

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGES OF COMPENSATION CLAIMS
WEST PALM BEACH DISTRICT OFFICE

Eddy Ustarez,
Employee/Claimant,

OJCC Case No. 16-008959GJJ

vs.

Accident date: 9/5/2015

ALDI, Inc./Travelers Insurance,
Employer/Carrier/Service Agent.

Judge: Gregory J. Johnsen

FINAL COMPENSATION ORDER

After due and proper notice to the parties, the above entitled cause came before the undersigned Judge of Compensation Claims for a Final Merits Hearing on February 3, 2017 regarding Petitions for Benefits filed on 6/6/16 and 7/14/16.¹ Private mediation was held on these Petitions for Benefits on 9/13/16. Claimant appeared at the final hearing along with his attorney William Haro. Attorney Cheryl L. Wilke appeared on behalf of the Employer/Carrier along with the Employer representative, Brett Rayner.

Stipulations pursuant to the Uniform Pretrial Stipulation:

1. Worker's compensation insurance coverage was in effect on the date of the accident.
2. Timely notice of the final hearing was provided.
3. There was an employer/employee relationship on the date of the accident.
4. Claimant's accident and right shoulder injury were accepted as compensable.
5. Venue is appropriate in Palm Beach County.

1. Claimant's counsel acknowledged during the final hearing that Petitions for Benefits filed 4/15/16, 4/20/16, and 7/26/16 had previously been resolved. These petitions were dismissed with a reservation as to any outstanding claims for attorney's fees and costs.

6. The undersigned Judge of Compensation Claims has jurisdiction over the subject matter and over the parties.

Claims:

1. Pursuant to the Uniform Pretrial Stipulation, claims were made for the following benefits:
 - a. Provision and authorization of an MR arthrogram of the left shoulder per Dr. Matarazzo.
 - b. Payment of TPD benefits from 10/27/15 through the present and continuing.²
 - c. Penalties, interest, costs, and attorney's fees.

Defenses:

1. Pursuant to the Uniform Pretrial Stipulation the Employer/Carrier asserted the following defenses:
 - a. Dr. Matarazzo has confirmed that any injury to the left shoulder is non-industrial and not work related.
 - b. Claimant was terminated for reasons unrelated to his work injury. In addition, Claimant was previously placed at MMI with a 0% for subsequent injuries to his right shoulder. No additional temporary benefits are due and owing.
 - c. There is no entitlement to penalties, interest, costs, and fees per F.S. 440.34.
 - d. Per mediation agreement filed September 13, 2016, the Claimant was paid TPD Benefits for the period of October 28, 2015 through November 19, 2015, plus penalties and interest.
 - e. Employer/Carrier is entitled to a credit for all wages earned by the Claimant.

Documentary Evidence:

Judges Exhibits

1. Order Denying Motion to Strike Trial Memorandum, Defenses, Witnesses, and Exhibits (D107).

2. In his trial memorandum and during the final hearing Claimant amended this claim to seek a closed period of temporary partial disability benefits from 11/20/15 through 9/27/16 with penalties and interest.

2. Uniform Pre-Trial Stipulation and Pretrial Compliance Questionnaire filed by the parties on 8/15/16 (D49). Claimant's Pretrial Amendment (D60). Employer/Carrier's Amendment to Pretrial Stipulation (D69). Order Approving Uniform Pre-Trial Stipulation filed 8/16/16 (D50). Composite exhibit.

Joint Exhibits

1. Deposition of Adjuster Brenda Igielski taken 12/2/16 (D94, D102).
2. Deposition of the Claimant Eddy Ustarez taken 6/30/16 (D93).
3. Medical records of Concentra, Independent Imaging, and Orthopedic Center of Palm Beach County (Dr. Marc Matarazzo) (D61, D62, D72). Also listed as Claimant's exhibits 3 & 4.

Claimant's Exhibits

1. Claimant's Motion to Strike E/C's Trial Memorandum and Motion to Strike Defenses, Witnesses, and Exhibits Regarding New Defenses Alleged by the Employer/Carrier (D96), and Claimant's Reply to E/C's Response to Claimant's Motion (D105).
2. First Report of Injury filed 9/21/15 (D85).
3. Claimant's Motion to Admit Medical Records and attached medical records of Concentra, Dr. Matarazzo, Orthopedic Center of Palm Beach County, and Injury Clinic and Rehab Center (D61).
4. Claimant's Second Motion to Admit Medical Records attaching additional Medical Records of Dr. Marc Matarazzo (D62).
5. Mediation report and agreement dated 9/13/16 (D84).
6. Claimant's 5/18/15 [sic 5/8/15] 2014-2015 performance review (D97).
7. Claimant's shift manager performance evaluation dated 9/22/10 (D98).
8. Claimant's store manager evaluations dated 3/14/13, 3/22/13, 5/29/14 (D99), (D100), (D101). Composite exhibit.
9. Claimant's Trial Memorandum and Notice of Filing Legal Authority (D102) & (D106). Accepted for identification and argument purposes only.

