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

RONALD LESNIAK,	)	
	)	
Employee/Claimant	)	
	)	
vs.	)	OJCC Case No. 09-017857-TWS
	)	
SERVICE MANAGEMENT SYSTEMS, INC.	)	Accident date: 1/10/2009
	)	
Employer	)	
	)	
and	)	
	)	
GALLAGHER BASSETT SERVICE, INC.-CLEARWATER	)	**Judge: Thomas W. Sculco**
	)	
Carrier		
_____/		

COMPENSATION ORDER

After proper notice to all parties, a hearing was held on this claim in Orlando, Orange County, Florida on March 15, 2011. Present at the hearing was Attorney Daniel DeCiccio for the employee. The Employer/Carrier/Servicing Agent was represented by Scott Miller.

This order addresses the Petition(s) for Benefits filed with DOAH on 8/17/2010 and 10/25/2010.

At hearing the evidence consisted of the testimony of:

Jim Langella, Brandon Coppock, Dion Lindsey and Shawna Emmert.

DOCUMENTARY EVIDENCE:

#1 Claimant's: Trial Memorandum/caselaw

#2 E/SA's: Trial Memorandum/caselaw

#3 Judge's: Pretrial Stipulation
January 12, 2011

#4 E/SA's: Deposition/attachments of Jonathan Greenberg, M.D.
January 21, 2011

#5 Joint: Deposition/attachments of Jim Langella
October 22, 2010

#6 Joint: Accident Scene DVD/CD-R

#7 Joint: Deposition/attachment of Joe Rowley
March 7, 2011

#8 Joint: Deposition of Tiffany Nguyen
March 7, 2011

#9 Joint: Deposition of Jay Sada
March 3, 2011

#10 Joint: Deposition of Ronald L. Kinney
March 3, 2011

#11 Joint: Deposition of Carlos Ortiz
March 3, 2011

#12 Joint: Deposition of Steven Suarez
March 3, 2011

#13 Joint: Deposition of Deon Lindsey

March 3, 2011

#14 Joint: Deposition of Reginald Taylor
March 3, 2011

#15 Joint: Deposition of Angel Gonzales
March 3, 2011

#16 E/SA's: Helmet

#17 Claimant's: Composite

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 issues for determination are: 1-whether the E/C is entitled to a 25% reduction in compensation pursuant to section 440.09(5), Fla. Stat. (2009); and 2-claimant's clams for penalties, interest, costs, and attorney's fees. All other issues are reserved for a later hearing, if necessary, and the parties agreed to handle the exact amount of benefits owed administratively, with jurisdiction reserved to resolve any disputes.

I. HAS THE E/C ESTABLISHED ENTITLEMENT TO A 25% REDUCTION IN COMPENSATION PURSUANT TO SECTION 440.09(5)

A. BACKGROUND

On January 10, 2009, claimant suffered a traumatic brain injury when he fell off an electric 3-wheel vehicle called a "T-3" in the parking lot of the Florida Mall in Orlando. At that time, he was working as a security guard supervisor for Valor Security Services ("Valor") at the mall.

Because of his brain injury, claimant apparently has no recollection of the accident, or whether, and if so in what manner, he was wearing a helmet at the time of the accident. Other evidence was presented, however, regarding these issues - specifically testimony from alleged eyewitnesses and individuals who arrived almost immediately after the accident occurred, and mall surveillance video both before and after the accident.

As discussed below, conflicting testimony was presented regarding the state of claimant's helmet during and immediately after the accident. Conflicting testimony was also presented on the issue of how Valor required claimant, and other employees, to use a safety helmet when driving a "T-3" vehicle. In addition, Dr. Jonathan Greenberg, neurosurgeon, testified regarding the impact of how claimant wore his safety helmet on

the injuries he sustained in the accident.

On 4/1/10, the carrier filed a "Notice of Action/Change" form reducing claimant's benefits by 25% due to claimant's alleged failure to properly use his safety helmet at the time of the accident. This litigation followed.

