STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGES OF COMPENSATION CLAIMS
SEBASTIAN/MELBOURNE DISTRICT OFFICE

Jared Humphreys,
Employee/Claimant,

vs.

Southeast Personnel Leasing Inc./
Packard Claims Administration,
Employer/Carrier/Servicing Agent.

OJCC Case No. 18-014448RLD

Accident date: 10/25/2017

Judge: Robert L. Dietz

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# FINAL COMPENSATION ORDER

**THIS CAUSE** was heard before the undersigned in Sebastian, Indian River County, Florida on February 19, 2019. The Petition for Benefits (PFB) was filed on June 14, 2018 (Docket Number (DN) 1). Mediation occurred on October 10, 2018. The parties' Uniform Statewide Pretrial Stipulation was filed on October 10, 2018 (DN 22). The Claimant filed a Trial Memorandum on February 15, 2019 (DN 50). The Employer/Carrier filed a Trial Memorandum on February 15, 2019 (DN 49). James R. Spears, Esq. was present on behalf of the Claimant. William H. Rogner, Esq. was present on behalf of the Employer/Carrier.

The claims are for: 1) temporary total disability (TTD)/temporary partial disability (TPD) from October 25, 2017, and continuing; 2) penalties, interest, costs and attorney's fees.

The defenses were 1) all TTD/TPD from October 25, 2017, to present has been paid; 2) any delay in any TPD payments was due to the Claimant's admitted failure to submit DWC-19s; 3) the sole issue for determination is whether the Employer/Carrier is entitled to a 25% reduction in indemnity benefits due to the Claimant's refusal to utilize a safety device under section 440.09(5), Fla. Stat.; 4) no penalties, interest, costs or attorney's fees are due.

The Claimant responded to the Employer/Carrier's affirmative defense regarding the 25% safety violation by indicating that the Claimant did not intentionally and knowingly refuse to use a safety device. The circumstances surrounding his fall justified him not being "tied off" at the time of the fall. The Employer/Carrier has withdrawn their avoidance to the Employer/Carrier's affirmative defense position.

The following pleadings were identified as relevant to this hearing:

**Judge's Exhibits:**

Exhibit #1: Order Denying Final Summary Order entered September 24, 2018 (DN 20)

Exhibit #2: Order Approving Uniform Pretrial Stipulation entered October 11, 2018 (DN 23)

Exhibit #3: Order Granting Motion to Compel Deposition entered December 14, 2018 (DN 37)

Exhibit #4: Employer/Carrier Trial Memorandum filed February 15, 2019 (DN 49)

Exhibit #5: Claimant's Trial Memorandum filed February 15, 2019 (DN 50)

The following documentary items were received into evidence:

**Joint Exhibits:**

Exhibit #1: Mediation Conference Report filed October 10, 2018 (DN 21)

Exhibit #2: Uniform Pretrial Stipulation and Pretrial Compliance Questionnaire filed October 10, 2018 (DN 22)

Exhibit #3: Deposition of Anthony Vansky (employee of Brevard Constructors) taken January 25, 2019, filed February 4, 2019 (DN 48)

Exhibit #4: Composite Medical Records:
Lawnwood Regional Medical Center (DN 25)
HealthSouth Sea Pines Hospital (DN 26)
Dr. Matthew Hurbanis (DN 27)
Dr. Bryan Reuss and Dr. Michael Riggenbach (DN 28)

**Claimant's Exhibits:**

Exhibit #1: Petition for Benefits filed June 14, 2018 (DN 1)

Exhibit #2: (moved to Joint Exhibit #3)

Exhibit #3: Roof Sketch introduced at the Hearing with numbered locations (DN 52)
(1) Place where Claimant working in lift
(2) Anthony Vansky working near peak of roof
(3) Tie-off location in that area
(4) Lean to
(5) Location where sheet metal flapping
(6) Location where removed lanyard
(7) Ditch by the lean to

**Employer/Carrier's Exhibits:**

Exhibit #1: Response to Petition for Benefits filed June 19, 2018 (DN 3)

Exhibit #2: Claimant's Deposition taken August 14, 2018, filed January 14, 2019 (DN 41)

Exhibit #3: Deposition of Michael D. Riggenbach, M.D. taken December 10, 2018, filed January 14, 2019 (DN 42)

Exhibit #4: Payment History from November 2, 2017, to January 16, 2019, filed January 16, 2019 (DN 45)

Testifying at the hearing was Jared Humphreys, the Claimant. Although I will not recite in explicit detail the witness's and deponents' testimony and may not refer to each piece of documentary evidence, I have attempted to resolve all of the conflicts in the testimony and evidence. Based on the foregoing and the applicable law, I make the following findings:

1) The undersigned has jurisdiction over the parties and the subject matter.

2) The stipulations agreed to by the parties in the Uniform Pretrial Stipulation filed on October 10, 2018 (DN 22) are accepted and adopted.

3) The parties stipulate that the average weekly wage is $964.73 with a corresponding compensation rate of $643.19.

**The Accident**

4) Jared Humphreys, the Claimant, currently 34 years old, worked for Brevard Constructors for seven years. On October 25, 2017, he was the foreman on a job installing a metal roof on a food processing plant that was being built. The building was 80 x 120 feet with a 50 x 20 foot lean-to off the back of the building (see Claimant's Exhibit 3, DN 52). Five workers were on the roof (including Mr. Humphreys) when the wind began to increase causing a 30 foot section of unattached lean-to roof to flap harder. As the noise from the flapping got louder, Mr. Humphreys moved toward it, fearful that it would fly off and endanger the workers. He was still hooked to the lift he was working from, but when the 50 foot retractable cable hooked to his back ran out, he unhooked his lanyard to get closer to the lean-to roof. There was no other place to hook-on between him and the lean-to roof. To create a new tie-down would have taken thirty minutes, about the same time as going to get a lift and moving it to a position where the lean-to roof could be reached. The job of securing the flapping roof would have required either using shears to cut off the metal section or screwing it down.

