

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

Cesar Portales, Employee/Claimant,	)	
	)	Consolidated
	)	<b>OJCC Case No. 10-029360JEM</b>
vs.	)	(11-004318JEM)
	)	
YRC, Inc.,	)	Accident date: <b>3/2/2009</b>
Employer,	)	(2/10/11)
Gallagher Bassett Services-Nashville	)	
Carrier.	)	Judge: Joseph Murphy
	)	
<hr style="width: 40%; margin-left: 0;"/>		
Stephen M. Barbas, Esq., Attorney for the	)	
Claimant		
Scott B. Miller, Esq., Attorney for the		
Employer/Carrier		

**ORDER ADDRESSING THE MERITS OF A PETITION FOR BENEFITS FILED**  
**12/17/2010**

**After due notice to the parties**, a hearing on this claim was held in Tampa, Hillsborough County, Florida. The Parties were represented by Counsel as indicated hereinabove. The claimant sustained a significant injury to his right wrist in a fall from the back of his tractor trailer rig. He was provided with workers' compensation benefits, both medical and indemnity, and has since returned to work in his usual occupation as a combination driver for YRC, Inc. The claimant seeks care and treatment of the right shoulder, including surgery to repair a torn rotator cuff. He attributes this condition, and need for treatment, to the industrial accident. Considering the arguments of counsel, and having heard the claimant's testimony, having reviewed his two deposition transcripts, as well as having reviewed all documentary evidence submitted I find that

neither the industrial accident nor the treatment received therefore were the major contributing cause of his current shoulder condition. For a more complete explanation of the forgoing finding please see the following analysis. The claims, defenses, stipulations and exhibit log are to be found in the appendices, which are attached hereto and by this reference made a part hereof.

**After due consideration** of this matter and after having the opportunity to review the documentary matters and having had the opportunity to observe the candor and demeanor of the witnesses who did appear and give live testimony before me, and having endeavored to resolve all conflicts of fact in the evidence presented herein, I do make the following findings of fact:

1. I have jurisdiction of the facts and the subject matter of this claim.
2. The stipulations as entered into by and between the parties are hereby adopted as findings of fact and incorporated herein by reference.
3. The claimant is a 51-year-old male. He has been employed by YRC, Inc, and its predecessor corporation, Yellow Freight, as a combination driver for over twenty-five years. On March 2, 2009 the claimant had finished a delivery and climbed onto the rear of his trailer to close the forty foot trailer's door. As he did so he lost his footing and fell to the ground landing on his right side. The claimant sustained a severe fracture of his right wrist and has since undergone three surgeries to the hand and wrist, all performed by his authorized surgeon Michael Buscemi, M.D.
4. The claimant underwent considerable physical therapy following his injury and initial surgeries. He was also placed in a work hardening program run by Select Physical Therapy to prepare him to return to work. It was the claimant's testimony that on October 23, 2009, while working out during a work hardening session, he overdid it and strained his right shoulder. He said that he advised the therapist that his shoulder and groin were bothering him. Mr. Portales recalled that the therapist lowered the weights he was working with that day and he was able to finish the session. The claimant testified that the following Saturday while driving

home from his mother's he was making a turn and as he did he felt a pop in his arm. He said he had immediate pain in his elbow and called Dr. Lunseth, an orthopedic surgeon with whom he'd received treatment in the past. Claimant says that he was told to come to the office on Monday, which he did.

5. The claimant was seen by Dr. Buscemi on Monday October 26, 2009. The doctor saw claimant as private patient as he'd had no clearance to see him under workers' compensation. The doctor was unable to find any problem with the claimant's right elbow but ultimately determined that the claimant had a full thickness tear of the supraspinatus tendon (a rotator cuff tendon), which the doctor recommended be surgically repaired.

6. Although Dr. Buscemi has testified that the industrial accident and physical therapy incident were the major contributing cause of the claimant's current shoulder pathology and need for treatment the compensability of the shoulder injury has been denied by the employer/carrier.

7. Susan Athanasopoulos is the adjuster responsible for claimant's case. She testified that the claimant did contact her on 10/27/2009 and reported having a problem with his elbow. She was provided with a history of the claimant's having the onset of pain while driving home from his mother's. At that time the claimant gave no other cause for the onset of pain. The adjuster testified that she spoke with Janet from Dr. Buscemi's office and was told that the claimant had been advised by the doctor that his treatment for the additional body parts he was now claiming were related to the industrial accident (the right elbow, right shoulder, right foot, and left upper extremity) would have to be filed under his health insurance as they were not related to the industrial accident. Ms. Athanasopoulos testified that Dr. Buscemi never requested

authorization to treat the claimant for the shoulder condition nor did he ever file a bill for treatment of the shoulder nor did he file a report drawing a causal connection between the industrial accident and any condition other than the wrist injury. She acknowledged that the claimant had been authorized to receive physical therapy and work hardening from Select Physical Therapy. She noted that she was provided with copies of all of select physical therapy's records and that there was no note or indication in those records that the claimant had injured himself there. The records of Select Physical Therapy were attached as an exhibit to the deposition of Ms. Athanasopoulos, without objection.

