

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

Livan Vidal,  
Employee/Claimant,

OJCC Case No. 14-005306DBB

vs.

Accident date: 8/24/2013

NIC EX/Protective Insurance Company,  
Employer/Carrier/Servicing Agent.

Judge: Diane B. Beck

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**FINAL COMPENSATION ORDER**

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This cause was heard before the undersigned Judge of Compensation Claims (JCC) at Sarasota, Manatee County, Florida on February 19, 2015 upon the petition for benefits filed on May 30, 2014. Mediation occurred on September 23, 2014, and the parties' Uniform Statewide Pretrial Stipulation was filed on October 14, 2014. Jurisdiction was reserved to address petitions for benefits filed February 12, 2015 and February 16, 2015 that have not been mediated. Ivan D. Voronec, Esquire was present on behalf of the claimant. Scott B. Miller, Esquire was present on behalf of the employer/carrier (E/C).

**OVERVIEW**

Claimant Livan Vidal, 48 years old, suffered a compensable hernia/right groin injury on August 24, 2013 while employed with NIC EX. He seeks enforcement of a mediation agreement, neurological evaluation, costs, and attorney fees. E/C denies the claims based on medical necessity and causal relationship, and contends all claims are barred for violation of section 440.105(4)(b), Fla. Stat. (2013)(the misrepresentation/fraud defense). For the reasons set forth below, I find in favor of E/C.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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1 A more detailed list of the parties' pretrial stipulations, claims and defenses, and my evidence log can be found at appendices 1, 2, and 3 at the end of this order.

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I have considered the candor and demeanor of the witness who testified before me and I have resolved all conflict in the testimony and evidence. Upon review of the evidence and applicable law, I make the following findings of fact and conclusions of law:

1. I have jurisdiction over the subject matter and parties, and venue is proper in Sarasota, Florida.

2. Any and all issues raised by way of the petition or petitions for benefits which are the subject matter of the final hearing, but which issues were not tried at the hearing are presumed resolved, or in the alternative, deemed abandoned by the claimant and therefore are denied. See, *Betancourt v. Sears Roebuck & Co.*, 693 So.2d 253 (Fla. 1<sup>st</sup> DCA 1997).

3. Claimant is originally from Cuba, where he attended college to become a telecommunications engineer. He came to the United States in 2001 and worked at Wellcraft (a boat building company), owned his own dump truck for about two years, worked for Verizon and Comcast as a fiber technician installer, and briefly at Wal-Mart as an order filler. Claimant can read and write in both English and Spanish, and understands 70-80 percent of English spoken to him.

4. Claimant began employment with NIC EX, employer herein, in 2011. His job involved shipping packages through Fed Ex which requires heavy lifting. On the date of accident of August 24, 2013 claimant was rearranging heavy packages inside the van and when he was picking one up felt a very sharp pain in the right side of his groin. He reported the injury the same day and was provided authorized medical care. Claimant saw Dr. Domingo Galliano, who diagnosed a right inguinal hernia which was surgically repaired on September 24, 2013.

5. Claimant's pain did not resolve after surgery and he was referred to pain management. He requested a one-time change and general surgeon Dr. Joseph Butler was authorized. Dr. Butler saw claimant on April 3, 2014 and did not find a hernia on examination. He thought claimant had a possible irritated nerve root from the lumbar spine from repetitive motion injury from his job, possible arthritis of

the right hip, or inflammation of the ilioinguinal nerve or genitofemoral nerve in the right groin. He recommended a neurology consult, special x-ray of the pelvis, and orthopedic evaluation of the right hip.

6. Claimant underwent the pelvic MRI on October 1, 2012 which was read by the radiologist as a negative pelvic MR study. Claimant did not give Dr. Butler a history of any similar pain before the August 24, 2013 accident, or of treating with any other doctors for similar pain before that date.

7. As a result of Dr. Butler's recommendations, claimant filed a petition for benefits and a mediation conference was held on September 23, 2014. The parties agreed at the conference that E/C would authorize the MRI of the pelvis and a neurological evaluation with Dr. David Kaler. Unresolved issues were authorization of an orthopedist for evaluation of the right hip, entitlement to and amount of fees and costs.

