

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

Daisy M. Bruton,)	
)	
Employee/Claimant,)	
)	
vs.)	OJCC Case No. 06-011650JTF
)	
Orange County Convention Center,)	Accident date: 2/24/2005
)	
Employer,)	
)	
and)	
)	
Alternative Service Concepts, LLC,)	
)	
Carrier/Servicing Agent.)	
_____)	

Final Compensation Order Denying PTD Benefits

After proper notice to all of the parties, a hearing was held on this matter before the undersigned Judge of Compensation Claims in Orlando, Orange County, Florida on February 23, 2010. Any and all issues raised in all pending Petitions for Benefits (PFB) that have been mediated and that were not previously withdrawn or adjudicated herein, are presumed resolved or in the alternative deemed abandoned by the Claimant and therefore are Denied and Dismissed. Betancourt v. Sears, Roebuck & Co., 693 So.2d 680 (Fla. 1st DCA 1997). This hearing specifically addressed the PFB filed on April 27, 2009.

Prior to the hearing, the parties made certain stipulations as indicated in the pre-trial stipulation

which are approved, accepted and adopted by the undersigned. In this Order, the Employee/Claimant shall hereinafter be referred to as the "Claimant" and the Employer/Carrier/Service Agent shall hereinafter be referred to as the "E/C/SA".

In addition to the documents listed in Rule 9.180, Workers' Compensation Rules of Appellate Procedure, the record will consist of the following exhibits which were admitted into evidence over any objections unless otherwise noted:

Court's Exhibits:

- 1.) Uniform Statewide Pretrial Stipulation, with any supplements and attachments.
- 2.) E/C/SA's Hearing Information Sheet, with any attachments (argument)
- 3.) Claimant's Hearing Information Sheet, with any attachments (argument)

Claimant's Exhibits: (NOTE = 1. all references to depositions in this Order include all records attached to such depositions; 2. all Exhibits are admitted into evidence unless specifically noted otherwise)

- 1.) Deposition of Dr. Paul Maluso, M.D. (taken on October 21, 2009)
- 2.) Composite Exhibit of the Claimant's Unemployment Records (filed on October 19, 2009)

E/C/SA's Exhibits: (NOTE = 1. all references to depositions in this Order include all records attached to such depositions; 2. all Exhibits are admitted into evidence unless specifically noted otherwise)

- 1.) Deposition of Dr. Stephen Goll, M.D. (taken on January 13, 2010)
- 2.) Deposition of Dr. Mark Beckner, M.D. (taken on December 8, 2009)
- 3.) E/C/SA's Deposition of the Claimant, Daisy Bruton (taken on June 29, 2009)
- 4.) Deposition of Claimant, Daisy Bruton (taken on February 11, 2010)
- 5.) Deposition of Gerri Pennachio, M.A. (taken on February 8, 2010)
- 6.) Final Compensation Order enter by JCC John Thurman (entered on November 9, 2006)
- 7.) E/C/SA's Composite Exhibit of the Claimant's Wal-Mart Personnel File (filed on October 19, 2009)
- 8.) Surveillance Videos and Reports from May 2009

The following witnesses testified live at the hearing:

- 1.) The Claimant, Daisy Bruton
- 2.) Randy Salmons
- 3.) Diane Kersey
- 4.) Carlos Resto
- 5.) Melissa Peles
- 6.) Pat Scott
- 7.) Raymond Torres
- 8.) David Peters

The issues submitted for determination by the Claimant were:

- 1.) PTD Benefits from November 1, 2008 to the present and continuing. This was amended at the hearing to reflect PTD Benefits from July 1, 2009 to the present and continuing.
- 2.) Penalties, interest, costs and attorney's fees

The defenses submitted for determination by the E/C/SA were:

- 1.) The Claimant is not PTD
- 2.) Voluntary limitation of income
- 3.) The industrial accident is not the major contributing cause of the Claimant's PTD or disability
- 4.) Apportionment
- 5.) Inadequate job search
- 6.) If the Claimant is PTD, the E/C/SA is entitled to a Social Security Disability offset
- 7.) Penalties, interest, costs and attorney's fees are not due or owing.

In making the determinations set forth below, I have attempted to distill the testimony and salient facts together with the findings and conclusions necessary to the resolution of this claim. I have not attempted to painstakingly summarize the substance of any live or deposition witness, nor have I attempted to state nonessential facts. Because I have not done so does not mean that I have failed to consider all of the evidence.

