STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ESCAMBIA COUNTY SCHOOL BOARD,

Petitioner,

v.

DOAH CASE NO.: 06-4028

JACKIE FOWLER,

Respondent.

FINAL ORDER

THIS CAUSE comes before the School Board of Escambia County, Florida upon a recommended order by Administrative Law Judge Diane Cleavinger. The Administrative Law Judge determined the School Board failed to carry its burden of proof that it had just cause to terminate Ms. Fowler's employment contract.

Section 120.57(1)(l), Florida Statutes provides the procedure for review of the instant recommended order. It provides:

The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. The agency may accept the recommended penalty in a recommended order, but may not reduce or increase it without a review of the complete record

and without stating with particularity its reasons therefor in the order, by citing to the record in justifying the action.

The School Board has reviewed the recommended order and the entire record, and finds as follows:

Ms. Fowler filed a worker's compensation claim on March 9, 2006. The basis of the claim was that Ms. Fowler was suffering from foot pain which Ms. Fowler stated was due to years of repeatedly pressing school bus gas pedals.

Ms. Fowler broke her toe at home prior to filing the worker's compensation claim. In speaking with School District officials about filing a compensation claim, Ms. Fowler never mentioned her previously broken toe. Ms. Fowler's claim was ultimately denied because the School District determined her injury was caused by the non-work-related injury. Ms. Fowler did not appeal that denial.

On September 14, 2006, the Superintendent notified Ms. Fowler of his recommendation to the School Board to terminate her employment based on making false, incomplete or misleading statements in support of her claim for worker's compensation benefits.

The School Board approved the recommendation on September 19, terminating Ms. Fowler's employment effective September 20, 2006. Ms. Fowler timely requested an administrative hearing to challenge her termination. The case was referred to the Division of Administrative Hearings.

A formal hearing was convened on March 8, 2007 before Administrative Law Judge Diane Cleavinger. Judge Cleavinger issued her recommended order on June 8, 2007. The Petitioner filed exceptions to the recommended order on June 19, 2007. Ms. Fowler filed no exceptions but filed responses to the Petitioner's exceptions. The School Board adopts the findings of fact contained in the recommended order with the exception of those specifically rejected below.

PETITIONER'S EXCEPTIONS

The Petitioner first takes exception to the administrative law judge's finding that "Dr. Lambert's office gave Ms. Fowler a pamphlet discussing foot pain and its possible causes. One of the potential causes for such pain was repetitive stress to the foot due to driving."[1] The Petitioner correctly notes there is no record evidence to support this assertion.

When Ms. Fowler attempted to testify regarding the contents of the pamphlet, the Petitioner's objection was sustained and *no* evidence was adduced concerning the contents of the pamphlet.[2] Moreover, the pamphlet was not admitted into evidence. Accordingly, the ALJ's finding regarding the pamphlet's contents is pure speculation and cannot be sustained.

Ms. Fowler contends that she testified concerning her understanding of neuroma and, therefore, the ALJ's conclusion is a proper inference; however, there is no testimony that Ms. Fowler's understanding of neuroma and its causes was based on the pamphlet's contents. Accordingly, her argument is without merit.

Next, the Petitioner takes exception to the determination that Susan Berry, Principal of Escambia Westgate Center, advised Ms. Fowler that if she felt her foot pain were work-related, she should file a worker's compensation claim. Ms. Berry did not testify. Moreover, as the Petitioner correctly notes, there is no testimony from Ms. Fowler or anyone else which attributes such statement to Ms. Berry.

The sole involvement of Ms. Berry which may be found from the record was that Ms. Fowler spoke with her about a possible position at Escambia Westgate Center which would not involve driving, the requirements of that job, and Ms. Fowler's decision that she could not do that particular job.[3]

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[1] Recommended Order (R.O.) at Page 4.

[2] Transcript of proceedings held March 8, 2007 at page 94.

[3] *Supra* note 2 at pages 98-99 and 103.

