

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGE OF COMPENSATION CLAIMS
Melbourne District**

EMPLOYEE:

Shirley Jones
2935 Kemplewick Dr. #207
Melbourne, FL 32935

EMPLOYER:

Burger King Corporation
5505 Blue Lagoon Drive
6th Floor
Miami, FL 33126

CARRIER:

Sedgwick CMS
5505 Blue Lagoon Drive
Miami, FL 33126

ATTORNEY FOR EMPLOYEE:

Dennis D. Smejkal, Esquire
The Law Office of Dennis D. Smejkal, P.A.
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ATTORNEY FOR EMPLOYER/CARRIER:

William H. Rogner, Esquire
Hurley, Rogner, Miller, Cox, Waranch &
Westcott, P.A.
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Winter Park, FL 32789

OJCC CASE NO.: 08-028056PTT
D/A: 9/1/2008

COMPENSATION ORDER

PURSUANT TO an October 17, 2008 DOAH filed Petition for Benefits, a merits hearing was convened before the undersigned Judge of Compensation Claims on May 8, 2009. At that hearing all exhibits were admitted into evidence and testimony was taken. On May 12, 2009 the parties completed the hearing through the presentation of closing arguments. At the conclusion of the May 12, 2009 hearing the undersigned closed the record and then ruled, expressing findings of fact and conclusions of law which are incorporated by reference into this order.

THE BENEFITS CLAIMED WERE:

1. Compensability of the injury.
2. Temporary total disability benefits from September 1, 2008 through the date of the hearing.

3. Temporary partial disability benefits from September 1, 2008 to the date of the hearing.
4. Authorization of orthopedic care.
5. Penalties, interest, costs, and attorney's fees.
6. Correct determination of the Average Weekly Wage. The parties stipulated to an Average Weekly Wage of \$258.09 per week.
7. The claim for neurological care was voluntarily dismissed.

THE DEFENSES OF THE EMPLOYER/CARRIER WERE AS FOLLOWS:

1. The accident was not the major contributing cause of the claimant's injury or condition, or need for treatment.
2. The claimant was not temporarily or totally disabled.
3. The claimant voluntarily limited her income.
4. The claimant conducted no job search.
5. The claimant's loss of earnings was unrelated to her injury.
6. The claimant's loss of earnings was related to personal issues or the economy.

THE FOLLOWING EXHIBITS WERE ADMITTED INTO EVIDENCE:

1. The pre-trial stipulation and order approving it February 27, 2009. (Joint Exhibit #1).
2. The deposition of Yashica Jackson taken March 19, 2009. (Joint Exhibit #2).
3. The deposition of Dr. William Stolzer taken March 5, 2009. (JCC Exhibit #1).
4. Order setting merits hearing entered October 28, 2008. (JCC Exhibit #2).
5. Order setting merits hearing entered November 4, 2008. (JCC Exhibit #3).
6. Order setting merits hearing entered January 12, 2009. (JCC Exhibit #4).
7. The claimant's first trial memorandum filed April 20, 2009. (Claimant Exhibit # 1(a)argument only).

8. The claimant's second trial memorandum filed May 6, 2009. (Claimant Exhibit #1(b) argument only).
9. The employer/carrier's pre-hearing checklist. (Employer/Carrier Exhibit #1 - argument only).
10. The employer/carrier's first trial memorandum filed April 16, 2009. (Employer/carrier Exhibit #2(a) argument only).
11. The employer/carrier's second trial memorandum filed May 6, 2009. (Employer/carrier Exhibit #2(b) argument only).
12. The deposition of Dr. Rojas taken April 27, 2009. (Claimant Exhibit #2).
13. The deposition of Dr. Patel taken March 23, 2009. (Employer/Carrier Exhibit #3).
14. A composite of documents pursuant to a April 16, 2009 Notice of Filing. (Employer/Carrier Exhibit #4).
15. The deposition of the records custodian for Baptist Hospital. (Employer/Carrier Exhibit #5).
16. The deposition of the records custodian for Homestead Hospital. (Employer/Carrier Exhibit #6).
17. The deposition of Dr. Homi Cooper taken April 14, 2009. (Employer/Carrier Exhibit #7).

