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

Lynn Richards, Employee/Claimant, vs. One Eleven Grill, Inc./Zenith Insurance Company, Inc., Employer/ Carrier/ Servicing Agent.	)	OJCC Case No. 07-007779JJL Accident date: 6/12/2006

FINAL ORDER

AFTER DUE NOTICE to the parties, a Final Hearing on this matter was held in Madison, Madison County, Florida, on September 25, 2007. The matter was mediated on June 13, 2007 resulting in an impasse, and pretrial was conducted on June 29, 2007. The parties were represented by counsel as indicated below. The undersigned judge of compensation claims has jurisdiction of the parties and the subject matter.

At the hearing, the Claimant sought the following benefits:

1. Compensation for temporary total or temporary partial disability (TT/TPD) benefits from February 2, 2007 and continuing;

2. Such further medical treatment as the nature of the injury and the process of recovery requires; to wit: authorization and follow up appointments with Dr. Arnold Zeal, M.D.;

3. Interest and penalties on all past due payments of compensation;

4. A reasonable attorney fee for Claimant's counsel of record; and

5. The cost of these proceedings.

The Claim was defended on the following grounds:

1. The entire claim is denied because the industrial accident is not the major contributing cause of the Claimant's disability or need for treatment;

2. The entire claim is denied because the Claimant violated section 440.105, Florida Statutes, by intentionally misrepresenting her prior physical condition for the purpose of securing workers' compensation benefits;

3. Should the Employer/Carrier prevail on its defenses, the Employer/Carrier seeks costs of these proceedings at the expense of the Claimant; and

4. Employer/Carrier denies Claimant's entitlement to penalties, interest, costs and attorney's fees at their expense.

The parties have entered into the following stipulations:

1. The Judge of Compensation Claims has jurisdiction of the parties and the subject matter of this claim.

2. Venue properly lies in Madison County, Florida.

3. Notice of Hearing and Notice of Injury were properly

furnished and received as required by the Workers' Compensation Act.

4. On June 12, 1006, the Claimant was employed by the captioned Employer and on that date sustained and suffered an injury by accident arising out of and within the course and scope of said employment earning an average weekly wage of $159.00 per week yielding a compensation rate of $106.00 per week.

At the trial of this cause, the following Exhibits were admitted into evidence.

Claimant's Exhibits

1. Petition for Benefits (PFB) filed on March 19, 2007. (At the commencement of the final hearing, the PFB filed on 6/25/2007, which was mediated on 9/10/2007 but not pre-tried, was initially stipulated by the parties to also be the subject matter of this hearing but was subsequently withdrawn for inclusion for trial so that the same could be first pre-tried on September 28, 2007 and tried at a later date.)

Employer/Carrier's Exhibits

1. Deposition of Lynn Richards taken 5/22/2007, together with attachments.

2. Deposition of Linda Cherry taken 7/26/2007, together with attachments.

3. Deposition of Katherine Griffin taken 7/26/2007, together with attachments.

4. Deposition of Jennifer Brooks taken 8/26/2007, together with attachments.

5. Deposition of Dr. Edward Mark, M.D., taken 9/10/2007, together with attachments.

6. Deposition of Dr. Arnold Zeal, M.D., taken 9/24 2007, together with attachments.

7. Response to PFB, dated 6/29/2007.

8. Supplemental Stipulation filed 7/2/2007. (Claimant's objection to the additional defense of apportionment was sustained as being untimely raised.)

Joint Exhibits

1. Deposition of Dr. Julie Schindler, D.O., taken 8/16/2007, together with attachments.

2. Pretrial Stipulation and Order entered 6/27/2007.

The following individual testified live before me:

1. Lynn Richards, the Claimant.

After due consideration of this matter and after having the opportunity to review and consider the aforesaid exhibits which were admitted into evidence, and having observed and considered the candor and demeanor of the witnesses who appeared and testified before me, and having endeavored to resolve all

conflicts of facts in the evidence presented herein, I hereby make the following findings of fact and conclusions of law:

1. The undersigned judge of compensation claims has jurisdiction of the parties and the subject matter of this claim;

2. The stipulations entered into by and between the parties herein are hereby approved and adopted as findings of fact and are incorporated herein by reference;

3. In my determination herein I have attempted to distill the testimony and salient facts together with the findings and conclusions necessary to the resolution of this matter. I have not necessarily attempted to summarize the substance of the claimant's testimony or the testimony of any live or deposition witness, nor have I attempted to state nonessential facts. Because I have not done so should not be construed that I have failed to consider all of the evidence.