Employer/Carrier's Exhibits

1. Employer/Carrier's Response to Claimant's Motion to Strike the Employer/Carrier's Trial Memorandum (D104).
2. Claimant's personnel file (D108). Claimant objected to the admissibility of his personnel file even though he admitted portions of his personnel file as Claimant's exhibits 6, 7, & 8. Claimant's objection was **OVERRULED** during the final hearing. Employer/Carrier listed the Claimant's personnel file as an exhibit in the Pretrial Stipulation, had produced a copy to Claimant's counsel, and was able to authenticate the personnel file through the testimony of Mr. Brett Rayner, Director of Operations for the Employer.
3. Medical and Indemnity Payout Ledgers (D70) & (D71).
4. Employer/Carrier's Trial Memorandum of Law (D95). Accepted for identification and argument purposes only.

Live Testimony: Claimant, Eddy Ustarez, Dr. Marc Matarazzo, Employer representative, Brett Rayner.

Summary of the testimony:

Claimant Eddy Ustarez – live and deposition testimony

1. Claimant, Eddy Ustarez, was employed with the Employer, ALDI from 2/1/10 through 10/26/15. For the last 3 years of his employment, Claimant worked as a store manager earning a salary of 62,000 per year plus monthly bonuses. Claimant testified that while employed with ALDI, he earned bonuses every month. Claimant was responsible for unloading trucks, and moving and filling displays. Claimant's job required him to lift items anywhere from 5 to 10 pounds to upwards of 40 to 60 pounds. On 9/5/15, Claimant was standing on a wooden shelf moving boxes in the freezer, when the shelf moved causing the Claimant to lose his balance and hang from the top shelf by both arms. Claimant asserts injury to both of his shoulders as a result of this accident. Claimant's primary concern was to his right shoulder, which he had previously injured in 2013 with ALDI. Claimant underwent surgical repair to his right shoulder in 2013

causing him to miss 4 months of work. Claimant has not had any other accidents or injuries to either his left or right shoulders. Claimant reported the accident the next day as a right shoulder injury, but testified he later amended the report of injury to include both shoulders.³

2. Claimant underwent initial medical treatment at Concentra on 9/21/15 where he reported injuries to both shoulders, although his main concern was the right shoulder. Claimant continued his treatment through Concentra and continued to work for the Employer with work restrictions. Claimant was terminated on 10/26/16 because, according to him, he could not do the job. Prior to his termination, Claimant received a reprimand on 9/21/15 for not helping to unload a truck. Claimant explained that he was at home on pain medication and could not come to work. He also received a second reprimand for having another manager to perform inventory for him.

3. After his termination, Claimant attempted to return to Concentra for treatment in February of 2016. He was eventually able to go back to Concentra. The physician at Concentra recommended an MRI for his right shoulder and referred the Claimant to a specialist. Claimant was referred to shoulder specialist, Dr. Mark Matarazzo, for treatment. When initially seen by Dr. Matarazzo in May of 2016, Claimant reported bilateral shoulder pain. He primarily received treatment for his right shoulder from May 2016 through September 2016. He treated with Dr. Matarazzo until he was released in September 2016. Dr. Matarazzo had requested an MRI for the Claimant's left shoulder which has never been authorized.⁴ Claimant states that he wishes to undergo this MRI to find out what is wrong with his left shoulder.

3. There appears to be some discrepancy as to when the left shoulder was reported as an injury. Any discussion of this issue would be academic since, admittedly, Employer/Carrier has not raised a defense of lack of notice. In any event, all the testimony establishes that Claimant reported the left shoulder injury within 30 days of his accident as required by Florida statute 440.185(1).

4. Claimant is referring to the MR arthrogram recommended by Dr. Matarazzo.

4. Claimant currently has pain in both shoulders. Claimant testified he cannot lift heavy items. He started looking for work one week after being terminated by the Employer. He looked for work at various retail places for management and office positions. Claimant has not rejected any job offers from potential employers. He was finally able to find employment on 8/1/16 as a store manager for Spirit Halloween. This was a seasonal job which ended in November 2016. Claimant earned \$700 per week while employed with Spirit Halloween. From 11/20/16 to present the Claimant has been employed by Adecco Staffing. I find the Claimant to be truthful and credible in his testimony.

Adjuster Brenda Igielski – deposition testimony

5. Brenda Igielski is the adjuster for the Carrier. She was assigned the claim of Eddy Ustarez on 4/4/16. (Joint exhibit 1 at page 6). Concentra Medical Center and Dr. Matarazzo are the authorized medical providers on the file. Id. at 7. Ms. Igielski testified that the Claimant's right shoulder injury was accepted as compensable, but the left shoulder was never accepted as compensable. Id. at 8-9. The Employer/Carrier, however, authorized treatment for the Claimant's left shoulder at Concentra on 9/21/15. Id. at 10-11, see exhibit 1 to deposition of Brenda Igielski. The Carrier paid Concentra for that date of service. Id. On 5/11/16 Dr. Matarazzo was authorized to evaluate the Claimant's left shoulder. Id. at 13. The Carrier did not issue any notices of denial denying the Claimant's left shoulder injury. Id. at 18. The Carrier did not issue a 120 day pay and investigate letter regarding any body parts, including the Claimant's left shoulder. Id.

