ms. Chestnut at MMI in April of 2011. These permanent restrictions were assigned even after the doctor reviewed the results of a functional capacity evaluation performed on Ms. Chestnut on 04/08/10.

b. I reject as unpersuasive the E/C's argument that Ms. Chestnut had no valid restrictions between 03/11/10 and 08//11/10. I reject this argument for primarily two reasons:

   I. First, Dr. Greenberg testified that in light of her industrial injuries Ms. Chestnut should be limited to sedentary to light duty activity with no lifting greater than approximately 10 pounds. He believed those restrictions should have related back to 01/08/10 and 03/11/10 (See 02/04/11 deposition transcript of Dr. Greenberg at pgs 18-19). A judge of compensation claims, as I do here, may accept restrictions imposed by a physician retroactively. See ***Feacher v. Total Employee Leasing/Guarantee Insurance Company, 61 So.3d 1236 (Fla. 1st DCA 2011).***

   II. Secondly, Dr. Kornberg by again imposing restrictions ultimately of a permanent nature, rescinding his earlier MMI date and revising his opinion as to whether Ms. Chestnut had an exacerbation of her preexisting condition as opposed to an aggravation, supports a reasonable conclusion that Ms. Chestnut required restrictions from between 03/11/10 and 04/08/11 (See 01/11/11 deposition of Dr. Kornberg at pgs 16 & 18-19). I have no reason to not reasonably infer that had Ms. Chestnut been able to get in earlier than 08/12/10 to see Dr. Kornberg, he would have assigned her restrictions at that time. Given the totality of the evidence before me I am persuaded that more likely than not Ms. Chestnut required restrictions related to her industrial accident between 03/11/10 and 04/08/11.

I find Ms. Chestnut's industrial injury contributed to her wage loss:

13. I accept Ms. Chestnut trial testimony that she has sought although unsuccessfully work within her restrictions. She has followed up with her employer about available work but they have not

offered her any. I find that she has not refused or turned down any suitable employment. She also contacted the state regarding retraining.

14. There is no evidence of Ms. Chestnut working since she last worked with the employer in March of 2010. A job search provides an alternative evidentiary means by which an employee may be able to establish disability following a period of successful work. The JCC however is to consider the totality of the circumstances in determining whether the injury contributes to the wage loss or whether such wage loss is due to an intervening or superseding cause. See ***Vencor Hospital v Ahles, 727 so.2d 968, 971 (Fla. 1st DCA 1998).*** In the instant case I find no intervening cause or intermediate employment. I find Ms. Chestnut's departure from work with C & C Pool Services was due to physical complications from her industrial injury.
15. In ***Wyeth/Pharma Field Sales v Toscano, 40 So. 3d 795 (Fla. 1st DCA 2010)*** it is clear that the claimant's burden to establish causation for entitlement to temporary partial disability benefits does not require but may include evidence of an unsuccessful job search. In ***Williams v. Archer W. Contractors, 43 So.3d 780 (Fla. 1st DCA 2010)*** it was held that where the claimant did not refuse work, was not offered modified work, was not terminated for misconduct, and did not commence employment elsewhere followed by termination for misconduct or for economic reasons, the claimant was entitled to TPD benefits without conducting a job search. I find given the facts in this case, Ms. Chestnut has clearly established her entitlement to TPD benefits in that she has indeed satisfied all of the criteria as outlined in ***Toscano*** and ***Williams*** cases in addition to the performance of job search activity.
16. For the foregoing reasons I find that Ms. Chestnut is entitled to the payment of temporary partial disability benefits from 03/11/10 through the date of MMI, 04/08/11, with interest and penalties.

WHETHER THE CLAIMANT IS ENTITLED TO THE AUTHORIZATION OF MEDICAL CARE AS RECOMMENDED BY DR. GREENBERG?

