

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

Kenny Arzola Martinez,
Employee/Claimant,

OJCC Case No. 19-009287MES

vs.

Accident date: 12/20/2018

Cherry Hill Delivery, Inc./Protective
Insurance Company,
Employer/Carrier/Servicing Agent.

Judge: Margaret E. Sojourner

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FINAL COMPENSATION ORDER

This matter was heard at a Final Hearing before the undersigned in Altamonte Springs, Seminole County, Florida on October 19, 2021. Present at the hearing were Claimant, Kenny Arzola Martinez and her attorney, James D Payer. Also present at the hearing was attorney Scott B. Miller on behalf of the Employer/Carrier (EC).

Issues:

1. Authorization of an MRI of the lumbar spine without contrast as recommended by Dr. Duran.
2. Authorization of a pain management physician as recommended by Dr Duran.
3. Authorization of a right sacroiliac joint injection as recommended by Dr. Duran.
4. Authorization of arthrography followed by SI joint provocative tests as recommended by Dr. Duran.
5. Costs and attorney's fees.

Defenses:

1. Entire claim is denied as claimant has misrepresented her medical history in deposition and to the authorized physicians for the purpose of obtaining workers' compensation benefits.
2. No penalties, interest, costs or attorney's fees are due.

Preliminary rulings:

The EC argued that it had raised the defenses of no compensable accident and no causal relationship on the pretrial stipulation. Claimant objected on the basis that these defenses were not set forth on the pretrial. EC countered that these defenses were raised by its answer to question 7 on the pretrial which asks if the accident or injury has been accepted as compensable. The EC's response was that it was initially accepted but was now denied. No further explanation was given. These defenses were not set forth under Part II titled "Claims and Defenses." "An injured employee's right to receive workers' compensation benefits is a property right protected by procedural due process safeguards including notice and an opportunity to be heard." *Rucker v. City of Ocala*, 684 So.2d 836(Fla. 1st DCA 1996); *Isaac v. Green Iguana, Inc.*, 871 So.2d 1004 (Fla. 1st DCA 2004). The parties, as stated in *Isaac* are thus required to set forth their claims, defenses, and issues at the pretrial conference. EC's response to question 7 simply states that the claim is now denied. It does not set forth any reasons for that denial. It does not put claimant on notice of the specific defenses. The only defense set forth under the section "Claims and Defenses" is that of misrepresentation. The claimant has the right to rely on the listed defenses. As such the claimant's objection was sustained and the EC's defenses are limited to misrepresentation.

Evidence Presented:

The claimant fell at work and sustained injuries to her right ankle, right knee, right hand, left shoulder and lower back. She is currently treating with Dr. Rafael F. Cardona Duran. Dr. Duran has recommended a lumbar MRI and referral to a pain management doctor for a sacroiliac joint injection. Claimant was involved in a motor vehicle accident on August 17, 2016. In that accident she injured her left shoulder, neck, chest wall and her lumbar spine. She was treated by Dr. Nalley, chiropractor and this treatment included the lumbar spine. He also ordered a lumbar MRI which claimant underwent. Her pain was recorded in Dr. Nalley's records as being severe and an 8/10 on the pain scale.

The claimant was deposed on August 1, 2019. She stated that she spoke a little English. She trained as a pharmacy tech at University. She acknowledged being in a car accident which she occurred in 2016. She advised that she went to Celebration Hospital and treated with a

chiropractor whose name she could not recall. She stated there was a lawsuit and a settlement, but could not remember her attorney's name. She said she only treated with the chiropractor for her chest and that he did not treat her low back. She denied any treatment for her low back prior to the compensable work accident. She denied ever having an MRI for her low back.

She treated with Dr. Lalli for her lumbar condition following her work accident. He stated that claimant's MRI's were negative and diagnosed her with a sciatic hip. He put her at MMI as of April 10, 2020 for her shoulder, wrist and back. He stated that she did need any further orthopedic care.

Claimant also treated with Dr. Gerber, physiatrist, for her compensable accident. She was first seen on December 19, 2019. When claimant arrived at Dr. Gerber's office for her first visit there was no interpreter. Dr. Gerber understood that claimant contacted her attorney's office for assistance with translation, but claimant stated she did not receive any assistance with translation. In any event she completed the health history form. She answered every question except the one that asked about prior motor vehicle accidents which she left blank. In the question which asked regarding prior treatment for this body part she listed the treatment she received for the work injury, but not for the injuries sustained in the motor vehicle accident. Dr. Gerber testified that he always asks patients about prior back problems and she did not tell him about the back injuries from the motor vehicle accident. She did not mention the prior MRI of the lumbar spine which he learned about when he received a copy of the report from the carrier. He later received medical records from the treatment received following the motor vehicle accident and noted that her symptoms were very similar. He stated that the lumbar MRI from May 19, 2021 was read as normal. He also noted that the EMG he ordered came back as normal. He said every procedure he attempted in order to reduce claimant's pain seemed to increase her pain. He stated her pain was not supported by objective findings. It was his opinion that she had an exacerbation of her prior injuries which resolved as February 13, 2020 which is the date he placed her at MMI.

Findings of Fact and Conclusions of Law

In making my findings of fact and conclusions of law in this claim, I have carefully considered and weighed all of the testimony and evidence presented. I have resolved all of the

conflicts in the testimony and documentary evidence. Based upon the foregoing, the evidence, and the applicable law, I make the following determinations. I have jurisdiction over the parties and the subject matter of this claim. Venue lies in Orange County, Florida. The stipulations of the parties are accepted and adopted by me as findings of fact.

