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December 30, 2012

Honorable William C. Oakerson
Supervisory Judge
Division of Workers Compensation
124 Halsey Street
2nd Floor
Newark, New Jersey 0710X

RE: SMILE ALVAREZ v CONTINENTAL AIRLINES
CP #: 2002-22421

Dear Judge Oakerson:

At the listing of December 14, 2012, the Court requested that the Petitioner submit a legal memorandum on the issue of "Notice" as utilized within the Workers Compensation Act. Kindly accept this letter-brief in support of such. Recognizing the limitations of the resources of the Court, attached are copies of the Panchak and Brunell cases cited. Respondent counsel may utilize his legal library to obtain his copies of the opinion from the citations provided.

RELEVANT FACTS

The factual background relevant to the event, symptoms and the initial treatment obtained, can be more concisely obtained from the Hypothetical Question and marked as P-13 and should have been in evidence with its weight subject to its facts having a basis in the record of the matter. Those facts, as excerpted and supplemented with additional transcript citations, are:

On October 21, 2001, the Petitioner in this matter, Smile Alvarez, was employed as an international flight service manager with the Respondent, Continental Airlines, and had Newark as his home base **[Alvarez 7/15/10 T6:11-16; T7:9-14].** His residence was, and is, in Texas **[Alvarez 7/15/10 T4:23-24; T17:21 thru T18:1-4].** He is 52 years old and is right-handed **[Alvarez**

7/15/10 T4:8-12; T118:6-7]. At the time of his accident, the Petitioner's duties as a required that he handle the documentation going into foreign countries, deal with customer/passenger complaints concerning the plane and staff, handle monies of the duty-free or purchased items **[Alvarez 7/15/10 T6:11-16].** His job would require a lot of standing and lifting of weights.

On the date of the incident, the Plaintiff had worked the flight to Quito, Ecuador **[Alvarez 7/15/10 T7:15-17].** As he went to check the galley door, both of his feet slipped on the plane's vinyl floor and he slipped in a fall backwards such that his feet went over his head in a type of tumble. **[Alvarez 7/15/10 T8:4-13; T11:16-19].** When he fell, his shoulders, neck, and head struck the plane galley floor. **Id.** He was helped up by a nearby co-worker who heard the incident **[Alvarez 7/15/10 T8:16-20; T11:20-25; T72:20 thru T73:1-16].**

The fall caused the Petitioner to "be pretty sore" and "banged up" **[Alvarez 7/15/10 T14:10-12].** According to his testimony, his co-worker, Marcy Herman, asked if he wanted to go to a doctor in Ecuador, but the Petitioner declined as he did not want to have medical treatment provided in Quito, Ecuador, or be left behind by his crew when it returned to the United States **[Alvarez 7/15/10 T12:7 thru T13:1-3].** He chose to self-treat at that time by returning to the flight crew hotel and soaking in a hot tub, hoping that the physical soreness would abate.

When he had returned to Houston, the Petitioner had vacation time pre-scheduled so he could be with his terminally ill mother until her death in February of 2002 **[Alvarez 7/15/10 T14:13 thru T15:1-2].** He immediately flew to his mother in California **[[Alvarez 7/15/10 T77:7-10; Alvarez 12/14/12 T9:12-25; T11:10-15]**. During that time, the Petitioner performed no physical activity but was simply present for the moral support of his mother and sisters **[Alvarez 7/15/10 T15:20 thru T16:1-20].** However, he was noticing that although he would not be doing

anything in particular, he would get a sharp pain radiating down from his neck and down his left arm. The pain would be so great, that it would bring him to his knees. He also noted that the index finger and thumb would go numb as would the back of his hand and wrist. These complaints began within a month of his fall but rather than dissipate, had continued to increase while he was utilizing his family leave time **[Alvarez 7/15/10 T16:1-20].**

The Petitioner testified that while in California at his mother's, the Petitioner's pain and numbness had slowly increased and become greater. He approximated that time to have been in November of 2001 **[Alvarez 7/15/10 T43:23 thru T44:1-7; Alvarez 12/14/12 T18:24 thru T20:1-6].** By November 21, 2001, his pain from the October of 2001-fall began its progressive worsening **[Alvarez 7/15/10 T77:11 thru T78:1; T81:17-21; Alvarez 12/14/12 T21, 25 thru T22:1-10].**

