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

EMPLOYEE:
Robert Carpenter
1785 SW Import Drive
Port St. Lucie, FL 34953

ATTORNEY FOR EMPLOYEE:
Mario R. Arango, Esquire
Law Offices of De Varona & Arango.
2150 Coral Way, Fourth Floor
Miami, FL 33145

EMPLOYER:
Florida Power & Light
700 Universe Blvd.
Juno Beach, FL 33408

ATTORNEY FOR EMPLOYER/ CARRIER/SERVICING AGENT:
Robert S. Gluckman, Esquire
Hurley, Rogner, Miller, Cox, Waranch & Westcott, P.A.
1280 SW 36th Avenue, Suite 100
Pompano Beach, FL 33069

CARRIER/SERVICING AGENT:
Broadspire - Plantation
Post Office Box 189091
Plantation, FL 33318

OJCC NO.: 08-013495GCC

D/A: 04/09/2008

FINAL COMPENSATION ORDER DENYING BENEFITS AND FINDING VIOLATION OF SECTIONS 440.105 AND 440.09

I. PROCEDURAL HISTORY:

THIS CAUSE came before the undersigned Judge of Compensation Claims for final hearing in Miami, Miami-Dade County, Florida on December 16, 2009. Claimant Robert Carpenter was represented by Mario R. Arango, Esquire of the Law Offices of De Varona & Arango. Employer Florida Power & Light Corporation and carrier Broadspire (collectively hereinafter: E/C) were represented by Robert S. Gluckman, Esquire of Hurley, Rogner, Miller, Cox, Waranch & Westcott, P.A. The parties were notified of the undersigned's ruling on January 12, 2009. Consistent with same, counsel for the E/C submitted a proposed Order on January 16, 2010. This Order ensues.

II. EVIDENCE PRESENTED:

(a) Live Witnesses

1. Claimant Robert Carpenter testified live at final hearing.

(b) Documentary Evidence:

Unless otherwise indicated, the following exhibits were introduced into evidence.

1. 12/11/09 transcript: deposition of adjuster Denise Jaffke.
2. 06/16/09 transcript: deposition of adjuster Denise Jaffke.
3. 11/02/09 transcript: deposition of claimant Robert Carpenter.
4. 03/11/09 transcript: deposition of claimant Robert Carpenter.
5. 09/22/08 transcript: deposition of claimant Robert Carpenter.
6. Original deposition transcript of William Stolzer, MD of 08/25/09.
7. Original deposition transcript of William Stolzer, MD of 11/16/09.
8. Original deposition transcript of Mark Rubenstein, MD of 09/2/09.
9. Original deposition transcript of Michael Auletta of 12/11/09.

9A. Surveillance report and video from Lemieux & Associates 12/17/08.

10. Original deposition transcript of Michael Zeide, MD of 12/15/09.
11. Original deposition transcript of Michael Landman, DO of 12/14/09.

11A. IME report of Michael Landman, DO (proffer only)

12. Uniform Pretrial Stipulation
13. Pretrial Amendments of both parties.
14. Notice of Denial (DWC-12) of 04/16/09.
15. Claimant's Petition for Benefits of 04/30/09.
16. Medical Records from Dr. Mark Rubenstein's of 01/13/09 and 02/19/09.
17. Medical records from Dr. William Stolzer.

Documentary Evidence For Identification Purposes Only

18. Alcoholics Anonymous Booklet used by Claimant.
19. Employee/Claimant's Memorandum of Law
20. Employer/Carrier's Trial Summary and Memorandum of Law

III. CLAIMS AND DEFENSES:

A. - Claims- Per PFBs filed March 13, 2009, May 6, 2009, and June 23, 2009, respectively.

1. Temporary Partial Disability Benefits;
2. Temporary Total Disability Benefits;
3. Alternate Orthopedic physician, reinstate medical benefits, authorization of a weight reduction; program; authorization of a smoking cessation program;
4. Penalties, interests, costs, and attorney's fees;
5 The claimant has violated 440.105 and a finding of a violation per 440.09; and
6. Costs to the Employer/Carrier per 440.34 (3).

