STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGES OF COMPENSATION CLAIMS
SEBASTIAN/MELBOURNE DISTRICT OFFICE

John Peddicord,
Employee/Claimant,

vs.

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

OJCC Case No. 17-017054RLD

Accident date: 8/31/2015

Judge: Robert L. Dietz

FINAL COMPENSATION ORDER

THIS CAUSE was heard before the undersigned in Sebastian, Indian River County, Florida on February 6, 2018. The Petition for Benefits (PFB) was filed on July 17, 2017 (Docket Number (DN) 1). Mediation occurred on November 22, 2017. The parties' Uniform Statewide Pretrial Stipulation was filed on December 29, 2017 (DN 24) and an Amended Uniform Pretrial Stipulation and Pretrial Compliance Questionnaire was filed on January 2, 2018 (DN 26). The Claimant filed a Trial Summary on February 6, 2018 (DN 65). The Employer/Carrier filed a Trial Memorandum on February 5, 2018 (DN 50). Kevin Gallagher, Esq. was present on behalf of the Claimant. Anthony Amelio, Esq. was present on behalf of the Employer/Carrier.

The claims are for: (1) temporary total disability (TTD) benefits from September 1, 2015, to date and continuing with interest and penalties on all late paid and unpaid sums; (2) temporary partial disability (TPD) benefits from September 1, 2015, to date and continuing with interest and penalties on all late paid and unpaid sums; (3) adjustment of average weekly wage (AWW) to at least $860.00 and corresponding compensation rate with penalties and interest on all late paid and unpaid sums due to said adjustment; (4) authorize, schedule and pay

for appointment with Dr. Michael Propper as the Claimant's one-time change in doctors; and (5) penalties, interest, attorney's fees and cost.

The defenses were: the Claimant made false, fraudulent and/or misleading statements during his deposition in connection with his medical non-compliance, missed appointments, didn't reveal a subsequent accident, and made statements that were false, fraudulent and misleading for the purpose of securing workers' compensation benefits; no medical evidence to support claim for indemnity benefits; if no Section 440.105 defense, the Claimant is entitled to a one-time change; however, Claimant's selection of Dr. Propper is unreasonable because he is located 100 miles away and there are appropriate doctors within a reasonable distance; AWW is correct or too high; earnings from Southeast Personnel American Drilling is not "covered" employment and is not includable; no entitlement to penalties, interest, costs and attorney's fees. Employer/Carrier seeks costs.

The following pleadings were identified as relevant to this hearing:

Judge's Exhibits

Exhibit #1: Order Approving Uniform Pretrial Stipulation entered January 2, 2018 (DN 27)

Exhibit #2: Order Admitting Medical Records Into Evidence entered January 24, 2018 (DN 35) (Company Care, Coastal Orthopaedic & Sports Medicine Center and Raulerson Hospital)

Exhibit #3: Order Denying Motion to Continue Final Hearing entered January 31, 2018 (DN 41)

Exhibit #4: Order on Employer/Carrier's Emergency Motion for Rehearing or in the Alternative Motion for Post Hearing Depositions and Motion to Amend Pretrial Stipulation entered February 5, 2018 (DN 56)

Exhibit #5: Employer/Carrier's Trial Memorandum filed February 5, 2018 (DN 50)

Exhibit #6: Claimant's Trial Summary filed February 6, 2018 (DN 65)

The following documentary items were received into evidence:

Joint Exhibits:

Exhibit #1: Amended Uniform Pretrial Stipulation and Pretrial Compliance Questionnaire filed January 2, 2018 (DN 26)

Exhibit #2: Deposition of Amber Dyer (Adjuster) taken January 29, 2018, filed on February 5, 2018, with Exhibits (DN 52) – E/C's Response to Claimant's Objections to Adjuster's testimony on statements made by the Claimant: statements made by Claimant to Adjuster reflected in the adjuster notes are not hearsay under Section 90.803 and 90.803(3), Fla. Stat. (2015) because they are a statement of existing emotional/physical condition, or, in the alternative, are non-hearsay because the statements have independent legal significance and are a statement of a party opponent. E/C also argues that statements made for medical diagnosis or treatment would be admissible under Section 90.803(4), although no citation was provided where it has been applied to a non-health care provider's recording of the medical information. Objection overruled. Statements made by the Claimant to the Adjuster are a statement of a party opponent and have independent legal significance relating to the medical non-compliance defense.

