

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

<b>DAVIS DYKE</b>	)	
	)	
Employee/Claimant	)	
	)	
vs.	)	OJCC Case No. 13-004052-TWS
	)	
<b>THE NATIONAL DEAF ACADEMY</b>	)	Accident date: 6/01/2011
	)	
Employer	)	
	)	
and	)	
	)	
<b>SEDGWICK CMS</b>	)	
	)	
Carrier/Servicing Agent	)	<b>Judge: Thomas W. Sculco</b>
_____ /	)	

FINAL COMPENSATION ORDER

THIS CAUSE came before the undersigned Judge of Compensation Claims (JCC) at Orlando, Orange County, Florida on November 5, 2013, for a final merits hearing upon the petition for benefits (PFB) e-filed February 19, 2013 and May 21, 2013. Mediation was held on June 24, 2013. The parties' Uniform Pretrial Stipulation was e-filed July 10, 2013. Bradley G. Smith, Esquire was present on behalf of the claimant. Scott Miller, Esquire was present on behalf of the employer/carrier/servicing agent.

This order addresses the Petition for Benefits filed with DOAH on February 19, 2013 and June 21, 2013.

**LIVE TESTIMONY:** Davis Dyke

**DOCUMENTARY EVIDENCE:**

- #1 Claimant's: Hearing Information Sheet
- #2 E/C's: Hearing Information Sheet
- #3 Claimant's: Notice of Conflict
- #4 Joint: Pretrial Stipulation
- #5 E/C's: Amendment to Pretrial Stipulation
- #6 E/C's: Deposition of Richard Smith, MD  
October 21, 2013
- #7 E/C's: Deposition/attachments of Tiffany Nicole Palmer  
October 23, 2013
- #8 E/C's: Deposition of Davis Dyke  
May 6, 2013
- #9 E/C's: Deposition of Richard Shure, MD  
September 6, 2013
- #10 E/C's: Deposition of Richard Shure, MD  
October 24, 2013
- #11 E/C's: Attachments to Dr. Shure's deposition
- #12 E/C's: Deposition of Richard Smith, MD  
October 14, 2013

After hearing all of the testimony and evidence presented,  
and after having resolved any and all conflicts therein, the

undersigned Judge of Compensation Claims makes the following findings of fact and conclusions of law: The issue for determination, as narrowed by the parties and the court at the time of the final hearing, is the E/C's "fraud" defense pursuant to Section 440.09(4), Fla. Stat. (2011). Pursuant to the agreement of the parties and order of the court, all other issues, claims, and defenses, including appointment of an EMA, will be determined at a subsequent hearing, if necessary.

### **BACKGROUND**

In 2011 claimant was working as a sign-language interpreter for the employer. He alleges an on-the-job injury on 6/1/11 from repetitive activities causing pain in his right elbow through his neck. On 5/31/12, claimant saw his family physician, Dr. Kathleen Todd, for complaints of right elbow pain. Under the "History of Present Illness" section of her 5/31/12 report, Dr. Todd states: "28 year old male presents with c/o Elbow pain: Rt. Elbow pain Golfer's elbow. Was getting better then was in car accident and had stiff neck down to bicep and elbow MS."

Notwithstanding Dr. Todd's report indicating claimant was in a car accident, claimant denied ever being in a car accident at the final hearing, in his deposition, and to IME physicians Dr. Richard Smith and Dr. Richard Shure. At the final hearing, he

explicitly denied telling Dr. Todd that he had been in a car accident. When asked how Dr. Todd's 5/31/12 note could have mistakenly indicated he had been in a car accident, claimant first testified that mistakes are common in medical transcriptions, and that some of Dr. White's medical notes contained mistakes and were not transcribed correctly. Claimant then testified that mistakes in medical notes are not uncommon because of software errors in transcribing what was said by physicians. Then, claimant testified that he may have said to Dr. Todd that his symptoms were so severe that he felt like he had been in a car accident. The E/C alleges that claimant's testimony and statements that he has never been in a car accident was knowingly false and was for the purpose of securing workers' compensation benefits.

