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

Juan Paz,
Employee/Claimant,

vs.

MDA CONCRETE INC/NorGuard Insurance Company,
Employer/Carrier/Servicing Agent.
_____/

OJCC Case No. 19-031568TAH

Accident date: 11/27/2019

Judge: Thomas A. Hedler

FINAL COMPENSATION ORDER

This matter came before the undersigned Judge of Compensation Claims on December 16, 2020 to adjudicate the petitions for benefits filed on March 3, 2020, June 15, 2020, and July 15, 2020. The parties stipulated that mediation was not necessary to permit the adjudication[1] of petitions for benefits filed on October 9, 2020 and November 2, 2020. The petition for benefits filed on December 12, 2019 was voluntarily dismissed on March 3, 2020, and the petition for benefits filed on January 21, 2020 was against Bondi Construction LLC and Sunz Insurance. The claim against Sunz Insurance was voluntarily dismissed February 28, 2020, and the claim against Bondi Construction LLC was effectively dismissed by the bifurcated final order entered on September 30, 2020 when it was adjudicated that MDA Concrete, Inc. was the legal employer – and all claims against Bondi Construction LLC were voluntarily dismissed on November 3, 2020. The Claimant was represented by Michael Goldstein, Esq. The Employer/Carrier was represented by Carlos Hernandez, Esq.

[1] See *M.D. Transport v. Paschen*, 996 So.2d 902 (Fla. 1st DCA 2008).

The following stipulations have been reached between the parties:

1. Though the pretrial stipulation reflects the parties stipulate that the undersigned has jurisdiction of the parties and of the subject matter, the employer/carrier challenges jurisdiction upon an argument addressed herein.
2. Venue properly lies in Palm Beach County, Florida.
3. A mediation conference was held on October 8, 2020.
4. While the undersigned entered a bifurcated final compensation order on September 30, 2020 in which it was determined that the claimant was an employee of MDA Concrete, Inc., the E/C does not stipulate to an employer/employee relationship at the time of the accident/claim.
5. The employer was properly insured with workers' compensation coverage at the time of the accident/claim.
6. Notice of final hearing was timely given to the parties.
7. The claim is not governed by a managed care arrangement.
8. The parties stipulated that the AWW would be calculated at $1,000.00 if it is determined the claimant had lawful wages in conjunction with F.S. 440.02(28).

Claims

1. TTD/TPD from 11/27/19 to present and continuing.
2. Claimant seeks correction of AWW. Again, the parties have stipulated the amount would be $1,000 if the wages are compliant with F.S. 440.02(28).
3. Compensability.
4. Claimant requests authorization for evaluation and treatment with a primary care physician.
5. Acceptance of compensability and medical necessity of treatment received at St. Mary's Medical Center on 11/27/19 and payment for same in the amount of $93,101.00.

6. Accept compensability of medical treatment received at St. Mary's Hospital.
7. Accept compensability of medical treatment received at JFK Hospital.
8. Claimant requests authorization for orthopedist.
9. Authorization of MRI scan of the right shoulder.
10. Authorization of MRI scan of the pelvis and coccyx.
11. Claimant requests authorization for physical therapy.
12. Acceptance of compensability and medical necessity of treatment received at JFK Medical Center on 11/28/20 and payment for same in the amount of $6,797.62.
13. Acceptance of compensability and medical necessity of treatment received at JFK Medical Center on 11/28/20 and payment for same in the amount of $1,487.00.
14. Penalties, interest, attorney's fees and costs.

Defenses

1. The claimant did not properly serve the petitions for benefits on MDA Concrete as required by F.S. 440.192(1) which requires the claimant to serve copies of the petition for benefits by certified mail, or by electronic means approved by the chief judge, upon the employer and the employer's carrier.
2. The claimant has not established that the medical care provided at JFK Medical Center on November 28, 2020 was provided on an emergency basis.
3. JFK Medical Center did not provide timely notice of the care rendered to the claimant by the close of the third business day after it rendered such care as required by F.S. 440.13(3)(b).
4. St. Mary's Medical Center did not provide timely notice of the care rendered to the claimant within 24 hours after the initial admission/treatment as required by F.S. 440.13(3)(b).
5. The JCC does not have jurisdiction re: payment/amount of the medical bills.

