

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

Cosme D. Calderon,
Employee/Claimant,

OJCC Case No. 18-013778MGK

vs.

Accident date: 3/7/2017

Super Landscape & Maintenance, Inc., and
Springs Landscape & Maintenance,
Inc./Zenith Insurance Company,
Employer/Carrier/Servicing Agent.

Judge: Margret G. Kerr

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FINAL MERITS ORDER

THIS CAUSE came before the undersigned Judge of Compensation Claims (hereinafter “JCC”), for a merits hearing on December 19, 2018, regarding the Petitions for Benefits (PFBs) filed June 7, 2018 and September 12, 2018. The Claimant is unrepresented and appeared live before me. The Super Landscape Maintenance/Liberty Mutual Insurance (hereinafter Super), was represented by Kate Albin Esq. The uninsured Springs Landscape & Maintenance (hereinafter Springs), was represented by Brian Rothman Esq. This Order ensues.

EXHIBITS:

JCC:

1. Claimant trial memorandum (correspondence) filed 12/10/2018 - ID only (DE#49).
2. Super/Zenith Trial Memorandum filed 12/14/2018 – ID only (DE#50).
3. Spring Trial Memorandum filed 12/17/2018 – ID only (DE#51).
4. Spring Pre Trial Stipulation filed 11/8/2018 (DE#35).
5. Super/Zenith Pre Trial Stipulation filed 11/9/2018 (DE#38).

CLAIMANT:

6. 2016 1099 form for Rolando Mendez (DE#64).
7. Check from Spring payable to Rolando Mendez (DE#65).
8. Daily work schedule for January 30 (DE#66).

E/C:

Super

1. No additional.

Spring

1. Deposition of Claimant, filed 12/17/2018 (DE#53).

2. Claimant's employment application with Spring, filed 12/17/2018 (DE#54).
3. Claimant's resignation letter, filed 12/17/2018 (DE#55).
4. Check stubs from Peoples Pack, filed 12/17/2018 (impeachment) (DE#57).
5. Petitions for Benefits for prior workers' compensation claims, file 12/17/2018 (impeachment) (DE#58).
6. Final Compensation Order in 08-026126MGK, filed 12/17/2018 (DE#59).
7. Final Compensation Order in 17-014307MGK, filed 12/17/2018 (DE#60).
8. Copy of check cashed by Rolando Mendez (DE#63) – identification only.

JOINT SUPER AND CLAIMANT:

1. Spring Pay Stubs and 1099, filed 12/17/2018 (DE#62).

CLAIMS:

1. Correction in the average weekly wage, including overtime and concurrent employment.
2. Authorization of a primary care physician for Claimant's groin.
3. Authorization of medical treatment for Claimant's left shoulder.
4. Penalties, interest, costs and attorney fees.

DEFENSES:

Super

1. No employer/employee relationship.
2. No medical evidence of an injury in the course and scope of employment.
3. No industrial injury is the major contributing cause of Claimant's complaints.
4. No treatment to Claimant's groin or shoulder is medically necessary.
5. Claimant's conditions are pre-existing and/or persona in mature.
6. The entire claim is denied.
7. No penalties, interest, costs or attorney fees owed.

Springs

1. The entire claim is denied.
2. No competent substantial evidence of an injury in the course and scope of Claimant's employment.
3. No medical evidence of an injury.
4. Claimant did not timely report an injury.
5. No evidence of concurrent employment.
6. No evidence of overtime.
7. Claimant did not report earnings to the federal government or file tax returns and therefore no evidence to support an average weekly wage.
8. Claimant has misrepresented and is therefore not entitled to benefits per 440.09(4)(a) and 440.105(4)(b).
9. Claims not contained in the petitions for benefits should be dismissed.
10. No penalties, interest, costs or attorney fees owed.

WITNESSES:

1. Cosme Calderon, Claimant - live.

2. Juan Carlos Hervis, owner of Super and Springs – live.

After hearing argument of Claimant and counsel for the E/C and reviewing the evidence and otherwise being fully advised on the facts and applicable law herein, I find that:

1. I have jurisdiction over the subject matter and the parties, and the exhibits are introduced into evidence.

2. Claimant alleges he injured his left shoulder and groin in the course and scope of his employment on 3/7/2017 when carrying a heavy bin of green coconuts. Claimant filed claims against Springs Landscape and Maintenance, his alleged actual employer, as well as Super Landscape & Maintenance, who he alleges is interchangeable with Springs Landscape as they are both owned by the same individual, Juan Carlos Hervis, and are operated as one entity. Claimant further alleges Mr. Hervis forced him to use an alias, Rolando Mendes, in order to be paid as part of an ongoing systematic fraud on the part of Mr. Hervis, the owner of both Springs and Super. He further alleges in retaliation for filing a workers' compensation claim, Mr. Hervis reported him to ICE as an illegal immigrant.

