STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGE OF COMPENSATION CLAIMS

Andres Correa Employee/Claimant,	)	
vs.	)	OJCC Case No. 09005862JTF
Finishing Systems of Florida and Amerisure Ins. Co. Employer/Carrier,	)	Judge: David Langham

FINAL ORDER DENYING CLAIMS

THIS CAUSE was heard before the undersigned at Orlando, Orange County, Florida on October 13, 2009 before the undersigned sitting as visiting Judge. The subject of Claimants claims as set forth in the pretrial compliance questionnaire are compensability of the claim, temporary total and temporary partial disability benefits from April 5, 2008 to the present and continuing, correction of the average weekly wage, authorization and payment of a treating physician, along with penalties, interest, attorney's fees and costs. The undersigned appeared for trial by Video Teleconference System (VTS). The petition for benefits was filed March 3, 2009. The final hearing occurred two hundred twenty-four (224) days after the petition was filed. David I. Rickey, Esq. was present in Orlando on behalf of the Claimant. William Rogner, Esq. was present in Orlando on behalf of the Employer/Carrier (hereafter "E/C").

Submitted into evidence at the Final Hearing were the following documents, each accepted and placed into evidence without any objection except where noted, as joint exhibits, Claimant's exhibits, or E/C exhibits, with each individual exhibit being further identified by a numerical designation as follows:

JUDGE'S EXHIBITS MARKED FOR THE RECORD:

1. The parties pretrial compliance questionnaire filed July 8, 2009 was marked as Judge's exhibit "1" for the record.
2. The Claimant's Hearing Information Sheet filed October 8, 2009 by Mr. Rickey was marked as Judge's exhibit "2" for the record.

3. The Employer/Carrier's Trial Memorandum of Law filed October 9, 2009 was marked as Judge's exhibit "3" for the record.

JOINT EXHIBITS:

1. None.

CLAIMANT'S EXHIBITS:

1. The deposition of Richard C. Smith taken October 6, 2009 was marked as Claimant's exhibit "1" and accepted as evidence.

EMPLOYER/CARRIER EXHIBITS:

1. A composite of records filed July 24, 2009 including telephone records, payroll records, payroll earnings, a 13 week wage statement, and denials/responses to Petitions was marked as Employer/Carrier exhibit "1" and accepted as evidence.
2. A motion for Judicial Notice filed October 13, 2009 was marked as Employer/Carrier exhibit "2" and accepted as evidence.
3. The Employer/Carrier's Notice of Filing of October 13, 2009 with attachment from the National Weather Service Forecast Office was marked as Employer/Carrier exhibit "3" and accepted as evidence.

In making the determinations set forth below, I have attempted to distill the salient facts together with the findings and conclusions necessary to resolve this claim. I have not attempted to painstakingly summarize the substance of the parties' arguments, nor the support given to my conclusions by the various documents submitted and accepted into evidence; nor have I attempted to state nonessential facts. Because I have not done so does not mean that I have failed to consider all of the evidence. In making my findings of fact and conclusions of law in this claim, I have carefully considered and weighed all evidence submitted to me. I have considered arguments of counsel for the respective parties, and analyzed statutory and decisional law of Florida.

Based upon the parties' stipulations and the evidence and testimony presented, I find:

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

2. Any and all issues raised by way of the Petitions for Benefits ("PFB"), but which issues were not dismissed or tried at the hearing, are presumed resolved, or in the alternative, deemed abandoned by the Claimant and, therefore, are Denied and Dismissed with prejudice. See, Betancourt v. Sears Roebuck & Co., 693 So.2d 680 (Fla. 1st DCA 1997); see also, McLymont v. A Temporary Solution, 738 So.2d 447 (Fla. 1st DCA 1999).

   The prevailing party is entitled to recover reasonable costs. F.A. Richard & Assocs. v. Fernandez, 975 So.2d 1224 (Fla. 1st DCA 2008); Palm Beach Cty Sch. Dist. v. Ferrer, 990 So.2d 13 (Fla. 1st DCA 2008); Morris v. Dollar Tree Store, 869 So.2d 704 (Fla. 1st DCA 2004).

   Claimant proceeded only upon authorization and payment of a treating physician and audiogram, and compensability of the claim, along with attorney's fees and costs. All other pending claims are therefore Denied and Dismissed with prejudice Betancourt, McLymont.

