

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ESCAMBIA COUNTY SCHOOL BOARD,)
)
 Petitioner,)
)
vs.) Case No. 06-4028
)
JACKIE FOWLER,)
)
 Respondent.)

)

RECOMMENDED ORDER

A formal hearing was conducted in this case on March 8, 2007, in Pensacola, Florida, before Diane Cleavinger, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Joseph L. Hammons, Esquire
Hammons, Longoria and Whittaker, P.A.
17 West Cervantes Street
Pensacola, Florida 32501-3125

For Respondent: H. B. Stivers, Esquire
Levine and Stivers
245 East Virginia Street
Tallahassee, Florida 32301

STATEMENT OF THE ISSUE

The issue in this proceeding is whether Respondent's termination should be upheld.

PRELIMINARY STATEMENT

By letter dated September 14, 2006, the Superintendent of Schools for Escambia County, Florida, notified Respondent, Jackie Fowler, of his recommendation to Petitioner, Escambia County School Board, that Respondent be terminated for misconduct involving her alleged fraudulent workers' compensation claim. The Board followed the recommendation of the Superintendent, and during its meeting on September 19, 2006, terminated Respondent effective September 20, 2006. Respondent timely requested a formal hearing. The matter was referred to the Division of Administrative Hearings.

At the hearing, Petitioner called four witnesses and offered eight exhibits into evidence. Respondent testified in her own behalf and called two witnesses. The parties offered the deposition testimony of Dr. George Corbett as a joint exhibit. Respondent offered one composite exhibit, which was entered into evidence.

After the hearing, Petitioner filed a Proposed Recommended Order on April 16, 2007. Respondent filed her Proposed Recommended Order on April 18, 2007.

FINDINGS OF FACT

1. At all times relevant to this proceeding, Respondent was employed as a Bus Driver and/or Bus Aide for the Escambia School District.

2. As a school bus operator Respondent worked approximately seven hours per day, including about three to four hours driving a large school bus. The school buses that Respondent drove had automatic transmissions and push-button doors. However, they did require more effort to drive than either a small school bus or a regular passenger vehicle.

3. Prior to September 2005, Respondent had experienced chronic foot pain in the ball and on the top of her foot. The pain was not enough for her to seek medical treatment and she was able to perform her job duties.

4. In early September 2005, Respondent broke the third toe on her right foot in an accident unrelated to her employment.

5. On September 9, 2005, approximately one week after breaking her toe Respondent sought treatment for her toe at an Urgent Care facility in Pensacola, Florida. The Urgent Care Center X-rayed her foot and diagnosed a broken toe and taped her toes together.

6. About a month later, on October 13, 2005, Respondent sought treatment for right foot pain from Dr. Mark Lambert of the Pensacola Foot and Ankle Center. This pain was in the ball of her right foot. Respondent did not associate the foot pain with her previously broken toe because the pain was not associated with her toe and she had experienced the pain prior to breaking her toe. However, the pain in her foot was worse.

7. Dr. Lambert's notes state that Respondent "stumped toe" about 3-4 weeks ago. The notes further state that Respondent was diagnosed by the Urgent Care Facility to have fractured the third toe of her right foot. Her toes were still taped together at the time of her visit with Dr. Lambert. She also reported to Dr. Lambert she had worked a week before she was seen for the injury to her right toe and that she drove a school bus. She reported that it hurt her to drive the bus. Dr. Lambert's assessment was "trauma/Joint Arthralgia/Bursitis/Neuroma." Dr. Lambert wrote a note requesting that Respondent be released from work for one week because of foot pain. Dr Lambert's office also gave Respondent 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.

8. Dr. Lambert saw Respondent again on October 25, 2005, for treatment under the same diagnosis and again on January 30, 2006. After the January visit Dr. Lambert declined to give Respondent a release from work.

9. On January 31, 2006, Respondent saw Dr. Brown, her primary treating physician, for the pain in her foot. Dr. Brown gave her a release from work.

10. From October through January, Respondent was able to intermittently return to work. However, she did miss some work due to foot pain.

11. Respondent discussed her foot problems and pain with her supervisors, although she was not detailed in those discussions. Respondent felt she could not continue to drive and wanted to transfer to another position.

12. At some point because of continued foot pain Respondent, scheduled an appointment for February 8, 2006, with a Dr. Corbett, an orthopedic physician, in Daphne, Georgia. She learned of Dr. Corbett from a relative.

