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

EMPLOYEE:
Wayne Wessells
In care of Mooney Colvin, PL
1525 East Amelia Street
Orlando, FL 32803

EMPLOYER:
SouthEast Personnel Leasing, Inc.
2739 US Hwy 19 North, Suite 500
Holiday, FL 34691

CARRIER:
Packard Claims Administration
P.O. BOX 1549
TARPON SPRINGS, FL 34688

ATTORNEY FOR EMPLOYEE:
Thomas E. Mooney, Esquire
Mooney Colvin, P.L.
P.O. Box 2569
Orlando, FL 32802

ATTORNEY FOR EMPLOYER/CARRIER:
William H. Rogner, Esquire
Hurley, Rogner, Miller, Cox, Waranch and Westcott, P.A.
1560 Orange Avenue, Suite 500
Winter Park, FL 32789

OJCC CASE NO.: 13-010312WJC
D/A: 12/29/2011

COMPENSATION ORDER

THIS CAUSE came on for hearing on February 13, 2014 and March 25, 2014 before the undersigned in Orlando, Orange County, Florida. Wayne Wessells ("claimant") was represented by Thomas E. Mooney, Esquire. SouthEast Personnel Leasing, Inc. and Packard Claims Administration ("employer/carrier) were represented by William H. Rogner, Esquire. The claimant was the only live witness. All other witnesses testified by deposition.

The claimant and the employer/carrier stipulated to the following:

1. The venue of the claim is in Orange County, Florida.

2. The case was mediated on September 30, 2013.

3. The date of accident is December 29, 2011.

4. Workers' compensation insurance coverage was in effect on the date of accident.

5. The claimant provided timely notice of the accident and injury.

6. The parties received timely notice of the final hearing.

7. The Judge of Compensation Claims had jurisdiction over the subject matter and the parties.

8. The employer/carrier filed a denial of the claim on January 6, 2012.

9. The claimant filed the initial petition for benefits on May 6, 2013.

10. The claimant filed an additional petition for benefits on February 12, 2014, but had not yet been mediated at the time of the trial. Jurisdiction is reserved regarding that un-mediated petition.

The benefits claimed were:

1. Temporary partial disability beginning December 29, 2011 and continuing at the proper compensation rate.

2. Temporary total disability starting December 29, 2011 and continuing at the proper compensation rate.

3. Authorization of medical treatment with a primary care physician.

4. Compensability of the claim.

5. Penalties, interest, costs, and attorney's fees.

The defenses of the employer/carrier were as follows:

1. There was no employer/employee relationship on the date of the accident.

2. The claimant had a positive drug test and therefore no benefits were due pursuant to section 440.09, Florida Statutes.

3. The employer/carrier was entitled to a 25% reduction in benefits for failure to wear

a safety device.

4. The claim was not compensable.

5. There were no medical or indemnity benefits due or owing.

6. No penalties, interest, costs, or attorney's fees were due or owing.

The following exhibits were admitted into evidence:

Judge's Exhibits:

1. The pre-trial stipulation and all amendments.

2. The claimant's hearing information sheet and the employer/carrier's trial memorandum (argument only).

3. The closing arguments of the claimant and the employer/carrier (argument only).

Joint Exhibits:

1. The claimant's deposition taken September 19, 2013.

2. The deposition of Jimmy Nash taken January 14, 2013.

3. The deposition of Jimmy Nash taken September 13, 2013.

4. The deposition of Allison Nash taken January 14, 2014.

5. The deposition of Charlie Clay taken January 14, 2014.

6. The deposition of Charles Szopinski taken December 19, 2013.

7. The deposition of Robert Garrison taken January 14, 2014.

8. The deposition of Eva Henderson taken December 19, 2013.

9. The deposition of Gwen McKee taken January 13, 2014.

10. The deposition of Brian Brunelli taken December 23, 2013.

11. The deposition of Kristen Davis taken January 30, 2014.

12. The deposition of Dr. Seth Portnoy taken October 18, 2013.

13. A composite of deposition exhibits numbered 1 – 24 with the exception of the notice of injury which was not admitted for substantive purposes.

