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

ROBERT CRAIG-WEBB Employee/Claimant vs. **COAST TO COAST MANPOWER, LLC** Employer **TRISTAR Risk Management, Inc.** Employer/Carrier	)	OJCC Case No.18-000051-**TWS** Accident date:12/08/2017 **Judge: Thomas W. Sculco**

FINAL COMPENSATION ORDER

THIS CAUSE came before the undersigned Judge of Compensation Claims (JCC) at Altamonte Springs, Seminole County, Florida on March 14, 2019 for a Final hearing. The Petitions for Benefits addressed in the Order are: 01/02/18; 01/04/18; 02/12/18; 03/12/18; 03/19/18; 04/16/18; 09/14/18. Mediation was held on January 11, 2019. The parties' Uniform Pretrial Stipulation was e-filed 02/04/2019. The claimant is represented by Catherine F. Agacinski, Esquire. The Employer/Carrier is represented by Derrick E. Cox, Esquire.

LIVE TESTIMONY: Robert Craig-Webb

DOCUMENTARY EVIDENCE:

Joint Exhibit#1 – Record from 12/6/18 hearing consisting of:

Claimant's Exhibits:

-Deposition Dr. Chaumont and exhibits-ID#: 87-88

-Deposition Dr. Ragab and exhibits-ID#: 89-90

-Deposition Claudia Crawford and exhibits-ID#: 92-93

-Deposition Shelley Jamison and exhibits-ID#: 94-95

-Deposition Anissa Nichols and exhibits-ID#: 96-98

-Deposition Diane West and exhibits-ID#: 99-102

-Deposition Mark Tressler-ID#: 103

-Deposition Dr. Rashkind and exhibits-ID#: 104-105

-Claimant's Trial Memorandum-ID#: 117

-Motion to Compel-ID#: 54

E/C Exhibits:

-Claimant's Deposition 3/13/18-ID#: 109-110

-Deposition Bill Cluver-ID#: 118

-Deposition Dr. Rashkind 1/11/16 and exhibits-ID#: 111-113

-E/C's Trial Memorandum-ID#: 114

Joint Exhibits:

-Pre-Trial Stipulations-ID#: 40

-Claimant Amendments to Pre-Trial Stipulations-ID#: 80

-E/C's Supplemental Pre-Trial Stipulations-ID#: 68,69,74

Exhibit#2-ID#: 128 – Emergency Motion to Strike

Exhibit#3-ID#: 130 – Motion for Rehearing

Exhibit#4-ID#: 140 – Order Denying Reconsideration

Exhibit#5-ID#: 141, 142 – Pretrial Stipulation/order

Exhibit#6-ID#: 147 – Trial Summary

Exhibit#7-ID#129 – Order to Amend Defenses

Exhibit#8-ID#:145 – Merit Hearing Transcript (12/6/18)

Exhibit#9-ID#:146 – Trial Memorandum

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 3/14/19 final hearing, are claimant's claims for: 1-TPD benefits from 12/8/17 – present; 2-Compensability of 12/8/17 injury; 3-Reauthorization of Dr. Ragab; 4-Authorization of L5-S1 injections; 5-Authorization of lumbar medial branch nerve blocks; and 6-penalties, interest, costs, and attorney's fees (PICA).

The E/C took the positions that claimant's disability was due to a prior injury, that claimant had not proven a compensable injury, and that no PICA was due and owing. The E/C also raised the defenses that: 1-benefits were barred pursuant to Section 440.15(5)(a), Florida Statutes, based on written pre-employment misrepresentations; 2-benefits were barred pursuant to *Martin v. Carpenter* based on written pre-employment misrepresentations; and 3-benefits were barred pursuant to Section 440.09(4), Florida Statutes based on false testimony given by claimant at the 12/6/18 hearing.

BACKGROUND

On 12/8/17 claimant suffered a work-related back injury with Coast to Coast Management, LLC, which is the injury at issue in this case. He was working as a truck driver, and injured his back unloading an auto part. Previously, in 2015, claimant had suffered a work-related back injury with a different employer. Specifically, on 7/24/15 he injured his low back working as a truck driver when he was loading pallets for Courier Express. He was diagnosed with disc bulges from L2-3 through L5-S1, and a central disc protrusion at L5-S1. He eventually came under the care of pain management physician Dr. Chaumont. Dr. Chaumont

placed claimant at MMI on 4/13/16, with a seven percent permanent impairment rating, and assigned permanent restrictions of no repetitive bending, no lifting over 25 pounds, and no working from unprotected heights.

