

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

David Thurman,
Employee/Claimant,

OJCC Case No. 15-020205MGK

vs.

Accident Date: 3/19/2015

Sea Level Marine , LLC/AmTrust North
America of Florida,
Employer/ Carrier/Servicing Agent.

Judge: Margret G. Kerr

FINAL MERITS ORDER

THIS CAUSE came before the undersigned Judge of Compensation Claims (hereinafter “JCC”), for a Merits Hearing on June 27, 2016, regarding the Petitions for Benefits (PFBs) filed January 19, 2016 and March 29, 2016. The Claimant was represented by Kevin Gallagher Esq., and the Employer/Carrier/Servicing Agent (hereinafter “E/C/SA”), was represented by Andrew Borah Esq., and Kate Albin Esq. This Order ensues.

EXHIBITS:

CLAIMANT:

1. Petitions for Benefits, filed 1/19/2016 and 3/29/2016 (ID#20,35).
2. Responses to Petitions for Benefits, filed 2/18/2016 and 4/19/2016 (ID#28,40).
3. Deposition of Dr. Edward Suarez with attached exhibits, filed 6/23/2016 (ID#52).¹ – fact only

E/C:

1. Deposition of Dr. Rafael Fernandez, filed 6/22/2016 (ID#51).
2. Medical Records of Orthopedic Associates of South Broward, filed 5/13/2016 (ID#45).
3. Petition for Benefits, filed 9/1/2015 (ID#1).

JOINT:

1. Deposition of adjuster, Lisa Sabbatini, filed 6/22/2016 (ID#52).
2. Deposition of Claimant, David Thurman, filed 6/22/2016 (ID#50).

¹ Dr. Suarez’ opinions are admitted for fact purposes only, but are not admissible as opinion evidence as he is not an authorized treating physician, an IME or an EMA.

JCC:

1. E/C Trial Memorandum, filed 6/23/2016 (ID#53) – identification only.
2. Claimant Trial Summary, filed 6/23/2016 (ID#56) – identification only.
3. Uniform Pre Trial Stipulation and Questionnaire, filed 5/20/2016 (ID#47).
4. E/C Amendment to Pre Trial Stipulation, filed 5/25/2016 (ID#48).
5. By agreement of the parties, the undersigned takes judicial notice of the documents contained in the OJCC docket.

CLAIMS:

1. Authorization and Payment of Dr. Suarez as Claimant’s one-time change in physician.
2. Authorize MRI of the left knee.
3. Authorize orthopedic evaluation of the left knee.
4. Authorize physical therapy as recommended by Dr. Hodor.
5. Attorney’s Fees and Costs.

DEFENSES:

1. E/C timely authorized Dr. Philip Lozman as Claimant’s one-time change in physician. When Claimant requested an earlier appointment, E/C timely authorized Dr. Jay Stein.
2. Claimant has an authorized orthopedic and has consistently failed to attend appointments.
3. Orthopedic surgical evaluation not medically necessary, and is not recommended by the authorized treating physician.
4. MRI of left knee is not medically necessary, and is not recommended by the authorized treating physician. Claimant has self procured a left knee MRI.
5. Physical therapy for the left knee is not medically necessary.
6. No attorney’s fees or costs owed.

After due consideration of the matter and having the opportunity to review and consider the aforesaid exhibits which were admitted into evidence, and having endeavored to resolve all conflicts of facts in the evidence presented herein, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

1. The undersigned Judge of Compensation Claims has jurisdiction over the parties and the subject matter of this case. The parties agree the claim is properly handled under the

Florida Workers' Compensation Act, not the Jones Act or the Longshore and Harbor Workers' Compensation Act.

2. Any and all issues raised by way of Petitions for Benefits (PFBs), but which issues were not dismissed or tried at hearing, are presumed resolved, or in the alternative, deemed abandoned by the claimant and, therefore, are denied and dismissed with prejudice. See, *Scotty's Hardware v. Northcutt*, 883 So.2d 859 (Fla. 1st DCA 2004). The exception is a petition for benefits filed 6/27/2016, which has not yet been mediated and is therefore not yet ripe for adjudication.

3. The claimant sustained a compensable injury to his left knee in the course and scope of his employment on 3/19/2015.

4. The claimant received medical treatment for his left knee at M.D. Now who referred the claimant to an orthopedist and he came under the care of Dr. Richard Strain.

5. On 9/1/2015, Claimant filed a PFB requesting an update appointment with Dr. Strain.

6. On 9/16/2015, the claimant's attorney requested a one-time change in treating physicians to replace Dr. Strain.

7. On 9/18/2016, the adjuster faxed a letter to the claimant's attorney identifying Dr. Phillip Lozman as the claimant's one time change, and scheduled an appointment for 11/16/2015.

8. On 10/9/2015, the claimant's attorney sent E/C counsel an e-mail indicating that the claimant is in too much pain to wait to 11/6/2015.

9. On 10/13/2015, E/C counsel notified counsel for Claimant E/C was authorizing Dr. Jay Stein to see the claimant on 10/21/2015.