6. The claimant is not entitled to attorney's fees and costs per F.S. 440.34 as the claimant did not properly serve the petitions on the employer, MDA Concrete as required per F.S. 440.192(1) and Rule 60Q-6.108(1)(b).
7. The claimant knowingly made false, misleading or incomplete statements in deposition and to his physicians for the purpose of obtaining workers compensation benefits. These statements *include, but are not limited to* the following statements:
    a) Claimant's denial, in deposition, of his involvement in the motor vehicle accident of May 6, 2018.
    b) Claimant's failure to disclose, in deposition, the full extent of his injuries as a result of the May 6, 2018 motor vehicle accident.
    c) Claimant's failure to disclose, in deposition, the extent of the chiropractic treatment received by the claimant as a result of the May 6, 2018 motor vehicle accident.
    d) Claimant's failure to disclose, to Dr. Aparicio, his involvement in the motor vehicle accident of May 6, 2018.
    e) Claimant's failure to disclose, to Dr. Aparicio, the injuries he sustained as a result of the May 6, 2018 motor vehicle accident.
    f) Claimant's failure to disclose, to Dr. Aparicio, that he received chiropractic treatment as a result of the May 6, 2018 motor vehicle accident.
    g) Claimant's failure to disclose, to Dr. Aparacio, the extent of the chiropractic treatment received as a result of the May 6, 2018 motor vehicle accident.

The employer/carrier filed a Motion to Amend Pretrial Stipulation on December 11, 2020, to add additional allegations of misrepresentation(s). Specifically, the employer/carrier asserted that after the parties completed the pretrial stipulation on October 22, 2020, the E/C learned that the claimant was

involved in a second and separate motor vehicle accident on March 9, 2018 in Hollywood, Florida. The employer/carrier asserts the claimant's alleged denials of prior motor vehicle accidents constitute a misrepresentation considering the 3/9/18 motor vehicle accident. The claimant filed his objection on December 14, 2020, arguing the amendment is untimely and that the E/C had 'enough time to conduct discovery.'

Rule 60Q-6.113(6) provides that "in no event shall an amendment or supplement be used to raise a new claim or defense that could or should have been raised when the initial pretrial stipulation was filed, unless permitted by the judge upon motion for good cause shown." The employer/carrier argued the 3/9/18 motor vehicle accident was discovered within the week of filing the motion to amend, despite having comprehensively investigated the claimant's history. I find the misrepresentation defense upon the alleged denial of the 3/9/18 motor vehicle accident was not known at the time of the pretrial stipulation, and further, that the employer/carrier timely asserted the defense upon discovery of the accident. The claimant was offered a continuance to accommodate any potential prejudice incurred, and the claimant rejected same. Accordingly, the employer/carrier's motion to amend the pretrial stipulation is GRANTED.

8. Claimant has failed to complete and submit DWC-19's sent to him by the carrier. Accordingly, temporary indemnity benefits are found due and owing the claimant is not entitled to same until she completes and submits the forms the carrier per Rule 69L-3.021.
9. There is no objective medical evidence to establish that the industrial injury remains the MCC of the claimant's disability and need for treatment.
10. There is no medical evidence to establish that any diagnostic testing is reasonably and medically necessary as a result of the work injury.
11. E/C is entitled to apportionment of claimant's pre-existing injuries/conditions.

12. The claimant was released to return to full duty work by Dr. Ruddy. Therefore, there is no causal relationship between the claimant's alleged work injury and his wage loss, if any. E/C is entitled to offset any post-accident earnings.
13. The claimant's average weekly wage should be deemed to be $0.00 based on the fact that there is no evidence that the claimant reported any of the wages earned at MDA prior to the 13 weeks for income tax purposes.
14. The claimant is not entitled to TT/TPD based on the fact that the claimant did not report his wages for income tax purposes and, therefore, has no wages to establish an AWW and on which to base the payment of indemnity.

Exhibits

Judge:

1. Petitions for benefits filed on March 3, 2020, June 15, 2020, July 15, 2020, October 9, 2020, and November 2, 2020 [Docket#15, 53, 75, 158 & 198].
2. Order bifurcating final hearing entered on August 21, 2020 [Docket#106].
3. Order setting pretrial stipulation filing date and final hearing entered on August 28, 2020 [Docket#134].
4. Bifurcated final compensation order entered on September 30, 2020 [Docket#148].
5. Uniform Pretrial Stipulation filed on October 22, 2020 and Order Approving Pretrial Stipulation entered on October 28, 2020 [Docket#170, 189].
6. Notice of voluntary dismissal filed on November 3, 2020 and amended on November 3, 2020 [Docket#200, 203].
7. Claimant's trial memorandum [Docket#262] and Employer/Carrier's trial memorandum [Docket#261] were accepted for argument purposes only.

Joint:

1. Deposition transcript of claimant, filed on August 28, 2020 and December 7, 2020 [Docket#131, 132, 240].

2. Deposition transcript of videographer and IME video exhibit, filed on December 15, 2020 & December 16, 2020 [Docket#265, 266].
3. Deposition transcript of records custodian for Progressive Insurance Company, with attached records, filed on November 23, 2020 [Docket#232].
4. Deposition transcript of records custodian for Cagigas Medical Center, with attached records, filed on November 23, 2020 [Docket#231].