6. Claimant was placed at maximum medical improvement by Dr. Matarazzo on 9/27/16 with a 2% permanent impairment rating. Id. at 21. The Carrier paid impairment benefits in

accordance with that rating. Id. at 43. The Employer/Carrier has denied indemnity benefits on the basis that the Claimant was terminated for reasons unrelated to his work injury. Id. at 24. Claimant was paid temporary partial disability benefits after his termination from 10/27/15 through 11/19/15. Id. at 27–28.

7. Ms. Igielski testified that Dr. Matarazzo rescinded the recommendation for the left shoulder MR arthrogram on 6/22/16. Id. at 33-4. The Carrier denied the MR arthrogram because Dr. Matarazzo opined on 6/22/16 that the left shoulder injury was not related to the 9/5/15 industrial accident. Id. at 34. This occurred after a conference between Dr. Matarazzo and the nurse case manager. Id. Ms. Igielski testified that the only DWC denial issued by the Carrier denying the MR arthrogram is the 6/23/16 Response to the 6/6/12 Petition for Benefits. Id. at 35-36, see exhibit 7 to deposition of Brenda Igielski. The Carrier's basis for denial of the arthrogram was that Dr. Matarazzo had withdrawn the request. Id. at 36. I find Ms. Igielski's testimony to be truthful and credible.

Brett Rayner – live testimony⁵

8. Mr. Brett Rayner is the Director of Operations for the West Palm Beach division of ALDI. He oversaw the Claimant's store from 1/20/15 through 10/26/15. Mr. Rayner established himself as a records custodian for the Claimant's personnel file. He first reprimanded the Claimant in June of 2015 for various performance issues, and issues regarding the Claimant's management of his store employees. On 9/21/16 he met with the Claimant and

5. Claimant objected to this witness testifying because he was not listed by name on the pretrial stipulation. Claimant's objection was **OVERRULED** at time of hearing for the following reasons: Claimant had listed an unnamed employer representative to testify live at final hearing, Employer/Carrier had listed employer representative Jacob Wilson from ALDI to testify, Employer/Carrier listed all of Claimant's witnesses as their witnesses, and no attempt was made by the Claimant to depose any representative of the Employer prior to the final hearing. Therefore, Claimant was not prejudiced by this witness testifying.

reprimanded him for selling out of date product in the store, and for having another employee perform the store inventory. On 9/21/16 Mr. Rayner first learned about the Claimant's 9/5/15 work accident, and he sent the Claimant to the doctor. Mr. Rayner continued to monitor the Claimant's job performance after 9/21/15, and the Claimant's job performance did not improve. Mr. Rayner did not see the Claimant at work every day, and he does not have any personal knowledge as to what the Claimant was required to lift. He did not request that the Claimant do any lifting more than 5 to 10 pounds. Mr. Rayner testified that the store employees had issues with the Claimant's management, and that the Claimant did not follow the store initiatives. After his talk with the Claimant on 9/21/15, approximately \$700 in expired product was found on the shelves of the Claimant's store. Mr. Rayner terminated the Claimant on 10/25/15.⁶ Mr. Rayner reprimanded the Claimant 6 times from 9/5/15 through 10/26/15. From 1/1/15 through 9/5/15 he reprimanded the Claimant a total of 9 times, but did not terminate the Claimant during that time period. When he terminated the Claimant, Mr. Rayner offered the Claimant a severance package, which is not offered to every terminated employee. I found Mr. Rayner to be credible and truthful in his testimony.

Dr. Marc Matarazzo – live testimony

9. Dr. Matarazzo is a board certified orthopedic surgeon. He first saw the Claimant on 5/5/16 wherein the Claimant reported a history of bilateral shoulder pain. Claimant reported a history of a prior right shoulder rotator cuff repair. Dr. Matarazzo found positive impingement signs and weakness to both the Claimant's right and left shoulders. Dr. Matarazzo diagnosed the Claimant with bilateral shoulder pain, right greater than left. He diagnosed the Claimant's right

6. There appears to be a minor discrepancy with the date of Claimant's termination. Claimant testified he was terminated on 10/26/16. Mr. Rayner testified he terminated the Claimant on 10/25/16. The Claimant's personnel file reveals a termination date of 10/27/16. (Employer/Carrier exhibit 2).

shoulder as having a partial thickness rotator cuff tear and bursitis. He diagnosed the Claimant's left shoulder with a probable rotator cuff tear. He assigned the Claimant light duty work restrictions and requested authorization to treat the Claimant's left shoulder from the Carrier.