Exhibit #3: Indemnity Payout Listing (Exhibit to Depo. of Amber Dyer) filed February 5, 2018 (DN 60)

Exhibit #4: Amendment to Pretrial Stipulation filed January 3, 2018 (DN 28)

Exhibit #5: Deposition of Heather Clark (Payroll Representative) taken January 12, 2018, filed on February 5, 2018 (DN 53)

Exhibit #6: 13 Week Wage Statement (Exhibit to Depo. of Heather Clark) filed February 5, 2018 (DN 57)

Exhibit #7: Payroll Records from 2015, 2016 and 2017 (Exhibit to Depo. of Heather Clark) filed February 5, 2018 (DN 58)

Exhibit #8: Medical Records of Care Company filed January 8, 2018 (DN 32, pp. 4-15)

Exhibit #9: Medical Records of Coastal Orthopaedics and Sports Medicine filed January 8, 2018 (DN 32, pp. 17-33)

Exhibit #10: Medical Records of Raulerson Hospital filed January 8, 2018 (DN 32, p.35)

Claimant's Exhibits:

Exhibit #1: Petition for Benefits filed July 17, 2017 (DN 1)

Exhibit #2: Response to Petition for Benefits filed August 1, 2017 (DN 4)

Employer/Carrier's Exhibits:

Exhibit #1: Amended Response to Petition for Benefits filed August 2, 2017 (DN 5)

Exhibit #2: Second Amendment to Pretrial Stipulation filed January 5, 2018 (DN 31) – The Claimant objected as moot since the witness was not present to testify live. The Employer/Carrier withdrew the exhibit.

Exhibit #3: Deposition of John Peddicord taken December 12, 2017, filed on February 5, 2018 (DN 51) – Objection: Can't be used except for impeachment or rebuttal. Overruled: The deposition testimony is material to the issue of misrepresentation and was used for impeachment and rebuttal.

Exhibit #4: Medical Records of Dr. Denise Ricketts filed February 5, 2018 (DN 54) – Claimant objected to lack of authentication and timeliness. E/C argued that they were listed on the Pretrial and moved to continue the hearing to allow the deposition to be taken February 16, 2018, or in the alternative to allow the records custodian to testify live by telephone to resolve authentication issues. Records were previously provided to the Claimant. Objection sustained. These issues were previously ruled upon. Employer/Carrier proffered the exhibit for fact purposes only.

Exhibit #5: Medical Records of Dr. Benjamin Epstein filed February 5, 2018 (DN 55) – Claimant objected to lack of authentication and timeliness. Same objections to the E/C Exhibit #4. Objection sustained. Employer/Carrier proffered the exhibit for fact purposes only.

Exhibit #6: Non-Compliance Letter sent to Claimant March 28, 2016, filed February 5, 2018 (DN 59) – Objection. Hearsay and authentication. E/C: Adjuster authenticated it in her deposition and indicated that she composed and sent the letter. Objection: overruled. See DN 52, p.35.

Exhibit #7: Affidavit of Service of Subpoena to Trial and Subpoena served upon Dr. Ricketts filed February 5, 2017 (DN 62) – Claimant objects on relevance. Employer/ Carrier supplementing record that they tried to subpoena the witness for the hearing. Objection sustained.

Exhibit #8: Affidavit of Service of Subpoena to Trial and Subpoena served upon Dr. Epstein

filed February 5, 2017 (DN 63) – Claimant objects on relevance. Employer/ Carrier supplementing record that they tried to subpoena the witness for the hearing. Objection sustained.

Exhibit #9: Affidavit of Service of Subpoena to Trial and Subpoena served upon Sabrina DiGiacomo, Records Custodian for Drs. Rickett and Epstein filed February 5, 2018 (ND 64) – Claimant objects on relevance. Employer/Carrier supplementing record that they tried. Objection sustained.

Exhibit #10: Mapquest of Distance from Claimant's Home to Dr. Propper's office filed February 6, 2018 (DN 66, p. 2) – Objection: Not appropriate subject for judicial notice. Objection overruled. Claimant had opportunity to put on evidence as to distance or to rebut the distance indicated by the Employer/Carrier, and did not. There was no allegation that the distance was incorrect.

