

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

David Hernandez,)	
)	
Employee/Claimant,)	
)	
vs.)	OJCC Case No. 13-001582MGK
)	
MGS - Manqual's General, and Mario)	Accident date: 12/17/2012
Concrete Service/Bridgefield Employers)	
Insurance Company, Guarantee Insurance)	Judge: Margret G. Kerr
Company,)	
)	
Employer/ Carrier/Servicing Agent.)	

FINAL MERITS ORDER

THIS CAUSE came before the undersigned Judge of Compensation Claims for a Merits Hearing on August 15, 2013, regarding the Petition for Benefits (PFB) filed February 26, 2013. The Claimant was represented by William Haro Esq., and the Employer/Carrier/Servicing agent was represented by Jessica Blyenburgh Esq.. This Order ensues.

EXHIBITS:

CLAIMANT:

1. Claimant Pre Trial Amendment June 13, 2013.
2. Petition for Benefits filed January 21, 2013 with attachments filed January 23, 2013.
3. Deposition of Dr. Osborne (with attachments) taken on July 23, 2013.
4. Printout from Florida Department of State.
5. Composite exhibit of returns of service for Mario Villanueva and Pedro Martinez.
6. Subpoenas for deposition and Final Hearing for Mario Villanueva and Pedro Martinez
7. Notice of Deposition.
8. Certificate of Non Appearance for Mario Villanueva and Pedro Martinez.
9. Receipt of payment from Jackson Memorial Hospital in the amount of \$485.00.

EMPLOYER:

1. Deposition of Jose Mangual taken on July 29, 2013.
2. Motion for Protective Order filed on August 6, 2013.

JOINT:

1. Pre Trial Stipulation filed May 29, 2013.

OJCC:

1. Claimant Trial Memorandum.
2. E/C Trial Memorandum.

LIVE WITNESSES:

1. Claimant, David Hernandez.

CLAIMS:

1. Determination of Compensability.
2. Provision of Initial Care.
3. Reimbursement of \$485.00 to Claimant for care at Jackson Memorial Hospital.
4. Attorney fees and Costs.
5. The prior claim of attorney fees pursuant to FS440.32 was withdrawn by the Claimant.

DEFENSES:

1. Claim is denied as the Claimant failed to report an injury within 30 days as required by FS 440.185.

In making the determinations set forth below, I have attempted to detail the salient facts together with the findings and conclusions necessary to resolve the issues. I have not attempted to painstakingly summarize the substance of the parties' arguments, not the support given to my conclusions by the various documents submitted and accepted into evidence; nor have I attempted to state non essential facts. Because I have not done so, does not mean that I have failed to consider all of the evidence. In making my findings of fact and conclusions of law in this claim, I have carefully considered and weighed all evidence submitted to me. I have considered arguments of counsel and the respective parties, and analyzed statutory and decisional law of Florida.

After due consideration of the matter and after having the opportunity to review and consider the aforesaid exhibits which were admitted into evidence, and having observed and

considered the candor and demeanor of the claimant, who appeared and testified before me, and having endeavored to resolve all conflicts of facts in the evidence presented herein, I hereby make the following

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

The Judge of Compensation Claims has jurisdiction over the parties and the subject matter of this case.

The parties' stipulations and agreements, set forth in the Pre Trial Compliance Questionnaires are accepted, adopted and made an Order of the Office of the Judge of Compensation Claims.

Any and all issues raised by way of Petitions for benefits ("PFB"), but which issues were not dismissed or tried at hearing, are presumed resolved, or in the alternative, deemed abandoned by the Claimant and, therefore, are Denied and Dismissed with prejudice. See, *Scotty's Hardware v. Northcutt*, 883 So.2d 859 (Fla. 1st DCA 2004). The only exception is the Petition filed August 15, 2013, where the issues in the Petition are not yet ripe and have not been mediated, and over which jurisdiction is specifically reserved.

