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

Employee/Claimant Mark F. James, vs. **Employer #1** Employee Leasing Solutions, Inc. **Carrier/Servicing Agent #1** EastGuard Insurance Company/AmeriChase Services, and **Employer #2** West Volusia Tree Service, **Carrier/Servicing Agent #2** None of Record	)	OJCC Case No. 08-013391TGP Accident date: 4/17/2008

ORDER DENYING COMPENSABILITY AND FINDING CLAIMANT VIOLATED FLORIDA STATUTE §440.09(4) AND §440.105

After proper notice to all parties, this cause came to be heard before the undersigned Judge of Compensation Claims in Daytona Beach, Volusia County, Florida, on August 12, 2009, September 4, 2009, and September 23, 2009. The Petitions for Benefits at issue were filed on the following dates: May 20, 2008, May 20, 2008, August 1, 2008, August 1, 2008, November 6, 2008, November 18, 2008, December 8, 2008, and December 29, 2008. The Claimant, Mark F. James was represented by Attorney Mark Zimmerman. Employer/Carrier #1, Employee Leasing Solutions/East

Guard Insurance Company/AmeriChase Services, was represented by Attorney Gregory White. Employer #2, West Volusia Tree Service, was not represented by an Attorney. The owner of West Volusia Tree Service, Mr. Evan Keller, appeared live in behalf of Employer/Carrier #2 at the Final Hearing date of August 12, 2009, appeared via telephone on September 4, 2009, and waived his appearance at the September 23, 2009, Final Hearing date.

I note that throughout litigation of the workers' compensation case, the undersigned Judge of Compensation Claims has informed Mr. Evan Keller, owner of West Volusia Tree Service, on numerous occasions of his right to contract with an attorney to represent West Volusia Tree Service in defense of this workers' compensation claim. I find that Mr. Keller, in behalf of West Volusia Tree Service, understood his right to counsel and knowingly chose to proceed to Final Hearing in this case without the benefit of legal representation.

Issues and Defenses

The issues as set forth by the Claimant in the Pretrial Questionnaires included: determination of compensability of Claimant's work injury which has been denied by the Employer/Carrier; authorization for payment of continued orthopedic care and treatment with Dr. Royce Hood; payment of various medical bills identified on the Pretrial Questionnaires; payment of temporary total and/or temporary partial disability benefits from April 17, 2008, to date and continuing together with penalties and interest; determination and adjustment of Claimant's average weekly wage and resulting compensation rate to include full time wages, fringe benefits, and concurrent earnings; and penalties, interest, costs and attorney fees.

Employer/Carrier #1, Employee Leasing Solutions/East Guard Insurance Company/AmeriChase Services Company, defended these claims at the various Pretrial

Questionnaires on the grounds that: there is no employer/employee relationship between the Claimant, Mark James, and Employee Leasing Solutions; the injury was occasioned primarily by the intoxication of the Employee and/or by influence of drugs and therefore no benefits due; presumption that the injury was occasioned primarily by the intoxication of the Employee or by the influence of the drugs upon the Employee because the Claimant had a positive drug test; Claimant not entitled to any benefits pursuant to Florida Statute §440.09(4) and §440.105 because he has knowingly or intentionally misrepresented his drug use to obtain Workers' Compensation benefits; the requested medical care is not medically necessary or causally related; requested bills are not medically necessary or causally related; the claim is not compensable; the average weekly wage is correct; Claimant is not entitled to temporary total disability and/or temporary partial disability; voluntary limitation of income/deemed earnings; any loss of earnings is not related to the industrial accident; the Claimant is not entitled to any benefits pursuant to Florida Statute §440.09(4) and Florida Statute §440.105 because he knowingly or intentionally misrepresented his post-injury earnings in order to obtain Workers' Compensation benefits; and the Employee is not entitled to penalties, interest, costs or attorneys fees.

At the Hearing, Employer #2, West Volusia Tree Service, adopted the defense asserted by Employee Leasing Solutions that the injury was occasioned primarily by the intoxication of the Employee and/or by the influence of the drugs and therefore no benefits are due. Additionally, at the Hearing, Employer #2, West Volusia Tree Service, adopted the defense asserted by Employee Leasing Solutions that the Claimant is not entitled to any benefits pursuant to Florida Statute §440.09(4) and §440.105, because he has knowingly or intentionally misrepresented his drug use and post-injury earnings in order to obtain Workers' Compensation benefits. Additionally, at the

Hearing, Employer #2, West Volusia Tree Service, adopted the position of the Claimant that an Employer/Employee relationship existed with Employee Leasing Solutions on the date of accident. Further, Employer #2, West Volusia Tree Service, asserted that the Claimant was not an employee of West Volusia Tree Service at the time of the industrial accident of April 17, 2008.

Previously in this case, this Court determined the Claimant's Motion for Summary Final Order under Rule 60Q-6.120. This Court entered an order on March 19, 2009, which "granted in part" and "denied in part" the Motion for Summary Final Order. This Court ordered that the Employer/Carrier's drug intoxication defense pursuant to Florida Statute §440.09(7)(b) was stricken with prejudice. This Court also ordered that the Employer/Carrier's drug intoxication defense pursuant to Florida Statute §440.09(3) should stand subject to the Court's factual findings and determinations which are to be made at the time of the final hearing.

Statement of the Case

The Claimant is a forty-nine year old male who was performing work as a tree trimmer on April 17, 2008. On the date of accident the Claimant fell from a tree and suffered a fractured leg and lower extremity injury. Dr. Royce Hood, orthopedic surgeon, preformed surgery at Florida Hospital.

The Claimant has received no authorized medical care or indemnity benefits. Petitions for Benefits regarding this incident have been filed against two employers; Employee Leasing Solutions and West Volusia Tree Service. These Petitions for Benefits are consolidated to be determined within the contents of this Order.