3. Claimant alleged that an accident occurred on April 5, 2008 in Pensacola, Florida. This date of accident was plead by petition, stipulated in the pretrial compliance questionnaire, and reiterated in the Claimant's hearing information sheet filed October 8, 2009. At the outset of trial on October 13, 2009, Claimant made an oral motion to amend the pleadings to conform to the evidence, amending the date of accident from April 5, 2008 to March 29, 2008. The Employer/Carrier objected to the Motion and persuasively described various prejudices that would result from allowing the amendment on the day of trial. The hearing was adjourned, and the undersigned examined various holdings of the appellate courts. I conclude that the appropriate standard to follow in a situation such as this is an evaluation of whether actual prejudice will accrue by granting the motion. I concluded that the Court's analyses in Binger v. King Pest Control, 401 So.2d 1310 (Fla. 1981); see also, Cedar Hammock Fire Dept. v. Bonami,

672 So.2d 892 (Fla. 1st DCA 1996), Burgess v. Buckhead Beef, 15 So.3rd 25 (Fla. 1st DCA 2009), and Med Logistics v. Marchines, 911 So.2d 823 (Fla. 1st DCA 2005) were all persuasive on the issue of analyzing the effect of prejudice. I concluded that each party to these proceedings has due process rights, and that denying the Motion might work as significant a detriment on Claimant's due process as would granting the Motion work on the E/C's. I therefore concluded that the most appropriate conclusion was to grant the oral Motion to Amend and simultaneously continue the final hearing for 90 days to ameliorate the prejudice of this decision upon the E/C. Having announced these two decisions on the record, the E/C elected to waive their objection to Claimant's oral motion and to proceed to trial on October 13, 2009 upon the amended accident date of March 29, 2008.

4. The Florida Evidence Code controls admissibility of evidence in workers' compensation proceedings.[1] The Division of Administrative Hearings ("DOAH") Rules of Procedure, Section 60Q6.101, et. seq. Florida Administrative Code governs the procedural aspects of this claim.[2] Those Rules are referred to herein as "DOAHRP."

5. The order has two purposes. One is to afford the parties the opportunity for appellate review as appropriate. For that purpose, this order need contain only "findings of ultimate material fact . . . necessary to support the mandate." Garcia v. Fence Masters, Inc., and AIG Claims Services, Inc., 34 Fla. L. Weekly D 1598 (Fla. 1st DCA 2009). Each trial of the Office of the Judges of Compensation Claims also provides the parties and the public with the reasoning that resulted in the outcome reflected. It is often the case that this purpose requires more discussion than what is required by the Court for their purposes. I therefore expound upon my perceptions of the evidence more fully than perhaps necessitated for appellate review. In respect to the Court's

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[1] See, e.g., Martin Marietta Corp. v. Roop, 566 So.2d 40 (Fla. 1st DCA 1990); Odom v. Wekiva Concrete Products, 443 So.2d 331 (Fla. 1st DCA 1983).

[2] On February 23, 2003, the OJCC enacted procedural rules, designated 60Q-6.101, et seq. The Florida Supreme Court recognized the enactment and efficacy of those rules in repealing the former Florida Rules of Workers' Compensation Procedure. See, In Re Florida Rules of Workers' Compensation Procedure 891 So.2d 474 (Fla. 2004).

admonition in Garcia, however, I have striven to clearly state the ultimate findings upon which my decisions ultimately rest. The absence from this order of recitation of specific testimony or documentary quotes should therefore be interpreted as a conscious effort to comply with the Court's admonition. Whether mentioned in this order specifically or not, the undersigned has carefully reviewed and considered all evidence admitted at trial. Certainly, any party has ample opportunity to address any perceived deficiency in the extent to which this order enunciates findings. See, Holland v. Cheney Brothers, Case no. 1D08-5917 (Fla. 1st DCA 2009)(rendered October 14, 2009)(not final until time expires to file motion for rehearing and disposition thereof).