17. In regard to the medical care sought, I have given greater difference for the reasons previously stated for relying on the opinions of Dr. Kornberg over those of the other doctors in this case. Dr. Kornberg did not believe Ms. Chestnut was a likely or reasonable candidate for surgery or injection therapy (See 01/11/11 deposition transcript of Dr. Kornberg at pgs 12-13). He had treated her with conservative measures including therapy and believed that Ms. Chestnut would

require ongoing support through medication for inflammation (Id at pg 24). Dr. Weber did not believe that further treatment orthopedically or otherwise is required. In short given the medical evidence as a whole I am not persuaded that the recommendations for future treatment made by Dr. Greenberg are medically necessary. Consequently those benefits such as the weight reduction program, swimming/aquatic therapy, lumbar traction and injections/facet blocks are respectfully denied.

WHETHER THE EMPLOYER/CARRIER IS ENTITLED TO APPORTIONMENT?

18. *Section 440.15(5)(b)* provides, "**If a compensable injury, disability, or need for medical care, or any portion thereof, is a result of aggravation or acceleration of a preexisting condition, or is the result of merger with a preexisting condition, only the disabilities and medical treatment associated with such compensable injury shall be payable under this chapter, excluding the degree of disability or medical conditions existing at the time of the impairment rating or at the time of the accident, regardless of whether the preexisting condition was disabling at the time of the accident or at the time of the impairment rating and without considering whether the preexisting condition would be disabling without the compensable accident. . . .**" It goes further to provide, "**Medical benefits shall be paid apportioning out the percentage of the need for such care attributable to the preexisting condition.**" By such language it has been held that the statute unambiguously provides that only the disabilities and medical treatment associated with a compensable injury shall be payable. See ***Staffmark v. Randy Merrell, 43 So.3d 792 (Fla. 1st DCA 2010).***
19. In regard to what constitutes a "preexisting condition" the term is not specifically defined in the apportionment statute. However subsequent appellate decisions have led to a finding that the term for purposes of *Section 440.09(1) (b)* means "a preexisting injury or condition that is unrelated to an employment accident." See ***Pizza Hut v. Proctor, 955 So.2d 637 (Fla. 1st DCA 2007).*** Consequently to avail itself of the apportionment defense under *Section 440.15(5) (b)* the E/C must present evidence of the extent of the claimant's preexisting condition resulting from non-occupational causes. This would appear to require the doctor to carve out any and all occupational contributions to the disability and need for treatment. In ***Staffmark*** of the full preexisting condition, the doctor did not pare out or make an effort to apportion the injured

worker's disability and need for medical care between his prior industrial back injuries and non-industrial causes.

20. The ***Staffmark*** opinion goes on to hold that the apportionment of temporary indemnity benefits, permanent indemnity benefits, and medical benefits are governed by distinct clauses contained within *Section 440.15(5) (b)*. The first sentence deals with the apportionment of temporary indemnity benefits. The second sentence deals with the apportionment of permanent indemnity benefits and the third sentence deals with the apportionment of medical benefits. The lack of an anatomical impairment rating attributable to the preexisting condition, although required to apportion permanent indemnity benefits, is not an adequate grounds with which to deny apportionment of a claimant's medical or temporary indemnity benefits.
21. It has been held that when the need for medical care is the result of merger with a preexisting condition the employer/carrier must also prove a preexisting permanent impairment or disability. See ***Jewell v. Gevity HR, 57 So.3d 918 (Fla. 1st DCA 2011).***

I find no support for the apportionment of permanent benefits:

22. I find in regard to any permanent indemnity benefits, no apportionment would be available as there is no evidence of a preexisting permanent impairment or disability. This was a matter I find was ripe for consideration at the time of the trial as the E/C argued that the claimant had reached maximum medical improvement as on 02/18/10 and had not sustained a permanent physical impairment as a result of the industrial accident. As previously decided, I find from the evidence produced that Ms. Chestnut in fact reached MMI on 04/08/11 and sustained a 5% permanent partial impairment as a result of the 01/08/10 industrial accident.

