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

Jose D. Romero, Employee/Claimant,	)	OJCC Case No. 12-007484DBB
vs.	)	Accident date: 7/21/2010
Thrive HR FL 1, LLC/Sunz Ins. Co./Corvel, Employer/ Carrier/Servicing Agent.	)	Judge: Diane B. Beck

FINAL COMPENSATION ORDER

This cause was heard before the undersigned Judge of Compensation Claims (JCC) at Sarasota, Manatee County, Florida on March 4, 2013 upon the petitions for benefits filed on April 2, 2012, April 17, 2012, September 20, 2012, September 21, 2012, and November 1, 2012 [1]. Mediation occurred on July 20, 2012 and January 11, 2013 and the parties' Uniform Statewide Pretrial Stipulation was filed on January 28, 2013. Alex Lancaster, Esquire was present on behalf of the claimant. Gregory D. White, Esquire was present on behalf of the employer/carrier (E/C).

OVERVIEW

Claimant Jose Romero, 64 years old, injured his low back in a compensable accident on July 21, 2010. E/C provided medical and indemnity benefits but now denies the entire claim based on claimant's alleged misrepresentation. Claimant seeks various medical and indemnity benefits. For the reasons set forth below, I am finding in favor of E/C.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I have considered the candor and demeanor of the witnesses who testified before me and I have

1 A more detailed list of the parties' pretrial stipulations, claims and defenses, and my evidence log can be found at appendices 1, 2, and 3 at the end of this order.

resolved all conflict in the testimony and evidence. Upon review of the evidence and applicable law, I make the following findings of fact and conclusions of law:

1. I have jurisdiction over the subject matter and parties, and venue is proper in Sarasota, Florida.

2. Any and all issues raised by way of the petition or petitions for benefits which are the subject matter of the final hearing, but which issues were not tried at the hearing are presumed resolved, or in the alternative, deemed abandoned by the claimant and therefore are denied. *See, Betancourt v. Sears Roebuck & Co.*, 693 So.2d 253 (Fla. 1st DCA 1997).

3. Claimant Jose Romero was born in El Salvador and emigrated to the United States in 1978. He was here illegally for a few years, but become a legal resident in 1983 and obtained his citizenship in 2011. He went to the 6th grade in El Salvador and spent two years in that country's military. His primary language is Spanish and he speaks only a little English. He worked as a supervisor in cotton factories in El Salvador. His employment in the United States consists of cleaning in a hotel, construction (cement), and painting.

4. Claimant testified at his first deposition that he had a prior low back injury in 1996 while working as a painter for a different employer. He underwent surgery by Dr. Boyer and eventually settled his claim. He testified that he had another work injury in 2009 while working as a painter for Sureway Enterprises, Inc. when he fell from a ladder and injured his right wrist. He underwent surgery to his wrist but could not remember the doctor's name. Claimant denied reinjuring his back in the 2009 accident or treating with Dr. Boyer. Claimant said after settling his 1996 claim, his back was perfectly fine, he had no problems with his back, and he did not see any doctors for his back. He agreed his back was fine from 1998 until 2010 and his current injury.

5. The records of Blake Medical Center show that claimant was admitted on September 20, 2007 for colles', dorsal, and lumbar fractures he sustained in a fall from a ladder at work. On admission

claimant's chief complaint was right wrist pain and lower back pain past his right lower extremity to below the knee. It was reported that he fell six to eight feet from a ladder and landed on his back. His past medical history was listed as "hx chronic back pain" and he had a past surgical history of microdisc by Dr. Boyer in 1996. Claimant underwent surgery to his right wrist by Dr. Dunlap while in the hospital, and Dr. Boyer was consulted to see claimant for his spine fractures at T12 and L1. CT and MRI scans were performed and minimal acute severe superior endplate fractures at T12 and L1 were noted, which Dr. Boyer deemed stable. On discharge of September 23, 2007, claimant was instructed to follow up with Dr. Boyer if his back pain persisted.