8. Claimant saw Dr. David Kaler, who is an orthopedic surgeon and not a neurologist, on October 21, 2014. He understood that claimant's hip and low back complaint began with the August 24, 2013 accident. Dr. Kaler testified that claimant's pelvic MRI showed arthritis in his right hip. Dr. Kaler's impression was that claimant had arthritis in his right hip. Dr. Kaler testified the claimant's preexisting arthritis in his hip was exacerbated by the work accident, and that the major contributing cause (MCC) of the right hip condition was the arthritis. He indicated the MCC of the need for treatment to the right hip is the work accident, based on history.

9. Dr. Kaler recommended that claimant have his hip injected with local anesthesia for diagnosis, and if his pain goes away, he needs a total hip replacement. He opined the work accident would be the MCC for that surgery. He agreed the objective findings on MRI predated the work accident. Dr. Kaler testified that groin pain is characteristically where the hip joint refers pain, and typical complaints are groin pain, inner thigh pain with weight bearing, movements in bed, and just motion of the hip joint. Dr. Kaler considered claimant's degenerative joint disease of his right hip to be the pain generator of his

complaints. On the patient information form for Dr. Kaler, claimant checked “no” to the question whether he had a history of back pain.

10. Dr. Luis Casanova is claimant personal primary care physician and saw him for the first time on February 7, 2011 for an annual well exam. Claimant was next seen on August 29, 2011 with a complaint of back pain. Claimant provided a history of working and going up and down a ladder and missed a step, with low back pain since then.

11. Claimant returned on May 7, 2012 complaining of low back pain radiating to the right hip. Dr. Casanova diagnosed lumbago and sacroiliitis. Claimant returned January 14, 2013 for a physical, with his only complaint being more tired than usual. Claimant returned on August 12, 2013 having low back pain again and some intermittent loose stools and abdominal discomfort with bloating. Dr. Casanova ordered x-rays of the lumbosacral spine and put claimant on anti-inflammatory drugs.

12. Claimant returned to Dr. Casanova on August 16, 2013 with a lot of back pain. He was having difficulty walking and was asking for some days off of work due to the back pain. Dr. Casanova ordered an MRI of the spine and added some stronger pain medication, Tramadol. Claimant’s x-rays showed a little spurring in the level of L3 and L5 and some narrowing of the disc space between L4 and L5.

13. On claimant’s first visit after his work accident-September 5, 2013-he was complaining of pain in the right groin radiating into the upper thigh, and he felt a slight bulge. Claimant incurred some straining at work on the Saturday prior and his employer recommended he see his doctor. He reported his back pain had resolved and he no longer needed the pain medication for that. After his hernia surgery claimant continued to complain of pain in the groin to Dr. Casanova.

14. Claimant provided a recorded statement to carrier’s prior adjuster on August 29, 2013. He provided a history of a prior work comp claim while working at Wal-Mart with injury to his arm and shoulder. Claimant denied a history of the same or similar pain/condition. He gave Dr. Casanova as his

personal family physician.

15. Gwendolyn Walton-Nickson is carrier's current adjuster on claimant's case. She received Dr. Butler's April 3, 2014 report on May 30, 2014 and testified that she did not respond directly to his request for the orthopedic and neurological referrals. She said she did not respond to the petition seeking the referrals because she had already notified claimant's counsel that she was in the process of setting an appointment with Dr. Kaler. She selected Dr. Kaler on the recommendation of Dr. Butler and assumed she was sending claimant to both an orthopedic and neurologist because Dr. Butler recommended Dr. Kaler. At the mediation she thought Dr. Kaler was a neurologist. She testified that she had opportunity to speak with claimant over the course of handling the file, and he never mentioned that he had previously treated with a physician for similar complaints.

16. During claimant's deposition, he denied prior off the job accidents or injuries; he denied treating with Dr. Casanova for any other reason than an annual physical; he denied having any symptoms or complaints when he saw Dr. Casanova prior to August 24, 2013; he denied that Dr. Casanova ever found anything wrong with him during his evaluations; he said Dr. Casanova only prescribed sleep medication for him; he denied any right hip or back pain prior to August 24, 2013; and he denied prior x-rays, MRIs, CT scans or recommendations for those tests that he didn't have done.

