

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

Laurie Steinberg,  
Employee/Claimant,

OJCC Case No. 15-015157GJJ

vs.

Accident date: 7/1/2015

Headway Workforce Solutions/Travelers  
Insurance,  
Employer/Carrier/Service Agent.

Judge: Gregory J. Johnsen

**AMENDED FINAL COMPENSATION ORDER**  
**(AMENDED TO ADD PARAGRAPH NUMBER 20)**

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 held on November 19, 2018 regarding the Claimant's Petition for Benefits filed on 4/25/18.<sup>1</sup> State mediation was held on this petition for benefits on 8/23/18. The Claimant appeared at the final hearing along with her attorney, David S. Benn. Jason T. Selwood appeared on behalf of the Employer/Carrier.

**Stipulations pursuant to the Uniform Pretrial Stipulation:**

1. Worker's compensation insurance coverage was in effect on the above date of accident.
2. There was an employer/employee relationship at the time and on the above date of accident.
3. The parties stipulated to a date of accident of 7/1/2015.
4. The Claimant's date of accident and right foot, lumbar spine, right shoulder, right elbow, vertigo, and right forearm injuries were accepted as compensable.
5. The claim is not governed by a managed care arrangement.

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1. The Claimant's 10/23/18 Petition for Benefits has not been mediated and is not ripe for adjudication pursuant to Florida Statute 440.192(9). The undersigned expressly reserves jurisdiction to adjudicate the 10/23/18 Petition for Benefits at a later date, if necessary. See *Department of Agriculture and Consumer Services v. Anderson*, 132 So.3d 900, 901 (Fla. 1<sup>st</sup> DCA 2014).

6. Timely notice of the final hearing was provided.
7. Venue is appropriate in Palm Beach County, Florida.
8. The undersigned Judge of Compensation Claims has jurisdiction over the subject matter and over the parties.
9. The parties stipulated to an average weekly wage of \$238.25.

I accept, adopt, and incorporate the above stipulations of the parties as part of this order.

**Claims:**

1. Pursuant to the Uniform Pretrial Stipulation claims were made for the following benefits:
  - a. Payment of TTD/TPD benefits from 4/11/18 through present and continuing.<sup>2</sup>
  - b. PICA.

**Defenses:**

1. Pursuant to the Uniform Pretrial Stipulation the Employer/Carrier asserted the following defenses:
  - a. TT/TP not due or owing based on medical non-compliance as Claimant has failed to show for scheduled recommended VNG testing per Dr. Parnes 3 consecutive times.
  - b. PICA not due or owing.

**Claimant's objections and responses to Employer/Carrier's affirmative defenses:**

1. Claimant demands strict proof of E/C's "medical non-compliance" defense.

**Documentary Evidence:**

**Judges Exhibits**

1. 9/7/18 Uniform Pretrial Stipulation and 9/10/18 Order Approving Uniform Pre-Trial Stipulation (D124, D127).

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2. In the pretrial stipulation the Claimant voluntarily withdrew her claim for permanent total disability benefits asserting that she had not reached overall maximum medical improvement.

### **Joint Exhibits**

1. Claimant's 10/19/18 Motion to Admit Medical Records and 11/5/18 Order Granting Claimant's Motion to Admit Medical Records (D132, D135).

### **Claimant's Exhibits**

1. Claimant's 4/25/18 Petition for Benefits (D104).
2. Claimant's 7/12/18 Petition for Benefits (D110).
3. 7/13/18 Deposition of adjuster, Darla Pagano (D137).

### **Employer/Carrier's Exhibits**

1. 11/2/18 Deposition of Dr. Todd Parnes (D139).

**Live Testimony:** Claimant, Laurie Steinberg

**Deposition Testimony:** Adjuster, Darla Pagano  
Dr. Todd Parnes

### **Summary of the Evidence:**

1. 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 or summarize 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 reviewed every medical record, every deposition, and all other documentary evidence the parties have submitted into evidence. I have referenced in this order what I consider to be the most relevant testimony and evidence. Any objections raised in deposition or at final hearing not previously ruled upon are hereby overruled.
2. I find that I have jurisdiction over the parties and the subject matter of this dispute. Venue is proper in Palm Beach County, Florida.

