STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGES OF COMPENSATION CLAIMS
FT. MYERS DISTRICT OFFICE

Rosa Albina Socorro, Employee/Claimant, vs. Southeast Personnel Leasing (Golden Corral of Punta Gorda,) Employer, and Packard Claims Administration, Inc.. Carrier/Servicing Agent.	)	OJCC Case No. 08-18332EDS Date of Accident: 3/12/2007

FINAL COMPENSATION ORDER

THIS CAUSE was heard by the undersigned in Fort Myers, Lee County, Florida on April 6, 2009 upon Claimant's claims for the worker's compensation benefits claimed in the Petitions for Benefits docketed on July 10, 2008 and August 14, 2008. Both petitions sought identical benefits. The Employer/ Carrier responded to the initial petition on July 30, 2008. The petitions were mediated on October 6, 2008 and the parties submitted pretrial stipulations on that same date. The parties were permitted to complete a post hearing deposition of Dr. Fred Liebowitz on April 14, 2009, and permitted thereafter to submit written closing arguments to the undersigned on or before April 24, 2009. The evidentiary record submitted in this matter was therefore deemed closed as of April 24, 2009. The Employee was present at the hearing and was represented by her attorney, Victor Arias, Esquire. The Employer/Servicing Agent was represented by Jonathon Cooley, Esquire.

The claims specifically remaining for final hearing were:[1]

1. Temporary total or partial disability from June 16, 2008 to date and continuing.
2. Penalties, interest, costs, and attorney's fees.

[1] E/C announced acceptance of Claimant's request for a one time change of physician at the commencement of the hearing.

These matters were defended by the Employer/Carrier on these arguments:

1. The industrial accident is not the major contributing cause of claimant's alleged disability.
2. Claimant has voluntarily limited her income.
3. The loss of earnings is not related to the industrial accident.
4. Claimant has reached overall maximum medical improvement.
5. Claimant abandoned her employment.
6. Claimant voluntarily left her employment.
7. No penalties, interest, costs, or attorney's fees are due and owing.

The parties submitted the claim for hearing upon the following record:

COURT EXHIBITS

1. Composite of Petitions for Benefits, Notice of Final Hearing, Pretrial Stipulation, and Order Approving Pretrial Stipulation and Notice of Final Hearing.

EMPLOYEE EXHIBITS

1. Deposition of Dr. Fred Liebowitz, M.D. completed April 14, 2009. (Post hearing exhibit). Claimant's Trial Memorandum, and Amended Trial Memorandum received as argument only.

EMPLOYER/CARRIER EXHIBITS

1. Payroll records composite exhibit.
2. Deposition of Pamela McDonald dated January 13, 2009..
3. Payout records composite.
4. Deposition of Rosa Socorro dated September 25, 2008.
5. Deposition of Rosa Socorro dated March 19, 2009.
6. Deposition of Dr. Lance Kreplick, M.D. dated April 1, 2009.
7. Deposition of Norma Nickles dated April 1, 2009.

Employer/Carrier's Trial Summary and Closing Arguments, received as argument only.

JOINT EXHIBIT

1. Stipulated medical records, supplementing Dr. Kreplick deposition (received April 14, 2009).

The Employee appeared and testified live at the hearing. In making my findings of fact and conclusions of law regarding these claims and defenses, I have carefully considered and weighed all the evidence presented to me. I have resolved all conflicts in the testimony presented to me. Although I may not reference each specific piece of evidence submitted by the parties, I carefully considered all the evidence and exhibits in making my findings of fact and rendering my conclusions of law.

Based upon the testimony contained in the depositions, testimony of witnesses, stipulations, and exhibits and after careful consideration of the arguments of counsel, I make the following findings of fact:

1. The Claimant is presently a 38 year old Hispanic woman, born in Peru, who sustained a compensable injury on March 12, 2007 while employed at Golden Corral restaurant in Punta Gorda, Florida. (The Employer, Southeast Personnel Leasing, is the PEO that leased employees to Golden Corral). The injury occurred when Claimant bent at her waist and attempted to remove a tray of approximately a dozen chickens from a food cart. She reported an immediate onset of low back pain. She began treatment for those complaints the next day March 13, 2007 at Company Care, an occupational health clinic associated with Fawcett Memorial Hospital in Charlotte County, Florida. She treated at Company Care under the supervision of Dr. Lance Kreplick, M.D. from March 13 until released without restrictions on May 22, 2007, when Dr. Kreplick determined she had reached maximum medical improvement (MMI) from her injuries.

