

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

Rosalba Trejo,
Employee/Claimant,

OJCC Case No. 14-013426SHP

vs.

Accident date: 12/2/2013

First Watch Restaurants, Inc./PMA
Insurance Group,
Employer/Carrier/Service Agent.

Judge: Shelley H. Punancy

MERIT ORDER

AFTER DUE AND PROPER NOTICE, this cause came on to be heard in Palm Beach County, Florida, on 1/7/15. The Claimant was represented by William Haro, Esquire. The E/C was represented by Jeffrey Marks, Esquire. This order resolves the issues raised in the Petition for Benefits filed on 9/30/14.

A. Claims:

1. Temporary partial disability (TPD) benefits from 7/17/14 to present and continuing.
2. Penalties, interest, costs and attorney's fees.

B. Defenses:

1. Voluntary limitations of income/deemed earnings.
2. No evidence of lost wages as a result of the compensable injuries.
3. Claimant failed to submit DWC-19s evidencing wage loss.
4. Penalties, interest, costs and attorney's fees not due or owing.
5. Prevailing party costs per section 440.34(3) should E/C prevail at Merit Hearing.

C. Documentary Exhibits:

Court:

1. Pretrial Stipulation/Order.

Claimant:

1. Petition for Benefits filed 9/30/14.
2. Medical Records-Dr. Hodor.
3. Post-Accident Payroll Records.
4. Carrier's Payout Records.
5. Deposition-Ms. Tekoah Hammonds-12/5/14 with attachments.
6. First Report of Injury-E/C objection-relevance, hearsay.

Ruling-Overruled.

Employer/Carrier (E/C):

1. Response to Petition for Benefits filed 11/19/14.
2. Deposition-Ms. Trejo-10/22/14.
3. 13 Week Wage Statement dated 1/2/14. Claimant objection-hearsay, lack of authentication.-Ruling-Overruled.

D. Stipulations:

1. I have jurisdiction of the parties and subject matter of the claim.
2. On the Pretrial Stipulation filed 11/10/14, Claimant at #11 indicated N/A regarding

AWW. At trial 1/7/15, Claimant's position was that she was hired to work 35 hours per week at \$11.50 per hour. The E/C's position on the Pretrial Stipulation was that Claimant's base wage was #331.48 with a compensation rate of \$220.99.

3. Jurisdiction is reserved regarding the Petition for Benefits filed 12/10/14 as same has not been mediated.

E. Testifying before me was the Claimant, Ms. Trejo, with the aid of a Spanish language interpreter. Mr. Hale testified on behalf of the E/C.

I have carefully considered and weighed all evidence presented. I observed the candor and demeanor of the witnesses who testified before me. I have resolved all conflicts in the evidence. I have considered the argument of counsel, statutory, and case law authority. I now make the following findings of fact and conclusions of law:

Findings of Fact:

1. The stipulations of the parties are approved and adopted.

2. The Claimant was born 9/30/71 and is 43 years old. On 12/2/13, as she was carrying a container of dirty dishes to the dishwasher, Claimant struck her right elbow and right hand against a metal stand in the kitchen. The accident and injury were accepted as compensable and medical treatment was authorized.

3. Claimant was seen at MD NOW on 12/2/13. Subsequently, Claimant's care was transferred to Dr. Hersch, orthopedist, who placed her at MMI 5/21/14 with a 0% impairment and no work restrictions. In response to Claimant's request for a one-time change of treating provider, Dr. Hodor, orthopedist was authorized.

4. Claimant was first seen by Dr. Hodor on 7/17/14. At that time she complained of continued episodes of a burning sensation of pain in her right elbow radiating to the dorsoradial aspect of her right forearm in the region of the superficial radial nerve. Dr. Hodor documented Claimant's report that she had returned to work about two months ago (5/2014) full duty; cutting

up food, mopping, sweeping, and throwing out garbage. Claimant reported that there were days when her pain was quite intense; burning dyesthetic pain to her right forearm. Dr. Hodor performed a physical examination. His impression was direct trauma-right elbow. He documented that Claimant had clinical evidence of tenderness in the radial tunnel where the posterior interosseous nerve travels to the supinated muscle. Initially, Claimant's symptoms were consistent with irritation of the superficial radial nerve, but they were improving at that point, according to Dr. Hodor. Based upon Claimant's failure to respond to previous steroid injection to the right lateral epicondyle, and by history of failure to have any lasting relief from previously administered platelet rich plasma injections, Dr. Hodor opined that it was likely Claimant had in addition to lateral epicondylar pain, a possible entrapment neuropathy involving the radial nerve (posterior interosseous division).