Exhibit #11: Mapquest of Distance from Claimant's Home to Dr. Propper's office filed February 6, 2018 (DN 67) – Objection: Not appropriate subject for judicial notice. Objection overruled. Claimant had opportunity to put on evidence as to distance or to rebut the distance indicated by the Employer/Carrier, and did not. There was no allegation that the distance was incorrect.

Exhibit #12: E-mail from Attorney for Drs. Ricketts & Epstein regarding subpoena to appear at trial and Records Custodian testimony by telephone filed February 5, 2018 (DN 48) – Claimant objects to authentication of e-mail and untimeliness of filing. Objection sustained.

Testifying at the hearing was John Peddicord, the Claimant, and Sara Reno of American Drilling (who contracted with Southeast Personnel Leasing, Inc. to lease their employees). Although I will not recite in explicit detail the witnesses' and deponents' testimony and may not refer to each piece of documentary evidence, I have attempted to resolve all of the conflicts in the testimony and evidence. Based on the foregoing and the applicable law, I make the following findings:

1) The undersigned has jurisdiction over the parties and the subject matter.

2) The stipulations agreed to by the parties in the Uniform Pretrial Stipulation filed on January 2, 2018 (DN 26) and the Amendment filed January 3, 2018 (DN 28) are accepted and

adopted.

3) At the hearing, the Claimant narrowed the claim for indemnity benefits to September 15, 2015, to October 14, 2015, in the amount of $138.38 plus penalties and interest, and the determination of average weekly wage to $649.52 based on the earnings reported to Southeast Personnel Leasing, Inc., plus overtime paid in cash by American Drilling Services.

4) The Employer/Carrier renewed their Motion to Continue, Motion to Allow Records Custodian to Attend Live by Telephone, and Motion for Post-Hearing Deposition. The prior denial of the Motions by Order (DN 41) stands. The Emergency Motion for Re-Hearing or in the Alternative Motion for Post-Hearing Depositions filed February 1, 2018 (DN 42) is denied.

5) John Peddicord, the Claimant, is a 55 year old service technician that worked for American Drilling Services which leased its employees through Southeast Personnel Leasing. He slipped on the tailgate of his truck while working and fell injuring his neck and left shoulder.

6) Following the accident, he reported to Raulerson Hospital Company Care (DN 32, p.3) and was diagnosed with a cervical spine strain. He was prescribed Toradol and Flexril and given restrictions of no overhead lifting or reaching and no lifting or carrying more than ten (10) pounds. He was re-evaluated on September 9, 2015, and it was recommended that he undergo a cervical spine MRI. His restrictions remained in place with the addition of no climbing. Mr. Peddicord was paid temporary partial disability benefits from September 1, 2015, through September 14, 2015. On September 18, 2015, he was referred for an evaluation with an orthopedic spine specialist. His restrictions remained no overhead reaching or lifting and no lifting or carrying more than ten (10) pounds.

7) Dr. John Hruska, orthopaedic surgeon, was authorized and evaluated Mr. Peddicord on October 5, 2015 (DN 32, p.17). Dr. Hruska diagnosed a cervical disc disorder with radiculopathy. He recommended physical therapy and imposed light-duty restrictions. He underwent an epidural steroid injection, and was instructed to continue physical therapy. Mr. Peddicord worked full time during this time and took days off whenever he felt like it. The Employer/Carrier alleges that he did not attend his physical therapy appointments or undergo additional injections that were prescribed. In 2017, Mr. Peddicord requested a one-time change from Dr. Hruska. A timely response was not provided, and Dr. Michael Propper, an orthopaedic surgeon, was selected by Mr. Peddicord. The Employer/Carrier objected to Dr. Propper because he was approximately 100 miles from the Claimant's home in Okeechobee.

8) On April 11, 2016, Mr. Peddicord was kicked by a horse at his farm resulting in a fractured left ulna, and surgery by Dr. Benjamin Epstein. From April 7 to April 13, 2016, Mr. Peddicord only worked eight (8) hours for the Employer. The two (2) weeks after he had the surgery, he only worked 15 hours and 8 hours. The Employer/Carrier contends that the subsequent accident is the reason for any ongoing symptomatology with Mr. Peddicord's left upper extremity and that Mr. Peddicord misrepresented his medical condition in order to secure workers' compensation benefits.

