

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

Annette Kirkland,
Employee/Claimant,

OJCC Case No. 14-023619RLD

vs.

Accident date: 7/13/2014

DSI Management/Amerisure Insurance,
Employer/Carrier/Service Agent.

Judge: Robert L. Dietz

FINAL COMPENSATION ORDER

THIS CAUSE was heard before the undersigned in Sebastian, Indian River County, Florida on March 27, 2015, upon the Claimant's claims for Temporary Partial Disability (TPD) benefits from October 6, 2014, to December 4, 2014, and from February 10, 2015, to March 13, 2015, penalties, interest, costs and attorney fees. The Petition for Benefits (PFB) was filed on November 19, 2014 (Docket Number (DN) 11). All additional issues raised by this PFB have been resolved. Mediation occurred on January 12, 2015, and the parties' pretrial compliance questionnaire was filed on February 9, 2015 (DN 32). The Claimant filed a Final Hearing Information Sheet on March 25, 2015 (DN 44). The Employer/Carrier filed a Trial Memorandum on March 18, 2015 (DN 40). David I. Rickey, Esq. was present on behalf of the Claimant. William H. Rogner, Esq. was present on behalf of the Employer/Carrier.

The defenses were loss of earnings unrelated to injury, Claimant refused available employment, Claimant has not filed DWC-19's, Claimant either worked or was paid Temporary Total Disability (TTD)/Temporary Partial Disability (TPD) through October 5, 2014, and again from December 4, 2014, through February 9, 2015, leaving the only gap from October 6, 2014, to December 4, 2014, and from February 10, 2015 to March 13, 2015, and no penalties, interest, costs and attorney fees due.

The following documentary items were received into evidence:

Judge Exhibits:

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

Exhibit #2: Order Granting Motion for Continuance dated January 26, 2015 (DN 28).

Exhibit #3: Order Approving Uniform Pretrial Stipulation and Pretrial Compliance Questionnaire dated February 9, 2015 (DN 33).

Joint Exhibits:

Exhibit #1: Uniform Pretrial Stipulation and Pretrial Compliance Questionnaire filed on February 9, 2015 (DN 32).

Claimant's Exhibits:

Exhibit #1: Petition for Benefits filed on November 19, 2014 (DN 11).

Exhibit #2: Witness List and Exhibit List filed on February 13, 2015 (DN 35).

Exhibit #3: Deposition of Kurt A. Gasner, M.D. taken February 19, 2015, filed on March 9, 2015 (DN 37).

Exhibit #4: Exhibits of Deposition of Kurt A. Gasner, M.D. taken February 19, 2015, filed on March 9, 2015 (DN 38).

Exhibit #5: Notice of Filing Deposition Transcript and Exhibits of Dr. Gasner filed on March 9, 2015 (DN 39).

Exhibit #6: Notice of Voluntary Dismissal of Petition(s) for Benefits (October 10, 2014, November 25, 2014, January 7, 2015, and treatment by an authorized medical provider found in the November 19, 2014, PFB), filed on March 24, 2015 (DN 42).

Exhibit #7: Medical/Exempt Records of Jewett Orthopaedic Clinic, P.A. filed on March 25, 2015 (DN 43).

Exhibit #8: Addendum to Pretrial Stipulation filed February 9, 2015 (DN 32, pp. 8-9).

Employer/Carrier's Exhibits:

Exhibit #1: Witness/Exhibit List filed on February 12, 2015 (DN 34).

Exhibit #2: Supplemental Exhibit List filed on February 20, 2014 (DN 36).

Exhibit #3: Payout Ledger filed on March 18, 2015 (DN 41).

At the hearing, Annette Kirkland (the Claimant) and Steven Danos (the Employer Representative), Sonia Mowles, and Deborah Lund 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 parties stipulated that the Claimant suffered an industrial accident arising out of and in the course and scope of her employment as a certified nurse's assistant at Washington Square, an intermediate care facility for the disabled, on May 5, 2014, and suffered injuries to her right wrist. The Claimant has received Temporary Total Disability (TTD) benefits from September 22, 2014, to October 5, 2014, and from December 5, 2014, to January 12, 2015, and TPD benefits from July 14, 2014, to September 20, 2014 (DN 34, p. 3).
3. The parties stipulated that the base Average Weekly Wage (AWW) (without fringe benefits) is \$515.68 which results in a corresponding compensation rate of \$343.79 and a TPD rate of \$330.04 (DN 34, p. 6).
4. At the hearing, the Claimant's Counsel stipulated that the Claimant was on full duty release from October 23, 2014, through November 3, 2014, and would not be entitled to any TPD benefits during that period. This leaves the periods October 6, 2014, to October 22, 2014, November 4, 2014, to December 4, 2014, and February 10, 2015, to March 13, 2015, outstanding.
5. The Claimant received authorized medical care from Dr. Kurt Gasner beginning August 25, 2014. Dr. Gasner diagnosed right wrist sprain with de Quervain tenosynovitis,

which is tendonitis on the thumb side of the wrist and mild median nerve symptoms that were consistent with early carpal tunnel syndrome. He placed the Claimant on light duty with no lifting or carrying on the right side, and felt she could do administrative-type duties, which included paperwork, desk-type jobs, writing, keyboarding and some data entry (Depo. of Dr. Gasner, pp. 5-6; DN37). He performed surgery on September 23, 2014, and the Claimant was off duty until October 6, 2014. The Claimant had a second surgery performed December 5, 2014. The parties have agreed that the Claimant was released to light duty work performing administrative duties during the contested periods of October 6, 2014 through October 22, 2014, November 4, 2014, through December 4, 2014, and February 10, 2015, through March 13, 2015. The Claimant has not reached Maximum Medical Improvement (MMI) following her second surgery (Depo. of Dr. Gasner, Claimant's Exhibit #3, DN 37, p. 9).

