

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

Eric Evans,)	
Employee/Claimant,)	
)	
vs.)	OJCC Case No. 02-016218JJL
)	
Gray Communications/Columbia Insurance)	Accident date: 12/17/2001
Group,)	
Employer/Carrier/Servicing Agent.)	Judge John J. Lazzara
_____)	

FINAL ORDER

AFTER DUE NOTICE to the parties, a Final Hearing on this matter was held on July 30, 2012 in Tallahassee, Leon County, Florida. The parties were represented by counsel as indicated below. The undersigned Judge of Compensation Claims has jurisdiction of the parties and the subject matter.

The litigation history of this case reflects a Petition for Benefits (PFB) was filed on January 12, 2012 and a Response thereto was filed on January 24, 2012. The issues/claims were mediated on May 24, 2012 resulting in an impasse. The Uniform Statewide Pretrial Stipulation was filed on June 5, 2012 and approved by Order of June 7, 2012. The matter was scheduled for trial and heard on July 30, 2012.

At the final hearing, the claimant sought the following benefits:

1. Re-authorization of Dr. Gregg Alexander, M.D., and Dr. Umesh Mhatre, M.D.;
2. An award of attorney's fee for claimant's counsel of record; and
3. The reimbursement for the cost of these proceedings.

The claim was defended on the following grounds:

1. The claimed workers' compensation benefits are barred because the claimant violated § 440.09(4) and §440.105, Fla. Stat., by misrepresenting and making false and misleading statements regarding his physical condition and functional abilities thereby forfeiting further workers' compensation benefits;
2. Employer/Carrier denies claimant's entitlement to costs and attorney's fees at their expense; and
3. Employer/Carrier seeks costs at the expense of the claimant if they prevail herein.

The parties have entered into the following stipulations:

1. The Judge of Compensation Claims has jurisdiction of the parties and the subject matter of this claim.
2. Venue properly lies in Leon County, Florida.
3. Notice of Hearing and Notice of Injury were properly furnished and received as required by the Workers' Compensation Law.
4. On December 17, 2001, the captioned claimant, Eric Evans, was employed by the captioned employer and on that date sustained and suffered a compensable accident arising out of and within the course and scope of said. However, employer/carrier did not stipulate to the claimant's physical and psychiatric injuries and conditions listed in the pretrial statement.

At the trial of this cause, the following Exhibits were admitted into evidence.

Claimant's Exhibits

1. Petition for Benefits filed on 1/12/2012.
2. Medical records composite filed on 6/28/2012; 7/6/2012; 7/13/2012; and 7/27/2012.
3. Composite of prior stipulations of the parties filed on 12/18/2009 (permanent total disability benefits); 12/17/2009 (urologic care); 9/16/2009 (IDD treatment); 1/22/2009 (authorization of medical and lab); 9/10/2008 (authorization of Dr. Mhatre); and 7/1/2003 (AWW and temporary indemnity benefits).
4. Composite of three (3) prior pretrial stipulations and questionnaire forms filed on 12/9/2009; 10/1/2009; and 9/12/2003.

Employer/Carrier's Exhibits

1. Sixteen (16) surveillance DVDS.
2. Deposition of Marsha Thweatt, Carrier's Adjuster, taken on 7/19/2012, together with exhibits. (*Claimant's objections to the introduction in evidence of said deposition on the grounds that the adjuster is not licensed as such in Florida and because she had no personal knowledge of the allegations in her affidavit were denied*).
3. Deposition of Eric Evans taken on 5/25/2011. (*Claimant's objection to the introduction of said deposition in evidence on the grounds that it was not specifically listed in the pretrial statement was denied as the claimant was listed as a witness and counsel for the claimant was*

in attendance at the taking. The additional ground that the errata sheet was not attached was remedied by the filing of the errata sheet).

