

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

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OJCC NO.: 14-022578CMH  
D/A: 8/19/2014  
Judge: Charles M. Hill, III

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FINAL EVIDENTIARY ORDER

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THIS MATTER came before me on May 6, 2015 as a specially set evidentiary hearing upon the claimant's motion to enforce mediation agreement and pretrial stipulation filed 2/24/15 (DE 34).

A preliminary case management conference was held on 3/26/15 at the request of the undersigned due to uncommon procedural developments. A court ordered mediation had been held on 2/4/15 wherein it was reported all pending medical and indemnity issues were resolved except for attorney's fees and costs. Based on that mediation report the then pending final hearing set for 4/1/15 on the petitioned claims, as outlined in the pretrial stipulation of 1/30/15 (DE 31), was cancelled. However, the E/C filed 10 days after mediation, 2/24/15 (DE 35), a notice of amendment to the original pretrial stipulation of 1/30/15 with a misrepresentation (forfeiture) defense permitted by section 440.09(4), Fla. Stat.

The parties outlined the events giving rise to the controversy, at which time it was decided the parties would submit another pretrial stipulation no later than 4/10/15 appertaining solely to the claimant's motion to enforce the mediated agreement and the affirmative defense asserted thereto. Thus, the instant special evidentiary hearing was set for 5/6/2015.

It was the E/C's position compensability itself had now become an issue, as the continued procurement of medical records revealed a greater scope of misrepresentation than that appreciated by the E/C at the time of mediation, which then only involved the potential for a failed memory and a singular report by Dr. Serpa of right shoulder treatment during the month of March, 2013. These things were excused away (excusable), but the later acquisition by the E/C of reports by Dr. Marquez, the claimant's personal physician, made during the month of November, 2013 elevated the matter to the point the misrepresentation could no longer be excused away by the E/C. The defensive position was therefore formally advanced on 2/18/15 to deny and foreclose all benefits under the Act.

The claimant responded during this case conference that the E/C had knowledge the statement contained in the claimant's deposition of 12/9/14, to the effect he had no prior problems with his right shoulder, was inconsistent with medical records in their possession well prior to the mediation. Notwithstanding this knowledge, the E/C voluntarily opted to go forward with the mediation and execute the agreement, rather than seek an impasse or a reset by the mediator. E/C had sufficient information to formulate their defenses prior to mediation. After all, the E/C themselves provided the claimant with Dr. Serpa's 3/5/13 report prior to the mediation. There was no subterfuge, no concealment, by the claimant which would have induced the E/C to enter into the mediated agreement. It was conducted arm's length and is binding on the parties.

In the meantime, an evidentiary hearing was conducted on the motion for an advance, and granted in part by order entry of order 3/27/15 (DE 61). The misrepresentation/forfeiture defense was preserved for later determination as part of the evidentiary matters comprising the motion to enforce mediation agreement, by order entry of 3/30/15 (DE 62).

Upon hearing commencement on 5/6/15 the parties' positions remained the same as previously outlined on 3/26/15. Documentation was marked and admitted into evidence or otherwise marked for ID purposes. An appendix thereof is attached. The medical record notes of Drs. John Serpa and Julian Marquez were considered for their factual contents only, as they were not authorized physicians. (Factual contents are limited to history provided, symptoms reported, signs observed, diagnoses/impressions rendered and treatment given.) The claimant personally testified through the assistance of a professional Spanish interpreter.

AFTER DUE CONSIDERATION given to the evidence admitted, memoranda of law and argument of counsel the following findings of ultimate fact and conclusions of law shall be applicable.

1. Chronology of events. A review of the sequence of events is most helpful in placing parties' dispute into perspective.

12/9/14. The claimant's deposition is taken and he denies any prior problems with or treatment to his right shoulder. There is no dispute this statement by the claimant is incorrect, as records subsequently revealed prior complaints of right shoulder pain and treatment provided.

1/30/15. The carrier representative acknowledged her predecessor had receipt (or knowledge) of the medical record of Dr. Serpa for DOS 3/5/13 disclosing a right shoulder injection and a right supra-scapular nerve block, prior to the pretrial stipulation of 1/30/15. This

pretrial stipulation sets forth an apportionment defense supported by preexisting conditions. Injuries (including the right shoulder) were accepted as compensable.

2/3/15. The E/C forwards a copy of Dr. Serpa's 3/5/13 medical note advising the note is evidence to support their apportionment defense, with a reminder to opposing counsel his claimant had denied any prior shoulder issue during his deposition.

