

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

Brenda Leiva,
Employee/Claimant,

vs.

Gems Global Incorporated/Tower Group
Companies, and Tower Group Companies,
Employer/Carrier/Service Agent.

OJCC Case No. 10-005184ERA

Accident date: 7/11/2009

Judge: Edward Almeyda

FINAL COMPENSATION ORDER

This matter came before me, the undersigned Judge of Compensation Claims, for a Merits Hearing held on March 3, 2014. The Claimant was represented by Sal Sicuso, Esquire, and the Employer/Carrier by Andrew R. Borah, Esquire. On the evidence presented, this Order ensues.

CLAIMS/DEFENSES:

Claims:

1. Authorization for evaluation and treatment by an orthopedic surgeon including but not limited to arthroscopy of the right ankle as prescribed by authorized treating physician, Dr. Randall Blinn.
2. Attorney's fees and costs.

Defenses:

1. The claimant's request for an orthopedic surgical evaluation is denied as Dr. Phillip Lozman, the EMA, has indicated that he Claimant is not a surgical candidate.
2. Claimant's condition has not changed since Dr. Lozman addressed whether the Claimant needed surgery. (Amended 1/21/14).
3. Deny fees and costs.

DOCUMENTARY EVIDENCE PRESENTED:

Joint Exhibits:

Joint 1: Deposition of Dr. Blinn taken on 2/7/14 and efiled 2/26/14

Joint 2: Dr. Blinn's medical records efiled 2/26/14.

Joint 3: PFB dated 6/30/10.

Claimant's Exhibits:

1. Five pages of Dr. Blinn's records.
2. PFB dated 5/20/13 with attachment.
3. Six pages of adjuster's notes.

Employer/Carrier's Exhibits:

1. Dr. Lozman's deposition taken on 11/12/13- efiled 2/26/14.
2. Response to PFB dated 10/12/10.

Judges Exhibits:

- J1: E/C trial memorandum efiled 2/26/2014 (for id. only).
- J2: Claimant's trial memorandum efiled 2/27/14 (for id. only).
- J3: Pretrial dated 1/09/14 and efiled 1/09/14.
- J4: E/C amendment to pretrial efiled 1/21/14.

Live testimony:

1. Claimant.

CONCLUSIONS OF LAW AND FINDINGS OF FACT:

1. The parties stipulated that the PFB dated 5/20/13 was received by the E/C on 5/23/13.

In addition, the parties stipulated that the undersigned has jurisdiction over the subject matter and the parties. The stipulations are accepted and adopted as a finding of fact.

2. In making the determinations set forth below, I have attempted to detail the salient facts together with the findings and conclusions necessary to resolve the issues. I have not attempted to painstakingly summarize the substance of the parties' arguments, nor the support given to my conclusions by the various documents submitted and accepted into evidence; nor have I attempted to state non essential facts. Because I have not done so, does not mean that I have failed to consider all of the evidence. In making my findings of fact and conclusions of law in this claim, I have carefully considered and weighed all evidence submitted to me. I have considered arguments of counsel and the respective parties, and analyzed statutory and decisional law of Florida.

3. By way of explanation of the current issue, the Claimant was involved in an accident on 7/11/2009 when she injured her right ankle. The parties, at the time of the pretrial, agreed that the accident was accepted as compensable. The claim is for authorization of an orthopedic surgeon pursuant to the request of Dr. Blinn and for ankle surgery (which the orthopedic surgeon has yet to prescribe). The Claimant, according to the trial memorandums, had previously made a similar request, was sent to an EMA, and then the Claimant took a voluntary dismissal. This is the re-filed similar, but not identical, claim. In support of the claim/defenses, the parties presented records and testimony via deposition of two physicians in addition to the Claimant's live testimony. Also some records were introduced in evidence. This recapitulation of the salient facts follows.