The Petitioner responds to the exception by noting her testimony that she was told by two administrators to file a worker's compensation claim if she felt her foot pain were job-related. [T. 105] Ms. Fowler now asserts the only two administrators to whom she spoke were Jerry Caine and Ms. Berry. As stated previously, there is no basis in the record for even an inference that Ms. Berry told the Petitioner to file a worker's compensation claim. Such an inference cannot be extrapolated from the fact that the Petitioner states she was told by two "administrators" to file such a claim.

The testimony immediately preceding the statement pertains to conversations with worker's compensation adjustor, Jean Bradish.[4] It is undisputed that the Petitioner was told if she believed her foot pain to be work related then she should file a worker's compensation claim.[5] There is no testimony from the Petitioner regarding whether she considered Ms. Bradish to be anything other than an "administrator." Indeed, the record is devoid of any evidence regarding the job classification of Ms. Berry, Ms. Bradish and Mr. Caine. Accordingly, the Petitioner's second exception is sustained.

The Petitioner objects to Judge Cleavinger's finding that Ms. Fowler advised Dr. Corbett of her previously broken toe, in part, because Ms. Fowler provided x-rays to the doctor which demonstrated the broken toe. Additionally, the administrative law judge determined that whether the Petitioner told Dr. Corbett about the broken toe was immaterial because Dr. Corbett stated it was not material to his treatment of the foot.

The Petitioner correctly notes the x-rays Ms. Fowler provided to Dr. Corbett at his request are not of record. Accordingly, there is nothing on which to base a finding that the x-ray readily revealed a broken toe. Moreover, no one testified regarding that first x-ray or its contents.

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[4] *Id.* at pages 104-105.

[5] *Id.* at pages 30-31 and 98.

The Petitioner contends that the records provided to Dr. Corbett establish that the x-rays show trauma to her toe. This is a misstatement of what is contained in the records provided to Dr. Corbett.

Dr. Lambert's records which were provided to Dr. Corbett contain notes on the Petitioner's report of injury to Dr. Lambert. The records state the Petitioner reported she went to the ER where she was informed her toe was definitely "broke" [sic].[6] The record reflects the Petitioner's report of prior treatment, not a review of the x-ray and its contents.

Judge Cleavinger could base a finding of fact that the Petitioner's toe was broken and Dr. Corbett was made aware of that fact by the provision of Dr. Lambert's records; however, such finding cannot be based on the x-rays themselves. Therefore, the finding in this regard cannot be sustained based on the x-rays.

Judge Cleavinger notes that whether Ms. Fowler told Dr. Corbett about her broken toe is irrelevant because Dr. Corbett testified it was not material to his treatment. The Petitioner correctly notes that whether the provision of false, incomplete or misleading information to a treating physician is material to the ultimate treatment is irrelevant and is not the standard for establishing fraud. *Paulson v. Dixie County Emergency Medical Services,* 936 So.2d 1109 (Fla. 1st DCA 2006).

In most circumstances, accurate medical histories, including evidence of prior accidents and injuries, are relevant and material to a workers' compensation claim. *Citrus Pest Control and Claims Control, Inc. v. Brown,* 913 So.2d 754 (1st DCA 2005). While Dr. Corbett testified at the hearing that the broken toe was irrelevant to his treatment, that is in contradiction to his earlier testimony at deposition that the Petitioner's "stubbed" toe could have been a cause of the pain she was reporting. (Corbett Depo. pp. 20 – 21). In his deposition, Dr. Corbett described the Petitioner's pain as being in the "forefoot of the

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[6] See Joint Exhibit 1 – Deposition of Dr. George Corbett at attachment 8.

foot" and " the high part of the arch **towards the toes.**" (Corbett depo. at 14, 27, emphasis added).

The Petitioner takes exception to the finding concerning the contents of a note Ms. Fowler gave to Ms. Bradish.[7] The Petitioner correctly notes the block quotation contained in the recommended order is from an entirely different exhibit.[8] It was not the note which was presented to Ms. Bradish.[9] Ms. Fowler concedes this is a clear error. Accordingly, this exception is sustained.

