

**STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS  
OFFICE OF THE JUDGE OF COMPENSATION CLAIMS  
LAKELAND DISTRICT**

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Employee:	Attorney for Employee:
PHYLLIS J. WIMBERLY	LAURIE MILES. ESQ.
Employer:	Attorney for Employer:
WINN DIXIE	DERRICK COX, ESQ.
Carrier/Servicing Agency	OJCC No.:05- 34288 MHH 07-3478 MHH
SEDGWICK CLAIMS SERVICES	Date of Accident: 9/3/2003 12/1/2005

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**COMPENSATION ORDER**

THE ABOVE STYLED CAUSE was heard by the undersigned at Lakeland, Polk County, Florida on September 13, 2007 upon Claimant's claim for benefits contained in several Petitions for Benefits: PFB docketed on November 15, 2006 re: D/A 9/3/2003, OJCC# 05-34288; PFB docketed February 6, 2007 re: D/A 12/1/2005, OJCC# 07-3478; PFB docketed February 6, 2007 re: D/A 9/3/2003, OJCC# 05-34288. The Parties entered into pretrial stipulations on April 4, 2007 agreeing to a common disposition of the above petitions in one proceeding, which pretrial stipulations were accepted and approved by the presiding JCC in an Order dated April 5, 2007. The Claimant was represented by her attorney Laurie Thrower Miles, Esq. The Employer/Servicing Agent (E/C) was represented by Derrick E. Cox Esq.

The common remaining unresolved issues requiring adjudication from the above referenced petitions were Claimant's request for surgery on her left hand as recommended in an IME conducted by Dr. Robert Belsole, M.D. on June 7, 2006; a request for reimbursement for charges in the amount of \$125.00 relating to an office visit by the Claimant to Dr. Jerry Rubin, M.D. on February 14, 2006; authorization for continued medical care on Claimant's left hand, wrist and thumb to be provided by Dr. Rubin regarding injuries sustained by the Claimant in the accidents of September 3, 2003 and/or December 1/2005 (approximately). At the hearing the Claimant also argued the need for medical care possibly resulted from repetitive trauma while Claimant performed the duties of her employment with the employer herein before the date of September 3, 2003. (See the

Employee's Memorandum of Law and Fact, Claimant's exhibit argument only). The claim also included a request for costs of these proceedings and attorney's fees.

The E/C defended these claims on the basis that only the accident occurring on September 3, 2003 is compensable; a repetitive trauma claim was not properly noticed to the E/C; the repetitive trauma claim is barred by the Statute of Limitations; there was no compensable injury arising out of or occurring in the course and scope of employment on December 1, 2005; neither accident on September 3, 2003 or December 1, 2005 or repetitive trauma are the major contributing cause of the current request for medical care; apportionment was requested; and no costs or fees would be awarded from these proceedings.

At the time of the hearing the parties entered into the following stipulations:

1. The Judge of Compensation Claims has jurisdiction of the parties and the subject matter of the claim.
2. Venue is proper in Polk County, Florida.
3. On the date and at the time of the accident there was an employer/employee relationship.
4. The employer had worker's compensation coverage in effect through the named carrier herein for this accident.
5. The accident of September 3, 2003 has been accepted as compensable.
6. The injuries sustained by the claimant in the 9/3/2003 accident have been accepted as compensable.
7. There was timely notice of the 9/3/2003 accident and injuries.

The parties also stipulated that they would waive the requirement that a merit order be rendered within thirty (30) days of the date of the hearing.

The parties submitted this matter for adjudication upon a stipulated record. That record consists of:

JCC EXHIBITS

1. Composite of PFB's, Pretrial Stipulation, Mediation Report and required Notices and Orders.
2. EMA Composite.

JOINT EXHIBIT

None

CLAIMANT EXHIBITS

1. Deposition of Dr. Robert Belsole, M.D. dated September 4, 2007.
2. Deposition of Dr. Jerry Rubin, M.D. dated November 15, 2006.
3. Deposition of Leslie Gerlach dated September 6, 2007.
4. Deposition of Wendy Gabaldon dated September 4, 2007.
5. Memorandum of Fact and Law argument only.

EMPLOYER/CARRIER EXHIBITS

1. Deposition of Dr. Richard Gray M.D. dated August 27, 2007.
2. Deposition (continuation) of Dr. Richard Gray dated September 7, 2007.
3. Memorandum of Fact and Law argument only.

