

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

|                                   |   |                                |
|-----------------------------------|---|--------------------------------|
| <b>ALAN KRINGEL,</b>              | ) |                                |
|                                   | ) |                                |
| Employee/Claimant                 | ) |                                |
|                                   | ) |                                |
| vs.                               | ) | OJCC Case No. 05-022990TWS     |
|                                   | ) |                                |
| <b>MODERN BUSINESS ASSOC.</b>     | ) | Accident date: 07/26/2005      |
|                                   | ) |                                |
| Employer                          | ) |                                |
|                                   | ) |                                |
| and                               | ) |                                |
|                                   | ) |                                |
| <b>INSURANCE COMPANY OF THE</b>   | ) |                                |
| <b>AMERICAS/SCIBAL ASSOCIATES</b> | ) |                                |
|                                   | ) | <b>Judge: Thomas W. Sculco</b> |
| Carrier/Servicing Agent           | ) |                                |

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ORDER ON E/SA'S PETITION FOR MODIFICATION

After proper notice to all parties, a hearing was held and concluded on this claim in Orlando, Orange County, Florida on December 10, 2009. Present at the hearing was Attorney Ronald Webster and Sage Morris-Webster for the claimant/employee and Attorneys Timothy Stanton for the employer/servicing agent, hereinafter referred to as the E/SA.

This order addresses the Petition for Modification filed with DOAH on July 14, 2009 and the Amended Petition for Modification filed with DOAH on October 23, 2009.

**DOCUMENTARY EVIDENCE:**

- #1 Claimant's: Trial Memorandum
- #2 E/SA's: Trial Memorandum
- #3 E/SA's: Deposition/attachments of Craig H. Lichtblau, MD  
November 18, 2009
- #4 E/SA's: Deposition of Alan M. Kringel  
June 8, 2007
- #5 E/SA's: Deposition of Kathleen Kringel  
June 8, 2007
- #6 E/SA's: Deposition of Craig H. Lichtblau, MD  
May 9, 2007
- #7 E/SA's: Amended Petition for Modification  
October 23, 2009
- #8 E/SA's: Petition for Modification  
July 14, 2009
- #9 E/SA's: Deposition of Kathleen Kringel  
September 28, 2009
- #10 E/SA's: Deposition of Alan M. Kringel  
September 28, 2009
- #11 E/SA's: Petition for Benefits  
July 29, 2009

After hearing all of the testimony and evidence presented, and after having resolved any and all conflicts therein, the undersigned Judge of Compensation Claims makes the following findings of fact and conclusions of law: The issues for determination are the E/C's petition for modification of the order dated 8/16/07 - specifically the award of 24 hour per day attendant care at at least an LPN level. The E/C seeks to have that award modified to 12 hours per day care at at least an LPN level and 12 hours per day of non-skilled care with claimant's mother, based on an alleged change of condition.

Claimant took the positions that no change of condition had been established; that an award of attendant care was not subject to modification; that a family member cannot be forced to perform attendant care; and that claimant was entitled to attorneys fees and costs if it prevailed on the petition for modification.

### **FINDINGS, ANALYSIS, AND CONCLUSIONS**

Pursuant to section 440.28, Florida Statutes (2005) if a party can establish a change in condition, the JCC can "issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation or award compensation."

To support modification, the change of condition must be

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substantial and material. See Starkman v. Bechtel Power Corp., 588 So. 2d 304 (Fla. 1<sup>st</sup> DCA 1991). Here, based on the evidence and argument presented, I find that the E/C has failed to establish a material or substantial change of condition from the prior order of 8/16/07. Consequently, the E/C's petition for modification is denied.

In the prior order of 8/16/07, this court awarded claimant "attendant care from an LPN for 24 hours per day, 7 days per week", based on the testimony of Dr. Craig Lichtblau. Subsequently the E/C and claimant's mother reached an agreement that an LPN would provide care when the mother was working, and that the mother would provide care when she got home.

On 11/18/09, the E/C took the deposition of Dr. Lichtblau, claimant's primary treating physician. At the deposition, Dr. Lichtblau testified regarding claimant's current need for attendant care:

Q. At that time [12/22/08], did you feel it was appropriate that twelve hours could be provided per day with a CNA and then 12 hours per day by the claimant's mother?

A. Yes, that's correct. But realize that CNA's cannot pass medications and this patient is on medications in the morning and the night. So as long as the mother is actively involved in the care, that system would work. However, if the mother is not actively involved in the care, then it would have to be an LPN, because by state law CNA's cannot pass meds.

Q. So if at the present time the mother is willing to

be actively involved in his care, would that be appropriate?

A. Yes. (deposition of Dr. Lichtblau, at 10).

Thus, Dr. Lichtblau's change of opinion in this case is conditional, based on the involvement of Kathleen Kringel, claimant's mother. As the E/C argues, at her deposition Ms. Kringel expressed her preference that an attendant not be in the home when she is there. That generalized preference, however, is not sufficient in my view to find that the E/C has established a material or substantial change of condition under the circumstances of this case. While the prior order requires the E/C to provide 24 hour care with an LPN, nothing in that order prevents the parties from agreeing to an alternative arrangement, as they have done in this case. Dr. Lichtblau's recent testimony that Kathleen Kringel can, if she chooses, provide 12 hours per day of care is not a change of condition because there is nothing in the prior order that prevents that arrangement, then or now.

When the court asked counsel for the E/C how granting the requested modification would effect the rights and responsibilities of the parties, counsel replied that the E/C wanted the order to conform to the evidence. Providing the E/C peace of mind regarding the contents of an order entered more than two years ago, in my view, is simply not a valid basis for modification under section 440.28. Modification under the

statute is intended to result in a new compensation order "which may terminate, continue, reinstate, increase, or decrease such compensation or award compensation." Section 440.28, Fla. Stat (2005). Dr. Lichtblau's change in opinion, which in essence ratifies the parties' current arrangement, and is conditioned on the future whims of claimant's mother, does not support the entry of a new order that would do any of those things. Consequently, I find that the E/C has not established a change of condition pursuant to the requirements of the statute.

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

1. The E/C's petition for modification is DENIED.
2. Claimant is entitled to reasonable attorneys' fees and costs from the E/C for prevailing on the E/C's petition for modification. Jurisdiction is reserved to determine the amount of fees and costs owed.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida this 15 day of January, 2010.

Thomas W. Sculco

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Thomas W. Sculco  
Judge of Compensation Claims  
400 West Robinson Street, Suite 608N  
Orlando, Florida 32801-1701

This is to certify that a true and correct copy of the foregoing Order has been furnished by electronic or U.S. Mail to the parties and counsel listed below.

Yadira Suarez

Digitally signed by Yadira  
Suarez  
Date: 2010.01.15 15:58:24  
-05'00'

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Yadira Suarez  
Assistant to Judge Sculco

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