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

EMPLOYEE:
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OJCC CASE NUMBER: 11-002065WJC

DATE OF ACCIDENT: 08/31/2009

Judge: W. James Condry, II

FINAL COMPENSATION ORDER

After proper notice to all parties, a final hearing was held on this claim in Orlando, Orange County, Florida on the morning of Wednesday, December 7, 2011. Present at the final hearing were Attorneys Sandra L. McAuley for the claimant and William H. Rogner for the employer/carrier, hereinafter referred to as the E/C. Also in attendance at the final hearing was the claimant, Russell Edward Hanna, and employer representative Kirk Allen Robinson.

At trial testimony was received from Mr. Hanna and Mr. Robinson. The remainder of the evidence was received via deposition and other documents as detailed below. Final written arguments were submitted on December 9, 2011 at which time the trial record was formally closed.

This order addresses the Petition for Benefits (PFB) filed with DOAH on 01/26/2011.

The claim was unsuccessfully mediated on 05/12/2011

OVERVIEW

The claimant, a twenty-nine-year old crew leader and tractor/equipment operator for Robinson's Tractor Service sustained multiple injuries in a work-related motor vehicle accident occurring within the course and scope of his employment on August 31, 2009. The accident was accepted as compensable with certain indemnity and medical benefits furnished.

In dispute is a claim for an increase in the payment of indemnity benefits payable to Mr. Hanna. The increase in benefits is said according to the claimant to be warranted because the E/C is unjustifiably applying in his opinion a 25% reduction in benefits due to an alleged violation of *Section 440.09(5), Florida Statutes (2009).* Additionally the claimant questions the E/C's right to seek repayment or recoupment of benefits under *Section 440.15(12)* for the claimed overpayment in benefits made before the 25% reduction was initiated in December of 2010. For the reasons stated below I find that the claimant is not entitled to the increase in benefits requested.

The specific issues to be decided at the 12/07/11 final hearing were as follows:

1. Whether Mr. Hanna is entitled to the payment of temporary total disability (TTD) benefits from 12/07/10 and continuing as otherwise provided by law without a 25% reduction in benefits and recoupments under *Sections 440.09(5)* and *440.15(12), Florida Statutes*?
2. Whether Mr. Hanna is entitled to the payment of interest and penalties on the claimed underpayment of indemnity benefits?
3. Whether Mr. Hanna is entitled to the payment of his reasonable attorney fees and costs at the expense of the E/C?

The E/C defended the claim on the following grounds:

1. That all due and owing TTD benefits have been paid since 12/07/10 at the correct compensation rate.
2. That the E/C is entitled to a 25% reduction of TTD benefits because of the claimant's safety violation to wit: his failure to wear a seatbelt contrary to *Sections 316.614* and *440.09(5), Florida Statutes.*
3. That the reduction and recoupment were appropriately initiated on 12/17/10.

4. That no penalties, interest, costs or attorney fees are due.
5. That the E/C is entitled to prevailing party costs pursuant to *Section 440.34(3)*

STIPULATIONS OF THE PARTIES

1. That the Judge of Compensation Claims has jurisdiction over the parties and the subject matter.
2. That venue properly lies in Seminole County.
3. That there was an employer/employee relationship at the time of the 08/31/09 accident.
4. That there was worker's compensation insurance coverage in effect on the date of the accident.
5. That the employee gave timely notice of the accident.
6. That the accident was accepted as compensable.
7. That there was timely notice of the pretrial conference and the final hearing.
8. That the claimant's correct average weekly wage is $618.27 with a corresponding compensation rate of $412.20.
9. That by judicial notice and acknowledgement of the parties, the seatbelt law under *Section 316.614* applies to the vehicle to which Mr. Hanna was operating at the time of his accident.

