

**STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS  
OFFICE OF THE JUDGE OF COMPENSATION CLAIMS  
Gainesville District**

**EMPLOYEE:**

Carl Lewis  
510 NW 56th Avenue  
Ocala, FL 34482

**EMPLOYER:**

Employee Leasing Solutions  
1401 Manatee Avenue West  
Suite 600  
Bradenton, FL 34205

**CARRIER:**

Insurance Company of the Americas  
P.O. Box 770  
Bradenton, FL 34206

**ATTORNEY FOR EMPLOYEE:**

Mark Tipton, Esquire  
Daniel Hightower, P.A.  
7 East Silver Springs Blvd., Suite 300  
Ocala, FL 34470

**ATTORNEY FOR EMPLOYER/CARRIER:**

Gregory D. White, Esquire  
Hurley, Roger, Miller, Cox, Waranch &  
Westcott, P.A.  
1560 Orange Avenue, Suite 500  
Winter Park, FL 32789

**OJCC CASE NO.:** 07-007679JPT

**D/A:** 12/4/2006

---

**FINAL ORDER**

---

After due notice to all parties the Final Hearing on the merits of this claim came on for hearing before the undersigned Judge of Compensation Claims on February 14, 2008 in Ocala, Marion County, Florida. The Court conducted and concluded a Merit Hearing on all outstanding Petitions for Benefits. Following the close of the Merit Hearing the Court announced verbal findings of fact and conclusions of law which are directly incorporated into the written order by reference.

**THE CLAIMS PRESENTED BY THE CLAIMANT WERE AS FOLLOWS:**

1. Temporary total disability and/or temporary partial disability benefits from December 5, 2006 and continuing with credit for indemnity/wages already paid to the claimant;

OJCC Case #07-007679JPT  
Final Order

2. Authorization of surgery recommended by Dr. Mark Oliver on March 21, 2007;
3. Penalties, interest, costs and attorney's fees.

**THE DEFENSES RAISED BY THE EMPLOYER/CARRIER WERE AS FOLLOWS:**

1. The claimant not TTD/TPD;
2. Voluntary limitation of income/deemed earning;
3. Any loss of earnings not causally related to the industrial accident;
4. No penalties, interest, costs and attorney's fees due and owing;
5. Employer/carrier request costs from the claimant;
6. Claimant at MMI;
7. Requested medical care not medically necessary or causally related;
8. Industrial accident no longer the major contributing cause of the claimant's condition and need for treatment;
9. Misrepresentation defense pursuant to Florida Statute §440.09 and §440.105, claimant misrepresented a prior back condition to the employer/carrier and to his physicians.

**THE FOLLOWING DOCUMENTARY EVIDENCE WAS RECEIVED INTO EVIDENCE AT THE REQUEST OF BOTH THE CLAIMANT AND THE EMPLOYER/CARRIER:**

1. Composite of the Pre-Trial Stipulation and all amendments;
2. The deposition of Dr. Scott Cutler along with all attachments.

**THE FOLLOWING DOCUMENTARY EVIDENCE WAS RECEIVED INTO EVIDENCE PURSUANT TO THE REQUEST OF THE CLAIMANT:**

OJCC Case #07-007679JPT  
Final Order

1. Hearing Information Sheet;
2. Deposition of Dr. Oliver;
3. Deposition of Mark Snell;
4. Composite of all Petitions file.

**THE FOLLOWING DOCUMENTARY EVIDENCE WAS RECEIVED INTO EVIDENCE  
PURSUANT TO THE REQUEST OF THE EMPLOYER/CARRIER;**

1. Hearing Information Sheet;
2. Deposition of the claimant;
3. Deposition testimony of Dr. Weber.

At the outset of the hearing the parties stipulated that the average weekly wage was \$526.42 and that the claimant did not have any fringe benefits. At the hearing, the claimant, Carl Lewis, appeared and testified live before me. The employer/carrier called Robert Stevenson to the stand for live testimony. These were the only two witnesses to testify live. All other witnesses testified by way of deposition. In making my findings of fact and conclusions of law, I have carefully considered and weighed all of the evidence presented to me. Although I may not recite in exclusive detail all the witness testimony and may not refer to each piece of documented evidence, I have observed the candor and demeanor of the live witnesses and have attempted to resolve all the conflicts in their testimony. As to the issue of the average weekly wage, I find that the parties stipulated to the amount listed by the employer/carrier on the Pre-Trial Stipulation. Accordingly, the average weekly wage is \$526.42. There are no fringe benefits and that is the total average weekly wage.

As to medical causation, I accept the opinion of Dr. Scott Cutler who was appointed as the Expert Medical Advisor. The court would note that his opinion is presumed correct in the absence of clear and convincing evidence to the contrary. I find that there was no clear and convincing evidence to the contrary and therefore, accept Dr. Cutler's ultimate opinions.

Dr. Cutler testified that the claimant does have a lumbar back condition that is causally related to the industrial accident. Furthermore, I find that the claimant would be entitled to temporary indemnity benefits following the industrial accident. However, while the industrial accident may have caused the claimant's condition and need for treatment and benefits, I must deny all requested benefits. All requested benefits are denied because I find that the claimant knowingly or intentionally made a false, fraudulent, or misleading statement for the purpose of securing workers' compensation benefits. Therefore, pursuant to Florida Statute §440.09(4)(a) and §440.105, the claimant is not entitled to any compensation or benefits.