B. - Defenses

In response to the Claims listed above, the E/C timely asserted the following defenses:

1. The Claimant's wage loss is not related to the accident of 4/9/08, and there is no medical evidence establishing that the major contributing cause of the need for benefits relates to the accident. The Claimant violated 440.105 which bars all benefits.
2. There is no medical evidence to substantiate that the Claimant is on a no work status. The Claimant violated 440.105 which bars all benefits.
3. The Claimant is not entitled to additional medical treatment because violated 440.105 which bars all benefits. The Claimant forfeited any/all entitlement to additional benefits.
4. Payment of penalties, interests, costs, and attorney's fees are not due or owing as all appropriate benefits were timely provided, and additional benefits are not due because the Claimant violated 440.105. The medical benefits are not medically necessary and not causally related to the industrial accident.
5. The claimant has violated 440.105 and a finding of a violation per 440.09; and
6. Costs are due to the Employer/Carrier pursuant to 440.34 (3).

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW:

The undersigned Judge of Compensation Claims has considered both live and documentary evidence presented, as well as the written and the oral arguments presented by the respective parties. All conflicts of fact and law have been resolved. The factual findings contained herein are limited to these deemed necessary in adjudication of the issues presented for adjudication. In making my findings of fact and conclusions of law, the undersigned has

carefully considered the arguments of counsel, and weighed all of the evidence presented; observed the claimant's candor and demeanor; resolved all conflicts in the testimony and the evidence; and attempted to distill the issues together with findings of fact and conclusions of law necessary to their resolution. After careful consideration of all of the evidence presented, and after resolving any conflict therein, the following findings of fact are entered:

(1) Claimant Robert Carpenter is a 52-year-old white male born on September 24, 1957. His testimony at final hearing was taken in English. His address is 4370 Christensen Road, Fort Pierce, Florida 34981.

(2) Mr. Carpenter has many years of experience in remodeling, framing, and carpentry work. He is presently a member of the Carpenter's Local 174 Union in Will County, Illinois. He also studied to be a mechanic and took classes as an EMT and firefighter.

(3) On the date of accident at issue, Mr. Carpenter was employed Day and Zimmerman but workers compensation coverage was through Florida Power and Light. He was injured while doing carpentry work at a Florida Power & Light facility in Miami-Dade County. .

(4) There are at least 2 versions of the mechanism of injury. One was that the Claimant was going to get tools and he did not notice a step because several people were standing around it when he walked right off of it and caught himself between split levels by landing and jamming his back and right foot. His initial Petition for Benefits alleges that he slipped. In either event, Mr. Carpenter felt pain immediately. He tried to walk it off. He reported the accident to the general foreman and to the safety department. It is undisputed that he suffered a compensable accident.

(7) Mr. Carpenter attempted to return to work after the accident, but could not because he was locked out of the plant.

(8) After he met with a lawyer, he went to the Emergency room for medical care.

(9) Mr. Carpenter then saw Dr. Stolzer in September 2008. Initially he was placed on a no work status. He went for physical therapy, and was prescribed Celebrex and Flector.

(10) Mr. Carpenter had a prior work related injury in the late 1980's for carpal tunnel syndrome, a broken arm, and broken ribs. He had a prior motorcycle injury when he wrecked the motorcycle and hit his head on the ground. He has been previously hospitalized for pulmonary and respiratory infections. He had his gallbladder removed. He has previously received treatment with a chiropractor in the 1990s for a few months for arthritis in his back

(11) At one point, he treated for over a year with a chiropractor for prior back injuries - though he reported treating in both 1998 and 2002. (Exhibit 5, p. 23). His live testimony created some inconsistency in that he stated he only treated for a couple of months. The time periods for treatment are clearly inconsistent. The salient point, however, is that Mr. Carpenter omitted the

prior chiropractic care in the medical history questionnaire he completed for Dr. Stolzer on 9/3/08, which he signed. (Exhibit 6, ex. 2).

(12 Mr. Carpenter also failed to disclose the prior chiropractic care to Dr. Rubenstein. (Exhibit 8, ex. 2).

(13 Similarly, Mr. Carpenter did not disclose to Dr. Michael Landman, his IME physician, that he had a history of back treatment or problems. (Exhibit 11, p. 19-21).