10. Dr. Matarazzo next saw the Claimant on 6/2/16. Dr. Matarazzo testified he was authorized to evaluate the left shoulder. He opined that the Claimant could have a possible slap tear to the left shoulder. He prescribed a left shoulder MR arthrogram for the Claimant's left shoulder. Dr. Matarazzo met with the nurse case manager on 6/22/16, and after that meeting opined that the Claimant's left shoulder was unrelated to the 9/5/15 industrial accident. The Claimant was not present for this conference. Dr. Matarazzo was provided records from Concentra at this conference. Dr. Matarazzo signed a letter drafted by the nurse case manager which indicated that the left shoulder was not related to the Claimant's 9/5/15 accident.⁷ Dr. Matarazzo opined that as of 6/22/16 the Claimant's left shoulder condition is not causally related to the Claimant's industrial accident. He also opined that the major contributing cause of the Claimant's left shoulder injury is not the work accident. Dr. Matarazzo's notes do not indicate that he opined that the left shoulder was unrelated to the Claimant's 9/5/15 accident.⁸ Dr. Matarazzo has not rescinded or withdrawn his recommendation for a left shoulder arthrogram. Neither the conference letter nor his office notes reflect a withdrawal of this recommendation.

11. Dr. Matarazzo continued his treatment of the Claimant on 7/26/16. Dr. Matarazzo noted on 7/26/16 that authorization to treat the left shoulder was denied. His impression of a possible

7. Claimant's objection to this letter coming into evidence was **SUSTAINED**. The letter was not admitted into evidence and was used only to refresh Dr. Matarazzo's recollection.

8. Prior to having this letter refresh his recollection, Dr. Matarazzo did not recall his opinion that the Claimant's left shoulder injury was unrelated to the industrial accident.

slap tear and rotator cuff strain of Claimant's left shoulder remained unchanged. Dr. Matarazzo next saw the Claimant on 9/27/16. On that date he placed the Claimant at maximum medical improvement with a 2% whole body impairment rating. He released the Claimant to full duty work status. During the course of his treatment of the Claimant, he prescribed the Claimant physical therapy and anti-inflammatory medications. There were no objective changes in the Claimant's condition during the time he treated the Claimant. His diagnosis to the Claimant's right shoulder of a partial thickness rotator cuff tear and bursitis remained the same. The light duty work restrictions Dr. Matarazzo assigned to the Claimant remained unchanged from 5/5/16 through 9/27/16. Dr. Matarazzo did not have any opinion regarding the Claimant's work restrictions prior to seeing him on 5/5/16. Dr. Matarazzo opined that when he saw the Claimant on 5/5/16 he was not at maximum medical improvement.

12. Dr. Matarazzo testified that an MRI arthrogram is essentially an MRI taken of the joint. It is a diagnostic test. Dr. Matarazzo opined that the MRI arthrogram of the left shoulder is medically appropriate and would significantly help to diagnose a slap tear. Dr. Matarazzo is unaware of any prior complaints or injuries to the Claimant's left shoulder. He has no evidence of any prior or subsequent accidents to the Claimant's left shoulder. I find Dr. Matarazzo's testimony to be truthful and credible.

Findings of Fact:

13. In making my findings of fact and conclusions of law, I have carefully considered and weighed all of the evidence presented to me. Although I will not cite in explicit detail each witness' testimony, and may not refer to each piece of documentary evidence, I have attempted to resolve all conflicts in the testimony and evidence. I have referenced in this order what I

consider to be the most relevant testimony. Any objections raised in deposition or at final hearing not ruled upon are hereby overruled.

14. I find that I have jurisdiction over parties and the subject matter of this dispute. Venue is proper in Palm Beach County.

15. The Claimant sustained a compensable accident while working for the Employer, ALDI on 9/5/15. The Employer/Carrier accepted compensability of the accident and of the Claimant's right shoulder injuries.

16. I find that the Claimant reported a left shoulder injury on 9/21/15. The uncontroverted medical evidence shows that the Claimant reported right shoulder pain, and to a lesser degree left shoulder pain to the doctors at Concentra on 9/21/15.

17. Although the Claimant primarily treated for his right shoulder at Concentra from 9/21/15 through 11/19/15, I find that the Employer/Carrier authorized and paid for an evaluation and any required treatment of the Claimant's left shoulder with Concentra on 9/21/15. (Joint exhibit 1 at page 10). I find that the Employer/Carrier never issued a 120 day pay and investigate letter regarding the left shoulder. Id. at 18. I find that the first denial of treatment for the Claimant's left shoulder was filed on 4/19/16 in response to a petition for benefits filed by the Claimant. (Exhibit 1 to Joint exhibit 1, deposition of Brenda Igielski).

18. Dr. Matarazzo treated the Claimant from 5/5/16 through 9/27/16. I find that on 5/11/16 Employer/Carrier authorized Dr. Matarazzo to evaluate the Claimant's left shoulder. (Joint exhibit 1 at page 13). Dr. Matarazzo initially diagnosed the Claimant with a left shoulder probable rotator cuff tear. After receiving authorization to evaluate the Claimant's left shoulder

on 6/2/16, he diagnosed the Claimant with a possible slap tear to the left shoulder and recommended an MR arthrogram for the left shoulder.

19. On or about 6/22/16 Dr. Matarazzo met with the nurse case manager sent by the Employer/Carrier. During that meeting he opined that the Claimant's left shoulder injury was not related to the Claimant's 9/5/15 industrial accident, but he did not withdraw the recommendation that the Claimant undergo the left shoulder MR arthrogram.

20. I find that an MR arthrogram is a diagnostic test that is medically appropriate to diagnose a slap tear. I also find that the MR arthrogram is medically necessary to help diagnose a slap tear.

