

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

**EMPLOYEE:**

Ricardo Vasquez  
900 West 74th Street, Apt.313  
Hialeah, FL 33014

**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**

**EMPLOYER/CARRIER/SERVICING  
AGENT:**

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 Insurance Company Serviced by:  
Packard Claims Administration, Inc.  
P.O. Box 1549  
Tarpon Springs, FL 34688

**OJCC NO.:** 07-029348AMK

**D/A:** 9/17/2007

**FINAL MERITS ORDER DENYING BENEFITS**

**THIS CAUSE** came before the undersigned Judge of Compensation Claims for final hearing on September 23, 2009 regarding Petitions for Benefits filed on 10/15/07, 11/19/07, 02/29/08, and 12/15/08. A ruling letter was entered September 23, 2009. At the hearing the undersigned accepted the evidence as follows:

**I. EVIDENCE:**

**Documentary Evidence:**

**Judge's Exhibit:**

1. Pre-Trial Stipulation of May 1, 2009. & Amendments

**Claimant exhibits:**

1. Petitions for Benefits dated 11/25/08 and docketed 12/15/08.
1. Deposition transcript of Barry Burak of 09/17/09.
2. Deposition transcript of Mary Merrill of 09/18/09.
3. Refusal of Light Duty Letter of 09/19/07.

**Employer/Carrier exhibits:**

- A. Medical Records of Dr. Robert Baylis and Dr. Jon Donsnik.
- B. Claimant deposition transcription taken 2/6/08, Identification only.

**Live Testimony:**

1. Ricardo Vasquez, Claimant.
2. Pamelita Gonzalez, Employer Representative.

## **II. CLAIMS**

1. Payment of Temporary Total Disability (“TTD”) benefits from 9/17/07 to date and forward;
2. Payment of Temporary Partial Disability (“TPD”) benefits from 9/17/07 to date and forward;
3. Provision of alternate orthopedic care and treatment; and
4. Penalties, Interest, Costs, and Attorney’s Fees paid by the Employer/Carrier.

## **III. DEFENSES**

1. All indemnity due or owing has been timely provided.
2. The claimant voluntarily limited his own income by refusing suitable employment within his restrictions. Claimant’s wage loss is not causally related to the industrial accident.
3. The Employer/Carrier timely authorized the claimant’s one-time change in orthopedic physicians from Dr. Baylis to Dr. Donshik. The claimant attended the appointment with Dr. Donshik, so any claim of untimeliness is waived.
4. Payment of Penalties, Interest, Costs and Employer/Carrier paid Attorney’s Fees are not due or owing as all appropriate benefits were timely provided.
5. Costs are due to the Employer/Carrier pursuant to § 440.34(3).

## **IV. SUMMARY OF FACTS AND TESTIMONY**

Monica de Feria Cooper, Esquire, appeared on behalf of the Claimant, Ricardo Vasquez. Robert Gluckman, Esquire, appeared on behalf of the Employer/Carrier. In making my findings of fact and conclusions of law, I have carefully considered the arguments of counsel and weighed all of the evidence presented to me. I observed the candor and demeanor of the witnesses and resolved all conflicts in the testimony and evidence. I have attempted to distill the issues together with findings and conclusions necessary to their resolution. After careful consideration of all the evidence presented, and after resolving any conflict therein, I hereby find as follows:

- I. The claimant, Ricardo Vasquez, is a Hispanic male born in Columbia. He testified live at final hearing in Spanish with the use of a Spanish interpreter. It was accepted that the claimant speaks basic English and has some computer skills. The claimant's date of birth is February 5, 1973, and he resides at 8075NW 7<sup>th</sup> Street, Miami, Florida 33126.
- II. The claimant was employed with Metropolitan Delivery Company (MDC) as a delivery driver. MDC obtains its employees through Southeast Personnel Leasing.
- III. On September 17, 2009 the claimant was involved in a compensable accident. The claimant was in route making a delivery when he was involved in a motor vehicle accident. He rear ended a semi truck in front of him. As a result of this accident, the claimant reported injuries to both knees, his low back, neck, and left wrist.
- IV. The Judge of Compensation Claims has jurisdiction over the subject matter and the parties herein. Proper venue over this matter lies with the Miami District Office of the Office of the Judge of Compensation Claims.
- V. After the accident, the claimant received authorized medical treatment at Miami Hialeah Group. He also treated with Dr. Robert Baylis and Dr. Jon Donshtik.
- VI. The claimant acknowledged that he was released to return to work in a light duty capacity on September 17, 2007, and acknowledged that he refused the light duty position offered by the employer. (Claimant Exhibit 4). The claimant further testified that he refused the light duty position because the hours were not acceptable to him and because he had to drive his mother to and from work, and the employer's schedule would not permit him to do so.
- VII. Pamelita Gonzalez, the employer representative, testified live that light duty was made available for the claimant. It entailed office work such as filing and dispatch type phone calls. This was offered to accommodate his hours based on his availability, and that the claimant refused this job offer.
- VIII. The claimant received additional medical care with Dr. Robert Baylis and Dr. Jon Donshtik. The care he received is well documented in the medical records provided. (Employer/Carrier Exhibit A).
- IX. I accept the medical opinions of Dr. Robert Baylis and Dr. Jon Donshtik. As such, the claimant reached MMI with a 0% PIR effective June 23, 2008. The claimant is able to work full duty with no permanent work restrictions. (Employer/Carrier Exhibit A). To the extent that the opinions of Dr. Burak conflict with those of Dr. Baylis and Dr. Donshtik, I accept those of Dr. Baylis and Dr. Donshtik as being more credible and consistent with the medical evidence.

#### **IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

##### **A. Temporary Total Disability Benefits**

1. I find that the claimant is not entitled to Temporary Total Disability Benefits from September 17, 2007 through June 23, 2008. The claimant was not placed on a no work status, and in fact, was released

to return to work in a light duty capacity on September 17, 2007, and failed/refused to do so. The claimant reached Maximum Medical Improvement on June 23, 2008.

2. The record is devoid of any evidence that the claimant's disability was total in character to be entitled to temporary total disability benefits as required under 440.15(2), Fla. Stat. (2009). Any such benefits would cease upon the claimant achieving Maximum Medical Improvement. Therefore, no temporary total disability benefits are due for period September 17, 2007 through June 23, 2008, and an award for same is **Denied**.

#### **B. Temporary Partial Disability Benefits**

1. I find that the claimant was not entitled to Temporary Partial Disability Benefits from September 17, 2007 through June 23, 2008. The claimant was released to returned to work in a light duty capacity on September 17, 2007. The claimant in his own testimony and by way of demonstrative evidence (Claimant's Exhibit 4) affirmed that the claimant refused light duty work offered by the employer.

2. Temporary Partial Disability Benefits are due where an employee has a loss in wages, and has not reached overall Maximum Medical Improvement and the medical conditions resulting from the accident create restrictions on the employee's ability to work. 440.15(4), Fla. Stat. (2009).

3. I find that the claimant had medical restrictions during the time at issue and was therefore eligible for TPD benefits. However, a claimant must still prove a causal connection between a work related injury and resulting wage loss in order to recover TPD benefits. Garrick v. William Thies, 521 So.2d 179 (Fla. 1st DCA 1998); Burger King v. Nicholas, 580 So.2d 656 (Fla. 1st DCA 1991); Interim Servs. & Specialty Risk Servs. v. Levy, 843 So. 2d 915 (Fla. 1st DCA 2003).

3. Based upon the credible testimony of Pamelita Gonzalez, and my review of the other testimony at trial, I find that the employer accommodated the claimant's work restrictions through June 23, 2008 and would have continued to do so until the claimant was released to full duty.