The undersigned has carefully considered and reviewed all the documentary and verbal evidence presented and has not overlooked any evidence which conflicts with the evidence cited in support of my findings of fact and conclusions of law. All such conflicting evidence is specifically rejected.

After giving careful consideration to the stipulations of the parties, the documentary evidence, the candor and demeanor of the live witnesses and after resolving all of the conflicts in the evidence and hearing argument of counsel, I make the following findings of fact and conclusions of law:

1.) The Judge of Compensation Claims (JCC) as the trier of fact has the obligation and authority to judge the credibility of witnesses and is not bound to accept even an un-contradicted medical opinion. Ullman v. City of Tampa Parks Dept., 625 So. 2d 868 (Fla. 1st 1993); Prather v. Process Systems, 867 So. 2d 479 (Fla. 1st DCA 2004). The competent substantial evidence rule allows room for the JCC as trier of the facts to accept the testimony of one doctor over the testimony of several others. Crowell v. Messana Contractors, 180 So. 2d 329 (Fla. 1965). The trier of fact may also reject expert medical testimony when there is relevant conflicting lay testimony and base the verdict solely on the lay testimony. Weygant v. Fort Myers Lincoln Mercury. 640 So2d 1092 (Fla 1994).

2.) The Claimant has the burden of proving the existence and causation of her injuries to a reasonable degree of medical certainty and by objective medical findings. Section 440.09(1) Florida Statutes.

3.) The Claimant has the burden to establish that she is entitled to Permanent Total Disability benefits (PTD) in accordance with section 440.15 (1)(b) Fla. Statutes. This requires either the showing of a listed catastrophic injury or a showing of an inability to engage in at least sedentary employment within a 50-mile radius of the employee's residence, due to her physical limitation.

4.) I find that the Claimant has not met her burden to share that she has suffered a listed catastrophic injury in accordance with section 440.15 (1) (b). I basis this finding on the totality of the medical deposition testimony and medical records admitted into evidence.

5.) The prior compensation Order in this case (E/C/SA exhibit #6) established the following facts which are res judicata in this case. They can be summarized as follows:

a) The Claimant sustained a compensable injury on February 24, 2005 when a “whale” was pushed into her upper back/shoulder area by a co-employee. The Claimant ultimately went for medical treatment to Central Care for several visits and then to Dr. Goll. She had MRI’s of the cervical spine and thoracic spine. There is no indication in the medical records that the Claimant injured her low back in this compensable accident. Both the Centra Care records and Dr. Goll’s reports document that the Claimant received treatment for cervical and thoracic conditions which were ultimately diagnosed by Dr. Goll as a cervicothoracic strain superimposed on pre-existing cervical degenerative disc disease.

b) The Claimant returned to work with the Employer through mid-December 2005. She testified that she was never taken out of work by any physicians for this industrial injury. However, in December 2005 she was diagnosed with an unrelated health concern and stopped working to have surgery for unrelated medical conditions. After this surgery she was diagnosed with an additional unrelated surgical issue and had a second surgery. She was then out of work for approximately three months, after which her employment was terminated as of March 29, 2006 for health reasons unrelated to the Workers Compensation accident.

c) Dr. Goll's records indicate that the Claimant reached maximum medical improvement (MMI) on August 1, 2005 without any permanent impairment and without any work restrictions due to this industrial accident.

6.) Sometime after the Claimant stopped treating with Dr. Goll, she requested her one time change in treating physicians and began treating with Dr. Paul Maluso. Dr. Maluso first saw the Claimant on September 11, 2006. Dr. Maluso diagnosed the Claimant with cervicothoracic sprain/strain and pre-existing degenerative disc disease in the cervicothoracic spine. This was basically the same diagnosis as given by Dr. Goll. Dr. Maluso did not assign the Claimant any work restrictions. The Claimant continued to follow up with Dr. Maluso in 2006, 2007, 2008 and 2009. After these visits, Dr. Maluso opined in his reports that the Claimant can work her normal job or alternatively that she had no work restrictions. However, after having a conference with the Claimant's Attorney in November 2008, Dr. Maluso opined that the Claimant had work restrictions of no lifting greater than 30 to 35 pounds and limited overhead lifting.