The claimant has established that the authorized treating provider has recommended the requested treatment for her. Because the claimant has established the compensability of the injury, the EC may only challenge the causal relationship between the injury and the requested benefit. *Perez v. Southeastern Freight Lines, Inc.*, 159 So. 3d 412 (Fla. 1st DCA 2015). As explained in *Perez* the burden of proof regarding that causal connection is on the EC to demonstrate a break in the chain of causation. The EC did not, as stated above, raise any specific defense with regard to causal relationship and thus cannot meet its burden of proof.

I find that claimant did make material misrepresentations with the intent to obtain workers' compensation benefits. Whether a claimant has knowingly misrepresented facts for the purpose of obtaining benefits is a fact question. *Pinnacle Benefits, Inc. v. Alby*, 913 So.2d 756 (Fla. 1st DCA 2005). The EC has the burden to prove misrepresentation by a preponderance of the evidence. *LSG Sky Chefs, Inc. v. Santaella*, 299 So.3d 1180 (Fla. 1st DCA 2020). "The workers' compensation system is designed to be efficient and self-executing. See § 440.15, Fla. Stat. (1997). It cannot depend on an adversary's ability to investigate and discover false testimony." *Village Apartments v. Hernandez*, 856 So.2d 1140 (Fla. 1st DCA 2003).

Claimant admitted to being in a motor vehicle accident that occurred on August 17, 2016. The claimant was the driver of the vehicle which was struck on the driver's side. She underwent chiropractic treatment from September 20, 2016 through June 13, 2017 for a total of twelve (12) visits which included treatment for her lumbar spine. Her lumbar spine pain was noted to be an 8/10. She was referred for and underwent an MRI of her lumbar spine. In her deposition taken on August 1, 2019, two years after her last chiropractic treatment, she clearly stated that the only injury she received treatment for was her chest. She specifically denied any injury to her low back or treatment for her low back and denied undergoing an MRI of her lumbar spine. She stated that the chiropractor never touched her back.

Claimant filled out a medical history form when she first went to Dr. Gerber. She left the question regarding prior motor vehicle accidents blank. She stated at the hearing that she had trouble understanding some questions due to her limited English. It should be noted that claimant completed the remainder of the form. The question regarding the prior accident was the only one not completed. I find the claimant was not credible in explaining why she left this question blank. I accept Dr. Gerber's testimony that he always asks patients regarding prior back injuries and that claimant did not tell him of any prior injuries.

Claimant's categorical denial of any injury to her lower back or treatment for her lower back in her deposition is clearly a misrepresentation. It would be difficult to understand how she could forget an injury which occurred two or three years previously and resulted in ongoing chiropractic treatment. Particularly when the pain was noted to be 8/10 and an MRI was required. In addition, her failure to answer the question on the medical history form regarding prior automobile accidents and her denial to Dr. Gerber of prior injuries are misrepresentations. I find that these misrepresentations were done with the intent to obtain workers' compensation benefits. The fact that she told the EC of the motor vehicle accident does not overcome this finding of intent. She clearly attempted to mislead the EC by denying any back injury at her deposition and attempted to mislead Dr. Gerber by not admitting to the motor vehicle accident and denying prior injuries. As stated in *Hernandez* the system cannot depend on the EC's ability to discover the false testimony. The claimant's obligation is to tell the truth regarding her prior accidents and injuries.

Wherefore it is ordered and adjudged as follows:

1. All claims for benefits sought by claimant are denied.
2. The claimant's entitlement to past and future benefits of any kind under Chapter 440, Florida Statutes is denied as a result of her violations of the provisions of Sections 440.105(4)(b) and 440.09(4), Florida Statutes.
3. All pending petitions for benefits are hereby denied and dismissed with prejudice.

DONE AND SERVED this 18th day of November, 2021, in Altamonte Springs, Seminole County, Florida.

Margaret E. Sojourner

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Exhibit A

Judge's Exhibits:

1. PFB filed at DN 102-103.
2. PFB filed at DN 108-108.
3. Response to PFB filed at DN 110.
4. Mediation conference report filed at DN 115.
5. Pretrial stipulation and amendments thereto filed at DN 115, 120, 135 and 140.
6. Claimant trial memorandum filed at DN 154.
7. EC trial memorandum filed at DN 153.

Joint Exhibits:

1. Motion to admit, order granting motion and medical records filed at DN 121-126, 128.
2. Deposition of Lillian Jordan with exhibits filed at DN 131.
3. Deposition of Dr. David A. Lalli with exhibits filed at DN 132.
4. Deposition of Calandra Wright with exhibits filed at DN 133.
5. Deposition of Holly Roberson with exhibits filed at DN 142.
6. Deposition of Dr. Marc Gerber with exhibits filed at DN 144.
7. Deposition of Kenny Arzola Martinez filed at DN 146.

EC's Exhibits:

1. Deposition of Lauren King with exhibits filed at DN 147 for fact information only.
2. Deposition of Dr. Nalley with exhibits filed at DN 148 for fact information only.
3. Deposition of Julian Maeso with exhibits filed at DN 149 for fact purposes only.
4. Deposition of Alondra Martinez with exhibits filed at DN 150 for fact purposes only.
5. Deposition of Maritza Vega with exhibits filed at DN 151 for fact purposes only.
6. Deposition of Kyla Boswell with exhibits filed at DN 152 for fact purposes only.
7. Motion to admit, medical records and order granting motion filed at DN 119, 127.