STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGE OF COMPENSATION CLAIMS
Orlando District

EMPLOYEE:
Richard B. Chamness
4195 Quail Wood Drive
St. Cloud, FL 34772

EMPLOYER:
Cargill Incorporated
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Kissimmee, FL 34758

CARRIER:
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Lake Mary, FL 32795

ATTORNEY FOR EMPLOYEE:
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ATTORNEY FOR EMPLOYER/CARRIER:
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OJCC CASE NO.: 07-008696ORL
D/A: 4/25/2006

FINAL COMPENSATION ORDER

After proper Notice to all parties, a Final Hearing on the merits of this case was held on March 6, 2008 in Orlando, Orange County, Florida before the Honorable Thomas W. Sculco, Judge of Compensation Claims. Present and representing the claimant, Richard Chamness, was David Rickey, Esquire, of Orlando, Florida, and present and representing the Employer/Carrier, Cargill Incorporated and Specialty Risk Services, Inc., was Michael S. Waranch, Esquire, of Winter Park, Florida. The claimant, Richard Chamness, Roger Atkins of Cargill Inc., and Mark Tomlinson, a paralegal with Mr. Rickey's firm, were also present at the Final Hearing.

The parties stipulated as follows:

1. That the claimant was involved in a compensable accident on April 25, 2006;

2. That the accident occurred in Kissimmee, Osceola County, Florida;

3. That an employer/employee relationship existed on the date of accident;

4. That workers' compensation insurance coverage existed on the date of accident;

5. That the claimant injured his right knee as a result of the accident;

6. That there was timely notice of the Final Hearing;

7. That the case is not governed by managed care;

8. That the undersigned Judge of Compensation Claims has jurisdiction over the subject matter and the parties; and

9. That the maximum compensation rate of $683.00 applies to this case.

The following exhibits were offered, entered into evidence and marked as follows in order of admittance:

Employer/Carrier's #1- March 3, 2008 Memorandum of Law filed by the Employer/Carrier (for argument only but used as direct evidence in the case);

Employer/Carrier's #2- The transcript of the claimant's deposition, taken on June 11, 2007, with the claimant's July 23, 2007 and August 24, 2007 Errata Sheets attached;

Employer/Carrier's #3- A November 21, 2007 printout from Gold's Gym of St. Cloud, which showed the dates on which the claimant used his membership at Gold's Gym from July 18, 2006 through November 9, 2007;

Employer/Carrier's #4- The transcript from the deposition of the adjuster, Leah Ostroff,

taken on September 18, 2007;

Joint Exhibit #1- Transcript from the deposition of Dr. Thomas Winters, taken on November 28, 2007, with attachments;

Claimant's #1- January 31, 2008 Pre-Hearing Sheet filed by attorney David Rickey (for argument only but not used as direct evidence in the case);

Judge's #1- Uniform Statewide Pretrial Stipulation with court's November 15, 2007 Pretrial Order and Order governing the Trial; and

Claimant's #2- Motion to Admit Medical Records into evidence filed by the claimant on November 30, 2007.

Claims to be determined by the court were as follows:

1. The payment of temporary partial disability (TPD) benefits from February 16, 2007 to August 9, 2007 and the payment of temporary total disability (TTD) benefits from August 10, 2007 to the present and continuing;
2. The authorization of arthroscopic surgery as recommended by Dr. Anwarul Hoque; and
3. Penalties, interest, costs, and attorney's fees (PICA).

The Employer/Carrier raised the following defenses:

1. That the claimant's benefits should be terminated based on misrepresentations made at the claimant's June 11, 2007 deposition and for the purpose of obtaining

workers' compensation benefits;

2. That there was no causal connection between the claimant's accident and is loss of earnings;

3. That there was no evidence that arthroscopic surgery is medically necessary at the present time; and

4. That no PICA was due.

The claimant testified in person at the Final Hearing as did Roger Atkins, a representative from Cargill, Inc. No other witnesses testified at the Final Hearing.

In making my findings of fact and conclusions of law in this case, I carefully have considered and weighed all of the evidence including the live testimony and deposition testimony. I observed the candor and demeanor of the claimant and Roger Atkins. Although I will not recite the specific details of all testimony presented, and I may not refer to each piece of documentary evidence presented, I have considered the evidence in its totality. I have resolved all conflicts in the testimony and evidence and based on the foregoing and applicable law, I make the following findings of fact:

1. Those matters to which the parties were in agreement on the Pretrial Stipulation and to which they agreed at the Hearing are hereby accepted by me as findings of fact.

2. The claimant was born on [redacted] and he was [redacted] at the time of the Final Hearing. The claimant began working for the employer in the case, Cargill,

Inc., on August 1, 2005. The claimant was hired to work in industrial maintenance.

