

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGE OF COMPENSATION CLAIMS
West Palm Beach District**

Eugene Antosh,

Employee/Claimant,

-vs-

OJCC CASE NO.: 15-007821SHP

D/A: 12/23/2014

Judge: Shelley Punancy

Setty Enterprises, Inc. and AmTrust
North America of Florida and Technology
Insurance,

Employer/Carrier.

FINAL COMPENSATION ORDER

After due and proper notice to the parties, this cause came before the undersigned Judge of Compensation Claims on January 19, 2016, for a Final Merits Hearing. The claimant filed petitions on 4/9/15, 6/8/15, 6/11/15, and 10/12/15, however, the claimant's Motion to Bifurcate filed October 8, 2015 was granted on October 14, 2015, therefore, the sole issue for determination was whether the claimant has violated the misrepresentation provisions in Fla. Stat. §440.09(4) and Fla. Stat. §440.105(4)(b)1. I certify that determination of the exact nature and amount of benefits due to the Claimant would require substantial expense and time. The claimant was represented by Eric S. Lakind, Esquire. The Employer/Carrier was represented by Andrew Borah, Esquire.

A. Documentary Evidence. The following exhibits were admitted into evidence.

1. Judge's Exhibit #1: 8/28/15 Pretrial Stipulation and 10/9/15 Motion to Amend Pretrial.
2. Employer/Carrier's Exhibit #1: 7/17/15 Claimant's deposition transcript.

3. Employer/Carrier's Exhibit #2: 10/27/15 Dr. Karl Michel deposition transcript with attachments.
4. Employer/Carrier's Exhibit #3: 10/9/15 deposition transcript of Lisa Sabattini (adjuster) with attachments.
5. Employer/Carrier's Exhibit #4: E/C's 7/27/15 Notice of Misrepresentation defense.
6. Joint Exhibit #1: 6/8/15 Petition for Benefits.

B. Stipulations.

1. I have jurisdiction over the parties and subject matter of this claim.
2. Venue is properly in Palm Beach County, Florida.
3. Mediation was held on July 29, 2015.
4. There was an employer/employee relationship on the D/A.
5. There was workers' compensation insurance coverage on the D/A.
6. The E/C accepted the claimant's accident as compensable.
7. The claimant's head, neck, and right foot injuries are related to his industrial accident.

C. Live Testimony.

1. Claimant

The Judge of Compensation Claims has jurisdiction of the parties and the subject matter. I resolved all conflicts in the evidence and have carefully reviewed and considered documentary evidence, statutory law, case law, and arguments of the parties. I have also observed the witnesses who testified before me. I now make the following findings of fact and conclusions of law:

Findings of Fact

1. The stipulations of the parties are approved and adopted.
2. The claimant is a 54 year-old male who sustained injuries to his head, neck, and right ankle on December 23, 2014 while working for the employer.
3. The claimant's case was initially accepted as compensable under the 120 day rule. No indemnity benefits were paid. The Employer/Carrier authorized MD Now, and then Dr. Brian Coleman, an orthopedic foot and ankle specialist.
4. Prior to the Employer/Carrier authorized medical treatment, the claimant treated outside of workers' compensation with podiatrist, Dr. Karl Michel, who performed surgery on the claimant's right ankle at JFK Medical Center shortly after the claimant's industrial accident and then provided follow up care.
5. The claimant filed a Petition for Benefits on 6/8/15 seeking temporary indemnity benefits.
6. The adjuster, Lisa Sabattini, testified that she sent the claimant a DWC-19 for the month of January 2015. The document was signed by the claimant on 5/15/15 and the only income reported was Unemployment Compensation for the period of 1/16/15 to 1/31/15 in the amount of \$550.00.
7. The Employer/Carrier took the claimant's deposition on 7/17/15. There, the claimant testified that his only income since he last worked for the Employer on 12/24/14 was Unemployment Compensation benefits starting in late January or the start of February 2015. The claimant denied having told any of his treating physicians that he was working. He also testified that he never told Dr. Michel that he was working, and testified that he was not mobile throughout January 2015 as he was bound to a wheelchair, walker, crutches, or cane.