Claimant:

1. Employee earnings reports filed on August 17, 2020, October 29, 2020, and November 6, 2020 [Docket#102, 192, 217].
2. Judicial notice of the docket.
3. Request to produce served on September 16, 2020 and responses served on October 16, 2020 and November 12, 2020, filed on December 9, 2020 [Docket#245].
4. Deposition transcript of Dr. Raul Aparicio, with attached exhibits, filed on July 27, 2020 [Docket#83].
5. Deposition transcript of records custodian for St. Mary's Medical Center, with attached records, filed on August 20, 2020 [Docket#105]. The employer/carrier objected asserting the provider was not authorized, an IME or EMA. The claimant responded the treatment is submitted as emergency care / *Parodi*. The evidence is reviewed for fact purposes, with reservation upon admissibility of medical opinions pending the outcome.
6. Deposition transcript of records custodian for JFK Medical Center, with attached records, filed on August 28, 2020 [Docket#124]. The employer/carrier objected asserting the provider was not authorized, an IME or EMA. The claimant responded the treatment is submitted as emergency care / *Parodi*. The evidence is reviewed for fact purposes, with reservation upon admissibility of medical opinions pending the outcome.
7. Deposition transcript of Alejandra Lagos filed on May 15, 2020 [Docket#33].

8. Deposition transcript of Julio Moradel filed on July 1, 2020 [Docket#70].
9. Deposition transcript of Christopher Slatky, adjuster, filed on June 3, 2020 & November 13, 2020 [Docket#45, 225].
10. Notice of filing tax returns filed on June 30, 2020 and deposition transcript of Niko Sosa, filed on August 31, 2020 [Docket#69, 138].
11. Deposition transcript of records custodian for West Palm Beach County Fire Rescue, filed on November 16, 2020 [Docket#227].
12. Attachments to the petitions for benefits [Docket#54, 76, 159]. The employer/carrier objected on the grounds of hearsay and authenticity. As to Docket#54, 76, the objections are overruled. As to Docket#159, the objections are sustained.

Employer/Carrier:

1. Request to produce served on November 4, 2020 and response served on December 1, 2020, filed on December 11, 2020 [Docket#257]. The claimant objected on the grounds the documents were not listed on the pretrial stipulation and relevance. The objections are overruled.
2. Deposition transcript of Dr. Michael Ruddy, with attachments, filed on December 3, 2020 [Docket#237].
3. Deposition transcript of records custodian for Kanner & Pintaluga, with attached records, filed on December 7, 2020 [Docket#241].
4. Deposition transcript of records custodian for MGA Insurance, with attached records, filed on December 3, 2020 [Docket#236].
5. Deposition transcript of records custodian for Wells Fargo Bank, with attached records, filed on December 3, 2020 [Docket#238].
6. Deposition transcript of records custodian for T-Mobile, with attached records, filed on December 10, 2020 [Docket#246-252]. The claimant's objection as to relevance is overruled.

7. Deposition transcript of Jay Alpert filed on August 31, 2020 [Docket#139]. The claimant's objection as to relevance is sustained.

Live Witnesses

Claimant:

Juan Paz - claimant

Employer/Carrier:

Norma Matute Reyes – claimant's wife

Pre-trial Motions

On November 5, 2020, the claimant filed a Motion to Strike/Motion for Sanctions. In the motion, the claimant argued the employer/carrier's amendment to the pre-trial stipulation filed on November 3, 2020 [in which the E/C asserted two additional defenses] was untimely, been waived, and inappropriate and frivolous. The employer/carrier's amendment asserted the following new defenses: claimant did not make a good faith effort to resolve the pending petitions as required under F.S. 440.192 and claimant did not properly serve the pending petitions for benefits on the employer as required in F.S. 440.192 and Rule 60Q-6.108. The employer/carrier filed its response on November 13, 2020.

Again, Rule 60Q-6.113(6) provides that no amendment shall be used to raise a new defense that could or should have been raised when the initial pretrial stipulation was filed, unless permitted by the judge for good cause. The parties submitted the initial pretrial stipulation on October 22, 2020. The employer/carrier offered no evidence or explanation for why these new defenses were not raised in the initial pretrial stipulation. Further, the employer/carrier offered no evidence or explanation to justify a finding of good cause. I find the defenses could or should have been raised in the initial pretrial stipulation and there hasn't been a requisite showing of good cause to justify the untimely amendment.