B. DID VALOR REQUIRE CLAIMANT TO WEAR A SAFETY HELMET WITH HIS CHIN-STRAP SNUGLY ATTACHED WHEN RIDING A T-3 VEHICLE?

To be entitled to a 25% reduction of compensation pursuant to Section 440.09(5), the E/C must establish that claimant had actual notice of the employer's requirement to properly use a safety appliance - in this case a safety helmet. *See McKenzie Tank Lines, Inc. v. McCauley*, 418 So. 2d 1177, 1181 (Fla. 1st DCA 1982). Here, conflicting evidence was presented on this issue. Jim Langella was claimant's supervisor and is the security director for Valor at the Florida Mall. Mr. Langella testified that the T-3 vehicle comes with a bicycle helmet and training and operator instructional videos. He testified that he set up training for claimant and other security supervisors and guards that involved watching a video, a classroom session, and a written test. He testified that claimant personally helped him set up the test and administer training drills. He testified he

discussed the proper fitting of the safety helmets in his classroom presentation, and that he specifically instructed claimant and others to wear the helmet snugly, with the chin-strap fastened so that only one finger could fit between the strap and underneath the chin (Mr. Langella referred to this as the "one-finger rule"). Mr. Langella testified that claimant passed his examination regarding use and safety requirements for using the T-3. He further testified that on several occasions he took helmets out of service because of defects in the chin-straps.

Mr. Langella's testimony regarding instruction for using the T-3 helmet was confirmed by Brandon Coppock, who was also a supervisor like claimant. In addition, Angel Belay Gonzales testified in deposition that Jim Langella instructed him to attach the chin-strap on the helmet in the T-3 training.

In contrast, Shawna Emmert, who was supervised by claimant, testified that she was never instructed to wear the safety helmet with the strap fastened under the chin, and doesn't remember anything about a "one-finger rule".

In considering this and other testimony and evidence on this issue, I find, by a preponderance of the evidence, that claimant did have actual notice of Valor's requirement that he

use a safety helmet with the chin-strap snugly fastened under the chin. I find the testimony of Jim Langella and Brandon Coppock logical, reasonable, and credible, and reject the contrary testimony of Shawna Emmert on this issue. This determination is based on my assessment of the credibility and demeanor of the witnesses, and on the fact that several witnesses recalled the training provided by Mr. Langella.

C. DID CLAIMANT KNOWINGLY REFUSE TO WEAR HIS SAFETY HELMET WITH THE CHIN STRAP SNUGLY FASTENED UNDER HIS CHIN, AS REQUIRED BY HIS EMPLOYER?

Under Section 440.09(5), the E/C must also prove that claimant intentionally committed an act in refusal of the employer's requirement to use a safety device – a negligent failure would not be sufficient to trigger application of the statute. *See McKenzie Tank Lines, Inc. v. McCauley*, 418 So. 2d at 1180. Because claimant has no recollection of the date of injury, no direct evidence was presented regarding his state of mind. However, conflicting circumstantial evidence was presented on this question.

Jim Langella testified that he arrived at the accident scene one to two minutes after the accident occurred, and observed claimant on the ground, with the "T-3" vehicle claimant

was riding on the ground on its side. Mr. Langella saw claimant's helmet lying on the ground, 6-8 feet away from claimant. He testified he saw the chin-straps for claimant's helmet tucked through the back of the helmet and snapped together.

Brandon Coppock, a security supervisor like claimant, did not see the accident happen, but testified that he arrived on the scene less than 10 seconds after the accident occurred. He testified he raced over to claimant and saw that he was unconscious and gasping for air. Mr. Coppock observed claimant's helmet was on the ground about 7 feet away. He testified he saw the straps on claimant's helmet pulled through the back of the helmet and snapped together.

In contrast to the testimony of Jim Langella and Brandon Coppock, Shawna Emmert testified she saw the accident from about 30 feet away on her bicycle. She testified that she observed the helmet about 3-4 feet from claimant and that it was lying on its side. She testified that the straps were unclasped and hanging from the side of the helmet when she arrived on the scene. Moreover, Ms. Emmert testified that just minutes before the accident she observed claimant riding on his T-3, and that she saw the chin-trap on his helmet across the side of his face,

indicating that it was clasped under his chin.