17. At final hearing claimant testified that after he gave the recorded statement to the adjuster on August 29, 2013 he was sent a form to sign for authorization to obtain Dr. Casanova's records. He signed and returned the form and believed E/C wanted his medical records and that was okay with him. Claimant said that he currently has no back or buttocks pain. He said he wants to see a neurologist because he continues to have pain. Claimant said he doesn't have the slightest idea why E/C is not sending him to a neurologist but said they reviewed medical records and are trying to tie something in the past that caused pain and trying to derail the problem.

18. Claimant recalled his deposition testimony and agreed that he testified that Dr. Casanova

was his primary care physician. He agreed that he answered “no” to whether he had prior low back or hip pain. Since his deposition he looked at Dr. Casanova’s records and saw that he did complain of low back and hip pain. According to claimant, he was so concentrated on his hernia and he didn’t pay much attention to his back. He asked for forgiveness and apologized, saying it was not his intent to keep information from E/C. He said he turned over all information and has nothing to hide.

19. Claimant agreed that his testimony at deposition had nothing to do with a translation issue and that he had a translator at the deposition. He also had a translator during his recorded interview with the adjuster. He testified that Dr. Casanova is Cuban and speaks Spanish. Claimant said he did not remember stepping off a ladder in 2011 but agrees he did complain of back pain to Dr. Casanova then. He also recalls seeing Dr. Casanova in 2012 and having low back pain and pain into his right hip. He recalls seeing Dr. Casanova on August 12, 2013 and having x-rays and getting pain medication. He said the medication was strong and he took a day off because he couldn’t drive. He said the pain stopped after he took the medication.

20. Claimant did not specifically recall returning to Dr. Casanova on August 16, 2013 but did recall a visit where he had a lot of back pain and reported difficulty walking. He said he did have an MRI for his back and Dr. Casanova did not see any problems with his back when he reviewed it. He agreed that he mentioned his Wal-Mart arm/shoulder injury to the adjuster in his recorded statement, but denied similar pain/conditions. He said it was because the pain he was having was strong like never before in his life. He did not tell the adjuster that he saw Dr. Casanova for low back pain or right hip pain, or that one week prior an MRI was recommended.

21. Claimant agreed that he answered “no” to prior back pain on Dr. Kaler’s form. He said Dr. Kaler told him he could have a right side hip problem but he told Dr. Kaler that he knows his body and knows where the pain is coming from, and it is coming from the area where he had surgery. He did not tell Dr. Kaler about seeing Dr. Casanova for right hip and back pain. He agreed that he did see Dr.

Casanova for back pain and for reasons other than his yearly evaluations, and that his deposition testimony was not correct. According to claimant, if he didn't mention all of his past history, it had nothing to do with his accident at work and is irrelevant. He agreed that it was his decision at deposition to deny prior treatment because he decided it was a different pain and not relevant.

22. In determining the E/C's misrepresentation/fraud defense a JCC must answer two questions. The first is whether claimant made or caused to be made false, fraudulent or misleading statements. The second is whether the statement was intended by claimant to be for the purpose of obtaining benefits. *See, Arreola v. Administrative Concepts*, 17 So.3d 792 (Fla. 1<sup>st</sup> DCA 2009). In a workers' compensation case, a claimant's responses to inquiries regarding his prior accidents, current injuries, or medical history are made in support of his claim for benefits. *See, Village Apartments v. Hernandez*, 856 So.2d 1140 (Fla. 1<sup>st</sup> DCA 2003). Honesty is not a luxury to be invoked at the convenience of a litigant. *Hernandez*, *supra* citation omitted.

23. In this case, I find that claimant made or caused to be made false, fraudulent, or misleading statements in his recorded statement to the adjuster, to Dr. Kaler, and at his deposition concerning his medical history. Claimant admitted that his statements were not true. He argues that he told everyone about Dr. Casanova being his primary physician and signed a release for his records; therefore E/C knew his treatment history. He argues that having the records prior to his deposition and not clearing it up with him then amounts to entrapment. Claimant also argues that he does not have back pain and is not seeking treatment for back pain.