5. Dr. Hodor ordered electrodiagnostic studies of Claimant's right upper extremity. He indicated that Claimant was capable of working with avoidance of any lifting, pushing, or pulling over 20 lbs. Claimant was advised to use contrast therapy with ice/heat to the right elbow.

6. On 8/5/14, Dr. Hodor documented that per the electrodiagnostic studies there was no evidence of any definitive compression neuropathies involving Claimant's median, ulnar, or radial nerves. Dr. Hodor's 10/7/14 note indicated a continued showing of improvement referable to Claimant's right lateral epicondylitis following an injection 5½ weeks ago. Claimant was utilizing a volar wrist splint and was given a right elbow air cast to use while working. Dr. Hodor documented that Claimant could increase her activity level using the air cast but, if chopping food caused pain, she would need rest periods. He continued to restrict Claimant from sweeping and mopping.

7. At trial, Claimant confirmed the restrictions on her work activity imposed by Dr. Hodor on 7/17/14. She testified that she was given a brace to wear when working but, could not work with it because she had to wear gloves and be able to cut up food at times, according to the Claimant. She related the following current symptoms: right hand is swollen in the morning; pain in right elbow; unable to mop/sweep; pain and discomfort when turning steering wheel of the car; and left hand pain and tingling of fingers left hand due to increased use.

Conclusions of Law:

1. Claimant seeks payment of temporary partial disability benefits from 7/17/14 to present and continuing.

2. The Court in Wyeth/Pharma Field Sales v. Toscano, 40 So.3d 795 (Fla. 1st DCA 2010), clarified the legal standard applicable to the payment of temporary partial disability benefits. Benefits are payable if overall MMI has not been reached and the medical conditions resulting from the accident create restrictions on the injured employee's ability to return to work. Section 440.15 (4)(a); 440.02 (13), Fla. Stats. (2013). A Claimant need only prove a causal connection between the injury and the loss of income. To establish the causal relationship, a Claimant can show that her capabilities preclude adequate performance of her prior job. The burden to establish a prima facie case of lost earning capacity is clearly on the Claimant. Id.

3. Here, Claimant submits that the Employer's unwillingness to provide her with the same number of hours as prior to the accident "because of her injury-related restrictions and pain", combined with her not having attained MMI, establishes a prima facie case for entitlement to temporary partial disability benefits.

4. In the instant case, Claimant's duties as a cook required the following: food prep (chopping/cutting), work the salad and fruit line, clean/sweep/mop when the restaurant closes for the day, lift/carry trash cans (20 lbs. or more), lift/carry bus bins of dirty dishes and utensils, and put dishes and utensils back in place at the end of the day.

5. Under Dr. Hodor's care and treatment in the period 7/17/14 through 10/7/14 and continuing, Claimant's restrictions have remained as follows: avoid any lifting, pushing, or pulling over 20 lbs., and no sweeping or mopping.

6. A dispute exists as to the number of hours Claimant worked before the 12/2/13 accident. At deposition on 10/22/14, Claimant testified that she was a full-time employee working 37 to 40 hours per week, earning \$11.50 per hour. At trial, Claimant testified that she worked up to 40 hours a week "sometimes". Mr. Hale, general manager with the Employer, had no evidence at trial to refute the testimony of Ms. Hammonds, adjuster with PMA Insurance Group. She testified that the First Report of Injury (Claimant's Exhibit #3 to Ms. Hammonds' deposition) showed the following: rate of pay \$11.50/hour, 7 hours/day, 5 days/week. The document shows 6/28/13 as the date Claimant began her employment.

Ms. Hammonds testified that the 13 Week Wage Statement (Claimant's Exhibit #2 to Ms. Hammonds' deposition) reflects Claimant's AWW of \$331.48. The corresponding CR is \$220.99. The Wage Statement reflects Claimant's starting pay rate of \$10.00 per hour as a busser, and subsequent increased rate of \$11.50 per hour as a cook.

The E/C asserted the AWW/CR derived from the Wage Statement as its position on the Pretrial Stipulation filed 11/10/14. **Claimant's position asserted on the Pretrial Stipulation was "N/A"**. The first time Claimant asserted a position as to her proper AWW/CR was at trial.

She submitted that it should be determined based upon \$11.50/hour for a 35 hour week; that is, that it should be AWW of \$402.50 with CR of \$268.33. I reject Claimant's position as it does not comport with her own testimony regarding her starting hourly rate of \$10.00, the rate she was paid from 9/1/13 through 11/9/13; \$10.33/hour for the period 11/10/13 through 11/16/13; and \$11.50/hour from 11/17/13 through 11/30/13, all reflected on the Wage Statement. Moreover, to wait until the day of trial to raise a challenge to the AWW/CR deprives the E/C of its right to due process. I accept the Wage Statement as the correct source for the determination of Claimant's AWW/CR.