10. The claimant did not attend the appointment with Dr. Stein, and instead treated with Dr. Suarez on 12/10/2015, taking the position E/C had not timely provided a one-time change in physicians in accordance with F.S 440.13(f)(2).

11. Fla. Stat. §440.13(2)(f) states:

“Upon the request of the employee, the Carrier shall give the employee the opportunity for one change of physician during the course of treatment for any one accident. Upon the granting of a change of physician, the original authorized physician in the same specialty as the changed physician shall become de-authorized upon written notification by the Employer or Carrier. The Carrier shall authorize an alternate physician who shall not be professionally affiliated with the previously physician within five days

after the receipt of the request. If the Carrier fails to provide a change of physician as requested by the employee, the employee may select the physician and such physician shall be considered authorized if the treatment being provided is compensable and medically necessary.”

12. E/C argues the alternate physician was timely authorized, not once, but twice within five calendar days of the Employer/Carrier’s receipt of the request. E/C authorized Dr. Lozman on 9/18/2015, two days after Claimant’s written request for a one-time change in physicians.

13. E/C further argues they had no obligation to alter the choice of Dr. Lozman, as there is no requirement in Fla. Stat. §440.13(2)(f) or in case law that the initial appointment with the alternate physician occur within a certain period of time. However, as E/C was advised on 10/9/2015 that Claimant was in too much pain to wait for the scheduled appointment with Dr. Lozman, they counted this as a second request for a one-time change within four days, and again voluntarily and timely provided Dr. Stein for a date only eight days away.

14. E/C further argues Claimant did not present to his own physician until 12/10/2015, well after the date of the original appointment with Dr. Lozman, which they argue contradicts his position he was in too much pain to wait for the appointment with Dr. Lozman in the first place. E/C further argues the second request was therefore simple gamesmanship and an effort to manipulate the facts of the case to allow him to choose his own physician.

15. Claimant argues the original appointment was voided by E/C’s action in scheduling the appointment with Dr. Stein and cancelling the appointment with Dr. Lozman. Claimant further argues the provision of Dr. Lozman was void *ab initio* as he E/C paid him \$1,200.00, which is well above fee schedule.

16. Claimant argues therefore, the one-time change in treating physician became Dr. Stein, who was not authorized within 5 days of the original request and therefore Claimant was entitled to treat with the physician of his choice.

17. Claimant did not take the deposition of Dr. Lozman or any other individual in his office to provide documentation of the basis of the \$1,200.00 payment.

18. E/C argues as the appointment with Dr. Lozman was cancelled at the request of the Claimant and scheduled with a different physician, the issue of the basis for the \$1,200.00 fee is irrelevant.

19. I find Claimant has failed to establish the payment to Dr. Lozman was in violation of the fee schedule.

20. I find merit in E/C's argument that Dr. Lozman was timely authorized as the one-time change of treating physician within 5 days of the written request by Claimant.

21. As Claimant then contacted E/C and requested a different physician, and within 5 days of this request, E/C authorized Dr. Stein, I find this authorization was also timely.

22. As I find the authorization of both Drs. Lozman and Stein were timely in accordance with F.S 440.13(2)(f), I conclude Claimant had no justification for self procuring treatment with Dr. Suarez.

23. I conclude Dr. Suarez is not an authorized treating physician and his opinions are therefore inadmissible. I further conclude E/C has no responsibility to pay the bills of Dr. Suarez.

24. Claimant has also requested provision of an orthopedic evaluation of the left knee, an MRI of the left knee and physical therapy.

25. The burden is on the Claimant to show entitlement to medical treatment, particularly as here, where the condition is not readily observable.

26. The records of M.D.Now, the PCP, and Dr. Strain, the authorized treating physician, were not placed into evidence.

27. The Claimant did not avail himself for an IME.

28. Claimant has provided no admissible medical evidence of the need for an orthopedic evaluation, an MRI of the left knee, or physical therapy.

29. E/C argues the only medical testimony is that of their IME, Dr. Rafael Fernandez, who testified via deposition.

30. Dr. Fernandez testified that after taking a history from Claimant, he examined him and reviewed his prior MRI film from 3/7/2016, as well as the medical records. Dr. Fernandez provided his opinion Claimant is at MMI with a 1% PPI rating, and could return to work with no restrictions. He should continue the exercises he was taught in physical therapy as a home exercise program, but no further physical therapy or treatment was medically necessary.

31. I conclude the Claimant has failed to carry his burden to provide medical evidence to show he is entitled to an orthopedic evaluation, an MRI of the left knee or physical therapy.

Based on the foregoing, it is hereby:

ORDERED AND ADJUGED THAT:

1. The claim for authorization of Dr. Suarez and payment of his bills as Claimant's one-time change in physician is DENIED.
2. The claim for a left knee MRI is DENIED.
3. The claim for orthopedic evaluation is DENIED.
4. The claim for physical therapy and orthopedic follow up is DENIED.
5. The claim for attorney's fees and costs is DENIED.

DONE AND ENTERED this 14th day of July, 2016, in Miami, Miami-Dade County, Florida.



Margret G. Kerr
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