

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS  
OFFICE OF THE JUDGES OF COMPENSATION CLAIMS  
FT. MYERS DISTRICT OFFICE

Cladiu Bursuc,  
Employee/Claimant,

OJCC Case No. 15-000361KAS

vs.

Accident date: 5/15/2013

UPS/Liberty Mutual Insurance,  
Employer/Carrier/Servicing Agent.

Judge: Kathy A. Sturgis

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CLARIFIED MERITS ORDER ON BIFURCATED ISSUE OF 440.105 DEFENSES

After proper notice to the parties the above captioned workers' compensation case came for final hearing before the undersigned on July 7, 2015, in Fort Myers, Lee County, Florida, on the petition(s) for benefits docketed on: January 8, 2015 and April 23, 2015. The Claimant was represented by David Scott Benn, Esq. and the Employer/Carrier ("E/C") was represented by Edward C. Duncan III, Esq. The evidence closed on July 7, 2015 after closing arguments. A merits order on the issue of E/C's 440.105 defenses was entered August 6, 2015. On August 14, 2015 E/C timely filed a Motion for Rehearing and/or Clarification. Claimant's attorney responded to same on August 19, 2015. After reviewing the Motion, Response and the evidence referenced therein this order is issued clarifying, but not changing the ultimate determination made in the original order.

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PRE-TRIAL MOTIONS –

Immediately prior to commencement of the hearing various objections to evidence were heard, as to the admissibility of certain medical records and opinions. The parties were offered a brief continuance to address these. Ultimately the parties elected bifurcation of the issue of E/C's 440.105 defenses from the pending claims to allow a determination on that issue immediately and prior to any securing additional medical opinions or evidence, as that issue could be determinative of all pending claims. The merits hearing proceeded on that basis.

DEFENSE UNDER 440.105

E/C asserts Claimant committed misrepresentations, violating section 440.105 (4)

(b) (1), (2) and/or (3) by:

1. Denying to his physician(s) that he had ever injured his left ankle before (including but not limited to health questionnaire 11/4/14, at Advanced Medical);
2. Denying to Mr. Schallert on or about 11/12/14, and to Dr. Crist, and employer representatives JP , Eric Downing and Cheryl Sprayberry that he had any prior problems with his ankle;
3. Denying in deposition having any prior problems with his left ankle (no problems with left ankle, no discomfort in left ankle, no recollection of having made any complaint to any doctor at all of having any problems in the ankle in the three years before this accident occurred);
4. Initially denying in deposition ever having any prior work injuries;
5. Denying to the carrier having any other workers' compensation injuries and denying any prior injuries (statement provided to Andrew Schallert on or about 11/12/14).

E/C asserts Claimant knowingly made the above statements for the purpose of obtaining benefits under Chapter 440; and/or presenting these statements as part of, or in support of, a claim for a benefit knowing that they contain any false, incomplete, or misleading information concerning any fact or thing material to such claim, and/or preparing such statement(s) intended to be presented to the employer or carrier in connection with a claim for a benefit knowing that such statement contains any false, incomplete, or misleading information concerning any fact or thing material to such claim.

#### EXHIBITS

The exhibits listed on Exhibit A attached hereto were received into evidence without objection except as noted.

#### STIPULATIONS OF THE PARTIES

I adopt as findings of fact the stipulations of the parties as set forth in the pre-trial stipulation (Exhibit 4).

## LIVE WITNESS TESTIMONY

The Claimant, Cladiu Bursuc, testified live at the merits hearing.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the foregoing stipulations, all the evidence presented, I hereby make the following findings of fact and conclusions of law:

### FINDINGS OF FACT

1. I have jurisdiction over the subject matter and parties.

2. Venue is properly in Collier County, Florida

3. As clarified in E/C's Motion for Rehearing and/or Clarification E/C does not dispute that Cladiu Bursuc, the Claimant, sustained a compensable left ankle injury as the result of an industrial accident while working for Employer on or about May 15, 2013. The Employer abandoned its notice defense by amendment to the pretrial stipulation on May 4, 2015. The only findings made in this order are those directly related to E/C's defenses regarding alleged violations of Section 440.105 94) (b) (1), (2), and/or (3), Florida Statutes.

