

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

**JULIO TRAVIESO,** )  
 )  
Employee/Claimant )  
 )  
vs. ) OJCC Case No. 08-030486TWS  
 )  
**MINER FLORIDA, LTD.** ) Accident date: 10/23/2008  
 )  
Employer )  
 )  
and )  
 )  
**TOKIO MARINE MANAGEMENT, INC.** ) **Judge: Thomas W. Sculco**  
 )  
Carrier )  
 )  
\_\_\_\_\_ )  
\_\_\_\_\_ )

**FINAL COMPENSATION ORDER**

After proper notice to all parties, a hearing was held on this claim in Orlando, Orange County, Florida on February 5, 2010. Present at the hearing was Attorneys Charles Smith for the employee and Attorney Scott Miller for the employer/carrier, hereinafter referred to as the E/C.

**This Order addresses the Petition(s) for Benefits filed with DOAH on April 28, 2009, June 1, 2009 and June 15, 2009.**

At hearing the evidence consisted of the testimony of: Julio Travieso, Manuel Acosta, Michael McAuliffe.

**DOCUMENTARY EVIDENCE:**

- #1 Claimant's: Hearing Information Sheet/with caselaw
- #2 E/C's: Trial Summary/with caselaw
- #3 Judge's: Pretrial Stipulation  
August 11, 2009
- #4 Claimant's: Composite/Employee Earning Reports
- #5 Joint: Deposition of Marilyn Heard-Thompson  
June 15, 2009
- #6 E/C's: Deposition of Julio Travieso  
January 18, 2009
- #7 E/C's: Deposition of Christian Kovats, D.O.  
September 11, 2009 (fact purposes only)
- #8 E/C's: Deposition of Jeffrey Rosen, M.D.  
September 23, 2009 (fact purposes only)
- #9 Joint: Deposition of Brian Barnard, M.D.  
June 15, 2009
- #10 E/C's: Deposition of Rory Evans, M.D.  
October 21, 2009
- #11 E/C's: Deposition of Denise Agosto  
November 4, 2009
- #12 E/C's: Deposition of Tracey Firkus  
November 16, 2009 (fact purposes only)
- #13 Joint: Deposition of Kim Dawson  
February 24, 2009

#14 Claimant's: Deposition of Michael McAuliffe  
October 13, 2009

#15 Joint: Deposition of Stephen Goll, M.D.  
October 14, 2009

#16 Claimant's: Deposition of Dionisio Flores, M.D.  
August 10, 2009

#17 Claimant's: Composite/Employee Earning Reports

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, as narrowed by the parties at the beginning of the final hearing, are claimant's claims for: 1-temporary disability benefits from 4/27/09 to present; 2-authorization of C5-6 spinal fusion surgery as recommended by Dr. Goll; 3-continued authorization of Dr. Goll; 4-entitlement to ongoing benefits; and 5-penalties, interest, costs and attorneys' fees ("PICA"). The parties agreed that claimant's claims relating to his abdominal injury were not ripe for adjudication and would be reserved for a later hearing, if necessary.

The E/C raised the defenses that: 1-claimant was barred from benefits due to his violation of the "fraud" provisions of

sections 440.09(4) and 440.105, Florida Statutes; 2-the compensable injury was not the major contributing cause of claimant's cervical condition; 3-claimant's loss of earnings not due to the compensable injury; and 4-no PICA owed.

## **I. BACKGROUND**

In November of 2006, claimant started working for Miner corporation (hereinafter referred to as the employer) as a service technician for loading docks and warehouse doors. One year later he was promoted to service manager. On 10/23/08 he suffered a compensable on-the-job injury when he was trying to avoid being struck by falling pallets which had been knocked over by a truck. The E/C authorized medical care for claimant's neck, back, and right shoulder.

At his deposition on 1/18/09, claimant was asked about prior injuries and problems before the 10/23/08 injury. He initially denied any prior work-related accidents or injuries, but then described an "incident" about 10 years ago when he was employed by a company called Arbon when he had to jump out of a pit to avoid being hit by a "leveler". (claimant deposition, at 14-15). He testified he hurt his back, neck, right arm and right shoulder, but that he didn't lose any time from work. (claimant deposition, at 15-16). Claimant testified that:

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Q. After that incident, did you have any recurring problems with either your neck, back, right arm, or right shoulder?

A. No.

Q. Did you ever have to go into the emergency room again for either one of those conditions after that?

A. No.

Q. And did you have to go to any other type of a medical provider for these problems after that incident at Arbon?

A. No.

Q. So between that time and October 23 of '08, you've had no problems whatsoever with your back, neck, right arm, and right shoulder?

A. Yes, I did have -- I fell off a chair at home, which is not work related. (claimant deposition, at 16-17).

Claimant went on to describe an incident 4 or 5 years before when he fell over backwards and landed on a tile floor, and treated with a Dr. Kovack and Orlando Orthopedic Clinic. (claimant deposition, at 20). He testified that he had about 3 weeks of physical therapy and then went back to work full duty. (claimant deposition, at 16-17). He testified as follows regarding problems following the chair incident:

Q. So between the chair incident [and] October 23 of '08, you've had no problems at all with your neck, back, or shoulder?

A. No.

Q. Had there been any other either work-related or

non-work related accidents?