2/4/15. The mediation is conducted and both parties are represented by competent counsel before the state mediator, who memorialized their agreement in typewritten form containing the proviso that it is final and binding and entered into knowingly and voluntarily. It was then appropriately executed by each party and the mediator.

2/18/15. The E/C issued a notice of denial of further benefits reciting the misrepresentation/forfeiture defense under 440.09(4) and cancelled authorization for the shoulder surgery which had been scheduled for 2/19/15.

2/24/15. The claimant files his motion to enforce the mediated agreement.

2/25/15. The E/C asserts the 1/30/15 pretrial stipulation and 2/4/15 mediation agreement are void and unenforceable based on the claimant's misrepresentations made during deposition on 12/9/14 in violation of 440.09(4).

4/8/15. The E/C asserts the earlier pretrial of 1/30/15 not referencing a 440.09(4) defense was rendered moot as that defense was permitted for this hearing by order entry of 3/30/15, the 440.09(4) defense based on misrepresentations of no prior right shoulder treatment further precludes the right to enforce provision of those benefits and the false and/or misleading statements support an avoidance of the mediated agreement. The claimant asserts 440.09(4) is not meritorious in this instance and the E/C is estopped to assert that defense as the E/C had

knowledge of the inconsistent statement and knowingly bound themselves to comply in good faith with the terms of the mediated agreement.

2. Credibility. The claimant recalled the circumstances and mechanics of the injuries he sustained on 8/19/14 and recounted the medical treatment provided thereafter. He characterized the injuries as pain about his right arm and waist. He acknowledged a soccer goal post injury to his head at about 18 years of age. He remained steadfast in his denial of ever having problems with or treatment to his right shoulder. This applied to Dr. Serpa (anesthesiologist), as well as Dr. Marquez (primary care). He virtually had no memory of any manner of right shoulder treatment. It was his understanding the pain was coming from his waist and traveling into the legs and up the spine, which problems he thought were caused by his bad posture while cleaning cars (sometimes 70-80 per day). Injections were to his buttocks to address the waist and low back problems, never into his shoulder. He disavowed any knowledge of Alzheimer's disease or memory loss, but did recall having some form of testing with a helmet device many years ago regarding his memory. He does not engage in games such as dominos or cards involving memory, as he has always preferred sports. He has had headaches however, which he attributed to working midnights.

The Claimant again exhibited an inability to comprehend the issues surrounding these proceedings or the reasoning behind the E/C's suspension of his benefits. I find his outward bearing was sincere and absent guile, his candor simple and forthright. I find his testimony to be trustworthy and sufficiently credible to stand for the proposition he did not recall those earlier incidents when he complained of right shoulder pain and received treatment therefore.

3. Agreement validity. The gravamen of the E/C's complaint is the incorrect statement the claimant made during deposition on 12/9/14 that he had no prior problems with or treatment

for his right shoulder. No competent or substantial evidence was adduced however, that any other event or misrepresentation took place since that particular time to induce the E/C to enter into the mediated settlement of 2/4/15. I find the E/C was on notice of and charged with knowledge of the claimant's prior and significant treatment with Dr. Serpa involving injection therapy about his right shoulder well in advance of the mediation conducted on 2/4/15 and openly planned to buttress their then pending apportionment defense with those records. I find that a clear meeting of the minds was reached and a binding mediation agreement achieved on 2/4/15, which agreement was not induced by any set of material facts not known by the E/C or that any action by the claimant served to obstruct the E/C's ability to obtain any other relevant facts. The E/C I find, willfully, knowingly and voluntarily entered into their mediated agreement. For reasons best known to the E/C, their strategy was to provide the claimed benefits and have them outlined in writing during a formal mediation setting conducted by this Division in the Miami District. The misrepresentation and forfeiture defense allegedly emerging from the depositional statements of the claimant, I find, was waived by the E/C as they entered into their agreement. The E/C's challenge to validity on this basis is denied.