The claimant, David Hernandez, was employed as a construction laborer by the employer, Mario Concrete Service, a subcontractor to Mangual's General, the general contractor. On December 17, 2013, the claimant was using a portable toilet on the job site when a load of roof trusses, while being unloaded, struck the portable toilet. The claimant has alleged injuries to his neck, left shoulder, low back, right leg and waist.

The Claimant initially filed a petition for benefits naming Mangual's General and Bridgefield Employer's Insurance Company as the employer/carrier, but later filed a new petition against the actual employer/carrier, Mario's Concrete Service and Guarantee Insurance Company. He then withdrew the claims against Mangual's and Bridgefield.

The employer/carrier agrees that the incident occurred, but has denied the compensability of the claim as they allege that the claimant did not notify them of an injury within 30 days of the accident in violation of FS 440.185(1).

Section 440.185(1) provides that an "employee who suffers an injury arising out of and in the course and scope of employment shall advise his or her employer of the injury within 30 days after the date of or initial manifestation of the injury". FS 440.185(1).

The claimant testified live before the undersigned as to the circumstances surrounding the incident. The employer representatives were not deposed and were not present at the Final Hearing and as a result, the only live testimony was that of the claimant. Jose Mangual, the general contractor, testified by deposition, but did not appear live at the Final Hearing. I observed the candor and demeanor of the Claimant and find him to be a credible witness.

The Claimant testified that he was employed by Mario Concrete as a carpenter's assistant. On December 17, 2012, while he was using the portable toilet, he felt an impact and struck the wall of the portable toilet. Fearing that the structure would fall and trap him, he exited the portable toilet, and noticed that a truck had unloaded some roofing trusses, which had struck the portable toilet. He further testified that he impacted the side of the portable toilet impacted his left shoulder and also injured his neck and hips and that he also sustained a bruise on his thigh.

Upon exiting the toilet, the Claimant testified that he spoke to Jose Mangual as well as the driver of the truck. The Claimant testified that Mr. Mangual did not ask him if he was alright, but rather mocked him because when he came out of the toilet, his pants were down and he had excrement on him.

The Claimant testified that 15 minutes later, his supervisor, Pedro Martinez arrived and the Claimant told him what had happened and described his injuries. The Claimant testified that Mr. Martinez did not offer him medical care. The Claimant continued to work the rest of the day, but he testified that he worked light duty only.

The next day, the Claimant went to work to look for Pedro Martinez and told him that he needed to be seen by a doctor. Mr. Martinez told the Claimant that he would speak to Mr. Mangual. He then advised the Claimant that he should make the claim against the owner of the trusses. At no point was he sent to a doctor by any Pedro Martinez.

The employer has an affirmative duty to provide appropriate medical care at the appropriate time. Pursuant to FS 440.13(2)(c), if the employer "fails to provide initial treatment or care required by this section after request by the injured employee, the employee may obtain such initial treatment at the expense of the employer, if the initial treatment of care is compensable and medically necessary and is in accordance with established practice parameters and protocols of treatment as provided in this chapter". FS 440.13(20)(c).

Four days later, on his own, the Claimant presented to Jackson Memorial Hospital

“JMH”, where he was examined, treated and released. The medical records of JMH were not introduced into evidence and as a result, the undersigned is unable to determine the nature of the care and treatment rendered to the claimant. The claimant’s uncontested testimony is that he presented to JMH as a result of his industrial injuries and I accept this testimony. On December 26, 2012, he paid \$485.00 to JMH to satisfy a portion of the bill for the medical services provided to him. Four or five days later, the Claimant spoke to Mr. Martinez about helping him pay the medical bill, and he was told to talk to Mr. Mangual. Around the same time, the Claimant spoke to Mr. Mangual and was told to ask the owner of the trusses for assistance.

Since the accident, the Claimant testified that he has not worked and continues to be symptomatic.