4. Any and all issues raised by way of the petition or petitions for benefits which are the subject matter of the final hearing, but which issues were not tried at the hearing are presumed resolved, or in the alternative, deemed abandoned by the employee/claimant and therefore **denied.** *See* Betancourt v. Sears Roebuck & Co., 693 So.2d 253 (Fla. 1st DCA 1997).

5. On June 12, 2006, the captioned Claimant, Lynn S.

Richards, who is 47 years of age and has a GED Certificate and approximately a 3 years of community college education, was employed by the captioned Employer as a waitress. On that date she sustained and suffered a compensable injury by accident arising out of and within the course and scope of the Claimant's employment with said Employer when she slipped and fell landing on her buttocks. She testified that at the time she felt immediate pain in her right shin bone. She claims that she broke the skin on her right shin bone and that evening she started to experience mid to low back pain and was unable to sleep that night.

6. The Claimant testified that at the time of the work accident, the manager was not present but that her fiancé, David Westerman, called her manager the following day and reported the accident. Ms. Richards testified that she went to Four Freedom Medical Center the day following her accident and saw Beth Fulford, a Nurse Practitioner, who gave her some medication for her pain and referred her to the local hospital for back x-rays. Ultimately, the Carrier referred the Claimant to Dr. Adolph Dulay, M.D. The Claimant testified that on or about 6/22/2006, she went on her own to see her family physician, Dr. Julie Schindler, D.O., for pain medication. There is insufficient evidence reflecting that Dr. Schindler was ever authorized by

the Employer/Carrier to treat the Claimant.

Ms. Richards testified that Dr. Dulay, who had been authorized by the Carrier to treat her, referred her to Dr. Edward Mark, M.D., a board certified neurosurgeon in Valdosta, Georgia. Dr. Mark saw the Claimant on 8/14/2006, including two subsequent follow-up visits on 11/2/2006 and 2/12/2007.

7. The Claimant testified that she became dissatisfied with Dr. Mark since she believed the doctor did not like her fiancé being present during her appointments. She requested a second opinion with Dr. Arnold Zeal, M.D., a Jacksonville board certified neurosurgeon, which was authorized by the Carrier to evaluate the Claimant. The evaluation took place on January 9, 2007.

8. The Claimant testified that sometime in February of 2007 she was advised by the Carrier that they were denying the claim on the basis of what is commonly referred to as "workers' compensation fraud" alleging that the Claimant gave misleading, or false statements regarding her prior back condition. Relative to her prior health, the Claimant testified that she would see Dr. Schindler for adjustments of her hip whenever her hip went out. This occurred for a couple of years prior to the subject accident when she claims that her hip would hurt and that the pain would radiate to her low back at which time she

sought adjustments with Dr. Schindler. Dr. Schindler is an osteopathic physician, who performs manual adjustments, was the Claimant's family physician. The Claimant testified, and there is no evidence to the contrary, that she has never had a back accident or injury and that Dr. Schindler advised her that she had a hip problem and not a back problem. She claims that her hip pain was totally different from her back pain and that her current back symptoms are different than the back symptoms she experienced prior to her on-the-job accident. She says that she never believed she had a back problem, but only a hip problem based upon what Dr. Schindler told her regarding a condition the doctor described as "sacral torsion." She says that since the Employer/Carrier has denied her care she has being seeing Dr. Schindler. She does not believe that she can return to work as a waitress because she cannot carry trays or lift heavy objects. She believes that Dr. Schindler has restricted her from bending, stooping and lifting. She testified that she has not been offered any job by her Employer, but also admitted that she has not looked for any work or performed a job search. She claims that her work experience consists of being a waitress and managing a restaurant.