8. The Employer/Carrier took the deposition of Dr. Michel on 10/27/15. Dr. Michel testified that on 1/21/15 and 1/29/15, he initiated verbal exchanges with the claimant regarding the claimant's non-compliance with his non-weight bearing status. Per Dr. Michel, the claimant's cast was soiled and dirty, indicative of someone walking on it. Dr. Michel testified that the claimant told him on January 21, 2015 that he had been walking on his affected foot, and that he had no choice because he had to work to pay his bills. When Dr. Michel saw the claimant on January 29, 2015, the claimant told him he was working, he was in welding and he was working and applying pressure to his foot. On both visits, Dr. Michel advised the claimant that going against post-op instructions was very detrimental to his recovery. Dr. Michel further testified that in January 2015, the claimant was in a cast, not in a wheelchair, and did not use a rolling walker or cane. He testified that the claimant was given crutches but did not use them.
9. The claimant testified live at the Final Hearing. He testified that he tried to work for the employer from his wheelchair at the end of February/beginning of March 2015. According to the claimant, his total earnings for his post-accident work at the employer were \$140.00. The claimant acknowledged that he did not disclose the work or earnings on the DWC-19, but claimed that the omission was unintentional as he did not consider \$140.00 to be any money, rather, to him \$1,000.00 or more per week is money. He also testified that he remembered telling Dr. Michel in January 2015 that he was working because he was "feeling him out", but testified in fact, he was not working. The claimant testified that at the end of January and start of February 2015 he was unable to work, as he was in a wheelchair or bed because of his work related injury. The claimant further indicated that at the end of January or start of February 2015, he was unable to work as his foot swelled up like an elephant.

Conclusions of Law

10. Florida Statute 440.105(4)(b)1 prohibits any person to “make, or cause to be made,” any false, fraudulent, or misleading statements for the purpose of obtaining workers’ compensation benefits. An employee found to have knowingly or intentionally committed one of these prohibited acts is not entitled to compensation or benefits under the workers’ compensation statute. Fla. Stat. §440.105(4)(b)1 and Fla. Stat. §440.09(4).
11. To establish a misrepresentation defense, the burden is on the Employer/Carrier to prove by a preponderance of the evidence (greater than 50% likelihood) that claimant knowingly or intentionally committed one of the prohibited acts listed above. Matrix Employee Leasing v. Hernandez, 975 So.2d 1217 (Fla. 1st DCA 2008).
12. Whether the claimant has violated Fla. Stat. §440.105(4)(b)1 is a factual determination to be made by the JCC. In deciding the issue, the JCC has to answer two questions: (1) whether the claimant made or caused to be made, false, fraudulent or misleading statements; and (2) whether the statement was intended by claimant to be for the purpose of obtaining workers’ compensation benefits. The misrepresentation does not have to be material in actuality; rather, the relevant inquiry is whether the claimant’s misrepresentation is a misrepresentation that the claimant subjectively believed would have a material impact on his case. Arreola v. Administrative Concepts, 17 So.2d 1282 (Fla. 1st DCA 2005).
13. In the instant case, I have listened to the testimony of the claimant and I have read the deposition transcript of his testimony on July 17, 2015. I have reviewed the testimony of the adjuster, Lisa Sabattini, and Dr. Karl Michel in order to come to a conclusion with respect to the claimant’s statements under oath and statements to medical providers. I have also evaluated the claimant’s candor, demeanor, and consistencies or inconsistencies in his

testimony in front of this Court at the Final Merits Hearing.