JUDGE'S EXHIBITS

1. The pre-trial stipulation and pre-trial compliance questionnaire approved by order entered on 06/08/11.
2. A composite exhibit consisting of the claimant's trial memorandum dated 08/16/11, the E/C's memorandum of law dated 08/16/11 and E/C's supplemental memorandum of law dated 12/05/11. The composite items and any submitted case opinions were received and considered for argument purposes only.
3. The final written arguments of the parties.

JOINT EXHIBITS

NONE

CLAIMANT'S EXHIBITS

1. The 08/04/11 deposition transcript of employer, Kirk Allen Robinson.
2. The 08/10/11 deposition transcript of field nurse case manager, Traci Canela and attachments.

3. The 08/10/11 deposition transcript of field nurse case manager, Teresa Rupp.
4. The 07/15/11 deposition transcript of Dr. Vinod Malik and attachments.
5. The 06/23/11 deposition transcript of Dr. Mark Beckner and attachments.

E/C EXHIBITS

1. The 03/24/11 deposition transcript of claimant, Russell Edward Hanna.
2. The 08/04/11 deposition transcript of Robinson's Tractor employee, Donnie Grisham.
3. The 08/04/11 deposition transcript of Robinson's Tractor employee, Jeffrey Lee.
4. The 07/08/11 deposition transcript of claims adjuster, Scott Sprouse.
5. The 08/03/11 deposition transcript of Dr. Rory A. Evans.
6. The 11/02/11 deposition transcript of Dr. Marc R. Gerber and attachments.
7. A composite exhibit consisting of photographs of the vehicle in which Mr. Hanna was injured on 08/31/09.

PROFERRED EXHIBITS

NONE

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In making my findings of fact and conclusions of law in this claim, I have carefully considered and weighed all of the admitted evidence. I have observed and assessed the candor and demeanor of the witnesses that testified live before me, and I have resolved all of the conflicts in the live testimony, deposition testimony and documentary evidence.

I have carefully considered all of the evidence admitted even though I have not commented on or summated every piece thereof. Nevertheless, in my ruling I have set forth my ultimate findings of fact with mandate as required by *Section 440.25(4) (e).*

Pursuant to *Section 440.015,* I have not interpreted the facts in this case liberally in favor of either the rights of the injured worker or the rights of the employer. I have, as required, construed the law in accordance with the basic principles of statutory construction. Based on the foregoing, the evidence, and applicable law, I make the following determinations having weighed and elected to reject as unpersuasive the evidence and inferences inconsistent with these findings:

1. I find that I have jurisdiction over the parties and the subject matter and I accept as true those matters for which the parties have stipulated.
2. I find that on 08/31/09 Mr. Hanna was driving a Robinson's Tractor Service company truck in route to a client's worksite when one of the tires on the truck blew causing him to lose control of the vehicle. The truck flipped over multiple times and in the process Mr. Hanna was ejected through the rear window of the vehicle where he landed approximately 30 feet away. He was not wearing his seatbelt at the time of the accident.
3. Mr. Hanna was airlifted by helicopter to Orlando Regional Medical Center where he was subsequently discovered to have suffered among other things a fracture of his left arm, a dislocated right elbow, and a compression fracture at the T11 level of his thoracic spine. Mr. Hanna underwent three surgeries on his left arm and later had compensable lumbar surgery at the L5-S1 level performed by Dr. Mark Beckner on 10/21/11. There is no indication that Mr. Hanna has been released to return to work in any capacity for his back injury since said surgery. Neither is it evident through the medical opinion testimony produced at trial that Mr. Hanna has been formally placed at overall maximum medical improvement for his multiple accident related injuries.
4. *Section 440.15(2)(a)* provides in part that, "**in case of disability total in character but temporary in quality, 66 2/3 percent of the average weekly wages shall be paid to the employee during the continuance thereof, not to exceed 104 weeks except as provided in this subsection, s. 440.12(1) and s. 440.14(3).**" The section goes on further to provide that, "**Once the employee reaches the maximum number of weeks allowed, or the employee reaches the date of maximum medical improvement (MMI), whichever occurs earlier, temporary disability benefits shall cease and the injured worker's permanent impairment shall be determined.**"
5. According to the claims adjuster, Scott Sprouse, TTD benefits were initiated on this claim on 09/01/09 and were paid uninterruptedly from the date of the accident and continuing up until the time he was deposed (See 07/08/11 deposition transcript of Scott Sprouse at pg 11).
6. The first payment initiating the 25% reduction in bi-weekly indemnity benefits was issued on 12/17/10. Simultaneous with that reduction in payments, the E/C also initiated recoupment for overpayments it believed were made because of its entitlement to the reduction. According to the E/C, as of the time of trial on 12/07/11 Mr. Hanna continued to be paid TTD benefits but with

