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

EMPLOYEE:
Yandrys Linares
158 East 18th Street
Hialeah, FL 33010

ATTORNEY FOR EMPLOYEE:
Richard E. Zaldivar, Esquire
Richard E. Zaldivar, P.A.
2600 S.W. 3rd Avenue, Ste. 300
Miami, FL 33129

EMPLOYER:
Southeast Personnel Leasing, Inc.
2739 U.S. Highway 19 N.
Holiday, FL 34691

ATTORNEY FOR EMPLOYER/CARRIER/SERVICING AGENT:
Robert S. Gluckman, Esquire
Hurley, Rogner, Miller, Cox, Waranch & Westcott, P.A.
1180 SW 36th Avenue, Suite 201
Pompano Beach, FL 33069

CARRIER/SERVICING AGENT:
Lion Insurance Company Serviced by:
Packard Claims Administration, Inc.
P.O. Box 1549
Tarpon Springs, FL 34688

OJCC NO.: 06-033673AMK

D/A: 9/2/2006

ORDER DENYING BENEFITS UNDER 440.09(7)(c) AND 440.105(4)

Upon due notice to the parties, a hearing was conducted before the undersigned Judge of Compensation Claims on Monday, October 13, 2008 in Miami-Dade County, Florida. Present on behalf of the Employee/Claimant was Elvis Adan, Esq., of Richard E. Zaldivar, P.A.. Present on behalf of the Employer/Carrier, Southeast Personnel Leasing and Packard Claims Administration/Lion Insurance Company was Robert S. Gluckman, Esq., of Hurley, Roger, Miller, Cox, Waranch & Westcott, P.A..

I. STIPULATIONS

A. The undersigned Judge of Compensation Claims has jurisdiction over the parties and the subject matter hereof.

B. The Notice of Accident and Notice of Hearing were properly and timely given.

C. The venue properly lies in Miami-Dade County, Florida.

II. ISSUES AND DEFENSES

A. Pursuant to the Pretrial Stipulation and approved amendments, as well as this Court's Order of October 10, 2008 approving the Joint Motion for Bifurcation of the Issues, the sole issues for hearing was whether the Claimant refused to take a drug test required of him pursuant to the Employer's reasonable suspicion drug policy and in violation of Florida Statute 440.09(7)(c) and whether the Claimant had made any false or misleading statements for the purposes of obtaining workers' compensation benefits in violation of 440.105(4)(b) and thus subjecting him to the penalties of 440.09 (4).

III. FINDINGS OF FACT

In making my findings of fact and conclusions of law, I have carefully considered the arguments of Counsel and weighed all of the evidence presented to me. I observed the candor and demeanor of the witnesses and resolved all conflicts in the testimony and the evidence. I have attempted to distill the issues together with findings and conclusions necessary to their resolution. After careful consideration of all of the evidence presented and after resolving any conflict therein, I hereby find as follows:

1. The claimant was a leased employee from Southeast Personnel Leasing to Active Staffing. As part of the claimant's employment, he was required to take a drug test pursuant to the

claimant's agreement with Southeast Personnel Leasing. The claimant signed the acknowledgment and Post Accident/Reasonable Suspicion form and was admitted into evidence. I have read the deposition of Helen Eng, the employer representative from Active Staffing. She testified that it was Active Staffing's policy that all employees be drug tested after an accident. She testified that Demetrio Medivilla informed her that the claimant refused to take the drug test and that he refused to go to the workers compensation clinic.

2. Demetrio Mediavilla, a former manager at Active Staffing testified live. I had the opportunity to observe his demeanor and candor. Lawson Industries, the contract client of Active Staffing, called him on the date of accident to remove the claimant from the job site at Lawson Industries due to poor work performance. In the time he was dispatched to Lawson Industries until the time he arrived, the claimant alleged he hurt his ankle and back. Mr. Mediavilla testified that he told the claimant he needed to go to the workers compensation clinic and that the claimant informed him that he was not going and that his mother was coming to pick him up.

3. Mr. Mediavilla was pretty sure that he informed the claimant that he needed to take a drug test because the policy was that everyone was to be tested after an accident. He could not think of a reason why he would not have told Mr. Linares to take a drug test. He testified it was about two years ago and he could not be positive of what he told Mr. Linares. He recalls calling the main office in New York about the incident but had no further involvement after that.