4. Dr. Blinn is an orthopedic surgeon who no longer performs surgery. He first saw the Claimant on 9/28/2009 and subsequently on 9/20/10 recommended orthopedic foot and ankle surgery for arthroscopy of the right ankle. The reason for this recommendation is that the Claimant had a painful process due to a talar dome lesion. To the extent of the injury, this has been accepted as compensable, as indicated in the pretrial stipulation of the parties.

5. The Claimant, apparently, on May 10, 2013 again is seen by Dr. Blinn, and at that time again recommends arthroscopic surgery. He testified that it was for the same reason he previously had recommended surgery in 9/20/10. The Claimant, prior to the May 10, 2013 visit had another MRI which showed degenerative arthritic changes with impingement or the right ankle. Based upon that MRI and the clinical assessment Dr. Blinn concluded that:

"It's basically the same as MRI's go. She still has the impingement – I'm sorry. She still has the talar dome lesion. She still has the chronic sprain/strain syndrome.

As far as the impingement goes, it is my belief after examining the MRI and seeing the patient

that she has, and this happens as people just basically advance. Not that the talar dome is getting worse, but as synovium grows out in such a way that a pouch can form anteriorly.” (Dr. Blinn deposition, page 27-28).

6. He went on to add that an impingement is not an MRI finding as an MRI cannot find impingement. Thus, he concluded that the Claimant’s condition on 5/10/13 was “not completely” the same as on 9/20/10, and this is a new and distinct assessment.

7. He last saw her on 6/28/13.

8. As to the need for surgery, Dr. Blinn was also clear. In the direct examination of Mr. Borah he stated that:

“The indication for the arthroscopy has remained stable and the same. The indication for arthroscopy is the same thing, the talar dome lesion as found on MRI and based upon clinical exam.

So my recommendation for arthroscopy has remained the same. I don’t recommend arthroscopy just for degenerative ankles. I don’t do that....” (Dr. Blinn page 10).

9. In conclusion, he stated the reasons he recommended arthroscopy in 2013 were the same as the reasons he recommended arthroscopy in 2010, because of a painful talar dome lesion, adding that he was not recommending surgery due to the arthritis.

10. Based on this testimony, the undersigned finds that the Claimant’s recommended need for surgery is the same in 2010 as it is in 2013 after the last MRI. To that extent Dr. Blinn’s opinion has not changed. On the other hand, the undersigned finds that Dr. Blinn diagnosed a new condition of degenerative arthritis, which apparently was not present in the original conclusions he rendered on the last visit on 2010, and for which he is not recommending surgery.

11. Dr. Lozman is an orthopedic surgeon who performed an examination on 8/21/11 as the Expert Medical Advisor (EMA). In addition to the reports from Dr. Blinn, he also had

records from Rite Care Medical Center, Select Physical Therapy, Dr. Rowland Pritchard, Dade land MRI and CT, Central Magnetic Imaging, Gary Small, D.P.M. and Orthopedic Center of South Florida. He was posed with the following question: "Whether the claimant is a surgical candidate, and if the July 11, 2009 date of accident is the major contributing cause of the need for surgery".

12. His EMA conclusion as contained in his report was then that the Claimant had a status post right ankle sprain, resolved; and subjective right ankle pain. He further opined that the Claimant had recovered from a right ankle sprain which occurred on 7/11/2009 and that no further evaluation or treatment was necessary. A diagnostic arthroscopy would be indicated solely for the presence of an intraarticular lesion that is verified both by imaging studies and physical examination.

13. His deposition was taken on 11/12/13, and is in evidence. He stated that as of his date of examination surgery was not necessary. Yet he added that "impingement is an entirely different issue and usually related to scar tissue in front of the ankle.

14. He reiterated that the Claimant was not a surgical candidate for the lesion which he found after reviewing x-ray films and various MRI's which he identified in his report.