6. Section 440.15(4), Fla. Stat. (2013) states that temporary partial disability benefits are due "if overall MMI has not been reached and the medical conditions resulting from the accident create restrictions on the injured employee's ability to return to work." Section 440.15(6), Fla. Stat. (2013) states that "if an injured employee refuses employment suitable to the capacity thereof, offered to or procured therefore, such employee shall not be entitled to any compensation at any time during the continuance of such refusal unless at any time in the opinion of the judge of compensation claims such refusal is justifiable."

7. At the time the Claimant was being released to return to work after the first surgery (October 6, 2014), the Claimant enrolled in and returned to class to obtain her LPN degree during the day on weekdays. From that point to the present, the Claimant has complained of difficulties in scheduling her work during the week and has asked for adjustments in time, hours, shifts, and duties. The Employer has met each and every request with new work schedules that complied with Dr. Gasner's restrictions and met the Claimant's limited availability. As with

any return-to-work effort involving restricted duties, communication between employees and management could be better, but if each side is giving full effort to making that work, the Claimant successfully returns to work. In this case, the Claimant has been attending classes in her LPN program throughout the day Monday through Friday. The Employer has documented their efforts to coordinate the Claimant's return to work including letters to the Claimant and modified duty assignment descriptions which requested her signature (DN 34, pp. 5, 7, 8). Steven Danos, the program director, testified on all of the Employer's actions to return the Claimant to work within Dr. Gasner's restrictions. Sonia Mowles, a manager and supervisor of non-LPN employees, testified that she never told the Claimant that there was no work or to go home. She did not remember referring the Claimant to anyone else regarding work. Deborah Lund, the charge LPN who supervises the nurses, testified that she could not recall sending the Claimant home. Work has been available within Dr. Gasner's restrictions throughout the periods at issue here. The Claimant testified that she had returned four or five times to the Employer to work, but that no work was available for her and that she was sent home. There is only evidence of the Claimant clocking in three times. The Claimant clocked in only once (on October 14, 2014) over the entire three claimed TPD periods and actually worked (for six (6) hours). On two other occasions she clocked out after three minutes (on October 19, 2014) and after twelve minutes (on October 11, 2014) (DN 34, p. 4). She requested numerous changes of schedule (number of hours, days, and shifts), and job duties, was granted those changes, and then did not appear for work, changed the appointments, delayed complying with the schedules to which they had agreed, or refused to sign the modification plan.

8. No concerted effort to return to work was made by the Claimant during these periods of claimed TPD benefits. The inconvenience caused by her class schedule for her LPN program made her return to work a secondary concern despite the Employer's efforts. While

the Claimant's efforts to improve herself professionally are laudable, she has not shown that her loss of earnings or her entitlement to TPD benefits are due to her workers' compensation accident. In seventy-seven (77) days in the outstanding TPD periods, the Claimant worked one day for six (6) hours. This is hardly the effort that is expected of the Claimant when evaluating entitlement to TPD benefits where the Employer has provided work within the doctor's restrictions. Even the day where the Claimant alleges that a described work duty was outside her restrictions (folding laundry), it was one of several assigned duties within her restrictions and rather than do the work that was available within her restrictions, she chose to leave work (the Employer removed the conflicting work activity that day). The Claimant made no effort to perform any of the duties that were within her restrictions.

9. I find that the Claimant was offered work within her restrictions by the Employer. During the periods at issue, the Claimant did not return to work so that lost wages were avoided. The Claimant's enrollment in the LPN program has resulted in schedule conflicts and her lack of interest to work at the times she requested from the Employer. In order to be eligible for TPD benefits, the Claimant would have had to make a good faith effort to return to the light duty work the Employer had available. The claims for TPD benefits from October 6, 2014, through October 22, 2014, from November 4, 2014, through December 4, 2014, and from February 10, 2015, through March 13, 2015, are denied.

10. Since the claims for TPD benefits are denied, there is no entitlement to penalties, interest, costs and attorney fees.

11. Any and all issues raised by way of the Petition for Benefits, but which issues were not dismissed or tried at the hearing, or which were ripe, due and owing but not raised at the hearing, are presumed resolved, or in the alternative, deemed abandoned by the Claimant, and therefore, are denied and dismissed with prejudice. Notwithstanding the foregoing, the

parties at the hearing stipulated a Petition for Benefits had been filed on January 7, 2015, and it had not been mediated; thus, it is not ripe for adjudication at this time. Jurisdiction is reserved as to the claims set forth therein. As of the date of this Order, the January 7, 2015, PFB is closed.

It is ORDERED and ADJUDGED that:

- 1) The claims for TPD benefits from October 6, 2014, through October 22, 2014, from November 4, 2014, through December 4, 2014, and from February 10, 2015, through March 13, 2015, are denied.
- 2) The claims for penalties, interest, costs, and attorney fees are denied.

DONE AND ELECTRONICALLY SERVED ON COUNSEL AND CARRIER this 14th day of April, 2015, in Sebastian, Indian River County, Florida.



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