STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGES OF COMPENSATION CLAIMS
MIAMI DISTRICT OFFICE

Rolando Hernandez,
Employee/Claimant,

vs.

Southeast Personnel Leasing, Inc./Packard Claims Administration,
Employer/Carrier/Servicing Agent.
_____/

OJCC Case No. 13-012062MAM

Accident date: 4/12/2013

Judge: Mark A. Massey

FINAL COMPENSATION ORDER

This cause came for hearing before the undersigned Judge of Compensation Claims on 04/07/15. Present and representing the claimant was Jill Jacobs, Esquire. Present and representing E/C was Anthony Amelio, Esquire. The hearing was to address the petitions for benefits filed 09/19/14 and 09/22/14.

Prior to or at the hearing, the parties stipulated to the following:

1. The alleged date of accident is 04/12/13.
2. Venue properly lies in Dade County.
3. There was an employer/employee relationship on the date of accident.
4. The employer had workers' compensation coverage in effect on the date of accident.
5. The parties received timely notice of the final hearing.
6. The claim is not governed by a managed care arrangement.
7. The undersigned has jurisdiction over the parties and the subject matter.

CLAIMS

1. Compensability of left shoulder injury.
2. Provision and authorization of follow-up care with authorized provider.
3. Payment of bills from Metropolitan Hospital.
4. Attorney's fees and costs.

DEFENSES

1. No accident or injury arising out of or in the course and scope of employment.
2. Claimant's condition is pre-existing or personal in nature and unrelated to the industrial accident.
3. The alleged industrial accident is not the major contributing cause of the claimant's disability and need for treatment related to his left shoulder.
4. The claimant did not timely place the employer/carrier on notice pursuant to the provisions of section 440.185, F.S.
5. The claimant has not presented admissible medical evidence to prove compensability of a non-readily observable injury pursuant to section 440.09, F.S.
6. No entitlement to attorney's fees or costs.
7. E/C seek costs pursuant to section 440.34, F.S.

The following items were marked or proffered into evidence. The letter "D" in parentheses followed by a number refers to the OJCC docket number.

JUDGE'S EXHIBITS

1. Petition for benefits filed 09/19/14 (D-85)
2. Petition for benefits filed 09/22/14 (D-89, 90; attachments for identification only)
3. Response to petition filed 09/26/14 (D-91)

4. Uniform Pre-Trial Stipulation filed 03/24/15 and E/C objection thereto (D-106, 107)
5. Claimant's Trial Summary, for argument only (D-114)
6. E/C's Trial Memorandum, for argument only (D-112)

CLAIMANT'S EXHIBITS

1. Deposition of Peggy Ross (D-109)
2. [PROFFER] Notice of Filing dated 04/03/15 and documents attached thereto (D-115) (Objections sustained for reasons explained below)
3. Deposition of Roberto Tombo (D-113)
4. [PROFFER] Medical bills attached to petition filed 09/22/14 (Objection sustained as further explained below)

EMPLOYER/CARRIER'S EXHIBITS

None

WITNESSES

Claimant Rolando Hernandez testified live on his own behalf. Roberto Tombo testified live on behalf of E/C. Both testified with the assistance of a translator.

FINDINGS OF FACT

I accept the foregoing stipulations of the parties as true and correct and hereby incorporate them by reference as findings of fact. In addition, after carefully considering the evidence and testimony presented, after weighing the same and resolving any conflicts therein, after personally observing the candor and demeanor of those who testified before me, and after hearing and considering the arguments of counsel, I hereby make the following findings of fact

and conclusions of law.

Claimant, Rolando Hernandez, began working for Superior Mix (as a leased employee of Southeast Personnel Leasing) in 2012. His job was to drive a truck, deliver concrete to Superior's customers, and wash the truck once the delivery is complete.

Claimant claims that on April 12, 2013, he had delivered some concrete and was in the process of washing the truck (while still at the delivery site), when he was struck in the left shoulder by a large "bucket" attached to a piece of heavy machinery being operated by an employee of another company. He immediately felt pain in the shoulder.

