STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGES OF COMPENSATION CLAIMS
SEBASTIAN/MELBOURNE DISTRICT OFFICE

Chelsey Bateman,
Employee/Claimant,

OJCC Case No. 13-029083RLD

vs.

Accident date: 9/16/2013

McDonald's/Amerisure Insurance,
Employer/Carrier/Servicing Agent.

Judge: Robert L. Dietz

_____/

FINAL COMPENSATION ORDER

THIS CAUSE was heard before the undersigned in Sebastian, Indian River County, Florida on December 17, 2014, upon the Claimant's claims for Temporary Total Disability (TTD)/Temporary Partial Disability (TPD) from September 16, 2013, to present and continuing; determination of the correct average weekly wage (AWW)/compensation rate to include Claimant's forty (40) hours per week plus health insurance and overtime; and penalties, interest, costs and attorney's fees (Docket Number (DN) 15). The Petition for Benefits (PFB) was filed on June 12, 2014, Mediation occurred on September 11, 2014, and the parties' Statewide Uniform Pretrial Stipulation was filed on October 9, 2014.

The defenses were: the claim has been denied in its entirety pursuant to Section 440.105(4) and section 440.09(4), Florida Statutes; no TTD due; the Claimant has not been placed on a no-work status; no TPD due; the Employer provided the Claimant work within her restrictions post-accident; the Claimant voluntarily limited her income; the Claimant was terminated for cause; the Claimant's lost wages, if any, are unrelated to her accident; the AWW is correct; No penalties, interest, costs and attorney's fees are due; and the Employer/Carrier seeks costs.

David Rickey, Esq. was present on behalf of the Claimant. William Rogner, Esq. was present on behalf of the Employer/Carrier. Tim Morgan was present on behalf of the Employer. The Claimant filed a Final Hearing Information Sheet (DN 65) and the Employer/Carrier filed a Trial Memorandum (DN 64) that have been reviewed by the undersigned.

The following documentary items were received into evidence:

Judge's Exhibits:

Exhibit #1: All documents required by Fla. R. App.P. 9.180.

Exhibit #2: Order on Employer/Carrier's Motion to Admit Medical Records entered on September 18, 2014 (DN 29).

Exhibit #3: Order Approving Uniform Pre-Trial Stipulation entered on October 10, 2014 (DN 31).

Exhibit #4: Order on Claimant's Motion to Admit Records entered on October 22, 2014 (DN 44).

Exhibit #5: Order Granting Motion to Compel Execution of Releases for Social Security and Unemployment Records entered on December 12, 2014 (DN 48).

Exhibit #6: Order on Notice of Intent to Request Judicial Notice of Certain Facts Regarding Social Media at the Merits Hearing entered on December 12, 2014 (DN 62).

Joint Exhibits:

Exhibit # 1: Uniform Pretrial Stipulation and Pretrial Compliance Questionnaire filed September 18, 2014 (DN 30).

Claimant's Exhibits:

Exhibit #1: Petition for Benefits filed on June 12, 2014 (DN 15).

Exhibit #2: Deposition transcript of Medical Records Custodian of Cape Canaveral Hospital with medical records filed on October 16, 2014 (DN 34-38).

Exhibit #3: Motion to Admit Medical Records of Authorized Physicians with medical records filed on October 16, 2014 (DN 39-42).

Exhibit #4: Amended Witness List and Exhibit List filed on November 17, 2014 (DN 46).

Exhibit # 5: Claimant's Notice of Filing Deposition Transcript and Exhibits of Dr. Luc Teurlings taken October 29, 2014, filed on December 12, 2014 (DN 55).

Exhibit #6: Deposition transcript of Dr. Luc Teurlings taken October 29, 2014, with Exhibits filed on December 12, 2014 (DN 56-57).