Claimant's counsel, who also is his attorney for the 12/8/17 claim at issue here, filed a PFB requesting TTD/TPD and/or PTD benefits. In August of 2016 claimant returned to Dr. Chaumont complaining of continuing pain. As a result, Dr. Chaumont performed a medial branch nerve block on 11/10/16. Claimant testified that the injection performed by Dr. Chaumont on 11/10/16 relieved his pain. Before his scheduled follow-up appointment, claimant settled his 7/24/15 claim for about $79,000.00 on 12/6/16.

Claimant testified at the scheduled final hearing of 12/6/18 that following the settlement he hoped to go back to work. He testified he came upon the name of the employer while driving home one day. The next day he called the company, and was transferred to Danielle West. Claimant further testified that Ms. West told him there were no driving positions currently available. He testified as follows regarding his conversation with Ms. West:

Q. So I understand how you got in touch with Ms. West, Danielle West. But then at some point you ended up having a DOT physical.

A. Yes.

Q. How did that occur in relation to your, if it did, in relation to your discussion with Ms. West?

A. (Inaudible) my discussion with Ms. West I noted to her that I had a back injury about a year ago and that I was cleared by a doctor, and she -- I don't know exact words, but she said (inaudible) want put that down because you have to do another DOT physical anyway, and that I would have to pay for it.

Q. So did you go and get the DOT physical?

A. I did later that same week.

Q. Okay. You said you used the word clear. What -- what did that mean to you?

A. It meant my back was fine, I had no pain, I feel great, everything was good.

At the DOT physical, which occurred on 3/15/17, claimant filled out a section titled "Driver Health History", which began with a question "Do you have or have you ever had:", and listed 32 health conditions/problems. After each listed condition/problem claimant had a choice to select either "Yes", "No", or "Not Sure". After "Neck or back problems", claimant selected "No". Directly below these choices was a box with instructions to indicate "other health conditions not described above", with the same choices of "Yes", "No", or "Not Sure". Claimant selected "no" in response to this question.

When asked about his denial of neck or back problems on the DOT physical, claimant testified that: "Due to what Danielle West

informed me to do, that's what I did. I went in doing the physical. I had both (inaudible) just fine with Danielle West instruction. Well, she didn't instruct me. She was saying that I didn't have to note that, so that's what I was doing." He testified again that: "…I told her that I injured my back over - it's been a year (inaudible). And she said, that's okay, don't worry about putting that down. You're going to have to go do another DOT physical anyway, so don't put that down. I guess she - she didn't simply say that application, but she just said you don't have to put that down."

In contrast, Danielle West testified that while she had no independent recollection of speaking with claimant, she did not, and would never, tell an applicant "not to worry about" or not put down information about a prior injury on his DOT physical and/or employment application. She testified that if claimant had mentioned a prior injury she "…would have had him give me documentation as far as being released from his doctor and had the Safety Department review it."

At the 12/6/18 hearing, claimant provided additional and/or different explanations for why he indicated he had never had prior neck or back problems on the DOT physical:

Q. In that big rectangular box you could have discussed and described your back injury and the treatment that you received between July of 2015 and November of 2016, and you did not do that, did you?

A. That would be based on how I felt that day….

Q. Were you answering – what- what time period were you answering those questions for?

A. Just how I felt that day.

He also testified as follows regarding the same issue: "Like I said, when I went to that facility, I knew they had my history, so – I wasn't trying to hide. I went to that facility solely because – because they had my record."

Finally, at the 3/14/19 final hearing, claimant testified that he may have been confused at the 12/6/18 hearing between his DOT physical form and his written application for employment with Coast to Coast.

Claimant further testified that Danielle West called him in August of 2017 to let him know a driving position was now available. He then filled out an employment application, and attached his DOT physical from March of 2017, which is apparently valid for one year. In his employment application with Coast to Coast, claimant indicated the reason for leaving his previous job with Courier Express was "Company Losing Contract".

Claimant was hired by Coast to Coast as a truck driver on 8/8/17. On 12/8/17, claimant alleged he sustained another back injury while trying to lift a steel beam. He reported the injury to his supervisor, Mark Tressler, who sent claimant to MedExpress. He underwent an MRI, and ultimately was authorized

to treat with orthopedic physician Dr. Ragab. After comparing claimant's MRI in 2015 to his new MRI following his 12/8/17 injury, Dr. Ragab indicated claimant may have sustained a reopening of his previous tear at L5-S1. Dr. Ragab recommended physical therapy and epidural steroid injections or facet blocks.