9. At trial the Claimant admitted that in the past she has seen health care providers regarding complaints of back pain

and thought her back pain was due to her hip problem based on what Dr. Schindler told her. She also admitted that she had been previously been prescribed muscle relaxors and pain medication. She admitted that prior to this work accident the medical records from Four Freedoms show that she was seen on 5/23/2006, at which time she complained of back pain and not hip pain. She explained that the pain was initially in her hip but by the time she went to see the doctor it was in her back. She testified that when answering the question in Dr. Zeal's Intake Form whether she had similar back problems in the past she felt that her past back problems were different and not of the same type she was experiencing when she saw Dr. Zeal. She also said that when asked by Dr. Mark about prior back symptoms she denied having a back "problem" because she believed she had a hip problem instead. She testified that her back symptoms are now totally different than what they were before her work accident but that the areas of pain are very close. She stated that this current pain just doesn't go away.

10. The medical records regarding treatment of the Claimant prior to this work accident were received in evidence as Employer/Carrier's Exhibits # 2 and 3. These consisted of records of Madison County Memorial Hospital and Four Freedoms Health Services. The records reflect that as early as 2004 Ms.

Richards visited these medical facilities complaining in of back and/or hip pain. At various times she was provided with muscle relaxors and pain medication based on her complaints. Dr. Schindler, who treated her prior to her work accident, also testified that the Claimant described back pain which the doctor felt originated from hip describing the condition as a "sacral torsion." In one time of the visits, her back complaints were attributable to a purported urinary tract infection.

11. The deposition of Dr. Julie Schindler, D.O., was introduced in evidence by both parties. Counsel for the Claimant testified that the purpose of the deposition was offered in part to introduce the testimony of Dr. Schindler as a "fact" witness, which purpose Counsel for Employer/Carrier assented to. Counsel for the Claimant also intended to introduce the medical opinions of Dr. Schindler on the grounds that the doctor was the putative authorized treating physician since, as counsel argued at the taking of the doctor's deposition, "the law allows the injured workers to seek their own care if the Employer/Carrier has reasonable time to provide it, and then chooses not to." No case law support was offered for that proposition. Counsel for the Employer/Carrier made a timely objection to the introduction of Dr. Schindler's deposition for medical opinion purposes because Dr. Schindler

was not an authorized treating physician, an independent medical examiner (IME) or an expert medical advisor (EMA), who are only allowed to offer medical opinions in workers' compensation proceedings.[1] It is undisputed that Dr. Schindler was neither an IME nor EMA. Moreover, I find that there is insufficient evidence that Dr. Schindler was authorized by the Employer/Carrier to provide medical care to the Claimant for her work injury. Even Dr. Schindler testified that based on her review of her medical records that the Carrier "probably did not approve me for her (Claimant) work comp.[2]"

12. An "authorized treating provider" for purposes of section 440.13(5) (e), Florida Statutes, means treating providers authorized by the Employer/Carrier. Rucker v. City of Ocala, 684 So. 2d 836 (Fla. 1st DCA 1996). In Rucker, the court found that statutory provision constitutional in that the Claimant could avail herself of an independent medical examination which was not requested here.

Claimant's counsel also asserted that Dr. Schindler should be deemed authorized by the Carrier since Dr. Schindler's medical statement of charges reflect a one time payment of $57.00 purportedly by Zenith Insurance Company regarding a date of service of 6/22/2006. It is unclear if or why this Carrier

[1] Section 440.13(5) (e), Florida Statutes.
[2] See page 7 of Dr. Schindler's Deposition (Joint Exhibit # 1).

paid Dr. Schindler. This was not explored in Dr. Schindler's deposition, nor was it examined in the deposition of the Claim Adjuster, Jennifer Brooks (Employer/Carrier's Exhibit #4). Therefore, based on the greater weight of the evidence from the testimony of Dr. Schindler herself and the lack of sufficient evidence that this Employer/Carrier authorized Dr. Schindler to treat the Claimant, I find the notation in Dr. Schindler's records of a one time payment of $57.00 was, if made, inadvertent and does not constitute a valid authorization of Dr. Schindler's care. This can further be explained by the fact that Dr. Schindler was once employed by or affiliated with Four Freedoms Health Services, who had initially been authorized by the Carrier to treat the Claimant for her work accident. Therefore, I sustain the defense's objection to the medical opinions of Dr. Schindler regarding diagnosis of the Claimant's work injury and the causation of the Claimant's current condition and its relationship to her work accident of June 12, 2006. However, Dr. Schindler's deposition is received in evidence for factual purposes under the holding in Office Depot, Inc. v. Sweikata, 737 So. 2d 1189 (Fla. 1st DCA 1999) regarding her past medical condition.