(14) The omitted chiropractic history clearly was material. Had Dr. Landman known about the prior treatment, it had the potential to change his opinion. (Exhibit 11, p. 19).

(15) Mr. Carpenter denied any prior back injuries to both of his treating physicians and to his own IME physician. In doing so, he made false and incomplete statements to physicians regarding his past medical history. This was inappropriate. See, *Citrus Pest Control & Claims Control, Inc. v. Brown*, 913 So. 2d 754, 755 (Fla. 1st DCA 2005).

(16) In December 2008, Mr. Carpenter understood his work restrictions to be no lifting over thirty to forty pounds, no repetitive bending, kneeling, or squatting.

(17) Around that time, Dr. Stolzer asked Mr. Carpenter about his ability to work. He told the doctor it was severely limited by his level of pain. Subjectively, Mr. Carpenter felt he could not work continuously and uninterruptedly for a period of six to eight hours a day. He reported so much pain that he was having to sit down, recline, lay down, and lean against a wall, or push something because he could not otherwise realize extended relief.

(18) Surveillance was performed on Mr. Carpenter on December 17, 2008.

(19) On December 17, 2008, the day of the surveillance, Mr. Carpenter was on Celebrex and wearing a Flector patch. He was also on pain pills he had from the hospital.

(20) During his live testimony, Mr. Carpenter reviewed Dr. Stozler's report of 01/19/09 wherein it alluded to the claimant not working. More specifically, Mr. Carpenter had told the doctor he was not called back for work, was not doing anything as far as work was concerned, and he was not working at all. The claimant stated that this meant he was not working for the employer on the date of accident because Day and Zimmerman did not give him light duty work. He understood that they only wanted him back if he could resume full duty work. The claimant's comments to Dr. Stolzer were self-serving. His explanation suspect.

(21) Mr. Carpenter told Dr. Stolzer that he had not worked since the accident and that he was simply not able to do any work. (Exhibit 6, p. 21; and depo. ex. 2).

(22) Mr. Carpenter did not disclose to either Dr. Stolzer or Dr. Rubenstein, his two authorized treating providers his participation in the activities caught on surveillance. (Exhibit 6, p. 25; Exhibit 8, p. 13). Equally important is the fact that he attempted to portray is condition is

the type that would suggest him incapable of such activities. The Claimant's pain complaints to Dr. Stolzer on 12/9/08 were inconsistent with the surveillance video. (Exhibit 6, p. 31-32).

(23) Mr. Carpenter did not feel the need to disclose his December 17, 2008 activities to his physicians in part because he allegedly was not paid for them. This explanation is not compelling.

(24) Mr. Carpenter defined work as "something you go to do on daily basis, on a regular basis, and you get paid for it." Dr. Rubenstien in his deposition categorized the activities shown on the video as work. (Exhibit 8, p. 20). Mr. Carpenter's explanation is not credible. He had told his doctor's he was "just not able to do any work." The ability to do work is a different issue from the desire to be paid for it. Indeed, one may be willing to do the most grueling of work on a charitable or pro bono basis. That is an entirely different issue than the matter of whether they are physically capable of performing it. Mr. Carpenter's explanation confuses the two aforementioned issues. His definition of work is not credible.

(25) Thus, with regards to the representations made to his physicians, it is clear that Mr. Carpenter made false and misleading statements about his physical abilities and the extent of his current injury. See, *Lee v. Volusia County Sch. Bd.*, 890 So. 2d 397, 399 (Fla. 1st DCA 2004).

(26) In Mr. Carpenter's live testimony at Final Hearing, he explained the activities in the surveillance video of 12/17/08 as just helping a friend - consistent with the code followed by Alcoholics Anonymous ("AA"). Claimant has a history of past alcohol abuse, and he is involved in Alcoholics Anonymous. He explained that one of their primary principles is that AA members should help out fellow members in need.

(27) Specifically, Wayne Stephens offered to help Curtis Schmidts, the Claimant's friend, which he did for two or three days. The Claimant brought his tools to the shop being repaired. He agreed to help with critical things and tell the others how to do things. He agreed do to critical things that had to be precise such as cutting.