4. Deposition of Eric Evans taken on 10/14/2009. *(Claimant's objection to the introduction of said deposition in evidence on the grounds that it was not specifically listed in the pretrial statement was denied as the claimant was listed as a witness and counsel for the claimant was in attendance at the taking.)*

5. Employer/Carrier's Hearing Information Sheet filed on 7/26/2012. *(Marked for identification only).*

Joint Exhibits

1. Pretrial statement and stipulations filed on 6/5/2012 and 6/26/2012.

The following individual testified live before me:

1. Eric Evans, the claimant/employee.

After due consideration of this 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 witnesses 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:

1. The undersigned Judge of Compensation Claims has jurisdiction of the parties and the subject matter of this claim;

2. The stipulations entered into by and between the parties herein are hereby approved and adopted as findings of fact and are incorporated herein by reference;

3. In my determination herein I have attempted to distill all the testimony and salient facts together with the findings and conclusions necessary to the resolution of this matter. I have not necessarily attempted to summarize the substance of the claimant's testimony or the testimony of any live or deposition witness, nor have I attempted to state nonessential facts. Because I have not done so should not be construed that I have failed to consider all of the evidence.

4. Any and all issues raised in the petition or petitions for benefits described above which the subject matter of the final hearing was, but which issues were not tried at the hearing are presumed resolved or, in the alternative, deemed abandoned by the employee/claimant and therefore

denied. See Betancourt v. Sears Roebuck & Co., 693 So.2d 253 (Fla. 1st DCA 1997).

5. On December 17, 2001, the captioned claimant, Eric Evans, who is 49 years of age, single with no dependents, was employed by the captioned employer; Gray Communications (WCTV) as a videographer and on that date sustained and suffered a compensable injury resulting from a motor vehicle accident (MVA) while driving a company vehicle. Mr. Evans testified that the vehicle's tire blew out causing him to strike an embankment and then falling into a ditch causing the vehicle to roll over on the driver's side. He claims that during the crash he struck the roof of the vehicle with his head and shoulder and that his back was wrenched back and forth.

6. Mr. Evans testified that he sustained injuries to his head, back, shoulder, knees. Initially he says that he thought he was alright and was grateful that his injuries were not worse. He first received medical care at a walk-in clinic and was subsequently authorized medical treatment with a variety of physicians who either evaluated and/or treated him. Over the past 11 years the employer/carrier has authorized the following medical providers: Dr. Gregg A. Alexander, M.D. (back); Dr. William H. Thompson, M.D. (knee); Dr. Scott Sellinger, M.D. (urological); Dr. David Hartz, D.C. (chiropractic and IDD procedure); Dr. Karen Chason, D.O. (psychiatric); Dr. Umesh Mhatre, M.D. (psychiatric); Deborah Zurschmeide, PhD & LCSW (psychological counseling); Dr. George Arcos, M.D. (pain management); Dr. Sean Fitzgerald, M.D. (neurosurgical); and Dr. Christopher Rumana, M.D. (neurosurgical and second surgery opinion).

Mr. Evans underwent knee surgery and was eventually released from medical care and returned to full duty for that condition. He eventually began treating with Dr. Gregg Alexander, M.D., at Tallahassee Orthopedic Clinic, a musculoskeletal specialist, and underwent two (2) IDET procedures and injections. He claims he was never taken off work entirely; nevertheless, he has not worked for some time and was eventually accepted permanently and totally disabled (PTD) on 09/28/2009, per the carrier's Response of that date, shortly after filing his first claim for PTD on 09/15/2009. Mr. Evans testified that Dr. Alexander said that he could work subject to light duty restrictions consisting of not lifting more than 15 lbs. maximum. He says that he continues to treat with Dr. Alexander even though the doctor has been de-authorized by the carrier. Mr. Evans concedes that the only work restrictions placed on him were those by Dr. Alexander.

7. Dr. Alexander eventually referred him to Dr. David Hartz, D.C., chiropractic physician,

for chiropractic care. Because of the claimant's feelings of depression and anxiety he was initially authorized to treat with Dr. Karen Chason, D.O., a psychiatrist, who the claimant says prescribed numerous medications. When he developed urinary and erectile problems, the carrier authorized treatment with Dr. Scott Sellinger, M.D. His psychiatric care was eventually transferred to Dr. Umesh Mhatre, M.D., who has imposed no psychiatric work restrictions or limitations on Mr. Evans.

