

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

Robert LeCount,)	
)	
Employee/Claimant,)	
)	
vs.)	OJCC Case No. 08-024883TGP
)	
Employee Leasing Solutions,)	Accident date: 8/22/2008
)	
Employer,)	
)	
and)	
)	
East Guard Insurance Group,)	
)	
Carrier/Serviceing Agent.)	
)	

**ORDER DENYING WORKERS' COMPENSATION BENEFITS AND FINDING
CLAIMANT VIOLATED FLORIDA STATUTE §440.09(4)
AND FLORIDA STATUTE §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 May 18, 2009. The Petitions for Benefits at issue were filed on September 16, 2008, and December 9, 2008. The Claimant, Robert F. LeCount, was present and represented by Attorney Michal O'Rourke. The Employer/Carrier were represented by Attorney Gregory White.

The issues set forth by the Claimant in the initial pretrial questionnaire included: acceptance of compensability; temporary total disability/temporary partial disability benefits from August 27, 2008, to the present and continuing; authorization of an orthopedic physician; authorization of Palm Coast Urgent Care; payment of various medical bills as specifically set forth in the contents of the pretrial stipulation; reimbursement of out of pocket expenses; medical mileage; and penalties, interest, costs, and attorneys fees.

The Employer/Carrier defended these claims at the initial pretrial on the grounds that: claim not compensable; requested medical care not medically necessary or causally related; average weekly wage correct; any loss of earnings not causally related to industrial accident; voluntary limitation of income/deemed earnings; Claimant at MMI; no penalties, interest, costs or attorney fees due or owing; costs from Claimant.

By way of Supplemental Stipulation filed on February 5, 2009, the Employer/Carrier amended the defenses to include; no benefits due because the Claimant violated Florida Statute §440.09(4) and Florida Statute §440.105. More specifically, the Claimant has misrepresented himself regarding prior work injuries and prior back injuries.

By Order dated April 17, 2009, this Court granted the Employer/Carrier's Motion to Bifurcate the pending issues. Both parties requested that this Court bifurcate the pending issues to be decided at the May 18, 2009, Final Hearing. It was agreed and approved by this Court, that the sole issue to be decided at the May 18, 2009, hearing would be the defense raised by the Employer/Carrier in the contents of the Supplemental Stipulation, filed on February 5, 2009, asserting that the Claimant violated Florida Statute §440.09(4) and Florida Statute §440.105. This

Court, by order dated April 17, 2009, granted the joint request to bifurcate the issues and reserved jurisdiction to determine all other issues and defenses asserted by the parties on the condition that the defenses asserted under Florida Statute §440.09(4) and Florida Statute §440.105 are denied.

This case involves a thirty-one year old male who alleged a work injury occurring on August 22, 2008. On the day of the alleged accident, the Claimant was working as a carpenter for Employee Leasing Solutions, a leasing company for Advanced Builders Corporation. Mr. LeCount alleged that he was half way up a six foot ladder when using a high torque right angle drill. The drill bit got bound up and twisted in the drill causing the Claimant to fall off the ladder. The Claimant landed awkwardly on his feet, injuring his low back and right hip.

The owner of Advanced Building Corporation, Steve Wischmeyer reported the injury to the workers' compensation carrier for Employee Leasing Solutions and received instructions to take the Claimant to Palm Coast Urgent Care for authorized medical treatment. A MRI of the lumbar spine and right hip was ordered revealing a right femur subchondral fracture and a L5-S1 paracentral moderate disc bulge impinging on the left S1 nerve. It was recommended that the Claimant continue treatment with an orthopedist.

The workers' compensation insurance carrier, East Guard Insurance Company, issued a Notice of Denial dated October 30, 2008, denying the entire claim on the grounds that; "The condition complained of is idiopathic in nature and Employer's premise was merely the fortuitous location of an otherwise inevitable event". Subsequently, on February 5, 2009, by way of amendment to the pretrial, the Employer/Carrier raised the defense that the Claimant violated Florida Statute §440.09(4) and Florida Statute §440.105.

The Employer/Carrier alleged that the Claimant knowingly and intentionally made false and misleading oral statements at the time of his deposition on November 19, 2008, when he denied any prior low back or hip problems. Additionally, the Employer/Carrier alleged the Claimant intentionally made false representations at the time he gave a recorded statement to the Carrier and denied any prior injury to the same body parts. Additionally, the Employer/Carrier alleged the Claimant knowingly made false representations at the time he presented to Palm Coast Urgent Care Center where he sought treatment for the alleged worker compensation injury.