6. There is no dispute that Claimant was employed by the Employer, and that he was part of a work crew performing spray painting in Pensacola over a period of approximately three weeks in March and April 2008. Claimant testified that he reported to work on March 29, 2008 with a coworker named Matt. Claimant alleged that Matt had been drinking the night before, as had other co-workers. Claimant explained that because of the drinking on Friday night prior to March 29, 2008, that some of his co-workers elected to remain at the hotel on Saturday, and that therefore only Claimant, Matt, and Melvin Butts ("Mr. Butts") were working that day. Mr. Charles denied that any of the coworkers declined to work because of the effects of drinking the night prior to March 29, 2008. Mr. Charles specifically denied that he himself was drunk the night before, and concluded that the weather was the only reason why the crew or a portion of the crew would not have worked that day. Mr. Butts testified that he did not know why some members of the crew did not work.

7. Mr. Charles testified that the weather can have different effects upon the product that was used on the "steel" and the product used on the "barrier wall." He explained that therefore weather might prevent the "steel shift" from working on the same day that the "barrier wall shift" nonetheless worked. Mr. Butts also testified that humidity was more of an issue for the "steel" product the

crew was using than for the barrier wall product. Mr. Charles testified that weather and humidity would be the only reason that he and Mr. Matt Everly did not work on March 29, 2008. Mr. Charles testified that he worked day shift in Pensacola and that Mr. Everly worked day shift with him. Mr. Charles testified that Claimant worked the night shift. Ms. Soper is the President of the Employer. She testified that the pay records of the Employer indicate that Matt Everly did not work March 29, 2008, and that only Claimant and Mr. Butts did. She testified that she is familiar with "Matt," as Matt Everly, and that the payroll records do not indicate he worked March 29, 2008. Mr. Dreyer conceded, however, that if an employee did work for ten minutes and then left, that it would be predictable that they would not have reported time and that they would not be paid.

8. Claimant testified that Mr. Butts was at the "yard" with the truck obtaining supplies for the job when Claimant and Matt used a "bucket" on March 29, 2008 to ascend to some steel work to paint, and worked about 10 minutes. Claimant testified that at that time, as he was painting, Matt manipulated the bucket. Mr. Charles was a supervisor for the Employer on the Pensacola work site. Mr. Charles testified that Claimant and Mr. Butts worked together on the night shift at that time and that Mr. Charles and Mr. Everly worked together on the day shift on the Pensacola job. The presence of Claimant and Mr. Everly together, on the day shift, as Claimant describes is therefore at least curious. Furthermore, Mr. Dreyer testified that Claimant's task during the Pensacola job in March and April 2008 was to paint barrier walls, and that this task did not even involve use of the bucket.

Claimant described Matt as having been drinking the night before, and having not "recovered." Claimant testified that when Matt moved the bucket on March 29, 2008, Claimant stumbled and fell striking his head and back on the guard-rail surrounding the bucket. Claimant testified that he called Chris that day to report the accident and that Chris referred Claimant to Marvin Charles ("Mr. Charles"). Chris Dreyer testified that he "runs the field operations" for the

Employer. Mr. Dreyer testified that he did not recall any call from Claimant on March 29, 2008. Mr. Dreyer testified that Claimant did not advise him of any accident at any time, and he denied that any of Claimant's coworkers ever advised him that Claimant alleged an injury. Mr. Charles also denied that Claimant reported a work injury to him. Mr. Butts also denied that Claimant ever said anything to him about a work accident or injury. Ms. Soper denied that Claimant reported any injury or accident to her. She testified that the first knowledge she had of Claimant alleging a work accident was when she received mail from Claimant's counsel. Claimant testified that pursuant to Mr. Dreyer's instructions, he then told Mr. Charles that he had been injured. Mr. Charles denies this.

9. Claimant testified that after his accident in the bucket, Matt soon departed to return to the hotel, and that Claimant continued to work that day. Claimant also testified that he worked the rest of the week. Claimant denied that he sought any medical care in Pensacola. Claimant testified that he did not request medical care upon returning to Orlando. Claimant testified that he worked the remainder of the Pensacola project and then returned to Orlando in his own vehicle. Mr. Charles testified that he thought Claimant rode back to Orlando with the rest of the crew. Claimant testified that Mr. Charles talked with Chris and that Mr. Charles then told Claimant to take two weeks off of work when the Pensacola job was concluded. Mr. Dreyer testified that he did not tell Mr. Charles that Claimant could take two weeks off and he did not authorize Mr. Charles to convey such a sentiment to Claimant. Mr. Charles likewise denied that he told Claimant to take two weeks off of work.

