STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGES OF COMPENSATION CLAIMS
PORT ST. LUCIE DISTRICT OFFICE

Nivia L. Lascaibar,
Employee/Claimant,

vs.

Stack, Fernandez, Anderson & Harris/Castlepoint Florida,
Employer/Carrier/Servicing Agent.
_____/

OJCC Case No. 13-028208RDM

Accident date: 11/25/2013

Judge: Robert D. McAliley

AMENDED ORDER ON THE MERITS

This amended order corrects the sixth complete sentence on page 6. Claimant seeks a variety of medical care including the provision of several specialists, authorizing additional medical testing, furnishing various medical devices and the provision of an orthopedic mattress. I find claimant fails to establish their medical necessity and deny the claims. Furthermore, there is no basis for addressing the major contributing cause (MCC) issue because its potential application is never reached in the decision-making process.

JURISDICTION AND NOTICE

The parties agree, and I find, the judge of compensation claims (JCC) has jurisdiction over the parties and subject matter. The parties were properly notified of the merits hearing.

STIPULATIONS

The parties agree: claimant sustained injury by accident on the date indicated while working in Miami – Dade County; there was an employer-employee relationship; workers' compensation insurance coverage applies; the accident is accepted as compensable; the employer was timely notified of the accident; no managed medical care arrangement is in place; a petition

for benefits (PFB) was filed April 10, 2015, and the employer/carrier (E/C) responded April 23, 2015; all issues pertaining to attorney's fees and costs may be reserved for subsequent hearing.

CLAIMS AND DEFENSES

Claimant seeks the following: provision of a nerve conduction examination with SSEP and EMG; provision of a psychiatrist; provision of a neurosurgeon; provision of a neurologist; provision of a pain management program together with a pain management specialist; provision of a TENS unit; provision of an orthopedic mattress; attorney's fees and costs.

E/C maintains stating the medical practitioners, medical tests, medical devices and orthopedic mattress are not medically necessary. E/C further asserts that even if the need for these items is otherwise established, the MCC of the need for same is not the injuries sustained in the November 2013 industrial accident. General denial of all remaining claims.

Claimant responds to E/C's position stating: rest judicata; estoppel; no break in the chain of causation; Florida Statute 90.702 (*Daubert*); no subsequent intervening accident or injury broke chain of causation; *Perez v. Southeastern Freight Lines*; Florida Statute 440.13 (3) (d) & (i); 120 Day Rule. (The foregoing is essentially quoted from the pretrial stipulation).

PFBs

This order disposes of the PFB filed April 10, 2015, to the extent indicated. PFBs filed prior to that date have been resolved. The issues raised by a PFB filed February 12, 2016, are severed from these proceedings without objection.

EVIDENTIARY RULINGS

Claimant seeks to introduce the report of Dr. Barry N. Burak, D. C., on the basis that it is required for this document to be attached to the April 2015 PFB. The report in question is

entitled “Independent Medical Examination” (IME). Initially, I find claimant is not required to attach this report to her PFB. Section 440.192 (2) (i) mandates the attachment of such a written report if it is produced by a doctor from whom claimant is receiving “care.”

Moreover, the April 2015 PFB is in evidence without objection. E/C does not question, and to the best of my knowledge never questioned, its sufficiency. See §440.192 (5) Fla. Stat. (2015).

Claimant asserts in seeking to introduce this document she is not attempting to sidestep the hearsay rule. That being the case, I also find Dr. Burak’s report irrelevant. This report will be included in the record as claimant’s proffer.

BACKGROUND

Claimant, 52 years old, worked as a legal secretary for the employer. She was helping the firm move boxes when claimant injured her back and neck.

She initially received authorized medical treatment with Ben Droblas, M.D., at a walk-in clinic. Claimant was referred to an orthopedic surgeon whereupon E/C authorized Salvador M. Ramirez, M.D. to provide treatment. The medical reports of the foregoing physicians are not placed in evidence.

Claimant then exercised her right to a one-time change of physicians pursuant to section 440.13 (2) (f). Accordingly, E/C authorized Jay G. Stein, M.D. for treatment. Claimant presented to this board certified orthopedic surgeon on May 12, 2014.

Dr. Stein performed a clinical examination, reviewed medical records and took x-rays. He concluded claimant was at maximum medical improvement (MMI) on the date of his examination and advises that no further care or treatment is indicated. Claimant was released to

return on an as needed basis.

EXPERT MEDICAL ADVISOR (EMA)

Jonathan Hyde, M.D., was appointed to serve as an EMA. Dr. Hyde performs a clinical examination and reviews claimant's medical records in September 2015. He finds claimant in MMI and with no physical impairment.

Addressing specific questions put to him, Dr. Hyde advises in his report that claimant does not require an upper extremity nerve conduction examination, an examination by a psychiatrist, an examination by a neurosurgeon, an examination by a neurologist, placement in a pain management program under the auspices of a physiatrist, the provision of a TENS unit, or the provision of an orthopedic mattress.