Claimant's Exhibits:

NONE

E/C Exhibits:

NONE

The bifurcation of the issues:

The parties agree to bifurcate the issues for purposes of this trial. The undersigned was called upon to determine two issues. The first was whether the claimant was an employee of SouthEast Personnel Leasing (SPLI) on the date of accident. The second was whether the employer/carrier was entitled to a presumption that the claimant's injury was occasioned by intoxication pursuant to section 440.09(7), Fla. Stat. In the event this Court found the injury compensable, jurisdiction would be reserved on the remaining benefits due. In the event this Court denied compensability, a final, appealable order would be immediately entered.

Findings of fact and conclusions of law:

I have carefully considered all the evidence submitted to me for consideration in making my findings of fact and conclusions of law. I have resolved the conflicts in the evidence and I have rejected all evidence and inferences that may be inconsistent with my findings of fact and conclusions of law. Although I have not painstakingly summarized all of the evidence offered, I have reviewed and considered all of the evidence in reaching my ultimate conclusions. As discussed below, I deny SPLI's drug test defense. For the following reasons, however, I deny the

compensability of the claimant's injury as I find that he was not an employee of SouthEast Personnel Leasing (SPLI) on the date of the accident:

I. There was no employer/employee relationship between the claimant and SPLI

1. The claimant was hired on the date of accident by Nash Construction, Inc. ("Nash") who is not a party to this litigation. Nash is SPLI's client company. The central question is whether the claimant was an employee of SPLI at the time of the injury.

2. I find Nash did not comply with terms and conditions of its client leasing agreement with SPLI and that an employer/employee relationship between the claimant and SPLI did not exist at the time of the accident. In reaching this conclusion I find that Nash violated the express terms of its leasing agreement with SPLI by putting Mr. Wessells' to work before submitting his fully completed employment application paperwork to SPLI. Nash further failed to obtain and submit a complete employment application including form I-9 before the claimant suffered his unfortunate injury. The claimant was therefore an employee of Nash and not SPLI.

3. The uncontroverted facts are that an application was not submitted until sent by fax after 4:30 pm (over five hours after the workplace accident). Based on the annotation made by payroll tech Mary Martell, a call was placed to Mr. Nash on December 30 because the complete application (including a complete form I-9) was not submitted. I find that the application was not submitted timely and Nash violated the expressed terms of the SPLI client agreement that prohibited the putting of any applicant to work before delivery and acceptance of the employment application. Based on the plain language of the client leasing agreement and the authority of *Crum*

Services v. Lopez, 975 So.2d 1184 (Fla. 1st DCA 2008) I find an employer/employee relationship between Mr. Wessells and SPLI was not established.

4. SPLI argues in part that because Nash was released from this case by the claimant, that the claimant does not have standing to seek reformation of a contract to which he was not a party. I agree. The equitable estoppel case on which the claimant most heavily relies, *Fred Stevens Tree Company v. Harrison,* 944 So.2d 1109 (Fla. 1st DCA 2006), involved the client company's claim against the leasing company. Nevertheless I have evaluated this estoppel claim even in the event SPLI's position on the standing issue is rejected on appellate review.

5. To establish equitable estoppel the claimant must prove by the greater weight of the evidence that SPLI made a representation as to a material fact that is contrary to its later asserted position and that the claimant relied upon that representation and detrimentally changed his position. In support of his estoppel claim the claimant relies on what he maintains are a substantial similarity in facts of this case and those in *Fred Stevens Tree Company v. Harrison*, supra. I first note that the *Harrison* court did not order the JCC to rule against the leasing company. Instead, the court merely remanded the matter for the JCC to consider whether AMS (the leasing company) could be said by its conduct to have made a representation of a material fact on which Fred Stevens Tree Co. relied to its detriment in support of the application of equitable estoppel.

6. I find that Mr. Wessells did not rely on any representation by SPLI to his detriment. He testified that no one from SPLI told him or promised him anything at all. In fact, at the time he began work (and at the time he fell) he did not know that SPLI existed. Moreover, the application which he signed while in the hospital provided that he understood that he was not yet an employee of SPLI and that if he suffered an injury while working for the client company, but before he was

accepted as a leased employ by SPLI, the client company (Nash) and not SPLI was responsible for providing workers' compensation coverage.