8. The claimant's subsequent objections to the late separate filing of the records of Select Physical Therapy were sustained prior to the final hearing and his objection to the submission of the records for 10/23/2009 at final hearing were sustained. Upon further consideration I find that the later should have been admitted and the objection thereto overruled. These records and the claimant's therapy at Select Physical Therapy were clearly known well in advance of the final hearing. The treatment is central to the claimed injury occurring on 10/23/2009. Claimant actually filed the October 23, 2009 records of Select Physical Therapy himself, though he did not offer them into evidence. I find that under the fact finding obligation imposed by statute (sec. 440.29, sec. 440.33 F.S.) it is necessary to review the records of Select Physical Therapy for the 10/23/2009 date of service. I have, therefore reviewed the records marked as a proffer for the employer/carrier as well as the records for 10/23/2009 filed by the claimant. The records reflect that on Friday 10/23/2009 the claimant reported that he'd been feeling pain in the groin area since his last visit. The records make no mention of any problems

with his shoulder though they do note that the claimant said that he'd reinjured his elbow on the weekend and wished to see his doctor before coming back. The record notes that the claimant was to see his doctor the following Monday. The record gives no indication that the claimant participated in any therapy or work hardening on 10/23/2009.

9. As for the opinion expressed by Dr. Buscemi that the industrial accident was the major contributing cause of the claimant's shoulder injury and need for care and treatment, I find that the opinion is not consistent with other opinions expressed by the doctor and reject that opinion. I do accept as completely candid the doctor's opinion regarding the major contributing cause of the claimant's shoulder condition, as expressed at page 37 of his deposition. When asked if the industrial accident was the major contributing cause of the claimant's shoulder condition Dr. Buscemi stated "...I had no idea, and I still have no idea. If he tells me he thinks it's related to falling out of the truck, then that's the only thing I had to go on. So I just documented what he told me." While it is clear that Mr. Portales is a hard working reliable employee I find that, at best, he is a very poor historian and that his history and recollections cannot be relied upon. I reject the history of the elbow or shoulder injury occurring at physical therapy and find that the shoulder condition is the result of a non-industrial event occurring while driving home from his mother's.

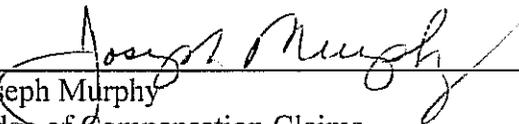
**IT IS, THEREFORE, ORDERED** that the Employee's claims' for benefits under the workers' compensation laws of the State of Florida, as raised by petition should be, and are hereby, denied and dismissed.

The parties are herewith notified that the court file relating to the instant claim will be destroyed six (6) months from the date this order becomes final, if not appealed, or six (6) months after the date of mandate or other order of final disposition if appeal is taken

A party desirous of retaining any portion of the closed file must so notify this office not less than 30 days prior to the destruction date.

**DONE AND ORDERED** in chambers in Tampa, Hillsborough County, Florida.



  
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Joseph Murphy  
Judge of Compensation Claims  
Division of Administrative Hearings  
Office of the Judges of Compensation Claims  
Tampa District Office  
1000 North Ashley Drive, Suite 309  
Tampa, Florida 33602-3330  
(813)272-2380  
[www.jcc.state.fl.us](http://www.jcc.state.fl.us)

## **APPENDIX I**

### **Claim was made for the following: \***

1. Authorization for orthopedic surgery to claimant's right shoulder, as recommended by Dr. Buscemi.
2. Authorization for care and treatment of injuries to the claimant's right shoulder, right elbow, and right foot.\*\*
3. Determination of the compensability of injuries sustained to the right shoulder, right elbow, and right foot.\*\*
4. A reasonable attorney fee for the attorney for the Claimant.
5. The cost of these proceedings.

