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

Jose Rivera,
Employee/Claimant,

vs.

Howard Leasing, Inc./Sunz Insurance, and
Corvel Corporation,
Employer/Carrier/Servicing Agent.
_____/

OJCC Case No. 14-004316WJC

Accident date: 01/20/2014

Judge: W. James Condry, II

FINAL COMPENSATION ORDER

After proper notice to all parties, a final hearing was held on the afternoon of Thursday, July 31, 2014. Present at the final hearing was Attorney David I. Rickey for the claimant and Attorney Matthew J. Troy for the employer/servicing agent, hereinafter referred to as the E/SA. Testifying at the final hearing were the claimant Jose Rivera and employer representative, William Tanner Bannett. The remainder of the evidence was received via deposition and other documents as detailed below. Mr. Raymond G. Ramos provided Spanish translation services.

This order addresses the Petitions for Benefits filed with DOAH on 02/21/14, 03/12/14 & 03/27/14. The claim was unsuccessfully mediated on 06/11/13

OVERVIEW

The claimant, a forty year-old transmission mechanic claims injury to his left foot and back in the course and scope of his employment on January 20, 2014 with Howard Leasing, the employee leasing company of All Transmission World. The left foot injury was accepted as compensable with workers' compensation benefits furnished. The E/SA has denied compensability of a back condition for which temporary indemnity and medical benefits have been claimed. For the reasons expressed below I find Mr. Rivera's claim to treatment for the back condition and benefits purportedly associated therewith should be denied.

The specific issues to be determined at the 07/31/14 final hearing were as follows:

1. Whether Mr. Rivera is entitled to a finding of compensability of his back condition and the authorization of treatment for same?
2. Whether Mr. Rivera is entitled to the authorization of an orthopedic physician as recommended by Dr. Harold Henningsen?
3. Whether Mr. Rivera is entitled to the payment of medical bills of MedAssit for Osceola Regional Medical Center in the amount of $7,805.25 for date of service 01/24/14; St Cloud Regional Medical Center in the amount of $2,183.36 for date of service of 02/06/14; Osceola Pathology Associates in the amount of $75.00 for date of service of 01/24/14; and Emergency Physicians of Central Florida in the amount of $689.00 for date of service of 02/06/14?
4. Whether Mr. Rivera is entitled to the payment of temporary total (TTD) or temporary partial (TPD) disability benefits from 01/20/14 and continuing with interest and penalties as otherwise provided by law?
5. Whether Mr. Rivera is entitled to the payment of his reasonable attorney fees at the expense of the E/SA?

The E/SA defended the claim on the following grounds:

1. That the industrial accident is not the cause of the low back condition. That the condition is personal to the claimant.
2. That the orthopedic referral is not due to a compensable injury.
3. That the medical bills claimed are not causally related to compensable injuries and not emergency treatment.
4. That there is no evidence to substantiate disability. That the claimant is at MMI with regard to the compensable left foot condition.
5. That the claimant was terminated for misconduct and that the MCC of disability is not the industrial accident. That the claimant is at maximum medical improvement.
6. That the E/SA is entitled to offset for unemployment benefits.
7. That no penalties, interests, cost or attorney fees are due.

STIPULATIONS OF THE PARTIES

1. That the Judge of Compensation Claims has jurisdiction over the parties and the subject matter.
2. That venue properly lies in Orange County.
3. That there was an employer/employee relationship at the time of the 01/20/14 accident.

4. That there was worker's compensation insurance coverage in effect on the date of the accident.
5. That the employee gave timely notice of the accident at to the left foot injury only.
6. That the accident as to the left foot injury only was accepted as compensable.
7. That there was timely notice of the pretrial conference and the final hearing.
8. That the claimant's average weekly wage is $747.59.

JUDGE'S EXHIBITS

1. The pre-trial stipulation and pre-trial compliance questionnaires entered into by the parties and approved by order entered on 06/16/14.
2. A composite exhibit consisting of the claimant's final hearing information sheet dated 07/27/14 and the E/SA's trial memorandum dated 07/28/14. The composite items and any submitted case opinions were considered for argument purposes only.
3. A composite exhibit consisting of the parties written closing arguments and any submitted case opinions.

