

**STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS  
OFFICE OF THE JUDGE OF COMPENSATION CLAIMS  
MIAMI-DADE COUNTY DISTRICT**

**EMPLOYEE:**

Eddie Pruitt  
11330 SW 190th St.  
Miami, FL 33157

**ATTORNEY FOR EMPLOYEE:**

Richard E. Zaldivar, Esquire  
Richard E. Zaldivar, P.A.  
2600 S.W. 3rd Avenue, Ste. 300  
Miami, FL 33129

**EMPLOYER:**

Southeast Personnel Leasing, Inc.  
2739 U.S. Highway 19 N.  
Holiday, FL 34691

**ATTORNEY FOR E/C/SI:**

Robert S. Gluckman, Esquire  
Hurley, Rogner, Miller, Cox, Waranch &  
Westcott, P.A.  
1280 SW 36th Avenue, Suite 100  
Pompano Beach, FL 33069

**CARRIER/SERVICING AGENT:**

Lion Ins. Co./Packard Claims Administration  
PO Box 1549  
Tarpon Springs, FL 34688

**OJCC NO.:** 08-031059SMS

**D/A:** 6/2/2008

**COMPENSATION ORDER**

**THIS CAUSE** came before the undersigned Judge of Compensation Claims for final hearings on 5/20/09 and 7/13/09 regarding petitions for benefits filed 11/14/08.

**Documentary Exhibits:**

JCC-

1. Pre-trial Stipulation of 2/25/09.
2. Transcript of 5/20/09 final hearing.

Claimant-

1. Deposition of Sally Wallace.
2. PFB and Response.
3. 2/11/09 Mediation Settlement Agreement and Report.
4. Workers' Compensation Payment Listing Alternate, Run Date of 2/9/09.
5. Payroll records for time periods 1/1/08 to 6/30/08.

6. 13 week statement.
7. 3/17/09 Notice of Denial.

E/C-

1. Deposition of Alfred Cueli.
2. Deposition of Chuck Szopinski.

**Claims:**

1. Payment of TPD benefits from 6/2/08 to 6/8/08. The remainder of the TPD claim was voluntarily dismissed by the claimant at the final hearing.
2. Change in treating physician. Claim for alternate MCC/PCP was voluntarily dismissed by the claimant at final hearing as the instant case is not governed by a manage care arrangement.
3. Adjustment of AWW to \$340.00 (contract of hire).
4. Claim for IME with Dr. Moya was voluntarily dismissed by the claimant at the final hearing.
5. Claim for transportation to and from medical appointments was voluntarily dismissed by the claimant at the final hearing.
6. Penalties, interest, costs, and attorney's fees paid by E/C.

**Defenses:**

1. TPD benefits appropriately paid.
2. Claimant was provided with one time change in treating physician to Dr. Donshik.
3. AWW correctly determined at \$317.81.
4. E/C already stipulated to claimant's entitlement to attorney's fees for securing change in treating physician. However, the remaining claim for PICA is denied as not due or owing.
5. On 6/9/09, E/C filed an Amendment to Pre-trial Stipulation asserting the affirmative defense of F.S. 440.09 and 440.105 based on claimant's 5/20/09 final hearing testimony.

### **Findings of Fact and Conclusions of Law:**

1. The claimant testified in person at the final hearings. He was a warehouse employee for the employer herein since 1/08. As a warehouse worker, the claimant loaded and unloaded merchandise, painted, cleaned the conveyor belts and other machines. Claimant earned \$8.50 per hour and worked 40 hours per week. He ordinarily earned approximately \$340.00 a week. Claimant worked 11 weeks prior to the date of accident.
2. On 6/2/08, while clearing a filter on a machine, claimant slipped and fell. He hit his shoulder and back. Claimant reported the accident to his supervisor, Fernando. He was taken via ambulance to North Shore Hospital where he underwent x-rays.
3. E/C authorized Concentra wherein claimant underwent a lumbar MRI and physical therapy. Claimant alleges that he suffered a lumbar herniated disc. He was released to light duty work and returned to work for the employer herein. Claimant was restricted to lifting no more than 15-20 pounds. Claimant then came under the care of Dr. Kelman whom provided a back brace and referred claimant to a pain management specialist. Claimant received pain management treatment with Dr. Solomon.
4. Claimant is not satisfied with Dr. Kelman because his back continues to bother him. According to the claimant, Sally Wallace, the adjuster contacted him via telephone authorizing Dr. Donshik for treatment. Ms. Wallace had scheduled an appointment for the claimant. Claimant attended the appointment fearing that his workers' compensation benefits could be terminated for medical non-compliance.
5. Claimant testified that he worked for 2 weeks after the date of accident. He was terminated on 8/2/08 which was the first occasion he received workers' compensation benefits. Claimant was told he was needed anymore. During those 2 weeks, claimant undertook his regular, full-time duties. Claimant has not worked since 8/2/08. Claimant desires to treat with a physician of his choosing.
6. Sally Wallace, the adjuster, testified via telephone with a notary at the final hearing. She utilized claimant's actual 11 weeks of earnings and divided by 11 weeks in order to arrive at an AWW of \$317.81. She divided by 11 weeks instead of 13 weeks to give the claimant the benefit of a higher AWW.