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

I have carefully considered all of the evidence submitted to me for consideration in making my findings of fact and conclusions of law. I have resolved the conflicts in the evidence and I have rejected all evidence and inferences that may be inconsistent with my verbal and written findings of fact and conclusions of law. Although I have not painstakingly summarized all of the evidence offered, I have reviewed and considered all of the evidence in reaching my ultimate conclusions. While my findings of fact and conclusions of law are contained in this order, my detailed findings of fact and conclusions of law provided to the parties at the hearing held on May 12, 2009 are directly incorporated by reference into this order.

1. For the reasons that follow I deny all claims and petitions and find that the claimant has not sustained her burden of proof to establish a compensable injury occurring on or about September 1, 2008.

2. The claimant allegedly was injured on September 1, 2008 when she slipped in grease and fell. She reported her fall and was authorized to leave work in order to go to the hospital. She went to Wuesthoff Hospital where she was treated and released. She was seen on the evening of September 1, 2008. She was told to stay off work until September 4, 2008 when she was instructed to return to work. The claimant never returned to work, despite acknowledging her release to work.

3. After the claimant received authorized care at Wuesthoff Hospital, the claim was denied in its entirety. Therefore, the claimant has received no other authorized care. In my review of the Wuesthoff Hospital records I find no objective evidence of injury. Instead, the records document only the claimant's subjective complaints along with diagnoses and treatment plans.

4. The claimant selected Dr. Joseph Rojas as her IME physician. Dr. Rojas evaluated the claimant and diagnosed her with sprains in her neck and back. He testified that he found spasm which was an objective finding. He further testified that there were no findings on the MRI scan that demonstrated objective evidence of injury. He was of the opinion that the claimant was not at maximum medical improvement, that she was totally disabled, and that her complaints in her neck and back were related to the incident of September 1, 2008.

5. Dr. Homi Cooper was the employer/carrier's IME physician. He saw the claimant on December 30, 2008 and April 9, 2009. The second visit was very near the time that Dr. Rojas saw the claimant. Dr. Cooper testified that the claimant had no objective findings and that her pain complaints were out of proportion to the claimed injury. He did not find any objective evidence of injury on the MRI. He assigned no limitations or restrictions based on the injury. He was of the opinion that the claimant reached MMI within four to six weeks of the September 1, 2008 incident. He believed she was at MMI with a 0% rating, no need for further care, and no restrictions.

6. The opinions of Drs. Rojas and Cooper were vastly differing. The claimant in this case filed a Notice of Conflict in Medical Testimony advising the Court of the conflict. The undersigned finds that the pleading filed by the claimant was filed in order to convince the Court to appoint an Expert Medical Advisor. As a result, the undersigned ordered the claimant to schedule and compensate the Expert Medical Advisor pursuant to section 440.13(9)(f), Florida Statutes. The

parties were unable to agree on a selection of physician and the Court chose Dr. William Stolzer as the expert medical advisor. Dr. Stolzer evaluated the claimant on April 29, 2009. He testified that there were no findings on examination. There were no significant findings on the MRI scan. His diagnosis was "complaints" of cervical, thoracic, and lumbar pain. Dr. Stolzer testified that the claimant needed no additional medical care. He found nothing objective to demonstrate an injury. He believed the claimant was embellishing her symptoms. He found the symptoms were grossly out of line in relation to the claimed injury. He opined that there was no physiological explanation for the complaints. Finally, Dr. Stolzer noted that the claimant said that she *chose* not to return to work.

7. Neither party argued that there was clear and convincing evidence to overcome the opinions expressed by the Expert Medical Advisor. Therefore, I adopt those opinions and find them to be true. Based on the opinion of Dr. Stolzer, the claimant has failed to establish objective relevant medical findings corroborating her subjective complaints confirmed by physical examination or diagnostic testing. Thus, under section 440.09(1), Florida Statutes, the claimant has not established a compensable injury.