21. Dr. Matarazzo placed the Claimant on a light duty work status during the course of his treatment from 5/5/16 through 9/27/16. The light duty work restrictions remained unchanged during that period of time. Dr. Matarazzo had no opinion of the Claimant's work status prior to seeing the Claimant on 5/5/16. Concentra had previously placed the Claimant at MMI and full duty work status as of 11/19/16. I find that there is no evidence of the Claimant having any work restrictions from 11/20/15 through 5/4/16. I accept the opinions of Dr. Matarazzo regarding the Claimant's work restrictions for the time period of 5/5/16 through 9/27/16, over the opinions of the doctors at Concentra. Dr. Matarazzo was the only physician treating the Claimant at that time, and thus his opinions are more consistent with logic and reason.

22. I accept the opinion of Dr. Matarazzo that the Claimant reached maximum medical improvement on 9/27/16 with a 2% whole body impairment rating. I accept this date of maximum medical improvement over the 11/19/15 date of maximum medical improvement assigned by Concentra. Dr. Matarazzo provided remedial treatment to the Claimant from 5/5/16

through 9/27/16, and therefore the 9/27/16 MMI date assigned by Dr. Matarazzo is more consistent with logic and reason. I find that the Employer/Carrier accepted the MMI date of 9/27/16 by paying impairment benefits consistent with the impairment rating and new date of maximum medical improvement assigned by Dr. Matarazzo. (Joint exhibit 1 at page 43, Employer/Carrier exhibit 3).

23. The Claimant continued to work after his accident with the Employer until 10/27/15. (Employer/Carrier exhibit 2). Claimant was terminated from employment with the Employer on 10/27/15 for failure to satisfactorily complete the store manager job description in regards to scheduling, communication, and maintaining store conditions. Id. Employer/Carrier subsequently paid the Claimant temporary indemnity benefits from 10/27/15 through 11/19/15 pursuant to an agreement reached at mediation, which I find is inconsistent with Employer/Carrier's defenses to temporary partial disability. (Employer/Carrier exhibit 3, Claimant's exhibit 5).

24. I find that the Claimant performed a good faith job search during his period of unemployment. Claimant testified that he looked for various jobs in retail stores and offices. Claimant did not turn down any job offers. As a result of Claimant's efforts he returned to work with a company called Spirit Halloween on 8/1/16 and earned \$700 per week from 8/1/16 through 9/27/16.

Legal Analysis MR Arthrogram left shoulder:

25. Claimant argues that the left shoulder MR arthrogram should be awarded as his left shoulder injury is deemed compensable by operation of law under the 120 day rule of Florida Statute 440.20(4). A correct analysis of the applicability of the 120 day rule requires a three part analysis. First, the JCC must determine the date the Employer/Carrier initially provided benefits for the injury in question. Second, the JCC must determine the identity of the specific injury for which the benefits were provided. Third, the JCC must determine whether the employer/carrier timely denied compensability of the injury for which it provided benefits. *Sierra v. Metropolitan Protective Services*, 188 So.3d 863 (Fla. 1st DCA 2015).

26. It is undisputed that the Employer/Carrier first authorized medical treatment for the Claimant's left shoulder on 9/21/15 with Concentra. (Joint exhibit 1 at pages 10-11). The Employer/Carrier paid for the 9/21/15 visit and treatment. *Id.* Employer/Carrier did not file a notice of denial or 120 day pay and investigate letter regarding the Claimant left shoulder injury. *Id.* at 18. I conclude, therefore, that 9/21/15 was the first date the Employer/Carrier provided benefits for the Claimant's left shoulder.

27. On 9/21/15 the Claimant complained of bilateral shoulder pain to Dr. Rocio Velasquez of Concentra. Claimant was diagnosed with a shoulder strain, and given work restrictions pertaining to both shoulders. (Joint exhibit 3, Claimant's exhibit 3). On 5/11/16 Employer/Carrier authorized Dr. Matarazzo to evaluate the Claimant's left shoulder. (Joint exhibit 1 at page 18). Dr. Matarazzo diagnosed the Claimant with a possible slap tear to the left shoulder and prescribed an MR arthrogram. Under the second part of the analysis, the Employer/Carrier provided benefits for a left shoulder strain and possible slap tear.

28. I find that the earliest date that Employer/Carrier denied the Claimant's left shoulder injury was in their 4/19/16 response to a petition for benefits. (Exhibit 1 attached to Joint exhibit 1, deposition of adjuster Brenda Igielski). The 4/19/16 Response to Petition for Benefits states as follows: The E/C/SA authorized initial treatment at Concentra on 9/21/15, where the examination of the left shoulder demonstrated no evidence of an injury. Claimant failed to complain of further issues with his left shoulder in his subsequent visits to the authorized treating physician. There is no indication that the need for additional treatment of the left shoulder is related to the industrial accident of 9/5/15. Id. Contrary to this position, on 5/11/16 Employer/Carrier authorized Dr. Matarazzo to evaluate the Claimant's left shoulder. In response to Claimant's 6/6/16 Petition for Benefits requesting authorization of the MR arthrogram, the Employer/Carrier reported that the MR arthrogram is denied as Dr. Matarazzo had withdrawn the request. (Exhibit 7 attached to Joint exhibit 1, deposition of adjuster Brenda Igielski). This response does not indicate that compensability of the left shoulder injury had been denied. Finally, in the Pretrial Stipulation filed on 8/15/16 the Employer/Carrier's defense to the MR arthrogram states that Dr. Matarazzo has confirmed that any injury to the left shoulder is non-industrial and not work related. (JCC exhibit 2). I find that Employer/Carrier denied compensability of the left shoulder on 4/19/16, then revoked the denial of compensability on 5/11/16 by authorizing a left shoulder evaluation with Dr. Matarazzo, and again denied compensability of the left shoulder on 8/15/16.