Exhibit #7: Deposition transcript of Miryah Haskens taken November 24, 2014, filed on December 12, 2014 (DN 58). The Employer/Carrier objected to admission of the exhibit since the witness is not a party, was present to testify live at the final hearing, and did not otherwise meet the requirements for admission of her deposition. The objection was sustained and Exhibit #7 is struck.

Exhibit #8: Deposition transcript of Eric Paddock taken November 6, 2014, filed on December 12, 2014 (DN 59). The Employer/Carrier objected to admission of the exhibit since the witness is not a party, was present to testify live at the final hearing, and did not otherwise meet the requirements for admission of his deposition. The objection was sustained and Exhibit #8 is struck.

Exhibit #9: Deposition transcript of Peter Dargy taken November 3, 2014, filed on December 12, 2014 (DN 60).

Employer/Carrier's Exhibits:

Exhibit #1: Response to Petition for Benefits filed on June 23, 2014 (DN 18).

Exhibit #2: Employer/Carrier's Motion to Admit Medical Records of Authorized Physician, MedFast filed on September 12, 2014 (DN 28).

Exhibit #3: Employer/Carrier's Response to Claimant's Motion to Admit Medical Records of Authorized Physicians filed October 22, 2014 (DN 43).

Exhibit #4: Notice of Intent to Request Judicial Notice of Certain Facts Regarding Social Media filed on December 2, 2014 (DN 47).

Exhibit #5: Employer/Carrier's Notice of Filing Claimant's Deposition Transcript Dated March 28, 2014, filed on December 11, 2014 (DN 50).

Exhibit #6: Employer/Carrier's Notice of Filing Supplemental Deposition Transcript taken October 16, 2014, filed on December 11, 2014 (DN 51).

Exhibit #7: Employer/Carrier's Notice of Filing June 23, 2014, Response to Petition for Benefits filed on December 11, 2014 (DN 52).

Exhibit #8: Employer/Carrier's Notice of Filing Wage Statement filed on December 11, 2014 (DN 53).

Exhibit #9: Employer/Carrier's Notice of Filing Wage Statement filed on December 11, 2014 (DN 54).

Exhibit #10: Employer/Carrier's Notice of Defense Under Section 440.105(4) and Section 440.09(4), Fla. Stat. filed April 4, 2014 (DN 13).

At the hearing, the Claimant, Chelsea Bateman, the Employer's General Manager, Eric Paddock, and one of the Employer's managers, Miryah Haskins, appeared and testified before me. In making my findings of fact and conclusions of law, I have carefully considered and weighed all the evidence presented to me. Although I will not recite in explicit detail the witnesses' testimony and may not refer to each piece of documentary evidence, I have attempted to resolve all of the conflicts in the testimony and evidence. Based on the foregoing and the applicable law, I make the following findings:

1. The undersigned has jurisdiction over the parties and the subject matter.

2. The items to which the parties were in agreement on the Uniform Statewide Pretrial Stipulation are accepted and adopted as findings of fact. The Employer/Carrier's response to Question #7 on the Pretrial is changed to reflect that the claim was initially accepted as compensable and then denied on April 4, 2014, when the Notice of Defense Under Section 440.105(4) and Section 440.09(4), Fla. Stat. was filed by the Employer/Carrier (DN 13). The Claimant stipulates to the AWW of $211.11 based on the 13 week wage statement (Question #14 on the Pretrial). On the issue of Maximum Medical Improvement (MMI), the Claimant's position is that it has not been reached, and the Employer/Carrier agree there is no evidence the Claimant has reached MMI (Question #15 on the Pretrial).

3. The parties stipulated that the PFB filed on December 15, 2014 (DN 63) has not as-of-yet been mediated and therefore is not ripe for adjudication. All other claims that are due, ripe and owing are final and adjudicated as of this hearing.

