

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

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|---|---|----------------------------|
| Mary Lamarre, |) | |
| |) | |
| Employee/Claimant, |) | |
| |) | |
| vs. |) | OJCC Case No. 08-019874JTF |
| |) | |
| Lake Bennett Health and Rehabilitation, |) | Accident date: 4/3/2008 |
| |) | |
| Employer, |) | |
| |) | |
| and |) | |
| |) | |
| Premier Group Insurance, |) | |
| |) | |
| Carrier/Servicing Agent. |) | |
| _____ |) | |

Final Compensation ORDER

After proper notice to all of the parties, a hearing was held on this matter before the undersigned Judge of Compensation Claims in Orlando, Orange County, Florida on May 14, 2009.

Prior to the hearing, the parties made certain stipulations as indicated in the pre-trial stipulation which are approved, accepted and adopted by the undersigned. In this Order, the Employee/Claimant shall hereinafter be referred to as the "Claimant" and the Employer/Carrier shall hereinafter be referred to as the "E/C".

In addition to the documents listed in Rule 9.180, Workers' Compensation Rules of Appellate Procedure, the record will consist of the following exhibits which were admitted into evidence:

Court's Exhibits:

- 1.) Pretrial Stipulation & Pretrial Compliance Questionnaire (with any attachments)
- 2.) Claimant's Hearing Information Sheet , with any attachments (argument)
- 3.) E/C's Hearing Information Sheet, with any attachments (argument)

Claimant's Exhibits: (NOTE = all references to depositions in this Order include all records attached to such depositions)

- 1.) Deposition of Richard Smith, M.D. taken February 20, 2009
- 2.) Deposition of Jay Bloomer taken November 4, 2008
- 3.) Deposition of Lynda Cole taken March 19, 2009
- 4.) Composite of Employee Earnings reports dated 10/07/08 and 08/25/08 with cover letters
- 5.) TPD calculation sheet (demonstrative aid)

E/C's Exhibits: (NOTE = all references to depositions in this Order include all records attached to such depositions)

- 1.) deposition of Dr. Steven E. Weber taken April 27, 2009
- 2.) Deposition of Kathleen Webber taken March 19, 2009 (objection to late filing overruled)
- 3.) Deposition of Marie Lamarre taken April 29, 2009

- 4.) Deposition of Marie Lamarre taken October 3, 2008
- 5.) Employee Earnings Report dated 02/20/09

The following witnesses testified live at the hearing:

- 1.) Jay Bloomer
- 2.) Mary Lamarre
- 3.) Xiomara Solares

The issues submitted for determination by the Claimant were:

- 1.) Temporary Partial Disability (TPD) benefits from April 3, 2008 through November 12, 2008
- 2.) Penalties, Interest, Costs, Attorneys fees (PICA)

The defenses submitted for determination by the E/C were:

- 1.) Light duty work was available for the Claimant with the Employer within her work restrictions from April 3, 2008 through June 11, 2008.
- 2.) Claimant was terminated from employment for misconduct
- 3.) Claimant has worked after June 11, 2008 within her restrictions so that the industrial accident is not the Major Contributing cause (MCC) of the Claimant's lost wages
- 4.) Claimant has voluntarily limited her income from June 11, 2008 through November 12, 2008.
- 5.) No PICA is due or owing

In making the determinations set forth below, I have attempted to distill the testimony and salient facts together with the findings and conclusions necessary to the resolution of this claim. I have not attempted to painstakingly summarize the substance of any live or deposition witness, nor have I attempted to state nonessential facts. Because I have not done so does not mean that I have failed to consider all of the evidence.

After giving careful consideration to the stipulations of the parties, the documentary evidence, the candor and demeanor of the live witnesses and after resolving all of the conflicts in the evidence and hearing argument of counsel, I make the following findings of fact and conclusions of law:

1.) I find that the Claimant was not terminated for misconduct as that term is used in Section 440.15(4)(e) and defined in Section 440.02(18) Florida Statutes; Thorkelson v. NY Pizza & Pasta, Inc., 956 So 2d 542 (Fla. 1st DCA 2007). I find that the Claimant's termination was due to the Claimant's poor work performance. I base these findings on the Employee Job Performance Evaluations, the Supervisory Adverse Action Forms and the live and deposition testimony of Jay Bloomer (Claimant's Exhibit #2).

2.) I find that the Claimant was not at MMI as of November 12, 2008 and that the major contributing cause (MCC) of the Claimant's work restrictions from May 9, 2008 through November 12, 2008 was her industrial accident of April 3, 2008 and resulting compensable injury. These work restrictions consisted of no lifting over 40 lbs. and to avoid repetitive bending (lifting restriction

changed to 30 lbs. as of May 30, 2008). I based this finding on the deposition testimony of Dr. Richard Smith (Claimant's Exhibit #1). I find that there was no medical evidence presented regarding the Claimant's work restrictions or the MCC thereof for the period April 3, 2008 through May 8, 2008.

3.) I find that the Claimant has met her burden to establish a causal connection between her compensable injury and her loss of earnings from May 9, 2008 through June 11, 2008. I base this finding on the Claimant's testimony, which I accept, that she was not able to work as many hours during this time period due to the work restrictions given to her by her treating physician, Dr. Richard Smith. This testimony was not substantially refuted by the E/C. As indicated above, there is no medical evidence to support any work restrictions for the period April 3, 2008 through May 8, 2008.

4.) I find that the E/C has met their burden of proof to show that the Claimant's compensable injury resulting from the industrial accident of April 3, 2008 no longer caused or contributed to her loss of earnings after June 11, 2008 and that the Claimant voluntarily limited her income after that date. I base this finding on the fact that the Claimant's termination on or about June 11, 2008 (and subsequent loss of earnings) was due to her poor work performance and not in any way related to her industrial injury. The Claimant presented an insufficient amount of credible and probative evidence of any significant good faith work search for the time period June 12, 2008 through November 12, 2008. The evidence presented (E/C's Exhibit #4 and Claimant's Exhibit #3) does show that the

Claimant in fact had a higher earning capacity on a per-hour basis than she did when she was working for this employer! (\$10 per hour vs. \$8.75 per hour). This is strong, albeit not conclusive, evidence that the Claimant did not suffer a diminution of wage earning capacity and voluntarily limited her income from June 12, 2008 through November 12, 2008. City of Miami v. Garrido, 402 So 2d 564 (Fla. 1st DCA 1981).

It is therefore ORDERED AND ADJUDGED that:

- 1.) The E/C shall pay TPD benefits to the Claimant, along with appropriate penalties and interest, for the period May 9, 2008 through June 11, 2008 in accordance with the statutory formula and after submission of any forms by the Claimant required by law.

- 2.) The Claimant is the prevailing party and is awarded reasonable COSTS and ATTORNEYS FEES. Jurisdiction is reserved to determine the amount of such costs and attorneys fees if the parties cannot otherwise agree.

- 3.) All other pending claims are DISMISSED.

DONE and ORDERED in Chambers in Orlando, Orange County, Florida.

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CERTIFICATE OF SERVICE

This is to certify that the above order was entered in the Office of the Judge of Compensation Claims and a copy was served by e-mail to counsel and by mail to the parties.

Secretary to the Judge

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