7. I reject the claimant's argument that estoppel applies because SPLI "represented" that he was an employee of SPLI in order to collect his urine sample for drug testing and I do so for three independent reasons. First, I expressly find that SPLI did not make *any* representation to Mr. Wessells that he was their employee. Second, Mr. Wessells did not change his position based on any purported representation because he had already claimed to be an employee of SPLI before efforts at drug testing were undertaken. If an employee as alleged he would have undergone the drug testing anyway, producing the same result. Third, for reasons addressed in greater detail below, I find that the section 440.09(7), Fla. Stat. presumption does not apply because the full requirements of 440.09(7) (d) and 59A-24 were not met. Therefore, Mr. Wessells' provision of the urine sample on the purported belief that he was an employee was not to his detriment.

8. I find that Mr. Wessells' accident occurred after representations made to him by Nash alone and not from representations made to him either expressly or impliedly by SPLI. Representations made by Nash may not serve as a basis to estop SPLI. Alternatively, if the claimant can indeed stand in the shoes of Nash in arguing estoppel as it relates to any alleged representations reportedly made by SPLI to Nash, I nevertheless am not persuaded by the greater weight of the evidence presented that SPLI is estopped from denying an employer/employee relationship with Mr. Wessells. I find SPLI did not represent to Nash that Mr. Wessells was its employee or that SPLI had approved Mr. Wessells' employment application. In fact, Mr. Nash was told when he first called in the accident that Mr. Wessells was not SPLI's employee. Nash was never told by SPLI at any time before or after Mr. Wessells' accident that Mr. Wessells was SPLI's employee.

9. The claimant argues that through SPLI's conduct or course of dealings an inferred material representation was made to Nash that SPLI accepted Mr. Wessells as its employee. Having considered the evidence I disagree.

10. Mr. Nash testified that it was his practice to call the new hire information to SPLI before submitting the employment applications as he did with his prior employee leasing company, Employee Leasing Solutions (ELS). Mr. Nash conceded he did not read the SPLI leasing agreement closely and claims that he simply followed the same practice as he had with ELS. However, I expressly accept as more believable the testimony of Gwen McKee over that of Mr. Nash as it relates to the reported "call in" activity that was not otherwise verified. Based on Ms. McKee's testimony I find: that she was the payroll technician for the Nash account; that Allison Nash usually provided the new hire paperwork; that complete paperwork was required every time; that Ms. McKee never authorized Nash to put someone to work before the paperwork was processed; that Mr. Wessells' paperwork was faxed, but was missing the I-9; that Jimmy Nash was advised of the non-acceptance of the application on December 30th; that Mr. Garrison's paperwork was complete and therefore he was accepted by SPLI; and that Mr. Wessells' paperwork was not complete so it was rejected for that reason.

11. I find no reason for SPLI not to expect Nash to follow the terms of its client leasing agreement. And I find that SPLI had no knowledge that Nash was violating its client leasing agreement before this claim arose. I expressly accept the testimony of Charles Szopinski and Gwen McKee and I reject any conflicting testimony from the Nash representatives. I find that SPLI did not permit new employees to be "called in," but instead required fully completed paperwork.

12. I find that Nash submitted completed applications for Mr. Garrison and all the other accepted employees, but not for Mr. Wessells. Therefore, I do not find it was unreasonable for SPLI to accept those applicants as employees. I find that SPLI did not know that any of those employees were working before their complete applications were submitted. In contrast, Mr. Wessells' incomplete application was submitted over 5 hours after a workplace accident clearly evidencing that he had worked before the submittal of his application in contradiction to the clear terms of the client leasing agreement. Consequently, Mr. Wessells was never accepted or paid as an SPLI employee.

13. I find that the $250 "W/C Admin Adj. - W. Wessells" invoiced to Nash relates to the claimed workers' compensation claim, that it was not a new hire set-up fee, and that it does not establish the existence of an employer/employee relationship.

