

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

PEGGY KASH)
)
 Employee/Claimant)
)
 vs.) OJCC Case No. 10-003216-TWS
)
 GLOBAL EMPLOYMENT SOLUTIONS)
 PEO) Accident date: 07/06/2009
)
 Employer)
)
 and)
)
 SUA INSURANCE COMPANY)
)
 Carrier)
) **Judge: Thomas W. Sculco**

FINAL COMPENSATION ORDER

After proper notice to all parties, a hearing was held and concluded on this claim in Orlando, Orange County, Florida on December 16, 2010. Present at the hearing was Attorney Marshall S. Adler for the Employee and Attorney Andrew R. Borah and Attorney Kimberly C. De Arcangelis for the E/C.

This Order addresses the Petition for Benefits filed with DOAH on 05/26/2010; 6/18/2010.

At hearing the evidence also consisted of the live testimony of:
Peggy Kash, Rhonda Cayson, Matthew Rose.

DOCUMENTARY EVIDENCE:

- #1 Claimant's: Memorandum
- #2 E/C's: Hearing Information Sheet
- #3 Judge's: Pretrial Stipulation dated 7/19/2010
- #4 E/C's: First Amendment to Pretrial Stipulation
- #5 Claimant's: Motion to Admit Medical Records
Order dated July 19, 2010
- #6 E/C's: Deposition of Peggy Kash
April 8, 2010
- #7 E/C's: Deposition of Peggy Kash
November 1, 2010
- #8 E/C's: Deposition/attachments of Alan R. Varraux, M.D.
July 13, 2010
FOR FACT PURPOSES ONLY
- #9 E/C's: Deposition/attachments of John Mark Cappleman
July 14, 2010
FOR FACT PURPOSES ONLY
- #10 E/C'S: Deposition/attachments of James D. McCluskey, M.D.
October 13, 2010
- #11 E/C's: Composite- Centra Care
- #12 E/C's: Surveillance of February 1 & 2, 2010

- #13 E/C'S: Third Amendment to Pretrial Stipulation

#14 E/C's: Telephone Encounter Printout

After hearing all of the testimony and evidence presented, and after having resolved any and all conflicts therein, the undersigned Judge of Compensation Claims makes the following findings of fact and conclusions of law: The issues for determination, as narrowed by the parties at the time of the final hearing, are claimant's claims for: 1-IIB benefits based on a 29% permanent impairment rating assigned by Dr. Ailani; 2-penalties, interest, costs, and attorney's fees ("PICA"). At the start of the hearing, claimant withdrew her claim for PTD benefits without prejudice.

The E/C raised the defense that claimant was barred from benefits because she violated the "fraud" provisions contained in sections 440.09(4) and 440.105, Florida Statutes. In addition, the E/C took the positions that the compensable injury is not the major contributing cause of claimant's current respiratory condition; that claimant has no permanent impairment attributable to the compensable injury; and that no PICA is owed.

I. BACKGROUND

In 2009, claimant worked as an office manager for the employer. On 7/6/09 she was exposed to fumes in the workplace causing her severe breathing problems. She has received authorized medical care from the E/C with Dr. Rajesh Ailani for her condition.

Dr. Ailani has diagnosed claimant with reactive airway disease and asthma. On 2/4/10, Dr. Ailani indicated that claimant's 7/6/09 exposure was the major contributing cause of her pulmonary condition. On 5/18/10 Dr. Ailani assigned claimant a permanent impairment rating of 29%.

Claimant was also examined by E/C IME physician Dr. James McCluskey on 4/23/10. Dr. McCluskey diagnosed claimant with possible asthma, and possible exposure to an irritant with the employer. Dr. McCluskey indicated that "Worst case scenario, she had a minor or transient exacerbation from Pounds Mower. It would have gotten completely resolved shortly after she left Pounds Mower." (deposition of Dr. McCluskey, at 27). Dr. McCluskey placed claimant at MMI in September of 2009, with no impairment attributable to the workplace exposure.

Claimant testified both at trial and in deposition that she never had any "respiratory" problems before her work-related exposure on 7/6/09. She also testified that she never was diagnosed with asthma or bronchitis before 7/6/09, and that she never experienced shortness of breath before 7/6/09. Dr.

McCluskey testified that claimant told him "No, I had absolutely no respiratory problems. I never had an inhaler or anything of that sort. I have never been given a diagnosis." (deposition of Dr. McCluskey, at 27).

The evidence establishes that claimant treated with internal medicine physician Dr. John Cappleman in 2008 and 2009 for various problems. On 1/29/08 Dr. Cappleman noted that claimant was complaining of difficulty breathing. On 3/18/08 claimant saw nurse-practitioner Karen Jones in Dr. Cappleman's office. The 3/18/08 note documents, among other things, "Asthma - on meds stable". Dr. Cappleman testified that on 6/17/10 he had a "phone encounter" with claimant as follows:

I think she basically left me a message to tell you guys [the e/c] that she never had asthma or any other upper respiratory condition before August of 2009. Her condition occurred after a chemical inhalation at work. Told patient what previous notes stated and that I would notify of her concern. That is the entry in my record dated June 17, 2010. (deposition of Dr. Cappleman, at 15).

Claimant treated with pulmonologist Dr. Allan Varraux on 10/25/07 and on 11/22/07 for complaints of shortness of breath, chest tightness, cough, and excessive mucus. Dr. Varraux's records document that claimant was concerned about "possible asthma", and that claimant's complaints started in 2003 when she moved from South Florida to Winter Garden. The 10/5/07 note indicates that claimant's symptoms have "gotten more continuous

over the years". Dr. Varraux testified that he diagnosed claimant with asthma and shortness of breath, and that he would have communicated those diagnoses to her. (deposition of Dr. Varraux, at 15-16).