Documentary Evidence

At the Final Hearing in this case, the following documentary evidence was admitted:

JCC's Exhibit #1	Pretrial Questionnaire and Order of the undersigned dated December 16, 2008.
JCC's Exhibit #2	Composite of Supplemental Stipulations, Witness Lists, and Exhibit Lists filed by the Claimant.
JCC's Exhibit #3	Composite Exhibit of Supplemental Pretrial Stipulations, Witness Lists, and Exhibit Lists filed in behalf of Employee Leasing Solutions/Guard Insurance Company/AmeriChase Services Company.
JCC's Exhibit #4	Composite Exhibit including "Order on Employer/Carrier's Motion to Appoint Dr. Hillman as Toxicological Expert", dated February 24, 2009, with accompanying Motion and Response filed by the Claimant.
JCC's Exhibit #5	Composite Exhibit of various Court pleadings with notice provided to West Volusia Tree Service, via certified mail, including copies of green card receipts.
JCC's Exhibit #6	Employee/Claimant's Hearing Information Sheet or Memorandum, admitted for argument purposes only.
JCC's Exhibit #7	Employee Leasing Solutions' Trial Memorandum, admitted for argument purposes only.
JCC's Exhibit #8	Record of Proceedings of Motion Hearing held before this Court on February 18, 2009, on "Employer/Carrier's Motion to Appoint Dr. Hillman as Toxicological Expert" and "Claimant's Motion for Protective Order/Motion to Strike Dr. Hillman".
JCC's Exhibit #9	Record of Proceedings before this Court held on April 22, 2009, regarding "Claimant's Motion to Strike".
JCC's Exhibit #10	Composite Exhibit, admitted post-hearing, including "Claimant's Motion to Allow Post-Hearing/Rebuttal Testimony", Employee Leasing Solutions' Response, and Notice of Hearing for September 23, 2009.

Claimant's Exhibit #1	Deposition of Royce E. Hood Jr., M.D., taken January 5, 2009, with attachments.
Claimant's Exhibit #2	Deposition of William Westfall, Jr., taken April 8, 2009.
Claimant's Exhibit #3	Deposition of Tracy Cochran, taken August 4, 2009.
Claimant's Exhibit #4	Deposition of Donald J. Ditaranto, taken August 4, 2009.
Claimant's Exhibit #5	Deposition of Timothy Andrew McMillen, taken April 8, 2009.
Claimant's Exhibit #6	Deposition of Gregory Mills, taken February 2, 2009, with attachments.
Claimant's Exhibit #7	Composite Exhibit including "Order on Employee/Claimant's Motion for Summary Final Order Under Rule 60Q-6.120 Regarding Drug Intoxication Defense", entered March 19, 2009, with accompanying Motion and attachments.
Claimant's Exhibit #8	Deposition of Daniel Keller, taken April 15, 2009.
Claimant's Exhibit #9	Composite Exhibit of various Employee Earnings Reports or Temporary Partial Disability Forms, filed by the Claimant with the Employer/Carrier.
Claimant's Exhibit #10	Deposition of Kathy McNamara, taken April 22, 2009.
Claimant's Exhibit #11	Subpoena Duces Tecum for Merit Hearing sent to Joanne Bell or the current adjuster assigned to the Claimant at East Guard Insurance Company.
Employee Leasing Solutions' Exhibit #1	Deposition of Pedro Yepez-Hoyoz, M.D., taken November 6, 2008, with attachments.
Employee Leasing Solutions' Exhibit #2	Deposition of Dr. Gwen McMillan, taken April 1, 2009.

Employee Leasing Solutions' Exhibit #3	Deposition Gwen McMillan, PHD, taken September 23, 2008, with attachments.
Employee Leasing Solutions' Exhibit #4	Deposition of Corey Yordon, take February 19, 2009, with attached records of Florida Hospital Fish.
Employee Leasing Solutions' Exhibit #5	Deposition of Rhonda Carmichael ,taken September 16, 2008, with attached records of Orange Park Medial Center.
Employee Leasing Solutions' Exhibit #6	Deposition of Martha Marsha, taken July 10, 2009, with attachments.
Employee Leasing Solutions' Exhibit #7	Deposition of Brenda Navin, taken February 3, 2009.
Employee Leasing Solutions' Exhibit #8	Deposition of Jason Tucker, taken August 4, 2009.
Employee Leasing Solutions' Exhibit #9	Deposition of David Turner Jr., taken April 8, 2009, with attachments.
Employee Leasing Solutions' Exhibit #10	Deposition of Gail Meadows, taken January 22, 2009, with attachments.
Employee Leasing Solutions' Exhibit #11	Employee Leasing Solutions Leasing Agreement with West Volusia Tree Service, signed June 8, 2007.
Employee Leasing Solutions' Exhibit #12	Composite Exhibit including "Order on Employer/ Carrier's Motion for Judicial Notice" and attached records regarding Hurricane Ike.
Employee Leasing Solutions' Exhibit #13	Deposition of Mark James, taken July 14, 2008.
Employee Leasing Solutions' Exhibit #14	Deposition of Mark James, taken April 7, 2009.
Employee Leasing Solutions' Exhibit #15	Deposition of Mark James, taken July 6, 2009.
Employee Leasing Solutions' Exhibit #16	Deposition of Evan E. Keller, taken February 3, 2009, with attachments.

Employee Leasing Solutions' Exhibit #17	Composite Exhibit of various Notices of Denial filed in this case.
Employee Leasing Solutions' Exhibit #18	Composite Exhibit of "Order Denying Claimant's Motion to Strike, Alternatively, Motion in Limine, Without Prejudice", dated May 4, 2009, with attached Motion and Response.
Employee Leasing Solutions' Exhibit #19	Subpoena Duces Tecum for Trial, dated August 4, 2009, to Mr. Osvaldo Sibila.
Employee Leasing Solutions' Exhibit #20	Deposition of Osvaldo Sibila, taken August 24, 2009, admitted post-hearing.
Employee Leasing Solutions' Exhibit #21	Portions of deposition of Dr. James V. Hillman, MD, taken April 6, 2009, with attachments, admitted over objections. The Court has stricken various portions of Dr. Hillman's deposition as indicated in the contents of the deposition.

At the initial day of Hearing, August 12, 2009, Mr. Evan Keller, in behalf of West Volusia Tree Service, offered documents including a medical review office report and a "treeworknow.com" brochure. These exhibits were not admitted into evidence pursuant to objections raised at Hearing, but have been identified for the Record as West Volusia Tree Service Exhibit's "A" and "B" respectively.