29. I find that an initial evaluation and treatment was provided to the Claimant's left shoulder on 9/21/15 when the Employer/Carrier authorized evaluation and treatment with Concentra for both of the Claimant's shoulders. Whether Employer/Carrier authorized an

evaluation only is not determinative here. See Sierra at 865. The 120 day window to deny the Claimant's injury to his left shoulder expired on or about 1/18/16. I find that the Employer/Carrier's 4/19/16 and 8/15/16 denials of left shoulder compensability fall substantially outside the 120 day window which began on 9/21/15.

30. I find that the Employer/Carrier accepted compensability of the Claimant's left shoulder injury as a matter of law pursuant to Florida Statute 440.20(4). The Employer/Carrier did not deny compensability of the left shoulder within 120 days after initially providing medical benefits for the left shoulder on 9/21/15. Additionally, the Employer/Carrier again authorized an evaluation with Dr. Matarazzo on 5/11/16, well after the 120 days had expired. In order to have denied compensability of the Claimant's left shoulder more than 120 days from 9/21/15, the Employer/Carrier would have to show material facts relevant to the issue of compensability that could not have been discovered through reasonable investigation within the 120 day period. McIntosh v. CVS Pharmacy, 135 So.3d 1157 (Fla. 1st DCA 2014). I find that Employer/Carrier have not established material facts relevant to the issue of compensability that could not have been discovered through reasonable investigation within the 120 day investigation period. I find that the Employer/Carrier's authorization of an evaluation of the Claimant's left shoulder injury with Dr. Matarazzo on 5/11/16 acted as a retraction of their 4/19/16 denial of compensability of the left shoulder leaving 8/15/16 as the date of ultimate denial of compensability of the left shoulder.

31. Once Claimant's left shoulder injury is deemed compensable by operation of law, the burden falls upon the Employer/Carrier to show a break in the causal chain. Sierra at 867 citing Perez v. Southeastern Freight Lines, Inc., 159 So.3d 412 (Fla. 1st DCA 2015). Employer/Carrier

have not raised an affirmative defense of major contributing cause. The sole defense raised by the Employer/Carrier is that the left shoulder is non-industrial and not work related. (JCC exhibit 2). I find that there is no evidence of any break in the chain of causation as it pertains to the Claimant's left shoulder. There is no evidence of any prior or subsequent injury to the Claimant's left shoulder. Dr. Matarazzo's testimony that the Claimant's 9/5/15 industrial accident is not the major contributing cause of the Claimant's left shoulder injury and that the left shoulder injury is not related to the 9/5/15 industrial accident is not applicable where the Claimant's left shoulder injury is deemed compensable by operation of law under 440.20(4). Where the waiver of the right to deny compensability of an identified injury has occurred under Florida Statute 440.20(4), a later finding that the compensable injury was not caused in major part by the workplace accident in the first instance, will not satisfy the necessary proof that the compensable injury no longer remains the major contributing cause of the need for treatment. *Sierra* at 868. Such a finding would be, in essence, a belated way of saying the compensable injury was never compensable and would be prohibited under 440.20(4). *Id.*

32. The benefit at issue here is an MR arthrogram to the left shoulder. Dr. Matarazzo requested this test when he was given authorization to evaluate the Claimant's left shoulder. Dr. Matarazzo testified during the final hearing that he had not withdrawn the request for the MR arthrogram. I find that an MR arthrogram is a diagnostic test that is medically necessary and medically appropriate to diagnose a potential slap tear to the Claimant's left shoulder. I find that Employer/Carrier, while not raising a defense of medical necessity, would be barred from challenging the medical necessity by failing to respond to the request for the MR arthrogram within the statutory time constraints of Florida Statute 440.13(3)(d) and (i). The evidence shows

that the request for the MR arthrogram was made by Dr. Matarazzo on 6/2/16. The request was followed up with a Petition for Benefit filed by the Claimant on 6/6/16. The first response to the request for the MR arthrogram filed by the Employer/Carrier was on 6/23/16 when the adjuster, Brenda Igielski, filed a Response to Claimant's 6/6/16 Petition for Benefits indicating that Dr. Matarazzo had withdrawn the request for the MR arthrogram. (Exhibit 7 attached to Joint exhibit 1, deposition of Brenda Igielski). As an incentive for prompt responses, a carrier is deemed to agree to the medical necessity of the referral in the absence of a timely grant or denial of the requested benefit. *Andino-Rivera v. Southeast Atlantic Beverage Company*, 132 So.2d 1191 (Fla. 1st DCA 2014); *Pearson v. BH Transfer*, 163 So.2d 1280 (Fla. 1st DCA 2015).

