STATE BOARD OF WORKERS' COMPENSATION
270 Peachtree Street, NW
Atlanta, Georgia 30303-1299
(404) 656-2973
www.sbwc.georgia.gov

STATEMENT OF THE CASE

This matter arises out of an accepted claim based upon an October 8, 2009 date of accident and an injury to Employee's lumbar spine. The case came on for hearing pursuant to the WC-14, Request for Hearing, filed on March 29, 2011, on behalf of Employer/self-insurer (Employer), whereby they are requesting authorization to suspend payment of temporary total disability (TTD) benefits to Employee for the following periods: February 12, 2010 through June 28, 2010, and for the period of January 28, 2011, to the present and continuing, based upon Employee's alleged failure or refusal to accept suitable employment pursuant to OCGA §34-9-240 and Board Rule 240. On August 8, 2011, a second WC-14 was filed adding the issue of Employer's request for reimbursement of TTD benefits paid to Employee for the following periods: February 12, 2010 through June 28, 2010, and for the period of January 28, 2011, to the present and continuing, based upon Employer's assertion that Employee was/is not entitled to benefits during these periods of time, again, based upon her alleged unjustified failure to accept suitable employment.

The Employee filed her own request for a hearing on September 15, 2011, seeking a change in her authorized treating physician from Dr. Sean Keem to Dr. David Stokes. In addition, the Employee requests payment of assessed attorney's fees and costs of litigation pursuant to OCGA §34-9-108, based upon Employer/insurer's alleged unreasonable prosecution of this matter. Alternatively, Employee requests approval of the Attorney Fee Contract executed in this matter. (C-5).

A hearing was held before the Trial Division of the State Board of Workers' Compensation on October 6, 2011 in Atlanta, Fulton County, Georgia. The Employee's native language is Bosnian and she testified at the hearing with the assistance of an interpreter. Witnesses testified subject to the Rule of Sequestration. Having reviewed and considered all admissible evidence and argument, I find and conclude as follows.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The parties were able to stipulate that they are subject to the Workers' Compensation Act (the Act); that the Board has jurisdiction in this matter; that venue is proper in Gwinnett County, Georgia, so that venue for hearing is proper in Fulton County, Georgia; that the Employer was properly self-insured for workers' compensation purposes on the date of accident and at all relevant times; that Employee was in the general employment of Employer earning an average weekly wage of six hundred, thirty seven dollars and twenty five cents ($637.25), which translates to a weekly compensation rate of four hundred, twenty four dollars and eighty five cents ($424.85); that Employee suffered a compensable accident and injury to her lumbar spine of October 8, 2009; that proper notice of the accident was given; and that Employee is currently being paid TTD benefits. It is further stipulated that Dr. Sean Keem is the Employee's current authorized treating physician; and that Employer has made offers of employment, although Employee disputes that the jobs offered were suitable to her impaired condition.

2. At the request of the parties, Judicial Notice was taken of the various Form WC-2s, Notice of Payment or Suspension of Benefits, filed on behalf of the Employer in this matter.

3. Employee is a 47 year old woman who began working for this Employer approximately six years ago. She worked as a custodian in an elementary school, and performed general cleaning duties, "everything that the custodian needs to do," such things as sweeping, mopping, and cleaning bathrooms.

4. On October 8, 2009 Employee was moving tables from the school cafeteria floor in preparation for cleaning the floor. Employee testified that as she was helping a co-worker move one of the cafeteria tables which was "not functioning," the co-worker started to drop the table, so Employee jumped back to avoid being hit. She further testified that she immediately felt severe pain in her back, pain which she described as "like a knife was stuck" in her back, and she fell to the floor. The accident and back injury were accepted as compensable and both medical and indemnity benefits have been paid.

5. It appears to be undisputed that following the accident Employee was taken to a hospital Emergency Room and was admitted and hospitalized for five days. Although a five day hospital stay would seem to indicate a rather severe injury, I note that neither party submitted medical records from the date of injury or the subsequent hospitalization.

6. Following her release from the hospital, Employee was provided a copy of Employer's Panel of Physicians and selected Dr. Christopher Edwards with the Atlanta Neurology and Spine Institute as her authorized treating physician. The records reveal that Employee was first seen by Dr. Edwards on October 19, 2011 presenting with complaints of "severe" back and left leg pain. She was diagnosed with "left radiculitis" and disabled from work for the next two weeks. The physician recommended physical therapy and a "one-time" epidural injection, which Employee declined. (E-5, p.9-14; E-9).

7. The record reflects that Dr. Edwards continued to find Employee unable to work until November 27, 2009, at which time Dr. Edwards released Employee to return to "sedentary work." On December 7, 2009, Employee was again released to return to sedentary work. (E-5, p.1, 3).