Preliminary Determinations:

Order dated March 19, 2009, Striking Presumption Only

Previously, by Order dated March 19, 2009, this Court ordered that the Employer/Carrier's drug intoxication defense pursuant to Florida Statute §440.09(7)(b) was stricken with prejudice. However, the Order also indicated that the Employer/Carrier's drug intoxication defense pursuant to Florida Statute §440.09(3) shall stand subject to this Court's factual findings and determinations which are to be made at the time of Final Hearing. As such, this Court has attempted to determine

the merits of the Employer/Carrier's drug intoxication defense raised under Florida Statute §440.09(3) in the contents of this Order. Notwithstanding the March 19, 2009, Order, I note that at times during the prosecution of this claim, the Claimant has argued that this Court has previously ruled that the Claimant's "due process" rights have been compromised due to the failure of the laboratory director of Florida Hospital Fish Memorial and Orange Park Medical Center to comply with the procedures set forth in the Florida Administrative Code, including failure to follow the "chain of custody" requirements and failure to collect a "split sample". Although the undersigned Judge of Compensation Claims has found that the Employer/Carrier is not entitled to the presumption set forth in Florida Statute §440.09(7)(b), I reject the Claimant's argument that this finding is tantamount to a determination that the Claimant's "due process" rights have been compromised with regards to the intoxication defense asserted under Florida Statute §440.09(3).

I note the March 19, 2009, Order of this Court does not mention the words "due process", but does find that the Claimant has been unfairly prejudiced by his inability to conduct his own independent testing for use in rebutting the Employer/Carrier's drug intoxication defenses and as such, the presumption set forth in Florida Statute §440.09(7)(b) was stricken. The March 19, 2009, Order goes on to expressly state that the Employer/Carrier's drug intoxication defense pursuant to Florida Statute §440.09(3) shall stand subject to this Court's factual findings and determinations made at the time of Final Hearing. Accordingly, I find the plain meaning of the March 19, 2009, Order clearly identified that this Court has made no rulings under Florida Statute §440.09(3), but struck only the intoxication defense and accompanying presumption asserted by the Florida Statute §440.09(7)(b). As such, this Court rejects the Claimant's argument that this Court has previously decided the issue that the Claimant's "due process" rights have been compromised with regard to the

Employer/Carrier's defense pursuant to Florida Statute §440.09(3). I also specifically reject the Claimant's argument that this Court previously decided that the Claimant has been unfairly prejudiced with regard to the Employer/Carrier's defense under Florida Statute §440.09(3).

Alternatively, to the extent that it is determined that the Order of this Court dated March 19, 2009, is interpreted to suggest that this Court struck the Employer/Carrier's drug intoxication defense under Florida Statute §440.09(3) or made any determination that the Claimant has been unfairly prejudiced with regard to that defense, a position I reject, the Order of March 19, 2009, is hereby modified and amended to clarify this Court's ruling that this Court made no determination at the time of the March 19, 2009, Order with regard to the defense asserted by the Employer/Carrier under Florida Statute §440.09(3) or whether the Claimant has been unfairly prejudiced in regard to that defense.

Dr. Hillman

Previously, by Order dated February 24, 2009, this Court reserved jurisdiction to determine the admissibility to Dr. Hillman's deposition as a toxicology expert offered by Employer Leasing Solutions in this case. I note a similar Order was entered in this case dated May 4, 2009, denying without prejudice the Claimant's Motion to Strike Dr. Hillman's testimony. After reviewing the totality of evidence in this case, including the Record of Proceedings from the prior Motion Hearings conducted February 18, 2009, and April 22, 2009, on these issues, the undersigned hereby sustains objections raised by the Claimant to certain portions of Dr. Hillman's testimony, but also overrules objections raised by the Claimant to other portions of Dr. Hillman's deposition testimony. As such, the deposition has been admitted into evidence as Employee Leasing Solutions Inc.'s Exhibit #21, over objection of the Claimant. This Court has attempted to make hand-written notations in the

margin of Dr. Hillman's deposition reflecting various rulings on the objections raised by the Claimant.

Particularly, this Court hereby sustains the objections raised by the Claimant to the portions of Dr. Hillman's testimony where Dr. Hillman makes any medical opinion referencing the Claimant's medical condition. In making this finding, I accept the Claimant's argument that Dr. Hillman is not an expert medical advisor, not an independent medical examiner, and not an authorized treating provider in this case. I find that Dr. Hillman's medical opinions are not admissible pursuant to Florida Statute Section 440.13(5)(e), which permits medical opinion testimony only by an expert medical advisor, independent medical examiner or authorized treating provider. Additionally, this Court has stricken any portion of Dr. Hillman's testimony where he may state or reiterate various medical reports, physicians' opinions, or laboratory results of the Claimant as inadmissible hearsay. Dr. Hillman's testimony has been admitted to the extent that it is purely factual in nature and does not contain hearsay, pursuant to the authority of Office Depot, Inc. and Kemper Insurance Companies v. Sally Sweikata, 737 So. 2d 1189 (Fla. 1st DCA 1999). However, I also find that whether Dr. Hillman's testimony is entirely admitted or entirely stricken, all rulings in this case would remain the same based on the totality of remaining evidence.

To the extent that any party in this case requested a possible continuance of the Final Merit Hearing due to the pending rulings of this Court regarding the admissibility of Dr. Hillman's testimony, this Court hereby denies all requests for continuance and finds there is no good cause to continue this matter. Further, I find that the admission of various portions of Dr. Hillman's testimony is not unfairly prejudicial to any party in this case. All parties had ample time to prepare for or rebut Dr. Hillman's testimony with the knowledge that this Court did not determined the

admissibility of Dr. Hillman's testimony prior to the time of Trial. In this regard, I reference this Court's Orders of February 24, 2009, and May 4, 2009, specifically reserving jurisdiction to determine objections raised by the Claimant to Dr. Hillman's testimony. I cannot find that any reason for continuance in this case can be considered as "good cause" or for reasons outside the control of the moving party. I find that the prior rulings of this Court, specifically reserving jurisdiction to determine admissibility of Dr. Hillman's testimony, allowed the parties ample time to prepare for any contingency that might occur with regard to the admission of Dr. Hillman's testimony.