3. On behalf of Springs and Super, Mr. Hervis testified that Super is his commercial landscaping company, and Springs is his residential landscaping company. While he owns both companies and they are run out of the same office they are managed completely separately. He alleges Claimant applied for full time work for Springs under an assumed name and was hired on 11/21/2016. He worked for Springs until 3/7/2017 when he requested to reduce his hours to 3 days a week. As no part time work was available, he submitted his resignation and made no allegation at that time of an injury at work.

4. Claimant has filed workers' compensation claims on 2 prior occasions against 2 other employers. He filed a claim against Miyako Japanese Restaurant alleging a date of accident of 7/26/2008. The case proceeded to Final Hearing before JCC Harnage and Claimant testified he was lifting garbage when he felt "air" in his stomach and suffered a hernia. Claimant alleged his employer had no insurance and fired him for reporting the accident, but the JCC found the evidence showed Claimant was terminated a month and a half after the injury because he had applied for unemployment benefits while still working for the employer. The JCC found numerous inconsistencies in Claimant's deposition and live testimony. He found Claimant was not a credible witness and that his hernia condition came from a prior employment scenario. He further found Claimant did not report the alleged injury to his employer and denied the claim for

benefits.]

5. Claimant later filed a claim against Peoples Pack Corporation alleging a date of accident of 5/17/2017. The claim proceeded to Final Hearing before the undersigned and the Claimant testified he had been employed by Peoples Pack for approximately 3 years as a packer on a production line when he injured his right great toe. No representative of Peoples Pack appeared for the Final Hearing and therefore Claimant's testimony was uncontested as to the occurrence of an injury and that he reported the injury to his employer in a timely manner. Claimant provided no documentary evidence of his earnings, and the undersigned was therefore unable to determine the average weekly wage. Claimant testified his employer had no insurance and he was terminated for filing a claim. At no time did Claimant testify he had concurrent employment with a landscaping company up until 2 months before his injury, that he was received a groin and shoulder injury 2 months prior to his foot injury with Peoples Pack, or that he had any difficulty performing his job duties for Peoples Pack during those 2 months.

6. Claimant has now filed a claim alleging a date of accident of 3/7/2017, two months before his injury with Peoples Pack. His employment application with Springs is completed in the name of Rolando Mendez, although the signature appears to be that of Cosme Calderon. He was hired at \$11.00 per hour. The evidence shows Claimant worked 45 hours for Peoples Pack during 3/6/2017-3/12/2017 the week of his alleged injury with Springs. The evidence further shows Claimant, as Rolando Mendez, resigned his employment with Springs on 3/13/2017.

7. In his deposition taking on 11/8/2018, Claimant was uncooperative, combative and obstructive in his testimony. He refused to answer most of the questions posed to him, claiming he could not remember where he had treated after his alleged injury, or worked prior to his injury. He refused to present a copy of his driver's license or passport. He testified he did not know if he had used any other names, did not know if he had a social security number and did not know if he had ever filed a tax return. He testified he did not know if he was injured while working at Super or Springs and did not remember if he was injured while working for them. He conceded he had never been to a doctor for the injuries he alleged he suffered while working for either Springs or Super. When asked if he had any other injuries or accidents other than at Springs or Super, he admitted to an injury to his toe, and that he had previously suffered a hernias to his right groin but that his present injury was to his left groin. He further testified he notified his employer but he did not provide him with medical care and he did not seek medical

care on his own as he could not afford it. The Claimant brought documents with him to the deposition, but refused to show them to counsel for either Springs or Super. He denied ever having seen the resignation letter and stated he did not sign it. He testified Mr. Hervis paid him under the false name of Roberto Mendes and arranged for him to cash his checks only at one specified check cashing facility. He testified he could not remember if he had ever worked for a company named Friends Cleaning Inc, but stated he had never used the name Rolando Mendes except when he worked for Mr. Hervis. On further questioning, Claimant admitted he had not filed a tax return in 3 years.