7.) The Claimant started working for Wal-Mart in September 2006. She worked for Wal-Mart as an overnight processor, which required her to lift and move boxes of clothing, open up the boxes and put the clothing on the selves and the racks. The Claimant stopped working for Wal-Mart in August 2008. At that time, Wal-Mart terminated the Claimant for verbally threatening a customer with physical harm (live testimony of David Peters). The Claimant has not returned to work anywhere since this termination from Wal-Mart.

8.) The Claimant saw Dr. Mark Beckner for an IME on November 17, 2009. Dr. Beckner opined that the Claimant was at MMI as of August 1, 2005, the date that Dr. Goll placed the Claimant at MMI. Dr. Beckner did not assign the Claimant any work restrictions.

9.) None of the medical evidence admitted indicates that the Claimant is restricted to sedentary or even light work activity. In fact, most of the medical evidence does not reflect any work restrictions for the Claimant except those given by Dr. Maluso after conferring with the Claimant's Attorney. None of this meets the statutory standard for Permanent Total Disability since no evidence was presented that the Claimant is limited to sedentary work within a 50-mile radius from her home.

10.) The Claimant testified that she did a job search starting in August 2009. This alleged job search included filling out applications at several prospective employers within 90 days of the hearing. However, several witnesses rebutted this testimony. Diane Kersey who is an Account Specialist with Central Parking Systems (where the Claimant allegedly applied) testified that she can find no information about the Claimant applying for work there. Carlos Resto who is in charge of Human Resources at Sears Fashion Square likewise found nothing on file to suggest that the Claimant applied for work at Sears since October 2009, contrary to the testimony of the Claimant. Melissa Peles at Macy's in Fashion Square, the Assistant Store Manager in charge of Human Resources, likewise testified that checking back to October 2009 she found no record of the Claimant applying for work at Macy's. Pat Scott the General Manager at Howard Johnsons on International Drive testified that all application there must be in person and he had nothing on file for the past 90 days regarding any applications by the Claimant. During her live testimony, the Claimant repeatedly

referred to a note book listing all the places she allegedly looked for work. However, when questioned about this note book, the Claimant admitted that it was recently prepared and not prepared contemporaneously at the times she conducted the work search. She did not have her original notes that she testified she used to prepare the recent note book of the job searches. Based on all of this contradictory evidence, I find that the Claimant's testimony regarding her job search since August of 2009 to be totally untrustworthy, not creditable and not believable. The Claimant's vocational rehabilitation expert, Randy Salmons testified that the Claimant was "completely employable" after considering the lack of substantial work restrictions imposed by any of the Claimant's treating or examining physicians. In other words he could not find any medical reason why the Claimant would not be completely employable. He admitted that she would be hard to place due to non-accident related factors, but would be employable and not limited to sedentary employment. Therefore from a vocational perspective, the Claimant was not limited to only sedentary work or even light work based on the medical records and vocational factors he considered and reviewed.

11.) Based on the findings and the totality of the evidence, including the medical and vocational records, reports, depositions and the live testimony of the Claimant herself I find that the Claimant did not meet her burden to prove by a preponderant of the evidence that she is permanently and totally disabled in accordance with section 440.15 Fla. Statutes.

It is therefore ORDERED AND ADJUDGED that:

- 1.) The claim for PTD is denied and dismissed with prejudice.
- 2.) Jurisdiction is reserved on any PFB's that have not been mediated.
- 3.) The E/C/SA is the prevailing party and is awarded reasonable costs. Jurisdiction is reserved to determine the amount of such costs if the parties cannot otherwise agree.

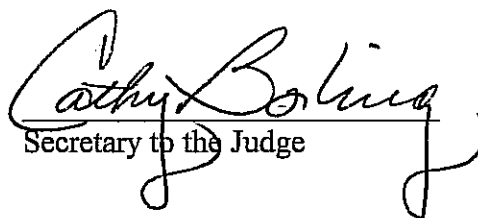
DONE and ORDERED in Chambers in Orlando, Orange County, Florida.



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CERTIFICATE OF SERVICE

This is to certify that the above order was entered in the Office of the Judge of Compensation Claims and a copy was served by e-mail to counsel and by mail to the parties.



Cathy Bolina 04/02/2010
Secretary to the Judge

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