The claimant does have a history of prior back pain and/or problems. The records of the Florida Department of Corrections were placed into evidence by the employer/carrier as an attachment to the deposition of Dr. Cutler. These records do show that the claimant has had prior back problems. In April 1987, the claimant was complaining of his back hurting. In October of 1988, the claimant was complaining of back pain. In July of 2000, the claimant was seen for followup for back pain. It was further noted that the claimant had back pain that had been going on for three months. In January 2002, the claimant was complaining of low back pain that had been ongoing for a month. It is clear in my mind that the claimant did have prior back pain and/or prior

back problems. However, the claimant failed to disclose these at his deposition and to the doctors.

At his deposition, the claimant was asked very specific questions about prior back problems.

In fact, on page 17, the following series of questions and answers took place beginning at line 11:

**Q:** Have you ever had any prior back problems?

**A:** No sir.

**Q:** Have you ever gone to a doctor, health care provider or any type of medical facility complaining of back pain before December 4, 2006?

**A:** No sir.

**Q:** Are you sure about that?

**A:** Yes sir.

**Q:** Have you ever injured your back before.

**A:** No sir.

Later on during the deposition the claimant was asked about the industrial accident. On page 36 of his deposition he was describing how the injury happened. On page 37 the following took place during the claimant's deposition.

**Q:** Now had you ever experienced pain in your low back before that incident?

**A:** No.

**Q:** Have you ever injured your low back before that incident?

**A:** No, No sir

The employer/carrier authorized Dr. Mark Oliver to treat the claimant. Dr. Oliver's

deposition was taken. The following series of questions and answers took place on page 8 of Dr. Oliver's deposition:

**Q:** Okay. Alright. Now, with respect to Mr. Lewis's complaints when you saw him back in March, did he relate to you any sort of past history of back problems?

**A:** He actually, I asked him specifically about that, and he denied having had any prior problems with his low back, or right leg proceeding the work injury of 12/5/06 was the date he gave me.

Dr. Oliver was questioned again on page 13:

**Q:** And regarding his history of no problems with his low back before the accident of 12/5/06, in your note you indicate that he adamantly denies that?

**A:** Yes.

On page 14 of Dr. Oliver's deposition he was shown some records relating to the claimant from the Department of Corrections. Dr. Oliver had a chance to review those records. After review of the records the doctor was asked:

**Q:** Following your review of those records from the Florida Department of Corrections running from April 19, 1987 to January 24, 2002, does it appear to you that the history the patient provided to you of having no prior problems with his low back appears to be accurate or truthful to you?

**A:** No.

I accept the testimony of Dr. Oliver that the claimant gave him a false, fraudulent or misleading statement.

The employer/carrier got an Independent Medical Examination of Dr. Steven Weber. On page 5 of his deposition Dr. Weber began discussing the claimant's pre-existing conditions. Starting at line 17 on page 5:

**Q:** Did you inquire with the patient as to any prior history of back problems?

**A:** I did.

**Q:** And what history do you obtain from him in that regard?

**A:** Per the notes, he adamantly denies any previous injury, x-rays, or MRIs of his lower back. And on the intake form, he indicates that he has not had a prior problem with the same orthopedic condition in the past.

**Q:** The patient intake form, was that completed by Mr. Lewis?

**A:** Yes sir.

**Q:** Was that done in your office before the IME?

**A:** They are either done in the office prior to the IME or done sometimes, we send them out to the patient so they can complete them at home.

**Q:** Okay. Did you have available the medical records of any other providers in conjunction with your IME?

**A:** I did.

**Q:** And what other medical providers records did you have?

**A:** There were records from Polk County, State of Florida from 1987. There were records all the way through 1988 to 2002, as well. There were records, written notes from Dr. Oliver. I have notes from Express Care and Diagnostic Testing.

**Q:** Did the prior medical records, did they indicate any prior back problems?

**A:** The record did indicate that the patient had had previous back pain.

**Q:** And where was he seen for the back pain?

**A:** I believe that was the State of Florida Department of Corrections and there are also visits to Express Care...

**Q:** Do you feel the claimant gave you an accurate and truthful history pertaining to his prior back complaint?

**A:** Well, he adamantly denied that he had any previous injury and he put down in his own writing that he did not have any previous injury which would seem to contradict what the previous records indicate.

On page 30 of the deposition Dr. Weber further discussed the claimant's lack of candor regarding his prior condition. On line 13 of page 30 Dr. Weber stated as follows:

**A:** You know, when you look at these things overall you have to look at it in a context of the entire situation. Here is a guy with significant, significant, significant pre-existing conditions. He's got back pain, he's got right leg pain, he's got an MRI that shows significant degenerative conditions and a



herniated disc. How long has that been there? Nobody really knows. He denied any previously injury. He was not forthcoming with any previous treatment. He was questioned about that directly by myself and had the opportunity to come forth with that on an intake form, as well, which he didn't. You know, part of this relies on patient integrity and patient reliability which, you know, obviously, is subject to question at this point.