JOINT EXHIBITS

1. The E/SA pay-ledger or payout.
2. A composite exhibit consisting of the claimant's submitted employee earnings reports/DWC-19s.

CLAIMANT'S EXHIBITS

1. The 07/07/14 deposition transcript of Dr. Stephen Goll and attachments.

E/SA EXHIBITS

1. The 05/02/14 deposition transcript of Jose Rivera Orozco and attachment.
2. The 07/23/14 deposition transcript of Antonia McGarrah, ARNP and attachments.

PROFERRED EXHIBIT

1. The Medical records of St. Cloud Regional Medical Center with date of service of 02/06/14 offered by the claimant.

*The reports were excluded in sustaining the E/SA objections because they were not established to be those of an authorized medical provider (the payout shows no payment to Osceola Regional Medical as a provider) nor were the records timely filed (offered the day before trial) so as to also satisfy the 30-day filing requirements of Section 440.29(4), Florida Statutes. See Tutor Time Child Care v. Patterson, 91 so.3d 264 (Fla. 1st DCA 2012) and Vaughan v. Broward General Medical Center, 105 So.3d 569 (Fla. 1st DCA 2012). The claimant further failed to establish emergent medical care as his only admitted medical evidence coming from Dr. Goll did not address the issue of the 02/06/14 medical visit, the appropriateness of such care or its emergent nature. The claimant's testimony alone cannot support the emergent nature and **medical necessity** of the care. See Church's Chicken v. Anderson, 112 So.3d 545 (Fla. 1st DCA 2013). Standing alone I find the records unauthenticated hearsay and sustain the E/SA's objection to their introduction. Additionally, I accept the E/SA argument that the reports do not qualify as a prior consistent

statement in that the argued motive for the claimant's purported fabrication (i.e. retaliation for termination) existed before the alleged prior consistent statement being made. See Anderson v. State, 874 So.2d 14 (Fla. 4th DCA 1991). Hence with the argued motive existing before the statement was rendered the statement otherwise constitutes self serving and unauthenticated hearsay.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In making my findings of fact and conclusions of law in this claim, I have carefully considered and weighed all of the evidence presented. I have observed and assessed the candor and demeanor of the witnesses that testified live before me, and I have resolved all of the conflicts in the live testimony, deposition testimony and documentary evidence. I have carefully considered all of the evidence admitted even though I have not commented on or summated every piece thereof. Nevertheless, in my ruling I have set forth my ultimate findings of fact with mandate as required by *Section 440.25(4) (e)*.

Pursuant to *Section 440.015*, I have not interpreted the facts in this case liberally in favor of either the rights of the injured worker or the rights of the employer. I have, as required, construed the law in accordance with the basic principles of statutory construction. Based on the foregoing, the evidence, and applicable law, I make the following determinations having weighed and elected to reject as unpersuasive the evidence and inferences inconsistent with these findings:

1. I find that I have jurisdiction over the parties and the subject matter and I accept as true those matters for which the parties have stipulated.
2. I find from the testimony of the claimant that while installing a transmission on a vehicle the "mount" from the cross-member or chassis fell striking the dorsal lateral aspect of his left foot. The cross-member mount weighed approximately 15 pounds. There were no witnesses to the accident.
3. The injury to claimant's left foot was accepted as compensable. However there is conflicting testimony with regard to whether Mr. Rivera simultaneously sustained and reported an injury to his lower back.
4. Mr. Rivera testified that he sustained and reported an injury to his back the very same day. He testified that the back injury occurred as he attempted to steady the heavy cross-member on the transmission jack after the mount fell.
5. Mr. Rivera's supervisor, William Tanner Bannett, denies the reporting of a back injury. Mr. Bannett testified that the foot injury was first brought to his attention on January 22, 2014 at which time he immediately referred Mr. Rivera for medical care at Lakeside Occupational