After considering the live testimony and the other evidence presented, I find that the testimony of Jim Langella and Brandon Coppock is credible, logical, and reasonable, and accept their testimony in its entirety. I specifically reject the testimony of Shawna Emmert that: 1-she saw claimant's chin-strap across his face minutes before the accident, and 2-she saw claimant's helmet shortly after the accident with the chin-strap hanging out the side and unclasped, as lacking credibility. This finding is based on my assessment of her credibility and demeanor while testifying, as well as other evidence.

First, it does not seem reasonable that Ms. Emmert could have observed a chin-strap across claimant's face right before the accident from the distance she was away from him, based on the surveillance video introduced into evidence.

In addition, her testimony that the chin-strap on claimant's safety helmet was unclasped when she saw it shortly after the accident is directly contradicted by the testimony of Jim Langella and Brandon Coppock, which I accept as credible and truthful. Consequently, I find that almost immediately after the accident occurred, claimant's safety helmet was lying on the ground 6-8 feet away, and that the chin-strap was clasped

together and pulled through the back of the helmet.

Claimant first argues that regardless of how, or even whether the chin-strap was fastened on the helmet at all, he was still "using" it per the statute because the evidence establishes that he had it on his head at the time of the accident. I reject claimant's argument because intentionally using a safety appliance improperly cannot reasonably be considered as "use" under the statute. If it could, a welder with safety goggles hanging from his neck instead of covering his eyes would be "using" the goggles under the statute, or a driver who snapped his seat-belt behind him instead of around his waist would be "using" the seat-belt. If possible, a statute should not be interpreted in a manner that leads to absurd results, and claimant's interpretation of the term "use" in Section 440.09(5) would, as noted above, lead to absurd and bizarre results and should therefore be avoided if possible. Rather, the term "use" in Section 440.09(5) should reasonably be interpreted to mean using the safety appliance for its intended purpose and pursuant to instructions as to its proper use.

Claimant further argues that regardless of how "use" is defined in the statute, the evidence is insufficient to establish that he knowingly refused to properly wear the safety

helmet. While there is no direct evidence as to claimant's state of mind and intent regarding the use of his helmet at the time of the accident, it is well settled that intent can be established by circumstantial evidence. *See Jones v. State, 192 So. 2d 285 (Fla. 3d DCA 1966).*

Here, the circumstantial evidence strongly supports the conclusion that claimant intentionally and consciously chose to reject his employer's instruction to wear his helmet with the chin-strap fastened snugly under his chin. The fact that the chin-strap was fastened and pulled through the back of the helmet suggests a conscious decision by claimant to both refuse to fasten the strap under his chin, and to hide his failure to properly wear the helmet from casual onlookers. If claimant simply let the unfastened chin straps dangle from the side of his helmet, it would be more likely, in my view, that onlookers would see that the straps were not fastened correctly.

Moreover, pulling the fastened chin-strap through the back of his helmet suggests a deliberate choice by claimant rather than an oversight or forgetfulness. No evidence was presented suggesting the helmet or strap was defective or did not fit correctly, or suggesting any other legitimate reason why claimant chose not to wear his helmet properly. As such, I

find, by a preponderance of the evidence, that claimant knowingly refused to properly wear the safety helmet provided by his employer at the time of the accident.

D. HAS THE E/C ESTABLISHED A CAUSAL RELATIONSHIP BETWEEN CLAIMANT'S KNOWING REFUSAL TO PROPERLY USE HIS SAFETY HELMET AND HIS INJURY?