13. Dr. Schindler testified that she has known the Claimant since the mid-90's but not professionally, and has been

treating the Claimant since 2004. She testified that she first saw the Claimant on 6/22/2006 following her work accident. Prior to that time, the Claimant had been seen by a nurse practitioner at Four Freedoms Health Services on 6/13/2006, the day after her accident. Dr. Schindler stated that at the time she did not believe that she was authorized to treat the Claimant. After reviewing medical records from Four Freedom, she noted that the Claimant had complained of back pain as early as March 19, 2004 possibly resulting from a urinary tract infection. Dr. Schindler went on to explain that in 2004 through 2006, the Claimant suffered from "sacral torsion" (hip problem) and that the Claimant was under the impression that the her problem was always in her hip. Dr. Schindler found that it was reasonable for Ms. Richards to believe that her problem was in her hip versus her back based upon what Dr. Schindler explained to her was the cause for her pain. Dr. Schindler testified that she never found the Claimant to be untruthful with her and believes that she now needs to see a neurosurgeon. Dr. Schindler's opinions regarding the Claimant's herniated disc and current back problems as they relate to the accident of 6/12/2006, and whether said accident is the major contributing cause of her current condition and need for treatment are stricken and not admissible for the reasons stated above. Even if said medical

opinions were admissible, I find that her medical opinions concerning causation do not carry the weight or credibility as the opinions of Dr. Zeal and Dr. Mark, both board certified neurosurgeons, whose opinions I find carry more weight based upon their greater medical expertise. Moreover, I find that Dr. Schindler also acted as an advocate for the Claimant and that her medical opinions were less than impartial.

14. Notwithstanding, I find that Dr. Schindler's opinions regarding the Claimant's prior back symptoms are candid and generally supported by her records. Dr. Schindler stated that Claimant's back discomfort between 2004 and the date of accident were less severe; her blood pressure was more stable than now; that the Claimant did not need the type of narcotic medication she has taken since her industrial accident; and before her accident she mostly took only muscle relaxors or no medication at all. Dr. Schindler said that since the accident the Claimant is now on Percocet, has been given Morphine and Darvocet with little improvement in her pain symptomatology. The Claimant has also had steroid injections and now requires pain management according to the doctor.

I find that Dr. Schindler's testimony reflects that Ms. Richard's prior back condition or symptoms were of a quality and frequency different than those that she has experienced since

her work accident of 6/12/2006. Dr. Schindler also did not specifically note any radicular symptoms regarding the Claimant's back complaints prior to her date of accident. The doctor also stated that prior to the Claimant's work accident she knew the Claimant to work 12-14 hour days and now is unable to be gainfully employed because of her current condition. Admittedly, Dr. Schindler testified that if asked whether the Claimant "had any type of back pain before 6/12/2006" then she would have had to say "yes." But there is no evidence that that specific question was asked of the Claimant. Dr. Schindler also agreed that the medical records showed multiple instances of complaints of back pain prior to the Claimant's work accident and that there was a one time prescription of Tylenol III, a narcotic medication. Dr. Schindler also testified that prior to her work accident the Claimant never told her of any back injury or radicular problems nor are there any such notations in the medical records prior to this industrial accident.