8. In his live testimony, Claimant admitted he may have worked for Friends Cleaning Floor. When shown a picture of a check payable to Rolando Mendez dated 10/18/2017 and cashed at the same check cashing facility with his photograph attached as the individual who cashed the check, Claimant testified it was not his signature on the check. Claimant was then shown a 3 page retainer agreement, which was also attached to his deposition, between Koz Law and Daniel Rolando Mendez which he conceded contained his signature. The third page of the agreement showed a first name of Daniel and a last name of Calderon.

9. Juan Carlos Hervis then testified live before me. He testified Claimant was hired in November 2017 by Springs, the residential landscaping business and never worked for Super, the commercial landscaping business. He completed an application in the name of Rolando Mendez and was issued uniforms from Springs. He worked for approximately 4 months and then requested to work only 3 days a week. He was advised this was not possible and so quit his job. A secretary filled in the separation paperwork and told him to bring in his uniforms and gave him his last check. At no time did Claimant notify him he had been injured and the first notice he received was a letter from an attorney in 2018. As Springs has only 3 employees, it does not carry workers' compensation insurance⁴, but Super is larger and has such insurance. Claimant introduced into evidence receipts for uniforms for Super Landscaping to show he worked there, but Mr. Hervis testified and the evidence shows the receipts do not reflect uniforms were issued to Claimant by Super, only that Super bought them from a supplier.

Findings of Fact and Conclusions of Law.

10. This case is fact intensive. After comparing the deposition and live testimony of Claimant and the live testimony of Mr. Hervis, as well as reviewing the documentary evidence submitted by both parties, I conclude Claimant was employed by Springs Landscaping &

Maintenance on 3/7/2017, not Super Landscaping & Maintenance. I further conclude Claimant has failed to carry his burden of proof to show by competent substantial evidence that he suffered an industrial injury in the course and scope of his employment, or that he notified his employer of an alleged injury.

11. The Claimant's testimony was not sufficiently credible to be relied upon due to the multiple inconsistencies between his sworn deposition and live testimony. The documentary evidence did not support Claimant's testimony but rather exposed further inconsistencies. In contrast, I find Mr. Hervis's testimony was credible and consistent with the documentary evidence and therefore I accept the testimony of Mr. Hervis over that of Claimant.

12. The evidence shows Claimant had concurrent employment with Peoples Pack, but Claimant failed to provide any evidence of the value of his concurrent earnings. As Claimant admitted he has not filed tax returns in the last 3 years, I conclude he has failed to carry his burden of proof to show his earnings from Springs.

13. A Judge of Compensation Claims, as the arbiter of disputed factual matters, is not required to accept an opinion which is not supported by the facts of record and may reject uncontroverted testimony which she disbelieves. Ullman v. City of Tampa Parks, 625 So.2d 868 (Fla. 1st DCA 1993). In the present case, based on the numerous inconsistencies in Claimant's testimony, and the lack of any evidence to corroborate his version of the events, I conclude I cannot rely on his testimony and reject it.

14. Claimant has made serious allegations that the employer routinely hires undocumented workers, underpays them and intimidates them. In addition, Claimant has alleged multiple parallel claims for unpaid wages and harassment. Claimant has provided no evidence to support these allegations and I must limit my findings to the evidence presented to me and solely to those facts relevant to the issues claimed in the petitions for benefits filed in the workers' compensation case at hand.

15. Claimant has provided no medical evidence he suffered an injury on 3/7/2017 in the course and scope of his employment, or that he has been placed on either light duty or no work status as a result of the alleged injury. I therefore conclude no medical or indemnity benefits are owed to Claimant.

Based on the foregoing, it is hereby:

ORDERED and ADJUDGED that:

1. The claim for a correction in the average weekly wage, including overtime and concurrent employment is denied.
2. The claim for authorization of a primary care physician for Claimant's groin is denied.
3. The claim for authorization of medical treatment for Claimant's left shoulder is denied.
4. The claim for penalties, interest, costs and attorney fees is denied
5. The affirmative defense that Claimant was not employed by Super Landscaping & Maintenance is granted.
6. The affirmative defense that Claimant failed to notify his actual employer, Springs Landscaping & Maintenance of an accident in the course and scope of his employment is granted.
7. The petitions for benefits filed 6/7/2018 and 9/12/2018 are dismissed with prejudice.

DONE AND SERVED this 7th day of January, 2019, in Miami, Dade County, Florida.



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MGK/aa
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