4. Claimant began working for Employer sometime in the fall of 2012. Claimant testified that while working for Employer in Charlotte County delivering packages he walked across a field and twisted his ankle. He did not seek medical attention or report an accident, but continued working for Employer. He transferred to Collier County in January, 2013 and continued working for Employer there. In Collier County his work was indoors loading and sorting packages. On May 15, 2013 he severely twisted his left ankle while loading packages and immediately reported the injury to his supervisor. He continued to work the remainder of that shift and went home. By the next workday his ankle was swollen and he could hardly walk on it. He called off work because of the ankle but was told to report anyway and continued working for Employer, but at a position requiring less walking.

5. Claimant sought medical care on his own with Dr. Crist but only saw him a few times. Dr. Crist ordered an MRI. He continued to work for Employer eventually

returning to heavier duty work. The left ankle continued to bother him and he sought medical care in August, 2014 with Dr. Lam. He continued to treat with Dr. Lam and eventually brought in a light duty work slip to Employer. At that time Employer authorized Advanced Medical for Claimant's ankle. Claimant first went to Advanced Medical in November 2014, about a year and a half after the May 15, 2013 injury. In January, 2015 Employer denied care for the ankle.

6. Claimant saw Dr. Schwartz in February, 2015 for a second opinion, and then returned to Dr. Lam for surgery on the left ankle. In March, 2015 E/C deposed Claimant. In May, 2015 Claimant went to Dr. Schwartz for an IME evaluation. [E/C's objection to the IME is not discussed here as it is not relevant to the issue for determination today, and the medical records are only in evidence for historical purposes, not opinions].

7. The documentary evidence included multiple medical records, admitted for historical purposes, as well as transcripts of Claimant's deposition and recorded statement to the adjuster. In addition to reviewing the above the undersigned personally observed Claimant testifying at the hearing. Claimant's presentation, demeanor, expressions, reactions and explanations during direct testimony as well as during vigorous cross examination were consistent with the documentary evidence viewed as a whole. I found Claimant's history of being an athlete fully consistent with not considering every incident where he'd twisted his ankle to be an "injury" or memorable. I find Claimant believable in his testimony that he did not recall the December, 2012 incident (while working for Employer) with his ankle until reminded of it by his wife after his deposition, and that he did not consider it to be an injury or accident when questioned about it since he never wrapped it, or sought treatment for it and it resolved on its own. Claimant's second visit to Dr. Schwartz was after Claimant's deposition and his refreshed recollection of the earlier incident with his ankle, so Claimant's informing Dr. Schwartz of it at that time is fully consistent with his overall testimony.

8. I find Claimant did not deny prior ankle injuries to employer representatives JP, Eric Downing and Cheryl Sprayberry, despite his deposition response to E/C's counsel's questioning. Claimant testified at the merits hearing the

employer representatives never asked him about prior ankle injuries, and that his deposition response was due to misunderstanding the questioning. Having observed Claimant's demeanor and manner while testifying, and reviewing the questioning at deposition I accept Claimant's trial testimony in this regard. Other than Claimant's deposition testimony and subsequent clarification at the merits hearing there was no other evidence regarding Claimant's statements to the employer representatives.

9. I am aware there are facts in the record which could be construed to reach a different result than the one set forth above. I have not referenced all the testimony and evidence presented, but summarized testimony and evidence I found probative in regard to the pending issues.

## CONCLUSIONS OF LAW

Section 440.105 (4) (b), Florida Statutes (2012) provides in pertinent 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 benefit 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."

E/C's defenses encompass all three subsections of the above statute, each of which deals with a slightly different format in which the alleged misstatement is made. However, common to all three is the requirement of intent, that the statement be **knowingly** made. The person making the statement must know it is false, misleading, etc. when the statement is made. The intent of the declarer is determined by the finder of fact. All three also have in common the requirement that the alleged misstatement be

made for the purpose of obtaining benefits under Chapter 440. E/C has the burden of proof for this affirmative defense, and I find that burden was not met.

Claimant's manner and demeanor while testifying at the merits hearing were candid, without guile, and were also consistent with the medical timeline and his past experiences as an athlete. Any witness's testimony is shaped in some manner by the personal life experiences and subjective perceptions of the witness. The Claimant as an active, athletic, man may dismiss as inconsequential- and therefore not memorable- the twisting of an ankle which did not require medical attention or even taping; to someone less active the same incident might be much more significant. I do not find sufficient evidence to support a finding the Claimant knowingly made false, fraudulent, misleading or incomplete statements for the purpose, or in support, of obtaining benefits under Chapter 440.