Additionally, I deny Employee Leasing Solutions' request at Hearing to designate Dr. Hillman as an expert medical advisor, independent medical examiner, or authorized treating provider. I accept the Claimant's argument that Employee Leasing Solutions failed to timely designate Dr. Hillman as an IME physician for use at the time of the instant Merit Hearing. Consistent with this finding, I note that Employee Leasing Solutions specifically stated in their "Motion To Appoint Dr. Hillman As Toxicological Expert", filed January 29, 2009, that; "Dr. Hillman is not being offered to provide medical opinions", JCC's Exhibit #4. By making this determination this Court does not find that the parties are not entitled to IMEs in this case. This Court merely finds that Employee Leasing solutions failed to timely designate Dr. Hillman as an IME physician for use at the time of the instant Merit Hearing. Again, I also note that whether Dr. Hillman's testimony is entirely admitted or entirely stricken, all rulings would remain the same in this case based on the totality of remaining evidence.

Additionally, I note that at the Final Merit Hearing, the Claimant withdrew any Frye objection to the testimony of Dr. Hillman.

Laboratory Data and Blood Test Results

The Claimant in this case has taken the position that the blood test results and any testimony based upon those results are inadmissible. This Court hereby overrules the objection raised by the Claimant to the laboratory data offered by the Employee Leasing Solutions in this case. I find that Employee Leasing Solutions has satisfied their burden of proof with regard to admission of evidence of the hospital medical records, including laboratory tests preformed on the Claimant immediately following the accident at Florida Hospital Fish Memorial and with regard to the Claimant's hospitalization in 2006 at Orange Park Medical Center.

I find that Employee Leasing Solutions has shown through the deposition testimony Gail Meadows, Dr. Yepez-Hoyos, and Dr. Gwen McMillin, as well as various record custodian depositions in evidence, that the medical records of Florida Hospital Fish Memorial and Orange Park Medical Center were reliable records made for the purpose of medical treatment. With regard to the records from both Florida Hospital Fish Memorial and Orange Park Medical Center, I find that Employee Leasing Solutions has satisfied each of the following: they were records that were made at or near the time of the event recorded; they were records that were kept in regular course of regular conducted business activity; that it was a regular practice of the businesses to keep the records; and that the information in the records were supplied by a person acting in the course of the regularly conducted business activity. I find these records are reliable as they are the type of record relied upon by the hospital in their daily affairs and the records are checked for correctness. I find that the records indicating the Claimant's vital signs, symptoms, behavior, laboratory test results, and physical examination findings have been admitted based upon the necessary foundation proven by Employee Leasing Solutions in this case. As testified by many of the witnesses in this case, the test,

particularly the blood sample and urine sample reflecting illicit drug use by the Claimant at the time of the accident as well during the course of his hospitalization in 2006, were used for purposes of medical treatment. I accept the argument of Employee Leasing Solutions that there were no indicia of unreliability regarding the methods of collecting the blood specimen or urine specimen, testing the specimens, or performing the confirmatory testing of the specimens.

Additionally, although this Court has stricken the presumption defense raised under Florida Statute §440.09(7), I accept the argument of Employee Leasing Solutions that the blood sample results are admissible in this case for purposes of demonstrating that the Claimant's injury was occasioned primarily by the intoxication of the Employee under Florida Statute §440.09(3). I accept the case law citations presented by Employee Leasing Solutions in this regard including: Temporary Labor Source v. E. H., 765 So. 2nd 757 (Fla. 1st DCA 2000) and European Marble Company and CNA v. Robinson, 885 So. 2nd 502 (Fla. 1st DCA 2004). I also note the case of Andres v. Gilberti, 592 So. 2nd 1250 (Fla. 4th DCA 1992), regarding admissibility of the blood and urine test results. Further, I note the case of Love v. Garcia, 634 So. 2nd 158 (Fla. 1994) and the case of Brock v. State, 676 So. 2nd 991 (Fla. 1st DCA 1996). In Brock, the First DCA held:

> If a laboratory or hospital records custodian or other qualified witness establishes a proper predicate under Section 90.803(6), Florida Statute, the burden is on the party opposing the introduction to prove the untrustworthiness of the records. If the opposing party is unable to carry this burden, then the record will be allowed into evidence, as a business record.

Accordingly, under the facts of the present case, I find that Employee Leasing Solutions has satisfactorily demonstrated the proper predicate under Florida Statute §90.803(6), for the admission of the Florida Hospital Fish Memorial medical records, including the blood sample test results following the date of accident, and the medical records of Orange Park Medical Center in 2006

including the urine sample test results taken at that time. Further, I find that the Claimant in this case has not been able to introduce or prove the untrustworthiness of these records. Additionally, I find that the records in dispute are relevant to the underlying workers' compensation claim and pending defenses in this case. I make these findings despite the Claimant's argument that he was not afforded a "split sample" and that Florida Hospital Fish Memorial did not otherwise follow the procedures set forth in the Florida Administrative Code with regard to the "chain of custody" requirements therein.

I also find that the medical records of Florida Hospital Fish Memorial as well as Orange Park Medical Center, including the blood and urine sample test results following the date of accident and reported by Orange Park Medical Center in 2006, are admissible as factual reports of the information contained in such records under the authority of Office Depot, Inc. and Kemper Insurance Companies v. Sally Sweikata, 737 So. 2d 1189 (Fla. 1st DCA 1999).

As such, this Court hereby overrules the Claimant's objections to the admissibility of Employee Leasing Solutions' Exhibits #1, #2, #3, #4, #5, #6, and #10 and hereby admits the depositions and attachments in evidence, to include laboratory data and test reports regarding Claimant's blood and urine samples. I find that Employee Leasing Solutions has established the proper foundation and predicate for the admission of this evidence. In support of this finding I, again, reference the deposition testimony of Gail Meadows, Dr. Yepez-Hoyos, Dr. Gwen McMillin, as well as the attached records of Florida Hospital – Fish Memorial and Orange Park Medical Center, describing the policies and procedures followed with regard to the blood and urine specimens that were drawn from the Claimant immediately following the date of accident and in 2006. I also note the corresponding testimony regarding the reliability of the procedures and testing preformed at ARUP Laboratories with confirmatory testing regarding the blood samples that were drawn from the

Claimant immediately following the date of accident in this case.