13. On February 7, 2006, Ms. Fowler met with Jerry Caine, the Manager of Educational Support Personnel, to discuss potential jobs that she might be able to perform with her medical condition. Potential jobs discussed were a Bus Aide, which, at the time, had no openings and a teacher's assistant for which there were openings at Escambia Westgate Center, a special education center with a large population of profoundly handicapped children.

14. During the discussion Respondent mentioned that she thought her foot pain was due to driving a bus for many years. Mr. Caine advised Respondent that if "she felt" that her medical problems were job related that she should file a workers' compensation claim.

15. Ms. Fowler informed Mr. Caine that she did not want to file a workers' compensation claim, but wanted to transfer to a different position.

16. Also, on February 7, 2006, after meeting with Mr. Caine, Respondent went to Dr. Lambert's office to pick up X-rays to take with her to Dr. Corbett. On February 8, 2006, she also requested that the office fax her records to Dr. Corbett's office.

17. Sometime after meeting with Mr. Caine, Respondent met with Susan Berry, the principal at the Escambia Westgate Center, to discuss the teacher's aide position. They discussed the job duties and responsibilities, the physical requirements and Respondent's medical condition.

18. Ms. Berry also advised Respondent that if she felt her medical problems were job related that she should file a workers' compensation claim.

19. Respondent did not take the position at the Escambia Westgate Center. She did not feel that she could do the work because of her foot problems.

20. On February 8, 2006, at Dr. Corbett's office, Respondent filled out the New Patient Information Sheet and the Medical History Questionnaire. The questionnaire asked what part of the body was to be checked. Respondent indicated the right foot. The questionnaire then asked if the condition was the result of an injury and Respondent checked "No." The history reported by Dr. Corbett was that of a 49-year-old female with right foot pain with "no known trauma for the past seven to

eight months." Respondent did not indicate on the initial paperwork that she was seeking treatment for her earlier broken toe since the pain she had in her foot was in the ball of her foot. She had not injured the ball of her foot. Her toe did not hurt.

21. During the initial visit, Respondent also completed an authorization for Dr. Corbett to obtain Dr. Lambert's medical records that contained his treatment and diagnosis of Respondent's condition and also contained her treatment and diagnosis by the Sacred Heart Urgent Care Facility. The medical release was immediately faxed to Dr. Lambert whose office faxed the records that day and again on February 13 and 16, 2006, to Dr. Corbett's office.

22. Respondent advised Dr. Corbett of her previous broken toe and treatment with Dr. Lambert. Indeed, the fact that she had had previous injuries to her toes was apparent from the crooked appearance of her toes, the X-rays she had brought with her to Dr. Corbett's office and the X-rays taken by Dr. Corbett. Clearly, some mention of Dr. Lambert's treatment was made since Dr. Corbett's office requested Respondent's records from Dr. Lambert. The evidence did not show that Respondent withheld any information from Dr. Corbett in an attempt to gain a work-related diagnosis. Dr. Corbett did not review Respondent's medical records until October of 2006. Dr. Corbett testified

that the information regarding Ms. Fowler's broken toe was not material to his treatment of her foot pain.

23. During the months of February and March 2006, Ms. Fowler was sometimes able to drive the bus. She missed several days of work due to her foot pain.

24. On March 9, 2006, about six months after she broke her toe, Respondent discussed the filing of a workers' compensation claim with Jean Bradish, a workers' compensation claims adjuster for the District. Respondent told Ms. Bradish that she wanted to file a workers' compensation claim, mentioning she might need surgery on her foot. Respondent handed Ms. Bradish a prescription pad note, dated March 8, 2006, from Dr. Corbett.

The note stated:

To Whom It May Concern

I am the treating physician for Jackie Fowler. Ms. Fowler has fairly marked right-sided foot pain that I have been treating since February 8, 2006. She said prior to my evaluation that she has been having pain for the previous seven to eight months. I understand that she is now trying to file a Workers' Compensation claim stating that the symptoms were brought on by her occupational requirements as a school bus driver. I would just like to add that she has consistently indicated that school bus driving requirements made her symptoms worse. She denies any other history or any type of trauma that caused these symptoms and thus far is failing to respond to conservative care.

25. Ms. Bradish was concerned about the note because it indicated that Respondent felt the pain was related to her work as distinguished from the doctor's offering his opinion that the condition was work related. Because the claim had not been officially filed, Ms. Bradish did not have Respondent sign a worker's compensation fraud statement, nor did she discuss the statement with Ms. Fowler. Ms. Bradish did not inquire as to Ms. Fowler's medical history or as to her treating physicians.