8. I accept the opinions of Drs. Cooper and Rojas where they are in agreement with Dr. Stolzer. To the extent that their opinions disagree with Dr. Stolzer, I reject their opinions. Specifically, I accept Dr. Stolzer's testimony that the claimant has no objective relative medical findings establishing the existence of an injury. I accept his testimony that the claimant has long been at maximum medical improvement with no impairment rating or restrictions. I accept his testimony that the claimant does not need orthopedic care, or any other care for that matter. I accept Dr. Stolzer's testimony that the claimant is not disabled in any way. I reject any contrary opinion expressed by either Dr. Cooper or Dr. Rojas.

9. The claimant has not established a compensable injury under section 440.09(1) of the Florida Statutes. Even if she had, however, she has not established a compensable disability under section 440.12(1), Florida Statutes. Under that section, no compensation is allowable for the first seven days of disability. The authorized records from Wuesthoff Hospital established that the claimant, at a maximum, established three to four days of disability. Although the claimant sought unauthorized care, those opinions were not considered as competent, substantial evidence of

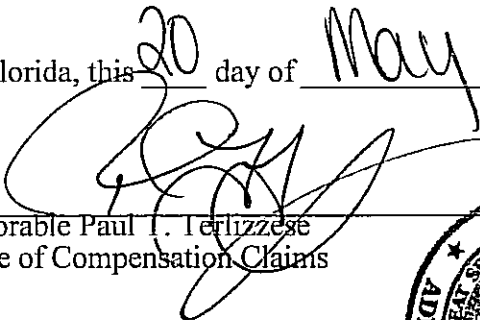
disability. The only other physician who testified that the claimant was disabled in any way was the Claimant's selected IME, Dr. Rojas. Since he disagreed with both Dr. Cooper and Dr. Stolzer, the EMA physician, I reject his opinions. Thus, the claimant has established a maximum of three to four days of disability which is insufficient under section 440.12(1), Florida Statutes.

10. I find that while the claimant suffered an incident on September 1, 2008, the claimant did not suffer a compensable injury under section 440.09(1), Florida Statutes. I find that the claimant has not established a compensable disability under section 440.12(1), Florida Statutes. I find that the claimant is not in need of any additional medical care, that she is not disabled, that she is at maximum medical improvement, that she has a 0% permanent impairment rating, and that she has no permanent work restrictions.

WHEREFORE, it is ORDERED and ADJUDGED as follows:

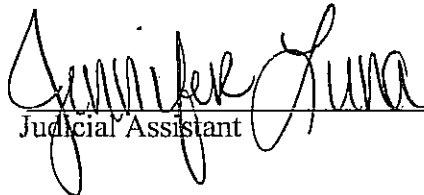
1. The claim for compensability of the September 1, 2008 incident is DENIED and DISMISSED with prejudice.
2. The claim for temporary total disability from September 1, 2008 through the date of the hearing is DENIED and DISMISSED with prejudice.
3. The claim for temporary partial disability benefits from September 1, 2008 through the date of the hearing is DENIED and DISMISSED with prejudice.
4. The claim for authorization for orthopedic care is DENIED and DISMISSED with prejudice.
5. The claims for penalties, interest, costs, and attorney's fees at the expense of the employer/carrier are DENIED and DISMISSED with prejudice.
6. As the employer/carrier was the prevailing party, the employer/carrier is entitled to an award of taxable costs. Jurisdiction is reserved to address the amount of those costs if the parties are unable to amicably resolve the issue.

DONE and ORDERED in Melbourne, Florida, this 20 day of May, 2009.


Honorable Paul I. Terlizzese
Judge of Compensation Claims



THIS IS TO CERTIFY that the foregoing Order was entered on the May 20 day of, 2009, and that a copy thereof was sent by regular U.S. Mail to all parties noted previously at their last known address.


Judicial Assistant