2. Earnings records, in evidence, and indicate that Claimant was able to work virtually full time after the accident and while she treated with Dr. Kreplick for her injuries. Following her release from care by Dr. Kreplick she continued to work unabated until June 18, 2008 when her employment terminated. Her duties and rate of pay increased in that period. The circumstances surrounding the termination are much in issue. Claimant has not worked since the termination and is claiming temporary total or temporary partial disability from that date until the hearing and even beyond by arguing she is not at MMI from the injuries sustained in the accident.

3. Claimant's contentions are that after the accident, she was provided with restrictions by Dr. Kreplick, and that Golden Corral never complied with those restrictions. She argued that the language difficulties she experienced lead to much miscommunication, both at work and with the doctor. She testified that she could not be understood by her non Hispanic co-workers and supervisors, and blames much of what occurred on June 18, 2008 which resulted in the termination of her employment on the supervisor at Golden Corral. That supervisor was Pamela McDonald. Claimant alleges that on that date a box of chickens were on the floor and she was ordered by McDonald to pick the box up. She alleged she was unable to pick it up, and that McDonald knew she was incapable of picking up the box. She told McDonald "no" and upon her refusal was "told to go", or was fired, by McDonald. She contended that her ability to communicate with McDonald was impaired because "I do not speak English". After being told to go, Claimant left the premises and has not worked since.

4. Contrary to Claimant's version of the events on June 18, 2008, the E/C offered the testimony of Pamela McDonald and Norma Nickles. McDonald was Claimant's supervisor on June 18, 2008 and is an assistant manager with Golden Corral and has worked at Golden Corral for about sixteen years. She did not actually see everything that preceded her confrontation with the claimant on that date but she was the one who had the last conversation with the Claimant before Claimant left the restaurant. Norma Nickles was Claimant's co-worker and had worked with her for about three years everyday, off and on. Nickles was closer to the actual events on June 18 as they occurred. According to Nickles' deposition testimony, she observed Claimant as she came out of the area called the meat room and described Claimant as being very upset, flailing her arms and speaking in both English and Spanish. She stated Claimant was complaining about the night crew and how they had created the circumstances that lead to the contents of a food cart spilling onto claimant's clothes. When Pam, the manager, arrived, Pam looked in the meat room and, allegedly, saw the mess and attempted to get Claimant to calm down. Nickles understood claimant to be complaining about how frequently the night crew messed up, and to indicate she (Socorro) had had enough and heard her state "I quit" in English. Pamela McDonald's testimony was similar. McDonald heard the commotion in the back and went to investigate. She saw the Claimant wiping something off her pants, and speaking primarily in Spanish, and described her as being quite upset. She understood Claimant's complaint to be about the night people and the meat room. After she observed the mess in the meat room she

returned to Claimant and requested that Claimant "clean it up and go on". Claimant apparently refused, and said "I no longer work here". McDonald's testimony suggested she resisted Claimant's assertion about quitting initially but ultimately conceded that if that is what Claimant wanted to do then she could "leave, if that is what [she wanted] to do." The undersigned accepts this version of the events on June 18, 2008, and rejects Claimant's testimony.

5. The medical evidence submitted from Dr. Kreplick, the testimony of McDonald regarding her knowledge of Claimant's medical restrictions, and the demeanor of Claimant as observed at trial, all mitigate against accepting claimant's version of the termination on June 18, 2008. Dr. Kreplick's notes and his deposition establish that following the injury the Claimant progressed through work restrictions from a limitation of fifteen pounds lifting restriction, initially, followed by an increase to twenty-five pounds, to eventually no restrictions being imposed by Dr. Kreplick on May 22, 2007. Medically, as of May 22, 2007 claimant was at maximum medical improvement from the lumbar sprain diagnosed by Dr. Kreplick with no restrictions. McDonald testified that she was aware that claimant was initially on restrictions but that she was eventually released by the doctor to normal duty, and could not remember any time following that release when the Claimant complained of physical difficulties or requested any assistance doing her job. Claimant had worked in her job for in excess of a year unabated, and presumably without medical assistance. During the hearing, Claimant was asked a simple question "Why did you say no" when she was asked to clean up the mess. In her answer and the exchange with E/C counsel, she admitted she never told McDonald why and indicated "why would I tell her...she knew I was hurting from my back." Claimant's argumentative response is in essence an admission that she did not attempt to link her refusal to comply with her manager's request to clean up a mess or pick up a box of chickens with her physical injury. The evidence paints a clear picture that Claimant quit her job, one that she was physically capable of performing as a result of losing her temper on June 18, 2008, and was not fired because she refused to perform a demand placed on her which was in excess of restrictions that the employer knew were in place.

