STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF JUDGES OF COMPENSATION CLAIMS
FORT LAUDERDALE DISTRICT OFFICE

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OJCC No: 16-005729DAL
D/A: 11/05/2015
JUDGE: Daniel A. Lewis

FINAL COMPENSATION ORDER

AFTER DUE NOTICE to the parties, a Final Merits Hearing was conducted before the undersigned Judge of Compensation Claims (JCC) on November 29, 2016 in Lauderdale Lakes, Broward County, Florida. The petitions for benefits which came on for adjudication were filed on March 9, 2016 and April 26, 2016. The parties stipulated as follows:

A. The undersigned has jurisdiction of the parties and of the subject matter.

B. Notice of hearing was timely given to the proper parties.

C. Venue lies in Broward County, Florida.

D. The claimant's accident of November 5, 2015 was initially accepted by the employer/carrier as a compensable occurrence and the claimant's low back injury was also accepted. However, the employer/carrier asserts that the claimant is barred or disqualified from

receiving further benefits on the basis of section 440.15(5)(a), Fla. Stat., and Martin Co. vs. Carpenter, 132 So. 2d 400 (Fla. 1961) as well as on the basis of section 440.105(4)(b), Fla. Stat.

E. The date of the claimant's attainment of maximum medical improvement (MMI) was not an issue for this hearing.

F. Claim was made for:

1. Continued compensability of the claimant's low back and left leg injuries.

2. Authorization of an orthopedic physician.

3. Also claimed were attorney's fees and costs.

G. The employer/carrier asserted as defenses that:

1. The claimant was involved in a compensable accident during the course and scope of employment and claims to have injured his low back. However, all benefits are denied based on Martin Co. vs. Carpenter and section 440.15(5)(a), Fla. Stat., as the claimant misrepresented his medical condition in writing to the employer at the time of hire.

2. The claimant forfeits all entitlement to benefits pursuant to section 440.105, Fla. Stat., as he misrepresented his medical history in deposition.

3. The employer/carrier also raised a general denial to the claim for attorney's fees and costs.

After careful consideration and review of the testimony, documentary evidence and argument presented, the following are my findings of ultimate facts and conclusions of law:

FINDINGS OF ULTIMATE FACTS

1. This claimant is a 48 year old man, date of birth July 4, 1968, who sustained his compensable workers' compensation accident with the employer herein, the Florida Institute for

Long Term Care d/d/a Pompano Rehab & Nursing Center, on November 5, 2015. At that time, the claimant was working for the employer as an Activities Director.

2. On November 19, 2012, prior to his commencing employment with the employer as an Activities Director, the claimant was interviewed by the employer's Risk Manager and Staff Development Coordinator, Gerald Burris. Mr. Burris testified that on November 20, 2012, the claimant was given a conditional offer of employment; however, the claimant had to complete additional paperwork involved in the hiring process. Mr. Burris testified that the following day, on November 21, 2012, after the conditional offer of employment was made, the claimant completed and signed the additional paperwork for the hiring, which included a Pre-Placement Health Questionnaire, the Job Description for the Director of Activities position and an Essential Functions Acknowledgment Form.[1] These documents were completed and signed by the claimant in Mr. Burris's presence. The claimant actually began working for the employer herein on November 30, 2012.

3. The Job Description, under the heading Physical Demands, indicated that "All employees of nursing homes may be required to provide lifting and transfer assistance to residents... Significant physical activities include standing, lifting (up to 60 pounds unassisted), bending, stooping, pushing, pulling and twisting." On the Essential Functions Acknowledgment Form, the claimant acknowledged there was no reason why he could not safely perform the essential functions of the job for which he was applying.