15. The Claimant testified live at the time of the trial. She is still employed by the Employer in handling flowers. The subject accident happened when she tripped and fell injuring her right ankle. She was treated by Dr. Blinn and other doctors and saw him through September 2011 continuously. During this time, she has continued to work. She had a hiatus in her treatment with Dr. Blinn from 2011 to 2013 as she was waiting for the E/C to make an appointment.

16. In 2011, her condition was such that she only had swelling three times a week, but has progressed to five times a week. Then the ankle was dark, and now gets red when swollen. She also has sensitivity when wearing stockings. The pain level has increased from a 7 to 8 to a 9 to 10 since 2011. Previously, she could work all day without pain, now she gets pain in the afternoon. She considers her condition to be deteriorating. If offered surgery, she would accept it.

17. The adjuster was sent a telefax from Dr. Blinn with the DWC-25 dated 5/10/2013 on 5/10/13 by Grisel Aponte, which has a confirmation sheet indicating that it was successfully delivered. (Claimant Exhibit #1). The adjuster's notes indicate that this was not denied until 5/29/13 with the notation "Sent efax to Dr. Blinn per defense recommendation to advise referral no auth". This DWC-25 makes a request for a referral to Dr. Evans for arthroscopy consultation.

18. The E/C is defending this matter on several grounds. The first is that the report and opinion of Dr. Lozman is dispositive as he is an EMA and the Claimant has not overcome his conclusion by clear and convincing evidence. Second, that there has been no change in the Claimant's condition.

19. The undersigned finds that, in part, this argument is correct. Dr. Blinn's surgical recommendation given at the time of the EMA appointment in 2011 is based upon the same underlying medical condition as at the time of his subsequent examinations on 2013. Dr. Blinn indicated that the MRI done post EMA examination has findings basically the same as in the previous MRI's. Thus, to the extent that the claim is seeking surgery to the ankle, it must be denied as the EMA has already clearly indicated the contrary and there is no clear and convincing evidence to the contrary.

20. As to the no change in condition, the Claimant's new complaints does not change the undersigned finding against surgery, even though there seems to be a worsening of the pain and arthritic changes. This brings forth the second part of the claim, an evaluation by an orthopedic surgeon. Such new surgeon would be bound by this order denying surgery, yet may be able to offer the Claimant some type of relief as to the arthritis and the impingement.

21. The E/C is arguing that the request on 5/10/13 is governed by their response to a prior similar, but not identical request in a 9/30/2010 PFB to which they responded on 10/12/10. At that time they seem to have authorized the surgery that they are currently denying. The undersigned finds that the prior response on 10/12/10 is not dispositive of this current litigation or eliminates the E/C's duty to respond within ten days to the treating physician's request for a consultation. As shown above, this was not done until nineteen days after receipt. Florida Statute 440.13(3)(i) which governs requests for specialists consultation, requires a response within ten days, otherwise the request is deemed valid. Thus the undersigned finds that the E/C cannot deny such a consultation request, which otherwise would be governed by this order.

22. Finally, the Claimant's objection to the testimony of the EMA, Dr. Lozman is overruled. The basis for this objection is that the EMA was either improperly appointed or otherwise appointed to render an opinion on a prior PFB which was the subject of a voluntary dismissal. The undersigned finds that the prior PFB is essentially the same as the current one being litigated, as both are addressing surgery to the ankle. Secondly, an EMA is appointed for the subject case and to render a particular opinion. Herein Dr. Lozman's opinion is directly on point to the tried issue.

23. The Claimant's attorney, having obtained a benefit in the form of a referral is entitled

to a fee and costs, for which jurisdiction is reserved to determine the amount.

WHEREFORE, IT IS ORDERED AND ADJUDGED THAT:

1. The Claim for surgery is Denied and Dismissed with Prejudice.
2. The Claim for an orthopedic referral is Granted.
3. The Claimant's attorney's fees and costs is deferred to a later hearing, for which jurisdiction is reserved.

DONE AND ORDERED this 4th day of March 2014, in Miami, Miami Dade County, Florida.



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