I accept the testimony of Dr. Weber that the claimant gave him a false, fraudulent or misleading statement.

Ultimately, an Expert Medical Advisor was appointed due to the conflict in the medical opinions between Dr. Oliver and Dr. Weber. Dr. Cutler's deposition was taken on January 29, 2008.

At the bottom of page 24, top of page 25, Dr. Cutler was asked as follows:

**Q:** Okay and if we can go back to that original form, not to belabor the point, but he was asked if he had similar back pain in the past, I think?

**A:** Yes, and he wrote no.

**Q:** And then doctor on page 1 of your report at the bottom it says, he states there was no previous back problem. Did you ask him if he ever had any prior back problem?

**A:** Yes.

**Q:** So he explicitly denied it to you?

**A:** Yes.

On page 27 Dr. Cutler was asked:

**Q:** Okay, would you at least agree with me, doctor, that the Department of Corrections Records do document prior low back problems?

**A:** Yes, that's clear.

**Q:** And you do agree with me that that's not consistent with him stating he had no previous back problems?

**A:** Yeah, I don't think I argued with that.

**Q:** I am not saying you did.

**A:** It's obviously inconsistent.

Dr. Cutler also admitted in his deposition that he has to presume he is giving accurate, historical information in order to make a diagnosis. Dr. Cutler also noted inconsistencies within the examination. Dr. Cutler was also questioned on page 38 of his deposition regarding pre-existing conditions.

**Q:** Okay. Which was going to I presume you asked him more than one time about prior back complaints and he said no, so you had no reason to follow up because you hadn't seen these records to potentially quiz him about that?

**A:** No. When I do these routinely, asking people in the course of treating them, have you ever had any other injuries before to your low back, have you ever had treatment to your low back, have you ever seen a chiropractor and telling him there is low back pain. I have also asked people routinely if there are

medical record anywhere that talk about you being treated for a back problem. That is my standard way of asking.

**Q:** Would you have asked him, also?

**A:** I would ask everyone I talk to that way.

**Q:** So he would have denied all of that?

**A:** Particularly yes. Particularly when there is a medical/legal issue involved, because I don't want to find out that I gave a perception only to have you tell me, by the way, did you see this other 800 pages of his back surgery? So I specifically ask if there are record anywhere of any back problems.

**Q:** Okay. So I guess what you are getting at, you make it your practice and pattern to take a very detailed history of that same body part?

**A:** Yes. Specifically, when there is a medical/legal issue that I am being asked.

**Q:** Again, that was done in this case?

**A:** Yes. It is done in every case.

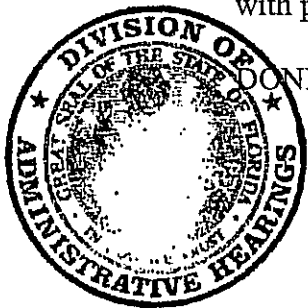
I accept the testimony of Dr. Cutler that the claimant gave him a false, fraudulent or misleading statement.

I find that the claimant is not entitled to any benefits pursuant to Florida Statute §440.09(4)(a). I find that the claimant misrepresented his prior medical condition at his deposition. I find that the claimant misrepresented his prior medical condition to Dr. Oliver. I find that the claimant misrepresented his prior medical condition to Dr. Weber. I find that the claimant

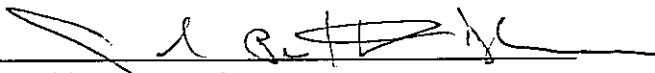
misrepresented his prior medical condition to Dr. Cutler. I find that the claimant knowingly or intentionally made these misrepresentations about his prior back condition in order to get workers' compensation benefits in the form of back surgery and lost wages. I find that claimant's are required to tell the truth all the time. As the First District Court of Appeal has noted in the case of Village Apartments v. Hernandez, 856 So.2d 1140, (Fla. 1<sup>st</sup> DCA 20003), "honesty is not a luxury to be invoked at the convenience of a litigant." The claimant was not honest and all of his workers' compensation benefits are denied.

According , it is ORDERED and ADJUDGED as follows:

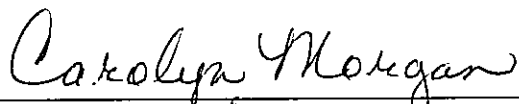
1. The claimant's average weekly wage is \$526.42;
2. The claimant is not entitled to any workers' compensation benefits because I find that he knowing or intentionally made false, fraudulent, or misleading oral or written statements for the purpose of securing workers' compensation benefits. Accordingly, all benefits are denied with prejudice.



DONE and ORDERED in Gainesville, Florida, this 5<sup>th</sup> day of March, 2008.

  
Honorable John P. Thurman  
Judge of Compensation Claims

THIS IS TO CERTIFY that the foregoing Order was entered on the 5<sup>th</sup> day of March, 2008 and a copy was sent by regular mail to all interested parties at the addresses listed above.

  
Judicial Assistant Secretary

OJCC Case #07-007679JPT  
Final Order