STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF JUDGES OF COMPENSATION CLAIMS
FORT LAUDERDALE DISTRICT

OLIVE McLEISH,	OJCC#:	10-013501 KSP
Employee/Claimant,	D/A:	3/9/10
v.	JUDGE:	KATHRYN S. PECKO

ALPHA STAFF GROUP, INC. and
ZURICH AMERICAN INS. CO.,

Employer/Carrier.
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Joan Dymond Horenstein, Esquire, Counsel for Employee/Claimant

Andrew R. Borah, Esquire, Counsel for Employer/Carrier

COMPENSATION ORDER

THIS CAUSE came before the undersigned Judge of Compensation Claims on February 7, 2012 in Broward County, Florida. The hearing record closed on February 7, 2012. The instant Compensation Order adjudicates outstanding claims in the Petition for Benefits [PFB] filed on June 28, 2011. The Employee/Claimant will be referred to by name or as "Claimant." The Employer and the Carrier will be referred to in the respective individual capacities or collectively as "E/C."

By way of background, Claimant worked as a medical assistant for Dr. Burton Danoff. Femwell is a company that provides payroll services and workers' compensation to doctors' offices. Femwell obtained payroll services and workers' compensation from Alpha Staff. The Employer in this case is Alpha Staff because it leased Claimant to Femwell, and then Femwell in turn leased Claimant to Dr. Danoff.

On March 9, 2010, Claimant was involved in an automobile accident while travelling from Dr. Danoff's Weston office to Dr. Danoff's office located inside of Broward General Medical Center. Claimant alleged injuries to her cervical region and her left wrist. E/C accepted compensability of the accident and provided workers' compensation benefits.

The authorized treating physician, Dr. Michael Feanny, recommended that Claimant be evaluated by a neurosurgeon to determine if she was a surgical candidate. Dr. Feanny also recommended that Claimant be evaluated by a psychiatrist to determine whether any psychiatric issues are attributable to the industrial accident. E/C denied the evaluations based on the premise that the industrial accident was no longer the major contributing cause of the need for treatment. These proceedings ensued.

In the instant proceeding, Claimant seeks authorization and payment of a neurosurgical evaluation per Dr. Feanny, authorization and payment of a psychiatric consultation per Dr. Feanny, a determination that Claimant has the right to select a specialist from E/C's managed care list of network providers, and attorney's fees and costs.

E/C defends on the bases that the industrial accident is not the major contributing cause of the need to undergo an evaluation with a neurosurgeon and a psychiatrist, the industrial accident is no longer the major contributing cause of Claimant's cervical condition, Claimant's cervical condition is pre-existing, the requested evaluations are not medically necessary, apportionment, Claimant does not have the right to select specialist providers under the managed care arrangement, and attorney's fees and costs as related to the instant proceeding are denied.

At final hearing, the parties stipulated that all issues regarding attorney's fees and costs as to past benefits obtained would be addressed in a separate proceeding. Claimant stipulated that

Dr. Feanny issued a 6% permanent impairment rating (PIR), but would not stipulate Claimant reached overall MMI.

Claimant was the only witness to testify before the undersigned at the final hearing. The following testimonial and documentary exhibits were admitted into evidence:

Jdg's Ex. 1	Pretrial Stipulation
Jdg's Comp. Ex. 2	Clmt. & E/C Amendments to Pretrial Stipulation
Clmt. Ex. 1	PFB filed 6/28/11 w/attachments
Clmt. Ex. 2	Response to PFB dated & filed 7/27/11
Clmt. Ex. 3	Depo. Dr. Raul Aparacio, plus exhibits
Clmt. Ex. 4	Depo. Dr. Michael Feanny, no exhibits
E/C Ex. A	Depo. Dr. Paul Meli, plus exhibits
E/C Ex. B	Depo. Roger Demello, plus exhibits

The undersigned considered all of the evidence submitted, notwithstanding that there may not be an express recitation of same within the four corners of the instant Compensation Order, before rendering the following findings and conclusions:

1. The undersigned has jurisdiction over the parties and the subject matter.

2. Claimant testified at final hearing that she worked as a medical assistant wherein she assisted the doctor and did call backs and chart reviews. The doctor went to Broward General Medical Center on Tuesday afternoons and Wednesdays. Claimant drove her own car to Broward General. On March 9, 2010, Claimant was en route to Broward General and was rear ended while her car was at a standstill. Claimant got out of the car, experienced neck pain and dizziness, and called the police. She was transported by ambulance to the Emergency Room at Broward General.