Claimant further claims that he reported the incident to Roberto Tombo (president of Superior Mix) on the same day that it happened, once he got back to the shop. However, he admits that he did not request medical treatment at that time, and states none was offered. Mr. Tombo denies and disputes that claimant reported any accident or incident to him on April 12, 2013, or at any other time before May 13, 2013 at the earliest.

According to claimant, the shoulder continued to be symptomatic, and three to four weeks after the incident, he asked Mr. Tombo for medical treatment, which was authorized shortly thereafter.

According to Mr. Tombo, claimant came to him during the week of May 13, 2013 and stated he had been injured on April 12, 2013. Mr. Tombo states that he instructed claimant to go to the "Airport Clinic" that they use for workers' compensation cases. Mr. Tombo further states that he reported the incident to Southeast Personnel shortly thereafter.

According to the adjuster, Southeast Personnel first became aware of the incident on May 16, 2013 by way of a telephone call from Superior Mix. Claimant was first seen at the clinic on

Friday, May 17, 2013.

On May 28, 2013 the servicing agent denied compensability of the claim, following an investigation by Mr. Tombo, who could not find anyone to verify or corroborate claimant's report, as well as their own investigation.

ANALYSIS

Evidentiary Issues

A. Admissibility of Medical Records from Airport Clinic

Claimant seeks to admit two DWC-25's from the "Airport Clinic" where claimant received authorized treatment on May 17, 2013 and May 21, 2013. E/C object to the admission of these records on the basis of authenticity and hearsay. The records in question were previously the subject of Motions to Admit filed in October 2013, in relation to a final hearing set for December 2013 (which was subsequently continued and then canceled upon voluntary dismissal of the then-outstanding petitions).

I reject claimant's argument that the previous granting of the October 2013 Motions to Admit, for purposes of the December 2013 hearing, automatically means that the records are admissible in a separate, subsequent proceeding. Rather, I find that Motions to Admit filed under section 440.29(4) are hearing-specific, or proceeding-specific.[1] Because certain records are deemed admissible in, or for purposes of, one proceeding, does not mean that they are necessarily admissible in any or all subsequent proceedings, in perpetuity.

[1] Section 440.29(4) requires the moving party to serve the records on opposing party "at least 30 days before **the** final hearing." (emphasis added)

The case was again set for final hearing on October 21, 2014. On August 26, 2014 the parties submitted a pre-trial stipulation in which claimant listed the records in question as an exhibit, and E/C raised objections thereto including authenticity and hearsay. The October 21, 2014 hearing was canceled, however, after claimant failed to appear at mediation and at a show cause hearing, and all then-outstanding petitions were dismissed without prejudice.

The petitions were refiled on September 19 and 22, 2014, which led to the setting of the instant hearing on April 7, 2015. A pre-trial conference was set for January 26, 2015. However, while E/C timely filed their portion of the pre-trial on January 22, 2015, claimant's portion of the pre-trial was not timely filed, nor did claimant file an exhibit or witness list at least 30 days before trial, or at any other time. Claimant filed his portion of the pre-trial on March 24, 2015 (14 days before trial) and listed the clinic records as an exhibit. E/C promptly filed an objection on March 25, 2015, again raising authenticity and hearsay as to the clinic records. A status conference was held on March 27, 2015 at which time E/C renewed their objection.

Claimant argues that no prejudice has been demonstrated by the late filing of the pre-trial or by failing to file a timely Motion to Admit specific to this proceeding. Claimant argues that E/C must have, or at least should have, been aware of claimant's intent to rely on the records in question, based on the history of the case as outlined above. Further, claimant argues that there would have been no change in E/C's position or trial strategy had the records been timely listed, since the respective positions of the parties are no different than they were previous to the prior scheduled hearings, and E/C never sought an IME in relation to the earlier proceedings.