7. On 10/22/14, Claimant testified that since July, 2014, she has been working "very little, like 19, 15, less maybe hours per week. Twenty-two hours a week is the most I've worked." Since July, 2014, she has been paid \$230.00 every 15 days, as opposed to making \$450.00 to \$540.00 every 15 days prior to the accident, according to the Claimant.

8. Mr. Hale testified that Claimant worked 3-4 days a week prior to the accident. He did not believe that she worked on week-ends. He confirmed that Claimant is paid bi-weekly, every other Friday.

9. On 10/22/14, Claimant testified that her hours were reduced since July, 2014 because she was restricted from mopping (and therefore could not work to closing time for the restaurant), and Mr. Hale said she did not train so as to be able to work at other areas in the restaurant.

10. Mr. Hale testified that the restaurant closes at 2:30 p.m. If the records show time for Claimant beyond that, she closed the restaurant on that date, according to Mr. Hale.

11. At trial, Claimant testified that since July, 2014, she has only been given 2 days of work per week (about 17 hours/week) and same had only been increased to 3 days (about 20

hours/week) as of the time of trial. She testified that 3 weeks before the trial she worked 4 days and the week of the trial she worked 5 days, because she worked at the Employers' other locations. The only time she worked over 30 hours in a week was 15 days before trial, according to the Claimant.

12. Before the accident, she worked 5-6 days a week, according to the Claimant. She testified that Mr. Hale said her hours were reduced because of her many restrictions and he had been told she did not want to work on Sundays.

13. Claimant denied not wanting to work on Sundays. She testified that before the accident she worked on Saturdays, but rested on Sundays. She testified that she told Mr. Hale she would work on Sundays if he needed her and told her in advance. According to the Claimant, since July, 2014 she has only been given Mondays or Wednesdays off from work. However, she testified that when needed, she works on Sundays.

14. Mr. Hale testified that after the accident, Claimant came into the restaurant in January, 2014 for breakfast, at which time she told him she could work 2-3 days a week. He denied ever telling Claimant that he could not give her more than 2-3 days a week. He further testified that he never at any time since July, 2014 decreased Claimant's hours because of her restrictions. The Employer has consistently offered Claimant work within her restrictions, and the salad station is where she has mainly worked, according to Mr. Hale. He testified that any decrease in her hours was due to Claimant's refusal to work at times; for example, about 4-5 months before trial Claimant said it was too hard and too hot for her to work at the inside egg station. About a month before trial he gave Claimant work at the outside egg station and she has worked there 4-5 days since July, 2014, according to Mr. Hale.

15. Mr. Hale testified that Claimant has refused to work on weekends on multiple occasions, saying it was too hard for her and she did not like working weekends. Since July, 2014, Claimant has worked 5 or 6 weekends, according to Mr. Hale. He testified that since about a month before trial Claimant has been willing to work weekends.

16. Claimant testified that since returning to work she has not refused any schedule she was put on by the Employer, including work on weekends. She denied ever being disciplined for not coming to work or for not working on Sundays. She testified that Mr. Hale never said he had no work for her within her restrictions, just that he could not give her more hours because of her restrictions; that he never said he would not put her on the schedule, just that he could not give her more hours.

17. Mr. Hale testified that during the slow season for the restaurant he needs the employees to be able to multi-task; that is, be able to work the line, the inside egg station, etc. Claimant refused to train to learn new skills/to increase her skills, according to Mr. Hale.

18. Claimant admitted that Mr. Hale has offered to train her for work at other areas of the restaurant, for example the inside egg station. She testified that she never refused to learn how to do it nor to do it. She then inconsistently testified that Mr. Hale did not want to train her for work at the inside egg station because the frying pan was too heavy for her. Finally, he gave her 2 days of training about 2-3 months before trial, but has not assigned her to work at the inside egg station, according to the Claimant. She testified that Mr. Hale would not train her for work at the pancake station either.

19. Mr. Hale testified that cooking eggs is within Claimant's restrictions and, Claimant never asked to be trained to work the pancake section. Mr. Hale had no written documentation of

Claimant's refusal to train/work/work specific hours or weekends even though he testified he had verbal interactions with Claimant concerning these matters. Despite that, Claimant is a good employee, according to Mr. Hale.

