

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

Karl A. Spellman,
Employee/Claimant,

OJCC Case No. 14-000258MAM

vs.

Accident date: 12/2/2013

City of Tampa/Commercial Risk
Management, Inc.,
Employer/Carrier/Servicing Agent.

Judge: Mark A. Massey

FINAL COMPENSATION ORDER

This cause came for hearing before the undersigned on 05/31/16. Present and representing the claimant was Tonya Oliver, Esquire. Present and representing E/C was Gray Sanders, Esquire. The hearing was held to adjudicate the petition for benefits filed 02/23/16.

CLAIMS¹

1. Compensability of hypertension reinstated; rescission of fraud defense.
2. Continued authorization of medical care and treatment with Dr. Fernandez.
3. Reimbursement for travel expenses associated with EMA appointment.
4. Attorney's fees and costs per section 440.34, F.S.
5. Attorney's fees and costs to defend fraud/misrepresentation defense.

DEFENSES

1. All benefits denied as of 03/10/16 due to misrepresentation/fraud based on claimant's intentional misrepresentations.
2. EMA travel expenses are not reimbursable as a Chapter 440 benefit.

¹ The petition also contained a claim for reimbursement of past bills from Injured Workers Pharmacy. However, that issue was resolved prior to trial.

3. No attorney's fees or costs due.

The following items were marked into evidence. The letter "D" in parentheses followed by a number refers to the OJCC docket number.

JUDGE'S EXHIBITS

1. Petition for benefits filed 02/23/16 (D-236, 237)
2. Response to petition filed 03/10/16 (D-238)
3. Amended response to petition filed 04/18/16 (D-251)
4. Pre-Trial Stipulation filed 05/06/16 (D-264)
5. Claimant's Trial Memorandum, for argument only (D-272)
6. E/C's Trial Memorandum, for argument only (D-275)

JOINT EXHIBITS

1. Deposition of Cathy Weiser taken 03/04/15 with exhibits (D-200-207)
2. Deposition of Aldo Bartolone taken 03/16/15 with exhibits (D-158, 199)
3. Deposition of Dr. Fernandez taken 11/11/14 and 06/01/15 with exhibits (D-113-115)
4. Deposition of Kevin O'Brien, Esquire taken 01/12/16 with exhibits (D-218-219)
5. Deposition of Michael Steinberg, Esquire taken on 01/18/16 with exhibits (D-221, 222)
6. Deposition of claimant taken 05/19/14 with exhibits (D-224, 225)
7. Deposition of claimant taken 12/18/14 with exhibits (D-227, 228)

CLAIMANT'S EXHIBITS

1. Deposition of Cathy Weiser taken 05/09/16 with exhibits (D-271)
2. Medical record composite (D-232-235)

EMPLOYER/CARRIER'S EXHIBITS

1. Records from State of Florida Department of Highway Safety & Motor Vehicles (D-141)
2. Records from Hillsborough County Tax Collector's Office (D-142)
3. Driver's license and vehicle tag records (D-143)
4. Bankruptcy filing (D-145)
5. Non-City Employment Disclosure form (D-146)
6. Medical record composite and order admitting same (D-133, 188, 196)
7. Department of Veterans Affairs sample benefit letter (D-208)
8. Surveillance reports (D-210-212)
9. Transcript of audio recording of hearing held 02/24/16 (D-246)
10. Pension/Employment Application (D-250)
11. VA Statement in Support of Claim (D-274)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant worked as a police officer for the City of Tampa. In 2013 he was diagnosed with uncontrolled hypertension, which was eventually accepted as compensable under the heart/lung presumption. See section 112.18, Fla. Stat. Medical treatment was authorized and provided, and some indemnity benefits have been paid. However, all benefits have now been denied based on misrepresentation/fraud pursuant to sections 440.09(4) and 440.105(4), Fla. Stat.

E/C allege three separate episodes of misrepresentation on the part of the claimant. For the reasons outlined below, I find that claimant did not make intentional misrepresentations for the purpose of maintaining or securing workers' compensation benefits, and the misrepresentation defense is respectfully rejected.