The Claimant Phyllis Wimberly appeared at this hearing and testified. The E/C presented testimony from Ms. Jolie Anderson, and Ms. Wendy Gabaldon. In making my findings of fact and conclusions of law regarding these claims and defenses, I have carefully considered and weighed all the evidence presented to me. I have resolved all conflicts in the testimony presented to me. Although I may not reference each specific piece of evidence submitted by the parties, I carefully considered all the evidence and exhibits in making my findings of fact and rendering my conclusions of law.

Based upon the testimony contained in the depositions, stipulations, and exhibits and after careful consideration of the arguments of counsel, it is found that

1. There is no dispute that the Claimant was injured by accident arising out of and occurring in the course and scope of her employment on September 3, 2003. The Claimant was injured when a case of cantaloupe struck her left hand as she was attempting to lift it. The box gave way and came down on top of her hand, and near the base of her thumb. The incident was not reported until about a month later and she began medical care. The Employer accepted the accident and injuries to her left hand as compensable.

2. There is no controversy as to the medical care the Claimant received up to December 1, 2005. She eventually came under the care of Dr. Maury Fisher who treated conservatively with steroidal injections and medications. Fisher requested a second opinion and she was evaluated and eventually treated by Dr. Jerry Rubin commencing January 25, 2005. Rubin initially diagnosed de Quervain's tendonitis and pre-existing arthritis at the base of the left thumb which was aggravated because of the injury. The de Quervain's tendonitis responded to injections and was remediated. Eventually, Rubin performed an arthroplasty on the left thumb on June 21, 2005. The Claimant did well following this surgery with no remarkable findings until August 2005 when Rubin noted the Claimant experiencing difficulty flexing her fingers on the left hand and the fingers were injected. Apparently the fingers responded well to the injections and he placed the Claimant at Maximum Medical Improvement for the injuries to the left hand on October 14, 2005, assigning permanent restrictions and a 6% impairment rating.

DECEMBER 1, 2005

3. Claimant alleges another injury occurred on or about December 1, 2005. She contends that on or about that date she was attempting to enter the break room through a swinging door at the same time her store manager, Jolie Anderson, was exiting. The Claimant testified at the hearing that she defensively raised her left hand. She was wearing a brace. When the door swung open toward her, the door "slapped" her injured left hand in the palm. She contended that Anderson apologized to her and that ice was applied to the hand that day. No accident report was filled out and she blamed that failure on the manager, Anderson. She stated that the incident caused pain in her hand which lingered for a couple of days, and she eventually went to Dr. Rubin.
4. Jolie Anderson testified at the hearing and denied this account. Anderson was no longer employed by Winn Dixie on the date of the hearing but had been an employee for them for fifteen (15) years, and manager at the store where the claimant worked for several years. She was the manager in December 2005 and was replaced in January 2006 by Wendy Gabaldon because she had accepted another position with another employer. Anderson did not remember and

denied the door incident as presented by the Claimant. She stated that the Claimant never reported an injury to her, and that if one had been reported the proper worker's compensation procedures would have been implemented.

5. Wendy Gabaldon current store manager testified by deposition and at the hearing. At the hearing she confirmed no accident/incident report had been generated. She was not employed in the store in December, but had been asked to verify the existence, or lack thereof of a report following her assumption of Store Manager duties in January. She had been personally acquainted with the Claimant for many years and had actually been her department manager in September 2003. She knew Claimant to be honest, but noted that Claimant never reported an injury to her resulting from a 2005 incident. The first time she officially knew of such a claim was in February 2007 after a PFB was filed.
6. Claimant for her part did go to Dr. Rubin after this alleged incident. Rubin's records in evidence attached to his deposition contain notes of two visits with the Claimant following this incident. In a note dated January 6, 2006 Dr. Rubin noted a complaint of two weeks pain and difficulty with triggering symptoms in the left hand. There was no history of a specific incident in December that may be the source of the complaints. The report states: "There has been no new injury". The note continued to indicate that the triggering was not related to the previous 9/3/2003 injury or any of the treatment subsequent to that event. Instead the note indicates that Rubin told the Claimant to initiate another worker's compensation claim, because, as he put it, the present trouble may be work related, just not related to the 2003 injury. In deposition, Rubin indicated his theory regarding a new worker's compensation claim was that the potential work relationship of the triggering complaints stemmed from the fact that throughout the time of his treatment of Claimant she had continued to work at Winn Dixie, which work, as he understood it, involved continuous use of her hand. Rubin next saw Claimant on February 14 2006. The expense of this evaluation is at issue in this claim. On this date Claimant presented with what Rubin described as "Insidious onset of pain and triggering symptoms in multiple digits of the left hand". The report repeated "There has been no new injury". The condition was described as "Generalized stenosing flexor tenosynovitis-left hand" and he recommended continued steroidal injections and eventual surgery if the symptoms

persisted. It is significant that in neither of these two visits the Claimant availed herself of the opportunity to relate the onset of these symptoms to another specific trauma as she described happening on December 1, 2005.