**\*The petition for benefits seeking care and treatment for a left upper extremity injury was voluntarily dismissed on May 12, 2011.**

**\*\*The claims for care and treatment of injuries to the claimant's right foot and right elbow, as well as the claim to determine compensability of those injuries, were voluntarily dismissed at the commencement of this hearing.**

### **The claim was defended on the following grounds:**

1. The industrial accident is not the major contributing cause of claimant's alleged need for treatment to the right shoulder.
2. The employer/carrier denies any causal relationship between the claimant's right shoulder condition and the industrial accident.

3.Claimant has misrepresented his medical history thus violating section 440.105 F.S.

4.All benefits should be denied per section 440.09(4) F.S.

5.The employer/carrier denies any liability to the claimant for the payment of costs or attorney's fees.

## **APPENDIX II**

### **The parties entered into the following stipulations:**

1. The Judge of Compensation Claims has jurisdiction of the parties and the subject matter of this claim.

2. Venue properly lies in Hillsborough County, Florida.

3. Notice of hearing and notice of injury were properly given as required by the Workers' Compensation Law.

4. On 3/2/2009 the Claimant was employed by the Employer herein and on that date sustained an injury to the right wrist by an accident arising out of and in the course of his employment.

## **APPENDIX III**

**At the trial of this cause, the following documents were admitted into evidence:**

### **Judge's Exhibits:**

1. Petition for benefits filed December 17, 2010.

2. Response to the petition for benefits filed January 18, 2011.

3. Composite: motion to consolidate filed April 7, 2011; objection to the motion filed April 14, 2011; order granting the motion to consolidate entered April 15, 2011.
4. Petition for benefits filed February 23, 2011.
5. Notice of withdrawal of the February 23, 2011 petition for benefits, filed May 12, 2011.
6. Composite: employer carrier's motion to amend pretrial stipulations filed June 17, 2011; claimant's objection to the motion filed June 28, 2011; order denying the employer carrier's motion entered June 28 2011.
7. Composite: employer carrier's motion to continue filed June 29, 2011; claimant's objection to the motion filed July 1, 2011; order denying the employer carrier's motion entered July 5, 2011.
8. Pretrial stipulations and order thereon entered April 8, 2011.
9. Employer carrier's trial summary filed July 11, 2011.
10. Claimant's trial memorandum filed June 11, 2011.
11. Records of Select Physical Therapy for 10/23/2009 filed by the employer/carrier on 7/13/2011 and by the claimant on 7/11/2011.

**Employer/Carrier Exhibits:**

1. Transcript of the deposition testimony of Anna Carino filed July 11, 2011(as a notice of filing): records custodian for Dr. Lubin.
2. Transcript of the deposition testimony of Susan Athanasopoulos filed in three parts with exhibits on July 11, 2011.(Exhibits re-filed in chronological order by claimant.)

3. Transcript of the deposition testimony of Paul Lunseth, M. D. filed July 11, 2011.
4. PROFFER: two pages from the records of Select Physical Therapy for services rendered October 23, 2009.

**Joint Exhibits:**

1. Records of Dr. Buscemi filed July 11, 2011 by claimant.
2. Transcript of the deposition testimony of Mr. Portales, taken February 11, 2011, filed by the employer carrier on July 11, 2011.
3. Transcript of the deposition testimony of Mr. Portales, taken June 6, 2011, filed by the claimant on July 11, 2011.
4. Transcript of the deposition testimony of Dr. Buscemi the taken June 6, 2011 and filed in three parts with exhibits on July 11, 2011.

THIS IS TO CERTIFY that the foregoing MERIT ORDER was entered and that a copy was sent by electronically, and by U.S. Mail to claimant, this 19<sup>th</sup> day of July 2011 to each of the following:

Cesar Portales  
2921 W. Palmetto Street  
Tampa, Florida 33609

Gallagher Bassett Services, Inc.  
P.O. Box 292109  
Nashville, Tennessee 37229

Yellow Roadway Corporation  
9801 Palm River Road  
Tampa, Florida 33619

Gallagher Bassett Services, Inc.  
P.O. Box 292109  
Nashville, Tennessee 37229

Yellow Roadway Corporation  
9801 Palm River Road  
Tampa, Florida 33619

Stephen M. Barbas, Esquire  
Barbas, Nunez, Sanders, Butler & Hovsepian  
1802 West Cleveland Street  
Tampa, Florida 33606  
sbarbas@barbaslaw.com;lpfeiffer@barbaslaw.com

Scott B. Miller, Esquire  
Hurley, Rogner, Miller, Cox, Waranch & Westcott, P.A.  
1560 Orange Avenue, Suite 500  
Winter Park, Florida 32789  
smiller@hrmcw.com;smclaughlin@hrmcw.com



Wanda Keenan, Deputy Clerk