6. After his July 21, 2010 industrial accident, claimant was eventually authorized to treat with orthopedic surgeon Dr. Nair, who saw claimant from October 13, 2010 to January 24, 2012. At claimant's initial visit, Dr. Nair opined on a form that the industrial accident was the major contributing cause (MCC) of claimant's injury and need for treatment, with the work injury accounting for 80 percent and degenerative changes 20 percent. Dr. Nair performed epidural steroid injections on November 15, 2010 and December 3, 2010. Dr. Nair also performed surgery on claimant consisting of a decompression lumbar laminectomy with fusion L2-5 on May 13, 2011. He opined on a form that 100 percent of the need for surgery was claimant's current work injury.

7. Claimant attended physical therapy post-surgery and was also provided with an orthotic evaluation and shoe lift for his leg length discrepancy. No recommendation for cane use was noted in the physical therapy records. Claimant was noted to be walking with a cane on July 14, 2011 in Dr. Nair's note of that date. When claimant was seen on December 8, 2011 he was walking with a cane. On that date Dr. Nair placed claimant at maximum medical improvement (MMI) with 10 percent impairment. He assessed restrictions of no lifting greater than 10 pounds. On January 24, 2012 claimant reported having no pain in his back but still having pain in the outer aspect of his left leg. Epidural steroid injections were recommended, and claimant was referred to pain management for those injections.

8. Claimant began treating with pain management physician Dr. Robert Hamilton on February 21, 2012. Dr. Hamilton placed claimant at MMI with 8 percent impairment on March 27, 2012 because he felt no other interventional treatment would be helpful. He said claimant's back pain was 50 percent improved at that time but he remained with left leg pain more posterior to the left calf. Dr. Hamilton assessed restrictions of no lifting greater than 15 pounds; no repetitive or continuous bending, stooping, squatting, crawling, or climbing; and frequent position changes. Although Dr. Hamilton opined that 80 percent of claimant's problem was due to the work injury and 20 percent preexisting, he testified the percentages are arbitrary, he really couldn't tell and there was no magic way of telling the percentages; it was really his best guess based on training and experience.

9. Claimant underwent an E/C independent medical examination (IME) with orthopedic surgeon Dr. Mark Lonstein on August 9, 2012. Dr. Lonstein noted that claimant used a cane in his right hand to ambulate. It was Dr. Lonstein's impression that claimant had back and left leg pain after an on the job injury of July 21, 2010 with a subsequent surgical procedure and continued back and left leg pain. He opined that claimant should have a post-op MRI prior to establishing MMI, but that if he declines the MRI, he would be at MMI with 10 percent impairment and a 20 pound lifting limit.

10. Based on conflict in the opinions of Drs. Nair and Lonstein regarding claimant's work restrictions, E/C requested appointment of an expert medical advisor (EMA). Claimant objected, a hearing was held, and on August 30, 2012 an Order was entered appointing orthopedic surgeon Dr. Gilberto Eli Vega as the EMA to determine claimant's work restrictions related to his July 21, 2010 industrial injury.

11. Dr. Vega saw claimant on October 2, 2012. Claimant reported that in order to ambulate he requires a cane in the left hand, which Dr. Vega recommended that he should try in the right hand in order to more effectively distribute weight bearing to help his gait. On examination claimant had a left antalgic component to his gait and was able to walk on his heels on the left and right as long as he uses

his cane in the right hand. He was able to extend his lumbar spine approximately only 10 degrees due to severe pain, with side bending only 10 degrees to the left due to severe pain and rotation to the left side of the lumbar spine was 16 degrees and exquisitely painful. Dr. Vega's impression was residual low back pain with left sciatica with paresthesia along the left lower extremity; 1.5 cm atrophy of the circumference of the left calf; and that claimant demonstrates weak plantar flexion on the left foot musculature 3 out of 5 while on the right it is 5 out of 5 and dorsiflexion reveals mild residual weakness of the left foot 4 out of 5 musculature and on the right it is 5 out of 5.