8. According to the docket, this tribunal's electronic file, a total of 17 PFBs (claims) have been filed regarding the captioned work accident. Except for the trial of 7/30/2012, none of the claims resulted in a final hearing and the issues, including attorney's fees matters, were resolved or dismissed prior to an adjudication by this tribunal. The employer/carrier here stipulated to the compensability of the claimant's accident of 12/17/2001 in this and prior pretrial stipulations. The employer/carrier also stipulated to the work-relatedness of the claimant's back, left knee, left shoulder, psychiatric conditions and urinary conditions. At the mediation of 9/10/2008, the carrier authorized psychiatric care with Dr. Umesh Mhatre, M.D., and at the mediation of 1/22/2009 the carrier again authorized specific psychiatric care recommended by Dr. Mhatre. In spite of its Response to PFB of 9/28/2009, on 12/11/2009 the employer/carrier again voluntarily stipulated to acceptance of the claimant as permanently and totally disabled and paid past due PTD benefits with interest and penalties. Said stipulation was approved by Order entered on 12/17/2009.¹

The current PFB was filed on 1/12/2012 seeking re-authorization of Dr. Gregg Alexander, M.D., and Dr. Umesh Mhatre, M.D., who had been unilaterally de-authorized by the employer/carrier. In its Response to said PFB filed on 1/24/2012, the employer/carrier asserted that the claimant was guilty of workers' compensation fraud as a basis for its de-authorization. That is the only defense of the employer/carrier to outstanding claim.

9. In support of its fraud defense the employer/carrier introduced in evidence surveillance footage consisting of a total of 16 DVDs for the period beginning 11/22/2010 through 1/27/2011. The employer/carrier contends that the depictions of the claimant's physical activities in the surveillance footage are inconsistent with his oral deposition of 5/25/2011, which deposition was taken after Mr. Evans filed the PFB of 3/14/2011 claiming PTD benefits.² The employer/carrier argues

¹ Yet another petition for benefits seeking PTD benefits was again filed on 3/14/2011.

² The petition was eventually voluntarily dismissed by counsel for the claimant on 6/29/2011.

that the claimant's deposition demonstrates that Mr. Evans made numerous false, fraudulent, or misleading oral statements regarding his physical limitations and inability to work for the purpose of obtaining workers' compensation benefits, to wit: PTD benefits. The employer/carrier say the deposition statements are inconsistent with the surveillance footage depicting the claimant's actual ability to perform and sustain physical labor greater than what he testified under oath he could perform.

10. Specifically, the surveillance demonstrates that Mr. Evans expended considerable physical labor building a porch for approximately five (5) hours on one day; bending and frequently lifting long wooden boards; and exerting energy and force in utilizing a drill and an electric circular saw. The footage also shows that on a separate day (11/24/2010) the claimant continued working on the porch for approximately six (6) hours, a total for a total of 11 hours, performing the same physical functions as described above without an apparent discomfort or limitations.

11. The surveillance footage of 12/21/2010 shows Mr. Evans slowly entering and exiting a vehicle to attend a medical appointment. However, approximately an 1½ hours later he is seen building a front porch at a different residence and spending approximately four (4) hours in that labor. The footage depicts him in various physical positions using a sledge hammer and crow bar; walking without any difficulty and without the assistance of a cane; lifting and installing iron railing; and entering a crawl space underneath the front porch, all without any demonstrable difficulty.

The footage of 12/22/2010 shows Mr. Evans entering and exiting a vehicle utilizing a cane to attend medical appointment. However, later that day he is seen working on the front porch project of the previous days and continues to work on constructing the porch for approximately three (3) hours. The footage clearly demonstrates that Mr. Evans was and is able to perform physical activity without any discomfort or hesitancy. However, the next day on 12/23/2010 the footage reflects the claimant again utilizing a cane while attending a medical appointment. The footage of 12/28/2010 indicates the same activities as that of 12/23/2010.

12. The footage of 12/30/2010 shows Mr. Evans outside his home using a cane to ambulate. However, earlier footage of that day does not depict him utilizing a cane while walking. Later in the day the claimant is observed walking into a hardware store with no cane and carrying two (2) long wooden boards over his shoulder without any apparent difficulty. He is also observed inside

the store pushing a heavy duty metal flatbed cart using both hands and unloading materials consisting of lumber into the back of his truck. Only when he uses the cane does he appear to ambulate with a slight gait

13. The combined footage of approximately 11 days in January, 2011, shows the claimant continuing to work on the porch; using his cane primarily when entering and exiting a medical facility; and at other locations not using his cane or walking without difficulty. It appeared to the undersigned judge that Mr. Evans holds his cane generally with his right hand as reported by Dr. Alexander in his medical records. This seems odd since the difficulty he claims he has is more with his left leg which seems to be antithetical with trying to alleviate bearing weight on the left leg. It seems as if the cane, which Mr. Evans claims he uses for stability, is utilized more as a prop rather than as an aid. Significantly, the cane was not prescribed by any physician.