3. The Claimant, Laurie Steinberg, testified live before me. Ms. Steinberg is presently seventy years old. She testified that she was injured on 7/1/15 when, while working as a field interviewer in Delray Beach, she slipped on a rock causing her to fall and injure the right side of her body. Specifically, the Claimant testified that she injured her right shoulder, right arm, right knee, back, and head. As a result of her injuries that Claimant has treated with Dr. Reiter, Dr. Brown, Dr. Parnes, and Dr. Zager.
4. The Claimant treated with Dr. Parnes, who is an ENT physician, for her vertigo from the 7/1/15 industrial accident. The Claimant testified that in January of 2017 Dr. Parnes recommended that she undergo a VNG test. The Claimant testified that she was never contacted about the VNG test until one year later. She did not contact Dr. Parnes about scheduling the test as she did not feel it was her role to do so. She testified that she was uncertain as to why the test was being scheduled more than a year later and had questions about the test. Initially, she testified that she did not know why the test was recommended, but then conceded that the test was for her vertigo and dizziness. The Claimant stated that she wanted to be cleared for the test by her personal internist due to her high blood pressure. She was told by Dr. Widdows that the VNG test, in addition to raising blood pressure, causes vertigo, and she did not wish to experience that again. The Claimant testified that her internist, Dr. Widdows, recommended that she not undergo the test due to her high blood pressure, but she admits that Dr. Widdows did not prohibit her from undergoing the test.
5. The Claimant admits that she did not go to the VNG test which was scheduled three times for 3/8/18, 3/23/18, and 4/11/18. The Claimant testified that her vertigo symptoms had previously resolved. After she received the 5/2/18 letter from Dr. Widdows recommending

that she not undergo the VNG test, she contacted Dr. Parnes. She attempted to schedule a follow up appointment with Dr. Parnes to discuss the test, but was not allowed to set the appointment without authorization from the Carrier. The Claimant testified that the VNG test was not scheduled at Dr. Parnes' office, but instead was scheduled in a different location. The Claimant testified that the VNG test was to be administered by someone other than Dr. Parnes. The Claimant testified that when she returned to Dr. Parnes on 8/20/18 she advised Dr. Parnes that she did not want the test. The Claimant testified that she never intentionally denied medical care, and did not purposefully delay being placed at maximum medical improvement. Overall, although the Claimant was somewhat guarded and evasive in her testimony, I find her to be credible and I accept her testimony.

6. The adjuster, Darla Pagano, testified via deposition. Ms. Pagano has been the only adjuster on this claim since 11/28/16. On 4/16/18 Ms. Pagano issued a Notice of Denial denying all indemnity benefits as of 4/11/18 based upon the Claimant's alleged medical non-compliance. The Notice of Denial, attached to her deposition, indicates that "indemnity benefits have been suspended due to medical non-compliance: failure to show for diagnostic testing for the third time. This testing is required to properly manage and move forward with the handling of her claim and to determine specifically the causal relationship to the at work accident and resultant alleged injuries." Ms. Pagano testified that the Claimant had been scheduled multiple times (March 8, 2018, March 23, 2018, and April 11, 2018) for the VNG testing and had failed to appear.
7. Ms. Pagano testified that she was unaware that the Claimant did not wish to undergo the VNG test, and that the Claimant's personal physician did not recommend that she undergo

the VNG test. An email from Claimant's counsel to the Employer/Carrier's counsel dated 2/28/18 indicates that the Claimant would not be attending the VNG testing until clarification could be obtained as to why the testing was being scheduled when the Claimant had not seen Dr. Parnes in over a year. Another email from Claimant's counsel dated 3/15/18 indicates that the Claimant, upon advice from her personal physician, did not wish to undergo the VNG testing. Ms. Pagano testified that the Carrier wanted the Claimant to undergo the VNG testing so that Dr. Parnes could finalize her and she could be placed at overall maximum medical improvement.