4. The parties stipulated that the Claimant suffered an industrial accident arising out of and in the course and scope of her employment on September 16, 2013, when she slipped and

fell. The Claimant indicates in the pretrial that she suffered injuries to her neck, right shoulder, right arm, and right hand. Authorized medical care was provided until April 4, 2014, by Cape Canaveral Hospital, MedFast Urgent Care Centers, and Dr. Luc Teurlings.

5. On September 18, 2013, the Claimant went to an authorized walk-in clinic and was sent to Cape Canaveral Hospital for diagnostic exams, where she was given a cervical collar. On September 29, 2013, the Claimant was treated at Medfast Walk-In Clinic and referred to physical therapy and given a pregnancy test. She was released to light duty work with the restrictions "as tolerated." She was to use the soft collar during the day as needed. There is no other evidence submitted as to any other instructions given related to the use of the cervical collar. On October 2, 2013, the Claimant was treated at Medfast for cervical and lower back strain and released to work with no lifting. On October 14, 2013, Medfast referred the Claimant to a neurosurgeon or orthopedic physician and for an MRI and x-rays to be performed. She was released to work with the same restrictions.

6. On October 22, 2013, the MRI was done at NSI Neuroskeletal Imaging and was interpreted as indicating a disc herniation at C4-5 and a bulging disc at C3-4. On November 13, 2013, the Claimant was referred by Medfast to an orthopedist and was released to work on light duty with no lifting. On December 6, 2013, the Claimant was again seen at Medfast and the office note questioned whether she was malingering, but noted that she had not been seen by a neurosurgeon or an orthopedist as had been requested since October 14, 2013. No reason or explanation was given in the office note for the inquiry regarding malingering. Despite this, the Claimant was again referred to an orthopedist. The restriction of light duty work with no lifting was maintained. The Claimant continued to be seen on December 14, 2013, and December 28, 2013, at Medfast, before being seen by Dr. Luc Teurlings, an orthopedist, on January 17, 2014. Dr. Teurlings diagnosed cervical disc herniation at C4-5 and possible right shoulder impingement syndrome. When the Claimant returned to Dr. Teurlings on January 31, 2014, all diagnostic testing was suspended because the Claimant was pregnant. Physical therapy had not helped. Dr. Teurlings placed the Claimant on restrictions of no lifting of more than 10 pounds, no overhead work, no pushing and no pulling. Diagnostic testing and treatment was to resume after the baby was born. On April 4, 2014, the Employer/Carrier filed its Notice of Defense Under Section 440.105(4) and Section 440.09(4), Fla. Stat.

7. The Claimant worked night shifts at McDonald's beginning approximately 11:00 p.m. and working until approximately 4:00 a.m. the following morning. On Friday night, November 15, 2013, and Saturday night, November 16, 2013, the Claimant called in and indicated she would not be coming to work due to sick children.

8. Miryah Hoskins, a manager with the Employer, was a "friend" on Instagram with the Claimant. In reviewing her Instagram feed, Ms. Hoskins saw a picture involving the Claimant, took a screenshot, and forwarded it to her General Manager, Eric Paddock. The screenshot included a reference in the top right corner of "17h" which the Claimant and Ms. Hoskins agreed meant that the picture had been uploaded onto Instagram 17 hours before. The picture was taken in a car (shoulder seat belt in background). When questioned about her activities at the time, the Claimant indicated that she was on her way to a strip club with friends. The Claimant was not wearing a cervical collar at the time the picture was taken.

9. There is no medical evidence that any authorized treating doctor took the Claimant off work, except for the day of the exam December 28, 2013, but the Claimant was returned to her prior restrictions the next day. As a result, there is no basis for the award of TTD benefits, and that claim is denied.