(28) In deposition, Mr. Carpenter testified that he had not worked anywhere since 9/22/08, and denied doing any physical remodeling. (Exhibit 4, P. 6-7). He explained that he only told people how things work. (Exhibit 4, p. 7). This is inconsistent with the surveillance video of him shot on December 17, 2008. Same shows Mr. Carpenter taking a wet vac to Cut Throat Tattoos, carrying debris and emptying the contents of the wet vac into a dumpster. He purchased a piece of piping that he took back to this store, and he was seen using a long armed pry type bar, measuring a piece of wood outside, and cutting the wood on a saw board with a saw. (Exhibit 9A; Exhibit 6, p. 24-25). Surveillance may be used to prove misrepresentation when it contradicts or disproves an oral or written statement by the Claimant. See, *Dieujuste v. J. Dodd Plumbing, Inc.*, 3 So. 3d 1275, 1278 (Fla. 1st DCA 2009). It clearly does just that in this case.

(29) The aforementioned documented activities are all within the claimant's work experience as a skilled carpenter. They were observed over a two day period.

(30) Mr. Carpenter attempted to minimize the adverse impact of the surveillance by explaining that he sat a great deal, rested; that he simply told the others what to do as he did the aforementioned; that his activities as seen on the surveillance video covered about an hour; that he sat down, laid down, leaned against the wall, and told people how to do things and which tools to use; that he suffered in pain. These were not compelling. Furthermore, there was no indication during the surveillance film that he was in any pain at all. The fact that he came back a second day further suggests that this point is being exaggerated.

(31) At trial, Mr. Carpenter did not deny that he performed the activities seen on the surveillance video at the tattoo parlor. He stated he helped his friend remodel his Cut Throat Tattoos shop. However, in the Claimant's deposition of 3/11/09, he denied doing any remodeling. (Exhibit 4, p. 8).

(32) He explains that he was in pain at that time, and taking two different medications. He stated he worked through the pain because he was told by the doctor that he should be able to do it, and wanted to find out if he could within his physical restrictions. This is in stark contrast to his testimony that he sat around a great deal and instructed others on how to do the job and further underscores his lack of credible testimony.

(33) Additionally, the same AA support culture which the claimant utilizes to attempt to explain away his inconsistency erodes his position. The claimant made clear that his AA colleagues were aware of his condition. It defies reason that his friends - his AA support group - would allow him to participate in the type of activity depicted in the surveillance if they had observed the type of ailment and limitations Mr. Carpenter described to his physicians. No good friend or supportive AA member could reasonably have expected Mr. Carpenter to engage in the types of activities documented in the videotape - not unless they had reason to believe he could perform these tasks. Before their very eyes, that is precisely what he did. Moreso, had he had to rest, lean against a wall and do all of the other machinations he described in trying to minimize the surveillance, one would reasonably thing his supportive AA friends would have had him stop. This did not seem to be the case, and Mr. Carpenter continued to engage in the carpentry and woodworking at Cut Throat Tattoo for a second day.

(34) The Claimant felt no one would pay him for these activities because he did not consider it as work. The explanation is in no way credible. (Exhibit 9A). He testified that, in his opinion, this was not working. Whether he was or was not working, the activities documented in the videotape clearly document that he was capable of working. They also demonstrate that his physical abilities were far greater than what he had reported to his doctors.

(35) Here, it is apparent that the Claimant knowingly made false or misleading statements in his deposition and in his trial testimony regarding his post-accident work abilities in support of his claim for benefits. He played down his abilities to his doctors and is clearly seen in the surveillance engaged in activities which exceed the abilities he reported to his doctors. This is a violation of section 440.105. *CDL v. Correa*, 867 So. 2d 639, 640 (Fla. 1st DCA 2004).

(36) After the accident, the carrier paid the claimant indemnity benefits beginning in of October in 2008. He received a few lump sump payments and biweekly payments thereafter - including indemnity benefits paid during the surveillance period. The benefits ended in early 2009.

(37) In the Petition for Benefits of 3/6/09 the Claimant sought reimbursement for his mileage and out-of-pocket expenses for prescription medication prescribed by Dr. Stolzer totaling $251.50. The claimant stated the carrier agreed to authorize one and not the other. This issue is mooted by the finding that the claimant made misrepresentations and/or omissions in his effort to secure workers' compensation benefits.