E/C, on the other hand, argue that their strategy may very well have changed, including but not limited to whether they needed an IME or additional depositions. Further, E/C argue that

the past history of the case has no bearing on the present proceedings, and they are entitled to rely on what is filed for *this* hearing. (The undersigned would also note that, although there was no objection to the October 2013 Motions to Admit, E/C did raise the hearsay and authenticity objections on the August 2014 pre-trial. Therefore, it could be argued that, just as E/C should have been aware of claimant's intent to rely on the records, claimant should have been aware of E/C's objection to same, with ample time to cure such objection).

There is no question that the clinic in question was, at least at one time, an authorized provider. Therefore, there is no question that they would fall under section 440.29(4) and be admissible "upon proper motion" and timely service. However, that procedure was not followed here, nor was any other action taken to overcome the evidentiary hurdles of hearsay and authenticity. Compounding the matter is that, for purposes of this hearing, claimant never otherwise placed E/C on notice of their intent to offer the records into evidence, by way of a timely filed pre-trial stipulation, or timely filed exhibit list, until two weeks before trial. This creates a dilemma. On the one hand, there is no question that claimant, through inadvertence or oversight, failed to follow the rules of procedure, especially those concerning timely disclosure of witnesses and exhibits, and failed to follow the rules of evidence regarding authentication of exhibits (either through traditional means, or by utilizing the exception provided in 440.29(4)). And, the purpose of those rules is to ensure due process and avoid trial by ambush. On the other hand, case law tells us that the exclusion of evidence is a "drastic remedy which should pertain in only the most compelling circumstances," and only upon a showing of actual, material prejudice, surprise, or unfair advantage, even when the rules are not followed. *American Airlines v Hennessey* (1D14-3604, Opinion filed February 23, 2015), citing *Binger v King Pest Control*,

401 So. 2d 1310 (Fla. 1981), *Cedar Hammock Fire Dept. v Bonami,* 672 So. 2d 892 (Fla. 1st DCA 1996), and *Ryan's Family Steakhouse v Whitlock,* 886 So. 2d 247 (Fla. 1st DCA 2004). Therefore, while the undersigned is hesitant to exclude evidence, I find that E/C's objection is well taken. Here, there was a clear failure on the part of the claimant to follow the rules of procedure. Even though I believe such failure was inadvertent and not intentional, it placed E/C at a disadvantage in that they did not know what, if any, evidence claimant would be relying on, and what evidence, if any, they would need to counter it. If claimant had listed the records as an exhibit on a *timely* submitted pre-trial stipulation, or at the very least on a timely submitted exhibit list, E/C would have then been able to decide if they need an IME, or if they need to depose the clinic physician, or conduct any other discovery. (Ironically, it also would have given claimant ample time to cure any objection, such as by filing a Motion to Admit, or deposing the physician himself; as it was, even after E/C immediately filed its objection in response to the late pre-trial, claimant still took no further action to remedy or cure it).

I reject claimant's assertion that because E/C had been aware of the existence of the records dating back to 2013, they could not be prejudiced or surprised. Simply being aware of the existence of certain records, is not the same as being aware the opposing side is going to use them at trial; this defeats the purpose of the rules. In sum, I find that E/C's objection should be sustained and that the clinic records are not admissible. However, I will treat them as a proffer.

B. Admissibility of Medical Bills Attached to 09/22/14 Petition

During the trial, claimant sought to admit the medical bills attached to the 09/22/14 petition, for which claimant is claiming payment. E/C objected on the grounds of hearsay and authenticity, *inter alia.* I sustained the objection but allowed claimant to proffer the records. The

objection remains sustained on the basis that claimant is not a proper records custodian and has no direct knowledge as to the amounts of the bills or any other information about the bills. In fact, when asked if they were bills that he had received, his answer was "I think so." Even if his answer had been more definitive, it would still not be sufficient since he did not author or prepare the bills and does not have any personal knowledge as to how they were generated or what information they were based on. As correctly pointed out by E/C, the fact that the bills were attached to a petition does not make them "evidence" for purposes of trial, and no further efforts were made to properly authenticate the bills or overcome any hearsay issues. Therefore E/C's objection is sustained and the bills will not be considered as admissible evidence.