14. As to the first question, whether the claimant made or caused to be made, false, fraudulent or misleading statements, I find that the Employer/Carrier proved by a preponderance of the evidence that the claimant knowingly and intentionally provided false statements at his deposition and on his DWC-19 regarding whether he worked or earned income since his December 23, 2014 work related accident.
15. I find the claimant's statements at deposition and in the January DWC-19 that he has not worked/earned income since the date of his industrial accident to be false. At trial, the claimant maintained his position that he did not work in January 2015 as according to the claimant, he was confined to a wheelchair or bed at that time and unable to work since his right foot swelled up like an elephant. However, such testimony is contradicted by the testimony of Dr. Michel who testified that the claimant presented to him on January 21 and 29, 2015 without a wheelchair, but just in a cast and crutches and he did not even use the crutches. I accept the testimony of Dr. Michel over that of the claimant where such testimony conflicts. Dr. Michel testified that he clearly recalled the claimant and his interactions with the claimant in January 2015 as the claimant was a challenging patient since he was disregarding his post-op instructions to stay off his right foot. Due to Dr. Michel's professed clear recollection of the claimant at his deposition, I do not believe Dr. Michel was mistaken in recalling the claimant's presentation in January 2015 and I also do not believe Dr. Michel intentionally provided false testimony about the claimant's January 2015 presentation as Dr. Michel would have nothing to gain by doing so. Rather, I believe the preponderance of the evidence demonstrates that the claimant's statements that he was not working in January 2015 since he was confined to a wheelchair or bed were false.

16. I reject as unbelievable the claimant's explanation at trial that he told Dr. Michel in January 2015 that he was working because he was "feeling him out" and that he was not actually working. It goes against all logic and reason for the claimant to have told Dr. Michel that he was working like he admits doing, if he was not in fact working. Therefore, I believe the claimant told Dr. Michel on January 21 and 29, 2015 that he was working because he was in fact working and reject the claimant's assertion otherwise. Further, there is other evidence that demonstrates the claimant was working at that time as the claimant presented to Dr. Michel with a soiled and dirty cast, which is clear evidence that he was walking on his cast and more likely than not working, as he reported he was to Dr. Michel.
17. The claimant also testified at his deposition that he did not tell Dr. Michel that he was working. The claimant admitted at trial that such statement was false as the claimant acknowledged telling Dr. Michel he was working, however, the claimant asserted he did not intentionally provide such false statement, but rather did so in error. Since I disbelieve and reject the claimant's explanation that he told Dr. Michel he was working in January 2015 because he was "feeling him out" and was not actually working, I also disbelieve and reject the claimant's assertion that he did not intentionally provide the false statement at his deposition that he did not tell Dr. Michel that he had been working.
18. As to the second question, whether the statements were intended by claimant to be for the purpose of obtaining workers' compensation benefits, I find that the preponderance of the evidence demonstrates that the claimant provided the aforementioned false statements to obtain workers' compensation benefits. I specifically hold that the claimant intentionally provide such false statements to support his claim for temporary indemnity benefits. The claimant simply would have no other reason to provide such false statements except to

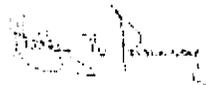
provide artificial support to his TTD/TPD claim.

19. Based on the foregoing, I find that the claimant has violated the misrepresentation provisions in Fla. Stat. §440.105(4)(b)1 and 440.09(4), and has thus forfeited all rights to compensation or benefits under Chapter 440. Leggett v. Barnett Marine, Inc., 167 So. 3d 480 (Fla. 1st DCA 2015).

WHEREFORE, it is Ordered and adjudged that:

1. The claimant has violated the misrepresentation provisions in Fla. Stat. §440.09(4) and Fla. Stat. §440.105(4)(b)1.
2. All claims for benefits under Chapter 440 are DENIED.

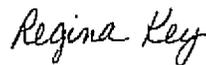
DONE and ORDERED in West Palm Beach, Florida, this 15th day of February, 2016.



Honorable Shelley Punancy
Judge of Compensation Claims

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that the foregoing Order was entered on the 15th day of February, 2016, and that a copy thereof was sent electronically to all parties.



Assistant to Judge of Compensation Claims