Dr. Varraux prescribed 3 inhalers for claimant, Albuterol, Asmanex, and Spiriva, and he testified that at the November 2, 2007 visit he confirmed that claimant was using the inhalers.

II. E/C'S "FRAUD" DEFENSE

Based on the evidence presented, I find that the E/C has proven, by a preponderance of the evidence, that claimant knowingly made false statements for the purpose of securing workers' compensation benefits. As a preliminary matter, I agree with claimant that some of the purported false statements are not strictly statements of fact, but are more in the nature of opinions and characterizations. Specifically, the E/C argued that several of claimant's statements regarding her physical capabilities in her 4/8/10 deposition were knowingly false. However, claimant's statements about what she "can" do, as opposed to what she "has" done, are more statements of opinion than they are statements of fact. Those statements were not technically contradicted by the surveillance video because the surveillance occurred *after* the deposition, although admittedly only about one week later. Giving claimant the benefit of the

doubt, I find that her testimony about her capabilities does not disqualify her from benefits because those statements were more "opinion" than fact.

Similarly, claimant's statements that she never had prior "respiratory" problems, again giving her the benefit of the doubt, are not strictly statements of fact but rather are characterizations of her condition. Consequently, those statements do not disqualify her from benefits pursuant to section 440.09(4).

That said, while claimant's testimony about her "capabilities" and her "characterizations" of her condition may not be technically sufficient to constitute a violation of the statute, I have considered that testimony in assessing claimant's credibility in this case, including her credibility with regard to clearly factual statements she has made. These statements include claimant's testimony that she never was diagnosed with asthma or bronchitis before 7/6/09, and that she never experienced shortness of breath before 7/6/09. Claimant told Dr. McCluskey that she had no prior respiratory problems, that she had never used an inhaler, and that she had never been given a diagnosis.

Dr. Varraux testified that in late 2007 he diagnosed claimant with asthma and shortness of breath, and that he would have communicated those diagnoses to her. (deposition of Dr. Varraux, at 15-16). Claimant's intake form to Dr. Varraux

indicates that she was concerned about "possible asthma". Given claimant's concern about asthma, it is extremely unlikely in my view that she would not have discussed Dr. Varraux's diagnosis of asthma with him. While it is possible that Dr. Varraux did not communicate this diagnosis to claimant, I find it is more likely than not that he did. Based on my assessment of the evidence presented, including my assessment of claimant's demeanor while testifying, I find, by a preponderance of the evidence, that claimant's testimony that she was never diagnosed with asthma before 7/6/09 was knowingly false and was for the purpose of securing workers' compensation benefits.

Similarly, I find, by a preponderance of the evidence, that claimant told Dr. McCluskey that she had never used an inhaler before 7/6/09, and that such statement was knowingly false and for the purpose of securing workers' compensation benefits. I accept Dr. McCluskey's testimony as truthful and credible that claimant told him that she had never used an inhaler before the workplace injury. I accept Dr. Varraux's medical records and testimony that he prescribed 3 inhalers for claimant, Albuterol, Asmanex, and Spiriva, and that at the November 2, 2007 visit he confirmed that claimant was using the inhalers. It is simply not credible or believable that claimant did not remember her relatively recent use of 3 inhalers prescribed by Dr. Varraux in late 2007.

In addition, I find that claimant's testimony regarding a phone call she made to Dr. Cappleman's office in June of 2010 was knowingly false and for the purpose of securing workers' compensation benefits. While I do sustain claimant's hearsay objection to the testimony of Ronda Cayson regarding the contents of claimant's call, Dr. Cappleman testified, without objection, that claimant left him a message to tell the E/C that she never had asthma or any other upper respiratory condition before August of 2009, and that her condition occurred after a chemical inhalation at work. (deposition of Dr. Cappleman, at 15).

Claimant denied saying any such thing to Dr. Cappleman or his office, and testified that she called merely to ask for her records. I can see no reason why Dr. Cappleman would make something like this up, and I reject claimant's contrary testimony as being knowingly false. Claimant's phone message to Dr. Cappleman also suggests that she believed that her prior medical history was important in her workers' compensation case, and casts doubt on the credibility of claimant's "characterizations" of her prior problems as common colds.

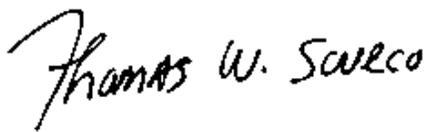
In sum, I find that claimant has made several knowingly false statements for the purpose of securing workers' compensation benefits. Consequently, she is barred from

receiving benefits. As such, it is not necessary for me to reach the other issues, claims, and defenses raised.

WHEREFORE it is hereby **ORDERED** and **ADJUDGED** that:

1. Claimant knowingly made false statements for the purpose of securing workers' compensation benefits, and is therefore barred from receiving benefits pursuant to Sections 440.105 and 440.09(4), Fla. Stat. (2009).
2. All pending Petitions for Benefits are DENIED and DISMISSED WITH PREJUDICE.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida this 20th day of January, 2011.



Thomas W. Sculco
Judge of Compensation Claims
400 West Robinson Street, Suite 608N
Orlando, Florida 32801-1701

This is to certify that a true and correct copy of the foregoing Order has been furnished by electronic or U.S. Mail to the parties and counsel listed below.



Digitally signed by Marla
Miller

Date: 2011.01.20 15:12:49
-05'00'

Assistant to Judge Sculco

Served by Electronic Mail:

Marshall S. Adler, Esquire

Andrew R. Borah, Esquire

By U.S. Mail:

Peggy Kash

Global Employment Solutions PEO

SUA Insurance Company