8. Employee exercised her right to a "one time" change in physician and began treating with Dr. Sean Keem, another panel doctor, on December 10, 2009. Dr. Keem's impression was that Employee was suffering from an exacerbation of a pre-existing degenerative disease. He placed Employee on "light duty" restrictions including no lifting over 10 pounds, "waist level work only, NO shoulder level work," "no repeated or heavy work above shoulder level," and no climbing. Under Dr. Keems' care, Employee underwent conservative treatment, including physical therapy and epidural injections. (E-10; E-1; E-1, p.42).

9. The record reflects that when an employee is released to return to restricted duty work it is the Employer's practice for the Risk Manager and the individual school personnel to work together to find work for an Employee within the restrictions given to him or her by the treating physician. In that regard, the Employer's Head Custodian, J.C., who was also Employee's Supervisor, testified that when Employee was released to work he went around the school to see what kind of work was available that Employee might be able to perform and "created" a light-duty job for her, which then was submitted to D.P., the Employer's Risk Manager, for her approval and then for approval by the Employee's treating physician. This testimony was confirmed by that of D.P. (E-6, p.2).

10. On January 28, 2010, and again on January 4, 2011, Dr. Keem approved light duty jobs based upon descriptions which were provided by Employer, and the jobs were properly offered to the Employee pursuant to OCGA §34-9-240. (E-6; E-7).

11. Employee did, in fact, return to work on February 10, 2010. Employee's Supervisor testified that the first job he had Employee doing was cleaning bathrooms with another worker, specifically, cleaning toilets, sinks, and mirrors in bathrooms used by elementary school children. The supervisor also testified

that because the toilets are cleaned every day, it would not require the Employee to apply the kind of pressure when using the brush for scrubbing that one might expect for this job. He further testified that no kneeling, stooping, bending, twisting or stretching was required. Employee's next job was to clean the windows on the classroom doors. The evidence reveals that the windows were approximately at eye level; the Supervisor testified that Employee could "stand there and just wipe." It appears, and I find, that these duties were in compliance with restrictions outlined by the authorized treating physician. I further note that while there was much testimony about the bending and stooping requirements of the job, the approved job analysis allows for these activities on an occasional basis and there is no restriction as to bending on the various work status reports. (E-8; E-6, p.4-6; E-7, p.4-5).

12. When Employee returned to work on February 10, 2010, she worked cleaning bathrooms for approximately 40 minutes and then reported to her supervisor that she was in pain and could not do the work assigned to her. She then ceased working and left for the day. The record further reflects that the next day, although Employee again reported for work, she worked "less than an hour," and again ceased working, stating that she was in pain and was unable to work.

13. While the evidence suggests that some aspects of the proffered light duty job were suitable to Employee's impaired condition, I did not find that Supervisor's testimony about the physical demands of cleaning bathrooms to be credible; and find that that aspect of the job was not suitable. I do not, therefore, find that the job was suitable. As such, I find that Employee was justified in ceasing work at that time.

14. It appears that Employee had an existing pathology at that time and when she continued to complain of pain and had minimal improvement with conservative care, surgery, including a lumbar discectomy and fusion at L4-5- L5-S1, was performed on June 29, 2010. Following the surgery, Employee was totally disabled from work for several weeks. This period of disability is not in dispute. (E-1, p.28-33).

15. At the time of her August 12, 2010 post-operative follow-up visit, Dr. Keem noted that Employee was "doing very well," although "she is still afraid of walking without a walker." Dr. Keem found Employee capable of work and released her to part-time, light duty work. (E-1, p.25-26).

16. On December 14, 2010, Employee was released her to "medium duty" work. However, there is no indication that the Employer had work available or offered light duty work to the Employee again until the WC-240 was served in January of 2011. I find that Employee would have been entitled to and was properly paid TTD benefits during the periods of time at issue from February 11, 2010 through January 26, 2011. (E-1, p.18-26; E-7, p.2-6). See Freeman v. Continental Baking Company, 212 Ga. App. 855, 443 S.E.2d 520 (1994); Peterson/Puritan, Inc. v. Day, 157 Ga. App. 827, 278 S.E.2d 674 (1981).