The medical records containing the alleged misstatements were primarily those of doctors outside of the workers' compensation arena as Claimant largely treated with private insurance – not under workers' compensation. Even though he was treating outside of workers' compensation he did not hide from them the fact that the injury he sought care for happened at work. I acknowledge there are some inconsistencies in the documentary evidence regarding Claimant's ankle, depending on who was taking the history, the particular questions asked, and the lapse of time between December, 2012 and much of the medical treatment for the May, 2013 injury. I do not find, however, these rise to the level of a violation of Section 440.105 (4) (b).

Notwithstanding the findings herein, I note this hearing was bifurcated to address solely E/C's 440.105 (4) (b) defenses and the findings herein are limited solely to that issue. At the second part of the bifurcated hearing other evidence may be presented that could impact the findings set forth herein as they may relate to the remaining outstanding issues other than the 440.105 (4) defenses.

**IT IS HEREBY ORDERED AND ADJUDGED THAT**

I find the evidence presented does not support a finding that Claimant violated Section 440.105 (4) (b) of the Florida Statutes. Jurisdiction is reserved as to all other

issues raised in the petitions for benefits pending at the time of this first half of the bifurcated hearing and the defenses thereto.

DONE AND ORDERED in Fort Myers, Lee County, Florida on the 20 day of August, 2015.

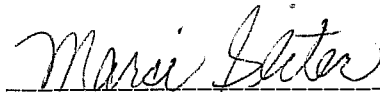


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Kathy A. Sturgis  
Judge of Compensation Claims  
4379 Colonial Boulevard Suite 200  
Fort Myers, Florida 33966  
(239) 938-1159

CERTIFICATE OF ENTRY AND MAILING OF ORDER

THIS IS TO CERTIFY that the above Order was entered in the Office of the Judge of Compensation Claims and a copy was served by mail or email on each party shown below and their respective attorneys, if represented, this 20<sup>th</sup> day of August, 2015.



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Deputy District Clerk to Judge Sturgis

Cladiu Bursuc  
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Naples, FL 34117

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CLADIU BURSUC  
OJCC#15-000361KAS

EXHIBIT A

- Exhibit #1: Petition for benefits filed 01/08/2015 and Response to said petition.  
Exhibit #2: Mediation Conference Report.  
Exhibit #3: Claimant's Unopposed Motion to Amend Date of Accident, proposed Order, and Order Correcting Date of Accident. Jurisdiction reserved on Petition for Benefits and Medical Exempt Records filed on April 23, 2015/Not ripe, not mediate  
Exhibit #4: Uniform Pretrial Stipulation, E/C's Addendum to Pretrial Stipulation, Order of Deficiency on Pretrial Stipulation, E/C's Amended Pretrial Stipulation, Claimant's Amended Pretrial Stipulation, and Order Approving Pretrial Stipulation.  
Exhibit #5: E/C's Objection to Admissibility of Medical Opinions of Dr. Schwartz and Claimant's Response to E/C's Objection (basis for bifurcation).  
Exhibit #6: Claimant's trial memorandum for purposes of argument only and composite of case law relied upon in Claimant's Trial Memorandum.  
Exhibit #7: E/C's trial memorandum for purposes of argument only.  
Exhibit #8: Claimant's Motion to Admit Medical Records (Advanced Medical of Naples), Claimant's, Renewed and Unopposed Motion to Admit Medical Records (Medical/Exempt) and Order, Admitting Medical Records.  
Exhibit #9: Claimant's UPS Job Description and UPS Personnel File.  
Exhibit #10: Claimant's Certificate of Authenticity of Medical Records (Family Foot & Leg Center - Dr. Kevin Lam, Parts 1 through 3). [historical purposes only]  
Exhibit #11: Deposition transcript of Dr. Jeremy Schwartz, Parts 1 through 3 (fact/history only).  
Exhibit #12: Deposition transcript of Dr. John Crist, with exhibits. - (historical purposes only)  
Exhibit #13: Deposition transcript of Jaymee Lynn Szeliga (Med. Records Custodian/Physicians Regional - historical purposes only)  
Exhibit #14: Deposition transcript of Claims Adjuster, Andrew Schallert, and exhibits.  
Exhibit #15: E/C's Deposition transcript of Claimant taken on 03/13/2015.  
Exhibit #16: Recorded interview transcript and audio recording of Claimant, taken 11/12/2014