(38) Dr. Stolzer told the Claimant to quit smoking and lose weight or else his condition would not improve. The claimant did neither. In fact, Mr. Carpenter gained about twelve to fifteen pounds since the accident.

(39) Dr. Stolzer and Dr. Rubenstien, respectively, opined that the industrial accident was not the major contributing cause of Mr. Carpenter's need to lose weight or quit smoking, nor is it an impedance or hindrance to treat his back condition. (Exhibit 7, p. 29-31, 37; Exhibit 8, p. 59). To the extent that Dr. Stolzer's and Dr. Rubenstien's testimony conflicts with Dr. Landman's, I accept Dr. Stolzer's and Dr. Rubenstien's opinions as being consistent with reason and the other medical evidence.

(40) While the claimant's misrepresentations have negated his entitlement to benefits, it should be made clear that what the claimant suffered as a result of the compensable accident at issue was a temporary exacerbation of a pre-existing back condition. (Exhibit 7, p. 46-47)

(41) Claimant had health insurance through his wife which he uses to get pain medication as prescribed by a general practitioner.

(42) He also saw Dr. Pribil, a neurosurgeon. The claimant feels he needs additional medical treatment due to the industrial accident. Based on the medical evidence, the major contributing cause of the Claimant's need for ongoing care related to his back condition is no longer the industrial accident of 4/9/08. (Exhibit 10, p. 14-15). However, as I find the claimant has violated section 440.105 and 440.09, the claimant is not entitled to any further medical or indemnity benefits.

(43) As detailed herein above, the Claimant's credibility suffered. It was not credible. His explanations were self-serving, highly suspect and inconsistent. His live testimony lacked the trustworthiness necessary to meet the evidentiary burdens placed upon him by law.

(44) According to Fla. Stat. 440.105(4)(b):

> *It shall be unlawful for any person: (1) to knowingly make, or cause to be made, any false, fraudulent, or misleading oral or written statement for the purpose of obtaining...any benefit or payment under this chapter; (2) to present or cause to be presented any*

written or oral statement... (3) to prepare or cause to be prepared any written or oral statement that is intended to be presented to any employer, insurance company, or self insured program in connection with or in support of any claim for payment or other benefit....knowing that such statement contains any false, incomplete, or misleading information concerning any fact or thing material to such claim."

(45) Claimant Robert Carpenter intentionally made false, incomplete, and misleading statements to his doctors and under oath in his depositions regarding his physical abilities, the extent of his current injuries, and his work activities of 12/17/08, in an effort to obtain benefits under this workers compensation claim. Claimant's explanations that he did not think his December 17, 2008 activities constituted work; that there was no opportunity to advise his treating physicians of his undertakings that day; etc. were simply not credible. The claimant was caught over-stating the degree of his injury and not fully disclosing his medical history.

(46) Dr. Rubenstein categorized the surveillance presentation as malingering. (Exhibit 8, p. 20). I agree with this interpretation.

(47) Claimant intentionally made false or incomplete statements about his prior back injuries to all of his doctors. The record evidence clearly shows Claimant intentionally concealed this information which case law demonstrates is a violation of 440.105(4).

(48) Mr. Carpenter is therefore not entitled to any past, present, or future indemnity or medical benefits pursuant to 440.09 (4) (a) as the Claimant violated Fla. 440.105 (4)(b). None of the requested benefits are due or owing and the claimant is not entitled to any future benefits. However, even in the absence of this violation, I find the claimant failed to meet his burden on any of the issues he requested.

(49) The claimant is not entitled to temporary total disability or temporary partial disability benefits. The opinions of Dr. Stolzer and Dr. Zeide are accepted over those of Dr. Landman to the extend that they conflict regarding the Claimant's disability status. The Claimant was released to full duty with no permanent work restrictions, and no permanent impairment rating. (Exhibit 10, p. 18; Exhibit 6, p. 26). 440.15(2). It is the claimant's burden to prove that his wage loss, if any, is causally related to the industrial accident. *Vencour Hospital v. Ahles, 727 So. 2d 968 (Fla. 1st DCA 1998).* The Claimant has failed to meet his burden of proof.

(50) The Claimant has not established by objective medical evidence that further medical care of any kind is medically necessary. The objective medical evidence, within a reasonable degree of medical certainty shows that the Claimant made a full recovery with no permanent impairment. (Exhibit 10, p. 18-22).