3. On April 25, 2006, while at work, the claimant was assisting two other mill operators clean the dye from the mill. While the claimant was jabbing a crowbar into the dye and chipping away at it, as he turned his body, the crowbar he was using struck his right knee. Initially, the case was accepted as compensable, and the claimant was sent to Centra Care.

4. The claimant underwent a right knee MRI, and it showed a torn medial meniscus. Dr. Anwarul Hoque, an orthopedic surgeon, was authorized, and he performed arthroscopic surgery, with a medial meniscectomy, on July 19, 2006. Dr. Hoque then kept the claimant out of work for a little over five months following the surgery. The Employer/Carrier paid the claimant TTD benefits while he was out of work.

5. The claimant returned to work, at Cargill, Inc., in early January, 2007. He was provided with light duty, which mostly consisted of typing up a work manual.

6. At the Final Hearing, Roger Atkins, of Cargill, Inc., testified that he terminated the claimant on February 16, 2007 after he had returned to work in a light duty capacity. Mr. Atkins explained that the claimant was terminated due to issues concerning tardiness, "stealing company time" by clocking in but not starting work for a long period of time, for failing to follow instructions, and for poor work performance. The claimant testified, at the Final Hearing, that he did not

commit the work offenses referenced by Mr. Atkins, and he indicated that he was harassed by some of the individuals at Cargill, Inc. The claimant also testified that he has looked for work since being terminated by Cargill, Inc. on February 16, 2007, but the claimant did not provide any documentation of his alleged work search. The claimant testified that he has not worked since February 16, 2007.

7. The Employer/Carrier scheduled an Independent Medical Examination (IME) with Dr. Thomas Winters, an orthopedic surgeon. Dr. Winters performed his IME on January 8, 2007. He ordered an updated right knee MRI, and it was performed on January 18, 2007. Dr. Winters reported that the MRI showed some irregularity of the posterior horn of the medial meniscus, but no obvious recurrent tear was revealed. Dr. Winters suggested conservative treatment and felt the claimant was capable of performing his regular activities without restrictions.

8. Dr. Winters then more or less became one of the claimant's authorized orthopedic physicians. He saw the claimant again on May 30, 2007. On that date, the claimant continued to complain of right knee pain, and Dr. Winters recommended an arthroscopic procedure. However, the claimant never returned to Dr. Winters after May 30, 2007.

9. Dr. Winters was deposed on November 28, 2007. He testified that he would need to see the claimant again to determine if arthroscopic surgery remains medically necessary. He also testified that he felt the claimant could perform his regular job when seen on February 1, 2007 and May 30, 2007.

10. The claimant introduced, into evidence, the medical records of Dr. Hoque. However, Dr. Hoque was never deposed in the case. Those records show that on March 9, 2007, Dr. Hoque felt the claimant could perform a job that would not require too much lifting, twisting, or turning. On April 27, 2007, Dr. Hoque recommended arthroscopic surgery. When seen on June 18, 2007, Dr. Hoque continued to recommend arthroscopic surgery.

11. During the Final Hearing, the claimant produced an August 9, 2007 alleged work slip from Dr. Hoque. The slip showed that the claimant was taken out of work as of August 9, 2007. The Employer/Carrier objected to the admissibility of the work slip as it was not included in the claimant's November 30, 2007 Motion to Admit Medical Records, and the Employer/Carrier had not been provided with a copy of the work slip until the time of the Final Hearing and certainly not within thirty (30) days prior to the Final Hearing. As a result, the court sustained the Employer/Carrier's objection to the admissibility of the work slip.

12. The Employer/Carrier took the claimant's deposition on June 11, 2007. During the deposition, the claimant was asked whether he belonged to any gyms and works out. The claimant denied working out and belonging to any gyms. The following exchanges occurred during the deposition:

Q. Now, are you able to work out still?

A. No.

Q. You don't work out. You haven't been able to work out since when?

A. I haven't worked out since '95. 1995.

Q. '95?

A. Yeah.

MR. WARANCH: Okay. I mean-- let the record reflect, I mean, wouldn't you say he's a big muscular guy, Dave? I mean, he's a pretty–he looks like he works out, right?

THE WITNESS: I used to be huge.

MR. RICKEY: Military build.

MR. WARANCH: You're going to say military build, okay.

MR. RICKEY: As opposed to, you know, some of these, you know, guys you might see on magazines as you're walking into 7-11 trying to get your, you know, Big Gulp. He doesn't look like a– you know, he doesn't look like a pro wrestler or something like that.

BY MR. WARANCH:

Q. So you don't work out?

A. No.

Q. You don't go to a gym?

A. No.

Q. And you haven't since '95 –

A. Yes.

Q. – is that right? I mean, you have not been since '95, right?

A. Correct.

Q. And you don't do any – you don't work out? Not in a gym, but just home work out, you don't do that?

A. No. I've got everything you need and it's all in storage, I don't have it set up at this– I've only been there a year.