15. The Employer/Carrier introduced the deposition of Dr. Edward Mark, M.D., a board certified neurosurgeon. Dr. Mark practices in Georgia and is not licensed to practice medicine in Florida. He is also not certified by the Agency for Health Care Administration (AHCA) to treat injured workers' under the Florida Workers' Compensation Law as provided under section

440.13(1)(q), Florida Statutes. Because of Dr. Mark's lack of AHCA certification, Claimant's counsel objected to the admissibility of the deposition of Dr. Mark and his medical opinions presumably because Dr. Mark cannot be an "authorized treating provider" under section 440.13(5) (e) since he does not meet the definition of "health care provider" or "physician" under either sections 440.13(1) (h) and (q), Florida Statutes, since these sections require certification by the AHCA.[3]

16. I specifically overrule said objection and receive Dr. Mark's deposition in evidence as Employer/Carrier's Exhibit #5 since Rule 59A-29.002(3) (d), Fla. Admin. Code, provides that AHCA certification is not required for doctors who render medical services outside of the State of Florida. According to the evidence all of Dr. Mark's medical services were rendered at his office in Valdosta, Georgia. Therefore, Dr. Mark is considered an authorized health care provider, who the Claimant was referred to by Dr. Adolpho Dulay, M.D., who was also authorized by this Carrier.

Dr. Mark first saw the Claimant on 8/14/2006, with two subsequent follow-up visits on 11/2/2006 and 2/12/2007. Dr. Mark stated that at the time of the first visit he did not have any prior medical records of significance but that he did review

[3] However, Claimant's counsel did not voice any objection to the introduction of Dr. Mark's Exhibit or the Employer/Carrier at trial.

the MRI scan of the Claimant's lumbar spine. Regarding the history the Claimant advised him that she had been experiencing back pain radiating into her thighs but denied any numbness or tingling. She related her back pain to an incident that occurred on June 12, 2006 when she slipped on a wet floor at work. The Claimant also advised him that she had not worked since the accident and "denied any previous back injury." Dr. Mark stated that he specifically asked her whether she had injured her back before and that she replied that she had not. When he asked her whether "had any back problems before" she responded that she had not.

The Claimant's Lumbar MRI reflected that she had a very small herniation of the disc at L5, S1 level. His recommendation was that she under go medical management for her symptoms and physical therapy. At the first visit, he conducted a physical examination which was in essence normal. He next saw the Claimant on 11/2/2006 after she had undergone physical therapy, which did not improve her symptoms. In fact, the Claimant told him that the therapy aggravated her symptoms. He next saw the Claimant on 2/12/2007 and there was no change to her condition. The Claimant advised him that she was not interested in any type of surgical treatment. He informed her that she should continue with "medical management" and could

return to him as needed. At that time, he placed the Claimant at maximum medical improvement (MMI) and assigned a 6% permanent impairment rating (PIR) in accordance with the Florida Impairment Guides.

17. Subsequently, the Carrier supplied Dr. Mark with certain records from Madison County Hospital which were received in evidence. He was then asked by the Carrier to assign a percentage of the Claimant's current condition that was attributable to her degenerative or preexisting condition and a percentage attributable to her work-place accident. He testified that he assigned 20% to the work-place accident and the remaining to her preexisting condition. In his medical opinion, Ms. Richards did not have any abnormal findings on clinical examination.

18. On cross-examination, the doctor admitted that the mechanics of the slip and fall accident could cause a herniation and that he initially related the job accident as the cause of her "back pain" within a reasonable degree of medical certainty. He found that she was not a surgical candidate and recommended pain management which he found reasonable and medically appropriate for her problem.

19. Dr. Mark was then asked to opine regarding the cause of the Claimant's back condition (herniated disc). As stated

above, he attributed 80% of the Claimant's current condition and need for treatment to her preexisting back condition, and 20% to the accident. He testified that if one were to assume that the Claimant had "no back pain prior to her injury then of course her current condition was completely attributable to her slip and fall accident of June 12, 2006." However, that is an inaccurate history regarding the Claimant's prior back pain.

Ultimately, Dr. Mark agreed that Claimant's pain was coming from a combination of her degenerative process and the fall and, therefore, Claimant's work accident would have to be something less than 100% of the cause of her current condition regardless as to whether her prior medical history is true or false. After evaluating Dr. Mark's testimony and opinions, I am left with the conclusion that the Claimant's prior degenerative condition is 80% of the cause of her current back condition or, in the alternative, Dr. Mark did not specifically express a clear opinion within a reasonable degree of medical certainty that the work accident is the major contributing cause of her current condition, disability, and need for treatment.