As to the 2nd proposed new defense – alleged failure to properly serve the petitions for benefits upon the employer, the E/C cites F.S. 440.192(1) which provides the employee shall serve the petition by certified mail, or by electronic means upon the employer. The E/C argues that if the employee does not serve the petition via certified mail, then the undersigned JCC does not have jurisdiction over the person and the subject matter. The E/C further notes that subject matter jurisdiction can't be waived. I reject the employer/carrier's argument.

The issue of perfecting service via certified mail upon the employer pertains to personal jurisdiction – not subject matter jurisdiction. Personal jurisdiction can be waived. See Solmo v. Friedman, 909 So.2d 560 (Fla. 4th DCA 2005) ["It is well established that '[i]f a party takes some step in the proceedings which amounts to a submission to the court's jurisdiction, then it is deemed that the party waived his right to challenge the court's jurisdiction regardless of the party's intent not to concede jurisdiction.'"]; Caldwell v. Caldwell, 921 So.2d 759 (Fla. 1st DCA 2006) ["By entering a general appearance without contesting personal jurisdiction," the defense is waived.]; Lennar Homes, Inc. v. Gabb Construction Services, Inc., 654 So.2d 649 (Fla. 3rd DCA 1995) ["A defendant who fails to contest the sufficiency of service of process at the inception of the case, whether by motion or responsive pleading, has waived this defense once he or she has entered a general appearance."]. The rationale for the law pertaining to personal jurisdiction is especially understood in the instant case. The claimant filed his petition for benefits against MDA Concrete, Inc. on March 3, 2020. Defense counsel filed his Notice of Appearance on March 9, 2020. Thereafter, the parties have made over 250 filings. The parties went to a bifurcated final hearing on August 31, 2020 [at which point the parties stipulated to jurisdiction over the subject matter and the person] and continued litigating beyond the most recent pretrial stipulation before the E/C asserted a defense of improper service. To determine months later and after extensive litigation that the employer was not properly served, and therefore, should not be subject to the proceedings

would contradict the concept of justice in every imaginable way. Accordingly, I reject the E/C's argument that jurisdiction can't be waived. Personal jurisdiction can be waived. I find the defense as to an alleged improper service relates to personal jurisdiction, and that such defense was waived. The claimant's motion to strike the 11/3/2020 E/C amendment is granted.

On December 10, 2020, the claimant filed a Motion for Protective Order, arguing the employer/carrier's effort to call the claimant's wife and son as witnesses was simply harassment. The employer/carrier filed its Response on December 11, 2020. The employer/carrier's response outlined its' basis for the relevance of the examination of the witnesses. After hearing argument of counsel and considering the subject pleadings, the claimant's motion for protective order was denied. Also, the employer/carrier's Motion to Compel Claimant to Answer Certified Deposition Questions filed on December 9, 2020 was withdrawn at the hearing.

Substantive Issues for Adjudication

I have taken the time to carefully review and consider all of the evidence presented to me, including the documentary evidence, deposition testimony, and live testimony. While I do not recite in explicit detail each piece of evidence/testimony, I have attempted to resolve any and all conflicts in the testimony and evidence. The stipulations of the parties are adopted and shall become part of the findings of fact herein. The undersigned has jurisdiction of the parties and subject matter. Based upon the stipulations of the parties, evidence presented and legal review, I make the following findings of ultimate facts and conclusions of law.

Factual History

The parties previously tried the bifurcated matter of employer/employee relationship on August 31, 2020. The undersigned entered the bifurcated final compensation order on September 30, 2020. It was determined that the claimant

was employed with MDA Concrete, Inc. on November 27, 2019 when he fell from a scaffold while performing stucco work. He was transported from the job site to St. Mary's Medical Center via ambulance. At St. Mary's, the claimant was treated for injury to his jaw, right flank, right shoulder, neck and back pain. The following day, the claimant presented to JFK Medical Center, reporting right shoulder, neck, and back pain. The claimant has thereafter largely gone without medical care, though he did present for IME evaluations with Dr. Raul Aparicio on June 15, 2020 and Dr. Michael Ruddy on August 4, 2020. After the bifurcated issue of employer/employee relationship was adjudicated, the parties return for the determination of the substantive claims and defenses.

Analysis - *Misrepresentation Defense*

The employer/carrier's primary defense was premised upon the allegation the claimant violated F.S. 440.09(4) and 440.105. Florida Statute 440.09(4) provides that an employee shall be disqualified from all benefits if a judge of compensation claims determines that the employee has knowingly or intentionally engaged in any of the acts described in s. 440.105 for the purpose of securing workers' compensation benefits. Florida Statute 440.105(4)(b) provides, in relevant part:

It shall be unlawful for any person:

1. To knowingly make, or cause to be made, any false, fraudulent, or misleading oral or written statement for the purpose of obtaining or denying any benefits or payment under this chapter.
2. To present or cause to be presented any written or oral statement as part of, or in support of, a claim for payment or other benefit pursuant to any provision of this chapter, knowing that such statement contains any false, incomplete, or misleading information concerning any fact or thing material to such claim.