Claimant also saw Dr. Chaumont for an IME in September of 2018. Dr. Chaumont testified that the permanent restrictions he assigned claimant following his 2015 back injury would be the restrictions he would assign following the 12/8/17 work injury.

Bill Cluver, Senior Vice President of Risk Management for the employer, testified that every DOT medical form submitted with an employment application is reviewed by his staff. He testified that applicants may be denied employment based on medical conditions or injuries identified on the DOT physical form. He testified he would not have hired claimant for the "Pep Boys" driving position if he had been provided information about claimant's prior work restrictions, but instead would have tried to place him in another position.

E/C'S DEFENSES OF SECTION 440.15(5)(a), *MARTIN v. CARPENTER*, AND SECTION 440.09(4).

Section 440.15(5)(a), Fla. Stat. (2017) bars workers' compensation benefits for aggravation or acceleration of a

preexisting condition "…if the employee, at the time of entering into the employment of the employer by whom the benefits would otherwise be payable, falsely represents himself in writing as not having previously been disabled or compensated because of such previous disability, impairment, anomaly, or disease and the employer detrimentally relies on the misrepresentation." Similarly, in *Martin v. Carpenter*, 132 So. 2d 400 (Fla. 1961), our Supreme Court held "…that a false representation as to a physical condition or health made by an employee in procuring employment will preclude the benefits of the Workmen's Compensation Act for an otherwise compensable injury if there is shown to be a causal relationship between the injury and the false representation and if it is shown that (1) the employee knew the representation to be false, (2) the employer relied upon the false representation and (3) such reliance resulted in consequent injury to the employer."

Here, neither claimant's DOT physical form, nor the rest of his employment application with Coast to Coast, asks any questions about previous "disability", or about any previous compensation for "disability". While claimant's response to the question about prior neck or back problems on his DOT Physical form was clearly false, a back "problem" is plainly a different concept than a "disability". Moreover, his perhaps

technically accurate (but misleading) statement on his employment application that his reason for leaving his previous job with Courier Express was "Company Losing Contract" is not a false statement regarding previous disability or compensation. As such, Section 440.15(a), Fla. Stat. (2017) cannot bar his entitlement to workers' compensation benefits.

As to *Martin v. Carpenter*, I find that claimant's indication on his DOT physical form that he had never had prior neck or back problems was knowingly false. In fact, one of claimant's differing explanations for his answer was that he was *told* by Danielle West he didn't need to answer that question truthfully. As discussed below, I find that *all* of claimant's "explanations" for his plainly false answer are knowingly and intentionally false, based on my assessment of his credibility and demeanor, and on the inconsistency and lack of logic of his testimony.

I also find the testimony of both Dr. Ragab and Dr. Chaumont establishes a causal connection between claimant's false statement on his DOT Physical form and the injury of 12/8/17. As to the elements of employer reliance and consequent injury, I accept the testimony of Bill Cluver as truthful and credible. I accept Mr. Cluver's testimony that applicants may be denied employment based on medical conditions or injuries identified

on the DOT physical form. I also accept the testimony of Danielle West that if claimant had mentioned a prior injury she "…would have had him give me documentation as far as being released from his doctor and had the Safety Department review it." I find this testimony sufficient to establish both employer reliance and consequent injury. Specifically, this testimony, as well as the totality of Mr. Cluver's testimony, is sufficient to establish that if claimant had answered truthfully about his neck or back injury on his DOT Physical form (which he submitted as part of his employment application), the employer would have investigated further and would not likely has placed him in the position in which he was injured.

Even if the E/C failed to establish all the elements of *Martin v. Carpenter*, I find claimant is barred from benefits based on my finding that he knowingly and intentionally gave false and misleading testimony at the originally scheduled final hearing on 12/6/18 and at the final hearing held on 3/14/19. Section 440.09(4), Florida Statutes (2017) provides "that [a]n employee shall not be entitled to compensation or benefits under this chapter if any judge of compensation claims, administrative law judge, court, or jury convened in this state determines that the employee has knowingly or

intentionally engaged in any of the acts described in s. 440.105 for the purpose of securing workers' compensation benefits." This statute provides the E/C an affirmative defense to claimant's PFB, and the E/C must prove its defense by a preponderance of the evidence. As discussed below, after considering the evidence and argument presented, I am persuaded that claimant knowingly or intentionally made false and/or misleading statements for the purpose of securing workers' compensation benefits at the 12/6/18 hearing, and at the final hearing that occurred on 3/14/19. Consequently, claimant is barred from benefits and his petitions for benefits are therefore dismissed with prejudice.