17. After Employee left work on February 11, 2010, she did not return to work again until January 26, 2011, nearly a year later. When Employee reported to work she was given the job of sweeping the cafeteria floor, but again claimed that she could not do the work. When Employee claimed she couldn't do the sweeping, her supervisor then assigned her to clean the door windows with a spray cleaner, a task which she was apparently able to perform. Thereafter, she was asked to clean the walls in the hallway. When she again complained of pain, her supervisor advised her that "there was no rush" with the work and she should rest as needed. However, Employee again left work and did not finish her shift. When Employee returned to work the next day, on January 27, 2011, she was given the assignment of cleaning the walls with the spray cleaner and advised to only work at the level where she could comfortably reach. Again, Employee worked only a very short time before reporting that it was hard for her to walk and she could not do the job. I find that this job was in compliance with the restrictions outlined by the authorized treating physician and find that the job was suitable. I further find that Employee's refusal to do the job was unjustified. (E-7, p.5-6).

18. On February 17, 2011, Dr. Keem approved another light duty job, with restrictions of occasional lifting, carrying, pushing or pulling up to 25 pounds and no bending, kneeling, squatting, crawling, or climbing. A WC-240 was issued offering the approved job to Employee and she again returned to work again on March 8, 2011. The Supervisor testified that "this time" when Employee returned to work he had her work cleaning walls and windows, with instructions to work at her own pace and rest whenever she felt she needed to do so. He then gave her the job of using a "dust wand" and merely dusting computers in the classrooms. The Supervisor also testified that because of Employee's complaints of pain, he did not have her follow the proposed schedule; for example, she was not asked to pick up trash. The Supervisor further testified that the next day, March 9th, when Employee returned to work, she did not attempt to do any actual work. Rather, Employee informed him that her back hurt and she could not work, and she turned her keys over to him and left. (E-8).

19. The Supervisor testified, and I find, that the job assignment did not require bending, kneeling, twisting, or stretching. Employee admitted that her supervisor's description of the duties she was required to perform was accurate. She also admitted that her supervisor did not ask her to do any task that she was unable to perform, and confirmed that he had told her she could rest when she needed. I find that the job offered as of March 8, 2011 was within the restrictions as outlined and approved by Employee's authorized treating physician and that the job was suitable to Employee's physical restrictions. In fact, according to the supervisor, Employee performed the work for several hours. (E-8, p.3-7).

20. Despite being capable of a return to work, albeit with restrictions, Employee has not returned to work for this, or any other, Employer since she unjustifiably ceased work on March 9, 2011, The Supervisor testified, and I find, that the job is still open and available to Employee.

21. Employee also testified that in addition to her back pain, she is having left leg and left arm or shoulder pain, and also that the fingers in her left hand get numb, all of which she claims affect her ability to do her job as a custodian. Employee described her back pain at the time of the hearing as a 7 on a scale of 1 to 10 and that any movement causes her pain to be "a 10." During the hearing Employee often rubbed or held her back, alternated sitting and standing, and at times, became tearful. At other times, however, she talked with her hands in an animated way and twisted from side to side with no apparent distress or discomfort.

22. On March 10, 2011, Employee underwent an evaluation with Dr. Plas James, another orthopedic surgeon, who had also evaluated him in October of 2010. Dr. James' impression was that Employee had a disc bulge at L3-4, degenerative disc disease with instability, and post-operative scarring. He recommended a "left-sided sacroiliac joint injection…to reduce inflammation and tenderness." (E-4; C-3).

23. Employee was seen for follow-up with Dr. Keem on March 15, 2011. Dr. Keem's notes indicate that Employee reported that she felt she "couldn't really deal with the stress of work." Employee also reported that she had "a lot of personal matters" that made it hard for her to return to work in any capacity. I find, as Dr. Keem did, that these issues were outside the scope of her workers' compensation injury. Dr. Keem further opined that "as far as her spine is concerned," Employee could continue on her previous restriction level, pending a functional capacity evaluation (FCE). (E-1, p.10).

24. On March 29, 2011 Employee underwent an FCE. The evaluator noted that Employee complained of pain at various times throughout the evaluation, but also found that Employee gave "full and consistent" performance during the evaluation The FCE results are consistent with Dr. Keem's finding that Employee could safely perform "medium" capacity work. (E-2).

25. At the time of her May 24, 2011 appointment with Dr. Keem the doctor noted that despite Employee's complaints of pain, he did not feel that L3-4 was a pain generator as "there was no significant

neuroforaminal or central canal stenosis." Dr. Keem stated however, that he would "like to give Employee the benefit of the doubt," and offer her another epidural steroid injection. In June of 2011, Dr. Keem noted what he called a rather new finding, a positive Febere sign, which is indicative of some problem in the sacroiliac joint. He recommended an injection of the joint for "diagnostic as well as therapeutic" purposes. Thereafter, Dr. Keem diagnosed Employee with sacroillitis, but opined that her work restrictions would remain the same. (E-1, p.2-3, 6, 8-9).