3. To prepare or cause to be prepared any written or oral statement that is intended to be presented to any employer, insurance company, or self-insured program in connection with, or in support of, any claim for payment or other benefit pursuant to any provision of this chapter, knowing that such statement contains any false, incomplete, or misleading information concerning any fact or thing material to such claim.
4. To knowingly assist, conspire with, or urge any person to engage in activity prohibited by this section.

The employer/carrier has the burden of proof, by a preponderance of the evidence, to show that a claimant has committed a violation of Florida Statute 440.105. See *Singletary v. Yoder's*, 871 So.2d 289 (Fla. 1st DCA 2004). Whether a claimant has violated section 440.105 is a factual determination to be made by the JCC, which is reviewed for competent substantial evidence. See *Arreola v. Administrative Concepts*, 17 So.3d 792 (Fla. 1st DCA 2009). A misrepresentation of a material fact is not required, but rather the misrepresentation must only be made with the intent to obtain a workers' compensation benefit. See *Village of N. Palm Beach v. McKale*, 911 So.2d 1282 (Fla. 1st DCA 2005). Determining that there has been a violation of section 440.105(4) requires a two-part inquiry, encompassing first a finding as to whether a false statement was made by the claimant, and second a finding as to whether, at the time the statement was made, it was made with the intent to obtain benefits. See *City of Hialeah v. Bono*, 207 So.3d 1030 (Fla. 1st DCA 2017).

The employer/carrier contends the claimant violated 440.105(4) in the following:

(a) The claimant denied, in deposition, of his involvement in the motor vehicle accident of May 6, 2018 and the motor vehicle accident of March 9, 2018.
(b) The claimant failed to disclose, in deposition, the full extent of his injuries as a result of the May 6, 2018 motor vehicle accident.

(c) The claimant failed to disclose, in deposition, the extent of the chiropractic treatment received by the claimant as a result of the May 6, 2018 motor vehicle accident.

(d) The claimant failed to disclose, to Dr. Aparicio, his involvement in the motor vehicle accident of May 6, 2018, and he failed to disclose his March 9, 2018 motor vehicle accident to Dr. Aparicio and Dr. Ruddy.

(e) The claimant failed to disclose, to Dr. Aparicio, the injuries he sustained as a result of the May 6, 2018 motor vehicle accident.

(f) The claimant failed to disclose, to Dr. Aparicio, that he received chiropractic treatment as a result of the May 6, 2018 motor vehicle accident.

(g) The claimant failed to disclose, to Dr. Aparicio, the extent of the chiropractic treatment received as a result of the May 6, 2018 motor vehicle accident.

False Statement?

The records from Progressive, Cagigas Medical Center and Kanner & Pintaluga reflect the claimant suffered a motor vehicle accident on May 6, 2018, when he was rear-ended while driving his truck. Following the motor vehicle accident, the claimant retained Kanner & Pintaluga for representation. The claimant was seen at Cagigas Medical Center, a chiropractor, on May 22, 2018. At that time, the claimant reported that since the accident, he had neck pain, with bilateral arm weakness and thoracic pain. He was recommended for chiropractic treatment, including physical therapy, electric stimulation and ultrasound. The claimant underwent chiropractic therapy on May 23, 2018, May 24, 2018, May 25, 2018, May 29, 2018, May 30, 2018, May 31, 2018, June 1, 2018, June 4, 2018, and June 5, 2018. The claimant was evaluated again at Cagigas on June 8, 2018 and reported only slight improvement. He was recommended ongoing chiropractic treatment for the right shoulder pain, and prescribed MRI studies of the cervical and thoracic. The claimant followed-up for chiropractic therapy on June 11, 2018,

June 12, 2018, June 13, 2018 and June 14, 2018. There are no other medical records related to this accident.

At the final hearing, the claimant and his wife confirmed a motor vehicle accident on March 9, 2018 involving a 2004 Toyota Corolla. The claimant confirmed the accident resulted in the total loss of the vehicle. The claimant maintained a denial of suffering injury as a result of this accident, and there were no records contradicting the denial of injury.