the 25% reduction in benefits and overpayment recoupments as earlier referenced.

7. Although there is a dispute as to whether more than 104 weeks of temporary indemnity benefits were paid by the time of trial, neither party appears to dispute that at least with respect to the treatment of Mr. Hanna's back injury he has not been released to return to modified or light-duty work and that he has not been placed by medical providers at overall maximum medical improvement. Therefore, based on the record evidence before me it appears that Mr. Hanna is indeed entitled to TTD benefits *provided* the total payments of temporary indemnity benefits in this case have not exceeded the 104 weeks as authorized by law.
8. The parties agreed on the record at trial that any question as to whether payments of temporary indemnity benefits have been exhausted can be handled administratively.
9. *Section 440.09(5)* provides that if an, "**injury is caused by the knowing refusal of the employee to use a safety appliance or observe a safety rule required by statute or lawfully adopted by the department, and brought prior to the accident to the employee's knowledge, or if injury is caused by the knowing refusal of the employee to use a safety appliance provided by the employer, the compensation as provided in this chapter shall be reduced 25 percent.**"
10. The claimant presents essentially three arguments challenging the reduction and recoupment utilized by the E/C.
    a. That he (the claimant) did not knowingly refuse to wear the seat belt.
    b. That on the basis of laches the E/C should be estopped from applying the *section 440.09(5)* reduction and *440.15(12)* repayment provisions; and
    c. That there is an inadequate showing that his (the claimant's) non-use of the seatbelt caused his injuries.

WHETHER THE CLAIMANT KNOWINGLY REFUSED TO USE A SAFETY DEVICE OR OBSERVE A SAFETY RULE?

11. In response to Mr. Hanna's position that he did not knowingly refuse to use the seatbelt, the E/C first contends that an assessment as to a knowing or intentional refusal to wear the safety belt or safety appliance is *irrelevant*. As to the E/C's position on this point, I disagree.
12. The E/C argued that the portion of *Section 440.09(5)* that it maintains Mr. Hanna violated was that portion of the statute that reads, "or observe a safety rule required by statute . .

."

13. The E/C submits that this language in the statute represents the second of three different ways in which a violation of *Section 440.09(5)* can occur. The first way being "the knowing refusal of the employee to use a safety appliance" and the third way being "the knowing refusal of the employee to use a safety appliance provided by the employer . . ."
14. The E/C submits that the portion of the statute it contends was violated in this case, the second way, does not require the element of "knowing refusal" but merely requires the violation of a safety rule, in this instance *Section 316.614*. By simply failing (regardless of intent) to use the safety/seatbelt required by *Section 316.614*, the E/C contends Mr. Hanna violated *Section 440.09(5)*.
15. Although an intriguing argument, I simply do not consider it a correct legal construction of the statutory language involved. Especially because of its punitive nature, I find that *Section 440.09(5)* must be strictly construed.
16. I find that the statute as properly read requires knowing refusal on the part of the employee to either use the safety appliance **or** observe the safety rule required by statute or adopted by the Department. I find that the statute also requires knowingly refusal of the employee when he or she fails to use a safety appliance provided by the employer. I find that in all three scenarios "knowing refusal" to either use the safety appliance or observe the safety rule is mandatory before violation of *Section 440.09(5)* can be said to have occurred.
17. I first find persuasive the claimant's statutory construction argument that when one considers where the commas are placed in the statute, the commas' emphasis for the related phrases would appear to dictate a reading of the statute that requires a knowing refusal to use a safety appliance or observe a safety rule.
18. Secondly, I find that the statute as currently written is a preferred and less awkward construction than otherwise requiring the statute to read as follows:

> *"If the injury is caused by the knowing refusal of the employee to use a safety appliance required by statute or lawfully adopted by the department, and brought prior to the accident to the employee's knowledge, or if the injury is caused by the knowing refusal of the employee to observe a safety rule required by statute or lawfully adopted by the department, and brought prior to the accident to the employee's knowledge, or if the injury is caused by the knowing refusal of the employee to use a safety appliance provided by the employer, the compensation as provided in this chapter shall be reduced 25 percent."*

19. Although in my opinion it would be unduly cumbersome for the statute to read as illustrated in the above paragraph, nevertheless, I do believe *Section 440.09(5)* if drafted in such a manner perhaps better expresses or communicates the legislative intent of the provision. I reach this conclusion in part because the statutory construction the E/C proposes would by its logical extension make a 25% reduction universally available whenever an employee knowingly refuses to use a safety appliance.
    a. Such a statutory construction would mean that a reduction could be available when there is a knowing non-use of any safety appliance regardless of whether it is one required by statute, adopted by department rule, or is one provided by the employer.
    b. Such a statutory construction in my opinion would constitute an overly expansive view or application of the reduction and would have the practical effect of rendering utterly meaningless the further statutory language in *Section 440.09(5)* pertaining to when there is a knowing refusal of the employee to use a safety appliance provided by the employer. See again the E/C's argument in paragraph thirteen (13) above.
20. I must assume that for statutory interpretation purposes the legislature placed in the statute no unnecessary or superfluous language. By the legislature specifically addressing circumstances where an employee knowingly refuses to use a safety appliance provided by the employer I must reasonably presume that the matter was not thought to have been adequately covered by the earlier statutory language in *Section 440.09(5)*. It would have been adequately addressed by merely prohibiting the knowing refusal to use a safety appliance if the E/C's statutory construction is the correct one. I don't find that the E/C's construction is. Clearly the earlier language in the statute concerning use of a safety appliance only pertained to an employee knowingly refusing to use an appliance required by statute or adopted by the department when brought to the employee's knowledge before his accident. The added language covers an additional situation or circumstance where an employee knowingly refuses to use a safety appliance provided by his employer.
21. I find that, notwithstanding the E/C's arguments to the contrary, *Section 440.09(5)* requires a **knowing refusal** on the part of the injured worker to not comply with a statutorily provided safety rule. In so ruling I disagree with the E/C's argument that the statute would be eviscerated if the Court adopts the claimant's argument requiring knowing refusal. I find that the factual

determination of whether there was or was not a knowing refusal is a question of fact left to the judge to decide based on the totality of the evidence, the credibility of the witnesses and whether the judge actually believes the employee simply forgot to observe the safety rule as opposed to having made the conscientious decision not to follow it.

22. The E/C in the alternative contends that, even if "knowing refusal" is required, the evidence produced at trial supports a finding of Mr. Hanna knowingly refusing to wear his seatbelt/safety device required by statute and supplied by his employer. With respect to the E/C's alternative argument I agree.

23. I find that before the accident, Mr. Hanna was aware that the seatbelt in the vehicle in which he was driving was operational. He had used it in the past and he testified at trial that it was working when he last drove the truck back to Robinson's Tractor Service premises on Friday, 08/28/09. That was at the end of the work week immediately before his accident three days later on Monday, August 31st. I accept his deposition testimony that he did not have any prior problems with the seatbelt and that it was fully functional (See 03/24/11 deposition transcript of Russell Hanna at pgs 24-25).