Misrepresentation Defense

9) The Employer/Carrier has raised the affirmative defense of a violation of Section 440.105(4)(b)1-3 with the resulting loss of entitlement to any benefits under Section 440.09(4), Fla. Stat. (2015). It is illegal for any person to "knowingly make, or cause to be made, any false, fraudulent oral or written statement for the purpose of obtaining or denying any benefit or

payment" under the Workers' Compensation Law. Section 440.105(4)(b)1., Fla. Stat. (2015). Workers' compensation benefits are barred for an employee found to have "knowingly or intentionally engaged in" such acts "for the purpose of securing workers' compensation benefits." Section 440.09(4), Fla. Stat. (2015). "[I]t is not necessary that a false, fraudulent or misleading statement be material to the claim, it only must be made for the purpose of obtaining benefits." Dieujuste v. J.Dodd Plumbing, Inc., 3 So.3d 1275, 1283 (Fla. 1st DCA 2009).

10) Determining that there has been a violation of Section 440.105(4) requires a two-part inquiry, encompassing first a finding as to whether the Claimant made or caused to be made a false, fraudulent or misleading statement, and second a finding as to whether, at the time the statement was made, it was made for the purpose of obtaining benefits. See City of Hialeah v. Bono, 207 So.3d 1030 (Fla. 1st DCA 2017); Arreola v. Admin. Concepts, 17 So.3d 782, 794 (Fla. 1st DCA 2009); see also Village Apartments v. Hernandez, 856 So.2d 1140, 1142 (Fla. 1st DCA 2003) ("Regardless of whether the claimant was under oath, if, at the time made any of these statements, he knew they were false…then the statements fall within the scope of Section 440.105(4)(b)2.").

11) The affirmative defense in this case is based on Mr. Peddicord's responses to questions in his deposition and in the history he provided his medical providers. "Under most circumstances, accurate medical histories, evidence of prior accidents, and statements regarding the extent of current injuries are relevant and material to a workers' compensation claim. These statements are relevant and material whether made to a health care provider or during testimony given at deposition or the merits hearing. In a workers' compensation case, a claimant's response to inquiries regarding his prior accidents, current injuries, or medical history are made in support

of his claim for benefits." Village Apartments v. Hernandez, 856 So.2d 1140 (Fla. 1st DCA 2003). See also Lee v. Volusia County School Board, 890 So.2d 397 (Fla. 1st DCA 2004).

12) The inquiry that the Court must make is not that the misrepresentation be material in actuality but rather the relevant inquiry is whether the claimant's misrepresentation, a misrepresentation the claimant thought would have a material impact on this case, was made with the intent to secure benefits. Arreola v. Administrative Concepts, 17 So.3d 792 (Fla. 1st DCA 2009). The employer/carrier's burden in proving its affirmative defense is not a clear and convincing standard but simply a preponderance of the evidence. Singletary v. Yoder's, 871 So.2d 279 (Fla. 1st DCA 2004); Village of North Palm Beach v. McKale, 911 So.2d 1282 (Fla. 1st DCA 2005).

13) It is irrelevant if the body part is not identical to the body part in the compensable claim. The relevant inquiry is whether an alleged misrepresentation was made for the purpose of obtaining benefits. Specifically in the case of THG Rentals and Sales of Clearwater, Inc. v. Arnold, 196 So.3d 485 (Fla. 1st DCA 2016), the claimant withdrew a back claim prior to the final hearing. The employer/carrier had asserted a Section 440.105 defense in relationship to the claimant's treatment of the low back. As a consequence, the JCC below denied the Section 440.105 defense. The 1st DCA in Arnold reversed, stating "the JCC too narrowly analyzed the E/C's defense by considering only whether the alleged misrepresentation related to the claimant's knee. The JCC apparently believed that to prove misrepresentation, the E/C had to link the allegedly false statements directly to the particular injury and benefits being sought, to claimant's knee in this instance. But such a requirement is not found in the law." Id. The court goes on to state, "thus, if the claimant made any misrepresentation for the purpose of obtaining

benefits, then he is barred from entitlement to benefits, even if the misrepresentation is unrelated to his knee injury or benefits based on that injury." Id.