24. Dr. Butler recommended evaluation and treatment for claimant based on possibilities that claimant may have a back or hip problem, and claimant was aware of these possible diagnoses. Therefore, claimant's past history of back and hip pain is relevant to the issues. Even if not relevant to the pending issues, claimant's history is relevant and material to a workers' compensation claim per *Hernandez*, *supra*. Further, per *Arreola*, *supra*, section 440.105 does not require that the misrepresentation be material

in actuality; rather the relevant inquiry is whether the claimant thought a misrepresentation made by him was material to his claim, and the misrepresentation was made with the intent to secure benefits. In this case claimant knew his statements were false when he made them. I find that claimant's false statements and misrepresentations were made with the intent to obtain benefits. I reject claimant's testimony that he had no such intent; his demeanor while testifying did not support the trustworthiness of his statements. I find that the case claimant cites in support of his position, *Steel Dynamics Inc.-New Millennium v. Markham*, 46 So.3d 641 (Fla. 1<sup>st</sup> DCA 2010) is inapposite to the facts herein and does not apply.

25. Based upon the foregoing, claimant has violated section 440.105(4)(b), Fla. Stat. and his claims should be barred pursuant to section 440.09(4)(a), Fla. Stat. (2013). 2

WHEREFORE, based upon the forgoing, it is **ORDERED AND ADJUDGED:**

A. Claimant's claims are denied and dismissed with prejudice.

DONE AND ORDERED this 23rd day of February, 2015, in Sarasota, Manatee County, Florida.



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2 Although this renders discussion of the remaining claims and defenses moot, if I had rejected E/C's misrepresentation/fraud defense, I would have granted the neurological evaluation because it was agreed to at mediation, or alternatively because E/C waived medical necessity by failing to timely respond, and as the evaluation is recommended for diagnostic purposes proof of causation is not required.

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**Appendix 1: The Parties' Pretrial Stipulations**

Contained within the parties' written pretrial stipulations and/or orally on the record at the final hearing, the parties entered into the following stipulations which I accepted and adopted as findings of fact:

- a. The date of accident is August 24, 2013 and Sarasota, Florida is the proper venue.
- b. There was an employer/employee relationship on the date of accident, and employer had workers' compensation insurance coverage in effect.
- c. E/C accepted claimant's accident and hernia/right groin injuries as compensable.
- d. The claimant gave timely notice of the accident and the parties received timely notice of the final hearing.
- e. I have jurisdiction over the parties and subject matter of this claim.
- f. Claimant's average weekly wage is not at issue.
- g. Dr. Galliano and Dr. Butler have been authorized for claimant.

**Appendix 2: Claims and Defenses**

Claimant seeks: neurological evaluation; costs and attorney's fees; and enforcement of a mediation agreement for a neurological evaluation. Claimant also alleges that E/C waived the medical necessity of the neurological evaluation by untimely response to Dr. Butler's request.

The E/C defends on the basis that: neurological evaluation not medically necessary; neurological condition not causally related to compensable injuries; no costs or attorney's fees due; E/C complied with the mediation agreement; and claimant is not entitled to further benefits under the Florida Workers' Compensation Act pursuant to misrepresentation the Claimant made in sworn deposition testimony; specifically the claimant denied any prior history of pain and/or injury to the right groin, right hip, low back and spine, this is contrary to medical records of Dr. Casanova that predate the date of accident.

### **Appendix 3: Evidence and Witness Log**

Exhibit 1 (Judge): Uniform Statewide Pretrial Stipulation as amended by Orders entered December 23, 2014 and January 6, 2015 and at the beginning of the final hearing.

Exhibit 2 (Judge): Claimant's Motion to Enforce Mediation Agreement filed December 11, 2014.

Exhibit 3 (Judge): Order on Motion to Enforce the Mediation Agreement entered December 19, 2014.

Exhibit 4 (Judge): Claimant's Trial Summary for argument only.

Exhibit 5 (Judge): E/C's Trial Memorandum for argument only.

Exhibit 6 (E/C): Deposition of Livan Vidal taken on December 8, 2014.

Exhibit 7 (E/C): Deposition of Dr. David Kaler taken on October 21, 2014.

Exhibit 8 (Claimant): Deposition of Gwendolyn Walton-Nickson taken on December 21, 2014.

Exhibit 9 (E/C): Deposition of Dr. Luis Casanova taken on January 30, 2015 for factual purposes.

Exhibit 10 (Claimant): Deposition of Dr. Joseph Butler taken on February 11, 2015.

I took judicial notice of the appropriate pleadings in the OJCC computer file.

Livan Vidal appeared and testified at the hearing through an interpreter. Counsel for the parties presented oral argument and submitted written Trial Summary/Memorandum.