The final element the E/C must establish to invoke Section 440.09(5) is a causal connection between claimant's failure to properly use his helmet and his injuries. Dr. Jonathan Greenberg, neurosurgeon, provided the only admissible medical opinion testimony regarding this issue. Dr. Greenberg indicated claimant suffered from a right temporal petrous region basilar skull fracture, and multiple cerebral contusions (bruises to the brain) as a result of the accident. He characterized claimant's injury as a "severe trauma". He testified that in order to cause the fracture claimant suffered, his skull "had to have been in direct contact with something that was hard enough to cause an impact that would break the skull at that point." (deposition dr. Greenberg, at 21). Dr. Greenberg further testified that: "if the -- if the helmet were covering that

area, by virtue of the way these helmets are designed, that would have provided a significant dissipation of the impact effect which most likely would have prevented the patient from having sustained a skull fracture." (deposition of Dr. Greenberg, at 21-22).

When asked whether there was a causal connection between claimant's brain injury and the way the helmet was placed on his head, Dr. Greenberg testified as follows:

> Had this helmet been worn in the standard fashion with the clasps and with the – with the lower aspect of the helmet, which is sort of like the ring of foam covering the areas of the head and projecting outward, it would have been much less likely that the skull would have been exposed to a direct impact sufficient to cause a fracture. And, therefore, there would have been less energy impacted on the skull and on the brain. And, consequently, there would have been a lesser degree of injury to the brain and on the brain tissue. (deposition of Dr. Greenberg, at 23).

I find Dr. Greenberg's testimony logical and reasonable, and I accept his testimony in its entirety. Based on Dr. Greenberg's testimony, I find that the E/C has established a causal connection between claimant's knowing refusal to properly wear his safety helmet at the time of his accident and his injury.

II. HAS CLAIMANT ESTABLISHED THAT THE E/C SHOULD BE ESTOPPED FROM CLAIMING A REDUCTION IN COMPENSATION PURSUANT TO SECTION 440.09(5)?

In *McKenzie Tank Lines, Supra*, the court recognized that if an employer is aware that employees are disregarding an order regarding a safety appliance, but does not enforce that order, than an employee's "willful refusal" should be excused. While claimant raised this issue as a claim of estoppel rather than of excusal, I will address the substance of claimant's argument regardless of how it is characterized.

Considering all the evidence presented, I find that claimant has not established estoppel/excusal pursuant to the rule discussed above in *McKenzie Tank Lines, Supra*. While claimant presented evidence that on some occasions Valor employees did not properly wear safety helmets, there is no evidence that Valor management knew of the violations. I accept the testimony of Jim Langella, security director for Valor at the Florida Mall, that he was thorough and vigilant in enforcing safety requirements for his employees, including those relating to the use of helmets for riders of the T-3 vehicles. As such, claimant's claim of estoppels is denied.

CONCLUSION

As the E/C has established the required elements to be entitled to a reduction of compensation pursuant Section 440.09(5), I find that the E/C is entitled to reduce claimant's disability compensation by 25%. Pursuant to the agreement of the parties, the exact amounts owed will be handled administratively, with jurisdiction reserved to resolve any disputes.

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

1. The E/C the E/C is entitled to reduce claimant's disability compensation by 25% pursuant to Section 440.09(5), Fla. Stat. (2009). Pursuant to the agreement of the parties, the exact amounts owed will be handled administratively, with jurisdiction reserved to resolve any disputes.

2. Claimant's claims for penalties, interest, costs, and attorney's fees are DENIED and DISMISSED WITH PREJUDICE.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida this 14 day of April, 2011.

Thomas W. Sculco

Thomas W. Sculco
Judge of Compensation Claims
400 West Robinson Street, Suite 608N
Orlando, Florida 32801-1701

This is to certify that a true and correct copy of the foregoing Order has been furnished by electronic or U.S. Mail to the parties and counsel listed below.

Yadira Suarez

Digitally signed by Yadira Suarez
Date: 2011.04.14 13:37:09 -04'00'

Yadira Suarez
Administrative Assistant to Judge Sculco

Served by U.S. Mailed to:

Valor Security Services

Gallagher Bassett Services, Inc.

Served by Electronic Mail:

Daniel DeCiccio, Esquire

Scott B. Miller, Esquire