The claimant provided deposition testimony on April 14, 2020. During the deposition, the claimant was asked if he had ever been involved in any auto accidents before November of 2019, and the claimant responded, 'No.' He was asked if he had ever been involved in a lawsuit before, to which the claimant responded, 'not that I remember.' Now at the time of this deposition the claim was defended by three different employers (and carriers) with three different defense counsels. Another defense attorney specifically asked the claimant if he was involved in a motor vehicle accident in May of 2018, and the claimant responded, 'I don't remember. Maybe, but I don't remember.' When asked if the claimant was involved in a motor vehicle accident in January of 2020, the claimant testified that was his wife. The claimant was asked again about the May 2018 accident and he testified that he did not remember. It was only after the claimant was asked if he had ever treated with a chiropractor prior to the subject industrial accident that the claimant testified, in the affirmative. When asked about the details of the chiropractic care, the claimant testified, 'it was when I was rear-ended, my truck.' The claimant was then asked if he remembered when he was rear-ended in his truck and he testified, 'I don't remember.' The claimant did not acknowledge the March 9, 2018 motor vehicle accident at his deposition.

I find the claimant made false, misleading and incomplete statements during his deposition when he denied any prior motor vehicle accidents. He expressly testified that he had not been in any motor vehicle accidents and after numerous

follow-up questions, the claimant testified he had no recollection. But the claimant possessed some recollection when he was asked specifically about chiropractic care. Nevertheless, the claimant lost his recollection when it pertained to the details of such care. "The parties have a right to expect that all statements…are truthful, responsive, and complete." See *Village Apartments v. Hernandez*, 856 So.2d 1140 (Fla. 1st DCA 2003). The claimant's express denial of prior motor vehicle accidents was false, and I find his deposition testimony otherwise regarding prior motor vehicle accidents was incomplete. Further, the claimant's denial of the March 9, 2018 accident remained throughout the deposition [and continued until it was discovered in December of 2020]. Accordingly, I find the evidence supports the claimant made false, misleading and incomplete statements in deposition when he denied prior motor vehicle accidents and otherwise provided incomplete testimony as it pertained to prior motor vehicle accidents.

The employer/carrier also contends the claimant made a misrepresentation in deposition as to the extent of his injuries arising out of the May 6, 2018 motor vehicle accident as well as the extent of the chiropractic treatment related to such accident. During his 4/14/2020 deposition, the claimant was asked if he had been to any doctor for any reason prior to November of 2019, to which he replied, 'No.' Thereafter, the claimant acknowledged prior surgery to his appendix in 2005 or 2006. It was only after the claimant was directly asked if he had ever been to a chiropractor prior to the industrial accident that the claimant answered in the affirmative. After confirming seeing a chiropractor, the claimant provided the following testimony:

> Q: When was that and where?
>
> A: It was when I was rear-ended, my truck. But I don't remember when it was.
>
> Q: Do you know where you went to see a chiropractor, what town, what the name of the doctor was?

A: It was here in Lake Worth.

Q: Do you know the name of the chiropractor?

A: No.

Q: Do you know how many times you went to see him?

A: No, I don't remember.

Q: Why did you see him? Was there something bothering you?

A: Yes, when the guy rear-ended me, I felt that my neck was like stiff, so I went to see if there was anything wrong.

Q: Did you have a lawsuit as a result of that rear-end collision?

A: No.

See 4/14/20 deposition, pages 62-64,

I find the claimant's deposition testimony included false, misleading and incomplete statements as it pertained to the extent of the injuries and the extent of the chiropractic treatment associated with the May 6, 2018 motor vehicle accident. While it is conceivable the claimant may not have recalled some of the inquired specifics, such as the date, identity and the amount of visits, the claimant's testimony – in its totality – reflects false, misleading and/or incomplete responses to the issue of the extent of the injuries and treatment received. Again, the records indicate the claimant was evaluated on two occasions and underwent chiropractic therapy on at least thirteen occasions. The records do not comport with testimony that the claimant's neck was stiff, and he wanted to see if there was anything wrong. Rather, the records reveal a history and presentation on May 22, 2018 of having neck pain with bilateral arm weakness and thoracic spine pain since the accident, and on June 8, 2018, the claimant reported only slight improvement since the physical therapy with ongoing complaints of neck pain with bilateral arm weakness and numbness and thoracic spine pain. In fact, on June 8, 2018, the provider recommended ongoing chiropractic therapy specifically for the right shoulder pain and recommended MRI studies of the cervical and thoracic spine,

with the cervical sought on an emergency basis. Further, the claimant did retain legal counsel for this accident, which is a direct contradiction to the specific question asked, but also a representation of the disparity between the claimant's testimony and the documentary evidence concerning the 5/6/18 motor vehicle accident. Accordingly, I find the claimant provided false, misleading and incomplete statements in his deposition as to the extent of the injuries sustained and chiropractic treatment received from the 5/6/18 motor vehicle accident.