After the Emergency Room visit, E/C sent Claimant to US Healthworks where she underwent physical therapy and a MRI of the neck. A referral was made for Claimant to see an orthopedist. E/C authorized Dr. Meli without providing Claimant a list of doctors from which to make a selection. Dr. Meli prescribed medications but no therapy. Claimant saw Dr. Meli

possibly three times, and then requested her one time change in physician. E/C authorized Dr. Feanny, and Claimant treated with him for approximately a year. According to Claimant, Dr. Feanny took x-rays of the neck, reviewed the MRI, performed surgery on the left wrist, and prescribed over the door traction for the neck.

Claimant described her pain as being 5 to 6 out of 10 before doing the traction, and at least 7 out of 10 after traction. Claimant testified that she is in pain every day, and the pain going down her arm is getting worse. Claimant testified that she takes medication so that she can work.[1]

Claimant testified that she feels like she is depressed due to the pain she has every day. Claimant explained that she has a problem driving because she gets anxious and nervous - especially when she is at a standstill. Claimant still has to go from Weston to Broward General, and she gets nervous and has difficulty sleeping the nights before she has to drive to Broward General.

3. Dr. Michael Feanny, the second authorized orthopedic surgeon who saw Claimant for the last time on June 6, 2011, testified by deposition taken on October 13, 2011 and admitted into evidence as Claimant's Exhibit 4. Dr. Feanny saw Claimant for the first time on June 24, 2010, and placed Claimant at MMI as of August 26, 2010. Clmt. Ex. 4 at 16, 17, 19, 24, 25. Dr. Feanny recommended the neurosurgical and psychiatric evaluations at the June 6, 2011 office visit. E/C Ex. 4 at 12.

Dr. Feanny testified that Claimant "has a cervical disk herniation at C4-5 on a preexisting degenerative disk basis and that condition was aggravated by her industrial accident." Clmt. Ex. 4 at 9. The aggravation of the preexisting degenerative disk condition is the chronic

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[1] Claimant no longer works for the same physician but is still an employee of Alpha Staff.

pain due to the herniated and bulging disks in her cervical spine. Clmt. Ex. 4 at 24. The cervical pain is a permanent aggravation of the preexisting condition. Clmt. Ex. 4 at 25.

In response to questions posed by defense counsel during direct examination, Dr. Feanny admitted that he signed a "confirmation" letter sent to him by defense counsel after a conference on July 8, 2011 with defense counsel. Clmt. Ex. 4 at 6-8. In the "confirmation" letter, Dr. Feanny concurred with statements therein that the preexisting degenerative disease in the cervical spine was the major contributing cause of the need to be evaluated by a neurosurgeon and psychiatrist. Clmt. Ex. 4 at 10, 13-14, 14, 16. Dr. Feanny testified that he agreed with those statements "with the caveat that she has an aggravation of that condition secondary to an injury." Clmt. Ex. 4 at 8. The doctor also explained during his direct testimony that he interpreted those statements in the "confirmation" letter to include the aggravation from the industrial accident to be part of her condition. Clmt. Ex. 4 at 9.

During cross examination by Claimant's counsel, Dr. Feanny was asked whether the pain Claimant experiences was more than 51% caused by the industrial accident. Clmt. Ex. 4 at 24. Dr. Feanny responded that "based upon the history, the pain was precipitated by the [industrial] accident." Clmt. Ex. 4 at 24.

According to Dr. Feanny, he recommended a neurosurgical evaluation in order to determine whether Claimant would be a surgical candidate. Clmt. Ex. 4 at 6. Dr. Feanny believed that an evaluation with a neurosurgeon was medically reasonable and necessary. Clmt. Ex. 4 at 24-25, 27.

Dr. Feanny recommended the psychiatric evaluation on the basis of her cervical spine symptoms, which was the most significant problem of which she complained. Clmt. Ex. 4 at 6. The doctor believed that the psychiatric evaluation was reasonable and medically necessary.

Clmt. Ex. 4 at 27. The doctor noted in his records that there were a number of factors that Claimant told him about that lead to his recommendation for a psychiatric evaluation, such as issues with her capacity to maintain her job, ability to cope with day to day situations, and economic stresses. Clmt. Ex. 4 at 11, 12-13.