Q. You don't exercise, you don't do anything like that?

A. I eat right.

Q. Are you – do you have any gym memberships?

A. Yes.

Q. Here in Florida?

A. No.

Q. Where are they?

A. I have one in Tennessee, World's Gym. But I'm sure it's expired like about four years ago. You mean current?

Q. Current. You don't belong to any gyms here?

A. No.

Q. The YMCA, nothing like that?

A. No.

(Claimant's deposition at 48-50).

13. The claimant stated, at that end of the deposition, that he wanted to read the deposition transcript. On July 23, 2007, the claimant filed an Errata Page, but none of his alleged corrections corresponded to page numbers from the deposition transcript. After receiving and reviewing the Errata Page, the Employer/Carrier informed claimant's counsel that the Errata Page did not correspond with any of the relevant page numbers from the deposition. The claimant next filed a second Errata Page on August 24, 2007. Pursuant to the August 24, 2007 Errata Page, which was filed more than two months after his deposition, the claimant changed his answer to the affirmative as to whether he belonged to any gyms in Florida. However, he did not attempt to change any of his answers to the questions of whether he worked out, went to a gym, or exercised. Furthermore, he did not attempt to change his testimony concerning staying in shape by only "eating right."

14. At the Final Hearing, the claimant attempted to explain his testimony, at his deposition, by indicating that he did not realize that he was being asked whether he exercised but whether he worked out for purposes such as body-building. The claimant also mentioned, at the Final Hearing, that he was nervous and anxious during the deposition and that he had taken Vicodin on the morning of the deposition, but during the deposition, the claimant testified that he had last taken medication in December, 2006.

15. The records, from Gold's Gym, show that the claimant went there from July 18, 2006 to November 9, 2007. During that time period, the claimant typically used

his membership 4 to 6 times per month, and in some months, during the period, he used his membership 8 to 10 times. The claimant's deposition took place on the morning of June 11, 2007. The records show that the claimant used his gym membership later that afternoon on June 11, 2007 and then used his gym membership 10 more times from June 11, 2007 to August 24, 2007 when he completed his second Errata Page. The evidence in this case clearly establishes that at the time of the claimant's June 11, 2007 deposition, he belonged to Gold's Gym and was regularly working out there.

16. Pursuant to Section 440.09(4), an employee is not entitled to any workers' compensation benefits if it is determined that the employee knowingly or intentionally engaged in any of the acts described in Section 440.105 for the purpose of securing workers' compensation benefits. Pursuant to Section 440.105, it is unlawful for a claimant to make any false, misleading or incomplete oral or written statements which are intended to obtain workers' compensation benefits.

17. I have considered the claimant's explanation that he misunderstood the questions he was asked and subsequently recognized what he was being questioned about, and I have taken into consideration that he prepared an Errata Page to correct his mistakes. However, the deposition questions, referenced above, are not confusing or ambiguous, and I find it very unlikely that the claimant could have misunderstood what he was being asked. Significantly, the claimant specifically mentioned an old/expired gym membership from 1995 in Tennessee, which

strongly suggests he understood the questions he was asked. Furthermore, questioning on the issues of the claimant belonging to any gyms and working out is contained in 3 consecutive pages of the deposition. Pursuant to the claimant's second Errata Page, he only changed a few answers on page 50 of the deposition but did not change any of his false testimony on pages 48 and 49. Accordingly, even if the court was willing to consider the claimant's initial deposition testimony on page 50 a nullity, misrepresentations, made for the purpose of obtaining workers' compensation benefits, remain on pages 48 and 49. However, the Errata Page does not equate to the original deposition testimony "disappearing." In addition to that Errata Page, the original deposition testimony remains and continues to constitute misrepresentations along with the unchanged false testimony found on pages 48 and 49 of the deposition. Furthermore, I accept the Employer/Carrier's argument that the claimant provided the false testimony, concerning working out and belonging to a gym, in order to conceal his level of activity and his degree of disability for the purpose of obtaining workers' compensation benefits.

18. Based upon the foregoing, I find, by a preponderance of the evidence, that the claimant knowingly gave false testimony in his deposition for the purpose of obtaining workers' compensation benefits. Accordingly, all claims are denied with prejudice, and the claimant is not entitled to any workers' compensation benefits pursuant to Section 440.09(4).

WHEREFORE, predicated upon the foregoing findings of fact, it is ORDERED and

ADJUDGED that:

1. All benefits claimed are hereby denied and dismissed with prejudice, and the claimant is not entitled to any workers' compensation benefits.

DONE and ORDERED in Chambers in Orlando, Orange County, Florida this ____ day of MAR 3 1 2008, 2008.

Honorable Thomas W. Sculco
Judge of Compensation Claims for ORL Judge

MAR 3 1 2008

THIS IS TO CERTIFY that the foregoing Order was entered on the _____ day of _____, 2008 and that a copy was sent by regular U.S. Mail to all interested parties at the addresses listed above.

Judicial Assistant