In his September 2015 report, Dr. Hyde also opines claimant does not require further medical care as a result of her industrial accident. It should be noted that the question of whether claimant in fact requires further medical care generally is not an issue before me.

ANALYSIS

E/C has accepted the accident as "compensable" by their prior actions including providing medical treatment, the pretrial stipulation and a mediation settlement agreement reached July 2, 2015. Claimant argues, in effect, that given E/C's position, the burden is on E/C to demonstrate the MCC of the particular claims in this case is something other than the sequela of the industrial accident citing, inter alia, *Jackson v. Merritt Electric*, 37 So. 3rd 381 (Fla. 1st DCA 2010). I disagree.

The initial burden of proof is on claimant to establish entitlement to benefits. See *Fitzgerald v. Osceola Cty. Sch. Bd.*, 974 So.2d 1161, 1164 (Fla. 1st DCA 2008). Conversely, a

decision in favor of the party without the burden of proof need not be supported by competent, substantial evidence. *Mitchell v. XO Communications*, 966 So.2d 489, 490 (Fla. 1st DCA 2007).

In the present case claimant fails to establish her entitlement to the various medical specialists, modalities of care, medical devices and medical testing being sought. Simply making a claim for these medical items does not demonstrate their medical necessity. Compare *MBM Corp. v. Wilson*, Case No. 1D15 – 2398 (Fla. 1st DCA Feb. 10, 2016) (not final) (Holding where a doctor authorized to treat a shoulder condition opines it would be reasonable to evaluate a neck condition without testifying as to a possible causal relation between the two symptomatic areas is an insufficient basis to order the carrier to provide an evaluation of the cervical spine.)

Claimant also contends that regardless of the merits of her immediate claims, the JCC is required to rule on the question of whether the MCC of any additional modality of care is the medical sequela of her industrial accident. Again, I disagree.

If claimant had established the claims herein were a medically necessary component of her underlying industrial injury, then E/C has the burden of proving a break in the causal chain.

Typical examples are the occurrence of an intervening accident or, in the event of the presence of a pre-existing injury to the same area, claimant's industrial injury subsided to the point where the MCC of the need for future care is underlying condition. See *Perez v. S.E. Freight Lines, Inc.*, 159 So. 3rd 412, 413-14 (Fla. 1st DCA 2015).

The argument forwarded is that while the burden is on claimant to establish an industrial accident is the MCC of a given injury, once that injury is accepted as compensable by an E/C the burden shifts to E/C to establish a break in the causal chain relative to a claim for additional care. In that sense demonstrating the absence of MCC does take on the posture of being an

"affirmative defense."

To analyze this argument I utilize the definition of "affirmative defense" found in the 8th edition of Black's Law Dictionary: "A defendant's assertion of facts and arguments that, if true, would defeat the plaintiff's or prosecutions claim, *even if all the allegations in the complaint are true*." (emphasis added).

Consideration of an affirmative defense is never reached if the underlying allegations in the claim are never proved. The JCC is required to rule *on all issues ripe for adjudication* and not some hypothetical issue that may or may not be raised in the future. See *Bettencourt v. Sears Roebuck and Co.*, 693 So.2d 680 (Fla. 1st DCA 1997) (en banc).

In so ruling, I am mindful the EMA opines that at the time of his examination claimant required no further medical care. It does not follow this opinion, ipso facto, precludes claimant from receiving medical benefits for this industrial accident at some point after the EMA's examination. A characteristic of symptoms connected with many medical problems, especially including spinal injuries, is that they wax and wane. At least as of the time this matter was heard Dr. Stein remains authorized to treat claimant and placed her on a PRN status.

CONCLUSION

BASED ON the foregoing analysis, it is

ORDERED AND ADJUDGED as follows:

1). The claim for the provision of a nerve conduction examination with SSEP and EMG is denied.

2). The claim for the provision of a psychiatrist is denied.

3). The claim for the provision of a neurosurgeon is denied.

4). The claim for the provision of a pain management program together with a pain management specialist is denied.

5). The claim for the provision of a TENS unit is denied.

6). The claim for the provision of an orthopedic mattress is denied.

7). All issues pertaining to attorney's fees and costs are reserved for subsequent hearing.

DONE AND ORDERED this 22nd day of February, 2016, in Port St. Lucie, St. Lucie County, Florida.

Robert D. McAliley
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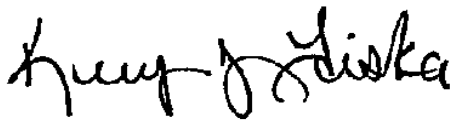
CERTIFICATE OF SERVICE

I HEREBY certify that a true and correct copy of the foregoing has been e-mailed to Counsel on February 22nd, 2016.



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Secretary to Judge of Compensation Claims

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