33. I find that the diagnostic test of an MR arthrogram is not subject to a causation analysis. A claimant must establish a causal relationship between his injury and the compensable accident in order to secure treatment, but is not required to make this showing to be entitled to a diagnostic test to determine the cause of his symptoms. *Chance v. Polk County School Board*, 4 So.3d 71 (Fla. 1st DCA 2009) quoting *Grainger v. Indian River Transport*, 869 So.2d 1269 (Fla. 1st DCA 2004). Dr. Matarazzo opined that an MR arthrogram is medically appropriate to diagnose a potential slap tear in the Claimant's left shoulder. Accordingly, Claimant's request for an MR arthrogram to his left shoulder is granted.

Legal Analysis Temporary Partial Disability:

34. Claimant is seeking payment of temporary partial disability for the time period of 11/20/15 through 9/27/16. According to the Pretrial Stipulation, Employer/Carrier have defended this claim on the basis that the Claimant was terminated for reasons unrelated to his employment, and that the Claimant was placed at MMI with a 0% impairment rating for his right shoulder injuries. (JCC exhibit 2). I accept the date of 9/27/16 as the date the Claimant reached maximum medical improvement over the 11/19/15 date of maximum medical improvement assigned by Concentra. The Claimant underwent remedial treatment from Dr. Matarazzo from 5/5/16 through 9/27/16, and as a result Dr. Matarazzo's date of maximum medical improvement is more consistent with logic and reason.

35. In their trial memorandum of law and at the final hearing, Employer/Carrier asserted that the Claimant was terminated for misconduct. (Employer/Carrier exhibit 4). Claimant strenuously objected to Employer/Carrier raising this defense as it was not pled as a defense on the Pretrial Stipulation. (Claimant's exhibit 1). In the Order Denying Motion to Strike Trial Memorandum and Motion to Strike Defenses, Witnesses, and Exhibits, the undersigned indicated that both parties would be bound by the claims and defenses pled in the Pretrial Stipulation and by their respective amendments to the Pretrial Stipulation. (JCC exhibit 1). Rule 60Q-6.113(2)(a) indicates that all available defenses not raised in the pretrial stipulation are waived unless amended by the JCC for good cause shown. Misconduct is a specific statutory defense contained in Florida Statute 440.15(4)(e) (2015). The primary purpose of the pretrial stipulation is to put the parties on notice of what is in dispute. *Knight v. Walgreens & Sedgwick CMS*, 109 So.3d 1224 (Fla. 1st DCA 2013). I find that Employer/Carrier's defense, as pled, raise a defense

of lack of causation to the Claimant's claim for temporary indemnity benefits, but not a defense of misconduct under Florida Statute 440.15(4)(e).⁹ However, even if I were to consider Employer/Carrier's misconduct defense, I do not find that Claimant's conduct amounts to misconduct as defined in Florida Statute 440.02(18).

36. A claimant's termination from employment for reasons unrelated to his work injury does not determine whether the claimant is entitled to temporary partial disability benefits. Ramos v. Wal-Mart, 789 So.2d 1240 (Fla. 1st DCA 2001). Even if a worker is justifiably fired for reasons unrelated to his injury, he may still be eligible for wage-loss benefits if his injury left him with a condition which prevents him from obtaining employment within his abilities. Sparks v. Aluma Shield Industries, 523 So.2d 680 (Fla. 1st DCA 1988); Betancourt v. Sears Roebuck, 693 So.2d 680 (Fla. 1st DCA 1997). The issue of whether a claimant has shown a causal relationship between his compensable injury and his loss of wages is a question of fact for the JCC to determine based upon the totality of the circumstances. Betancourt at 684.

37. The uncontroverted evidence shows that the Claimant was on consistent light duty work restrictions assigned by Dr. Matarazzo from 5/5/16 through 9/27/16. Specifically Dr. Matarazzo assigned the Claimant work restrictions of no lifting or carrying greater than 10 pounds, no climbing, no overhead lifting, and no overhead reaching. There is no evidence of the Claimant having any work restrictions for the time period of 11/20/15 through 5/4/16. Dr. Matarazzo declined to speculate on Claimant's work status prior to his first visit with the Claimant on 5/5/16.

9. Seemingly inconsistent with a defense of misconduct, Employer/Carrier paid the Claimant temporary partial disability benefits from 10/27/15 through 11/19/15 which is after the Employer terminated the Claimant's employment. (Employer/Carrier exhibit 3, Claimant's exhibit 5). Additionally, there is evidence that the Claimant received unemployment benefits after his termination from January to May of 2016. (Joint exhibit 2 at page 8).

38. The uncontroverted testimony establishes that the Claimant performed a good faith job search. Claimant testified that he started looking for work one week after his termination. He looked for various light duty jobs as a retail store manager and other office type jobs. Claimant was eventually able to find employment on 8/1/16 as a store manager with Spirit Halloween earning \$700 per week.