24. I find from his trial testimony that Mr. Hanna was aware of the seatbelt law before his accident and that he understood it applied to the Ford 350 truck that he was operating at the time his injuries were sustained. I further find that, notwithstanding Mr. Hanna's testimony, the employees (including Mr. Hanna) knew that they were supposed to wear their seatbelts accepting the testimony of Donnie Grisham, Jeffrey Lee and Kirk Robinson to the extent that it conflicts with that of Mr. Hanna. I accept Mr. Robinson's testimony that he would leave notes warning the employees about the use of their seat belts if they were discovered not to be using them. There was no testimony of the employer ever telling the employees that it was OK or acceptable for them not to wear their seat belts. In fact Mr. Hanna acknowledged that Mr. Robinson warned about non-seatbelt use at safety meetings. I do not find that the employer ever as a practice condoned or gave tacit approval to non-seat belt use.

25. Mr. Hanna contends that he used his seatbelt religiously and that after having arrived to work late on the day of his accident he was rushed by his employer to pick up a co-worker.

26. That over the weekend, Chris Root, a fellow Robinson's Tractor Service employee who performed service work on Mr. Hanna's truck that weekend had fastened the seatbelt behind the seat to disengage the vehicle's seat belt warning system. That as a result, when he (Mr. Hanna)

got into his truck on Monday, 08/31/09 the sound warning signal did not come on causing him to forget to put on his seatbelt. He later discovered after he and his crew had left a Handy Way convenience store in route to the jobsite that his seatbelt was not on. He testified that it was his full intent after making that discovery to put on his seatbelt but he couldn't do so because the belt was fastened behind his seat. He maintained that it was unsafe at that point to pull over and stop the vehicle to fasten his belt. He testified that the side of the road was muddy, that the vehicle could get stuck and that he did not want to be sitting on the side of the road wasting time (See position 50:53 through 51:16 of the recorded trial proceedings). According to Mr. Hanna he was going to wait until he got to a Walgreens to buckle up but the accident occurred before he could do so.

27. From the totality of the evidence presented, I do not find Mr. Hanna's explanation credible for his failure to wear his seatbelt at the time of his accident. It is well settled that intent can be established by circumstantial evidence. See ***Jones v. State, 192 So.2d 285 (Fla. 3rd DCA 1966)***.
    a. First if Mr. Hanna wore his seatbelt religiously as he claims, buckling up in my opinion would and should have been a matter of habit for him. Under such circumstances I find it would have been unlikely for him to have to depend on a warning signal to remind him to fasten his seatbelt. It has been my experience that most drivers who routinely wear their seatbelt belts fasten them either before or immediately following the start of their vehicle. I find his testimony in this regard somewhat dubious.
    b. Secondly if Mr. Hanna wore his seatbelt religiously as he so testified, then it would appear that Jeffrey "Newberry" Lee who rode with him regularly would have noticed it. Instead Mr. Lee testified that even though they were supposed to wear their seatbelts it was their practice in that vehicle not to do so (See 08/04/11 deposition transcript of Jeffrey Lee at pg 7). It is evident from Mr. Lee's testimony that he saw nothing unusual about Mr. Hanna not wearing his seatbelt on the day of the accident. This leads me to conclude that it was not necessarily an uncommon occurrence. Mr. Hanna's nonuse of his seatbelt could have more likely than not been a routine practice and by reasonable inference representative of an intentional act on his part not to wear the belt.
    c. Thirdly, in addition to the absence of the warning signal, Mr. Hanna testified at trial that on the day of the accident he was not sitting on the buckled seatbelt because he would have felt it (See position 50:11 through 51:23 of the recorded trial proceedings).