The employer/carrier contends the claimant failed to disclose to Dr. Aparicio his involvement in either prior motor vehicle accident; the injuries sustained as a result of the 5/6/18 accident; that he received chiropractic treatment as a result of the 5/6/18 accident; and the extent of such treatment. The claimant underwent an IME of his choice with Dr. Raul Aparicio on June 15, 2020. The claimant provided a history of the industrial accident and reported complaints of pain to the low back, right shoulder, and neck. He denied any prior orthopedic injuries or treatments. Dr. Aparicio was provided with medical records from St. Mary's and JFK. Dr. Aparicio diagnosed the claimant with injuries to the right shoulder, neck and low back/coccyx, and indicated the industrial accident was the major contributing cause for same. Dr. Aparicio made several recommendations for treatment and further diagnostics.

Dr. Aparicio testified via deposition on July 21, 2020. Dr. Aparicio testified that he had no difficulty communicating with the claimant.[2] Dr. Aparicio testified that he took a history from the claimant and that the claimant said 'that he never had treatment to his neck and his shoulder and his lower back.' Dr. Aparicio was asked if he "specifically asked him those questions about those body parts" and Dr. Aparicio testified, "Yes, I did." Dr. Aparicio was thereafter asked if he was aware that Mr. Paz had been involved in a motor vehicle accident in May of 2018 and Dr. Aparicio testified, "No." Dr. Aparicio testified, "The question is specifically any

[2] In the claimant's 7/28/20 deposition, he testified that Dr. Aparicio spoke to him in Spanish and that he had no trouble understanding him.

prior injuries or treatments by physicians to those areas of which you are complaining [right shoulder, neck, low back], so if he injured those body parts in the motor vehicle accident, I then I would expect him to tell me."

I find the claimant made false, misleading and incomplete statements to Dr. Aparicio by denying the prior motor vehicle accident[s], the injuries sustained in the 5/6/18 motor vehicle accident, that he treated with a chiropractor for his right shoulder and neck from the 5/6/18 motor vehicle accident, and thus, the extent of the injuries and treatment as well.

Intent to Obtain Benefits?

In that the employer/carrier has established the claimant made false, misleading and incomplete statements under each allegation, the inquiry turns to whether the claimant made such statements with the intent to obtain benefits. The challenge of determining an individual's intent is always difficult. In this matter, the false statements were made prior to the final hearing, and therefore, I had the benefit of analyzing the claimant's testimony at the final hearing, including his responses and explanations for his prior deposition testimony and statements to his IME provider.

At the final hearing, the claimant maintained that he simply did not remember the May 6, 2018 [or the March 9, 2018] motor vehicle accident[s]. However, while his deposition testimony, upon recollection, minimized the treatment; characterized his visit to the chiropractor was to see if there was anything wrong; and flatly denied legal representation, his trial testimony confirmed he retained Kanner & Pintaluga; that he retained counsel because he injured his neck; that his lawyers sent him to Cagigas Medical Center; and confirmed he received treatment. Still, at trial, the claimant minimized the extent of his treatment at Cagigas, testifying it was one to two weeks, when it was more than three weeks, and he still maintained the injury was only to the neck, even

though the records expressly reflect treatment recommendations to the right shoulder and the thoracic spine.

Interestingly, while the claimant testified at trial that he did not recall the motor vehicle accident[s] and extent of injuries and treatment on April 14, 2020, the claimant did recall the 5/6/18 motor vehicle accident and treatment received by the time he underwent his IME evaluation on June 15, 2020. The claimant testified at trial that he chose not to tell Dr. Aparicio about the prior motor vehicle accident and treatment because he didn't think it was important. Now by the time of his July 28, 2020 deposition, the claimant testified his current complaints were only to the low back – that his neck and right shoulder resolved. Even though he complained of neck and right shoulder problems to his IME provider a month prior, the claimant testified he did not recall making such complaints. Also, during the 7/28/20 deposition, the claimant was asked if he advised Dr. Aparicio about the 5/6/18 motor vehicle accident and chiropractic treatment, to which the claimant responded, "I don't recall." But five months after this 7/28/20 deposition, the claimant testified at final hearing that he did recall the 5/6/18 MVA at the time of the IME evaluation and chose not to disclose it because of a perceived lack of importance. Now the claimant did advise Dr. Aparicio of his prior appendix surgery [from 2005 or 2006] and explained that he didn't think prior neck treatment was relevant [at a visit for which he reported neck pain] but he believed the prior appendectomy was relevant because "it was a prior surgery."