10. Following the accident, the Claimant returned to work within two days at the Employer. She continued to work her normal hours until she was terminated. The Claimant indicates that she last worked on the morning of November 18, 2013 because she was not scheduled for any additional work. The Employer, Eric Paddock, testified that the Claimant was terminated "after that" for excessive absences. For purposes of the discussion of entitlement to TPD benefits, it is not necessary to identify a specific date of termination because the Claimant testified that she was unemployed for only two hours. She found employment through Express Employment, a temporary agency, at WalMart working 38-40 hours per week, earning $8.00 per hour, through the beginning of December 2013, when she was let go because they no longer needed her. She was off-work for two and one-half (2.5) weeks before being placed with Florida Linen Space Coast Hospital Services where she worked 40 hours per week and was paid minimum wage. She worked through January 2014 when she was fired for using the bathroom too much. She was then off-work until approximately March 14, 2014, when she enrolled at STEP Medical to study phlebotomy. Prior to returning to school, the Claimant was turned down for work due to her pregnancy. After she returned to school, she stopped looking for work. Her classes were from Monday through Thursday, 9:00 a.m. to 2:30 p.m. for six (6) weeks. She did not complete the course due to coming down with pneumonia, which lasted two and one-half (2.5) weeks. She was then hired at Burger King where she worked 30 hours a week at $7.79 per hour until September 17, 2014, the date she delivered her daughter. She was then on maternity leave for six weeks and worked from the end of her maternity leave until the present with Burger King with a promotion to shift manager and raise to $7.93 per hour, still at 30 hours per week. She cannot do all of the lifting required of other shift managers which has resulted in reduced

pay from that received by other shift managers.

11. From the time the Claimant was terminated from McDonald's, she has earned more in each job that she has held than she did at McDonald's (AWW $211.11). She was placed in these jobs by a temporary agency, was able to perform the work even with her assigned restrictions, and when she left those jobs, it was not due to this industrial accident (reasons given: no longer needed by employer, used the bathroom too much, registered and attended a phlebotomy training program, contracted pneumonia, and became pregnant). The Claimant has shown sustained continued ability to find work within her restrictions and has not demonstrated that her shoulder or neck prevented her from obtaining employment. As a result, any loss of earnings is unrelated to the injuries she sustained in this accident. There is no basis for the award of TPD benefits and that claim is denied.

12. The Employer/Carrier has denied the case in its entirety as of April 4, 2014, based on the Section 440.105(4) and Section 440.09(4), Fla. Stat. (2013) defenses.

Section 440.105(4)(b) states:

"It shall be unlawful for any person:

1. To knowingly make, or cause to be made, any false, fraudulent, or misleading oral or written statement for the purpose of obtaining or denying any benefit or payment under this chapter.
2. To present or cause to be presented any written or oral statement as part of, or in support of, a claim for payment or other benefit pursuant to any provision of this chapter, knowing that such statement contains any false, incomplete or misleading information concerning any fact or thing material to this claim.
3. To prepare or cause to be prepared any written or oral statement that is intended to be presented to any employer, insurance company, or self-insured program in connection with, or in support of, any claim for payment or other benefit pursuant to any provision of this chapter, knowing that such statement contains any false, incomplete, or misleading information concerning any fact or thing material to such claim."

Section 440.09(4)(a), Fla. Stat. (2013), in part, states:

"An employee shall not be entitled to compensation or benefits under this chapter if any judge of compensation claims, administrative law judge, court, or jury convened in this state determines that the employee has knowingly or intentionally engaged in any of the acts described in s. 440.105 or any criminal act for

the purpose of securing workers' compensation."

13. Where a section 440.09 defense is raised, the "JCC is … required to determine whether Claimant knowingly or intentionally made any false, fraudulent, incomplete, or misleading statement, whether oral or written, for the purpose of obtaining workers' compensation benefits, or in support of his claim for benefits," Village of N. Palm Beach v. McKale, 911 So.2d 1282, 1283 (Fla. 1st DCA 2005), and those raising the defense have the burden of proof by a preponderance of the evidence. *Id*; Pavilion Apartments v. Wetherington, 943 So.2d 226 (Fla. 1st DCA 2006).