(51) The need for any prescribed weight reduction program or smoking cessation program relates to the Claimant's personal health condition. Furthermore, there is no objective medical evidence that the need for such programs are medically necessary, and are not related to

the industrial accident. (Exhibit 7, p. 29-31, 37; Exhibit 8, p. 59). Succinctly, further treatment, evaluation, and/or care of any variety are not warranted. Per Dr. Stolzer, it clear that the weight loss program and smoking cessation program, respectively, are merely sound wellness recommendations for the Claimant's overall health.

(52) The claimant is not entitled to a change in physicians based upon my ruling that the claimant has violated section 440.105 and 440.09.

(53) No additional benefits have been secured for the Claimant. Accordingly, the Claimant has no right to have his attorney's fees and costs reimbursed by the Employer/Carrier.

(54 As the prevailing party, the Employer/Carrier is entitled to Claimant paid costs under 440.34(3). Jurisdiction is reserved to address the quantum should the parties not be able to amicably resolve the issue amongst themselves.

V. DECREE:

It is hereby Ordered and Adjudged that:

1. The claims for temporary partial disability and temporary total disability benefits for April 7, 2009 through present are **DENIED.**

2. The claim for an alternate orthopedist is **DENIED.**

3. The claim for a weight reduction program is **DENIED.**

4. The claim for a smoking cessation program is **DENIED.**

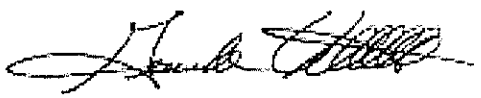
5. The claims for penalties and interest are **DENIED.**

6. The claim for attorney's fees is **DENIED.**

7. That the claimant has violated section 440.105 and 440.09 and is not entitled to any future benefits. All Petitions for Benefits are hereby dismissed with prejudice.

8. The employer/carrier's request for costs per 440.34 (3) is **GRANTED**.

DONE and ORDERED in Chambers, in Miami, Miami-Dade County, Florida this 29th day of January, 2010.



Honorable Gerardo Castiello
Judge of Compensation Claims

I HEREBY CERTIFY that the above Order was entered in the office of the Judge of Compensation Claims on the 29th day of January, 2010, and that a copy thereof was sent by regular U.S. Mail/E-Mail to all parties at the following addresses.

Robert Carpenter
1785 SW Import Drive
Port St. Lucie, FL 34953

Mario R. Arango, Esquire
Law Offices of De Varona & Arango.
2150 Coral Way, Fourth Floor
Miami, FL 33145

Florida Power & Light
700 Universe Blvd.
Juno Beach, FL 33408

Robert S. Gluckman, Esquire
Hurley, Rogner, Miller, Cox, Waranch & Westcott, P.A.
1280 SW 36th Avenue, Suite 100
Pompano Beach, FL 33069
zzevallos@hrmcwbroward.com
rgluckman@hrmcwbroward.com

Broadspire - Plantation
Post Office Box 189091
Plantation, FL 33318

Assistant to Judge of Compensation Claims

Final Hearing Statistics Worksheet

Please complete this form at the time of Order upload for any of the following:

Evidentiary Motion Hearing.
Expedited Final Hearing.
Fee Amount Hearing.
Fee Entitlement Hearing.
Final Hearing.
Fund Hearing.
Remand Hearing.
Appellate Fee Hearing.

OJCC Number(s) 08-013495GCC

Date Order Mailed/Emailed 1/29/10

Trial/Hearing dates opened 12/16/09; concluded 12/16/09

For Final Hearing or Expedited Final Hearing:

Dates of all pending petitions heard 3/13/09; 5/6/09; 6/23/09 & 10/20/09

OR

For Evidentiary Motion Hearing:

Type of Motion _____

Filing Date of Motion Heard _____

OR

For Fee Amount Hearing or Fee Entitlement Hearing

Date motion or verified petition filed _____

OR

For Appellate Fee or Remand Hearing

Date of Mandate _____

AND

If abbreviated final/fee order was issued and later vacated:

Date Abbreviated Order Entered: _____

Date Abbreviated Order Vacated: _____