8. Ms. Pagano testified that the authorized psychiatrist, Dr. Zager, has not placed the Claimant at psychiatric maximum medical improvement, but has the Claimant on a full duty work status. She testified regarding the contents of a report from Dr. Zager dated 8/22/16 which states that that the Claimant is "full duty, no MMI." Ms. Pagano testified that impairment benefits have not been paid to the Claimant on this claim. I find Ms. Pagano to be a credible witness and I accept her testimony. (Claimant's Exhibit 3).
9. In a 5/2/18 letter, which was attached to the deposition of Darla Pagano, Dr. Joanna Widdows indicates that there is a concern doing a VNG study on the Claimant as the results may cause momentary vertigo which could lead to anxiety and increase of blood pressure. (Claimant's Exhibit 3).
10. Dr. Todd Parnes, the authorized ENT physician, testified via deposition. Dr. Parnes first saw the Claimant on 11/2/16. The Claimant was referred to Dr. Parnes by MedExpress because of complaints of hearing loss and tinnitus associated with the right ear. The Claimant described her accident and complained of hearing loss, vertigo, and ringing in her ears due to

the fall. Dr. Parnes diagnosed the Claimant with unspecified hearing loss on the right side, tinnitus associated with the trauma, as well as possible dizziness. Dr. Parnes next saw the Claimant on 1/17/17. The Claimant complained that the ringing in her ears had gotten worse. She complained of pain to her right temple area and that the hearing loss and dizziness also persists on a daily basis. Dr. Parnes recommended an ENG<sup>3</sup> evaluation which is an electronystagmograph test to evaluate the Claimant's dizziness. Dr. Parnes described the ENG test as a specific test for the inner ear to see if the vestibular system or the balance system of the inner ear was disrupted or interfered with. Dr. Parnes does not know if the test was authorized by the Carrier.

11. Dr. Parnes testified that he last saw the Claimant on 8/21/18. The Claimant described her dizziness as slightly better, but that she had not undergone the recommended testing. The Claimant still complained of hearing loss and tinnitus. Dr. Parnes opined that the previous MRI did not show any unusual injuries to the Claimant's inner ear. He testified that the Claimant did not want to undergo the ENG test so he could offer no further opinion on the Claimant's dizziness. Dr. Parnes placed the Claimant at maximum medical improvement as of 8/21/18 with no permanent impairment rating. Dr. Parnes testified that he was never advised by the Claimant that she did not want the ENG testing. Dr. Parnes testified that had he known the Claimant did not want the ENG test back when he recommended it on 1/17/17 he would have placed her at maximum medical improvement at that time. Dr. Parnes testified that the Claimant did not provide him with a reason for not wanting to undergo the ENG test. Dr. Parnes also denied any knowledge of the Claimant's personal physician advising against the ENG testing. I find Dr. Parnes to be a credible witness and I accept his

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3. The parties stipulated on the record that the VNG and ENG tests are one and the same.

testimony. (Employer/Carrier's Exhibit 1).

12. The parties submitted portions of medical records from authorized physicians. On 7/1/15 the Claimant was seen by Dr. Gregg Nezowitz of MedExpress of Boynton Beach. Dr. Nezowitz assigned the Claimant work restrictions of no prolonged standing, hourly 10-minute rests as needed, and no lifting greater than 5 pounds. (Joint Exhibit 1).
13. On 1/20/16, the Claimant saw orthopedic surgeon, Dr. Brian Reiter. Dr. Reiter diagnosed the Claimant with lumbar radiculopathy, foot pain, and neck pain. Dr. Reiter referred the Claimant to physical therapy for her back injuries, and recommended that the Claimant undergo a neurological evaluation. Dr. Reiter placed the Claimant on a sedentary duty work status. On 7/20/16 Dr. Reiter placed the Claimant at maximum medical improvement with a 6% whole body impairment rating for her lumbar herniated disk at L4-L5. Dr. Reiter did not assign the Claimant any permanent work restrictions and indicated that the Claimant could return to work full duty. On 4/24/17 Dr. Reiter signed a questionnaire which indicated that he concurred with the Claimant's work restrictions indicated in the functional capacity evaluation (FCE). Dr. Reiter opined that the Claimant was at maximum medical improvement with these permanent limitations. (Joint Exhibit 1).
14. On 5/23/16 the Claimant saw neurologist Dr. Richard Bailyn. He performed an EMG and NCV on the Claimant and concluded that there was no electrodiagnostic evidence of lumbosacral radiculopathy affecting the right lower extremity, and no electrodiagnostic evidence of peripheral nerve dysfunction involving either leg. (Joint Exhibit 1).
15. On 8/24/16 the Claimant saw psychiatrist Dr. Arnold Zager. The Claimant reported to Dr. Zager that her vertigo symptoms have not reoccurred since January of 2016. The Claimant