4. Question 4 of the Pre-Placement Health Questionnaire asked the following question: "Do you have a mental or physical condition that may substantially limit your performance of

[1] The Americans with Disabilities Act (ADA) requires that employers make information requests about health or workers' compensation and accident history as part of a post-job offer, medical examination or inquiry. However, the ADA does not preclude the Martin Co. vs. Carpenter defense. Dubreuil's Florida Workers' Compensation Handbook, Ch.5, Section 5.01[1] (2010 ed. Matthew Bender).

the essential functions of this job?" The claimant responded "No" to this question. The Questionnaire asked for further explanation for any "Yes" answer, and asked, "Will you need an accommodation to perform the essential functions of the job?" The claimant again responded "No" to this question.

5. Question 7 of the employer's Pre-Placement Health Questionnaire asked if the claimant had ever been subject to various diseases or conditions. The Questionnaire asked, "Do you have now, or have you ever had, any of the following?" In response to the inquiry regarding "Back pain," the claimant responded "No." The claimant also answered "No" to the same question regarding "Neck pain." Question 7 also requested that the claimant provide additional information with respect to any "Yes" responses.

6. As stated, the claimant sustained a work accident with this employer on November 5, 2015. After the accident, the claimant was seen at the Concentra Medical Center, which facility was authorized to treat. The claimant's treating physician at Concentra was Dr. Lojko. Dr. Lojko specializes in occupational medicine, and testified he first saw the claimant on November 5, 2015. At that time, the claimant gave a history of having injured his back and left shoulder while trying to prevent a patient from falling. Dr. Lojko testified the claimant presented with complaints of pain in his lower back. The Concentra medical records reveal the claimant was diagnosed with a lumbosacral strain with nerve root impingement. Medication and physical therapy were prescribed, and an MRI scan was performed.

7. Dr. Lojko continued to follow the claimant and saw him on two subsequent occasions. The claimant was last seen by Dr. Lojko on December 11, 2015. At that time, Dr. Lojko recommended that the claimant follow up with an orthopedic specialist due to the findings on the MRI.

8. The evidence reveals this claimant sustained a prior motor vehicle accident on May 17, 2012 for which he received both chiropractic and orthopedic care. The claimant received extensive chiropractic care from Dr. Riegel at Palm Beach Physical Medicine from July 23, 2012 to November 19, 2012.[2] The Personal Injury Intake Form dated July 23, 2012 and signed by the claimant listed complaints of low back pain, back stiffness and leg pain.

9. The medical records of Palm Beach Physical Medicine reveal the claimant presented to Dr. Riegel with complaints of neck pain, middle back and lower back pain. The records reflect the back pain was located in the lumbar region, with radiation into the buttocks. The diagnosis of Dr. Riegel was lumbar sprain/strain and lumbar radiculitis. Chiropractic manipulation was administered.

10. Dr. Riegel last saw the claimant on November 19, 2012, the same day as his interview with the employer herein for the Activities Director position. At that time, Dr. Riegel noted the claimant continued to complain of bilateral neck, mid back and lower back pain with radiation from the lower back into the buttocks and legs. Chiropractic MMI was assigned as of November 19, 2012, with a residual permanent physical impairment of 9%.

11. As indicated, for the prior, May 17, 2012 motor vehicle accident, the claimant also came under the care of an orthopedic surgeon, Dr. Eskenazi. Dr. Eskenazi specializes in spinal surgery, and first saw the claimant on September 6, 2012. The claimant was referred to Dr. Eskenazi by Dr. Riegel.

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[2] At this Final Hearing, the claimant objected to the medical records and testimony of any unauthorized medical providers, including the claimant's prior treating chiropractor and orthopedic surgeon, as inadmissible pursuant to section 440.13(5)(e), Fla. Stat. That subsection provides that no medical opinions other than an expert medical advisor (EMA), an independent medical examiner (IME), or an authorized treating provider are admissible in proceedings before the JCC. However, such evidence is still admissible for fact purposes. Under the case law, factual testimony may include evidence concerning the claimant's appearance, history, complaints, diagnosis and treatment, but not opinions as to causation. Office Depot vs. Sweikata, 737 So. 2d 1189 (Fla. 1st DCA 1999), Cespedes vs. Yellow Transportation, Inc., 130 So. 3d 242, fn. 1 (Fla. 1st DCA 2013).