Upon his return to work following the death and resolution of estate matters of his mother, the Petitioner had arrived at the airport in early April to check-in for three, day trips of flights, but because of the pain in his arm and neck, he reported to the Clinic doctor at the airport with his complaints. The pain at that time was significant and causing physical difficulty **[Alvarez 12/14/12 T14:15 thru T15:7-17]**. However, up to that time, the Petitioner had thought he could do his work **[Alvarez 12/14/12 T16:4-15].** The doctor gave him Ibuprofen and told him to go home **[Alvarez 7/15/10 T35:24 thru T37:1-8].** When he was unable to be cleared by the clinic, he sought medical treatment in order to obtain his clearance to fly **[Alvarez 12/14/12 T22:17 thru T23:1-11].** He did not return to work from that point until April 8, 2003 following recovery from his cervical fusion surgery. **[Alvarez 7/15/10 T39:6-9; Alvarez 12/14/12 T23:1-6].**

Testifying in July of 2010, the Petitioner recalled that about a month after his mother's

death, at sometime in March, the Petitioner had spoken about his symptoms to his friend, Dr. DelCastillo, who was an anesthesiologist **[Alvarez 7/15/10 T16:21-25; T31:22-24; T87:1-17].** Dr. DelCastillo referred the Petitioner to Dr. Diaz who is a neurologist **[Alvarez 7/15/10 T17:1-6].** The Petitioner testified that "right after my Mom's funeral [in California], I saw Dr. DelCastillo and then Dr. Diaz" **[Alvarez 7/15/10 T16:21-25; T43:1-7].** Both of those doctors are located in Texas.

Assume that the first appointment the Petitioner was able to obtain for a medical opinion of the diagnosis and cause of his symptoms, as well as for treatment, was with Dr. Diaz on April 12, 2002 **[P-10; Alvarez 7/15/10 T17:8-12; Alvarez 12/14/12 T16:25 thru T7, 1-3]**. At the time of that appointment, assume that the Petitioner had complaints of neck pain, pain shooting down his left arm into thumb and index finger of his left hand **[Alvarez 7/15/10 T17:13-20].** The Petitioner was not medically advised to return to work.

Dr. Diaz prescribed medication for the Petitioner which he recalls to have been Valium, as well as an MRI and an EMG **[Alvarez 7/15/10 T18:4-9].** The office records of Dr. Diaz corroborated the complaints of tingling pain in the left arm which was worsening with a sharp pain radiating down the arm, and the prescription of the medications of Valium and Celebrex together with a MRI at Katy Open MRI, and a diagnosis of C6 radiculopathy **[P-10]**. The EMG was performed within the doctor's office and is contained in the doctor's records. It was reported as normal for the left upper extremity **[Alvarez 7/15/10 T18:8-10].** However, after medical review of the April 12, 2002-MRI at Katy Texas Medical Center **[P-2]**, the Petitioner was referred on April 15, 2002 to Dr. Kopaniky, a neurosurgeon who had his initial office consultation on June 11, 2002 **[P-11; Alvarez 7/15/10 T18:21 thru T19, 1]**. Dr. Kopaniky recommended surgery based upon the MRI findings. The MRI was read to indicate the presence of moderately advanced spondylotic

changes without evidence of acute osseous lesion; bilateral foramina stenosis at C4-5 and C6-7; and significant left-side disc herniation at C5-6 **[P-2, P-10].** The doctor's notes indicate his personal review of the MRI which he reported to show a large disc herniation at C5-6 extending into the lateral recess on the left side. The diagnosis at that visit was Left C6 radiculopathy secondary to C5-6 disc herniation. **[P-11].**