reported anxiousness about having another recurrent vertigo episode and reported a fear of driving a motor vehicle due to this possibility. Dr. Zager diagnosed the Claimant with an adjustment disorder with depressed and anxious mood. Dr. Zager did not place any psychiatric work restrictions on the Claimant and recommended antianxiety medication, supportive counseling, and relaxation training. The Claimant returned to Dr. Zager on 10/25/16. Dr. Zager reported that she had been undergoing the recommended sessions with the psychologist. Dr. Zager recommended that the Claimant continue with the psychologist and to return to his office on an as needed basis. (Joint Exhibit 1).

16. A DWC-25 from Dr. Christopher Brown indicates that the Claimant reached maximum medical improvement on 2/14/18 with a 6% whole body permanent impairment. (Joint Exhibit 1).

17. The Claimant saw Dr. Todd Parnes on 11/2/16. The Claimant complained of bilateral ear ringing, pain, ear fullness, and hearing loss. The Claimant also reported constant daily dizziness and loud tinnitus. The Claimant reported an inability to work because of the unrelenting vertigo. Dr. Parnes diagnosed the Claimant with unspecified sensorineural hearing loss, unspecified injury of face, tinnitus right ear, dizziness, and giddiness. Dr. Parnes placed the Claimant at maximum medical improvement on 8/21/18<sup>4</sup> with no permanent impairment rating or permanent work restrictions. (Joint Exhibit 1).

18. On 7/12/18 the Claimant filed a petition for benefits requesting a follow-up appointment with Dr. Todd Parnes. (Claimant's Exhibit 2).

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4. The DWC-25 from Dr. Parnes indicates an actual MMI date of 8/20/18.

**Findings of Fact and Legal analysis:**

19. A claimant has not reached overall maximum medical improvement until she has reached maximum medical improvement for both her psychiatric and physical conditions. *Greber v. Tallahassee Development Center*, 778 So.2d 999, 1000 (Fla. 1<sup>st</sup> DCA 2000). I find, and the parties agree, that the Claimant has not reached overall maximum medical improvement from her injuries sustained in her 7/1/15 industrial accident. I find that the Claimant has reached physical maximum medical improvement, but not psychiatric maximum medical improvement. I find that the Claimant has not reached overall maximum medical improvement for the injuries sustained in her 7/1/15 industrial accident.
20. I find that Dr. Parnes was the last physician to treat the Claimant's physical injuries sustained in her 7/1/15 industrial accident. There appears to be some confusion as to when Dr. Parnes last saw the Claimant. Dr. Parnes testified that his last office visit with the Claimant was on 8/21/18. The Claimant testified that her last office visit with Dr. Parnes was on 8/20/18. Dr. Parnes' DWC-25 indicates that he saw the Claimant on 8/21/18, but assigned an MMI date of 8/20/18. Dr. Parnes testified in deposition that he placed the Claimant at maximum medical improvement on 8/21/18. While Dr. Parnes, in his deposition, considered moving the Claimant's date of maximum medical improvement back to 1/17/17, I find that he did not actually do this. I conclude that if Dr. Parnes had assigned a retroactive date of maximum medical improvement, this would have been improper as he was still recommending treatment as of 1/17/17. *Utley-James, Inc. v. Lady*, 448 So.2d 1191, 1193 (Fla. 1<sup>st</sup> DCA 1984); *Delgado v. Omni Hotel*, 643 So.2d 1185, 1187 (Fla. 1<sup>st</sup> DCA 1994). I find that as of 1/17/17 Dr. Parnes was recommending additional testing and treatment for the Claimant's