7. On 8/13/08, claimant contacted Ms. Wallace and informed her that he had been terminated as of 8/1/08. Ms. Wallace sent claimant DWC-19 forms. Claimant was paid TPD benefits, the last benefits paid 1/28/09 for pay period 1/18/09-1/21/09. Ms. Wallace stopped paying TPD benefits because claimant reached MMI.

Correct Determination of AWW-

8. F.S. 440.14(1)(a) indicates as follows: " if the injured employee has worked in the employment in which she or he was working on the date of accident, whether for the same or another employer, during substantially the whole of 13 weeks immediately preceding the accident, her or his average weekly wage shall be one-thirteenth of the total amount of wages earned in such employment during the 13 weeks. As used in this paragraph, the term "substantially the whole of 13 weeks" means the calendar weeks before the date of accident, excluding the week during which the accident occurred. The term "during substantially the whole of 13 weeks" shall be deemed to mean during not less than 75 percent of the total customary hours of employment within such period considered as a whole."

9. In the present case, as in *Stubbs v. Bob Dale Construction*, 977 So.2d 718 (Fla. 1st DCA 2008), the resolution of the AWW issue rests on determination of whether claimant worked at least 75% of her "customary hours" within such period considered as a whole or 13 weeks prior to the industrial accident. Claimant testified that his customary hours were 40 hours per week or 520 hours for 13 weeks. The 13 week wage statement reflects that claimant worked a total of 401.5 hours in the 11 weeks prior to the date of accident. 75% of 520 hours is 390 hours. Accordingly, since the claimant worked 401.5 hours, he worked substantially the whole of 13 weeks.

10. E/C could have divided claimant's earnings by 13 weeks. Rather, E/C divided claimant's earnings by 11 weeks and took into account claimant's \$57.56 listed gratuity. E/C's calculation of

AWW benefitted the claimant and is in excess of claimant's true AWW of \$268.91. I find no support for claimant's alleged AWW.

TPD benefits from 6/2/08-6/8/08-

11. The payroll records and the testimony of Mr. Cueli reflect that for the week ending 6/8/08, claimant worked only one day, on 6/2/08 (Monday) the date of the accident. Claimant worked 8.25 hours. There are no earnings for Tuesday through Friday (6/3/08 to 6/6/08)(Pgs. 13-14 of Mr. Cueli's deposition).

12. At the final hearing, Ms. Wallace testified that on 6/2/08 (date of the accident) claimant was released to full duty work until 6/5/08. However, on 6/3/08, Concentra assigned claimant lifting restrictions of not exceeding 30 pounds, no pulling or pushing and reaching above shoulders. The restrictions continued through 6/18/08. Accordingly, claimant is due TPD benefits plus statutory penalties and interest for 6/3/08 to 6/8/08.

Change in Treating Physician (One Time Change)-

13. On 11/14/08, claimant filed a PFB. Within same PFB, claimant asserts a vague claim for alternate PCP if the case is manage care. If the case is not manage care, claimant requested an alternate treating physician. The 11/14/08 PFB also request authorization of an orthopedist. E/C did not move to dismiss the above vague claim.

14. On 2/9/09, Ms. Wallace testified in deposition that she missed the alternate treating physician claim. She testified that she was authorizing the one time change and stipulated to fee entitlement (Pg. 8 of Ms. Wallace deposition).