20. Also received in evidence was the opinion of Dr. Arnold Zeal, M.D., a board certified neurosurgeon in Jacksonville, Florida. Dr. Zeal saw the Claimant on January 9, 2007, at the request of the Claimant for a second opinion. Dr.

Zeal testified that the intake forms in his office asked the Claimant whether she had "ever personally experienced similar (back) symptoms for which you are here?" She answered "no." She was also asked "Have you ever previously experienced (back) problems similar those you are here today?" Again, she answered "no." Dr. Zeal stated that the Claimant's chief complaint when he first saw her was that of back pain. She complained of pain in the right low back and buttocks and denied any radiation into the leg. However, she stated that occasionally there was some radiation into the groin on both sides. He found no numbness or tingling. He found that the Claimant's pain was aggravated if she "over does things" and by vacuuming, long walks, sitting and that coughing and sneezing produced some local back pain. There is nothing in Dr. Zeal's notes to shows that he personally questioned the Claimant regarding prior "similar" symptoms which were posed in the intake form. The Claimant did advise him that she had never been injured at work before. He found that the Claimant had misinterpreted Dr. Mark's opinion when she told him that Dr. Mark had recommended surgery which was not the case here. Dr. Zeal reviewed the MRI scan of the Claimant's lumbar spine of 7/18/2006, and like Dr. Mark, found that the Claimant had a small broad-based disc herniation at L5-S1, but did not particularly see any impingement of any nerve root. This was

his diagnosis of the Claimant's current back condition. He recommended pain management and the Claimant asked about chiropractic care. Although, he did not specifically recommend chiropractic care he felt that the request was reasonable. He did not recommend any surgery and suggested that she try to move on with her life. He recommended conservative treatment for her condition which he thought to be persistent for at least a number of years with possible improvement over time.

Dr. Zeal admitted that he had received certain medical records from the Carrier which discussed the Claimant's prior back problems, but that the records were "not very specific" and hard to read. He did, however, state that the records revealed that the Claimant had prior episodes of back pain and that she had been treated for the condition. He found this to be inconsistent with the intake form Ms. Richards completed in his office and believed that the Claimant was misleading based on her responses on the intake form denying she had experienced similar problems in the past. When asked whether or not the work accident was the major contributing cause of her current low back condition, Dr. Zeal testified that it was difficult to say since it appeared that she had a history of preexisting low back pain which contributed to her current condition. He stated that when he initially evaluated the Claimant he thought 80% of

her condition was related to her fall, but that when he was provided with medical records prior to her industrial accident; he found that the accident was "probably 55% responsible". However, later in his deposition after further consideration he stated that if there was information of previous significant back pain he would say that the Claimant's work injury was less than 50% responsible. Ultimately, Dr. Zeal concluded that Claimant "clearly had significant preexisting disease" based on the medical records that he reviewed which may have been aggravated to some degree by her fall, but that he "would not probably classify her work-related injury as being over 50% responsible."

21. On cross-examination, Dr. Zeal stated that in 30 years of practice he had never personally seen a patient with hip problems radiating to the low back as the patient described, but understood how the Claimant could classify her prior condition as hip-related if her family physician, Dr. Schindler, told her as much. Dr. Zeal reasoned that if the Claimant had been treated for back pain for two years prior to her work accident, and as recently as a couple of weeks before her accident, then he would have a hard time saying that a majority of the Claimant's current symptoms are related to her work accident. Dr. Zeal went on to state that although he believed that the

work accident "probably did aggravate her preexisting disease" based on the information which he was provided, it was still "not greater than 50%." He went on to qualify that opinion by saying that his opinion as to causation was based on the assumption that the Claimant's current problems were "similar to the problems that she had prior to her work accident." I do not find sufficient evidence to establish his assumption of similarity of symptoms since I accept Dr. Schindler's description of the Claimant's back symptoms prior to her accident as being sufficiently different from her current symptomatology. Notwithstanding Dr. Zeal's qualification of his last opinion as to causation, there is simply insufficient evidence extracted from Dr. Zeal's testimony to establish that the work accident is the major contributing cause of the Claimant's current back condition because prior medical records show that she had significant and periodic complaints of back pain preceding her work accident and that she had a preexisting degenerative condition. In other words, the most persuasive interpretation of Dr. Zeal's causation opinions is that the accident was something less than 50% of the cause of her current condition, and thus the Claimant failed to sustain her burden of proof under section 440.09(1) (b). Causal relationship between employment and Claimant's subsequent condition or injury must be