12. On September 6, 2012, the claimant presented to Dr. Eskenazi with complaints of back pain, neck pain and thoracic pain due to the car accident on May 17, 2012. The claimant indicated the pain was worse in his lower back. The claimant also informed Dr. Eskenazi he had prior neck surgery. A health questionnaire dated September 6, 2012 asked the following question, "Do you currently, or have you ever had any of the following?" In response, "Back Pain" and "Neck Pain" are circled.

13. Dr. Eskenazi testified he reviewed the claimant's lumbar MRI scan which had been performed on August 10, 2012. The MRI reflected the claimant had complaints of low back pain and lower extremity radiculopathy. The August 10, 2012 MRI revealed a central disc herniation at L5-S1 with an annular tear as well as disc pathology at L4-5. Dr. Eskenazi's reports reflect an impression or diagnosis of lumbar disc herniation at L5-S1, persistent back pain as well as radiculopathy affecting the lower extremity.

14. On September 28, 2012, Dr. Eskenazi performed surgery consisting of a laminotomy and lumbar microdiscectomy at L5-S1. The preoperative diagnosis was lumbar disc herniation at L5-S1 with intractable lumbar radiculopathy and buttock pain. Dr. Eskenazi continued to follow the claimant after the surgery. The claimant continued to express complaints of back pain and sciatica following the surgery. On October 16, 2012, Dr. Eskenazi diagnosed right-sided S1 radiculopathy, likely secondary to nerve root irritation.

15. Dr. Eskenazi last saw the claimant on October 25, 2012, less than a month before his November 19, 2012 interview with the employer herein. The claimant advised Dr. Eskenazi he had been working and was required to twist and lift. Dr. Eskenazi testified the claimant was complaining of lower back pain radiating into his right leg with numbness. The medical reports reflect that Dr. Eskenazi was concerned about a recurrence of the claimant's disc herniation.

Another lumbar MRI was ordered and was performed on November 29, 2012. In his deposition, Dr. Eskenazi testified that MRI revealed a disc bulge at L4-5 and a small disc herniation at L5-S1.

CONCLUSIONS OF LAW

16. The employer/carrier contends that this claim is barred on the basis that the claimant misrepresented his medical history or condition to the employer at the time of his hiring and that the employer relied on that misrepresentation, pursuant to Martin Co. vs. Carpenter, 132 So. 2d 400 (Fla. 1961) and section 440.15(5)(a), Fla. Stat. I find that the claimant knowingly misrepresented his medical condition, that the employer relied on the misrepresentation to its detriment, and that the prior undisclosed back injury was causally related to the November 5, 2015 workplace injury.

17. In Martin Co. vs. Carpenter, *supra*, the Florida Supreme Court set forth the rule of law regarding false representations made by an employee in procuring employment:

> We therefore adopt the rule that a false representation as to physical condition or health made by an employee in procuring employment will preclude the benefits of the Workmen's Compensation Act for an otherwise compensable injury if there is shown to be a causal relationship between the injury and the false representation and if it is also shown that (1) the employee knew the representation to be false, (2) the employer relied upon the false representation and (3) such reliance resulted in consequent injury to the employer.

Id. at 406. "An employee who has misrepresented a condition which is causally related to a subsequent claim for benefits has denied the employer the opportunity of making a choice as to whether or not to hire that particular employee notwithstanding the attendant risks." Irving vs. Ametek, Inc., 756 So. 2d 1045 (Fla. 1st DCA 2000).