14. In Dieujuste v. J. Dodd Plumbing, Inc., 3 So.3d 1275 (Fla. 1st DCA 2009), the court held that although the basis of a misrepresentation defense must be a Claimant's oral or written statement, an Employer/Carrier can prove that statement constitutes misrepresentation by presenting evidence of the Claimant's nonverbal conduct inconsistent with that statement, and convincing a Judge of Compensation Claims (JCC) of its veracity. See also Lucas v. ADT Security, Inc., 72 So.3d 270 (Fla. 1st DCA 2011). While surveillance video is the most frequently cited example of this, use of a cane or crutch was also referenced in Dieujuste. In our case, the use of a neck brace is central.

15. This defense is based on the intent of the Claimant as it relates to her claim for workers' compensation benefits. The issues of whether the Claimant had excessive absences or whether company policies were violated if it is established that an absence was not actually for the reason given are not relevant here because no evidence was introduced on these issues other than the Employer's statement that the Claimant was terminated for excessive absences, and that it wasn't only related to the night the Instagram picture was taken. This does not give enough basis for a determination as to whether the Claimant was fired "for cause" due to this one event. The Employer insists that termination was due to "excessive absences" but no other documentation of other absences other than the weekend when the Instagram picture was taken are referenced or documented. Again, it is not the undersigned's job here to evaluate whether a company policy has been violated. The voluntary limitation of income defense is typically argued where the Claimant has made no effort to return to work or has sabotaged her efforts to return to work. It is not applicable where the Claimant took her next job within hours of being terminated and has worked continuously since being terminated from the Employer. I find the voluntary limitation of income defense is not applicable in this case.

16. The fraud defense was raised by the Employer/Carrier in its Notice dated April 4, 2014, over four months after the events of the night when the Instagram picture was taken. The Employer/Carrier took great effort to establish the date of the Instagram picture apparently

assuming that the Claimant's lack of memory at her deposition March 28, 2014, of the exact date and her not wearing her cervical collar decided the case. The picture stands for what it is. Nothing more and nothing less. The picture is neither an oral nor a written statement. The Claimant is not wearing the neck collar in the picture. She testified that she wore the neck collar when she was outside of her house when she was going to be physically active, like going to work, until the physical therapist told her that she didn't have to wear it. Again, the Claimant is uncertain of the exact date.

17. The Employer/Carrier argue that the claimant's deposition testimony and the statements to the doctors constitute the false or misleading statements. They point specifically to the five Medfast Clinic notes that she was using the neck brace "daily" and, on January 13, 2014, "24/7." There is no evidence presented that she didn't use her neck brace daily, or that she wasn't using it around-the-clock on January 13, 2014. A picture taken one evening in November while the Claimant was out with friends does not provide evidence as to any of these other times. Dr. Luc Teurlings saw the Claimant on January 17, 2014, four days after the "24/7" office note, and assigned restrictions that did not even include wearing the cervical collar, and did not recall any discussions of it (Dr. Teurlings Depo., DN 55, p. 8). When asked about the Claimant being given a cervical collar, he noted that it was a prior physician.

18. The fraud defense is based on the Claimant's intention to knowingly make a false, fraudulent or misleading oral or written statement for the purpose of obtaining or denying any benefit or payment under Section 440. At the time that the Claimant first made the sworn statements that are the basis for the defense (the March 28, 2014, deposition of the Claimant (DN 50)), the Claimant was receiving no indemnity benefits because she had not missed any work at either her former employer (McDonald's) or the subsequent employers where she worked after being terminated. She was actually making more money at the subsequent employers than she had at McDonalds. She was receiving no medical benefits because she was pregnant and could not have additional treatment until after the baby was born (arrival date: September 17, 2014, some six months later).