12. Dr. Vega found that claimant was at MMI and would remain with permanent disabling low back pain. He recommended that claimant would need external support with a cane in his right hand to coincide when he bears weight on the left lower extremity; that he should alternate sitting and standing and should not lift or push or pull over ten pounds; that he should avoid stair climbing as well as climbing on ladders. Dr. Vega testified at his first deposition that claimant told him he always has to use a cane to walk. He felt claimant had a new injury from his July 21, 2010 industrial accident and not an aggravation of his old L4-5 injury. He agreed that claimant was at MMI in January of 2012 as determined by Dr. Nair. Dr. Vega assessed claimant with 14 percent impairment and said that he did not use the combined value charts in determining this rating.

13. E/C undertook video surveillance of claimant on September 21, September 22, September 28, October 10, October 11, October 12, October 13, October 14, October 15, and October 16, 2012. I reviewed the DVDs of the surveillance and on those of the above dates when claimant was visible on the surveillance he never utilized a cane or any other assistive device during any of his activities. He did not engage in any obvious pain behaviors, nor did he limp or demonstrate any difficulty getting in and out of a truck or SUV. He was able to bend, sit, stoop, and squat and arise from those positions without aid or apparent difficulty.

14. Dr. Vega was deposed again and shown the DVD surveillance of claimant. Dr. Vega

testified that he is fluent in Spanish and spoke to claimant in Spanish during his examination. He agreed that claimant was not using a cane in the surveillance and appeared to be walking fairly fluid and did not seem to be limping. He observed claimant squatting without putting his hands on the ground for support. Dr. Vega testified that when claimant was asked to squat during his examination he could not, although he could kneel on both knees. He also observed claimant bending in the surveillance. Dr. Vega testified that the way claimant presented to him in examination he would have thought it unlikely that claimant could sit for as long as depicted in the surveillance. He noted that claimant was depicted leaning to the left but in the evaluation he could only side bend 10 degrees and he appeared to be able to bend more than 10 degrees in the video. He noted that not only was claimant side bending to the left but there was also a rotational component to more than 10 degrees and no guarding demonstrated by claimant.

15. Dr. Vega testified that the surveillance was not consistent with claimant's presentation on examination, and there was no limping component on the film. Based on the surveillance Dr. Vega determined claimant does not need a cane and that he can sit over an hour. He thought that it would be pertinent for claimant to have a functional capacity evaluation (FCE) to determine his ability to lift and push and pull, and that although he limited that to 10 pounds before, maybe claimant could do 20 pounds. However, he agreed on cross-examination that even with an FCE, claimant would be limited to sedentary and he doubted that claimant could sit six hours out of an eight hour work day, and he could not lift and carry on a continuous basis, based on his type of injury and two surgeries. Dr. Vega testified that the difference between his examination of claimant and the surveillance was quite drastic.

16. Based on Dr. Vega's recommendation, E/C filed a Motion to Appoint FCE, to which claimant objected. A hearing was held, and an Order was entered granting the Motion and choosing the FCE provider. Claimant underwent the FCE on February 5, 2013 at Select Physical Therapy performed by Hilary Richard, who has a doctorate in physical therapy. Dr. Richard concluded that claimant demonstrated the ability to work in the light classification.

17. Dr. Richard testified that claimant demonstrated varied consistency throughout the testing to include cogwheeling, break-away testing during manual muscle testing to the lower extremity, and ability to kneel, stoop, crawl, and crouch, and he refused to attempt partial squatting to lift from the floor during material handling. She determined that his overall inconsistencies demonstrated that he did not put forth a maximal effort. She noted that although you normally expect to see a 10 percent increase in heart rate when maximal effort is given, she did not see that in all cases with claimant. He did not use a cane for ambulation during the testing, and demonstrated a mild antalgic walking with a slight shift in his trunk. Claimant terminated walking on a treadmill after twelve minutes due to complaints of lumbar pain.

18. Based on the test results, Dr. Richard opined claimant could walk occasionally, or up to 2.5 hours of an 8 hour day; could stand frequently, or 2.5 to 5.5 hours out of an 8 hour day; and could sit constantly, or at least 5.5 hours out of an 8 hour day. She noted that he was not limited to sedentary only because of his ability to stand frequently and walk occasionally.