Jose Mangual testified by deposition that in December 2012, he subcontracted work to Mario Concrete on a construction site at Vintage Estates. On December 17, 2012, he witnessed the truck unloading trusses which then struck the portable toilet, and immediately went to help. He spoke to the Claimant and testified that at no time did he mock or ridicule the Claimant, and instead, asked him if he was alright, and the Claimant said he was.

Mr. Mangual went on to testify that Pedro Martinez was not present when the accident happened. Mr. Mangual also testified that Mr. Martinez, as the Mario’s Concrete supervisor, was always on the job site and supervised his own employees.

At some point after the accident, Mr. Mangual spoke to Pedro Martinez, who asked him if the Claimant had hurt himself, and Mr. Mangual told him he had not. Mr. Mangual admitted that he was not aware of whether Pedro Martinez ever spoke to the Claimant at the scene of the accident about the accident and that he was unaware of any conversations between the Claimant and Pedro Martinez about the accident. Mr. Mangual also admitted that he did not know if the Claimant was hit by the walls of the portable toilet while he was inside the bathroom, as he saw the accident from a distance of approximately 200 feet. He did not have a conversation with the Claimant after the accident other than to ask him if he was okay and he then walked away. He testified that he did not know if the Claimant spoke to Mr. Martinez after the accident.

The Claimant underwent an IME with Dr. Kenneth Osborne on June 25, 2013. After examining the Claimant, Dr. Osborne diagnosed him with a cervical sprain/strain, cervical and lumbar radiculitis, a thoracic and lumbar sprain/strain, paresthesias of both hands and feet, an injury to the left knee, cephalgia, vertigo and insomnia, all of which he testified were causally

related to the industrial accident. Dr. Osborne's testimony is uncontested.

Under FS 440.185(1), the Claimant has the burden of showing that he timely reported the industrial accident and injury to his employer. While Mr. Mangual testified that the Claimant did not report an injury to him, he admitted that he had no knowledge of whether the Claimant had reported an injury to Pedro Martinez, his supervisor. The Claimant testified that he did report his injuries to Mr. Martinez, and also requested assistance in paying the medical bills incurred as a result of his treatment at JMH. Neither Pedro Martinez, the Claimant's supervisor, nor Mario Villanueva, the owner of Marios' Concrete, testified, either by deposition or at the Final Hearing. As a result, the Claimant's testimony that he reported the accident and his injuries to his immediate supervisor is uncontroverted, and I accept this testimony over that of Mr. Mangual.

It is worth noting that whether the claimant reported his injuries to Mr. Mangual, the general contractor, is largely irrelevant. This is not a case where notice to the general contractor as the statutory employer is at issue. Here, there is unrebutted testimony that the claimant reported his injuries to Pedro Martinez, his direct supervisor, as the representative of his actual employer, Mario Concrete.

I find, based on this uncontroverted testimony, that the Claimant has satisfied his burden of proof and that he timely reported not only the accident, but his injuries to Pedro Martinez, his direct supervisor.

I further find that as the employer was timely notified of the accident and injury to the Claimant, they had an affirmative duty to provide medical care, which they failed to do.

I further find that the Claimant was therefore forced to self procure medical treatment at JMH, and payment of the medical expenses for this treatment are the responsibility of the E/C.

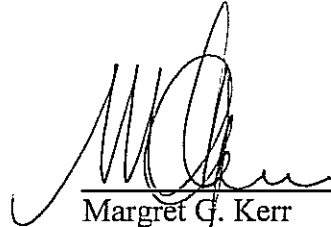
Based on the foregoing, it is hereby:

ORDERED AND ADJUDGED THAT:

1. The claim for compensability of the accident and injuries of the employee, David Hernandez, on December 17, 2012, is GRANTED.
2. The claim for provision of initial care is GRANTED.
3. The claim for reimbursement to the Claimant of \$485.00 for medical care provided at Jackson Memorial Hospital is GRANTED.

4. Jurisdiction is retained over attorney fees and costs and the same shall be determined at a later time or agreement of the parties.

DONE AND MAILED this 29th day of August, 2013, in Miami, Dade County, Florida.



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