26. Ms. Bradish again advised Respondent that if she felt that her medical condition was job related to file a workers' compensation claim and that a claim must first be reported to Corvel, the District's reporting agency. Ms. Fowler signed a medical authorization form which permitted Ms. Bradish to obtain her medical records.

27. On March 9, 2006, Respondent contacted Corvel and filed a workers' compensation claim for right foot pain. As the cause of the condition, she indicated that it was caused by 20 years of driving a bus. The claim lists Dr. Corbett as the doctor treating her foot pain. The form does not inquire as to medical history or ask a claimant to provide the names of other treating physicians.

28. Ms. Bradish obtained Respondent's medical records from Dr. Bradish, Dr. Lambert, Sacred Heart Urgent Care and Dr. Corbett. Per her claim adjustment duties, Ms. Bradish

obtained these records to make a determination whether Respondent's reported foot pain was a covered condition or injury under the Workers' Compensation Act or, alternatively, a non-covered, non-work related condition or injury. Also, pursuant to her job duties, Ms. Bradish completed a workers' compensation required form known as the "First Report of Injury" that included Respondent's description of her work injury/condition. In the report Ms. Bradish stated:

Progressive injury. She states she is having foot surgery on April 4, 2006, by Dr. George Corbett. Has had 20 years of damages to right foot from pushing gas pedal. Pain on top of foot and the ball of the foot.

29. On March 10, 2006, Respondent took a voluntary demotion to a Teacher Assistant Special Bus Aide which resulted in a three pay grade decrease. Her reason for taking the demotion was because of her right foot pain and her inability to continue to regularly drive a bus. The demotion was unrelated to the filing of her workers' compensation claim.

30. On or about March 20, 2006, the District denied Respondent's workers' compensation claim.

31. Respondent did not file a petition to contest the denial of her claim for workers' compensation benefits or otherwise pursue additional benefits. As far as she was

concerned, the denial was the end of her claim. She continued to be treated for her foot pain.

32. Respondent also continued her employment as a bus aide for the remainder of the school year without incident.

33. On or about July 28, 2006, Respondent was notified of a disciplinary conference based on the allegations that she filed a fraudulent workers' compensation claim.

34. At the conference, Respondent tried to explain that she felt the condition was job related and that she notified Dr. Corbett of the prior injury. She further indicated that she did not seek treatment from either Dr. Corbett or Dr. Lambert, for her broken toe, but for right foot pain to the "ball" of her foot. Her explanations were either not understood or not accepted and, by letter dated September 14, 2006, she was advised that she was being recommended for termination based on the "falsification and misrepresentation of medical conditions to unlawfully obtain workers' compensation benefits." The letter stated:

(1) You claimed an on-the-job injury to your right foot through repetitive use while operating a school bus and willfully declined to disclose to treating physicians and others as appropriate a non-work related foot injury.

(2) You sought treatment for a condition claiming it was a work injury when you knew it was not.

35. However, the evidence demonstrates that Respondent had a genuine belief that her foot pain was not caused by the toe she broke in September, 2005. The pain was not in her toes, but another part of her foot and she had experienced the pain prior to her injury in September, 2005. She did feel that her broken toe may have made the pain worse as indicated by Dr. Corbett's note. Indeed, Dr. Corbett testified in his deposition that Respondent's pain and discomfort would not be associated with "micro-trauma" or a single impact trauma, but that it was from repetitive small traumas. He stated that there was no definitive association between the "stubbed toe" injury and the pain Respondent was experiencing. Given this genuine belief and Dr. Corbett's testimony, the evidence does not demonstrate that Respondent intentionally filed a fraudulent workers compensation claim or failed to disclose any treatment or injury to Dr. Corbett. Therefore, Respondent's termination cannot be sustained.

CONCLUSIONS OF LAW

36. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. § 120.57(1), Fla. Stat.

37. A district school board employee against whom a dismissal proceeding has been initiated must be given written notice of the specific charges prior to the Section 120.57(1)

hearing. Although the notice "need not be set forth with the technical nicety or formal exactness required of pleadings in court, it should specify the [statute] rule [, regulation, policy, or collective bargaining provision] the [district school board] alleges has been violated and the conduct which occasioned [said] violation". School Board of Dade County v. Jones, DOAH Case No. 96-5169 citing Jacker v. School Board of Dade County, 426 So. 2d 1149, 1151 (Fla. 3d DCA 1983)(concurring opinion of Judge Jorgenson).

38. Pursuant to Section 1012.40(2)(b), Florida Statutes, an educational support employee may only be terminated for "reasons stated in the collective bargaining agreement, or in district school board rule in cases where a collective bargaining agreement does not exist. . .".