4. Dr. Paul Meli, the initial authorized orthopedic surgeon, testified by deposition taken on December 13, 2011 and admitted into evidence as E/C Exhibit A. Dr. Meli saw claimant for the first time on April 21, 2010 and again on May 10, 2010 and June 14, 2010. E/C Ex. A at 6, 10. The doctor conducted a physical examination, took x-rays, and reviewed an MRI scan and report taken on April 10, 2010. E/C Ex. A at 7. Dr. Meli testified that Claimant has chronic and preexisting degenerative osteoarthritis of the cervical and that she has a slight sprain/strain of the neck as a result of the industrial accident. E/C Ex. A at 8, 9.

According to Dr. Meli, Claimant's cervical strain/sprain was resolved when he saw her for the last time on June 14, 2010, and he would not recommend any further medical treatment regarding the cervical condition for which the industrial accident was the major contributing cause. E/C Ex. A at 14. Dr. Meli further opined that the industrial accident would not be the major contributing cause for Dr. Feanny's recommendations for a psychiatrist and neurosurgeon because of the preexisting degenerative osteoarthritis.[2] E/C Ex. A at 15.

5. Dr. Raul Aparacio, orthopedic surgeon who served as Claimant's IME physician, testified by deposition taken on January 17, 2012 and admitted into evidence as Claimant's Exhibit 3. The IME was conducted on November 2, 2011. E/C Ex. A at 6. Dr. Aparacio was furnished with and reviewed the records of Dr. Meli, Total Orthopedic Care, Health South, the scan and the report of cervical spine MRI performed on April 5, 2010, and report of a MRI of the

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[2] Claimant's counsel's objections of speculation, as well as lack of predicate and foundation are noted and will be addressed elsewhere in this Compensation Order.

left wrist taken on October 8, 2010. Clmt. Ex. 3 at 8, 10. Claimant provided a history of the accident to the doctor, and denied any prior history of neck pain, treatment for neck pain, and prior accidents. Clmt. Ex. 3 at 8, 9.

Dr. Aparacio opined that Claimant had bulging discs in the cervical spine, she developed instability at these disc levels secondary to the trauma from the motor vehicle accident, and the symptoms were discogenic in nature. Clmt. Ex. 3 at 11. Dr. Aparacio acknowledged that there was disc degeneration that preceded the industrial accident. Clmt. Ex. 3 at 12, 13. Dr. Aparacio testified that Claimant's current state was an aggravation of the preexisting condition and was permanent in nature. Clmt. Ex. 3 at 13, 23, 24.

Dr. Aparacio opined that it was reasonable and medically necessary for Claimant to have both a neurological and psychological evaluation as recommended by Dr. Feanny. Clmt. Ex. 3 at 13. In regard to the psychological evaluation, Dr. Feanny explained that neither he nor Dr. Feanny had the expertise to determine whether Claimant had a psychological condition that was related to the industrial accident. Clmt. Ex. 3 at 14. In regard to the neurosurgeon, Dr. Aparacio felt that Claimant should undergo an evaluation to consider whether surgical fusion surgery should be done. Clmt. Ex. 3 at 14. Dr. Aparacio concurred that the aggravation of a preexisting condition was more than 51% responsible for the need of an evaluation with a neurosurgeon and psychiatrist. Clmt. Ex. 3 at 14, 24. Claimant is not at MMI. Clmt. Ex. 3 at 15.

6. An injured worker need only show that a medical evaluation was reasonably required by the nature of the injury to determine the etiology of his/her condition. See Grainger v. Indian River Transport, 869 So.2d 1269 (Fla. 1st DCA 2004). In that case, the JCC denied a request for a neurological evaluation and noted that there was no record evidence that the

industrial injury was the major contributing cause of the need for the evaluation. The appellate court disagreed and found that the employer/carrier should have been ordered to pay for the evaluation to determine the etiology of the medical problem. The court stated that "[i]t is the purpose of the diagnostic testing and evaluation, not the results thereof, that determines the compensability of such services." Id.