Substantive Issues

A. Compensability

A claimant has the burden of proving all elements of his or her claim. *Bob Wilson Dodge v Mohammed,* 692 So. 2d 287 (Fla. 1st DCA 1997). When compensability is in dispute, the claimant carries the burden of proving an **injury** by **accident** arising out of and in the course of employment. In this case, I find that claimant has not carried his burden.

In regard to the "accident" element, the only evidence that an accident occurred is the testimony of the claimant. There are no other witnesses to the alleged accident, even though claimant states it was witnessed by at least one other individual (the heavy machine operator), who was not called or subpoenaed as a witness even though claimant was able to recall the name of the company the machine operator worked for. Further, if the accident occurred as claimant claims, and caused the immediate level of pain claimant claims it caused, it seems unlikely that

claimant would go about his regular work for three to four more weeks (with no observed difficulty) without saying anything to anyone. (For the reasons explained below, I reject any testimony that claimant reported the accident on the day it happened).

To his credit, Mr. Tombo, whose testimony I accept over that of the claimant, conducted an immediate investigation by contacting, at least, the customer to whom the concrete had been delivered on the day in question and otherwise trying to find anyone who could corroborate what claimant was saying, to no avail.

I would further note that there are some discrepancies in claimant's story. For instance, he was very insistent that the accident occurred on a Saturday, but April 12, 2013, which has always been the claimed date of accident in this case, was a Friday. Further, he claims he reported to Mr. Tombo on that same Saturday, but Mr. Tombo testified that Saturday is usually his day off.

In sum, I find that claimant's testimony, standing alone, is not sufficiently credible to constitute competent, substantial evidence that the accident in question occurred.

Even if I were to accept claimant's testimony that the accident occurred as he described, it would still be claimant's burden to prove that he sustained an injury as a result of that accident. I find that he has not carried his burden as to the injury element either. Under section 440.09(1), Fla. Stat. (2012), "[t]he injury, it occupational cause, and any resulting manifestations or disability must be established to a reasonable degree of medical certainty, based on objective relevant medical findings, and the accidental compensable injury must be the major contributing cause of any resulting injuries." [2] When a condition is not readily observable, lay testimony

[2] I reject claimant's assertion that major contributing cause is an affirmative defense for which E/C bears the burden of proof. It is claimant's burden to prove that the work accident (if one is found to have occurred) is the MCC of the injury being claimed. *Clay County School Board v Robison,* 725 So. 2d 425 (Fla. 1st DCA 1999). I also reject claimant's assertion that E/C are estopped to argue MCC by virtue of their initial acceptance of the claim as

alone is not sufficient to prove either the existence of an injury, or its cause. *Orange County MIS Dept. v Hak,* 710 So. 2d 998 (Fla. 1st DCA 1998); *ClosetMaid v Sykes,* 763 So. 2d 377 (Fla. 1st DCA 2000) HN 9 and cases cited therein.

The sole medical evidence on which claimant relies is the two DWC-25's from the "Airport Clinic." As noted above, I find that these records are not admissible, and claimant has presented no other medical evidence or testimony as to the nature of the injury or its causal relation to the alleged accident. Without such medical evidence or testimony, there is no competent substantial evidence to support a finding of a compensable injury.

Even if the clinic records were deemed admissible, I find that they would not constitute competent substantial evidence on which to base a finding of compensability. At best, the forms are ambiguous, internally inconsistent, and inconclusive as to major contributing cause, objective findings or lack thereof, and the existence of any pre-existing conditions. There are no corresponding office notes or other records to clarify or explain these ambiguities or place the limited information in context. The physician's deposition was not taken to explain what the alleged findings were. Claimant did not avail himself of an IME. In sum, the forms on which claimant relies, by themselves, even if admissible, are too inconclusive to support a finding of compensability, and the claim for compensability is hereby denied accordingly.

B. Notice

Even if I were to find that a compensable accident and injury occurred, I find that claimant failed to provide timely notice to the employer and the claim is therefore barred by section 440.185, Fla. Stat. (2012).

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compensable, and initial authorization of medical treatment. E/C timely filed a denial of compensability well within 120 days of their initial provision of benefits. Therefore estoppel does not apply.