Disabled Veteran's License Tag

Claimant testified in deposition that he had served in the U.S. Navy, that he had received an honorable discharge, and that he had no service-connected disability. Through surveillance, however, E/C discovered that claimant had a disabled veteran's license tag on his car. E/C argue that claimant misrepresented himself to the Department of Motor Vehicles as being a disabled veteran; and, more significantly for purposes of the fraud defense, that he then committed a further misrepresentation when he denied in deposition that he had ever represented himself as a disabled veteran, and denied ever attempting to obtain a disabled veteran's tag.

Claimant maintains that he was given the disabled veteran's tag by mistake or administrative error on the part of the DMV clerk, and that he brought the mistake to the clerk's attention, but was told to hold on to the tag anyway. Claimant states he only wanted a U.S. Navy tag. I do not find the totality of the evidence on this to be sufficiently persuasive that there was an intentional misrepresentation on the part of the claimant, either at the time of obtaining the tag, or when he testified about it in deposition (or hearing). There are at most some unanswered questions regarding the circumstances of his obtaining the tag, and the documentation he submitted to the DMV, but overall I find that E/C have not carried their burden of proving this aspect of the misrepresentation defense. In so finding, I have not overlooked the testimony of attorney Michael Steinberg, but found same to be inconclusive and speculative at best in regard to the specific issue at hand.

Bankruptcy Filings

Claimant and his wife jointly filed for bankruptcy in early 2014, during the course of the workers' compensation claim. They were represented in the bankruptcy by attorney Aldo Bartolone, who testified by deposition. In the bankruptcy filings, claimant reported his income

from workers' compensation (although it was inaccurately recorded on the form which was filed). However, where the forms ask for disclosure of any "suits and administrative proceedings," the pending workers' compensation legal claim/action was not listed. E/C argue that the failure to disclose the existence of the workers' compensation legal claim on that portion of the bankruptcy forms is a misrepresentation that bars claimant's pursuit of that claim. I can find no authority for this proposition. Further, attorney Bartolone stated claimant did disclose the existence of the claim, but it was reported (by his office staff) only in the income section of the form, and not in the administrative proceeding section, as perhaps it should have been. I find the evidence to be insufficient to prove that claimant made a misrepresentation in the bankruptcy proceeding, or that any alleged misrepresentation in the bankruptcy proceeding was made knowingly and with the intent of securing workers' compensation benefits.

Representations to Treating Physicians

Claimant's authorized treating cardiologist, Dr. Joel Fernandez, was asked in deposition if claimant had told him about an incident at work where someone put a gun to his head. Dr. Fernandez answered "Yes" (Deposition of Dr. Fernandez taken 11/11/14, p.34) but did not elaborate. He was asked about it again in his second deposition, and stated "I believe he mentioned that to me once. And it was in the middle of discussing stress and how he's been. But I don't remember – I cannot recall his narrative." (Deposition of Dr. Fernandez taken 06/01/15, p.13). [In reviewing Dr. Fernandez's records, I am unable to locate an office note which contains a history referring to a gun to the head. Therefore it is unclear to me where this history came from].

There is also an office note from Dr. Pandya, psychiatrist, which states claimant gave him

a history “where a guy had put a gun to his face.” Dr. Pandya noted that there was no official report of such an incident and the information therefore cannot be verified. Nevertheless, Dr. Pandya diagnosed claimant with severe anxiety related to his hypertension and possible post-traumatic stress disorder.

In deposition and at hearing, claimant testified that there was never an incident where someone put a gun to his head. He further testified that he never told either Dr. Fernandez or Dr. Pandya about anyone putting a gun to his head, and has no idea where that history came from.

E/C argue that claimant misrepresented his history to his physicians by telling them about an incident involving a gun that never really happened, and that he made further misrepresentations when he denied having provided such a history to the physicians. E/C further argue that claimant made such misrepresentations to his physicians with the intent and purpose of enhancing his claim for workers’ compensation benefits by embellishing his history of stress related incidents; and that he compounded the misrepresentation by later denying he had provided such a history, once he realized it could easily be proven untrue.