Brenda Navin

At the Hearing, the Claimant objected to various portions of the deposition testimony of Brenda Navin, underwriter for Guard Insurance Group, in evidence as Employee Leasing Solutions' Exhibit #7. The undersigned has reviewed the deposition of Brenda Navin and hereby overrules each of the objections raised to the deposition testimony of Brenda Navin. I note, however, that even if the testimony of Brenda Navin was stricken pursuant to all objections raised by the Claimant, a position I reject, each of the rulings in this case would remain the same based upon the totality of remaining evidence in this case.

Motion to Admit Post-Hearing/Rebuttal Testimony

This Court hereby grants the Claimant's Motion to Allow Post-Hearing/Rebuttal Testimony and, as such, the Claimant's live testimony presented on September 23, 2009, is admitted in evidence and given appropriate weight as described in the contents of this Order.

Remaining Evidentiary Matters

This Court herby overrules any objection raised to evidence offered by a party not specifically identified by the undersigned in the contents of this Order or at Trial.

Findings of Fact and Conclusions of Law

In making my findings of fact and conclusions of law in this matter, I have carefully considered and weighed all the testimony and evidence presented to me including all the live testimony as well as the documentary exhibits and I have resolved any and all conflicts therein. After having carefully considered the arguments of the parties and all evidence presented in this case, I make the following findings of fact and conclusions of law:

1. The stipulations of the parties as listed above and as identified in the Pretrial Questionnaire are approved and adopted by me.

2. This Court has jurisdiction over the subject matter and over the parties.

3. In making the determinations set forth below, I have attempted to distill the testimony and salient facts together with the findings and conclusions necessary for the resolution of this claim. I have not attempted to painstakingly summarize the substance of all the documentary evidence or the testimony of the witness nor have I attempted to state nonessential facts. Because I have not done so does not mean I have failed to consider all the evidence.

Misrepresentation Defense Under Florida Statute §440.09(4) and §440.105

4. I find that Employee Leasing Solutions and West Volusia Tree Service satisfied their burden of proof, beyond a preponderance of evidence, that the Claimant knowingly and intentionally violated Florida Statute §440.09(4) and §440.105. I find the Claimant made material, false representations in order to secure Workers' Compensation benefits. Florida Statute §440.09(4)(a) provides that:

> An 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 or any criminal act for purpose of securing workers' compensation benefits…this Section shall apply to all accidents, regardless of the date of accident…

5. Additionally, Florida Statute §440.105 (1-3) provides:

It shall be unlawful for any person:

1. To knowingly make, or cause to be made, any false, fraudulent, or misleading oral or written statement for the purpose of obtaining or denying any benefit or payment under this chapter.

2. To present or cause to be presented any written or oral statement as part of, or in support of, a claim for payment or other benefit pursuant to any provision of this chapter, knowing that such statement contains any false, incomplete, or misleading information concerning any fact or thing material to such claim.

3. To prepare or cause to be prepared any written or oral statement that is intended to be presented to any employer, insurance company, or self-insured program in connection with, or in support of, any claim for payment or other benefit pursuant to any provision of this chapter, knowing that such statement contains any false, incomplete, or misleading information concerning any fact or thing material to such claim.

Misrepresentation of Drug Use

6. I find that the Claimant violated both Florida Statute §440.09(4) and Florida Statute §440.105, at the time he gave testimony under oath at his various depositions. In the Claimant's first deposition on July 14, 2008, the Claimant denied any illegal drug use aside from his marijuana use last when he was approximately twenty-one years old. Additionally, the Claimant denied ever being treated for drug or alcohol abuse (Deposition of Claimant, July 14, 2008, page 17, 18). Additionally, the Claimant specifically denied using Cocaine prior to the date of accident or using any illicit drugs prior to the accident (Deposition of the Claimant, July 14, 2008, page 30). The Claimant denied ever using Cocaine in his life (Deposition of the Claimant, July 14, 2008, page 30).

7. Despite the Claimant's denial of prior drug use at his depositions, the testing following the industrial accident showed Methadone use and illegal Cocaine use. The medical records of Orange Park Medical Center showed illegal drug use in June 2006, including Cocaine and Marijuana. As such, I find that the Claimant has violated Florida Statute §440.09(4) and §440.105 by knowingly making material, oral misrepresentations pertaining to his illegal drug usage and, particular, his use of drugs at the time of the industrial accident, and that these misrepresentations were made in pursuit of workers' compensation benefits.

8. I note that the Claimant's denial of illicit drug use initially occurred at his deposition taken on July 14, 2008. This deposition was taken subsequent to the initial Notice of Denial issued in this case, dated April 23, 2008, setting forth the reason for denial; that the Claimant tested positive and that the injury was presumed to have occurred primarily by the influence of such a drug. The Notices of Denial are in evidence as Employee Leasing Solutions' Exhibit #17. I also note the first Petition for Benefits in this case was filed on May 20, 2008. Based on the timing of these events, this Court's review of the Court file, as well as on the totality of evidence, I find it is logical and reasonable to conclude that the Claimant's representations made at the July 14, 2008, deposition were made in pursuit of Workers' Compensation benefits.

9. In making these findings, I take into account the opinion of the First DCA in Village of North Palm Beach and Employers Mutual Inc. v. John McKale, 911 So. 2nd 1282 (Fla. 1st DCA 2005), where the First DCA held:

> The JCC is only required to determine whether the claimant knowingly or intentionally made any false, fraudulent, incomplete, or misleading statement whether oral or written for the purpose of obtaining workers' compensation benefits, or in support of his claim for benefits... significantly, it is not necessary that a false, fraudulent, or misleading statement be material to the claim; it must be made for purposes of obtaining benefits...