4. Agreement avoidance. The E/C also seeks to set aside or void the mediated agreement because further discovery, subsequent to 2/4/15, revealed complaints of right shoulder pain were given to Dr. Marquez, the claimant's PCP, whose 11/4/13 record note also included a diagnosis of post traumatic Alzheimer's disease. This attempt at avoidance is still bottomed upon the same depositional statement of the claimant. While the E/C was prepared to excuse failure to recall Dr. Serpa, the failure to recall Dr. Marquez created a situation which had now become for them inexcusable. It was now made clear to the E/C a fraud/forfeiture defense justified suspension of benefits, to include foreclosure of any corollary right on the claimant's part to enforce the

mediated agreement. The deficiency in this position is that the facts had not changed after the mediation, only the trial strategy of the E/C. The E/C I find, has failed to demonstrate the mediation agreement itself was perpetrated by fraud, overreaching or intentional misrepresentation by the claimant, and has otherwise failed to demonstrate a change in circumstances which would necessitate the agreement be voided or in some manner modified. The E/C's challenge to the mediated agreement on this basis is denied.

5. Section 440.09(4) & 440.105(4)(b). Based upon the foregoing findings and the totality of the unique circumstances presented, I find the claimant did not *knowingly* make, present or prepare a false statement regarding prior right shoulder problems and treatment for the purpose of obtaining benefits. I accept as truthful that he did not remember the complaints or treatment and despite references to records of such, that he still does not remember those events. I therefore find he has not knowingly or intentionally engaged in the acts proscribed in 440.105. This affirmative defense is denied, and cannot serve to vitiate the parties' mediated agreement or to now impose forfeiture of any benefits lawfully available under the Act.

6. Attorney's fees and costs. I find the claimant's attorney is entitled to E/C paid fees and costs for the benefits secured herein.

WHEREFORE premises considered, it is

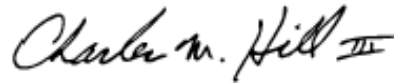
ADJUDGED that:

7. The claimant's motion to enforce the mediated agreement of 2/4/15 is hereby GRANTED.

8. The E/C are directed to forthwith comply with the mediation agreement of 2/4/15 by expeditiously providing the benefits therein enumerated.

9. Jurisdiction is reserved to later determine reasonable values for the fees and costs awarded herein, as well as those associated with any prior benefits secured.

ORDERED in Chambers this 30<sup>th</sup> day of June, 2015.



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Charles M. Hill, III  
Judge of Compensation Claims

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been emailed to counsel this 30<sup>th</sup> day of June, 2015.



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Secretary to Judge of Compensation Claims



## APPENDIX

### Joint exhibits:

1. FEO granting advance issued 3/27/15 (DE 61) marked joint exh (1).
2. Notice of filing 11/4/13 medical records of Dr. Marquez (fact purposes only) filed 5/2/15 (DE 64) marked joint exh (2).
3. Deposition of Marie Cruz, adjuster with attachments dated 4/30/15 (DE 75) marked joint exh (3).
4. Notice of filing medical records of Drs. Donshik and Herrera filed 5/2/15 (DE 66) marked joint exh (4).
5. Notice of filing medical records of Physicians Health Center (PHC) filed 5/2/15 (DE 67 & 71) marked joint exh (5).

### Claimant exhibits and items for ID:

1. Pretrial stipulation dated 4/8/15 (DE 63) marked claimant exh (1).
2. Mediation agreement dated 2/4/15 (DE 33) marked claimant exh (2).
3. Pretrial stipulation last dated 1/30/15 (DE 31) marked claimant exh (3).
4. PFB filed 11/28/14 (DE 24) with attachments (DE 25) marked claimant exh (4).
5. Notice of filing emails between counsel dated 2/3/15 (DE 65) with attachment marked claimant exh (5).
6. Motion to enforce mediation agreement and pretrial stipulation filed 2/24/15 (DE 34) marked item (6) for ID on behalf of the claimant.
7. Reply to E/C's response to motion to enforce filed 2/26/15 (DE 40) with attachments marked item (7) for ID on behalf of the claimant.
8. Memorandum of law for evidentiary hearing filed 5/4/14 (DE 68) marked item (8) for ID on behalf of the claimant.

### E/C exhibits and items for ID:

1. Deposition of the claimant dated 12/9/14 (DE 70) marked E/C exh (1).

2. Medical records of Jonathan Donshik, MD filed 5/4/15 (DE 72) marked E/C exh (2).
3. Order on claimant's motion to strike fraud/misrepresentation defense and pretrial amendment dated 3/30/15 (DE 62) marked E/C exh (3).
4. Response to claimant's motion to enforce mediation agreement filed 2/25/15 (DE 39) with attachments marked item (4) for ID on behalf of the E/C.
5. Trial memorandum filed 5/4/15 (DE 69) marked item (5) for ID on behalf of the E/C.