19. Dr. Vega was deposed a third time and given the FCE results. It was noted the FCE shows claimant's ability to lift 12 pounds from waist to shoulder, carry 19 pounds, push 26 pounds, and pull 20 pounds, and that he refused to attempt squatting and so was not tested for the ability to lift from the floor to shoulder. Dr. Vega testified initially that claimant could return to work at a very low stage light level with no climbing ladders, alternate sit and stand, and no lift or pull over 19 to 20 pounds.

20. Dr. Vega testified that he never told claimant not to use a cane. He agreed that claimant could not stand for 6 hours out of an 8 hour day, so on that basis he was in a more sedentary than light category. He opined that claimant should sit 4 hours and stand 4 hours out of an 8 hour day. Based on his experience, Dr. Vega said that claimant should be able to lift, push, or pull 20 pounds all day so long as he sits 4 hours and stands 4 hours and does not climb ladders.

21. At claimant's second deposition he testified that he did not tell Dr. Vega he always used a cane to walk. According to claimant, Dr. Vega "asked me if I used a cane to walk with and I said yes".

Claimant said he does have to use a cane from time to time, mostly when he is in pain. Claimant agreed it was him depicted in the surveillance. He said he tries not to use the cane, and that he uses it when he is in pain. He said that he was never told by any doctor to stop using the cane or not to use a cane all the time. He also denied that anybody told him to use the cane all the time.

22. At final hearing claimant testified that a physical therapist recommended that he use a cane. He said that Dr. Vega asked him if he used a cane all the time and he said yes but he also asked if he could walk without the cane and he told Dr. Vega yes. Claimant admitted that when he had his work injury to his hand they also did an x-ray of his back to make sure he didn't hurt his back when he fell and there was no lesion. His back was hurting after that fall and he felt pain when he fell but they didn't find anything wrong with it.

23. Claimant again agreed he was depicted in the surveillance. He said when he started using the cane he was supposed to use it all the time but he didn't want to. He said he was told at physical therapy to use the cane because his body was going to one side. He said he was using the cane all the time when told to at physical therapy. He admitted that after he was discharged from Blake hospital after his wrist surgery that he was sent to see the doctor for his back.

24. Claimant's vocational expert Dr. Anita Rothard met with him and issued a report on June 23, 2012. Claimant told her he used a cane most of the time for balance and stability because he had fallen, and he was using a cane when she evaluated him. He said he had difficulty bending. It was her opinion that claimant could not be employed in the general economy due to his age, two prior significant accidents, he is illiterate in English, his past work is medium with no transferable skills to light or sedentary, he does not have typing or computer skills, and he cannot sit long enough to be productive. It was Dr. Rothard's opinion that claimant would not do well as a driver because he sits off to one side and it would be hard for him to get in and out of a vehicle. She thought he could not clean because of difficulty bending.

25. Gerri Pennachio, E/C's vocational expert, met with claimant on December 10, 2012. He told her he could not bend over to lift and that he used a cane because he fell a few times. She saw claimant using a cane. Claimant told her he was unable to stoop and squat. Ms. Pennachio also testified that claimant has no transferable skills from his past medium work, so he would have to be employed in sedentary or light unskilled jobs. She testified that claimant can drive and he could work as a shuttle driver for a rental car agency or a courtesy driver for a car dealership. She noted that older individuals usually are employed in those jobs and they require driving for only short periods at a time. She also thought claimant could work part-time cleaning offices at night. She testified that these jobs exist within 50 miles of claimant's residence, and that she is aware of a woman who does not speak English currently working as a shuttle driver.