Notwithstanding the ruling in Village of North Palm Beach and Employer's Mutual cited above, I find that the Claimant's misrepresentations with regard to prior illicit drug use and illicit drug use at the time of the industrial accident are material to this case, particularly material to the defenses raised by Employee Leasing Solutions prior to the Claimant's deposition and raised since the onset of this workers' compensation case.

10. I accept the argument of Employee Leasing Solutions as adopted by West Volusia Tree Service, that the Claimant violated Florida Statute §440.09(4) and §440.105 when he knowingly and intentionally misrepresented his use of Methadone at deposition. The Claimant testified at his July 14, 2008, deposition, that he was not on any prescription medication at the time of the accident on April 17, 2008 (Deposition of the Claimant, July 14, 2008, page 22). Yet, during his live testimony before this Court on August 12, 2009, the Claimant changed his testimony and admitted to using prescribed Methadone medication. I reject the Claimant's testimony and explanation at Hearing with regard to his failure to admit to the use of Methadone at the time of his deposition in July 2008. Instead, I find that the Claimant intentionally misrepresented his use of medication at the time of his deposition. I base this finding on this Court's observation of the candor and demeanor of the Claimant while testifying live. Additionally, I base this finding on the ample evidence in the Record demonstrating the presence of Methadone and Benzodiazepines in the drug screens preformed in this case. Again, I note that the Claimant's drug use is particularly relevant to the defense asserted in this case prior to the Claimant's July 2008 deposition, including the presumption under Florida Statute §440.09(7) and defense raised under Florida Statute §440.09(3). I find that it is unreasonable and illogical, under the totality of circumstances in this case, for the Claimant to omit or forget that he was using prescription drugs such as Methadone at the time of the industrial accident.

11. I accept the argument of Employee Leasing Solutions as presented at closing arguments that the Claimant's admission to the use of Methadone as a prescription drug is consistent with the test results in this case taken following the industrial accident and the test results in June 2006, both which clearly showed the Claimant's usage of Methadone. The Claimant's admission to

the use Methadone at Hearing is consistent with the argument of Employee Leasing Solutions that the drug test and laboratory data following the June 2006 hospitalization as well as following the industrial accident are valid and reliable. Again, I accept the argument of Employee Leasing Solutions that the Claimant has presented no evidence that the laboratory results following the blood test and urine samples taken from the Claimant are unreliable. I accept the argument of Employee Leasing Solutions that it is highly unlikely and improbable that the drug results from both Orange Park Medical Center as well as Florida Hospital-Fish Memorial are inaccurate as argued by the Claimant, yet both include the prescription drug Methadone which the Claimant admitted to using.

12. Additionally, I find the Claimant intentionally made material oral misrepresentations with regard to his hospitalization at Orange Park Medial Center occurring in June 2006. I note that the Claimant in his deposition testimony on July 14, 2008, denied being hospitalized ever in his life, except for the date of accident in this case as well as one prior work related injury involving his left arm (Claimant's deposition, July 14, 2008, page 20). Yet, at his subsequent deposition of April 7, 2009, the Claimant did recall being hospitalized at Orange Park Medical Center in June 2006, but could not recall the reason for his hospitalization (Deposition of Claimant, April 7, 2009, pages 28, 29, and 30). I note at the April 7, 2009, deposition, the Claimant again denied the use of illicit drugs and had no explanation for why he may have tested positive for both Cocaine and Marijuana during his hospitalization in 2006. Contrary to his prior deposition testimony, at the Hearing on August 12, 2009, the Claimant did recollect facts surrounding his hospitalization in June 2006 in Orange Park Medical Center and testified that he was hit on the head and was robbed and that was the reason for his hospitalization. I find the Claimant's explanation for his failure at deposition to recollect events surrounding his hospitalization in 2006 is illogical under theses circumstances. I also reject the

Claimant's testimony on these issues, particularly with regard to his denial of illicit drug use at the time of his industrial accident, based upon this Court's observation of his candor and demeanor while testifying live. Again, I note the Claimant's misrepresentations in this case are material to the defenses raised by Employee Leasing Solutions from the onset of this claim and go to the defense of whether or not the Claimant's work injury was the result of intoxication or influence of any drugs.

13. Additionally, to the extent that the Claimant denied any illicit drug use during the course of his live testimony before this Court, I make similar findings; that the Claimant knowingly misrepresented his use of illicit drugs in pursuit of Workers' Compensation benefits at the time of Trial.

Misrepresentation of Subsequent Earnings

14. I accept the argument of Employee Leasing Solutions that the Claimant misrepresented his earnings following the date of accident at his deposition and in the Employee Earnings Report filed with the Employer/Carrier. I accept the argument of the Employee Leasing Solutions as supported by the deposition testimony of Osvaldo Sibila, Employee Leasing Solutions Exhibit #20. Mr. Sibila testified that the name of his business is "O. B. and Son Tree Service and Handyman" (Deposition Mr. Sibila, page 5). Mr. Sibila testified that the Claimant began working for him sometime prior to November or December 2008, when the Claimant began to live with Mr. Sibila (Deposition Mr. Sibila, page 9). Mr. Sibila further testified that the Claimant last performed work for Mr. Sibila in August 2009 (Deposition Mr. Sibila, page 10). Mr. Sibila testified that the Claimant would typically work four or five days a month for cash, but there were times he did not receive cash and instead would be paid with room and board (Deposition Mr. Sibila, page 11). Mr. Sibila estimated that the amount of cash paid to the Claimant over this period of time was less than

five hundred dollars (Deposition Mr. Sibila, page 22). In the Employee Earnings Reports filed with the Employer/Carrier in this case, Claimant's Exhibit #9, the Claimant identified earnings with O. B. and Son Tree Service and Handyman for February and March 2009, in the amount of one hundred and ninety dollars. I note the Claimant sets forth no additional earnings with O. B. Tree Service throughout the contents of the Employee Earnings Reports, April 18, 2008, through June 30, 2009, and no room or board. I accept the position of the Employee Leasing Solutions that the Claimant misidentified the extent of his earnings with O. B. and Sons Tree Service and consistently misrepresented his place of residence which corresponded to his employment with O. B. and Sons Tree Service during his period of employment.

