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

Jorge Carrazana,
Employee/Claimant,

vs.

OJCC Case No. 14-003324MRH
Accident date: 11/4/2013
Judge: Marjorie Renee Hill

Renovations Property Management, LLC/Castlepoint Florida,
Employer/Carrier/Servicing Agent.
_____/

FINAL COMPENSATION ORDER

THIS CAUSE came on for a Final Hearing on January 8, 2015.[1] Claimant was represented by Albert Marroquin and the E/C was represented by Andrew Borah. Adam Nott was Claimant's translator. The hearing and this Final Order resolve the Petition for Benefits filed May 8, 2014. Jurisdiction is reserved to address the Petition for Benefits filed January 6, 2015.

Claimant seeks authorization of a cubital tunnel release surgery. He asserts Dr. Gilbert's EMA opinion that the work accident is not the major contributing cause of the need for the surgery should be rejected for, *inter alia*, failing to meet *Daubert*[2] admissibility requirements.

Daubert Challenge

To timely raise a *Daubert* challenge in the workers' compensation context, the moving party must include the objection in the pre-trial stipulation, and make a contemporaneous objection during the expert's deposition. *See U. S. Sugar Corp. v. Henson*, 787 So. 2d 3, 12-13 (Fla. 1st DCA 2000) (addressing timeliness in challenging an expert under the *Frye* standard). Although the *Daubert* standard now applies, logic would suggest the reasoning the First DCA used in *Henson* would apply equally in the *Daubert* context, especially when considering the more stringent *Daubert* standard.

Once a timely *Daubert* objection has been made, the proper method of attacking an expert is by a motion to strike or motion in limine containing specific objections sufficient to place the Judge and the opposing party on notice of the deficiencies of the challenged expert. *See Rushing v. Kansas City Southern Ry.*, 185 F.3d 496, 506 (5th Cir. 1999); *FDIC v. Meyer*, 781 F.2d 1260, 1268 (7th Cir. 1986) (refusing to treat "response" as motion to strike where it failed to alert the court to alleged deficiencies in opposition's affidavit). Depending upon the basis of the challenge, the motion should be supported by "conflicting medical literature and expert

[1] The parties' stipulations, claims, defenses, witnesses and exhibits, all of which were considered in rendering this Order, are listed in Appendix A attached to this Order.
[2] *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

testimony," and be "scientifically related to the disputed facts at issue in the case." *United States v. Hansen*, 262 F.3d 1217, 1234 (11th Cir. 2001). Unsubstantiated facts, suspicion, or theoretical questions regarding the expert's qualifications are insufficient. *See Rushing*, 185 F.3d at 506.

Here, Claimant's counsel first raised a *Daubert* objection on December 9, 2014 in an Amendment to the Pre-Trial Stipulation. The Amendment provided: "Claimant amends to object to the E/C's affirmative defense of major contributing cause and to the medical reports of Drs. Easterling and Gilbert, and to the deposition transcript of Dr. Gilbert, as their opinions do not meet the *Daubert* standard under section 90.702, Florida Statutes."

Claimant's counsel did not raise a *Daubert* objection during Dr. Gilbert's deposition, and did not file a motion in limine, a motion to strike, or anything else containing more specificity than the conclusory assertion contained in the December 9, 2014 Amendment to the Pre-Trial Stipulation. Because no contemporaneous objection was made during Dr. Gilbert's deposition, the E/C had no opportunity to cure any alleged deficiency. *See Henson*, 787 So. 2d at 13 (quoting Florida Rule of Civil Procedure 1.330(d)(3)(A), which provides: "Objections to the competency of a witness or the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition unless the ground of the objection is one that might have been obviated or removed if presented at that time." (Emphasis added). Moreover, because the challenge was not made with specificity, it failed to alert me to alleged deficiencies in Dr. Gilbert's opinion. When considering the foregoing, the *Daubert* challenge was both untimely and facially insufficient.

EMA's Opinion

An EMA's opinion is presumptively correct unless the JCC determines there is clear and convincing evidence to the contrary. *See* § 440.13(9)(c), Fla. Stat.; *Mobile Med. Indus. v. Quinn*, 985 So. 2d 33, 36 (Fla. 1st DCA 2008). An EMA's opinion has "nearly conclusive effect." *Pierre v. Handi Van, Inc.*, 717 So. 2d 1115, 1117 (Fla. 1st DCA 1998); *Amos v. Gartner, Inc. & Sentry Ins.*, 17 So. 3d 829 (Fla. 1st DCA 2009). "It creates a presumption that can be overcome only by 'evidence . . . of a quality and character so as to produce in the mind of the JCC a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established [and therefore the falsity or inaccuracy of the expert medical advisor's opinion]." *Walgreen Co. v. Carver*, 770 So. 2d 172, 174 (Fla. 1st DCA 2000); *McKesson Drug Co. v. Williams*, 706 So. 2d 352, 353 (Fla. 1st DCA 1998). The mere disagreement with the opinion of another physician, standing alone, is insufficient to undermine the trustworthiness of the EMA's opinion. *See Brandywine Convalescent Care & Assoc. Indus. Ins. Co., Inc.*, 1D13-0982 (Fla. 1st DCA 2013); *Travelers Ins. v. Armstrong*, 118 So. 3d 865, 866 (Fla. 1st DCA 2013).

