

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGES OF COMPENSATION CLAIMS
WEST PALM BEACH DISTRICT OFFICE

Jesus De La Pena,)	
)	
Employee/Claimant,)	
)	
vs.)	OJCC Case No. 07-035973SHP
)	
East Coast Metal Decks, Inc.,)	Accident date: 9/10/2007
)	
Employer,)	Judge: Shelley H. Punancy
)	
and)	
)	
Frank Winston Crum Services,)	
)	
Carrier/Servicing Agent.)	
_____)	

MERIT ORDER

AFTER DUE AND PROPER NOTICE, this cause came on to be heard on 9/17//10, in Palm Beach County, Florida. This order resolves the issues raised in the Petition for Benefits filed on 12/4/09 and 1/18/10.

A. Claims:

1. Permanent Total Disability/Permanent Total Supplemental benefits from 1/1/10 to present and continuing pursuant to section 440.15(1), Florida Statutes (2007), as Claimant is unable to work in a sedentary capacity on an uninterrupted basis.

2. Penalties and interest.

3. Payment for attendant care by Rosa Fuentes for one hour per day from 3/6/09 through 4/14/09 as per Dr. Chang to aid Claimant with activities of daily living post-lumbar spine fusion surgery pursuant to section 440.13(2)(b), Florida Statutes.

4. Costs and attorney's fees pursuant to section 440.34(3)(a)-(d), Florida Statutes.

B. Defenses:

1. Due to claimant's violation of section 440.105(4)(b), Claimant is not entitled to workers' compensation benefits pursuant to section 440.09(4)(a). Specifically, Claimant misrepresented his physical capabilities/limitations in furtherance of his workers' compensation claim. During his deposition testimony Claimant made statements regarding his physical capabilities that are inconsistent with surveillance evidence.

2. Claimant is not entitled to PTD/PTD Supplemental benefits. No medical/vocational evidence of PTD. Claimant's claim is premature as he has not reached MMI. Claimant is capable of engaging in at least sedentary employment within a 50 mile radius of his residence.

3. E/C's agreement to pay attendant care from 3/20/09 through 4/14/09 based on the prescription for same dated 3/20/09, was

rejected by the Claimant. The offer is rescinded in light of Claimant's violation of 440.105. The period 3/6/09 through 3/19/09 is retroactive to the prescription date of 3/20/09, and pursuant to section 440.13(2)(b), is not the responsibility of the E/C.

4. Penalties, interest, costs and attorney's fees are not due and owing.

C. Documentary Exhibits:

Court:

1. Pretrial Stipulation/Amendments/Order.
2. Order On Motion To Withdraw As Counsel-5/12/10.

Claimant:

1. Prescription-3/20/09-Dr. Chang; Medical Records-Dr. Rubenstein-10/22/09-6/29/10-E/C objection-Non-Compliance with section 440.29(4), hearsay, authenticity-Ruling-Sustained. Marked as Proffer #1.

Employer/Carrier:

1. Deposition-Jesus De La Pena-3/16/10.
2. Transcript of Proceedings Held on 7/19/10.
3. Response To Petition for Benefits dated 1/26/10.
4. Copies of Surveillance DVD-2/2/10; 2/10/10; 4/1/10; 4/6/10; 4/7/10; and 4/8/10; and Reports dated 2/16/10; 4/2/10; and

4/10/10.

D. Stipulations:

1. I have jurisdiction of the parties and subject matter of the claim.

2. Claimant appeared pro se at the 9/17/10 Final Hearing, his former counsel, Kenneth E. Ehrlich, Esquire, having withdrawn as attorney of record pursuant to an order entered on 5/12/10.

3. Proceedings were held before the undersigned on 7/19/10 at which Claimant appeared pro se, with the assistance of a Spanish language translator. Present was Rosa Fuentes, Claimant's significant other of ten years. Counsel for the E/C, Amy Ritchey, Esquire, appeared by telephone.

E. Testifying before me was the Claimant, Mr. De La Pena, with the aid of a Spanish language interpreter. Mr. Oberdier, regional manager for Litigation Solutions Investigative Services, and Mr. Gaston, private investigator for On-Site and Litigation Solutions, testified on behalf of the Employer/Carrier.