14. Regarding the drug testing, I accept as more persuasive the argument of the employer/carrier as expressed in its written closing arguments that a work injury to a person alleged to be an employee was reported and that SPLI had the right to test without prejudicing its right to assert a lack of employer/employee relationship. To test after the employment question was adjudicated would be useless. Ms. Henderson, who ordered the drug testing, does not make determinations as to employment status but merely took action because a workers' compensation claim had been submitted to SPLI's workers' compensation department.

15. I expressly accept the testimony of Charles Szopinski and reject all conflicting testimony. Based on his testimony I find that the claimant's application was rejected because it was missing a valid I-9; that client companies are notified of non-acceptances and Jimmy Nash was therefore notified on December 30th; that Mr. Garrison's application was accepted because it was complete; that Mr. Garrison should not have been paid for hours prior to submission and if he

was, that was an error; that SPLI gets approximately 1,000 applications per day and it is not possible to check every one to assure that no hours are submitted for time worked before submission; that SPLI collected no new employee set up fee on the claimant; and that the claimant was not an SPLI employee for 2011 or 2012.

16. I expressly accept the testimony of Allison Nash that she did not submit the paperwork for Mr. Wessells or Mr. Garrison; that each and every person accepted by SPLI had fully completed paperwork, including a proper I-9; that Mr. Wessells' application was missing the completed I-9; that SPLI never accepted or paid any employees without the complete paperwork submission; and that she did not send SPLI the second, complete I-9.

17. In summary I find that Nash violated the client leasing agreement. Compliance with the client leasing agreement is not excused because Mr. Nash did not read it fully. I find that Mr. Nash was responsible for knowing the requirements under the contract that he executed on behalf of his company. I find that the terms of the client leasing agreement were clear and that SPLI had a reasonable expectation that they be observed. SPLI did not advise Nash that it was acceptable to ignore the terms of the agreement and it was not known to SPLI that Nash was non-compliant. I reject claimant's argument that SPLI should be estopped from denying that Mr. Wessells was its employee. I find that he was not an employee of SPLI at the time of the accident. If Mr. Wessells is entitled to workers' compensation benefits they are the responsibility of Nash. I cannot, however, order Nash to provide such benefits as it is not a party to this proceeding.

II. SPLI's defense under section 440.09(7), Fla. Stat. is rejected

18. The parties agree that SPLI had not implemented a drug-free workplace program. Nevertheless, SPLI relies on the defense under Section 440.09(3) that Mr. Wessells' injury was

primarily caused by drug intoxication or influence after having tested positive for marijuana. The claimant challenges the validity of the drug testing, asserting that the testing did not satisfy the requirements of Section 440.09(7)(d) and Chapter 59A-24 of the Fla. Administrative Code.

19. Pursuant to the cases of *Temporary Labor Service v. E.H.,* 765 So. 2d 757 (Fla. 1st DCA 2000) and *European Marble Co. v. Robinson,* 885 So. 2d 502 (Fla. 1st DCA 2004), among others, I agree with the claimant and find that SPLI failed to fully comply with the drug testing procedures and thus SPLI is prevented from availing itself of the legal presumption set out in Section 440.09(7)(b).

20. The claimant acknowledged that he used marijuana at least a week prior to the industrial injury. However, I find this is irrelevant as to the applicability of the presumption. The claimant denied that he had used marijuana on the date of the accident or that he was in any way under the influence of it or any other drug. There is no evidence to the contrary and I accept the claimant's testimony.

21. I find that whether SPLI attempted in good faith to comply with the drug testing policies and procedures or even whether there was substantial compliance is irrelevant to the analysis. Under the statute and case law, full compliance with Chapter 59A-24 must be met before the presumption in Section 440.09(7)(b) may be applied. *See Gustafson's Dairy, Inc. v. Phillips*, 656 So. 2d 1386 (Fla. 1st DCA 1995). The burden of proof rests with SPLI to establish such compliance in support of its presumption defense.