Medical Center. The record evidence that includes the claimant's trial testimony and the deposition testimony of Antonia McGarrah a nurse practitioner for Lakeside substantiates or confirms that Mr. Rivera did indeed first receive evaluation and treatment on January 22nd. Mr. Rivera received treatment at Lakeside Occupational Medical Center on January 22nd, 24th and 27th. At such time he only received treatment for his left foot. Ms. McGarrah testified that the medical records did not indicate the reporting of a back injury nor did Mr. Rivera complain of back pain to her when she examined him on January 24, 2014. That testimony is also further corroborated by the testimony of the claimant's independent medical examiner, Dr. Stephen Goll, who testified that the records provided for his review as part of his IME did not reveal Mr. Rivera claiming or receiving treatment for a back condition before February 4, 2014 the date in which Mr. Rivera was subsequently terminated by the employer. Mr. Rivera testified that on his medical visits he also reported his back pain. I find this testimony comes to pose a significant conflict.

6. Although Dr. Goll diagnosed Mr. Rivera with a lumbar strain he testified that his medical opinion on causation rested on the reliability of the claimant's history and on the accurate representation that the back pain began and continued from the date of the accident as described occurring on January 20, 2014. Dr. Goll testified that if the history he obtained from the claimant of having back complaints since the incident in January 2014 is not correct it would change his opinion on causation.
7. Although Dr. Goll only responded, "Maybe" to the question of whether he would expect the claimant to complain of back pain at any point when he was being seen at either Lakeside or Osceola Regional Medical Center for his foot, I find it is reasonable to expect that if back pain complaints were indeed communicated to the medical providers as Mr. Rivera said they were, those complaints would have been recorded in the facilities medical reports. Those back complaints were not so recorded as evidenced from the factual testimony of Ms. McGarrah and Dr. Goll. The medical facilities in my opinion would not have a motive to not record back complaints if they were indeed made. For example I find Ms. Ms. McGarrah had no reason to lie in testifying that Mr. Rivera did not report a complaint of back pain or a back injury to her when she examined him on January 24, 2014. In fact it would seem that medical providers for effective treatment as well as potential liability reasons would attempt to record an accurate history of complaints to access the nature of the problem or problems and needed treatment. The absence of such medical documentation of back pain complaints in my opinion support the

claimant's supervisor, William Bannett's testimony that a back injury was not reported nor was treatment for a back condition requested.

8. In considering the record evidence as a whole I do not believe Mr. Bannett lied about there being no back complaints reported to him. Not only did I find him credible as he testified at trial but I find there wasn't a reasonable or likely motive at that time for Mr. Bannett to refuse to authorize the claimant obtaining an evaluation and treatment of his back if such an injury had been reported. Mr. Bannett had since February of 2011 been the store manager at the All Transmissions World store where claimant worked and suffered the subject accident. While in that capacity Mr. Rivera suffered a previous on the job accident with this employer that involved his right hand. Mr. Rivera reported the accident and hand injury to Mr. Bannett who authorized medical care for same. That work related hand accident was accepted as compensable and workers' compensation benefits furnished. Under the circumstances given this past workers' compensation claims handling history I find it unlikely that Mr. Bannett would have denied Mr. Rivera medical care for his back had such an injury been reported and care for same requested.
9. After the industrial accident Mr. Rivera went back to work performing his same duties of removing and installing transmissions and general automotive repair work. According to Mr. Bannett the claimant did not report difficulty doing that work or any complaints with back issues. Mr. Rivera testified to the contrary. There was also conflicting testimony as to whether the transmission installation work required two individuals to do it. Mr. Bannett testified that two individuals were not required. He testified that provided the cross-member is properly affixed to the transmission jack, the jack would carry the full weight of the cross-member assembly. Given the testimony of the two witnesses I find it more likely than not, that two workers were not required to do the work that Mr. Rivera was doing at the time he injured his left foot.
10. Mr. Bannett testified that Mr. Rivera was terminated on February 4, 2014 for no-call, no-show problems. Mr. Rivera was said to be a no-show to scheduled work on Saturday, February 1, 2014. In regard to this particular February absence, Mr. Bannett testified that claimant had prior no-call, no-shows. This no-show was not a first time incident. On the February 1st date in question Mr. Bannett attempted although unsuccessfully to contact Mr. Rivera. Mr. Rivera was then terminated on his next scheduled day of work on February 4, 2014. Since Mr. Rivera was terminated he has received unemployment compensation benefits that began in March of 2014.