I have carefully considered and weighed all evidence presented. I observed the candor and demeanor of the witnesses who testified before me. I have resolved all conflicts in the evidence. I have considered the E/C's Memorandum of Law, statutory, and case law authority. I now make the following

findings of fact and conclusions of law:

1. The Claimant suffered a compensable lumbar injury by accident on 9/10/07. Indemnity and medical benefits were provided. Claimant underwent a lumbar laminectomy and fusion in early 2009. On 1/18/10, Claimant filed a claim for PTD benefits. Previously on 12/4/09, Claimant filed a claim for attendant care benefits. Following an update deposition of the Claimant on 3/16/10, the E/C took the position that based on a violation of §440.105(4)(b), Claimant forfeited the right to workers' compensation benefits pursuant to §440.09(4)(a).

2. It shall be unlawful for any person to knowingly make...any false, fraudulent, or misleading oral or written statement for the purpose of obtaining...any benefit or payment under this chapter. Fla. Stat. §440.105(4)(b)1. It is also unlawful for any person to present...any written or oral statement as part of, or in support of, a claim for payment or other benefit...knowing that such statement contains any false, incomplete, or misleading information concerning any fact or thing material to such claim. Fla. Stat. §440.105(4)(b)2.

3. An update deposition of the Claimant was taken on 3/16/10. Claimant testified with the aid of a Spanish language interpreter. Claimant was asked questions regarding his physical

capabilities and activities since his last deposition in 5/08. At the start of the deposition, Claimant was advised that all of the questions were for the purpose of providing information to the Carrier on handling his claim. Claimant was advised that any false or misleading information could have an effect on his entitlement to workers' compensation benefits or could even lead to charges of perjury. Lastly, Claimant was advised that if he did not understand the question, to stop the attorney and ask to have the question rephrased.

4. On the matter of whether he had any problems physically with driving, Claimant related that his back hurts at the area of the surgery, he sometimes has problems getting in and out of the vehicle and cannot go out quickly, the occurrence of the back pain varies daily, he has good/bad days, and he always has some discomfort in his back.

5. Claimant was asked about his ability to walk around in a store and shop. He testified that sometimes he can walk, sometimes he cannot and uses a cart. According to the Claimant, sometimes he gets very tired when he takes a step and feels something in his back. He testified that he has good/bad days, and on his best days he cannot walk around in a store for 45 minutes.

6. With respect to his ability to lift items, Claimant testified that when he feels better he sometimes loads grocery bags into the car. He denied being able to pick up a gallon of milk from the floor, stating that he has not tried to do so. He testified that on his best day, sometimes he can lift a gallon of milk from the grocery cart and put it in the car, sometimes not.

7. Claimant was asked if he had problems physically with dressing or bathing. He related that he has trouble cleaning his feet, and his wife puts his socks on for him. Bending at the waist, swelling sometimes on one side of the waist, is what gives him problems, according to the Claimant.

8. Claimant was asked if he had moved any furniture since 5/08, and responded "No". With respect to his work restrictions, Claimant testified that he did not remember, he thought it was 40lbs. He claimed he could not recall if he had lifted anything heavier than forty pounds. Claimant was vague as to the questions concerning the location of his pain, the type of pain, the activities that made his pain worse, and the period of time of walking, standing, and sitting he was able to do before experiencing pain. He testified that he can bend at the waist a little bit, that if he drops something he tries to pick it up, that he has not stayed bent over for any length of time, that he

has not tried to bend over for any sustained period of time, that he always walks slowly.

9. The surveillance obtained of the Claimant on 2/10/10 showed him to be fairly active. He drove a Jeep vehicle with an attached wooden trailer on which were unidentified tied down objects. Present in the vehicle with the Claimant was a female. Claimant drove to a service station where he was observed bending at the waist as he appeared to be putting air into the Jeep's tire. He then drove to a market where he entered and came out carrying a small bag. Claimant then drove to a store that he entered. After exiting the store, Claimant checked the items on the trailer by rocking it back and forth. Claimant then drove to an auto repair shop where he remained for a short period of time. Claimant then drove to a restaurant where he remained in the Jeep while the female passenger entered the restaurant. From the restaurant, Claimant and his passenger traveled to a mobile trailer home. Claimant exited the vehicle, walked up a set of stairs, and entered the home. On exiting the mobile trailer home, Claimant walked to the Jeep, bent at the waist and untied the rope on the attached trailer. He then walked back to the residence and exited with an extension cord and a power drill. Claimant pulled a dresser from the back of the trailer attached to the Jeep,

carried it to the porch of the trailer home, and used the drill to secure several boards from the dresser. When finished, Claimant placed the dresser on a dolly and moved it into the mobile trailer home.