4. I accept the credible testimony of Dr. Robert Baylis and Dr. Donshik that the claimant was able to return to work in a full duty capacity with no work restrictions effective June 23, 2008. I further accept their testimony that the claimant achieved overall Maximum Medical Improvement on June 23, 2008 with a 0% PIR.

5. I find that any reduction in wages was not the consequence of the claimant's industrial accident but rather due to the claimant refusing reasonable light duty. Even had the claimant failed to refuse the work offered to him, I find that the claimant failed to present sufficient evidence to demonstrate to me that any wage loss resulted from the industrial accident.

6. A claimant who refuses or resigns from suitable employment is not entitled to TPD benefits. A. Duda & Sons, Inc. v. Kelley, 900 So.2d 664 (Fla. 1st DCA 2005). I find from a totality of the evidence that the claimant voluntarily limited his income by refusing light duty. I accept the testimony of the employer representative Pamelita Gonzalez as credible and reject the claimant's testimony that the job offered was not reasonable.

7. I find that, but for the claimant relinquishing his position, the employer would have continued to employ him and therefore there is no causal connection between the claimant's employment status and the industrial injury. Burger King v. Nicholas, 580 So.2d 656 (Fla. 1st DCA 1991); and Publix v. Hart, 609 So.2d 1342 (Fla. 1st DCA 1992) (holding that but for claimant's insubordination, claimant would have maintained employment and there is no causal connection between the change in employment status and the compensable injury).

8. I find that the claimant failed to meet his burden of proving the causal connection between the work related injury and the claimed wage loss because he refused reasonable light duty offered by the employer which was within his medical work restrictions. Therefore, no Temporary Partial Disability Benefits are due and owing from September 17, 2007 through the date of Maximum Medical Improvement of June 23, 2008, and is same is **Denied**.

### **C. Authorization of Alternate Orthopedic Care**

1. I find that the claimant is not entitled to another orthopedic evaluation as the Carrier timely provided Dr. Jon Donshik.

2. I find that the claimant filed which the Carrier received on December 15, 2008 seeking an alternate orthopedic physician, and that the Carrier authorized the request on December 17, 2008 and provided an evaluation with Dr. Jon Donshik. (Claimant Exhibit 3).

3. A Carrier must authorize a request for a health care provider by the close of the third business day after receipt of a request. 440.13(3)(d), Fla. Stat. (2009).

4. I find the testimony of the Carrier to be credible that the authorization was timely provided. Therefore, the claimant is not entitled to another alternate orthopedic evaluation and an award for same is **Denied**.

**D. Penalties, Interests, Costs, and Attorney's fees**

1. I find that the claimant is not entitled to indemnity benefits and therefore penalties and interest are not ripe, due, or owing.

2. The claimant failed to prevail on the issues presented to the undersigned and therefore, claimant's counsel is not entitled to Employer/Carrier paid attorney's fees.


**E. Costs to Employer/Carrier under 440.34(3), Fla. Stat. (2009).**

1. I find that the Employer/Carrier is entitled to reasonable costs per 440.34(3), Fla. Stat. (2009). Jurisdiction is reserved to address the quantum of the costs should the parties be unable to amicably resolve the issue.

**WHEREFORE, IT IS ORDERED AND ADJUDGED:**

1. The Claim for TTD from 09/17/2007 and continuing is **Denied**.
2. The Claim for TPD from 09/17/2007 and continuing is **Denied**.
3. Provision of alternate orthopedic care and treatment is **Denied**.
4. Penalties and Interest are **Denied**.
5. All other claims not timely raised are dismissed with Prejudice.
5. Costs are awarded to the Employer/Carrier pursuant to 440.34(3), Fla. Stat. is **Granted**.

**DONE and ORDERED** in Chambers, Miami-Dade County, Florida this 06 day of October, 2009.

  
Honorable Alan Kuker  
Judge of Compensation Claims

**THIS IS TO CERTIFY** that the foregoing Order was entered on the 06 day of OCT, 2009, and that a copy thereof was sent by e-mail to counsel on 10/06/09.

  
Secretary to Judge of Compensation Claims