11. There was no evidence introduced at trial concerning the medical bills claimed on the pretrial stipulation or evidence as to the reasonableness and medical necessity of such bills.

WHETHER THE CLAIMANT IS ENTITLED TO A FINDING OF COMPENSABILITY OF HIS BACK CONDITION?

12. *Section 440.02(1)* provides that "Accident" **means only an unexpected or unusual event or result that happens suddenly.**
13. *Section 440.09(1)* provides that the employer must pay compensation or furnish benefits required by *Chapter 440* if the employee suffers an accidental compensable injury or death arising out of work performed in the course and the scope of employment.
14. The section further requires that the injury, its occupational cause, and any resulting manifestation or disability must be:
    a. Established to a reasonable degree of medical certainty based on objective relevant medical findings; and,
    b. The accidental compensable injury must be the major contributing cause of any resulting injuries. "Major contributing cause" is defined under Section 440.09(1) as, "**the cause which is more than 50 percent responsible for the injury as compared to all other causes combined for which treatment is sought.**"
15. I find that Mr. Rivera suffered an "accident" as that term is defined when while installing a transmission a "mount" from the cross-member or chassis fell on his left foot resulting in injury. The carrier does not dispute this injury. In this regard Mr. Rivera suffered an event that was unexpected, unusual and sudden. The event did indeed occur within the course and scope of his employment with Howard Leasing, the employee leasing company of All Transmission World. There is conflicting testimony as to whether the accident was reported to the claimant's supervisor, William Tanner Bannett, on the same day or two days later. In resolving that conflict I am inclined to believe that it was likely that injury and medical care was first requested of Mr. Bannett on January 22, 2014 that prompted the initial medical visit.
16. The accident occurred at a place where Mr. Rivera could reasonably be expected to be and while reasonably fulfilling the duties of his employment. I find an evidentiary basis exists as the parties have stipulated to a compensable injury involving the left foot.
17. I do <u>not</u> find an accident and compensable injury to the lower back. I find from the totality of

the evidence the reporting of the back condition and tying it to the employment and accident of January 20, 2014 is questionable. I find it especially troubling that corroboration in medical records of the reporting or treating of back complaints is not shown from this record to exist until after Mr. Rivera was terminated from his employment with the employer. Therefore I am not convinced that any back condition Mr. Rivera may legitimately have was caused by the subject employment and specific incident that occurred on January 20th. I might have reached a different conclusion had Mr. Rivera testified that he did not notice back pain initially but only later. That his back pain was otherwise masked by the more significant pain from his foot injury. That once the back pain was noticed he promptly reported it. However that was not his testimony. He testified that his back pain persisted upon the inception of his accident and was troubling for him from the outset. It did not later become noticeable or progressively worsened. Mr. Rivera testified that he asked for treatment of his back and made such requests at Fish Memorial Hospital and at Lakeside Medical but the facilities only treated his foot. He then, when they neglected to treat him, sought treatment on his own. The first treatment was on February 6, 2014 at St Cloud Regional Medical Center. However Mr. Rivera had been fired from his employment with Howard Leasing/All Transmissions World by that time.