A. No. (claimant deposition, at 21).

Medical and other records from Sentry Insurance introduced into evidence documented that claimant suffered 3 work-related injuries between 2004 and 2006. The 2004 injury involved claimant's right knee. On April 14, 2006, claimant injured his low back while working for Rite Hite. On May 10, 2006, claimant injured his neck and right shoulder working for Rite Hite, and treated at the South Seminole Hospital ER on that date. The 5/10/06 hospital record notes under past history "Rotar cuff tear 5 years ago". The 5/10/06 record also documents that claimant complained of neck and right shoulder pain, and that claimant rated his "pain severity" as a 7 out of 10.

On 11/23/06, claimant presented at the South Seminole Hospital ER complaining of right shoulder pain after awaking at 3:00 AM. The "ED Focused Assessment" part of the 11/23/06 hospital record documents that claimant's pain level was 10 out of 10. Claimant was discharged on 11/23/06, and instructed to see his regular doctor or to see an orthopedic physician in 1-2 days.

On 11/26/06 claimant returned to the South Seminole ER complaining of severe right shoulder pain. The 11/26/06 hospital record documents that claimant was injured last year and

diagnosed with a rotator cuff injury. Claimant again documented his pain as a 10 out of 10 on 11/26/06. His discharge instructions told him to follow up with an orthopedic physician, and he was prescribed some new medications.

At the final hearing, claimant testified that he did not remember the injuries that occurred in April and May of 2006, and he didn't remember going to the hospital on May 10, 2006. He also testified that he didn't remember his visits to the hospital in November of 2006, and doesn't remember experiencing any shoulder pain at that time.

Claimant has seen several physicians for his compensable injury in this case. He saw Dr. Stephan Goll for his back and neck complaints beginning on 12/3/08. According to Dr. Goll, claimant denied any prior injuries to his back or neck. (Dr. Goll deposition, at 6). Claimant saw Dr. Brian Barnard and Dr. Rory Evans for his right shoulder. According to Dr. Barnard, claimant gave a history of a prior "muscular strain" to his right shoulder 10 years before, and that he said there had been no problems between that incident and the 10/23/08 injury. (Dr. Barnard deposition, at 8). According to Dr. Evans initial office visit note of 9/21/09, claimant reported a prior injury to his shoulder in approximately 2000, with an aggravation in 2005 when he fell off his chair at home. Following treatment for the 2005 injury, Dr. Evans noted that "He apparently has not sought any help with

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the right shoulder until this recent injury.”

## **II. E/C's "FRAUD" DEFENSE**

The E/C argues that claimant knowingly and intentionally misrepresented his prior medical history in his deposition, to his treating physicians, and at the final hearing. Based on the evidence presented, I find that the E/C has proven, by a preponderance of the evidence, that claimant knowingly made false statements for the purpose of securing workers' compensation benefits.

It is clear, based on the medical records introduced into evidence, that several of claimant's responses in his deposition regarding prior right shoulder problems were false. Specifically, claimant's testimony that he had no problems with his neck, back, or shoulder between his fall from a chair in 2005 and the 10/23/08 injury is clearly contradicted by the South Seminole Hospital records from 5/10/06, 11/23/06, and 11/26/06. In addition, the histories claimant provided to Dr. Barnard and Dr. Evans that he had no shoulder problems after the chair incident in 2005 is similarly contradicted by the hospital records from 11/23/06, and 11/26/06.

For benefits to be barred pursuant to section 440.09(4), however, the claimant's misrepresentations must be knowing and

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for the purpose of obtaining benefits. At the final hearing, claimant testified that he simply does not remember his injuries at Rite Hite, and does not remember his 3 visits to the South Seminole ER in May and November of 2006. He also testified that he has experienced some memory problems since 10/23/08.

While it is certainly possible that claimant's trial testimony on this issue is true, in considering all the evidence, including my assessment of claimant's demeanor, I find it is more likely that claimant knowingly misrepresented his relatively recent right shoulder problems in order to obtain benefits. It is extremely unlikely, in my view, that claimant would not remember shoulder pain so severe that he went twice to the ER in a period of 3 days, and that he rated as a 10 out of 10, only 2 years and 2 months earlier. Claimant was able to remember more remote and apparently less severe problems, and no medical evidence was presented supporting such an unusual manifestation of memory problems. In addition, the medical histories provided by claimant to Dr. Barnard and Dr. Evans appear intended to minimize claimant's prior right shoulder problems, and specifically omit any reference to the recent problems in 2006. Considering all the evidence presented, I find the E/C has established, by a preponderance of the evidence, their defense pursuant to section 440.09(4), Florida Statutes (2008).

Consequently, claimant is barred from receiving benefits pursuant

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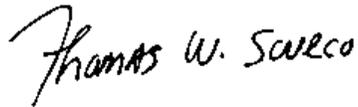
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to the statute. As such, it is not necessary for me to reach the other claims, defenses, and evidentiary issues raised by the parties.

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

1. Claimant is barred from all compensation and benefits for violating section 440.09(4), Fla. Stat. (2008).
2. All pending petitions for benefits are DENIED and DISMISSED WITH PREJUDICE.
3. The E/SA is entitled to costs as the prevailing party pursuant to section 440.34(3), Fla. Stat. (2007).

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida this 9th day of March, 2010.



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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.

*Marla Miller*

Digitally signed by Marla  
Miller  
Date: 2010.03.09  
15:21:34 -05'00'

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Marla Miller  
Assistant to Judge Sculco

Served by U.S. Mailed to:

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