It should further be noted the claimant acknowledged at the final hearing having lied repeatedly throughout the claim pertaining to his association with Julio Moradel, the supervisor with MDA Concrete at the time of the accident. The claimant has consistently maintained that he had minimal contact with Mr. Moradel, and that he did not have contact with anyone from MDA Concrete after the industrial accident. At the final hearing – after being confronted with his phone records - the claimant acknowledged that he knew Mr. Moradel; that they had

repeated contact before the industrial accident and after – up to at least June 22, 2020 [during the pendency of this litigation]; and that he consistently lied[3] about such contact because Mr. Moradel asked him not to get Mr. Moradel involved in the matter. This is somewhat odd since Mr. Moradel had been deposed on June 29, 2020; testified live at the bifurcated final hearing on August 31, 2020; and had stopped working for MDA Concrete prior to the commencement of this matter. Accordingly, Mr. Moradel was involved and there seemed to be little reason to justify lying about the extent of the contact with Mr. Moradel. While claimant counsel argued such lies were to the claimant's detriment, it makes more sense to deny a friendship with a key witness so as to bolster that witness' credibility as an impartial participant. While this misrepresentation is not assessed under F.S. 440.105 and 440.09(4) because it was not specifically pled, it is a piece of the puzzle in determining the claimant's intent. For similar reasons, it should also be noted that the claimant seemingly provided misleading and/or incomplete testimony regarding his earnings reports in that he gave conflicting evidence regarding income in January of 2020, while his bank records reflected cash deposits totaling more than $3,000. The claimant provided a rather Clintonian explanation[4] – when I say 'work', I mean 'working seriously'…working steady as opposed to sporadically.

Upon careful consideration of the evidence submitted and having had the opportunity to assess the claimant, I find the claimant's false, misleading and incomplete statements regarding his 5/6/18 motor vehicle accident and resulting injuries and treatment – in deposition and to Dr. Aparicio – were made with the intent of obtaining benefits. I find the claimant's final hearing testimony that he did not recall the 5/6/18 motor vehicle accident and resulting injuries/treatment at deposition lacked credibility. Rather, I find the claimant repeatedly exercised selective amnesia when it pertained to particular facts - facts that one might

[3] The claimant did not concede that Mr. Moradel did not ask him to lie – the claimant chose that route.

[4] President Bill Clinton famously defended a prior [apparently] false statement by declaring, "It depends upon what the meaning of the word 'is' is."

perceive to be damaging to a claim for workers' compensation benefits. I find the claimant's testimony that he naively omitted the 5/6/18 motor vehicle accident to Dr. Aparicio lacked credibility. The claimant acknowledged he understood it was expected that he would have to provide a medical history and that a medical history was important for an evaluation. The claimant acknowledged misrepresentation in his claim and he consistently testified with specifics and detail in certain respects while relying upon convenient lack of recollection in other respects. I find the weight of the evidence supports the requisite intent.

I do feel compelled to address a particular argument made by the claimant – that there is no factual dispute about the accident [the claimant undisputedly fell off the scaffold and was transported to the hospital via ambulance] and that the employer/carrier 'had done everything they could to avoid responsibility' for what was an obvious industrial accident. I understand and appreciate the claimant's point – that the subsequent misrepresentations arguably had no bearing on whether the claimant suffered a compensable industrial accident, and therefore, the notion of a blanket disqualification of benefits is unjust. Nevertheless, this argument is more appropriately to be presented to the legislature. The law mandates that if the claimant makes a misrepresentation with the intent of obtaining benefits, he is barred from receiving benefits. The legislature has not created a hierarchy of offenses and/or repercussions to capture a more just outcome. Perhaps, the legislature exhibited great wisdom in the original drafting…perhaps, the statute warrants a re-visit. Nevertheless, the undersigned JCC is without subject matter jurisdiction to make this assessment.

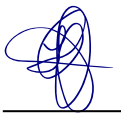
For the reasons set forth herein, I conclude the employer/carrier has met its burden by a preponderance of the evidence that the claimant made false, misleading and incomplete statements in deposition and to Dr. Aparicio, his IME, pertaining to the 5/6/18 MVA, including prior injuries sustained and treatment received, for the purpose of obtaining workers' compensation benefits. For such transgression, the

claimant is barred from receipt of compensation and benefits under F.S. 440.09(4). In light of this conclusion, I do not address the substantive claims and other defenses.

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

1. The claimant is barred from compensation and benefits under chapter 440 pursuant to F.S. 440.09(4) and section 440.105(4).
2. All pending petitions for benefits are denied and dismissed, with prejudice.

DONE AND SERVED this 15th day of January 2021, in West Palm Beach, Palm Beach County, Florida.



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