It was after the April 2002-MRI, that the Petitioner became aware that he had any knowledge that his complaints required surgical treatment **[Alvarez 7/15/10 T32:14-17; T33:24 thru T34:1-11].** Although he was told by his supervisors that his medical bills would be paid by Continental, the claim was denied by workers compensation **[Alvarez 7/15/10 T35:7-12].** Consistent with the claim denial appearing in the TCI agency records and the letter of Gallagher Bassett to the Petitioner, the medical bills incurred subsequent to April 8,2003 were not paid **[Alvarez 3/24/11 T23:10 thru T25:1-12; T31:5 thru T33:1-13; P7; P8; P9].**

Cervical fusion surgery ultimately took place on July 16, 2002 at the Spring Medical Center **[P-11]**. On that date, Dr. Kopaniky performed an anterior C5-6 diskectomy and autologous bone fusion using microscopic dissection **[P-11]** during which he found a free fragment in the neural foramina at C5-6 on the symptomatic left side.

The Petitioner initially completed his forms noting that the injury was work related. After the carrier denied the claim to the TCI, he submitted his bills to his medical heath carrier and testified that he continued to note the injuries were related to the work accident of October 21, 2001 **[Alvarez 3/24/11 T30:16-25].** According to the records of the Texas Commissioner of Insurance, Gallagher Bassett denied the Petitioner's claim for treatment. Included in block 14 of the denial form that was filed by Gallagher Bassett on behalf of Continental, written notice of the claim and

the Petitioner's need for treatment were received by it on April 19, 2002 **[P-9].** The records further note the initial treatment sought with Dr. Diaz.

The Petitioner remained out of work until approximately April 8, 2003 **[Alvarez 7/15/10 T39:2-9].** During his absence, he was providing his supervisors with medical information and doctors notes justifying his inability to work **[Alvarez 7/15/10 T39:11 thru T40:1-17].** He was not terminated and continues to be employed by Continental Airlines. **Id.**

LEGAL ARGUMENT

THE PETITIONER PROVIDED TIMELY NOTICE WITHIN 90 DAYS OF WHEN HE FIRST LEARNED HE HAD INCURRED A HERNIATED CERVICAL DISC REQUIRING TREATMENT

The Respondent in this matter urges the Court to equate the ***occurrence of an accident*** with the obligation of a Petitioner to provide a Respondent with ***notice of an injury*** as addressed in N.J.S.A. 34:15-17. However, the courts of our State have not interpreted the compensation statutes in that manner. Indeed, such a harsh interpretation would be in conflict with the well-established liberal construction of our compensation laws to include as many cases as possible within its coverage due to the "ameliorative effect that the act was intended to achieve". Lindquist v City of Jersey City Fire Dept., 175 N.J. 244, 258 (2003); Brunell v Wildwood Crest Police Department, 176 N.J. 225, 235-236 (2003).

The statutory "notice" provision is found within N.J.S.A. 34:15-17. That provision reads as follows:

> § 34:15-17. Notification of employer
> Unless the employer shall have actual knowledge of the occurrence of the injury, or unless the employee, or some one on his behalf, or some of the dependents, or some

> one on their behalf, shall give notice thereof to the employer within fourteen days of the occurrence of the injury, then no compensation shall be due until such notice is given or knowledge obtained. If the notice is given, or the knowledge obtained within thirty days from the occurrence of the injury, no want, failure, or inaccuracy of a notice shall be a bar to obtaining compensation, unless the employer shall show that he was prejudiced by such want, defect or inaccuracy, and then only to the extent of such prejudice. If the notice is given, or the knowledge obtained within ninety days, and if the employee, or other beneficiary, shall show that his failure to give prior notice was due to his mistake, inadvertence, ignorance of fact or law, or inability, or to the fraud, misrepresentation or deceit of another person, or to any other reasonable cause or excuse, then compensation may be allowed, unless, and then to the extent only that the employer shall show that he was prejudiced by failure to receive such notice. Unless knowledge be obtained, or notice given, within ninety days after the occurrence of the injury, no compensation shall be allowed.