established "with reasonable certainty and by objective medical evidence." Section 440.02(32), Florida Statutes, Hunt v. Exxon Company U.S.A., 747 So. 2d 966 (Fla. 1st DCA 1999). Section 440.09(1) (b), Florida Statues, provides that if an injury arising out of and in the course of employment combined with a preexisting disease or condition to cause or promote disability or need for treatment,… the injury arising out of and in the course of employment is and must remain more than 50% responsible for the injury as compared to all other causes combined and thereafter remains the major contributing cause of the disability or need for treatment. The major contributing cause must be demonstrated by medical evidence only." Although, the applicable standard may be established without pronouncement of the magic words (reasonable certainty), the Claimant has the burden of providing the totality of the evidence demonstrating that the work accident was the major contributing cause of the Claimant's injury and current condition "with the appropriate quantum of proof." Hunt v. Exxon Company U.S.A., 747 So. 2d 966, 967 (Fla. 1st DCA 1999). That was not the case here. Even though I reject Dr. Zeal's opinion that the Claimant's current problems were similar to those she experienced before the accident, I cannot accept his opinion which he made after his first evaluation that the industrial accident was 80% the cause

of her current condition because he believed she had no prior back problems. The medical records which pre-date her accident indicated significant preexisting lumbar disease according to Dr. Zeal, and those records together with Dr. Schindler's testimony clearly show that Ms. Richard's complained of back pain regardless of what she thought was causing it. Moreover, even though Dr. Schindler stated that the back pain was caused from "sacral torsion", Dr. Zeal and Dr. Mark both dispel the notion that the Claimant's back condition was related to her hip problem.

22 With regard to the Employer/Carrier's Misrepresentation Defense, I find that the Employer/Carrier here failed to establish by a preponderance of the evidence that the Claimant did knowingly or intentionally misrepresent her prior back condition.[4] As provided in sections 440.09(4) and 440.105(4) (b), Florida Statutes, it is undisputed that an accurate medical history is relevant and material to workers' compensation claims. Village Apartments v. Hernandez, 856 So. 2d 1140, 1141 (Fla. 1st DCA 2003).

Employer/Carrier (E/C) here asserts that Claimant gave false and misleading statements to the Carrier's Adjuster Jennifer Brooks. A close examination the relevant questions

[4] In workers' compensation matters the standard of proof for misrepresentation under section 440.105, Fla. Stat., is by a preponderance of the evidence. Village of North Palm Beach v. McKale,

posed to Ms. Richards, which the E/C asserts give rise to this defense, are vague, ambiguous or susceptible to a different interpretation. Ms. Brooks asked whether the Claimant "had any prior injury to your back." The Claimant responded in the negative. This response was truthful since there is no evidence she sustained any back injuries predating this date of accident. Ms. Brooks then asked "[h]ow about any prior treatment?" Claimant responded "no." Although, the Claimant had received prior medical care concerning back complaints, there is no evidence indicating that she ever received any "prior treatment" regarding a prior back injury. In other words, the question regarding prior treatment could refer to the previous question concerning prior back "injury." Therefore, I find that the response was not untruthful.

Ms. Richards also truthfully answered Ms. Brooks' question regarding whether she "ever had any pain in your low back before?" The Claimant answered in the affirmative.

Ms. Brooks also asked "when do you think the last time you had any prior back pain would have been?" The Claimant's response was that she had "no idea." The question here was whether she recalled a time or date she had experienced back pain. In other words, when she last had back pain. My interpretation of Ms. Richards' response was that she did not

recall or could remember.