The Petitioner objects to the determination that Ms. Bradish did not discuss the worker's compensation fraud statement with Ms. Fowler, nor did she have Ms. Fowler sign such statement. Ms. Bradish testified she did not have Ms. Fowler sign the fraud statement at their *initial* meeting which occurred in a hallway.[10] However, Ms. Bradish expressly testified that Ms. Fowler was requested to and, in fact, did sign the statement.[11]

The signed statement was admitted into evidence and cannot be disregarded.[12] No objection was raised as to its admissibility or authenticity. The recommended order never addresses the fact that the statement was, in fact, signed and of record. Accordingly, this exception is sustained.

The Petitioner's final exception pertains to the finding of fact that Ms. Fowler did not seek treatment for her broken toe from by either Dr. Lambert or Dr. Corbett. The Petitioner correctly notes that Dr. Lambert did not testify; however, his treatment notes

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[7] Recommended Order at page 8, Paragraph 24.

[8] Joint Exhibit 1 at attachment 5.

[9] *Id.* at attachment 6 and *supra* note 2 at page 13. Dr. Corbett testified this note was written at Ms. Fowler's request to convey her perception of the cause of her injury and was not intended as his medical opinion.

[10] *Supra* note 2 at page 34.

[11] *Id.* at page 26.

[12] Petitioner's Exhibit 5.

were admitted into evidence. Dr. Lambert's notes clearly reflect that Petitioner reported a recently broken toe.[13]

The administrative law judge determined Ms. Fowler had a "genuine belief" her foot pain was not related to her broken toe because the pain predated the toe injury and was in a different part of her foot.[14] That is a credibility determination which cannot be disturbed by this agency. Accordingly, the final exception is overruled.

OTHER FACTUAL ERRORS IN THE RECOMMENDED ORDER

In reviewing the entire record, the School Board has found other findings made by the administrative law judge which are wholly unsupported by the record or are in express contradiction of the record. For instance, the recommended order contains a finding of fact that driving a large school bus required more effort for Ms. Fowler than driving a smaller bus.[15] There is no support for this finding in the record. In fact, Ms. Fowler's unrebutted testimony was that driving a smaller bus caused her greater foot pain and required more effort to press the gas pedal.[16] Accordingly, that finding is specifically rejected.

Next, the recommended order contains a finding of fact that Ms. Fowler sought treatment in Daphne, Georgia.[17] It is undisputed by the testimonial and documentary evidence that Ms. Fowler sought treatment in Daphne, *Alabama*.[18] While this finding of fact is not relevant to the outcome of the case, it is nevertheless a finding which is clearly erroneous and cannot be sustained.

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[13] Joint Exhibit 1 at attachment 8.

[14] Recommended Order at page 12, paragraph 35.

[15] *Id.* at page 3, paragraph 2.

[16] *Supra* note 2 at page 107.

[17] Recommended Order at page 5 paragraph 12.

[18] *Supra* note 2 at pages 14 and 100 and Joint Exhibit 1.

Also, the administrative law judge made reference to Ms. Fowler's regular treating physician as Doctor *Bradish*.[19] It is undisputed that her regular treating physician is Dr. *Brown*.[20] Like the preceding error, this is not relevant to the ultimate issue; however, it is a finding which has no basis in fact and cannot be sustained.

The only finding which would support Judge Cleavinger's ultimate conclusion is the finding that Ms. Fowler told Dr. Corbett she previously broke her toe and that Ms. Fowler did not believe her foot pain was related to her broken toe. Judge Cleavinger clearly found those assertions by Ms. Fowler to be credible.

CONCLUSION OF LAW

The Petitioner objects to two conclusions of law made in the recommended order which revolve around the same issue – the materiality or lack thereof – of Ms. Fowler informing Dr. Corbett of her prior foot injury. The Petitioner correctly notes Section 440.105(4)(b), Florida Statutes, encompasses even false, fraudulent, misleading or incomplete statements that are immaterial to the claim made if the statements were made for the purpose of obtaining worker's compensation benefits; however, that section requires that such statements be made knowingly. The administrative law judge resolved that issue in favor of Ms. Fowler, observing the Respondent had a "genuine belief" that her foot pain was unrelated to her broken toe. The finding that Ms. Fowler had no intent to deceive Dr. Corbett is supported only by the Respondent's self-serving testimony.