I find that claimant did report to Dr. Fernandez and Dr. Pandya at least one stressful incident which involved the threat of physical violence, with the common thread being that claimant felt deserted or abandoned by his co-workers.² Dr. Pandya specifically referred to a gun being used. Dr. Fernandez seemed to agree that claimant had mentioned a gun, but had no independent recollection of claimant’s “narrative.” For his part, claimant insists that there was only an incident involving knives, but not one involving a gun.

While it is plausible that claimant intentionally misled his physicians by embellishing his history, it is equally plausible that something got “lost in translation” by one or both of the

² See office note of Dr. Fernandez dated 05/02/14.

physicians recording the history. There is no question that there was a use of force incident which involved some kind of weapon, whether it was a knife or a gun. I accept claimant's testimony that there was no mention, by him, of a gun, and find that E/C have not carried their burden of proving misrepresentation by a preponderance of the evidence.

EMA TRAVEL EXPENSES

Pursuant to an *ore tenus* notice of conflict in medical opinions made by claimant's counsel at an earlier proceeding in this matter, the undersigned appointed, on my own motion, an expert medical advisor (EMA) per section 440.13(9)(c), Fla. Stat. Claimant attended the EMA appointment and incurred certain travel expenses relating thereto. Claimant now seeks reimbursement of the travel expenses from E/C.

There is no question that an employer and carrier are responsible for reasonable transportation costs associated with authorized medical treatment. *Sam's Club v Bair*, 678 So. 2d 902 (Fla. 1st DCA 1996); *Remington v City of Ocala*, 940 So. 2d 1207 (Fla. 1st DCA 2006) (E/C are responsible for providing medical treatment, and transportation to obtain the treatment is part of the cost of treatment). However, an EMA evaluation is not "treatment" for which E/C is responsible for providing under the statute (as interpreted). I find that transportation costs incurred to attend an EMA evaluation are not the responsibility of E/C under the auspices of general medical transportation costs. They *may* be awardable as a taxable litigation cost, but that is not the issue before me. Nor should this ruling be construed as a ruling as to the reasonableness of the costs incurred. The claim for reimbursement of EMA travel expenses, as a Chapter 440 benefit, is respectfully denied.

WHEREFORE it is hereby ORDERED AND ADJUDGED:

1. The fraud/misrepresentation defense is rejected.
2. E/C shall reinstate claimant's benefits under Chapter 440.
3. The claim for reimbursement of travel expenses to the EMA is denied.
4. Claimant's counsel is entitled to a reasonable attorney's fee and taxable costs on the issues on which claimant prevailed. Jurisdiction is reserved as to amount if the parties are unable to agree. Jurisdiction is also reserved as to any other prevailing party cost issues.

DONE AND ORDERED this 21st day of June, 2016, in Tampa, Hillsborough County, Florida.




Mark A. Massey
Judge of Compensation Claims
Division of Administrative Hearings
Office of the Judges of Compensation Claims
Tampa District Office
6302 E. Dr. Martin Luther King Jr. Blvd., Suite 460
Tampa, Florida 33619
(813)664-4000
www.fljcc.org

COPIES FURNISHED:

Commercial Risk Management, Inc.
PO Box 18366
Tampa, FL 33679
DOAHemail@crm-su.com

Tonya Anne Oliver, Esquire
Bichler, Oliver, Longo & Fox, PLLC
13031 West Linebaugh Avenue, Suite 102
Tampa, FL 33626
tonya@bichlerlaw.com, claudine@bichlerlaw.com

L. Gray Sanders, Esquire
Barbas Nunez Sanders Butler & Hovsepian
1802 West Cleveland Street
Tampa, FL 33606
gsanders@barbaslaw.com, ycastro@barbaslaw.com

I HEREBY CERTIFY that the foregoing order
was posted to the DOAH website
www.jcc.state.fl.us