Intoxication Defense Under Florida Statute §440.09(3)

15. I find that Employee Leasing Solutions and West Volusia Tree Service satisfied their burden of proof, by a preponderance of evidence, that the Claimant's accident of April 17, 2008, was occasioned primarily by the intoxication of the Claimant, including the influence of drugs, pursuant to Florida Statute §440.09(3). In making this finding, I again accept the laboratory data indicating the presence of Methadone and illegal Cocaine in the Claimant's system immediately following the industrial accident. I also note, again, that at Hearing, the Claimant modified his prior testimony and did admit to taking Methadone as a prescription drug. I find this admission by the Claimant at Hearing is consistent with the laboratory data and is consistent with this Court's finding that the Claimant fell out of a tree on April 17, 2008, primarily due to his intoxication.

16. I find it is logical and reasonable to conclude, based upon the totality of evidence, including the various lay testimony presented by Employee Leasing Solutions in this case, that the Claimant's accident occurred primarily due to his intoxication. I reject the Claimant's description of

his accident and mechanism of injury based upon this Court's observation of the candor and demeanor of the Claimant. I find that the Claimant is an incredible witness. I base this finding on the Claimant's numerous inconsistencies and modifications of his testimony during the course of these proceedings. I cannot rely on the Claimant's testimony at Hearing, particularly his description of the mechanism of injury in this case. In making this finding, I note that the accident was not witnessed; however, I cannot find that the Claimant's testimony by itself is competent substantial evidence and meets the standard of a preponderance of evidence to satisfy his burden of proof in this case. Instead, I find that the evidence presented by Employee Leasing Solutions is far more logical, reasonable, and consistent with the totality of evidence in this case, including the objective laboratory data, Claimant's own testimony that he utilized Methadone, and the various lay witnesses in this case.

17. As previously stated, I find that, even if Dr. Hillman's testimony in its entirety was not admitted in evidence, the rulings in this case would be the same based upon the totality of remaining evidence. Nevertheless, I note Dr. Hillman's testimony is consistent with the findings herein. I note that various portions of Dr. Hillman's testimony in evidence support the determination by this Court that the Methadone appearing in the Claimant's system, not denied by the Claimant at Hearing, would cause someone to have diminished cognitive functions; diminished neuromuscular functions; diminished cerebella functions; diminished coordination, and would lead to bad coordination and bad judgment (Deposition of Dr. Hillman, page 15). Dr. Hillman testified as follows:

> But just having the therapeutic level of Methadone would cause somebody to be impaired from doing cognitive neuromuscular functions that require not only strength, but coordination (Deposition of Dr. Hillman, page 17).

Additionally, Dr. Hillman testified on page 17 of his deposition that:

> Q. Now, somebody who is receiving a therapeutic level of Methadone and possibly even a higher than therapeutic level of Methadone - - would there be any activities that they would be restricted from?
>
> A. Sure. If one were - - a physician or to prescribe Methadone to an individual for legitimate reasons, that the admonition or the warning that would be expected that would go along with that medication is not to drive, not to use heavy equipment or equipment; not to engage in dangerous physical activities, that indeed, require coordination and neuromuscular function as well as cognitive function and being able to think and make good judgments etc.
>
> Q. Would that include an activity such as climbing a tree or tree trimmer?
>
> A. I think it would.

18. I note that the lay testimony in this case overwhelmingly establishes that a tree trimmer is dangerous activity. I find it is logical and reasonable under the totality of the circumstances in this case to conclude that tree trimmer work, such as the work preformed by the Claimant on the date of accident, was dangerous activity requiring coordination and neuromuscular function as well as cognitive function.

19. Consistent with this finding, I note the deposition testimony of William Westfall Jr., in evidence as Claimant's Exhibit #2. Mr. Westfall was employed by West Volusia Tree Service and worked with the Claimant at the time of the accident on April 17, 2008. Mr. Westfall testified that it would be very unsafe for a tree climber to be climbing a tree and working while under the influence of drugs (Deposition of Mr. Westfall, page 21). Mr. Westfall testified on page 21 of his deposition as follows:

> Q. Would it be fair to say that it would be very unsafe for a tree climber to be climbing a tree and working while under the influence of drugs?
>
> A. Yea, I would say so.

Q. Do you think that - -

A. I mean, yea. That's kind of dangerous up there, up know.

Q. Do you think that would have a high probability in resulting in some type of unsafe condition or accident?

A. Yes – Sir.

20. I find that Mr. Westfall's testimony regarding a high probability that a tree climber climbing up a tree while under the influence of drugs would result in an unsafe condition or accident is logical and reasonable under the totality of circumstances of this case, and is most reasonable with the diagnostic test results and Claimant's own admission of his use of Methadone at Hearing.

21. I accept the closing argument of Evan Keller as supported by the totality of evidence in this case that tree climbing preformed by the Claimant on the date of accident required focus, concentration, and agility which would be compromised by intoxication. As such, this Court would find that even if Dr. Hillman's testimony was entirely stricken from the Record in this case, that Employee Leasing Solutions has presented sufficient evidence under the total circumstances of this case, to support this Court's determination that the accident was occasioned primarily by the influence of drugs. Again, I note that under the particular circumstances of this case that the Claimant was performing an unusually dangerous activity, requiring a high degree of concentration and coordination, when he fell and that this Court rejects the Claimant's testimony with regard to the mechanism of injury.

22. I find the Claimant's testimony in this case, particularly regarding events surrounding his fall from the tree, are not logical or reasonable. I reject the Claimant's testimony that the Employer's failure to provide a ladder or throw ball contributed to his injury. Instead, I accept the

testimony of the lay witness, David Turner, the crew chief for the Claimant on the date of accident, that West Volusia Tree Service does not use ladders (Deposition David Turner, page 14). Additionally, Mr. Turner testified that it was common knowledge that the Claimant would be able to make a throw ball out of a climbing line by utilizing a knot often call a "monkey's fist" to create weight at the end of a rope for throwing purposes. Mr. Turner described how the Claimant would not need a throw ball and that a "monkey fist" was common knowledge in the tree trimming business (Deposition Mr. Turner, pages 14, 15). Mr. Turner's testimony supports portions of the closing argument of Evan Keller. Further, Mr. Turner's testimony supports this Court's determination that the Claimant's description of the mechanism of injury and events surrounding the April 17, 2008, industrial accident is not logical or reasonable under these circumstances. Again, even without the testimony of Dr. Hillman, the undersigned would find that the Claimant's accident was caused primarily by the intoxication of the Claimant at the time of injury.

