

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF JUDGES OF COMPENSATION CLAIMS
FORT LAUDERDALE DISTRICT OFFICE**

EMPLOYEE:

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OJCC No: 08-015669DAL

D/A: 11/10/2007

JUDGE: Daniel A. Lewis

FINAL COMPENSATION ORDER

AFTER DUE NOTICE to the parties, a Final Merits Hearing was conducted before the undersigned Judge of Compensation Claims on June 16, 2009 in Lauderdale Lakes, Broward County, Florida. The petition for benefits which came on for adjudication was filed on June 13, 2008. The parties stipulated as follows:

- A. The undersigned has jurisdiction of the parties and of the subject matter.
- B. Notice of hearing was timely given to the proper parties.
- C. Venue lies in Broward County, Florida.

D. The claimant's alleged accident of November 10, 2007 has not been accepted by the employer/carrier as a compensable occurrence. At the time of this Final Hearing, this case was bifurcated and tried solely on the issue of compensability, with jurisdiction reserved as to all

other pending issues in the event the accident is found to be compensable. By agreement of the parties, no further discovery will be conducted as to the remaining issues, and all discovery shall be considered cut off as of the date of this Final Hearing.

E. Whether notice of the accident was timely given was at issue.

F. Claim was made for:

1. A determination of the compensability of the claimant's November 10, 2007 accident and injuries.

2. Also claimed were attorney's fees and costs.

G. The employer/carrier asserted as defenses that:

1. No accident occurred in the course and scope of employment.

2. Notice of an accident was not timely given.

3. The employer/carrier also asserted a general denial as to the claim for attorney's fees and costs.

H. At this Final Hearing, the parties also stipulated that after the accident, claimant was seen at the Broward General Medical Center on multiple occasions, but that he first complained of left shoulder or back problems to that facility on May 18, 2008. The parties also stipulated that was the only record from that hospital reflecting any left shoulder or back complaints from the date of the accident to date.

After careful consideration and review of the testimony, documentary evidence and argument presented, the following are my findings of ultimate facts and conclusions of law:

1. This claimant is a 76 year old man, date of birth July 11, 1932, who testified at this Final Hearing through the assistance of a Spanish speaking interpreter. Claimant testified he

worked for the employer herein doing maintenance type work, painting, pressure cleaning, carpet installation and other physical labor.

2. Claimant testified on the date of the accident herein, Friday, November 10, 2007, he was lifting a discarded sofa with a coworker to put it into a truck when he lost his balance and fell onto a chair. According to the claimant, as the result of the accident, he injured his left shoulder and lower back.

3. Claimant testified that the next day, his pain intensified, so he reported the accident the following Monday to Eddie Diaz's secretary. Mr. Diaz is the employer's regional manager. Claimant testified he did not speak with Mr. Diaz personally at that time. According to the claimant, approximately two weeks later, he spoke with Mr. Diaz over the telephone. When asked by his counsel what was discussed at that time, claimant testified he told Mr. Diaz he wanted additional work. According to the claimant, he thought the accident was not serious. Claimant testified he was never given additional work by Mr. Diaz. However, according to the claimant, Mr. Diaz knew about the work accident.

4. Eddie Diaz, on the other hand, testified that the claimant did not report an on the job accident or injury. Mr. Diaz initially testified he did not recall the claimant reporting an accident or injury, but then testified the claimant did not do so. Mr. Diaz also testified the claimant did not request medical care or attention after November 10, 2007. According to Mr. Diaz, the claimant worked for this employer from August 7, 2006 to November 30, 2007. Although Mr. Diaz admitted the claimant contacted his office after November 10, 2007 seeking additional work, he testified that due to economic reasons, the employer had no additional work available for him. Mr. Diaz testified he first learned the claimant was claiming a workers' compensation accident in June, 2008. I note that claimant's petition for benefits was filed on June 13, 2008.

5. Claimant testified since the employer did not provide medical care, he sought out medical treatment on his own. Claimant admitted that Spanish interpreters were provided for him at those medical facilities. Claimant also testified he has not returned to work for this or any other employer since the November 10, 2007 accident.

6. The only direct testimony regarding whether an accident occurred and whether same was timely reported came from the claimant and Mr. Diaz, and their testimony was in opposition. Consequently, I have also reviewed the medical records to determine whether the claimant ever reported a work accident to any of his health care providers or gave a history of left shoulder and lower back complaints with a date of onset on or about November 10, 2007.