18. The rule of law set forth in Martin Co. vs. Carpenter was codified in the Workers' Compensation Law in section 440.15(5)(a), Fla. Stat. That statute provides that an aggravation or

acceleration of a preexisting condition is compensable "except that no benefit shall be payable if the employee, at the time of entering into the employment of the employer by whom the benefits would otherwise be payable, falsely represents herself or himself in writing as not having previously been disabled or compensated because of such previous disability, impairment, anomaly or disease and the employer detrimentally relies on the misrepresentation." Section 440.15(5)(a), Fla. Stat., Dubreuil's Florida Workers' Compensation Handbook, Ch. 5, Section 5.04[1] (2010 ed. Matthew Bender). Case law tells us, however, that the adoption of section 440.15(5)(a), Fla. Stat., did not overrule the Martin Co. vs. Carpenter case, and the Martin defense is not limited to those situations where the employee was previously disabled or compensated for the preexisting condition. Irving vs. Ametek, Inc., 756 So. 2d at 1048.

19. Here, I find the claimant made a false representation as to his physical condition knowing such representation to be false. Although it could be argued that Question 4 of the employer's Pre-Placement Health Questionnaire is nonspecific and calls for a statement of opinion by the claimant, Question 7 is directed to specific physical and medical conditions. *See* Martin Co. vs. Carpenter, *supra*, (pre-employment questionnaire asked if the claimant had ever been subject to various diseases, including back injury or backache). *See also* Irving vs. Ametek, Inc., *supra* (pre-employment questionnaire asked, "Do you now have or have you ever had any of the following:...arm, hand or shoulder trouble.").

20. The claimant testified that he was confused by Question 7 of the employer's Pre-Placement Health Questionnaire. As indicated, that question asked, "Do you have now, or have you ever had, any of the following? Back pain." According to the claimant, he thought the question meant whether he was experiencing back pain at the time he completed the Questionnaire. However, in his response to the same question, the claimant answered "Yes" as to

whether he ever had measles or mumps. At this Final Hearing, the claimant admitted he did not interpret Question 7 as asking whether he was experiencing measles or mumps at the time of the completion of the Questionnaire. Furthermore, in the portion of Question 7 which requested additional information regarding any "Yes" response, the claimant indicated he had measles and mumps as a child. This answer belies the claimant's contention that he misunderstood the question as inquiring whether he was experiencing these conditions at the time he filled out the form.

21. I find this claimant is not a credible witness, and I reject his testimony that he was confused by or misunderstood Question 7 on the employer's Pre-Employment Health Questionnaire. In his deposition taken on June 13, 2016, the claimant was asked whether, when he filled out the paperwork for the employer on November 21, 2012, he was still actively treating for the low back injury from the May, 2012 car accident. In his deposition, the claimant responded that he was not. However the testimony and medical records of Dr. Eskenazi, as summarized hereinabove, reflect that as of October 25, 2012, the claimant continued to complain of lower back pain radiating into his leg with numbness. Dr. Eskenazi was concerned that the claimant had suffered a recurrence of the lumbar herniated disc, and ordered a repeat MRI scan. In his deposition, when asked whether, following the back surgery with Dr. Eskenazi, all of his symptoms resolved or went away, the claimant responded that he believed so. When asked in his deposition whether he had any recurrence of his symptoms following the low back surgery with Dr. Eskenazi, the claimant responded that he did not believe so. Under the case law, the JCC, as the trier of fact, has the right to determine the credibility of witnesses, including the credibility of the claimant, weigh the evidence, and resolve any conflicts in the testimony of the witnesses.

Ullman vs. City of Tampa Parks Department, 625 So. 2d 868 (Fla. 1st DCA 1993), Prather vs. Process Systems, 867 So. 2d 479 (Fla. 1st DCA 2004).