At the May 18, 2009, Merit Hearing, the following documentary evidence was admitted:

JCC Exhibit #1	Pretrial questionnaire and Order by the undersigned date January 29, 2009.
JCC Exhibit #2	Order on Motion to Bifurcate, dated April 17, 2009, and Motion to Bifurcate filed on March 24, 2009.
JCC Exhibit #3	Supplemental Stipulations and Final Witness List filed by the Employer/Carrier on February 5, 2009, and April 17, 2009.
JCC Exhibit #4	Employer/Carrier's Trial Memorandum, admitted for argument purposes.
JCC Exhibit #5	Claimant's Memorandum of Law, admitted for argument purposes only.
Joint Exhibit #1	Deposition of Joanne Bell, taken March 17, 2009, with attachments.
Employer/Carrier's Exhibit #1	Deposition of Gayla Tinton, taken February 13, 2009, with attachments, admitted for factual purposes only.
Employer/Carrier's Exhibit #2	Deposition of Steven Feldman, taken April 2, 2009, with attachments, admitted for factual purposes only.

Employer/Carrier's Exhibit #3	Portions of the deposition of the Claimant, Robert LeCount, taken November 19, 2008. Portions admitted into evidence for substantive purposes are: pages 16 through 24; pages 36 and 37; and page 45, line 8 and 9.
Claimant's Exhibit #1	Deposition of Patty Ulrich, taken March 9, 2009, with attachments.
Claimant's Exhibit #2	Deposition of Steven Wischmeyer, taken March 9, 2009.
Claimant's Exhibit #3	Deposition of Joseph Adam Peterson, taken February 27, 2009.

With regard to the above documentary evidence, this Court notes that Employer/Carrier's Exhibit #1 and #2 were admitted for factual purposes only and that no medical opinions contained within the contents of those exhibits were considered by the undersigned Judge of Compensation Claims in deciding this matter. Additionally, this Court notes that only certain portions of Claimant's deposition on November 19, 2008, Employer/Carrier's Exhibit #3, were admitted into evidence as described above. This Court has not considered any portion of Employer/Carrier's Exhibit #3 outside of the portions admitted into evidence as described above.

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.

4. I find that the Employer/Carrier satisfied their burden of proof, beyond a preponderance of evidence, that the Claimant knowingly and intentionally violated Florida Statutes §440.09(4) and §440.105. I find the Claimant made material, false representations regarding his previous low back and right hip condition for the purposes of obtaining workers' compensation benefits. I find that, following the alleged workers' compensation accident, the Claimant denied preexisting low back problems and preexisting hip problems at the time he was deposed on November 19, 2008, and at the time he provided a sworn statement to the Workers' Compensation Carrier. However, I cannot find that the Claimant knowingly and intentionally violated Florida Statutes §440.09(4) and §440.105 at the time he presented to Palm Coast Urgent Care Center where he sought authorized treatment for the alleged injury.

5. In making the findings herein, I have carefully reviewed the portions of the Claimant's deposition testimony admitted into evidence, Employer/Carrier's Exhibit # 3, wherein the Claimant denied the existence of prior low back or hip problems. I specifically note the Claimant's deposition testimony on page 16 and 17 where the Claimant was asked the following:

Q. Have you ever had a problem with your back before?

A. No, sir. I've pulled – I've pulled muscles in – up in my shoulder blade, but I've never had – never had problems like that, like I have.

Q. Your problem is now what, in your low back?

A. Yes, sir.

Q. So you've never had any problems with your low back before, just in your upper back, right?

A. Yes, sir. I've never had any disk problem in my – in my back at all.

I had a torn muscle in my back – in my shoulder blades, and I required assistance at the hospital for muscle relaxer because I had muscle spasms in the back of my shoulder blade from pulling the muscle.

Q. And what hospital did you go to for that?

A. I'd been to Palatka Hospital before.

Q. Palatka Hospital?

A. Yes, sir. Putnam County.

Q. That's where you went for the shoulder when you had problems with the shoulder blade?

A. Yes, sir.

Q. But, again, you never had to go anywhere for your low back, right?

A. Never, sir.

Q. And that's what your problem is now, if I'm understanding correctly, your low back?

A. My low back and my right hip, yes, sir.

Q. Have you ever had any problems with your hips before?

A. Never.

6. I also note the Claimant's deposition testimony, page 24, where he denied seeing a doctor or hospital for any reasons that were not yet discussed.

