

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

CHARLOTTE COUNTY
PUBLIC SCHOOLS and
EMPLOYERS MUTUAL, INC.,

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

Appellants,

v.

CASE NO. 1D09-5914

KARYN E. GARY,

Appellee.

/

Opinion filed July 30, 2010.

An appeal from an order of the Judge of Compensation Claims.
Kathy A. Sturgis, Judge.

Date of Accident: November 14, 2007.

Marjorie Gadarian Graham of Marjorie Gadarian Graham, P.A., Palm Beach Gardens, and Daniel J. DeMay of Pallo, Marks, Hernandez, Gechijian & DeMay, P.A., Sarasota, for Appellants.

Mark L. Zientz, Miami, for Appellee.

PER CURIAM.

In this workers' compensation appeal, the employer/carrier (E/C) seeks reversal of an order of the Judge of Compensation Claims (JCC) which denies its misrepresentation defense, and awards hearing aids and an orthopedic evaluation.

The E/C raises four issues. We reverse only as to the award of hearing aids and the award of attorney's fees pertaining thereto. We affirm the remaining points on appeal without discussion.

Here, Claimant's authorized treating otolaryngologist initially recommended hearing aids, but testified she changed her opinion as to the cause of Claimant's hearing loss based on self-described symptoms that Claimant had previously reported to her allergist. The JCC rejected the treating physician's opinion regarding the pre-existing nature of Claimant's hearing loss because it was based on assumptions which were found to be faulty and not borne out by medical evidence. The JCC has the prerogative to reject the treating physician's opinion regarding the preexisting nature of Claimant's hearing loss. See, e.g., White v. Bass Pro Outdoor World, LP, 16 So. 3d 992, 993-94 (Fla. 1st DCA 2009) (stating a JCC has the prerogative to reject even uncontroverted testimony which is unpersuasive). Nevertheless, the JCC's mere rejection of this testimony did not, ipso facto, establish the requisite causal relationship between Claimant's accident and her hearing loss. Rather, Claimant had to introduce medical evidence proving that, within a reasonable degree of medical certainty, her hearing loss was causally related to her compensable accident. See § 440.09(1), Fla. Stat. (2007). Although Claimant's counsel attempted to obtain such evidence by posing appropriate hypothetical questions to the treating otolaryngologist, the doctor was unwilling to

make any concessions which might have served as a sufficient evidentiary basis for this court's affirmance of the award of hearing aids. Because no other qualified expert testified on the cause of Claimant's hearing loss, we REVERSE the award of hearing aids and attorney's fees pertaining thereto, and AFFIRM the remainder of the order in all other respects.

HAWKES, C.J., KAHN and WEBSTER, JJ., CONCUR.