4. Mr. Linares testified that Mr. Mediavilla and a driver took the claimant to Hialeah Hospital in Mr. Mediavilla's personal vehicle. On the ride to the hospital Mr. Mediavilla informed

the claimant that he was to say the accident occurred at his house or there would be no more work available for him. He says he was dropped off and left alone until his mother came to the hospital to pick him up. Mr. Linares testified that he knew he was required to take a drug test after a workplace accident and that it was his signature on the acknowledgment and Post Accident/Reasonable Suspicion form.

5. To the extent the incident versions of Mr. Linares and Mr. Mediavilla conflict, I find Mr. Mediavilla's testimony credible and I reject the testimony of Mr. Linares. I also find the testimony of Helen Eng credible and consistent with Demetrio Mediavilla' s testimony. I find that the claimant knew he was required to take a drug test pursuant to Southeast Personnel Leasing's Policy and refused to take the test in violation of Florida Status 440.09 (7)(c). This invoked the presumption that the accident the claimant may have had was occasioned primarily by drugs or alcohol. The claimant presented no evidence whatsoever to rebut this presumption. Therefore the employer/carrier successfully asserted the defense under section 440.09 (7)(c).

6. The claimant further testified that he had taken cocaine on one occasion prior to September 2, 2006 but denied use of cocaine on the date of accident or any time subsequent to September 2, 2006. The employer/carrier asserted a defense under Florida Statute 440.105 that the claimant made a false or misleading statement in his deposition taken on May 24, 2007. The claimant was asked:

> Q: Prior to your work accident on September 20, 2006, had you ever taken any drugs or alcohol?
>
> A: No. I don't drink.

I find that this testimony was misleading and was made for the purpose of obtaining workers compensation benefits. Pursuant to §440.09(4), an employee shall not be entitled to compensation "if any judge of compensation claims, administrative law judge, court, or jury convened determines that the employee has knowingly, or intentionally engaged in acts described in §440.105, for the purposes of securing workers' compensation benefits." Statements are "relevant and material when they are made to health care providers, or during testimony given at deposition or the merits hearing." Village Apartments vs. Hernandez, 856 S.2d 1140 (Fla. 1St DCA 2003). The parties have a right to expect that "all statements, whether written or oral, are truthful, responsive and complete." Id. at 1142. See also, Lee vs. Volusia County School Board, 890 S.2d 397 (Fla. 1" DCA 2004), noting that if any statements made during deposition, to a healthcare provider, or at a merits hearing are knowingly false, fraudulent, incomplete or misleading, benefits must be denied.

7. In addition to the statement made in the deposition, the claimant testified both on direct examination and on cross examination that he did not use cocaine other than the one time prior to the date of accident. That particular incident in April 2006 demonstrates he was admitted to Hialeah Hospital and had been doing cocaine. However it is clear from the joint exhibit in evidence of the Hialeah Hospital records that the claimant was admitted there on May 13, 2007, subsequent to the date of accident, where he informed the staff he had been snorting cocaine for two days. I find that the claimant's testimony regarding his cocaine use was false and misleading and was made with the intent to obtain workers compensation benefits in violation of section 440.105. As such, even if the claim were compensable, which it is not due to my ruling on the 440.09 (7)(c) defense, the claimant would not entitled to any

further benefits.

WHEREFORE, it is the Order of the undersigned Judge of Compensation Claims as follows:

1. The claim for compensability of the September 2, 2006 date of accident is DENIED with prejudice. The accident was primarily occasioned buy the use of drugs or alcohol pursuant to Florida Statute 440.09 (7)(c).

2. The claimant has violated Florida Statute 440.105 (4)(b) and 440.09(4).

3. Costs pursuant to Florida Statute 440.34(3) are awarded to the Employer/Carrier. The Court reserves jurisdiction to address quantum should the parties be unable to agree.

4. All other claims outstanding are hereby dismissed with prejudice.

DONE and ORDERED in Chambers, Miami-Dade County, Florida, this 23 day of, OCT 2008.

Honorable Alan M. Kuker Judge
of Compensation Claims

THIS IS TO CERTIFY that the foregoing Order was entered on the 23 day of OCT, 2008, and that a copy thereof was sent by regular U.S. Mail to all parties noted previously at their last known address.

Secretary to Judge of Compensation Claims