39. The Collective Bargaining Agreement between the School District of Escambia County and The Union of Escambia Education Staff Professionals provided that all "discipline shall be progressive, fair and only for just cause." § IX.2(B), Master Contract between The School District of Escambia County and The Union of Escambia Education Staff Professionals, FEA NEAS AFT (July 1, 2005 through June 30, 2008). However, the Agreement fails to define what constitutes "just cause."

40. Section 1012.40, Florida Statutes, which deals with Education Support Employees does not define "just cause."

41. The September 14, 2006, Notice of Recommendation letter constitutes the notice of the charges to Respondent. The letter does not set forth the specific state statute, rule, regulation, policy or collective bargaining provision that the School District believes has been violated.

42. The basis for the proposed action against Respondent in the September 14, 2006, letter is the assertion of the "falsification and misrepresentation of medical conditions to unlawfully obtain workers' compensation benefits." This assertion necessarily implies the statutes that establish workers' compensation in Florida.

43. Section 440.09(4), Florida Statutes, punishes workers' compensation claimants by denying benefits to which they might otherwise have been entitled, if a claimant, in seeking benefits, knowing or intentionally engaged in any of the acts described in Section 440.105, Florida Statutes.

44. Section 440.105(4)(b), Florida Statutes, provides that it shall be unlawful for any person:

1. To knowingly make, or cause to be made, any false, fraudulent, or misleading oral or written statement for the purpose of obtaining or denying any benefit or payment under this chapter.

2. To present or cause to be presented any written or oral statement as part of, or in support of, a claim for payment or other benefit pursuant to any provision of this chapter, knowing that such statement

contains any false, incomplete, or misleading information concerning any fact or thing material to such claim.

3. To prepare or cause to be prepared any written or oral statement that is intended to be presented to any employer, insurance company, or self-insured program in connection with, or in support of, any claim for payment or other benefit pursuant to any provision of this chapter, knowing that such statement contains any false, incomplete, or misleading information concerning any fact or thing material to such claim.

45. In order for there to be a violation that would bar a claimant from receiving workers' compensation benefits, the District must prove that Respondent made a written or oral statement that (1) was knowingly or intentionally false, incomplete, or misleading; (2) concerned material facts; and (3) was made for the purpose of obtaining benefits arising out of an accident. Chapman v. NationsBank, 872 So. 2d 390 (Fla. 1st DCA 2004); Lee v. Volusia County School Board, 890 So. 2d 397 (Fla. 1st DCA 2004); Citrus Pest Control and Claims Control, Inc. v. Brown, 913 So. 2d 754 (Fla. 1st DCA 2005); Pinnacle Benefits, Inc. v. Alby, 913 So. 2d 756 (Fla. 1st DCA 2005).

46. In this case, the Petitioner has failed to meet its burden of proof. The allegedly false and/or incomplete statements relied upon by Petitioner concerns whether or not Respondent disclosed her broken toe to Dr. Corbett. Dr. Corbett's history does not directly reflect that he was told

about the trauma, but the injury was viewable on the X-rays taken by Respondent to Dr. Corbett, as well as on the X-rays taken by Dr. Corbett. In addition, Respondent clearly authorized Dr. Corbett's office to obtain her prior records from Dr. Lambert, which included this trauma. She did not attempt to hide the injury from Dr. Corbett and credibly testified that she told him about it. However, even assuming that Respondent did not disclose the broken toe to Dr. Corbett, Dr. Corbett testified via his deposition that this was not material to his overall treatment, and given the records he had at his disposal does not demonstrate an intent to falsify or deceive Dr. Corbett in order to obtain workers' compensation benefits.

RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law, it is Recommended that a Final Order be entered reinstating Respondent to her position of employment and awarding her full back pay and benefits.

DONE AND ENTERED this 8th day of June, 2007, in
Tallahassee, Leon County, Florida.

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DIANE CLEAVINGER
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 8th day of June, 2007.

COPIES FURNISHED:

Jim Paul, Superintendent
Escambia County School District
215 West Garden Street
Pensacola, Florida 32502

Ellen Odom, General Counsel
Escambia County School District
215 West Garden Street
Pensacola, Florida 32502

Joseph L. Hammons, Esquire
Hammons, Longoria and Whittaker, P.A.
17 West Cervantes Street
Pensacola, Florida 32501-3125

H. B. Stivers, Esquire
Levine & Stivers
245 East Virginia Street
Tallahassee, Florida 32301

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.