7. As for Dr. Rubin, the undersigned notes that Rubin definitely was of the opinion that the complaints involving the trigger fingers were not caused by the 2003 injury. Although he noted there were complaints of stiffness in the fingers in August, he related that to what could be reasonably expected following surgery two months earlier. He further noted that complaints such as those received on January 6, 2006, occurring over five months from the surgery, were not very likely resulting from that surgery. He stated the trigger fingers were not related to the injury and treatment from the 2003 accident. The undersigned finds these opinions to be reasonable. However, the undersigned finds Rubin's efforts to advise Claimant to seek another worker's compensation claim to be unreasonable. It appears that since the Claimant had not reported any specific new trauma and he was definite that the earlier injury and surgery he performed played no part in formation of the symptoms he saw after January 6, 2006, if he was to get a worker's compensation carrier to authorize him to treat it he had to develop a nexus to the work place in order to do so. Dr Rubin's testimony on this theme is at best disingenuous. It is clear to the undersigned that Rubin lacked specifics as to what if any use of her injured hand the Claimant was required to encounter in the performance of her duties while working. He was never presented with any specifics. He completely discounted use of the hand in the activities of daily living as contributing to the complaints. Most importantly he testified (Page 25, lines 4-20, Deposition November 15, 2006) that trauma is not necessarily a cause of trigger finger. He stated the cause was "swelling of the tendon or from a proliferation of the synovial tissue that lubricates the tendon". "Rarely does this come from an injury." "It can be caused by repetitive use, but there is no proof that repetitive use even...causes trigger finger." (lines, 10-12). He goes on to indicate that it is more common in individuals with enumerated medical conditions. He concluded "I would say more commonly it's just an insidious problem that develops." (line, 19-20). He knew these general factors when he encouraged the Claimant to pursue another worker's compensation claim. The undersigned repeats, Dr. Rubin's encouragement to the claimant to pursue another worker's

compensation claim for treatment of the trigger finger based on an overuse theory is obviously disingenuous, self-serving and without merit.

8. There is conflict in the testimony of the lay witness as to the events surrounding the swinging door and whether it actually caused an injury. The undersigned reconciles the conflicts from the testimony summarized above by finding that the incident as described by the Claimant occurred. The date of the incident is not established. The Claimant testified that the event caused pain and swelling for a couple of days. It was not a serious matter to her at that time. The lack an incident report was because she did not seek medical care as a direct result of this incident. The manager, Anderson, did know it occurred, and apologized. Claimant however did not believe the incident actually caused her injuries and did not report any to Dr Rubin when she went to him on Jan.6, 2006. I find that the door incident did occur, but also find that there was no injury arising out of that incident as reflected in the medical records and testimony of Dr. Rubin.

#### REPETITIVE TRAUMA

9. As indicated earlier, Claimant's Memorandum of Law and Fact presented a theory that repetitive use of the claimant's left hand on or before the date of September 3, 2003 was a cause of the current need for surgery being pursued in the PFB's at issue. The undersigned cannot find any medical evidence to suggest that possibility and that theory is without merit.
10. Dr. Rubin did suggest overuse or repetitive trauma may be the cause and even stated it was the potentially greatest cause. However, the undersigned interprets this statement to be intended to suggest that the Claimant's continued use of the hand since the September 3, 2003 injury to be the culprit. The undersigned has already stated these opinions are not competent as they are not substantiated with facts.
11. The Claimant did not present any competent and substantial evidence to support any claim based on a repetitive trauma theory, prior to September 3, 2003.