26. Claimant initially testified that after settling his 1996 back injury claim his back was perfectly fine, he had no problems with his back, he did not see any doctors for his back, and his back was fine from 1998 until his work injury in 2010. At deposition he denied reinjuring his back in the 2009 (actually 2007 per the records) accident when he injured his wrist or seeing Dr. Boyer at that time for his back. However, the Blake Medical Center records show that claimant gave a history on admission of chronic back pain, that he was treated during the 2007 hospitalization for endplate fractures of thoracic and lumbar vertebrae, and that he saw Dr. Boyer in the hospital. He admitted at final hearing that he had back pain after the 2007 accident and that he saw Dr. Boyer. His testimony that he was able to work full time without restrictions after his 1996 and 2007 accidents does not excuse his failure to testify truthfully at deposition that his back hurt and he did see Dr. Boyer for his back after the 2007 accident.

27. Claimant presented to Dr. Lonstein, Dr. Vega, and both vocational experts using a cane, and told Dr. Vega he always used a cane to walk. I reject claimant's testimony that he did not tell Dr. Vega he always used a cane; even if he didn't use the word "always", his responses to Dr. Vega implied so, and Dr. Vega is fluent in Spanish. Further, claimant's testimony changed between his deposition and

final hearing regarding whether anyone told him to always use the cane. His demeanor while testifying about this and the other areas of inconsistency did not support the trustworthiness of his testimony; I did not find him to be a credible witness. More telling is the claimant's video surveillance, in which he is never depicted using a cane or any other assistive device.

28. Claimant told Dr. Vega, FCE Dr. Richard, and E/C's vocational expert Ms. Pennachio that he could not squat. Yet he is shown in the video surveillance squatting without any apparent effort or use of his hands or other items for balance or getting up and down from a squatting position. Dr. Vega testified that claimant's presentation during his examination and on the surveillance was inconsistent in various areas, and that the difference was "quite drastic". *See, Lee v. Volusia County School Board*, 890 So.2d 397 (Fla. 1st DCA 2004); *Village of North Palm Beach v. McKale*, 911 So.2d 1282 (Fla. 1st DCA 2005); *Dieujuste v. J. Dodd Plumbing, Inc.*, 3 So.3d 1275 (Fla. 1st DCA 2009); and *Lucas v. ADT Security Inc.*, 72 So.3d 270 (Fla. 1st DCA 2011).

29. When claimant was untruthful about his prior back problems and back injury in 2007, usage of a cane, ability to squat, and other areas as testified to by Dr. Vega, he knew or should have known that his testimony and behavior was false, incomplete or misleading. Because his false, incomplete, or misleading testimony and behavior was related to his physical problems he attributed to his 2010 workers' compensation injury, they were made in support of his claims and for the purpose of obtaining workers' compensation benefits. Based upon the forgoing, I find that claimant knowingly or intentionally provided false, incomplete or misleading information for the purpose of obtaining workers' compensation benefits and therefore has forfeited all entitlement to benefits pursuant to sections 440.105(4)(b) and 440.09(4), Fla. Stat. (2010). The petitions for benefits should be denied and dismissed with prejudice.

30. Because E/C is the prevailing party in this proceeding, its claim for reimbursement of taxable costs at claimant's expense should be granted, and jurisdiction retained to address the amount.

WHEREFORE, based upon the forgoing, it is **ORDERED AND ADJUDGED:**

A. Claimant's petitions for benefits are denied and dismissed with prejudice pursuant to section 440.09(4), Fla. Stat. (2010) based on violation of section 440.105(4)(b), Fla. Stat. (2010).

B. Claimant shall reimburse E/C's taxable costs related to this proceeding and jurisdiction is retained to address the amount.

DONE AND EMAILED this 11th day of March, 2013, in Sarasota, Manatee County, Florida.