Finally, Ms. Brooks asked "[b]ut again nothing that required any treatment?" The Claimant responded "no." The medical records indicate that this response was not accurate in that the Claimant sought attention for back pain and hyperlipidemia at Four Freedoms Health Services on May 23, 2006. Since the Claimant here believed that the treatment provided by Dr. Schindler was to her hip rather than to her back, and I cannot reasonable find her response to this one question, although not accurate, was knowingly intended to mislead the adjuster.

23 Regarding the history she gave to Dr. Mark, I find that she truthfully told him that she had not experienced any prior back injuries. He says that he asked her whether "she had any back problems before." He testified that she responded that she had not. Certainly, that response is inaccurate but the question specifically refers to "back problems." As Dr. Schindler and the Claimant testified, Ms. Richards believed she had "a hip problem rather than a back problem." Therefore, I find the weight of the evidence is insufficient to establish that the Claimant did knowingly or intentionally mislead Dr. Mark when she responded to his query above. Therefore, I find the Employer/Carrier failed to prove by a preponderance of the

evidence that the Claimant committed workers' compensation fraud in violation of section 440.105 when she responded to dr. mark's questions.

24 In regard to the intake form which she provided to Dr. Zeal, I also find that the Claimant did not intentionally or knowingly mislead him or fail to disclose relevant prior medical history. The questions in Dr. Zeal's intake form asked whether or not the Claimant had experienced "similar symptoms" to those symptoms that she complained of on January 9, 2007, her first visit with Dr. Zeal. As stated above, Dr. Schindler differentiated the difference in the Claimant's symptoms following her industrial accident with those prior to her accident in both quality and duration. Moreover, Dr. Zeal could not specifically point to any similar symptoms by comparing the prior records with Ms. Richards' complaints during the first visit. Therefore, I find her responses in the intake form that she had not experienced "similar symptoms" to those she complained to Dr. Zeal on January 9, 2007, were not misleading or false. For all of the reasons outlined above, I find the Employer/Carrier's fraud defense should be rejected.

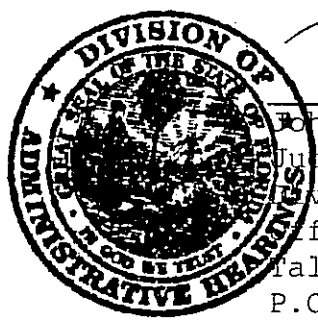
25. In conclusion, having found that the Claimant failed to sustain her burden of proof under section 440.09(1) (b) in establishing that the work accident of June 12, 2006 was the

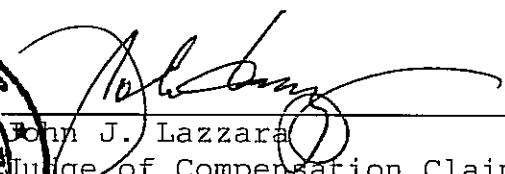
major contributing cause (more than 50%) of her current back condition, disability, and need for treatment her claim for indemnity benefits as well as for medical benefits must be denied.

WHEREFORE, it is **ORDERED** that the claims of the Employee, Lynn S. Richards, based on her claimed back injury by accident arising out of and within the course and scope of employment on June 12, 2006 are hereby **DENIED**.

IT IS FURTHER ORDERED that the Employee shall pay the Employer/Carrier the costs of these proceedings.

DONE AND ORDERED at Tallahassee, Leon County, Florida.





John J. Lazzara
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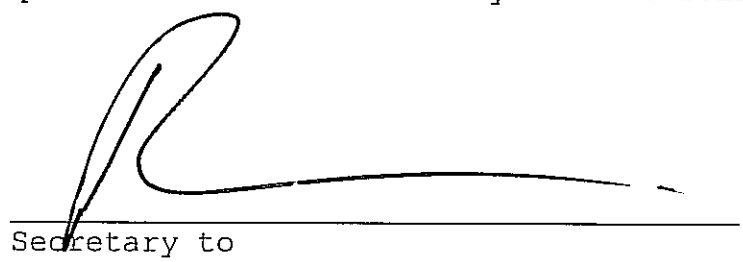
Certificate of Service

I HEREBY CERTIFY that the foregoing Order was entered and a true copy furnished by regular mail on this 12th day of October, 2007 to the captioned parties and their attorneys at the following addresses:



Secretary to
Judge of Compensation Claims

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