vertigo condition. I find that the Claimant did not decline the vertigo testing prescribed by Dr. Parnes until the Carrier attempted to schedule the testing over one year later in March and April of 2018. The Claimant's 5/2/18 letter from her personal physician, Dr. Widdows, supports this conclusion. The Claimant's attempt to return to Dr. Parnes in July 2018 for a follow up visit to discuss the testing also supports this conclusion. I find that the Claimant reached physical maximum medical improvement as of 8/21/18 per the testimony and medical records of Dr. Parnes.

21. I find, and the parties agree, that the Claimant has permanent physical work restrictions. I find, and the parties agree, that the Claimant does not have any psychiatric work restrictions. The Employer/Carrier argue that the Claimant is no longer entitled to temporary partial disability benefits because she has reached physical maximum medical improvement and does not have any psychiatric work restrictions. I reject the Employer/Carrier's argument. A worker's compensation claimant who has reached physical maximum medical improvement, but has no psychiatric work restrictions, is eligible for temporary partial disability benefits up until the date the claimant reaches psychiatric maximum medical improvement. See Rojas v. United Sheet Metal, 832 So.2d 174 (Fla. 1<sup>st</sup> DCA 2002).

22. The Claimant seeks temporary partial disability benefits from 4/11/18 to present and continuing. Pursuant to Florida Statute 440.15(4)(a) a claimant is eligible for temporary partial disability benefits if the claimant has not reached overall maximum medical improvement and the medical conditions resulting from the accident create restrictions on the injured employee's ability to return to work. A claimant seeking temporary partial disability need only prove a causal connection between the injury and the loss of income.

*Wyeth/Pharma Field Sales v. Toscano*, 40 So.3d 795, 802 (Fla. 1<sup>st</sup> DCA 2010). I conclude that the Claimant has demonstrated a causal connection between her 7/1/15 industrial injuries and her loss of earning capacity. I conclude that the Employer/Carrier has not challenged this causal connection, but instead paid the Claimant temporary partial disability benefits up until 4/11/18 when they suspended her indemnity benefits asserting that she was medically non-compliant. I therefore conclude that the Claimant has met her initial burden of proving a causal relationship between her injuries and loss of wages. *Toscano* at 800. I conclude that the Employer/Carrier has not asserted, as arguments or defenses, either that the Claimant has refused work or that the Claimant has voluntarily limited her income. I conclude that the Employer/Carrier has not met their burden to show that the Claimant has refused work or voluntarily limited her income. *Id.*

23. The Employer/Carrier argues that the Claimant is not entitled to temporary partial disability benefits due to her medical non-compliance for not attending the VNG test recommended by Dr. Parnes. Although neither the undersigned nor the parties could find any statutory basis for the Employer/Carrier's medical non-compliance defense, there are a few cases which address medical non-compliance. The medical non-compliance defense first originated in 1961<sup>5</sup> in *Lobnitz v. Orange Memorial Hospital*, 126 So.2d 739 (Fla. 1961). The Florida Supreme Court in *Lobnitz* upheld the reversal of benefits to the injured worker when she failed to return to the doctor for treatment for over six months. The Court found that the injured worker had a duty to mitigate the employer's liability. In the more recent case of *Davis v. Marion County*, 667 So. 2d 297 (Fla. 1<sup>st</sup> DCA 1995), the First DCA, in interpreting

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5. In 1961 the Cold War was in full swing. The USSR erected the Berlin wall, separating East Berlin from West Berlin, and launched the first man into space. The United States financed invasion of Cuba at the Bay of Pigs was also an unmitigated failure.

Lobnitz, reversed a denial of benefits to a claimant who left a pain management program against medical advice, without reasonable excuse, prior to completing the evaluation and necessary testing. The First DCA found that there was no showing that the pain management program evaluation was likely to bring about an improvement in the claimant's condition. Id. Most recently in Gil v. Cargo Force, Inc., 141 So.3d 253 (Fla. 1<sup>st</sup> DCA 2014), the First DCA partially affirmed the judge of compensation claims' denial of benefits to the claimant who did not take reasonable steps to secure the medical care when first offered by the employer/carrier. The First DCA held, however, that the doctrine of medical noncompliance does not result in the permanent forfeiture of benefits, and will only apply during the period of time the claimant failed to take reasonable steps to secure medical care. Id. at 254.