14. The employer/carrier took the deposition of the claimant on 3/25/2011 approximately 11 days after the filing of the PFB for PTD benefits. Mr. Evans testified then that he experienced low back pain radiating down his left leg and sometimes into his left shoulder. He described headaches which he thought might be due to his medication. He stated that he is not able to engage in certain sports that he played in the past, and that he cannot walk for more than 10 or 15 minutes at a time. He says that his condition has interfered with his social activities. He claims that the longest walk that he is able to take is 10 to 12 minutes long and then he would have to rest and sit down. He claims to have difficulty shopping and uses a shopping cart for stability. He answered in the affirmative when asked if he "always used the cane when you go shopping?" The footage shows this was not true. He describes difficulty in dressing and that cleaning his home aggravates his injury. He described that a typical day in April, 2011, consisted of finding a comfortable spot on his couch so that he can lay down to keep his back from spasming and watching TV or reading.

15. In his deposition, Mr. Evans claims that he does not believe he is able to work primarily because his "mental state is not stable enough." He also describes "blackouts" and difficulty lifting anything over 10 lbs. He testified that he requires frequent nap time during the day to lie down and rest, and that is a factor he does not believe any employer would accommodate. Mr. Evans claims that he experiences extreme amounts of pain and that his mental state, even with medication,

is still unstable. He said that he uses a cane every day³

16. At his deposition, Mr. Evans stated that he has difficulty caring heavy items and that although he can carry a box of cereal he could not lift it overhead. He said that he can lift a gallon of milk, but that he could not carry it for a long period.

17. After reviewing the surveillance footage and depositional testimony of Mr. Evans, primarily the deposition of 5/25/2011, I find the claimant did make misleading, exaggerated, and sometimes false oral statements in his deposition for the purpose of obtaining PTD benefits during the pendency of his claim for said benefits. That often times his oral statements regarding his physical limitations and disabling pain, made under oath, were grossly inconsistent with his physical capabilities and condition depicted in the surveillance footage of several months earlier. The footage showed Mr. Evans performing hours of sustained manual labor over the course of approximately two (2) months. He worked on constructing a wooden deck for approximately 11 hours over the course of two (2) days in November, 2010, and worked on building a front porch for approximately seven (7) hours over the course of two (2) consecutive days in December, 2010. At trial Mr. Evans testified that he did this charitable work at the insistence of his therapist, Deborah Zurschmeide, in an effort to focus him to engage in relationship with others rather than on himself and his problems. The reason why he performed these activities, for which he was not compensated, is irrelevant as to whether or not he could perform physical activity in amount and degree more than he claimed, and whether he intentionally minimized his functional capacity for the purpose of obtaining workers' compensation benefits or obtaining an advantage with regard to said claim. I find that surveillance footage clearly demonstrates that Mr. Evans is clearly capable of performing and maintaining manual labor on a sustained basis, and that his testimony with regarding his physical limitations are simply inconsistent with the surveillance obtained.

Moreover, Mr. Evans testified in his deposition that he used a cane every day when he leaves his home. Surveillance footage shows that this is not true and seemed to use it primarily when he was seeing a medical provider. He claims that he is able to bend but only with great difficulty and could only walk for 10 to 15 minutes and only lift light objects. Again, surveillance footage belies his statements showing them to be false or at the minimum misleading. In essence, the surveillance

³ At the final hearing claimant was observed using the cane.

footage evinces the claimant is capable of performing strenuous and sustained manual labor for long periods of time without observable discomfort or difficulty. He is capable of lifting weights of more than 10 lbs. as seen when he is lifting and carrying building materials, and walks without the assistance of a cane outside of his home. The fact that Mr. Evans utilized a cane when transported or when attending medical appointments shows the claimant conscious and willful intent to deceive or portrait to his medical providers that his physical condition was worse than it actually was.