On 4/1/10, Claimant was observed on surveillance driving a pick-up truck, putting gas into the vehicle, and standing on one leg on the left rear tire of the truck while, bending over into the bed of the truck where he appeared to be making room for an item. Claimant was later observed getting into and then jumping down from the bed of the truck.

On 4/7/10, on surveillance Claimant was observed climbing on top of the bed of a utility truck, lifting an add-on-bumper, and carrying it down to the ground. Claimant picked up a metal toolbox from inside the truck and placed it on the ground. Claimant removed what appeared to be a power grinder from the toolbox. He then began trying to fit the add-on-bumper to the front of the truck. Claimant was observed using the power grinder on the bumper, bending on one knee using a welding gun turning the truck's compressor, changing positions several times from standing to kneeling on his right knee, using an iron bar tool to straighten parts of the bumper, bending at the waist, and finally finishing welding the bumper to the truck. Afterwards, Claimant

drilled holes to fit locks on the back panel of the truck, alternating kneeling and standing. Claimant was also observed on his knees working on the back of the truck's undercarriage, bending at the waist and alternating putting his weight on his knees.

10. Claimant's explanation for the inconsistencies between his deposition testimony and the activity shown in the surveillance was that in preparing for his deposition, his attorney told him to deny things. He testified that he knew he had moved furniture, but was following his attorney's instructions as to what answer to give regarding a particular question. Claimant testified that it was not his intention to lie, that those were not his answers coming out of his mouth. Claimant acknowledged that he recognized himself as the person shown engaged in the activities described above.

11. I find that it is clear Claimant lied outright at deposition, and frequently gave evasive/qualified responses for the purpose of obtaining workers' compensation benefits. I find that Claimant did so knowingly, and at trial self-servingly attempted to place blame on his former attorney's alleged instructions. I find that Claimant's presentation at trial was that of an untrustworthy individual. Claimant's oral or written

statements concerning facts material to his claim that he knew were false, misleading or incomplete when he made them, may result in a denial of all benefits. Honesty is not a luxury to be invoked at the convenience of a litigant. Village Apartments v. Hernandez, 856 So.2d 1140(Fla. 1st DCA 2003). If a Claimant had reason to know his statements were false or misleading when he made them, or that he intended to make those statements to support his claim for benefits, then the JCC should apply §440.09(4), Fla. Stat. CDL v. Corea, 867 So.2d 639(Fla. 1st DCA 2004). All benefits (medical and indemnity) are forfeited, even if the Claimant commits fraud as to only indemnity benefits. Citrus Pest Control v. Brown, 913 So.2d 754(Fla. 1st DCA 2005).

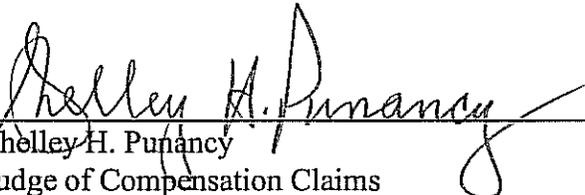
12. Based on the foregoing, I find that the E/C sustained its burden of proving Claimant violated §440.105 by a preponderance of the evidence. Village of North Palm Beach v. McKale, 911 So.2d 1282(Fla. 1st DCA 2005). Accordingly, pursuant to §440.09(4), Claimant has forfeited his right to all workers' compensation benefits. It is thereby,

ORDERED AND ADJUDGED:

1. The present claim for indemnity and medical benefits, as well as any potential future claim for workers' compensation benefits, is denied with prejudice.

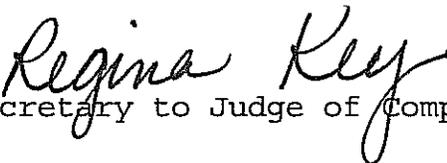
2. The claim for penalties, interest, costs and attorney's fees is denied.

DONE AND MAILED this 18th day of October, 2010, in West Palm Beach, Palm Beach County, Florida.


Shelley H. Punancy
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished VIA E-Mail to the following Counsel and via U.S. Mail to Claimant on October 18, 2010.


Secretary to Judge of Compensation Claims

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