- In deposition Mr. Hanna also testified that Chris Root had a practice of putting the seatbelt behind the seat and fastening it so that the warning signal would not go off (See 03/24/11 deposition of Russell Hanna at pgs 21, 30 & 36). However the photographs taken of the vehicle on the day of the accident revealed that the seatbelt straps were on the front of the driver's seat and not in the rear or underneath it. This visual evidence is inconsistent with Mr. Hanna's testimony that he was not sitting on the seatbelt. The seatbelt strap was clearly not underneath the seat as he claimed.
- I find the photographic evidence produced in the case more reliable than Mr. Hanna's testimony as to the location of the belt.
- I accept as true Mr. Kirk Robinson's trial testimony that the photographs were taken at the accident scene and accurately depicted the condition of the truck immediately following the accident. One of the photographs revealed that the seatbelt was fastened with the belts in front and lying on, not behind, the seat on which Mr. Hanna sat.
- Adding further credence or weight to the photographs, I accept Mr. Robinson's testimony that at the time the photos were taken he didn't even know anything about a 25% reduction in benefits provided for under the workers' compensation statute for the failure to wear a seatbelt. He did not take the photographs at the insistence or direction of the workers' compensation carrier but rather he took them to protect himself in the event of a law suit after having become aware that Mr. Hanna was not wearing his seatbelt at the time of his accident. Therefore I have no reason to believe that Mr. Robinson tampered with the belt in any way to manufacture evidence for the carrier in the defense of this claim.
- I also accept Mr. Robinson's testimony that he was not a participant in the decision of the carrier to apply the reduction in Mr. Hanna's case.

d. Fourthly, even if I were to accept Mr. Hanna's testimony that he discovered he wasn't wearing his seatbelt only a short time before his accident I find that his contention that he

made a sincere effort to fasten his belt before the accident actually took place to be unbelievable and self-serving.

- I do not believe that if Mr. Hanna really had a sense of urgency and wanted to put his seatbelt on that he could not have pulled over and done so.
- I find that Mr. Hanna out of personal choice and convenience and not because of any exigent circumstances of an emergency or safety nature consciously elected or decided not to stop and fasten up. I have reached this conclusion having listened very carefully and thoroughly to his and Mr. Robinson's testimony.
- Notwithstanding Mr. Hanna's testimony I believe that there were safe places for Mr. Hanna to stop his vehicle and secure his seatbelt if he really wanted to. I further believe that he could have pulled off to the side of the road even if the road was wet and that he could have turned on his hazard lights to warn oncoming traffic. Roads typically have adequate shoulder areas even if unpaved to provide room for emergency stops. Mr. Hanna did not say that he did not have enough room to get off of the road. Rather he testified that he was afraid that because the road was wet his truck might get stuck.
- I also accept the testimony of Mr. Robinson that there were other areas where Mr. Hanna could have pulled off other than on the side of the road. Those areas with paved surfaces would have included multiple businesses and housing developments located along the route in which Mr. Hanna's vehicle was travelling.
- I do not find that Mr. Hanna's purported fear that his vehicle might get stuck on the side of the muddy road overrode his responsibility by statute to wear a seatbelt while operating a motor vehicle on the state roads of Florida, a law for which he acknowledged he was fully aware. I find that he made the knowing and intentional decision not to stop and to engage the use of his seatbelt.

28. In summary I find by a preponderance of the evidence that Mr. Hanna knowingly refused to wear

the safety belt/appliance required by *Section 316.614* and supplied by his employer in violation of *Section 440.09(5)*. I am persuaded that Mr. Hanna either

a. From the outset elected not to wear his seatbelt as was the practice of the other crew members in his vehicle; or,

b. After discovering his seatbelt was not on, he knowingly and intentionally elected not to pull over to the side of the road, to cease operating the motor vehicle and to properly secure his safety belt before proceeding on. I simply do not believe his testimony that he wanted to put his seatbelt on but he couldn't. I find that he made the conscious decision to proceed on without securing his seatbelt and that in so doing he knowingly refused to observe the safety rule and use the safety appliance provided by his employer.

WHETHER THE E/C SHOULD BE ESTOPPED FROM APPLYING THE REDUCTION ON EQUITY OR LACHES GROUNDS?