18. In an effort to ameliorate and add to his responses in his deposition of 5/25/2011, Mr. Evans submitted an Errata Sheet.⁴ However, the errata sheet was not executed or submitted until 8/19/2011 approximately three (3) months after the taking of his deposition. I surmise and find that the purpose of the Errata Sheet and the responses therein were not to correct the transcriber's mistakes, but rather was essentially for the purpose of diluting the negative impact of his initial responses or changing his answers after further reflection. I also find that the Errata Sheet is not in compliance with Rule 1.310(e), Fla. R. Civ. P., which requires that "[a]ny changes in form or substance that the witness wants to make shall be listed in writing by the officer with a statement of the reasons given by the witness for making changes." Mr. Evans did not state the reasons for the changes other than to embellish or expound on his responses. See Baker v Myers Tractor Services, Inc., et al, 765 So. 2d 149, 151 (Fla. 1st DCA 2000)(errata sheet which did not state the reason for making changes, filed more than three (3) months after a deposition containing false statements, and more than one (1) week after filing a Motion for Involuntary Dismissal which disclosed the false statements, did not cure the fraud).

19. Section 440.105(4)(b), Fla. Stat., provides that it shall be unlawful for any person:

"1. To knowingly make or cause to made, any false, fraudulent, or misleading oral or written statement for the purpose of obtaining or denying any benefit or payment under this chapter. (Chap. 440)."

20. Section 440.09(4)(a), Fla. Stat., provides in pertinent part that:

"An employee shall not be entitled to compensation or benefits under this chapter if any judge of compensation claims...determines that the employee has knowingly or intentionally engaged in any of the acts described in section 440.105 or any criminal acts for the purpose of securing workers' compensation benefits."

⁴ His counsel said that his office typed the errata sheet because the claimant's handwriting was difficult to read.

21. The employer/carrier is only required to prove that a claimant committed a misrepresentation by a preponderance of evidence. Village of North Palm Beach v McKale, 911 So. 2d 1282, 1283 (Fla. 1st DCA 2005). The JCC is only required to determine whether the claimant knowingly or intentionally made any false, fraudulent, incomplete, or misleading statement, whether oral or written for the purpose of paying workers' compensation benefits, or in support of his claim for benefits." *Id.*

22. The statements given by a claimant are relevant and material whether made to healthcare provider, or during testimony given at depositions or the merits hearing. This is regardless whether the statements are under oath so long that if at the time the statements were made the claimant knew they were false, incomplete or misleading. Village Apartments v Hernandez, 856 So. 2d 1140 (Fla. 1st DCA 2003).

23. In Dieujuste v J. Dodd Plumbing, Inc., 3 So. 3rd 1275, 1277 (Fla. 1st DCA 2009), the court held that a "claimant's misrepresentation as to his or her physical capabilities made in order to obtain or enhance workers' compensation benefits results in the forfeiture of those benefits, and that activities observable on surveillance video can serve as a basis for a finding of misrepresentation." After having considered the evidence presented in this case by the employer/carrier and the claimant, I find that Mr. Evans did make misleading and at times false oral statements in his depositions testimony of 5/25/2011 for the purpose of obtaining workers' compensation benefits, and that said oral statements, under oath, were inconsistent with the picture of his true physical capabilities depicted in the surveillance footage introduced in evidence. That said statements were made willfully and intentionally for the purpose of obtaining or enhancing the claim for PTD benefits, which benefits were ultimately provided by the employer/carrier. Furthermore, although his physical activities depicted in the surveillance footage, except for the claimant's work on the construction of the deck and porch, may not have been beyond the light duty work restrictions imposed by Dr. Alexander, the footage nevertheless demonstrated that his physical capabilities are more than what he claimed and testified to in his deposition, and were consciously made for the purpose of enhancing Mr. Evans' claim. Said statements were objectively misleading.

24. Having found that the claimant's oral statements in his deposition of 5/25/2011 were

knowingly false, incomplete or misleading, further workers' compensation benefits must be denied under §440.09(4)(a), Fla. Stat. See Lee v Volusia County Sch. Bd., 890 So. 2d 397 (Fla. 1st DCA 2004).

WHEREFORE, it is **ORDERED** that the claim of the employee, Eric Evans, for further workers' compensation benefits regarding his compensable accident of December 17, 2001, and for the claims contained in Petition for Benefits of January 12, 2012 are hereby **DENIED**.

DONE AND ORDERED at Tallahassee, Leon County, Florida.

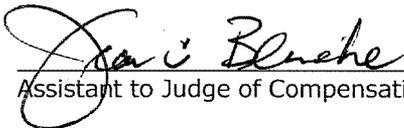




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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing final compensation order was entered and a true copy was furnished by electronic transmission on this 12th day of September, 2012 to counsel of record..



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