23. I note the Record includes testimony of various lay witnesses describing the Claimant's behavior prior to the industrial accident as talkative, jittery, and describing the Claimant as "pale" and hungry. I also note the various lay testimony that the Claimant, in an unusual manner, dropped a power saw on two occasions on the day of accident. Although I find this evidence is consistent with this Court's determination that the Claimant was intoxicated on the date of accident, I note this evidence is not determinative of the issues in this case. Instead, this Court relies on the objective diagnostic test results showing the presence of Cocaine and Methadone in the Claimant's blood supply immediately following the accident and the Claimant's own admission at Hearing that he was taking Methadone. When the Court combines these facts with the nature of the Claimant's work preformed as a tree climber, involving hazardous work requiring agility, concentration, and

coordination, this Court finds that it is logical and reasonable to determine that a preponderance of evidence in this case supports the finding that the Claimant's accident was occasioned primarily due to his intoxication.

Employer/Employee Relationship

24. I find that the Claimant and West Volusia Tree Service have not satisfied their burden of proof, by a preponderance of evidence, that there was an employer/employee relationship between the Claimant and Employee Leasing Solutions on the date of accident in this case. I accept the argument of Employee Leasing Solutions, as supported by the totality of evidence in this case, that there was no employer/employee relationship between the Claimant and Employee Leasing Solutions on the date of accident in this case. I find that Employee Leasing Solutions has presented a preponderance of evidence supporting the determination that the Claimant was employed by West Volusia Tree Service on the date of accident.

25. In making this finding, I particularly note the signed contract between West Volusia Tree Service and Employee Leasing Solutions, in evidence as Employee Leasing Solutions Exhibit #11. The contract states in Section V, paragraph C, that Employee Leasing Solutions is not responsible for co-employees (the Claimant) paid directly by the client (West Volusia Tree Service). I find the written contract clearly and without ambiguity reflects the terms of the agreement that Employee Leasing Solutions is not responsible for employees paid directly by West Volusia Tree Service. I find that the parties reached a "meeting of the minds" reflecting the terms of the contract between West Volusia Tree Service and Employee Leasing Solutions. I find that an essential term of this contact was that Employee Leasing Solutions would not be responsible for employees paid directly by West Volusia Tree Service, such as the Claimant in this case.

26. Based on the totality of evidence, I find that the Claimant in this case was at all times paid directly and solely by West Volusia Tree Service, including for the services preformed on the date of accident. I find that West Volusia Tree Service never reported payroll pertaining to the Claimant to Employee Leasing Solutions, not even following the date of accident. I note that the owner of West Volusia Tree Service, Mr. Evan Keller, does not dispute this fact.

27. I accept the argument of Employee Leasing Solutions under the case law authority of Crum Services v. Lopez, 975 So. 2nd 1184 (Fla. 1st DCA 2008) and I find that the written agreement between Employee Leasing Solution and West Volusia Tree Service is dispositive of the issue of employer/employee relationship in this case. Further, I find that there is insufficient evidence to support any argument the written contract between Employee Leasing Solutions and West Volusia Tree Service was modified so that the Claimant in this case would be considered an employee of Employee Leasing Solutions without the submission of payroll.

28. I particularly reject the argument that a series of email correspondence exchanged between Evan Keller and a representative of Employee Leasing Solutions, Matt Fitch, modified the prior written contract between Employee Leasing Solutions and West Volusia Tree Service. This correspondence is in evidence as Employee Leasing Solutions Exhibit # 16, attached to the deposition of Evan Keller. In making this finding, I have considered the email correspondence, including the email of April, 14, 2008, where Mr. Fitch refers to the Claimant and states; "He's all set". I find this correspondence is vague, nonspecific, and cannot support a finding that both parties agreed to modify the terms of the written contract and to forgo the requirement that payroll be submitted through Employee Leasing Solutions. Instead, I find that the Claimant in this case was on

the list of employees prepared to be transferred from West Volusia Tree Service to Employee Leasing Solutions for employment purposes, but that the transfer was not performed as the Claimant's payroll was never submitted through Employee Leasing Solutions, not even after the day of accident. I find that all conditions for employment with Employee Leasing Solutions were not met; including the condition that payroll was to be made through Employee Leasing Solutions. Accordingly, I find under the totality of evidence in this case, that Claimant was not an employee of Employee Leasing Solutions at the time of the industrial accident.

WHEREFORE it is ORDERED and ADJUDGED as follows:

1. The Claimant has violated Florida Statute §440.09(4) and §440.105 by knowingly making false statements with the intent to secure Workers' Compensation benefits.

2. Pursuant to Florida Statute §440.09(3), the April 17, 2008, accident was occasioned primarily by the intoxication of the Employee.

3. There was no employer/employee relationship between the Claimant and Employee Leasing Solutions on the date of accident, April 17, 2008.

4. The Claimant was employed by West Volusia Tree Service at the time of the alleged industrial accident on April 17, 2008.

5. The claim for determination of compensability of the Claimant's alleged work injury against West Volusia Tree Service is **DENIED** with prejudice.

6. The claim for determination of compensability of the Claimant's alleged work injury against Employee Leasing Solutions/East Guard Insurance Company/AmeriChase Services is **DENIED** with prejudice.

7. Any ripe arguments or issues not raised at the time of the Final Hearing are considered waived.

DONE AND ORDERED this 5th day of October, 2009, in Daytona Beach, Volusia County, Florida.

Thomas G. Portuallo

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Order has been sent by U.S. Mail to the parties as listed below and by email to the attorneys of Record on the 5th day of October, 2009:

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