29. I reject as unpersuasive the laches or estoppel argument offered by the claimant. In so doing I first note that the claimant does not allege that the E/C should be estopped from taking the deduction because the employer knew of its employees' non-use of seatbelts and did nothing about it. It was not argued that the employer in some way acquiesced and led the employees to believe that use of the seatbelt was not required. As previously addressed in paragraph twenty-four (24) above I do not find such to be the case.

30. Instead the claimant argues that the timing of the E/C taking the reduction is the basis for them to be estopped and for laches to be applied. That the E/C knew within 24 hours after the motor vehicle accident occurred that Mr. Hanna was not wearing his seatbelt but nevertheless the E/C did not apply the 25% reduction until over a year later on 12/17/10. Claimant submits that the timing of the E/C's efforts at reduction was unreasonable. That the consequences from the delay in initiating the reduction were further exacerbated by the E/C's simultaneous repayment or recoupment efforts. The simultaneous application of both the reduction and repayment statutory provisions the claimant contends imposed an even greater financial burden on him because the bi-weekly workers' compensation payments he was previously receiving (even if improperly so) were effectively reduced by 45%.

31. It is first noted that neither *Section 440.09(5)* nor *Section 440.15(12)* provide specific time

frames over which the E/C must govern itself when asserting its remedies under the pertinent provisions. The statutory provisions appear to be self-executing ones comparable to the social security and unemployment compensation benefit offset provisions provided for under *Sections 440.15(9) & 440.15(10), Florida Statutes*. The key is whether the reductions or offsets are justifiably taken consistent with the statutory requirements and are properly calculated. In the instant case Mr. Hanna contends only that the reductions and offsets should not have been taken in the first place and not that they were calculated incorrectly per sc.

32. I find based on the authority of ***Jackson v. Computer Science Raytheon, 36 So.3d 754 (Fla. 1st DCA 2010)*** that estoppel on such a grounds is not available and should not be granted. In ***Jackson***, it was held that the presence or absence of equitable considerations reportedly alleged would have no effect on the parties' substantive legal rights. Consequently, provided the E/C can prove in this case its clear entitlement to the 25% reduction and that an overpayment of compensation benefits was made, the E/C would likewise be entitled to repayment of the overpaid benefits not to exceed 20% of the rightfully due bi-weekly benefits as permitted under *Section 440.15(12)*.

33. It is well settled under current law that an overpayment of benefits is no longer presumed to be a gratuity. As explained by the court in ***Jackson***, the statute in essence "`transforms any overpayment of indemnity benefits into an interest-free loan, to be repaid on terms prescribed by the Legislature.`" Provided an overpayment is truly established, the employee would have received monies in advance for which he was not entitled. In that sense there is no real prejudice inured to the employee because for all practical purposes he or she would not be out of pocket of anything but rather would have had the real benefit of using additional or extra money for which he or she was not entitled thereby in essence receiving what was tantamount to a non-interest bearing lone.

34. For the similar reasons the estoppel or laches argument as specifically claimed by Mr. Hanna is also rejected. Provided Mr. Hanna violated of *Section 440.09(5)* he received compensation benefits in an amount that he was not entitled to. He is not entitled to a windfall in benefits. The pertinent sections when read in conjunction with each other provide for a reduction in benefits and a provision for repayment of overpayments. These are entitlements to an E/C by law and there is no demonstrated provision for the allowance of an avoidance of the rights and obligations of the parities by a showing of estoppel, reliance or laches due to a delay in exercising these rights. There are no clear time limitations as to when the E/C can assert such reduction or

repayment rights. No specific case opinions were cited to clearly authorize my application of estoppel or laches principles to either statutory section under such circumstances. For the foregoing reasons the claimant's request that I deny the E/C's reduction and repayment of overpayments on laches grounds is denied.

WHETHER THERE IS AN INADEQUATE SHOWING THAT CLAIMANT'S NON-USE OF THE SEATBELT CAUSED HIS INJURIES?