7. As indicated, the parties stipulated that after the November 10, 2007 accident, claimant was seen at the Broward General Medical Center on multiple occasions, but the first time he complained of left shoulder or back complaints to that hospital was on May 18, 2008. The parties stipulated that was the only record from that facility which reflected any left shoulder or back complaints. On that date, claimant gave a history of left shoulder, neck and low back pain, with a date of onset of "yesterday." The history given was the claimant was using a pressure cleaner yesterday and now feels worse. Claimant also gave a history of a motor vehicle accident nine months previously with resultant neck and back pain. The diagnosis was shoulder sprain.

8. The medical records of the Clinica Luz del Mundo, or Light of the World Clinic, reveal that even prior to the November 10, 2007 accident, claimant expressed complaints of left shoulder and low back pain. On February 23, 2006, claimant complained of knee and left and right shoulder pain, and on January 9, 2007, claimant complained of low back pain associated with heavy lifting. On January 23, 2008, after the claimed accident, claimant was seen at this

facility for complaints of lower back pain. However, the history given by the claimant at that time was that the pain was due to a new job which required heavy labor. On March 2, 2008, claimant was seen at this clinic for complaints of lower lumbar pain of one day's duration after using a pressure cleaner at work. On May 20, 2008, claimant was seen at this facility for complaints of back pain from lifting something heavy. At that time, claimant told this clinic he had gone to the Broward Hospital emergency room the prior Monday.

9. Similarly, on June 10, 2008, claimant was seen at the Clinica Luz del Mundo for complaints of back pain radiating into his right leg from lifting furniture two months previously. On August 20, 2008, claimant presented to this clinic for complaints of left shoulder pain from a trauma two years previous. On September 7, 2008, claimant was seen for complaints of left shoulder pain dating from January. On February 25, 2009, claimant complained of coccyx pain that comes and goes. None of the medical record support or substantiate the claimant's claim of a November 10, 2007 work accident or the onset of left shoulder or lower back problems on or about that date.

10. Orthopedic surgeon Dr. Delgado-Garcia performed an independent medical examination (IME) for the employer/carrier on January 14, 2009. Dr. Delgado-Garcia testified the claimant told him he had injured his left shoulder and low back in November of 2007, causing severe pain, and had been treated at the Broward General Medical Center for his left shoulder and back injuries on at least five occasions. This history is inconsistent with the medical records as well as with the parties' stipulation. Claimant also denied prior injuries to his left shoulder and back to Dr. Delgado-Garcia, which history again is inconsistent with the medical records in evidence.

11. Dr. Delgado-Garcia testified he performed his own review of the claimant's medical records. Dr. Delgado-Garcia testified the histories contained in the claimant's medical records were very inconsistent with the history given to him by the claimant. According to Dr. Delgado-Garcia, the medical records actually contradicted what the claimant told him. Dr. Delgado-Garcia testified that nothing in the medical records reflect the claimant sustained an accident or injury in November, 2007. Moreover, and as Dr. Delgado-Garcia observed, although the claimant was seen at these facilities on many occasions post the claimed accident and therefore had many opportunities to advise his health care providers of the accident and any complaints or injuries associated therewith, he did not do so.

12. Based on this evidence, I accept the testimony of the employer that notice of an accident or injury was not timely given. I also find that claimant did not suffer an injury by accident in the course and scope of his employment. Claimant's testimony was inconsistent with and contrary to all of the other evidence in this case, and I hereby reject his testimony. Under the case law, the question of whether an accident occurred, as contrasted with medical causation in the face of the undisputed occurrence of an accident, is not a medical question. Rather, it is a question of fact for the Judge of Compensation Claims, as the trier of fact, to decide. Ullman vs. City of Tampa Parks Department, 625 So.2d 868 (Fla. 1st DCA 1993).

13. Consequently, claimant's claim for a determination of the compensability of the November 10, 2007 accident and injuries, plus attorney's fees and costs, shall be, and the same is hereby, denied and dismissed.

DONE AND ORDERED at Lauderdale Lakes, Broward County, Florida this

22nd day of June, 2009.



Honorable Daniel A. Lewis
Judge of Compensation Claims

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true copy of the foregoing Final Compensation Order was furnished by U.S. mail this 22nd day of June, 2009, to the aforementioned parties and their counsel of record.

Secretary to Judge of Compensation Claims