19. Two things are not arguable: the claimant could not remember the exact date she went out without her neck collar (that was apparently the subject of the Instagram picture), and the authorized (at the time) doctor's, Dr. Teurling's, opinion that she has a new herniated disc based on comparison of the before and after MRIs. The undersigned does not find the intent to defraud the workers' compensation system based on the accuracy of the Claimant's memory to a specific date five months before. The Claimant, in her own mind, was positive that she went out with friends after her physical therapist told her that it was no longer necessary to wear the neck

collar. That's how she testified in her deposition on March 28, 2014, in her supplemental deposition on October 16, 2014, and at the final hearing. This is hardly the behavior of someone "caught" making an intentional misrepresentation. It is the behavior of someone that may be incorrect in their recollection, but it is how they remember it. Perhaps the most overlooked thing in this case is the stated purpose of the original prescription of the cervical collar. There is no evidence as to when it was to be worn, for how long it was to be worn, and under what circumstances that wear was optional other than the original instruction that it was to be worn "during the day as needed." The only orthopedic surgeon that testified, Dr. Teurlings, did not even include it in his treatment plan or list of restrictions, after diagnosing a herniated disc in the Claimant's neck. The Claimant testified that she would wear it at work, but didn't wear it all the time at home, particularly if she was relaxing, or showering. When someone says they do something "all the time," or even uses the phrase "24/7," it still requires inquiry of the intent of the language as it relates to the case. The Claimant was not questioned as to her meaning in using this language. Would any reasonable person think the neck brace was worn in the shower? Is a cane used, or a knee brace worn, in the shower? While in bed? While relaxing? While socializing with friends? As opposed to during a five hour work shift? Was the Claimant using the neck brace as a "prop" as suggested by the Employer/Carrier? Was it really medically necessary in this case or was it given because clinic physicians recommend cervical collars to anyone that reports cervical symptoms? No evidence was presented on these medical issues.

20. It is reasonable to expect that a person with a herniated disc in her neck may experience pain and symptoms from the condition. A person that has been given a cervical collar and told to use it as needed, with an objectively documented medical condition, will wear it when they think it is needed, and won't when they don't think it is needed. There was no testimony by any medical expert that the cervical collar had to be worn every moment of every day or that it didn't provide benefit if taken off for short periods of time. In fact, there was no testimony of the medical purpose of the cervical brace in this case. The only orthopedic surgeon that testified didn't even include the cervical collar in his treatment plan or restrictions: four days after the Claimant is criticized for describing her usage of the collar as "24/7." I agree with the Employer/Carrier that the Claimant is not the best historian. There is no question in my mind that the Claimant remembers that she reduced her frequency of using her cervical collar after the physical therapist told her it was no longer necessary to wear. The fact that there was uncertainty as to the date months later in her deposition highlights the obvious that no one's memory is perfect. The physical therapist didn't testify. This leaves us with a dispute over a conversation held on a date that is not documented and whether it is before or after November 17, 2013. I do

not find that the Claimant had intent to make any false, fraudulent, or misleading oral or written statement for the purpose of obtaining any benefit or payment under this chapter.

21. In light of the denial of indemnity benefits, the claim for penalties, interest, costs and attorney fees is denied. The Employer/Carrier is the prevailing party on those issues. In light of the denial of the Section 440.105(4) and Section 440.09(4), Fla. Stat. defenses, the Claimant is the prevailing party on those issues.

It is hereby ORDERED and ADJUDGED that:

1. The claim for TTD benefits is denied.
2. The claim for TPD benefits is denied.
3. The Employer/Carrier's defense based on Section 440.105(4) and Section 440.09(4), Fla. Stat. is denied.
4. The claim for penalties, interest, costs and attorney fees is denied.
5. The Employer/Carrier is the prevailing party on the indemnity issues and the Claimant is the prevailing party on the fraud defense issues.

DONE AND ELECTRONICALLY SERVED ON COUNSEL AND CARRIER this 30th day of December, 2014, in Sebastian, Indian River County, Florida.

Robert L. Dietz
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