22. I find that SPLI failed to comply with numerous policies and procedures for drug testing as set out in 59A-24 of the Florida Administrative Code, including the following:

a. SPLI failed to prove that the claimant or the collector, Ms. Kristen Davis, initialed the identification label placed over the specimen bottle as required by

59A-24.005(3)(c)16, thereby certifying that it was the specimen collected from the donor. Claimant did not remember initialing the label and there is no copy of an initialed label admitted into evidence at the final hearing. The labels attached to the lab copy of the report attached to the deposition of Mr. Brunelli are blank.

b. The form signed by the claimant fails to contain a list of over-the-counter and prescription drugs which could alter or affect a test result pursuant to 59A-24.005(2) (g).

c. 59A-24.006(1)(a) requires the director of a drug testing laboratory to be a licensed physician in the state in which he or she practices medicine or that the director hold a doctoral degree from an accredited institution with Chemistry, Toxicology or Pharmacology as a major subject of study. Brian Brunelli, the director of the lab who performed the drug testing in this case did not meet these requirements.

d. Dr. Seth Portnoy, the Medical Review Officer (MRO), declared a confirmed positive test as verified before receiving copy four of the chain of custody form from the collection site in violation of 59A-24.008(2)(b) 10. The MRO testified that he did not receive copy four of the chain of custody. *See* Joint Exhibit #12 at pg.29. Furthermore, he declared a confirmed positive prior to following the notice requirements to the donor/claimant.

e. The MRO did not personally contact the donor within three (3) working days of receipt of the test results from the laboratory as required by 59A-24.008(7)(a). Moreover, the MRO did not specifically request that the employer direct the claimant to contact him (the MRO) as soon as possible as required by the administrative code procedures. The MRO did not know what the employer did

after he sent them the testing results and he could not testify as to what specific instructions his assistant may have given the employer.

f. Eva Henderson, who was responsible for coordinating drug testing at SPLI, did not recall taking action to contact the claimant once she received the test results that reported a positive result but did not identify the drug. She said it was not her policy to contact the claimant. The letter she mailed to the claimant did not advise him of what he tested positive for nor directed that he contact the MRO as soon as possible. I find these efforts, or lack of effort, to notify the claimant of his positive test results failed to comply with 59A-24.008(7).

23. For the forgoing reasons, among others, I agree with the claimant and find that the multiple deficiencies in the testing procedures and protocols undermine the reliability of the drug testing and its results. Thus, I find that SPLI is not entitled to the presumption set out in Section 440.09(7)(b).

24. In the absence of the presumption, SPLI must prove by the greater weight of the evidence that the claimant's injury was occasioned primarily by the use of drugs. I do not find that SPLI has met its burden. The claimant denied being impaired and using marijuana on the day of his accident. This testimony was not refuted. There was no testimony from Charlie Clay or anyone else suggesting that Mr. Wessells, while on the job on the day of his accident, appeared impaired or intoxicated.

25. I accept Mr. Wessells' testimony that he removed toe boards on the roof at his supervisor’s request, slipped on a piece of the plastic that he pulled off of the peel and stick application to the roof and then slid off of the roof, sustaining his injuries. Although Mr. Wessells admitted having used marijuana in the past, he denied using it at any time contemporaneously to

his accident and he denied impairment. There was no probative evidence that Mr. Wessells was impaired at the time of his accident or that he could have escaped injury had his reflexes not otherwise been impaired because of the influence of drugs. Absent the valid test result, I find the presumption cannot be applied and there is insufficient evidence establishing his marijuana use was the primary cause of his accident and injuries.

26. I find that the absence of the toe boards on the roof was the primary cause of Mr. Wessells' fall from the roof and not the influence of marijuana or any other drug that may have been present in his system.

27. Therefore, I find that Mr. Wessells did not violate Section 440.09(3) and reject SPLI's affirmative defense on this issue.

WHEREFORE, it is hereby ORDERED and ADJUDGED:

1. Temporary partial disability benefits beginning December 29, 2011 and continuing at the proper compensation rate are denied;
2. Temporary total disability benefits starting December 29, 2011 and continuing at the proper compensation rate are denied;
3. Authorization of medical treatment with a primary care physician is denied;
4. Compensability of the claim is denied; and
5. Penalties, interest, costs, and attorney's fees are denied.

DONE and ORDERED in Orlando, Florida.

Honorable W. James Condry, II
Judge of Compensation Claims

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that the foregoing Order was entered and a true and correct copy was furnished by electronic mail.

Assistant to Judge of Compensation Claims
Susan Berman.