The School Board is mindful that it cannot second-guess credibility determinations made by the administrative law judge even where the only supporting evidence is uncorroborated, self-serving testimony. *Stinson v. Winn,* 938 So.2d 554 (Fla.1st DCA 2006). The School Board determines, nevertheless, that Judge Cleavinger's determination that the Petitioner failed to meet the burden of proof is not supported by competent substantial evidence. As noted above, the determination was based upon

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[19] Recommended Order at page 9, paragraph 28.

[20] *Supra* note 2 at pages 19-20, 30, 110 and 113.

alleged statements which were not received as testimony and other material, such as a pamphlet, x-rays, etc. which were not received into evidence. The determination was further based upon misstatements of what the adduced evidence did show, including attributing a quotation to the wrong exhibit, the erroneous finding that a fraud statement was not signed despite its being entered into evidence without objection and other clear errors.

In the notice letter to Respondent, the Superintendent based his recommendation to terminate her employment on false, incomplete or misleading statements made, not only to her treating physician, but also to District officials.

When Ms. Fowler went for an initial visit with Dr. Corbett, she completed a medical questionnaire. When asked which part of the body she wished the doctor to inspect, Ms. Fowler checked "Right foot." The follow-up question was "Is this the result of an injury?" Ms. Fowler stated "No."[21] During the initial evaluation meeting, Ms. Fowler expressly denied she had *any* trauma to her foot in the prior seven to eight months – a statement which was patently false.

Dr. Corbett testified that he did not recall Ms. Fowler telling him of a broken toe; however, he noted that his records are completely devoid of any mention of a broken toe.[22] In fact, in a letter written by Dr. Corbett on March 8, 2006, when Respondent filed her worker's compensation claim, Dr. Corbett reiterated that Ms. Fowler denied any injury or trauma to her foot.[23]

The administrative law judge states that the Respondent credibly testified she told Dr. Corbett of her broken toe; however, the recommended order fails to address the incomplete statements made to School District officials. There is no testimony that Ms. Fowler disclosed her broken toe to her supervisor, to the School Board's workers'

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[21] Joint Exhibit 1 at attachment 1.

[22] *Id.* at pages 38

[23] *Id.* at attachment 5.

compensation adjustor, or to Jerry Caine – the Human Resources Manager. It is interesting to note that Ms. Fowler was insistent that she told both Doctor Lambert and Dr. Corbett of her broken toe despite her belief that it was not relevant to her foot pain; however, she did not disclose the broken toe to School District officials in her quest to secure worker's compensation benefits. Ms. Fowler obviously attached some relevance to the broken toe if, as she testified, she reported it to both doctors.

The recommended order fails to address the false, misleading or incomplete information given to School District officials. The record contains competent, substantial and most significantly, unrebutted evidence that Ms. Fowler did not tell Ms. Bradish or Mr. Caine of her non-work related injury. Accordingly, the recommendation of the administrative law judge is rejected and the Respondent's termination is upheld. Either party may seek further review of this order by filing a notice of appeal with the First District Court of Appeal within thirty (30) days.

APPROVED by the School Board of Escambia County, Florida in open meeting on Tuesday, ~~August 21, 2007.~~ August 28, 2007

Patricia Hightower

Patricia Hightower, Chair

Attest:

Jim Paul, Superintendent

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APPROVED
SCHOOL BOARD ESCAMBIA COUNTY

AUG 2 8 2007

JIM PAUL, SUPERINTENDENT OF SCHOOLS
VERIFIED BY RECORDING SECRETARY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that an original of the foregoing Final Order was furnished by U.S. Mail on this 5th day of September 2007 to the Clerk, Division of Administrative Hearings, The DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Florida 32399-3060 with a copy of the Final Order to H. B. Stivers, Esquire, Attorney for the Respondent, 245 East Virginia Street, Tallahassee, Florida 32301, and Joseph L. Hammons, Esquire, Attorney for the Petitioner, 17 West Cervantes Street, Pensacola, Florida 32501, on this 5th day of September 2007, at Pensacola, Escambia County, Florida.

Wanda Willis

Wanda Willis, Agency Clerk