6. Indemnity benefits are not automatically foreclosed when an injured employee loses a job for a reason unrelated to her injury. **Vencor Hospital v. Ahles 727 So. 2d 968 (FLA 1st DCA 1998).** Even when a disabled employee loses a job for an extraneous reason, a good faith job search may serve as an important factor in determining whether the employee is unable to

find employment as a result of her disability. Coupled with medical restrictions, a good faith job search is not infrequently more than adequate proof of eligibility for temporary disability benefits. **Arnold v. Florida's Blood Centers, Inc., etc. 949 So. 2d 242 (Fla. 1st DCA 2007).** Unfortunately for Claimant in this case, she had no medical restrictions in place when she terminated form her employment, and presented limited evidence of a job search, which the undersigned notes was limited to Claimant placing only a few applications with prospective employers. Claimant presented virtually no medical evidence that her injuries in any way prevented her from performing the duties requested of her by her employer or becoming re-employed. She also did not obtain any medical corroboration contemporaneous with the termination that would support her claim that the duties of her job were excessive for her in light of her injuries or exceeded physical restrictions.

7. In an effort to bolster some of these limitations Claimant was examined by her chosen medical expert, Dr. Fred Liebowitz, M.D. on March 24, 2009, only a few days before the merit hearing. Dr. Liebowitz' examination was essentially normal. Dr. Liebowitz noted the examination occurred over two years after the date of accident. Many of the complaints Claimant made to Dr. Liebowitz at the time of the examination (and repeated at the hearing) were not made initially after the accident in 2007. There were no objective physical findings in the examination that could explain or corroborate those complaints. Because he noted the extent of his findings was lumbarsacral tenderness, a subjective complaint, his assessment was "low back pain". Beyond that assessment, Dr. Liebowitz did not have a firm diagnosis. He suggested Claimant "maintain an off work status", but admitted that assessment was based on a mistaken understanding of claimant's work status prior to the examination. Although Claimant was making complaint of neck pain at the hearing, Dr. Liebowitz noted that Claimant made minimal mention of her neck at all during his examination. Dr. Liebowitz found no reason why Claimant was not capable of at least light duty work, but because he had not completed his evaluation as of the date of the deposition, he could not testify to any present work restrictions with any degree of certainty. He was not asked to comment on past restrictions. Regarding the crucial issue of whether the complaints exhibited by Claimant during her examination were causally related to the industrial accident of March 12, 2007, Dr. Liebowitz stated that while it seemed feasible, based on what he knew he could not provide an opinion on that issue with certainty. In summary, none of the findings and opinions reached by Dr. Liebowitz during the evaluation he performed on March 24, 2009, over two years after the initial injury, provide a sufficient evidentiary basis for disregarding the opinions expressed by her initial treating physician Dr. Kreplick, especially as to

whether Claimant remained at MMI following May 22, 2007 and any post accident and injury related physical restrictions caused by the industrial accident.

8. The undersigned accepts the assessment of Dr. Kreplick that claimant sustained a lumbar strain in the industrial accident and reached MMI for that condition on May 22, 2007 without any physical restrictions. The undersigned finds that Claimant voluntarily quit and left her employment. The claimant did not present sufficient medical evidence to establish that her injury in any way contributed to her termination from the employment she performed unabatedly following the accident until June 18, 2008. There is also no evidence that her injuries are contributing in any way to her being unable to regain suitable gainful employment since June 18, 2008.

Wherefore, on the basis of the foregoing it is Ordered and Adjudged:

1. The claims for temporary total disability and/or temporary partial disability from June 18, 2008 forward to the date of the hearing are denied and dismissed with prejudice

2. Jurisdiction is reserved to determine the issues of entitlement and amount of any attorney's fees and costs to be paid by the E/C because of the acceptance of the claim for a one time change in primary treating physicians. Jurisdiction is also reserved to determine the issue of E/C's request for taxation of costs in connection with the results of this proceeding.

DONE AND ENTERED in chambers, Fort Myers, Lee County, Florida.

E. Douglas Spangler, Jr.
Judge of Compensation Claims

I Certify that a true copy of the foregoing Order was served by mail on all parties and counsel of record this 4 day of May, 2009.

Kathleen P. Hayes
District Deputy Clerk