20. Earnings Statements for the Claimant show the following:

<u>Period Ending</u>	<u>Hrs/Bi-Weekly</u>	<u>Hrs/per Week</u>	<u>Gross Pay Bi-Weekly</u>	<u>Gross Pay Weekly</u>
7/6/14	39.11	19.55	\$449.77	\$224.89
7/20/14	25.56	12.78	\$293.94	\$146.97
8/3/14	51.72	25.86	\$594.78	\$297.39
8/17/14	17.68	8.84	\$203.32	\$101.66
8/31/14	22.33	11.16	\$256.80	\$128.40
9/14/14	12.18	6.09	\$140.07	\$70.04
9/14/14	37.23	18.61	\$428.15	\$214.08
9/28/14	43.94	21.97	\$505.31	\$252.66
10/12/14	37.19	18.59	\$427.69	\$213.85
10/26/14	74.26	37.13	\$853.99	\$426.99
11/9/14	48.32	24.16	\$555.68	\$277.84
11/23/14	64.37	32.18	\$740.26	\$370.13

The FW Daily Payroll Transactions (MU) covers the period 7/22/14 through 12/1/14 and reflects the start/end time and number of hours worked per day by Claimant.

21. To determine whether an injury and a subsequent wage loss are causally connected, a JCC is to consider the totality of the circumstances. See Interim Services v. Levy, 843 So.2d 915 (Fla. 1st DCA 2003).

22. Here in the instant case, the record evidence shows that Claimant has worked consistently for the Employer from 7/1/14 through 12/1/14. There is no dispute that she has physician-imposed physical restrictions on her work activity as a result of the compensable accident/injury. There is no dispute that Claimant has not yet attained MMI. I conclude that she has established a prima facie case for eligibility for temporary partial disability benefits. Having done so, the burden shifts to the E/C to prove that during the period in which wage loss benefits are claimed, Claimant refused work or voluntarily limited her income. See Church's Fried Chicken v. Maloney, 599 So.2d 706 (Fla. 1st DCA 1992).

23. Mr. Hale disputes Claimant's allegation that he reduced Claimant's hours because of her injury-related restrictions and pain complaints. A comparison of Claimant's testimony as to her pre-injury hours and the Wage Statement is instructive:

<u>Claimant's Testimony</u>	<u>Wage Statement-9/1/13 through 11/30/13</u>
37 to 40 hours/week	16.50 to 41.75 hours/week
5 to 6 days/week	2 to 5 days/week
\$11.50	\$10.00/hour, increased to \$10.33/hour, increased to \$11.50/hour

The hours worked per week by Claimant since 7/1/14 are reflected on the Earnings Statements and FW Daily Payroll Transactions (MU) discussed at paragraph #20. herein. There are weeks shown in which Claimant's hours worked were below the range reflected on the Wage Statement. As Claimant failed to substantiate her claim with documentation of having worked significantly more hours per week before the accident as opposed to after the accident, I find her testimony is


nothing more than self-serving in nature. The record evidence supports Mr. Hale's testimony in this regard and at the same time evidences Claimant's eligibility for temporary partial disability benefits. I accept Mr. Hale's testimony as to the fluctuating nature of work in the restaurant business and the need for an employee to be able to work in more than one area. However, he had no documentation of an offer of training to increase Claimant's skills so that she would be capable of working in other areas of the restaurant, and her refusal of the offer, nor documentation of Claimant's refusal to work specific hours or on weekends. Accordingly, I find that the E/C failed to prove that Claimant refused to work or voluntarily limited her income. Mr. Hale conceded that since July, 2014, Claimant continued to mainly work the salad station, worked on weekends at time, worked the outside egg station, and even worked beyond 2:30 p.m. at times to close the restaurant. Claimant admitted that she was given work at other locations of the Employer and as a result saw an increase in her hours on some occasions. While Claimant may want to work more hours per week to increase her income, she has failed to establish that her inability to bring that desire to fruition is due to an unwillingness on the part of the Employer to provide her with the same number of hours as prior to the accident. The evidence shows that the pattern of days and hours worked by the Claimant pre and post the accident remained essentially the same. Accordingly, based upon the foregoing analysis, it is hereby,

ORDERED AND ADJUDGED:

1. Utilizing an AWW of \$331.48 and CR of \$220.99, on submission of completed DWC-19 forms by the Claimant, the E/C shall apply the formula found at section 440.15(4)(a) and pay appropriate temporary partial disability benefits for the period 7/17/14 through 1/7/15.

2. Statutory penalties and interest are awarded on the quantum of benefits administratively determined to be owed for the period 7/17/14 through 1/7/15.
3. Jurisdiction is reserved on the matter of entitlement and quantum of E/C owed attorney's fees and costs in the event the parties are unable to resolve the matter.

DONE AND ORDERED this 21st day of January, 2015, in West Palm Beach, Palm Beach County, Florida.


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished VIA E-Mail to the following Counsel on January 21, 2015.


Secretary to Judge of Compensation Claims

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