7. Additionally, I note the Claimant's testimony at deposition, pages 36 and 37, where he testified as follows:

Q. Okay. Okay. And you say you have never had any problems like this before, correct?

A. No, sir.

8. Further, I note the Claimant's deposition testimony, page 45, line 8, as follows:

Q. And we've covered - - you told me everything about any prior injuries, correct?

A. Yes, sir.

9. I also note the Claimant's sworn statement, provided to the Carrier on August 25, 2008, attached to Joint Exhibit #1, the deposition of the workers' compensation insurance adjuster, Joanne Bell. On page two of that statement the Claimant was asked the following; "Have you ever had any prior injuries to the body part(s) affected by this (date) injuries?" The Claimant answered; "No Ma'am."

10. I find that, despite the Claimant's representations at the time of deposition and during his sworn statement to the Carrier, that the Claimant did in fact have preexisting low back and hip problems as demonstrated by the medical reports in evidence from various emergency room or hospital visits where the Claimant was diagnosed with low back pain or strain, hip problems, and referred for diagnostic testing of the low back.

11. Contained in Employer/Carrier's Exhibits #2 are various medical reports and emergency room records demonstrating the existence of low back and hip problems experience by the Claimant prior to the alleged August 22, 2008, industrial accident. For instance, I note a medical report dated February 29, 2008, showing the Claimant complained of "lower back pain" occurring "after lifting a heavy object, radiating to L hip". Under the "Pain Assessment" portion of the report, the location of the pain is described as "low back" and "L hip", with a "high" intensity of pain. The Claimant was referred to radiology for the lumbar spine. A subsequent page of that report indicates that the diagnosis at that time was; "acute low back sprain". Another page of that report from Putnam Community Medical Center dated February 29, 2008, (date appearing in upper left corner of document) reveals back pain with "onset while lifting TV today". This report contains a drawing entitled "Location of Discomfort" showing discomfort beginning in the mid-back and radiating bilaterally through the lower back to the knees. The "Clinical Impression" on this date was "Low Back Pain" and "Acute Sciatica".

12. Also contained in Employer/Carrier's Exhibit #2 is a report from Putnam Community Medical Center dated December 5, 2007, showing the Claimant experienced pain in his back "shooting down his legs". This record indicates that this pain began when the Claimant "missed a step, jarred his back around 10 pm." Under the "Pain Assessment" portion of the report, the location of the pain is described as "low back" and "L hip", with a "high" intensity of pain. Page two of that report shows the "Chief Complaint" on that date (shown near the upper left hand corner of page two of the document) is checked off as "low back" and "back pain". Page two of this report also contains a drawing entitled "Location of Discomfort" showing discomfort beginning in the mid-back and

radiating bilaterally through the lower back to the knees. The “Clinical Impression” on this date was “Low Back Pain” and “Acute Sciatica”.

13. I also note that Employer/Carrier’s Exhibit #2, reports from Putnam Community Medical Center, includes a record dated October 26, 2007, revealing that the Claimant “jumped off 6 foot ladder 2 days ago”. A subsequent page of that report indicates that the Claimant fell from a six foot ladder “while holding a heavy canvas/awning” and experienced back pain. The “Clinical Impression” on that date was “Low Back Pain”, “Thoracic Back Pain”, “Acute Myofascial Strain, dorsal lumbar” and “Acute Sciatica”. The Claimant was referred to radiology for the lumbar and thoracic spine.

14. In making all findings herein, I have carefully considered the Claimant’s argument that he did reveal the existence of preexisting back problems in the shoulder blade area as described by the Claimant on page 16 of his deposition of November 19, 2008, as set forth above. I also note that, at deposition, the Claimant provided the name and location of the hospital that treated him for problems with his shoulder blade area.

15. Likewise, in making all findings herein, I have carefully considered the Claimant’s argument that his problems as a result of the alleged industrial accident of August 22, 2008, exist in an area of the body never previously injured.