**Company Policy**

5) The Employer was a 100% tie-down company meaning that every employee on the roof had to be tied down 100% of the time. The company supplied the safety harnesses and the clips were six inches wide with 50 foot retractable cables attached to harnesses worn by the workers. The cables were hooked to the lifts (baskets) or to purlins running between the trusses.

6) Mr. Humphreys testified that the lift could not be easily moved from where it was located on the opposite side of the building and would have had to negotiate a ditch that was on the side of the lean-to where the sheet metal was flapping. The other option of creating another tie-off location on the purlins would also have taken 30 minutes. Not believing that he had time

to perform either task, he removed the harness attachment and continued down the roof toward the lean-to. Although he doesn't know the reason for the fall, he fell approximately 20 feet to the ground resulting in his injuries.

**Medical Treatment**

7) Mr. Humphreys was airlifted to Orlando. He was treated at Longwood Regional Meedical Center, SeaPines Rehab, and by Dr. Beiser, Dr. Hurbanis and Dr. Michael Riggenbach (DN 42, p.7). Dr. Riggenbach saw Mr. Humphreys September 7, 2018, and November 9, 2018, and diagnosed a complex elbow dislocation with radial head fracture and posterior wall acetabular fracture which were surgically repaired (DN 42, p.7). Dr. Riggenbach testified that the injuries were caused by Mr. Humphrey's fall from the roof (DN 42, p.17).

**Application of the Defense**

8) The Employer/Carrier raised an affirmative defense based on Section 440.09(5), Fla. Stat. (2017) which states:

> If injury is caused by the knowing refusal of the employee to use a safety rule required by statue 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.

9) It is the Employer/Carrier's burden to prove the knowing refusal. Mr. Humphreys admits that he disconnected his tie-down to get to the flapping metal roofing. His excuse was that he perceived this to be an emergency situation due to the increased wind and that the metal sheeting coming loose was endangering the workers present at the time. The alternative

procedures that would have allowed him to stay tied down would, he estimated, have taken 30 minutes to accomplish.

10) Does an emergency situation cancel the intent of the statute? No case law has been provided that gives the judge of compensation claims authority to excuse the knowing refusal to use a safety appliance. Even assuming that an emergency situation would justify Mr. Humphreys' actions, the metal roofing had been flapping for some time without any effort to resolve the problem. Anthony Vansky testified that he discussed the flapping metal panel that morning with the Claimant and that it would be cut when he finished working on the ridge cap (DN 48, p.5). Other statutory provisions provide the JCC with the authority to find that the affirmative defense is avoided when an act is in response to an emergency and designed to save life or property (see Section 440.092(3), Fla. Stat. (2017)). Section 440.09(5), Fla. Stat. (2017) does not.

11) The test is "not whether one is intending to specifically violate the statute, but whether he consciously intends to do the act which is violative of the statute." Gregory v. McKesson & Robbins, Inc., 54 So.2d 682, 686 (Fla. 1951). To require the employer to show that the claimant consciously intended to violate the law would render the defense meaningless. *Id.* The act that is violative of the statutory language is the claimant's intentional act of removing his safety harness's attachment to the lifts or the roof.

12) Inextricably intertwined with the requirement of a willful refusal is the necessity of determining that an employee had prior notice of the order to use a safety appliance or observe a safety rule. See McKenzie Tank Lines, Inc. v. McCauley, 418 So.2d 1177, 1181 (Fla. 1st DCA 1982). In his role as foreman, Mr. Humphreys had lead safety meetings for the Employer in which the 100% tie-down policy was discussed. There is no suggestion that he was not aware of

the safety rule and he confirmed as much in his testimony.

13) The fact that Mr. Humphreys did not intend for the consequence of his action is not determinative. The failure to use the safety device constitutes knowing refusal and caused Mr. Humphreys' injuries. For these reasons, the Employer/Carrier is entitled to take a 25% reduction in paid indemnity benefits due to the safety violation. While this ruling may be perceived unfairly punitive, that issue must be addressed with the Legislature.

**Penalties, Interest, Costs and Attorney's Fees**

14) The claim for penalties and interest is denied.

15) The claim for costs and attorney's fees is denied.

It is **ORDERED and ADJUDGED** that**:**

1. The Employer/Carrier's affirmative defense of a 25% reduction in indemnity benefits due to Claimant's knowing refusal to utilize a safety device pursuant to section 440.09(5), Fla. Stat. (2017) is granted.

2. The claim for penalties and interest is denied.

3. The claim for costs and attorney's fees is denied.

Done and electronically served on Counsel and the Carrier this 25th day of February, 2019, in Sebastian, Indian River County, Florida.

Robert L. Dietz
Judge of Compensation Claims
Sebastian/Melbourne District Office
1627 US-1, Suite 115
Sebastian, Florida 32958
(772) 581-6800

COPIES FURNISHED:

Packard Claims Administration
documents@packardclaims.com

James R. Spears, Esq.
james@jspearslaw.com,kira@jspearslaw.com

William H. Rogner, Esq.
wrogner@hrmcw.com,jrodriguez@hrmcw.com