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Appendix 1: The Parties' Pretrial Stipulations

Contained within the parties' written pretrial stipulations and/or orally on the record at the final hearing, the parties entered into the following stipulations which I accepted and adopted as findings of fact:

a. The date of accident is July 21, 2010 and Sarasota, Florida is the proper venue.

b. There was an employer/employee relationship on the date of accident, and employer had

workers' compensation insurance coverage in effect.

c. E/C accepted claimant's accident and low back injury as compensable.

d. The claimant gave timely notice of the accident and the parties received timely notice of the final hearing.

e. I have jurisdiction over the parties and subject matter of this claim (E/C excepts managed care issues).

f. Claimant's average weekly wage is $669.54.

g. E/C has agreed that the bill requested to be paid via the January 10, 2013 petition for benefits will be paid pursuant to the fee schedule when properly submitted, and therefore the JCC has no jurisdiction over this bill dispute. *See, Cook v. Palm Beach County School Board*, 51 So.3d 619 (Fla. 1st DCA 2011); *Bergstein v. Palm Beach County School Board*, 37 Fla. L. Weekly D1978 (Fla. 1st DCA August 17, 2012).

Appendix 2: Claims and Defenses

Claimant seeks: TTD/TPD benefits from the date of accident to present and continuing; PTD and PTD supplemental benefits if MMI reached; payment of IB's per EMA Dr. Vega; MRI per Dr. Lonstein; care with/or per Dr. Nair; and penalties, interest, costs, and attorney's fees.

The E/C defends on the basis that: the claimant violated section 440.09(4) and section 440.105, Fla. Stat. and is therefore not entitled to any benefits; the claimant misrepresented that his problems from his prior back accident had cleared up when in fact he had chronic and ongoing problems from the prior back accident that did not clear up; additionally, the claimant misrepresented himself to Dr. Vega by indicating that he must use a cane to ambulate; the claimant also misrepresented what he is currently able to do physically; industrial accident is not the MCC of claimant's condition; offset for impairment benefits paid; apportionment; claimant paid all appropriate TTD/TPD; voluntary limitation of income; deemed earnings; any loss of earnings not causally related to industrial accident; claimant not PTD; PTD

supplemental benefits not due; no penalties, interest, costs, or attorney's fees due or owing; and E/C requests costs from claimant.

Appendix 3: Evidence and Witness Log

Exhibit 1 (Judge): Uniform Statewide Pretrial Stipulation with attached Supplemental Stipulations and Final Witness Lists, and E/C's Supplemental Witness List filed February 1, 2013, as amended at the beginning of the final hearing.

Exhibit 2 (Judge): Claimant's Trial Memorandum, for argument only.

Exhibit 3 (Judge): E/C Trial Memorandum, for argument only.

Exhibit 4 (Joint): Deposition of Jose Romero taken on May 24, 2012.

Exhibit 5 (Joint): Deposition of Jose Romero taken on February 15, 2013.

Exhibit 6 (Joint): Deposition of Robert Hamilton, M.D. taken on October 9, 2012.

Exhibit 7 (Joint): Deposition of Gilberto Eli Vega, M.D. taken on October 23, 2012.

Exhibit 8 (Joint): Deposition of Gilberto Eli Vega, M.D. taken on November 30, 2012.

Exhibit 9 (Joint): Deposition of Gilberto Eli Vega, M.D. taken on February 27, 2013.

Exhibit 10 (Joint): Deposition of Robin Lilley, record custodian for Dr. Nair, taken on September 28, 2012.

Exhibit 11 (Joint): Deposition of Hilary Richard taken on February 28, 2013.

Exhibit 12 (Joint): Blake medical records.

Exhibit 13 (Joint) Deposition of Eve Jackson-Bing, record custodian for Manatee Memorial Hospital.

Exhibit 14 (Joint): Mark Lonstein, M.D. IME report dated August 10, 2012.

Exhibit 15 (E/C): Gerri Pennachio vocational assessment.

Exhibit 16 (E/C): DVD surveillance of claimant.

Exhibit 17 (E/C): Responses to Petitions for Benefits dated October 12, 2012 and January

23, 2013 and Notice of Denial dated September 25, 2012.

I took judicial notice of the appropriate pleadings in the court computer file.

Claimant Jose Romero (through interpreter Diana Rico, with E/C's reservation of right to challenge interpretation due to lack of certification), Anita Rothard, and Gerri Pennachio appeared and testified at the hearing. Counsel for the parties presented oral argument and submitted written Trial Memoranda.