16. Nevertheless, I reject the Claimant’s argument that his problems as a result of the alleged accident of August 22, 2008, exist in an area of the body never previously injured. I cannot accept the Claimant’s testimony on this issue due to the totality of documentary evidence admitted in this case including the various emergency room records and medical diagnosis demonstrating the

existence of preexisting low back pain or strain and prior hip problems. I find the Claimant alleged a low back injury as a result of the August 22, 2008, incident. I find the Claimant's low back is precisely the area of the body previously injured by the Claimant. Further, I find that the Claimant clearly denied the existence of prior low back problems at deposition and in his recorded statement. Similarly, I find the Claimant alleged a right hip injury as a result of the August 22, 2008, incident and that the Claimant clearly denied the existence of prior hip problems at deposition and in his recorded statement. Consistent with these findings, but not determinative of the outcome of this case, I note that at deposition and in his recorded statement, the Claimant did not describe the existence of any prior radiating pain stemming from his mid-back and proceeding through his low-back and hips as shown in various medical reports. Instead, at deposition, the Claimant clearly limited the extent of any prior back problems to the shoulder blade area and completely denied the existence of any prior hip problems. Based upon the totality of evidence in this case, I find that the Claimant made intentional and material misrepresentations regarding his preexisting health condition related to his prior low back and hip problems which are presently at issue as a result of the alleged industrial injury.

17. I reject the Claimant's live testimony and argument to the extent that it contradicts the evidence presented by the Employer/Carrier. This Court finds that the Claimant's argument and testimony presented at Hearing is not in accord with logic or reason. I find there is insufficient evidence in the Record to support the Claimant's position in this case. I reject the Claimant's live testimony and argument to the extent that it contradicts the evidence presented by the Employer/Carrier on the grounds that the Claimant's position and testimony at Hearing are not

consistent with the totality of evidence and particularly not consistent with the documentary evidence. I also base this finding on the Court's observation of the candor and demeanor of the Claimant while testifying live.

18. I find that the Employer/Carrier's position is most consistent with the totality of evidence and most logical and most reasonable under these circumstances. I accept Mr. White's closing argument as supported by the totality of evidence in this case. To the extent that the Claimant's live testimony contradict any of the evidence presented by the Employer/Carrier, I accept the Employer/Carrier evidence as most logical, most reasonable, and most consistent with the totality of evidence presented in this case.

19. I find it is logical and reasonable to conclude that the Claimant intentionally violated Florida Statute §440.105 and Florida Statute §440.09(4) under the totality of circumstances in this case. These circumstances include: (1) the Claimant's clear denial of preexisting low back pain or hip problems at deposition and his recorded statement; (2) the number of occasions, at least three, in which the Claimant reported to the Emergency Room or Hospital preexisting low back pain and hip problems and received a diagnosis of low back pain or strain prior to the alleged industrial accident; (3) the close proximity in time, approximately six months, between the hospital visit of February 29, 2008, in which the Claimant reported low back and hip problems, and the alleged industrial accident of August 22, 2008; (4) the number of individuals at the Emergency Room or Hospital who recorded preexisting low back and hip complaints made by the Claimant as shown in the hospital records; and (5) the various referrals to radiology for lumbar diagnostic studies made prior to the alleged industrial accident.

20. Further, I reject the Claimant's argument as presented in the Pretrial Memo of Law and Hearing, that any mistakes or inaccuracies in Claimant's deposition or sworn statement were unintentional and the result of an honest mistake or memory lapse. I find this argument is not logical and not reasonable for each of the reasons described above and when considering the totality of circumstances in this case. I also reject this argument based on the Court's observation of the candor and demeanor of the Claimant while testifying live.

21. Further, I reject the Claimant's argument that the Employer/Carrier initially denied this claim in error, for reasons set forth in the Notice of Denial, and that the Employer/Carrier can not now successfully assert a defense to this claim under Florida Statutes §440.09(4) and §440.105. I find this argument is without merit and I note the Claimant did not produce sufficient legal authority to support his argument on this issue. I also note that there has been no judicial determination of the validity of other defenses raised in this case.

22. Based upon this Court's findings herein with regard to the Claimant's violation of Florida Statutes §440.09(4) and §440.105 and pursuant to the plain meaning of Florida Statutes §440.09(4) , I find the Claimant is not entitled to any workers' compensation benefits in this case including medical or disability benefits as claimed. Accordingly, it is not necessary for this Court to determine any of the remaining issues or defenses that were not addressed at the time of May 18, 2009, Merit Hearing. The Final Hearing presently scheduled for August 27, 2009, is hereby cancelled.

23. I find that any arguments or issues regarding the defenses under Florida Statute §440.09(4) and Florida Statute §440.105, not raised at the time of Hearing are considered waived.

WHEREFORE it is ORDERED and ADJUDGED as follows:

1. The Claimant knowingly and intentionally violated Florida Statute §440.09(4) and Florida Statute §440.105.

2. All outstanding Petitions for Benefits claiming Workers' Compensation medical and disability benefits are **DENIED** with prejudice.

DONE AND MAILED this 28th day of May, 2009, in Daytona Beach, Volusia County, Florida.



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