22. I find the employer herein relied upon the claimant's false representation to its detriment. Mr. Burris, the employer's Risk Manager, testified that he reviewed the forms, including the Pre-Employment Health Questionnaire, with the claimant on November 21, 2012. According to Mr. Burris, the position of Activities Director requires a lot of bending and stooping. Mr. Burris testified the claimant never informed him about his prior low back injury or of his prior back surgery. Mr. Burris testified that, had he been so informed, he would have notified the Nursing Home Administrator. According to Mr. Burris, if a person's physical capabilities differed from what the job description required, the prospective employee might be placed in a different position or the position might be modified.

23. Nashika Ogilvie, the employer's Administrator, testified that every applicant must fill out the Pre-Placement Health Questionnaire before being allowed to start work. Ms. Ogilvie testified the purpose of the Questionnaire is to determine if the prospective employee is capable of performing the essential functions of the job. According to Ms. Ogilvie, if a history was given a prior back injury or prior back surgery, then the employer might rescind the hire or look at alternate options, such as offering another position at the facility. Ms. Ogilvie testified that if the Questionnaire revealed prior back pain and back surgery, the applicant would not be offered the position of Activities Director because that position requires a lot of lifting, pulling and pushing which could exacerbate the condition. Ms. Ogilvie testified that she would make the decision as to whether to continue to extend the offer of employment to the prospective employee.

24. I find that here, the claimant's misrepresentation of his medical history deprived the employer of the opportunity to make an informed decision regarding whether it would assume

the risk of hiring the claimant. *See* Colonial Care Nursing Home vs. Norton, 566 So. 2d 44 (Fla. 1st DCA 1990) (holding that a successful assertion of the Martin vs. Carpenter defense does not require proof that the claimant would not have been hired but for his misrepresentations. Instead, the test is whether the misrepresentation of the medical history deprived the employer of the opportunity to make an informed decision about whether it would assume the risk of hiring the claimant). *See also* Florida Mining & Materials vs. Perkins, 612 So. 2d 667 (Fla. 1st DCA 1993).

25. I further find there is a causal relationship between the injury and the claimant's false representation. "A causal relationship for purposes of Martin is shown by evidence of a medical relationship between the workplace injury at issue and the undisclosed prior injury or condition, or by evidence that the prior injury or condition contributed to or was aggravated by the subsequent injury." Irving vs. Ametek, Inc., 756 So. 2d at 1048, Cycenas vs. Sarasota Coca Cola Bottling Company, 440 So. 2d 39 (Fla. 1st DCA 1983).

26. Here, occupational medicine specialist Dr. Lojko, who was authorized to and treated the claimant at the Concentra medical facility after his November 5, 2015 accident, testified that an MRI scan of the claimant's lumbosacral spine was performed on December 10, 2015. Dr. Lojko compared that MRI scan to the one performed on November 29, 2012, after the claimant's prior back surgery, and opined there was no significant change. Dr. Lojko testified the claimant's November 5, 2015 injury was an aggravation of the preexisting condition in the claimant's low back. According to Dr. Lojko, the claimant's findings are chronic in nature.

27. As indicated, I find that this claimant knowingly misrepresented his prior medical condition, that the employer relied on that misrepresentation to its detriment, and that the prior undisclosed back pain and surgery was causally related to the November 5, 2015 workplace injury. Irving vs. Ametek, Inc., 756 So. 2d at 1047. Consequently, I find the claimant's claim for

continued compensability of his low back pain and pain into his left leg is barred by section 440.15(5)(a), Fla. Stat., and Martin Co. vs. Carpenter. The claimant's claims shall be, and the same are hereby, denied and dismissed. As such, I do not need to address the employer/carrier's fraud or misrepresentation defense under section 440.105, Fla. Stat., or the claimant's objection thereto as nonspecific and not timely asserted.

DONE AND ORDERED at Lauderdale Lakes, Broward County, Florida this 6th day of December, 2016.

Honorable Daniel A. Lewis
Judge of Compensation Claims

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Final Compensation Order was furnished this 6th day of December, 2016 by electronic transmission to the parties' counsel of record and by U.S. mail to the parties.

Secretary to Judge of Compensation Claims