The New Jersey Supreme Court has recognized that the statutory language contemplates *actual* knowledge of the nature of the disability and its relation to the employment. In fact, New Jersey does not contemplate notice or the filing of a claim in the absence of injury. Consequently, the notice time periods do not begin to run until the worker is, or reasonably should be, aware that he has sustained a compensable injury. That has been the law as declared by the Supreme Court of New Jersey for almost 50 years, regarding notification of injury to the employer under the accident notice statute. N.J.S.A. 34:15-17. Brunell v Wildwood Crest Police Department, *supra* at 253; discussing Panchak v. Simmons Co., 15 N.J. 13 (1954).

In Panchak, the employee had lifted mattresses and felt a pain in his back. One month later he noticed a pain over his thigh. Seven months later, doctors diagnosed a herniated disc. It was at that point that the Petitioner notified his employer of the accident and his need for treatment. The Supreme Court found it was not until Panchak had learned that he had a diagnosis of a herniated disc that he "knew or had reason to know that he had a compensable injury". His notice was deemed timely within the requirements of N.J.S.A. 34:15-17. discussing Panchak v. Simmons Co., *supra;* Brunell v Wildwood Crest Police Department, *supra* at 253

In fact, under New Jersey law there is no accident for the purpose of filing a claim without an injury. The simple existence of a traumatic event does not automatically equate with an accident for workers compensation purposes. Brunell v Wildwood Crest Police Department, 176 N.J. 225, 248 (2003). The language of N.J.S.A. 34:15-36 specifically defines injuries such as minor lacerations, minor contusions, minor sprains, and scars which do not constitute significant permanent disfigurement, and occupational disease of a minor nature such as mild dermatitis and mild bronchitis to be excluded within the meaning of the definition of permanent disability. As noted by the New Jersey Supreme Court, "Every slip and fall in the day's work that does not result in incapacity or disability is not compensable. " Brunell v Wildwood Crest Police Department, *supra* at 253.

An accident for workers compensation filing purposes has not taken place until the signs and symptoms are such that they would alert a reasonable person that he has sustained a compensable injury. "It remains the fact that the accident calculation begins when the worker knows or should know that he has incurred a compensable injury (for example, when he incurs medical bills, lost wages due to temporary disability, or had a diagnosis of a condition that requires possible future surgery or permanent disability)". Brunell v Wildwood Crest Police Department, *supra* at 251.

In application of the holdings of Brunel and Panchak, to the facts in the case *sub judice*, it is apparent that Smile Alvarez did provide timely notice as required by our workers compensation statute. As he testified, he initially believed that his symptoms would abate, but instead, was faced with progressively increasing symptomology for which he did not have any medical treatment. Upon reporting to work on April 8, 2002, he was disqualified by the Respondent's medical clinic from going to work and incurred his first loss of wages due to his inability to work due to the

symptoms. Within a week, he had been referred to Dr. Diaz who had an April 12, 2002-MRI conducted that disclosed a herniated disc for which surgery would be required, and was then referred to Dr. Kopaniky for surgery and treatment of that medical condition. The records on file with the Texas Commission of Insurance which is the agency of that state which has responsibility for workers compensation claims, indicates the carrier was in receipt of notice of the claim and the need for medical treatment on April 19, 2002.

CONCLUSION

The Respondent in this matter has produce no lay evidence to deny any of the Petitioner's testimonial assertions that would be relevant to the issue of notice under N.J.S.A. 34:15-17. Instead, it has simply proceeded to try to equate the date of the accident with the date for which the notice must be given to the Respondent. No Respondent testimony has been adduced to demonstrate that any prejudice has been encountered by the Respondent to the Petitioner's claim as it was aware in 2002 of the Petitioner's claim of need for medical treatment flowing from the accident that occurred in October of 2001. Any witnesses or evidence which the Respondent arguably could point to for demonstration of prejudice, could have been preserved by it at the time the claim petition was filed, or notice was given in April 19, 2002 as reflected in the Texas Commission of Insurance records.

The evidence in this matter demonstrates that the Petitioner, like the Petitioner in Panchak v. Simmons Co., *supra*, has provided timely notice of his injury as our courts have interpreted required by N.J.S.A. 34:15-17, and, in fact, did file his claim petition within two years of the accident.

Respectfully submitted,

D. GAYLE LOFTIS

cc: Joseph Biancamano, Esq.