#### SEPTEMBER 3, 2003

12. On June 7, 2006 Claimant was evaluated by Dr. Robert Belsole,

M.D. a noted Tampa orthopedic surgeon specializing in the treatment of hands and wrists, for an IME. Dr. Belsole was of the opinion that the claimant required surgery to correct what he described as "A1 pulley involvement with tenopathy from the middle greater than the index, greater than the ring, greater than small" Surgery was the best option according to Belsole because injections had failed. Surgery was however a risk to the claimant, and prognosis was "not good". In deposition, Dr. Belsole attributed all his findings and recommendations to the September 3, 2003 industrial accident. Dr. Belsole was not provided any history by the Claimant that she may have injured her left hand in December 2005.

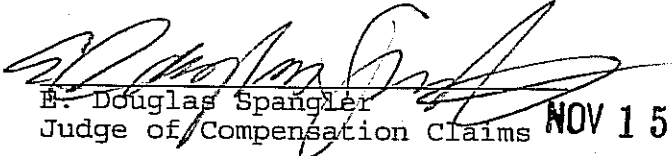
13. Dr. Belsole's opinions placed him into direct conflict with Dr. Rubin as to the relationship of the recommended surgery to the September 2003 accident. Upon motion of the E/C, the presiding JCC appointed an EMA and Dr Richard Gray, another noted Tampa orthopedic surgeon specializing in treatment of hands and wrists was selected.
14. Dr. Gray examined the Claimant on April 24, 2007. Dr. Gray noted developing symptoms of trigger finger in the Claimant's right hand, and developed a diagnosis of bilateral carpal tunnel syndrome, secondary to degenerative arthritis and trigger finger. According to Dr. Gray, none of these conditions have any relationship to the September 3, 2003 accident and no further treatment for the injuries sustained in that accident were reasonably medically necessary.
15. The undersigned notes that the Claimant's counsel argued that Dr. Gray was not advised about the potential December 1, 2005 incident and that his opinions should be evaluated in that light. This is not the case, as is evident in Dr. Gray's deposition. Dr. Gray was aware of the potential occurrence of the incident in December 2005 and that was considered in his information of his opinions. The Claimant has not presented any basis consisting of clear and convincing evidence for the undersigned to not accept the opinions of Dr. Gray, which opinions are by law presumed to be correct as to the issues he addressed. (Sec 440.13 (9) F.S.)

WHEREFORE on the basis of the foregoing it is Ordered:

The Petitions for Benefits docketed on November 15, 2006 and February 6, 2007 are DENIED, and DISMISSED with prejudice

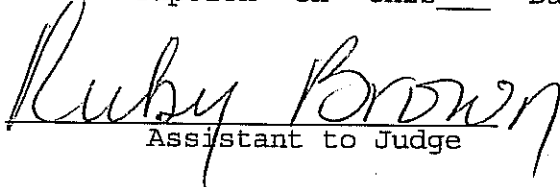


DONE AND ORDERED in Chambers, Fort Myers, Lee County, Florida.

  
E. Douglas Spangler  
Judge of Compensation Claims

NOV 15 2007

I HEREBY CERTIFY that the foregoing Order was entered and true copies served by regular U.S. mail to the parties and counsel at their respective addresses as stated on the caption on this \_\_\_ Day of NOV 15 2007, 2007.

  
Assistant to Judge

## \*\* Transmit Conf. Report \*\*

P.1

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**DIVISION OF ADMINISTRATIVE HEARINGS**  
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**LAKELAND DISTRICT**

<b>Employee:</b>	<b>Attorney for Employee:</b>
PHYLLIS J. WIMBERLY	LAURIE MILES, ESQ.
<b>Employer:</b>	<b>Attorney for Employer:</b>
WINN DIXIE	DERRICK COX, ESQ.
<b>Carrier/Servicing Agency</b>	<b>OJCC No.:</b> 05- 34288 MHH 07-3478 MHH
SEDGWICK CLAIMS SERVICES	<b>Date of Accident:</b> 9/3/2003 12/1/2005

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DIVISION OF ADMINISTRATIVE HEARINGS  
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LAKELAND DISTRICT**

**Employee:**

PHYLLIS J. WIMBERLY

**Employer:**

WINN DIXIE

**Carrier/Service Agency**

SEDGWICK CLAIMS SERVICES

**Attorney for Employee:**

LAURIE MILES, ESQ.

**Attorney for Employer:**

DERRICK COX, ESQ.

OJCC No.: 05- 34288 MHH  
07-3478 MHHDate of Accident: 9/3/2003  
12/1/2005**COMPENSATION ORDER**

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