10. Claimant testified that when he returned to the Employer after a two week absence, he spoke with "Brenda" and that she told him that he was not to return to the Employer, that he no longer worked there, and that if he returned she would contact the police. Ms. Soper denies telling Claimant to stay off the property or that he was no longer employed. She testified that if Claimant had been willing to go with the crew to Miami, he would have been welcome. Mr.

Dreyer testified that Miami was an ongoing project for the Employer and that whenever the crew left for Miami (he thought it was shortly after the crew returned from Pensacola) that he anticipated Claimant would accompany them. Mr. Charles testified that the crew left for Miami shortly after they returned from Pensacola, but conceded they may have been in Orlando for a "few" days in between. He denied that it was two weeks they remained in Orlando prior to departing for Miami. Mr. Charles denied that he ever witnessed anyone telling Claimant that he was fired or "not needed" any longer.

11. Claimant testified that he was not offered work with the Employer in Miami, and that if he had been offered that work, he would have gone to Miami with the work crew. Claimant admitted that he had told the Employer he preferred to stay "local" in Orlando due to his family commitments, but denied that he refused to go to Miami. Mr. Dreyer testified that Claimant was offered work with the crew in Miami, but he declined it.

12. Claimant testified that he was thereafter out of work for approximately two and one-half (2.5) months, and then began working for Bruno Brothers as a painter and foreman. Claimant later admitted that he was out of work only approximately 30 days after leaving the Employer. Claimant testified that he remains employed with Bruno Brothers as of the time of trial and works forty (40) hours per week for them, and has done so consistently since they hired him.

13. Richard Smith is an orthopedic surgeon that performed an independent medical examination of the Claimant. He examined Claimant August 4, 2009, reviewed diagnostic testing results, and rendered a report of his findings and conclusions. Dr. Smith opined that the "pain pattern" described by Claimant was "unusual." Dr. Smith diagnosed lumbar and cervical strain. He related these diagnoses and the symptoms of which Claimant complained "based on the history that he gave me," "to his reported industrial injury of April the 5th, 2008." Dr. Smith opined that this conclusion was dependent upon Claimant's history being truthful.

14. The trier of fact has the obligation and authority to judge the credibility of witnesses. Ullman v. City of Tampa Parks Dep't, 625 So.2d 868, 873, 874 (Fla. 1st DCA 1993) (citing Orange City Water Co. v. Barkley, 432 So.2d 698 (Fla. 1st DCA 1983))("The [JCC], as the trier of fact, has the right to determine the credibility of witnesses, including the claimant)(citing Irving v. City of Daytona Beach, 472 So.2d 810 (Fla. 1st DCA 1985)). See also, Prather v. Process Systems, 867 So.2d 479 (Fla. 1st DCA 2004). I have carefully observed all of the witnesses who testified at trial. I conclude that Claimant has indeed presented an "evolving" description of his alleged accident and the events that followed. His version of so many facts is contradicted by other evidence. I am persuaded by the direct contradictions in the testimony. There are instances in which Claimant's testimony contradicts Claimant's testimony. Those instances are telling. More importantly, however, I found Ms. Soper, Mr. Dreyer, Mr. Butts, and particularly Mr. Charles credible and believable. Their testimony in various facets directly contradicted Claimant's version of the facts. Examples include the event itself, the individuals working that day, and the alleged reporting of the event. The record is replete with examples, which I elect not to detail serially here. I have cited numerous examples of these conflicts above as examples only. In the end, I accept and adopt the testimony of Ms. Soper, Mr. Dreyer, Mr. Butts, and Mr. Charles and reject the conflicting testimony of the Claimant, who I did not find credible.

Wherefore, it is ORDERED AND ADJUDGED:

1. Claimant's claims for compensability of the claim, temporary total and temporary partial disability benefits from April 5, 2008 to the present and continuing, correction of the average weekly wage, authorization and payment of a treating physician, and penalties, interest, attorney's fees and costs are DENIED. As to this claim, the Employer/Carrier shall go forth without day.
2. Jurisdiction is reserved to determine what reasonable costs should be awarded to the prevailing party.

DONE AND ORDERED in Chambers, Pensacola, Escambia County, Florida, this 16th day of October 2009.

JUDGE OF COMPENSATION CLAIMS

CERTIFICATE

This is to certify that the above **FINAL ORDER DENYING CLAIMS** was entered on the date stated, and that copies were emailed to the parties' counsel as set forth below.

JUDGE OF COMPENSATION CLAIMS

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