24. The Claimant herein does not dispute that she failed to attend the VNG test prescribed by Dr. Parnes. The Claimant instead argues that she did not want to undergo the test based upon the recommendation of her personal physician, Dr. Widdows. While I find that Dr. Widdows did not prohibit the Claimant from undergoing the VNG test, I find that her 5/2/18 letter did offer a concern about the Claimant undergoing the test. The Claimant cannot be forced to undergo medical treatment. Jackson v. Columbia Pictures, 153 So.3d 349 (Fla. 1<sup>st</sup> DCA 2014); See also Lewis v. Dollar Rent a Car, 220 So.3d 1246 (Fla. 1<sup>st</sup> DCA 2017) (claimant could not be compelled to attend an FCE).
25. I find, and the parties agree, that the VNG test as prescribed by Dr. Parnes is a diagnostic test. I find that the VNG test is not designed to bring about improvement in the Claimant's condition, but is instead designed to determine causation of the Claimant's vertigo. I find that the Employer/Carrier, as evidenced in the parties' Uniform Pretrial Stipulation, had

already accepted the Claimant's vertigo condition as compensable which would lead a reasonable person to question the need for the VNG test. I find that the Claimant, through her counsel, timely notified the Employer/Carrier on 2/28/18 that she would not be attending the VNG test, and again on 3/15/18 that she did not wish to undergo the VNG test. I find that the Claimant, through her 7/12/18 petition, sought to return to Dr. Parnes to discuss the VNG test. Although there are some discrepancies between the Claimant's testimony and Dr. Parnes' testimony as to whether she advised Dr. Parnes that she did not want the VNG test, I find that this is not determinative of the issue. I find that the Claimant has treated with multiple doctors authorized by the Employer/Carrier, and I conclude that her decision to not undergo one diagnostic test, which was scheduled over one year after it was recommended, does not rise to the level of medical non-compliance. I conclude that the Claimant is entitled to temporary partial disability benefits from 4/11/18 through the 11/19/18 final merits hearing.

26. The Claimant seeks temporary total disability benefits from 4/11/18 to present and continuing. Florida Statute 440.15(2) provides for payment of temporary total disability benefits where the claimant is totally disabled from working. I conclude that there is no medical evidence of the Claimant having been placed on a no work status by any physician, which is required for an award of temporary total disability benefits. See *CVS Caremark Corporation v. McIntosh*, 163 So.3d 1270 (Fla. 1<sup>st</sup> DCA 2015). I conclude that the Claimant is not eligible for temporary total disability benefits for the time period of 4/11/18 through the 11/19/18 final merits hearing.

27. I conclude, pursuant to Florida Statute 440.20(7) and Florida Statute 440.20(8)(a), that the Claimant is entitled to penalties and interest on the awarded temporary partial disability benefits for the time period of 4/11/18 through 11/19/18.

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

1. Claimant's claim for temporary total disability from 4/11/18 through the 11/19/18 final merits hearing is hereby **DENIED**.
2. Claimant's claim for temporary partial disability benefits from 4/11/18 through the 11/19/18 final merits hearing is hereby **GRANTED**.
3. Claimant's claim for penalties and interest for the time period of 4/11/18 through the 11/19/18 final merits hearing is hereby **GRANTED**.
4. Claimant's claims for attorney's fees and cost are hereby **GRANTED**.
5. The 4/25/18 Petition for Benefits is hereby dismissed. The undersigned reserves jurisdiction to determine the amount of attorney's fees and costs owed to Claimant's counsel for obtaining the benefits awarded above.

DONE AND SERVED this 7th day of December, 2018, in West Palm Beach, Palm Beach County, Florida.



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Gregory J. Johnsen  
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Division of Administrative Hearings  
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