18. Mr. Rivera testified in trial that before he went to St. Cloud on his own he did not ask anyone with the employer to send him to a doctor for his back. I find from the totality of the evidence there is sufficient doubt that a back injury occurred on the job and was reported before his employment termination as claimed. I do not believe it is likely that had Mr. Rivera reported back pain and requested care for such while at Fish Memorial Hospital or Lakeside Medical, that such a request would not have been recorded. In light of the above considerations I find there is at least equal if not more reason to suspect an injury to the back from the employment was contrived by Mr. Rivera out of retaliation for his termination. Consequently I am not persuaded by the weight of the evidence that Mr. Rivera sustained a back injury in the course and scope of employment.
19. In support of this finding I note that the E/SA has never accepted the back condition as compensable and there has been no definitive showing that the E/SA has knowingly paid for back treatment. Therefore the burden of proof concerning the compensable character of the back condition and the major contributing cause of any such back condition remains on the claimant. See. ***Engler v. Am. Friends of Hebrew University, 18 so.3d 613 (Fla. 1st DCA 2009)*** and ***Jackson v. Merit Electric, 37 So.3d 381 (Fla. 1st DCA 2010)***. I do not believe the claimant has satisfactorily met

that burden. The request for a finding of compensability in regard to the back condition is denied.

WHETHER THE CLAIMANT IS ENTITLED TO THE AUTHORIZATION OF AN ORTHOPEDIC SURGEON?

20. *Section 440.13(2)(a)* provides that, "Subject to the limitations specified elsewhere in this chapter, the employer shall furnish to the employee such medically necessary remedial treatment, care, and attendance for such period as the nature of the injury or the process of recovery may require . . . "
21. Section 440.13(1) (l) defines "medical necessary" or "medical necessity" as, "any medical service or medical supply which is used to identify or treat an illness or injury, is appropriate to the patient's diagnosis and status of recovery, and is consistent with the location of service, the level of care provided, and applicable practice parameters."
22. In that I have not found the claimant's back condition compensable, the request for the authorization of orthopedic medical care in regard to it is denied.
23. The only medical opinion testimony concerning the claimant left foot condition is from the claimant's independent medical examiner Dr. Goll. Dr. Goll's testimony is that the claimant has reached maximum medical improvement with regard to the left foot condition with a zero percent impairment and no need for further treatment (See deposition of Dr. Goll at page 9). Consequently the ordering of orthopedic care in regard to the foot condition is also denied.

WHETHER THE CLAIMANT IS ENTITLED TO THE PAYMENT OF THE MEDICAL BILLS CLAIMED ON HIS PETITION FOR BENEFITS AND ON THE PRETRIAL STIPULATION?

24. I find that the claimant has failed to introduce the specific medical bills into evidence or to offer medical opinion testimony as to the bills reasonableness and medical necessity. In that I have not found a compensable back injury, any medical bills reportedly related to such an injury are denied. Furthermore there was no testimony, lay or medical, establishing that the medical bills related to the treatment of the compensable left foot condition that were not paid. Accordingly the request for the payment of medical bills as delineated on page two of this order is denied.

WHETHER THE CLAIMANT IS ENTITLED TO THE PAYMENT OF TEMPORARY TOTAL DISABIITY BENEFITS?

25. *Section 440.15(2)(a*) provides in part that, **"in case of disability total in character but temporary in quality, 66 2/3 percent of the average weekly wages shall be paid to the employee during the continuance thereof, not to exceed 104 weeks except as provided in this subsection, s. 440.12(1) and s. 440.14(3)."** The section goes on further to provide that, "**Once the employee reaches the maximum number of weeks allowed, or the employee reaches the date of maximum medical improvement (MMI), whichever occurs earlier, temporary disability benefits shall cease and the injured worker's permanent impairment shall be determined.**"
26. In that the claimant's back condition has not been found to be compensable, any indemnity or medical benefits related to it is denied. In regard to the compensable left foot condition the claimant failed to produce clear and specific evidence of definitive periods of total disablement for which temporary total disability benefits would be due. The request for same in regard to the left foot injury is therefore denied as well.

WHETHER THE CLAIMANT IS ENTITLED TO THE PAYMENT OF TEMPORARY PARTIAL DISABILITY BENEFITS FROM JANUARY 20, 2014 AND CONTINUING?