I do not find adequate support for the apportionment of temporary indemnity or medical benefits:

23. In regard to the claim for apportionment of her temporary indemnity and medical benefits, I find this claim is very similar to that in ***Staffmark***. Where prior occupational injuries exist, the presence of a preexisting condition aggravated by an industrial accident standing alone does not automatically support a claim for apportionment.
    a. Dr. Kornberg was only asked generally to apportion between the preexisting condition and

the industrial accident (01/11/11 deposition transcript of Dr. Kornberg at pg 19-20) but he was not in any way asked to specifically ferret out from the preexisting condition any contributions from the prior occupational injury or injuries.

b. I find that the E/C carries the burden of proof in establishing its entitlement to apportionment and the proper amount of said apportionment.

c. Dr. Kornberg makes it clear that the claimant with regard to her back complaints had a prior injury in 1989 and another work related injury in 1991 (See 01/18/10 medical report attached Dr. Kornberg's 01/11/11 deposition transcript and pg 5 of said deposition).

d. Furthermore it is unclear from Dr. Greenberg's deposition testimony whether what he describes as a motor vehicle accident in 1987 or 1989 (See 02/04/11 deposition transcript of Dr. Jonathan Greenberg at pg 7) was an occupationally related accident or not. Moreover Dr. Greenberg could not say to what extent the prior injury or accident contributed to the claimant's medical condition (Id at pg 22).

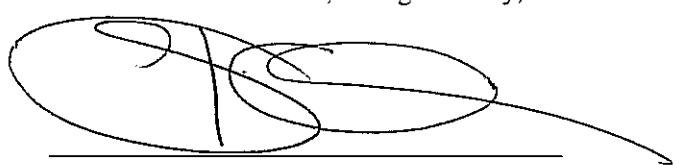
e. The above are issues that I certainly find it would have been appropriate for the E/C to clear up in order to establish by the preponderate weight of the evidence that the amount the E/C claims for apportionment only includes preexisting conditions of a non-occupationally related cause. I am unwilling to merely speculate or assume that the amount claimed does. In light of this deficiency I find Dr. Kornberg's deposition testimony on which the E/C primarily relies in support of its apportionment claim is just as weak or flawed as the testimony of the doctor in the ***Staffmark*** case. Therefore I respectfully declined to award apportionment as requested.

24. In summary I find that Ms. Chestnut has a compensable injury for which she is entitled to the payment of temporary partial indemnity benefits until reaching maximum medical improvement on 04/08/11. I find that she is entitled based on the testimony presented to the payment of such benefits through the date of MMI with interest and penalties. In regard to the medical care I find that Ms. Chestnut is entitled to the ongoing medical care as specifically recommended by Dr. Kornberg as reasonable and medically necessary. In that the claimant was successful in securing some of the benefits sought, she is entitled to the payment of her reasonable attorney fees and costs attributable to the benefits secured.

WHEREFORE it is hereby **ORDERED** and **ADJUDGED** that:

1. The request for the payment of temporary partial disability benefits from 03/11/10 through 04/08/11 with interest and penalties is granted.
2. The request for the payment of temporary partial disability benefits from 04/09/11 through the date of hearing is denied.
3. The request for the authorization of a weight reduction program, swimming/aquatic therapy, lumbar traction and injections or facet blocks as recommended by Dr. Jonathan Greenberg is denied.
4. The requested finding of compensability of a 03/11/10 accident is denied.
5. The E/C's claim to apportionment is denied.
6. The request for the payment of Ms. Chesnut's reasonable attorney fees and costs at the expense of the E/C for benefits secured under this order is granted. Jurisdiction is reserved to determine the amount.
7. All benefits ripe at the time of trial not otherwise reserved by stipulation of the parties or the undersigned in this order are hereby waived and dismissed with prejudice.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida.



W. James Condry, II
Judge of Compensation Claims
400 West Robinson Street, Suite 608-North
Orlando, Florida 32801-1701

I HEREBY CERTIFY that the Judge of Compensation Claims entered the foregoing Compensation Order. A true and accurate copy of the Order has been furnished by email to the parties' attorneys of record on this the 22nd day of September 2011.

Susan Berman
Assistant to Judge of Compensation Claims