39. It has been said that with great power comes great responsibility. The evidence shows that the Claimant worked for the Employer for more than 5 years, with the last 3 as a store manager. He earned a substantial salary plus monthly bonuses. Significantly, the uncontroverted testimony shows he earned a bonus during every month of his employment with ALDI. Claimant's personnel file contains various job performance reviews. (Claimant's exhibits 6, 7, and composite exhibit 8). These job performance reviews show that, while not perfect, the Claimant was a productive and valued employee and store manager. Things started going badly for the Claimant in June of 2015 and again in September of 2015. In reviewing the Claimant's personnel file and from listening to Mr. Rayner's testimony, Claimant received reprimands for the following reasons: failure to write a consistent work schedule for his employees, his store being out of stock on some items, a couple of customer service complaints, failure to work on one inventory day, selling expired product in the store, and general concerns about his leadership ability. (Employer/Carrier exhibit 2). The termination memo in the Claimant's file states that the basis for the Claimant's termination was Claimant's failure to satisfactorily complete the store manager job description in regards to scheduling, communication, and maintaining store conditions. (Employer/Carrier exhibit 2). The testimony from Mr. Rayner also establishes that he offered the Claimant a severance package upon his

termination. Mr. Rayner confirmed that not every terminated employee is offered a severance package.

40. A claimant is not disqualified from workers' compensation benefits just because he was terminated for cause. *Thorkelson v. NY Pizza & Pasta, Inc.*, 956 So.2d 542 (Fla. 1st DCA 2007). The JCC would have to make a finding of misconduct in order to bar a claimant's entitlement to TPD benefits. *Id.* Misconduct is defined in Florida Statute 440.02(18) as either (a) conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of the employee; or (b) carelessness or negligence of such a degree or recurrence as to manifest culpability, wrongful intent, or evil design, or to show an intentional and substantial disregard of an employer's interests or of the employee's duties and obligations to the employer. I find that the basis for the Claimant's reprimands and subsequent termination do not amount to the standard of conduct defined as misconduct under Florida Statute 440.02(18)(a) or (b). I find that the basis for the Claimant's termination as stated in the termination memorandum "failure to satisfactorily complete the store manager job description in regards to scheduling, communication, and maintaining store conditions" does not amount to misconduct as defined in 440.02(18). Claimant may have neglected the condition of his store, but I find no evidence of willful or wanton conduct. There is certainly no evidence of manifest culpability, wrongful intent or evil design on the part of the Claimant. Particularly persuasive are the uncontested facts that the Claimant received bonuses every month of his employment with the Employer, and that the Employer offered the Claimant a severance package upon his termination.

41. I find that the Claimant has proved a causal connection between his injury and loss of income for the time period of 5/5/16 through 9/27/16, and has satisfied his burden of proof by showing that his injury contributed to his loss of wages after his termination from employment. Temporary partial disability benefits are awarded for the time period of 5/5/16 through 9/27/16. Employer/Carrier shall be entitled to factor Claimant's post accident earnings of \$700 per week under the formula set forth in Florida Statute 440.15(4)(a) for the time period of 8/1/16 through 9/27/16 based upon Claimant's subsequent employment with Spirit Halloween. Claimant shall be entitled to penalties and interest on the amount of benefits paid by the Employer/Carrier for this period of time.

42. Claimant's claim for indemnity benefits for the time period of 11/20/15 through 5/4/16 is denied. There is no medical evidence to support Claimant's alleged disability for this period of time. The uncontroverted evidence shows that the Claimant was released to full duty work status on 11/19/15 by Concentra, and that the Claimant did not have work restrictions again until 5/5/16 when he was seen by Dr. Matarazzo. Dr. Matarazzo declined to opine on any work restrictions prior to the first time that he saw and treated the Claimant on 5/5/16.

Wherefore it is **ORDERED** and **ADJUDGED** as follows:

1. Claimant's claim for an MR arthrogram to the left shoulder as prescribed by Dr. Matarazzo is hereby **GRANTED**.
2. Claimant's claim for Temporary Partial Disability for the time period of 11/20/15 through 5/4/16 along with penalties and interest is hereby **DENIED**.
3. Claimant's claim for Temporary Partial Disability for the time period of 5/5/16 through 9/27/16 along with penalties and interest is hereby **GRANTED**. Employer/Carrier shall be allowed to factor Claimant's subsequent earnings of \$700 per week from Spirit Halloween pursuant to 440.15(4)(a) for the time period of 8/1/16 though 9/27/16.
4. Claimant's claim for attorney's fees and taxable costs to be paid to his attorney is hereby **GRANTED** for the benefits secured above. Jurisdiction is reserved on the amount of attorney's fees and costs due to Claimant's counsel for securing the above medical and indemnity benefits.
5. Jurisdiction is reserved on any issues pertaining to attorney's fee entitlement and amount as a result of any benefits secured from Petitions for Benefits filed 4/15/16, 4/20/16 and 7/26/16.

DONE AND SERVED this 17th day of February, 2017, in West Palm Beach, Palm Beach County, Florida.



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