15. On 2/11/09, the parties attended state mandated mediation wherein the following was agreed to: ". . . E/C agrees to provide alternate treating physician. E/C stipulate to attorney fee entitlement for securing alternate."

16. On 2/13/09, Ms. Wallace sent an appointment letter to the claimant to treat with Dr. Donshik (alternate treating physician). The letter was not copied to either claimant's attorney or E/C attorney which was a clerical error. The claimant neither consulted with his counsel. Rather, the claimant attended the appointment with Dr. Donshik.

17. Florida Statute 440.13 (2)(f) provides that:

“upon written request of the employee, the carrier shall give the employee the opportunity for one change of physician during the course of treatment for any one accident . . . the carrier shall authorize an alternate physician . . . within 5 days after receipt of the request. If the carrier fails to provide a change of physicians as requested by the employee, the employee may select the physician and such physician shall be considered authorized.”

18. Based on the evidence, E/C did not authorize the one time change within 5 days of receipt of the request. On the other hand, claimant has failed to exercise due diligence by selecting a physician *at any time* for his one time change. Rather, the parties agreed at mediation that "E/C agrees to provide an alternate treating physician." There is no language within the mediation settlement agreement indicating that the alternate treating physician would be selected by the claimant or that the claimant would select an alternate treating physician within a certain amount of days/weeks/months. As of the 7/13/09 final hearing date, claimant had yet to select an alternate treating physician. Accordingly, while F.S. 440.13(2)(f) indicates that an employee *may* select the physician if the carrier fails to authorize same within 5 days after receipt of the request, I find claimant failed to provide E/C with the identity of the alternate treating physician and agreed in the mediation agreement to E/C's selection of the alternate. Further, I find that E/C complied with the mediation agreement and authorized an alternate physician.

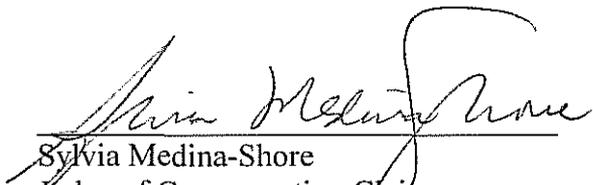
F.S. 440.105 and 440.09 Affirmative Defense-

19. E/C asserts that claimant misrepresented his length of employment at the final hearing. While claimant was certain that he solely worked 2 weeks after the date of the accident, his testimony, demeanor and actions during the 5/20/09 final hearing supports no intentional

misrepresentation. At the 5/20/09 final hearing, claimant inquired from his girlfriend on a break as to the length of his subsequent employment. Said action demonstrates claimant's uncertainty as to the issue. More importantly, claimant testified at the final hearing that "he worked 2 weeks, that he can remember, yes. It is not possible that he worked more than 2 weeks" (Pg. 48 of the 5/20/09 Transcript). I find claimant's testimony on 5/20/09 and 7/13/09 to substantiate that any misstatement regarding the length of time he worked subsequent to the industrial accident was an unintentional error in remembering. I accept claimant's 7/13/09 testimony to that effect. Accordingly, I find that claimant did not intentionally misrepresent his length of employment at the final hearing.

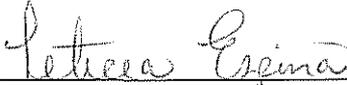
**WHEREFORE, IT IS ORDERED:**

1. E/C shall pay claimant TPD benefits from 6/3/08 to 6/8/08 with statutory penalties and interest. Claim for TPD benefits for 6/2/08 is denied.
2. Claim for change in treating physician is denied.
3. Claim for adjustment of AWW to \$340.00 (contract of hire) is denied.
4. E/C previously stipulated to attorney fee and costs entitlement for claimant's attorney securing alternate one-time change in treating physician. Claimant's attorney is also entitled to an E/C paid fee and costs for securing TPD benefits plus statutory penalties and interest herein. Penalties, interest, costs, and attorney's fees paid by E/C. Jurisdiction is reserved for determination of amount of fees and costs for a future hearing, in the event the parties are unable to amicably resolve same.

  
Sylvia Medina-Shore  
Judge of Compensation Claims

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that the instant Compensation Order was mailed to the above listed parties and e-mailed to the attorneys at ZaldivarPA@Gmail.com and zzevallos@hrmcwbroward.com this 27<sup>th</sup> day of July of 2009.

  
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Secretary to JCC