27. *Section 440.15(4)(a)* provides that**, "subject to subsection (7), in the case of temporary partial disability, compensation shall be equal to 80 percent of the difference between 80 percent of the employee's average weekly wage and the salary, wages, and other remuneration the employee is able to earn post-injury as compared weekly."** The provision goes further to provide that the compensation cannot exceed 66 and 2/3 percent of the employee's average weekly wage at the time of the accident and is payable under the subsection only if:
    a. Overall maximum medical improvement has not been reached; and,
    b. The medical conditions resulting from the accident create restrictions on the injured employee's ability to return to work.
28. *Section 440.02(10)* defines the date of maximum medical improvement as, **"the date after which further recovery from, or lasting improvement to, an injury or disease can no longer reasonably be anticipated, based upon reasonable medical**

probability."

29. As with the claim to temporary total disability benefits, because compensability of the back condition has not been found, any award of temporary partial disability benefits must be denied.
30. In regard to the left foot condition, there is no showing from this record that Mr. Rivera was placed in a restricted duty work status for his left foot. This coupled with the opinion of Dr. Goll that the claimant is at maximum medical improvement with no impairment, the claim for temporary partial disability benefits relating to the left foot injury is also denied.

WHETHER THE CLAIMANT IS ENTITLED TO THE PAYMENT OF HIS REASONABLE ATTORNEY FEES AND COSTS AT THE EXPENSE OF THE E/SA?

31. I find that as benefits have not been awarded, Mr. Rivera is not entitled to the payment of his reasonable attorney fees and costs at the expense of the E/SA.

CONCLUSION:

The parties for the most part acknowledge that this is a credibility case that hinges on whether I believe the claimant sustained and reported a back injury related to his January 20, 2014 accident. For the reasons set forth above I do not. I seriously question that Mr. Rivera injured his back while attempting to hold up or steady a cross member. I believe if he indeed had such an injury with the immediate onset of pain as he claims he would have reported that back injury and pain to his employer and his initial medical providers. I believe such complaints would have been reflected in his initial medical provider's reports. According to Ms. McGarrah and Dr. Goll that was not the case in the reports they reviewed. The fact that the back injury was not reflected in those reports and back pain and injury was not corroboratively shown to have been claimed until after Mr. Rivera's termination from employment causes me to find Mr. Rivera's testimony unreliable. I am not convinced that after the alleged accident he all along complained about a back injury and pain to everyone but that his back complaints were simply ignored by his employer as well as the medical providers who saw him before his termination. Given that Mr. Rivera carries the burden of proof and there is no presumption of compensability under the current law I am not persuaded by the preponderate weight of the evidence that Mr. Rivera indeed sustained a back injury on his job on January 20, 2014. Absent that finding I reject the causation opinion of his independent medical examiner.

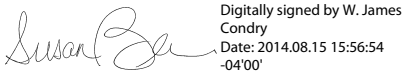
WHEREFORE it is hereby **ORDERED** and **ADJUDGED** that:

1. The request for the finding of compensability of the back condition is denied.
2. The request for the authorization of an orthopedic physician for the treatment of the back condition is denied.
3. The request for the payment of the medical bills of MedAssit for Osceola Regional Medical Center in the amount of $7,805.25 for date of service 01/24/14; St Cloud Regional Medical Center in the amount of $2,183.36 for date of service of 02/06/14; Osceola Pathology Associates in the amount of $75.00 for date of service of 01/24/14; and Emergency Physicians of Central Florida in the amount of $689.00 for date of service of 02/06/14 is denied.
4. The request for the payment of temporary partial disability benefits from 01/20/14 through the date of hearing and continuing with interest and penalties as otherwise provided by law is denied.
5. The request for the payment of the claimant's reasonable attorney fees and costs at the expense of the E/SA is denied.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida.

Honorable W. James Condry, II
Judge of Compensation Claims
400 West Robinson Street, Suite 608-North
Orlando, Florida 32801-1701

I HEREBY CERTIFY that the foregoing Compensation Order was entered by the Judge of Compensation Claims. A true and accurate copy of the order has been electronically served on the parties attorneys of record on this the 15th day of August 2014.



Susan Berman
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