As noted above, I accept the testimony of Mr. Tombo that claimant did not report the accident to him on the day it happened, and reject any testimony from the claimant to the contrary.

There are at least three dates that can be determined with relative certainty: Mr. Tombo reported the accident to Southeast Personnel by telephone on Thursday, May 16, 2013; claimant was first seen at the "Airport Clinic" on Friday, May 17 2013; and the servicing agent received the claim on Monday, May 20, 2013.

Mr. Tombo testified that he reported the accident to Southeast Personnel on either the same day or within a day or two of when claimant reported it to him. He further recalls that claimant's first visit to the clinic was within a day or two of that reporting. Therefore, it appears most likely that claimant reported the incident to Mr. Tombo on either Tuesday, May 14; Wednesday, May 15; or Thursday May 16. Even in the light most favorable to claimant, the very earliest date possible, but also the most unlikely, would be Monday, May 13. But all of these are outside 30 days of the alleged date of accident, April 12.

Section 440.185(1), Fla. Stat. (2012) requires that [a]n employee who suffers an injury arising out of and in the course and scope of employment shall advise his or her employer of the injury within 30 days after the date of or initial manifestation of the injury. Failure to so advise the employer shall bar a petition under this chapter unless [one of the enumerated exceptions is demonstrated]."

I find that, under any conceivable scenario or timeline, even that most favorable to claimant, his reporting of the accident to the employer was outside of the 30 day time limit, and therefore his claim is barred. I further find that none of the statutory exceptions apply.

During closing arguments, claimant's counsel raised three points that I feel need to be addressed. First was that the time lapse was actually thirty days or less. However, I believe this was a miscalculation and again find it was more than thirty days. Second was that, even if it was more than thirty days, there was no prejudice to the employer. However, employer prejudice is not a factor under the statute for this date of accident, as it was under previous versions (specifically, pre-1/1/94). Third, that because claimant continued to work after April 12, he sustained a "new injury" every day. However, this applies in repetitive trauma claims, which this claim is not and has never been.

Claimant's counsel also went to great lengths to distinguish an "accident" from an "injury." The argument seemed to be that claimant may have reported an "accident" on April 12, but not necessarily an "injury" (to defeat Mr. Tombo's assertion that no injury was reported on that date). First, Mr. Tombo's testimony, which I accept, was that neither an accident nor an injury was reported on April 12; nothing at all was reported on that date. Second, the statute specifically requires the employee to report the *injury*. Therefore, even if I were to accept that he reported an accident but not an injury on that date, it would not change the analysis, and in fact would work against the claimant.

For the foregoing reasons, the notice defense is hereby accepted and I find that the claim is barred by operation of section 440.185(1), Fla. Stat. (2012)

C. Payment of Metropolitan Hospital Bills

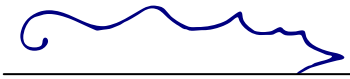
After his claim was denied, claimant sought treatment at Metropolitan Hospital, and seeks payment of the bills for same. That claim is denied because compensability has been denied. Even assuming that claimant had proven a compensable accident and injury, it would still be his

burden to prove not only the amount of the bills, but also that the treatment rendered was both medically necessary and causally related to the compensable injury. Here, he has done neither. Even if the bills were accepted into evidence, there is no evidence or testimony as to the nature of the treatment rendered, or as to the medical necessity of such treatment, or that it is causally related to the alleged industrial injury. Claimant's testimony, standing alone, is not sufficient to prove these elements. *Church's Chicken v Anderson,* 112 So. 3d 545 (Fla. 1st DCA 2013).

WHEREFORE it is hereby ORDERED AND ADJUDGED:

1. The claim for compensability of the left shoulder injury is denied.
2. The claim for authorization of follow-up care and treatment is denied.
3. The claim for payment of bills to Metropolitan Hospital is denied.
4. The claim for costs and attorney's fees is denied.

DONE AND ORDERED this 14th day of April, 2015, in Miami, Dade County, Florida.



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I HEREBY CERTIFY that the foregoing order

was posted to the DOAH website

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