35. *Section 440.09(5)* requires that the injury be caused by the knowing refusal of the injured worker to use the safety appliance or observe the safety rule.
36. In the case of ***Escambia County Board of County Commissioners v. Reeder, 648 So.2d 222 (Fla. 1st DCA 1994)***, a statutory provision using the same language was interpreted and held to require an E/C's showing of a causal relationship between the injuries sustained in the accident and the failure of the employee to comply with the statute. In that case there was also the failure of the injured worker to use a seatbelt.
37. Because the doctors in the ***Reeder*** case could not state that the failure to use the seatbelt had any bearing whatsoever on the worker's injuries and the trial judge rejected on valid grounds the employer's forensic engineering expert's opinion on the issue, the employer's 25% reduction in the injured worker's benefits was denied. The trial judge's decision to deny the reduction and reinstate the injured worker's full compensation benefits was affirmed on appeal.
38. For reasons previously stated I find that Mr. Hanna knowingly refused to use his seatbelt or safety appliance as provided by his employer and in violation of a safety rule required by statute.
39. I find the facts in this case significantly distinguishable from those in ***Reeder*** in that I conclude the E/C has indeed produced competent substantial evidence of a causal connection between the claimant's knowing refusal to wear his seatbelt at the time of his accident and his injuries. I accept Dr. Rory Evans and Dr. Marc Gerber's uncontradicted deposition testimony that Mr. Hanna's ejection from his vehicle was what caused his injuries (See 08/03/11 deposition transcript of Dr. Evans at pg 6 as well as the 11/02/11 deposition transcript of Dr. Gerber at pg 11). I further find that it was the non-seat belt use that facilitated that ejection from the vehicle. Dr. Gerber testified that he could not rule out that it was more likely than not that the ejection was caused by Mr. Hanna not wearing a seatbelt and that it is more remote for belted in

passengers to be ejected. I find that testimony logical and reasonable. It is furthermore consistent with the general or common understanding of most laypersons like me that seatbelts are designed for the specific purpose of restraining a passenger's contact with the dash board and windshield within the vehicle at the time of impact as well as preventing ejection from the vehicle. Given the totality of the evidence before me I find that the E/C has established a causal connection between Mr. Hanna's knowing refusal to wear his seatbelt at the time of his accident and his injuries.

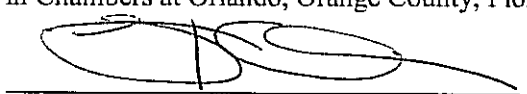
CONCLUSION

40. In summary I find that Mr. Hanna violated *Section 440.09(5)* by knowingly refusing to observe a safety rule required by statute and to use a safety appliance provided by his employer. That as such the employer is entitled to the 25% reduction as provided for by the statute. Accordingly the claimant's request for the disallowance of the reduction and the full reinstatement of benefits is denied as well as the claim to costs and attorney fees.

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

1. The request for the payment of temporary total disability benefits from 12/07/10 and continuing as otherwise provided by law without a 25% reduction in benefits and recoupment under *Sections 440.09(5)* and *440.15(12), Florida Statutes* is denied.
2. The request for the payment of the claimant's reasonable attorney fees and costs at the expense of the E/C is denied.
3. The E/C's request for the payment of its prevailing party costs pursuant to *Section 440.34(3)* is granted with jurisdiction reserved as to the amount.
4. All benefits ripe at the time of trial not otherwise reserved by stipulation of the parties or the undersigned in this order are hereby waived and dismissed with prejudice.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida.



W. James Condry, II
Judge of Compensation Claims
400 West Robinson Street, Suite 608-North
Orlando, Florida 32801-1701

I HEREBY CERTIFY that the Judge of Compensation Claims entered the foregoing Compensation Order. A true and accurate copy of the Order has been furnished by email to the parties' attorneys of record on this the 30th day of December 2011.

Laura Bookout
Assistant to Judge of Compensation Claims