Initially, I note that while claimant's counsel objected to the E/C raising the defense of misrepresentation related to claimant's testimony at the 12/6/18 hearing, Section 440.29(1) authorizes the JCC to conduct hearings "in such manner as to best ascertain the rights of the parties." The JCC's broad discretion in the conduct of hearings, however, must be exercised in a way that protects the due process rights of the parties. Here, based on claimant's differing and inconsistent explanations at the 12/6/18 hearing for why he falsely indicated on his DOT Physical that he had no prior neck or back problems, the E/C requested to raise misrepresentation pursuant

to section 440.09(4) as an additional defense. As a matter of simple logic and common sense, the E/C could not have raised the issue of the truthfulness of claimant's trial testimony until the testimony was given at the trial. To protect the due process rights of the parties, the court offered a continuance to both parties to review the transcript from the 12/6/18 hearing and do additional discovery and/or call new witnesses to address the issue. While there may have been other, perhaps better, ways to handle the situation, I am confident that the due process rights of the parties were protected, and that the way the issue was addressed was within my statutory authority under chapter 440 and Section 440.29(1), and was consistent with the legislative intent expressed in section 440.015 that cases be decided on their merits.

As argued by the E/C, claimant provided differing, inconsistent, and illogical explanations for why he indicated he had never had prior neck or back problems on the DOT physical. At the 12/6/18 hearing, claimant clearly testified that Danielle West told him one week *before* his DOT Physical that he did not have to put any information down about his prior back injury. At the 3/14/19 final hearing, claimant testified he may have been "confused" about whether this alleged conversation with Ms. West occurred after his DOT

Physical, and was directed to the employment application rather than the physical. I accept Ms. West's testimony that she did not, and would never, tell an applicant "not to worry about" or not put down information about a prior injury on his DOT physical and/or employment application, as credible and truthful. I am persuaded that both of claimant's versions of this alleged conversation are knowingly and intentionally false, and that Danielle West never said any such thing to claimant, before or after his DOT physical.

I find claimant's next "explanation" for his false answer on the DOT Physical, that he answered based on how he was feeling that day, to be evasive, misleading, and inconsistent with his claim that Danielle West told him he didn't need to provide the information. The question on the DOT Physical clearly asks about both the past and the present. If claimant misunderstood the question to only ask about his present condition, then why would claimant offer his alleged conversation with Ms. West as an explanation for his answer? By putting forth Ms. West's alleged instruction, claimant essentially admits he *intentionally* answered untruthfully, which is inconsistent with his additional/alternative explanation of misunderstanding the question.

I further find claimant's third explanation for his false

answer, that he wasn't trying to hide his prior injury because he believed the facility already had his records, to be illogical. If claimant truly believed that the doctor performing the physical knew all about his prior back injury, then his untruthful response would make it *more* likely that such an inconsistency would be noted and flagged for further investigation. To the contrary, claimant's complete omission of any mention of his prior back injury on his DOT Physical and employment application suggest that he believed that disclosing the prior injury would likely prevent him from being hired. While claimant's desire to work is commendable, Section 440.09(4) demands that all statements made in pursuit of workers' compensation benefits be truthful and complete.

Based on the evidence presented, the E/C has persuaded me that claimant's testimony at the 12/6/18 and 3/14/19 hearings was knowingly false, and was made for the purpose of securing benefits. As such, he is barred from all benefits. Given this determination, it is not necessary to address the remaining claims, defenses, or issues raised.

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

1. The E/C's defense pursuant to Section 440.15(5)(a), Fla. Stat. (2017) is DENIED.

2. The E/C's defense pursuant to *Martin v. Carpenter*, 132 So. 2d 400 (Fla. 1961) is GRANTED.

3. The E/C's defense pursuant to Section 440.09(4), Fla. Stat. (2017) is GRANTED.

4. All pending claims and petitions for benefits are DENIED AND DISMISSED WITH PREJUDICE.

5. Claimant is barred from all benefits by operation of Section 440.09(4), Fla. Stat. (2017).

DONE AND ORDERED in Chambers at Altamonte Springs, Seminole County, Florida this 10th day of April, 2019.

Thomas W. Sculco

Thomas W. Sculco
Judge of Compensation Claims
225 S. Westmonte Springs, Suite 3300
Altamonte Springs, Florida 32714

Catherine F. Agacinski, Esquire
wcservice@silveragacinski.com

Derrick E. Cox, Esquire
dcox@hrmcw.com

TRISTAR Risk Management, Inc.
FL.OJCC@Tristargroup.net