Here, Dr. Gilbert is a board certified surgeon, who limits his practice to hand, wrist, and elbow disorders. (Gilbert depo. p. 6). In approximately 2005, he was sued by an elderly patient who underwent cubital tunnel surgery, developed scar tissue, and had alleged worsening of her nerve function compared to the preoperative condition. Ultimately the insurance company settled the case for approximately $200,000.00. He was recently sued by another patient who

underwent carpel tunnel surgery, who alleges the nerve is not working after the surgery. That case has not been resolved. (Gilbert depo. pp. 4-5). Workers' compensation patients make up approximately 40% of his practice, independent medical examinations make up approximately 5% of his total practice "at the most," and approximately 90% of the IMEs are performed for employer/carriers. However, for that portion of his "legal work" practice outside of workers' compensation, the division is 50%/50% between plaintiff and defense. (Gilbert depo. pp. 7-8). Dr. Gilbert believed Claimant was a no-show for his previously scheduled EMA appointment. (Gilbert depo. pp. 10-12).

Dr. Gilbert opined Claimant has cubital tunnel syndrome, but the work accident is not the major contributing cause of the condition. He noted cubital tunnel syndrome is "exceedingly common," and does not have to be caused by an accident. He opined Claimant's condition could have been idiopathic or preexisting, but Claimant's "laceration of a completely unrelated nerve in the finger is not consistent with the development of cubital tunnel syndrome" of the elbow, and there was "no scientific reason" for the two to be related. (Gilbert depo. pp. 13-15).

He explained that just because prior medical records do not mention the condition does not mean Claimant did not have the condition, and just because there was not another known explanation for Claimant's condition does not mean the condition was caused by the work accident by default, any more than a later diagnosis of skin cancer in the same area would be caused by the work accident by default. Claimant's carpel tunnel release involved the median nerve, cubital tunnel involves the ulnar nerve, and Claimant's lacerated radial digital nerve in his finger has no involvement with the ulnar nerve. (Gilbert depo. pp. 14-15, 17, 21). Ultimately, he opined there was "no conceivable way" Claimant's cubital tunnel syndrome was related to the work accident. (Gilbert depo. pp. 15, 21-23).

Claimant's counsel argues Dr. Gilbert's opinion should be rejected because he only saw Claimant once, and Dr. Gonzalez-Hernandez, Claimant's authorized treating physician, is in a better position to opine as to the cause of Claimant's need for cubital tunnel release, because he treated Claimant's injury immediately after it occurred and performed the carpel tunnel release surgery. Claimant's counsel also argues Dr. Gilbert has had two lawsuits filed against him, and the lawsuits involved cubital tunnel release and carpel tunnel release patients and, finally, based on the percentage of E/C IME's he performs, he is pre-disposed in favor of the E/C.

Under the facts of this case, none of these arguments point to clear and convincing evidence sufficient for me to reject Dr. Gilbert's EMA opinion. In every case in which an EMA is appointed, the EMA will only see the Claimant once, and typically there is an authorized treating physician who is more familiar with the Claimant's condition. Those facts are essentially presupposed, and do not render the EMA's opinion untrustworthy. Similarly, the fact that Dr. Gilbert was sued by two patients following a cubital tunnel release and a carpel tunnel release does not mean Dr. Gilbert committed malpractice, or is unqualified to render an opinion here. Finally, there is no evidence that Dr. Gilbert is unable to objectively render an opinion or is somehow unqualified to render an opinion simply because 5% of his total practice is devoted to IMEs and 90% of that 5% involves IMEs for the defense. When considering the evidence in

its entirety, there is no clear and convincing evidence sufficient for me to reject Dr. Gilbert's EMA opinion. Based on the foregoing, it is hereby,

ORDERED AND ADJUDGED that the claim for cubital release surgery is **DENIED.** The claim for costs and attorney fees is **DENIED.**

DONE and ELECTRONICALLY SERVED this 9th day of January, 2015, in Chambers, in Alachua County, Florida.

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APPENDIX A

Stipulations

1. The Judge of Compensation Claims has jurisdiction over the parties.
2. An employer/employee relationship existed on the date of the accident.
3. Workers' compensation insurance coverage was in effect on the date of the accident.
4. The accident was accepted as compensable.
5. Dr. Gonzalez-Hernandez is the authorized treating physician.

Claimant Issues

1. Authorization of cubital tunnel release surgery
2. Attorney fees and costs

Employer/Carrier Defenses

1. Cubital tunnel release surgery is not medically necessary.
2. The work accident is not the major contributing cause of the need for a cubital tunnel release.
3. No costs or attorney fees are due or owing.

Joint Exhibits

1. Deposition of Dr. Gilbert taken, November 20, 2014
2. Dr. Gilbert's EMA report
3. Parties' Pre-trial Stipulation

Claimant Exhibits

1. Medical records and office notes from Dr. Gonzalez-Hernandez, e-filed June 14, 2014, September 30, 2014, and December 9, 2014.
2. Deposition of Dr. Gonzalez-Hernandez taken, December 19, 2014
3. Amendments to Pre-trial Stipulation dated September 30, 2014 and December 9, 2014.
4. Order Granting Motion to Admit Medical Records entered November 3, 2014
5. Order Granting Motion to Admit Medical Records entered January 2, 2015

Employer/Carrier Exhibits

1. None.

Judge Exhibits

1. Claimant's trial memorandum (considered for argument only).
2. E/C's trial memorandum (considered for argument only).

Live Testimony

1. Jorge Carrazana