26. Based upon the above and foregoing, I find that Employee has been capable of a return to work since December 14, 2010, when she was released to "medium duty" work by Dr. Keem. I further find that effective January 28, 2011 to the present and continuing, Employee has unjustifiably refused employment suitable to her physical capabilities. Accordingly, I find that she is not entitled to payment of TTD during the period of her refusal. OCGA §34-9-240(a) and City of Adel v. Wise, 261 Ga. 53 (1991).

27. An updated MRI was performed on August 31, 2011. The MRI revealed disc degeneration at L3-4, without nerve compression. On September 6, 2011, Dr. Keem again opined that because Employee was not a surgical candidate, he had no treatment to offer; as such, he again released Employee from his care. (E-1, p.1-2; E-3; C-2).

28. I turn now to Employee's request for a change in her authorized treating physician from Dr. Sean Keem to Dr. David Stokes. In support of her request, Employee argues that she continues to be in need of medical treatment and since Dr. Keem has released her from his care, she is without a treating physician. Employee also argues that she is entitled to a change in physicians because she was not given a free choice in her initial selection of a treating physician. It appears to be undisputed that Employee is still in need of medical treatment for her compensable conditions and that Dr. Keem has indicated he has nothing further to offer, so that a change in physician on that basis is appropriate.

29. Both the Employee and Employer's representative testified about the Panel of Physicians and procedures for selecting a treating physician. Employee claimed that she was told she could only select from the doctors on the panel that were "starred" by the Employer. Yet, she also testified that she did not know who to select and that she choice Dr. Edwards because he was the physician closest to her home. The Risk Manager testified, and I find, that since Employee had suffered a back injury, she "starred" the back specialists listed on the panel for Employee's information, but that Employee was provided with a complete copy of the panel and was therefore free to selection any physician off of the Panel. I further find that the Panel was properly utilized and that Employer provided appropriate assistance to the Employee pursuant to OCGA §34-9-201. (C-6; E-9).

30. Employer opposes a change to Dr. Stokes based upon the contention that he specializes in shoulders, and that a "more appropriate choice" for Employee's treatment would be someone who treats backs, such as Dr. Bennett Axelrod or Dr. John Foster, physicians with whom she indicated she would authorize Employee to treat. (C-6; E-8).

31. It is undisputed that Employee continues to be in need of medical treatment for her compensable back condition. I find that a physician who specializes in the treatment of the back would be the most appropriate choice to serve as the Employee's authorized treating physician. The available medical evidence reveals, and I find, that the Employee is not a surgical candidate, so that I further find that a non-surgical orthopedist or physiatrist would be the best specialist to serve as the Employee's treating physician. As such, I hereby designate Dr. Tamara Chachashvili with Resurgens Orthopedics, Lawrenceville office as the authorized treating physician in this matter.

32. In this case, the Employer has the burden of proving that Employee is no longer entitled to payment of TTD or other indemnity benefits. In order for an employer to meet their burden, the Employer must

show that the employee is able to return to work and that suitable work is available. See Freeman v. Continental Baking Company, 212 Ga. App. 855, 443 S.E.2d 520 (1994); Peterson/Puritan, Inc. v. Day, 157 Ga. App. 827, 278 S.E.2d 674 (1981). I find that the Employer has met their burden of proof as to Employee's entitlement to indemnity benefits from January 28, 2011, to the present and continuing.

AWARD

WHEREFORE, Based upon the above findings of fact and conclusions of law, Employer/self-insurer is authorized to suspend payment of benefits to the Employee effective January 28, 2011, to the present and continuing until benefits are otherwise modified in accordance with law.

Employer/self-insurer is authorized to take a credit for the overpayment of TTD made for the period of January 28, 2011, to the present and continuing. The credit may be taken against PPD or other future indemnity benefits that might be owned, or against any settlement in this matter.

A change in the Employee's authorized treating physician is granted. Dr. Tamara Chachashvili is hereby designated as the authorized treating physician in this matter. Dr. Chachashvili is authorized to provide reasonable and necessary treatment which she deems attributable to the Employee's October 8, 2009 accident/injury with this Employer.

Pursuant to the Workers' Compensation Act, the Employer/self insurer is responsible for the payment of necessary and reasonable medical expenses incurred as a result of Employee's treatment with Dr. Chachashvili. Dr. Chachashvili . is directed to mail copies of any medical records to the insurer.

Employee's request for attorney's fees is denied.

IT IS SO ORDERED, this the 01st day of December, 2011.

STATE BOARD OF WORKERS' COMPENSATION

This order is electronically signed and approved.
/s/Elizabeth W. Lammers
ELIZABETH W. LAMMERS
ADMINISTRATIVE LAW JUDGE