14) In our case, the subsequent accident and the resulting surgical repair of the fracture is to the same (left upper) extremity as the one involved in the initial workers' compensation accident. Mr. Peddicord testified on December 12, 2017, in his deposition as follows:

Q: Since the accident we are here for today, have you had any new accidents or injuries?

A: No, ma'am.

(DN 51, p.61, lines 20-22)

Q: Did you have any injuries in the Navy?

A: No, ma'am. Oddly enough this is my first and only. My hospital record is clean.

(DN 51, p.22, lines 2-4)

Q: After your accident, did you take any unpaid time for any reason?

A: Well, yeah, when – you know, when I couldn't tell you. I just remember taking days off you know, here and there.

(DN 51, p.39, line 23 – p.40, line 2)

Q: Alright. And for the days that you took unpaid time off, do you recall why you took that time off?

A: No.

(DN 51, p.40, lines 6-8)

Q: Did you want to have a surgery?

A: No. I have never been operated on in my life, but I'll tell you this: if it will fix my

pain, you bet you, I'll do it.

(DN 51, p. 60, lines 2-5)

15) Mr. Peddicord made false, fraudulent and/or misleading statements in connection with his post-accident treatment and injuries. The subsequent accident he denied was to the left upper extremity which is the basis for the current claim, involved similar symptoms as previously claimed, and required surgery. While claimed indemnity benefits for missed work would have included the time immediately after the surgery necessitated by the subsequent accident, this period was withdrawn at the Final Hearing. The statements were made knowingly and intentionally for the purpose of obtaining workers' compensation benefits. See Lee v. Volusia County Sch. Bd. 890 So.2d 397, 399 (Fla. 1st DCA 2004) (holding that workers' compensation benefits "must be denied" if statements of medical history, prior accidents, or the extent of current injuries are knowingly false, fraudulent, incomplete, or misleading); CDL v. Corea, 867 So.2d 639, 640 (Fla. 1st DCA 2004) (holding that knowingly false, incomplete, or misleading statements of material fact made by a claimant during workers' compensation proceedings regarding the claimant's current state of health or post-accident employment are deemed to be made in support of the claimant's claim for benefits).

The Claimant's Justifications for his False and Misleading Statements.

16) Claimant's counsel argues that Mr. Peddicord is a poor communicator and that he didn't consider any personal injuries in answering questions, only his work-related accident. A person's level of communication does not change the accuracy of the answers to questions. Mr. Peddicord answered questions relating to his medical condition and prior accidents that related back as far as to his service in the Navy. His answers reflect that he was referring to more than

just work-related accidents (e.g. "No. I have never been operated on in my life…").

17) In light of the findings that the Claimant made statements that were false, incomplete and misleading, and made knowingly and intentionally for the purpose of obtaining workers' compensation benefits, the Claimant is barred from the receipt of benefits under Chapter 440 by operation of Section 440.09(4)(a) and Section 440.105(4)(b), Fla. Stat. (2015). See Citrus Pest Control v. Brown, 913 So.2d 754 (Fla. 1st DCA 2005). In light of Mr. Peddicord's false and misleading statements related to his subsequent accident and medical treatment, it has not been necessary to consider Mr. Peddicord's statements made related to the Employer/Carrier's affirmative defense of medical non-compliance, or to determine the significance of his non-appearance for physical therapy, injections and doctor appointments.

It is **ORDERED and ADJUDGED** that**:**

1. The affirmative defense of misrepresentation is applicable and supported by the evidence, and, as applied, the Claimant is barred from the receipt of compensation and medical benefits under Chapter 440 by operation of Section 440.09(4)(A) and Section 440.105(4)(b), Fla. Stat. (2015).

2. All remaining claims are dismissed with prejudice.

3. Jurisdiction is reserved on prevailing party costs.

DONE AND ELECTRONICALLY SERVED ON COUNSEL AND THE CARRIER this 6th day of March, 2018, in Sebastian, Indian River County, Florida.

Robert L. Dietz
Judge of Compensation Claims
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