### **E/C'S FRAUD DEFENSE**

Section 440.09(4), Florida Statutes (2011) provides "that [a]n employee shall not be entitled to compensation or benefits under this chapter if any judge of compensation claims, administrative law judge, court, or jury convened in this state determines that the employee has knowingly or intentionally engaged in any of the acts described in s. 440.105 for the purpose of securing workers' compensation benefits." This

statute provides the E/C an affirmative defense to claimant's PFB, and the E/C must prove its defense by a preponderance of the evidence.

In many cases involving the "fraud" defense contained in Section 440.09(4), the claimant acknowledges making a false statement, but argues that he or she lacked the requisite intent under the statute for benefits to be barred. Here, claimant simply denies that he made a false statement at all. Claimant argues that a single mention in Dr. Todd's 5/31/12 report about a car accident, with no corroboration, is not sufficient to carry the E/C's burden of proof in this case.

While claimant's argument has some force, I note that the mere possibility of some sort of transcription error does not necessarily make it less likely than not that claimant had a car accident that he reported to Dr. Todd. Most significantly, I find that claimant's testimony at the final hearing explaining how Dr. Todd's note might be incorrect lacked credibility and was not truthful.

Specifically, if claimant had really said that "he felt like he had been in a car accident" to Dr. Todd, that would logically be the first thing he would think of when he was asked why Dr. Todd might have mentioned a car accident in the 5/31/12 note. Instead, the first thing that claimant said was that doctors' offices often make mistakes in transcribing notes, and he told a

story about errors in Dr. White's notes. I find claimant's testimony on this issue simply does not "ring true".

Moreover, if claimant had never been in a car accident, it does not make sense for him to tell Dr. Todd that he "felt" like he had been in one, since he would not know how that would feel. Based on my assessment of claimant's testimony, and his demeanor while testifying, I find that he likely felt his original testimony about the possibility of transcription errors by the doctor's office was not sufficiently persuasive, and he sought to bolster that testimony with his story about possibly telling Dr. Todd he "felt like" he was in a car accident. However, rather than persuading me of his truthfulness, I find his testimony has persuaded me that he has not been truthful.

In sum, I find, by a preponderance of the evidence, that claimant's testimony at the final hearing that: 1-he was never in a car accident; 2-he never told Dr. Todd that he was in a car accident; and 3-he might have told Dr. Todd he "felt like" he was in a car accident, was knowingly and intentionally false for the purpose of securing workers' compensation benefits. I also find, by a preponderance of the evidence, that claimant's testimony in his deposition and his statements to Dr. Smith and Dr. Shure that he had never been in a car accident, was knowingly and intentionally false for the purpose of securing workers' compensation benefits. Consequently, he is not entitled to

compensation or benefits pursuant to Section 440.09(4), Fla. Stat. (2011). Given these findings, it is not necessary to address the other issues, claims, and defenses raised by the parties.

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

1. Claimant is barred from all compensation and benefits pursuant to Section 440.09(4), Fla. Stat. (2011).
2. All pending petitions for benefits are DENIED and DISMISSED WITH PREJUDICE.

**DONE and ORDERED** in Orlando, Orange County, Florida.

This 10<sup>th</sup> day of December, 2013

*Thomas W. Sculco*



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**Thomas W. Sculco**  
Judge of Compensation Claims  
Division of Administrative Hearings  
Office of the Judges of Compensation Claims  
Orlando District Office  
[www.jcc.state.fl.us](http://www.jcc.state.fl.us)

**CERTIFICATE OF SERVICE**

**THIS IS TO CERTIFY** that the Order was entered by the Judge of Compensation Claims and was electronically served on the parties through their respective attorneys.

 Digitally signed by Marla  
Miller  
Date: 2013.12.10 13:16:19  
-05'00'

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**Marla Miller**  
**District Clerk**  
**Orlando District Office**