7. In the instant case, Claimant urges that she is entitled to the evaluations with the neurosurgeon and psychiatrist based upon the Grainger opinion. On the other hand, E/C argues that Claimant must prove major contributing cause before either evaluation can be ordered, and that an EMA must first be ordered to resolve a conflict in opinions regarding major contributing cause. E/C contends that the opinions of Dr. Meli, the previously authorized orthopedic surgeon, conflict with the opinions of Dr. Feanny, the currently authorized orthopedic surgeon, and Dr. Aparacio, Claimant's IME physician.[3]

In regard to E/C's reliance on the opinion of Dr. Meli to create conflict for its EMA motion, it is settled that the opinion of a provider who has been de-authorized is admissible to provide testimony pursuant to Section 440.13(5)(e), Fla. Stat. Russell v. Orange County Public Schools Transportation, 36 So.2d 743 (Fla. 1st DCA 2010). However, the weight and credibility to be given to the admissible testimony is within the JCC's discretion. Id. The appellate court recognized that while the testimony is admissible, "there may exist credibility concerns with providers who have not examined a claimant for a number of years...." Id.

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[3] Before final hearing, E/C filed a motion for EMA based on the conflicting opinions of Drs. Meli, Feanny, and Aparacio. Claimant opposed the motion. By Order issued on January 4, 2012, the undersigned denied the motion without prejudice to renew if appropriate after the deposition of Dr. Aparacio had been taken. E/C filed its second motion for EMA on February 2, 2012, less than 3 business days before final hearing. The motion was argued at commencement of final hearing and the undersigned reserved ruling on same.

Therefore, Dr. Meli's testimony is admissible even though he was no longer authorized after Claimant exercised her one-time change in physicians.

Dr. Meli saw Claimant three (3) times - the last time being on June 14, 2010. He was deposed on December 13, 2011. E/C Ex. A. Dr. Meli admitted that he had not seen Claimant since June 14, 2010 and had not reviewed any of Dr. Feanny's records. E/C Ex. A at 19, 20, 21. Although he has not seen the Claimant in a year and a half, Dr. Meli testified that he did not need to see any subsequent records of treatment nor examine the Claimant in order to render his opinion(s) on major contributing cause as to her current condition. E/C Ex. A at 21, 22.

Claimant's counsel timely objected on the bases of speculation, lack of predicate, and lack of foundation to numerous questions posed to Dr. Meli in deposition regarding Claimant's present need for future treatment and major contributing cause for such treatment. E/C Ex. A at 12, 15, 16, 17, 22. The objections are sustained, which renders Dr. Meli's opinions a nullity. Even if the objections were overruled, the undersigned does not find Dr. Meli's opinions credible under the circumstances in this case. Dr. Meli has not seen Claimant in a year and a half and he did not review any subsequent records. The doctor's testimony is neither competent nor substantial because he has no clue as to Claimant's actual condition during that year and a half.

Further, it is evident that Dr. Feanny's opinions regarding major contributing cause are not adverse to Claimant as urged by E/C. Rather, it is clear in the deposition that Dr. Feanny considered the Claimant's aggravation as part of the pre-existing condition when he opined about major contributing cause, thus negating the significance of the "confirmation" letter sent by E/C. The undersigned accepts Dr. Feanny's opinion (as well as Dr. Aparacio) that

Claimant suffered a permanent aggravation of a pre-existing condition. Thus, Dr. Feanny's opinions regarding major contributing cause do not conflict with those of Dr. Aparacio and the E/C's Motion for EMA is denied.

8. Claimant correctly relies on Grainger in regard to her request for an evaluation with a psychiatrist. There is substantial competent evidence to support a finding that the evaluation with a psychiatrist will address etiology of any psychiatric condition is reasonable and medically necessary as well.

9. Grainger does not apply in regard to the request for an evaluation by a neurosurgeon. Dr. Feanny testified that he recommended same to determine if she was a candidate for surgery. It is evident that the *etiology* of a condition was not the motivation for the recommendation. Accordingly, the undersigned accepts the opinions of Drs. Feanny and Aparacio finding major contributing cause and that the evaluation is reasonable and medically necessary.

10. E/C asserts the apportionment defense.[4] Section 440.15(2)(b), Fla. Stat. provides in relevant part that "[i]f a compensable injury, disability, or need for medical care, or any portion thereof, is a result of aggravation ... of a preexisting condition ... only the disabilities and medical treatment associated with such compensable injury shall be payable under this chapter ... regardless of whether the preexisting condition was disabling at the time of the accident...." The undersigned accepts the opinions of Drs. Feanny and Aparacio that Claimant suffered a permanent aggravation of a preexisting condition.

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[4] On or about January 27, 2012, E/C e-filed its Motion for Leave of Court to Amend Pretrial Stipulation Within 30 Days of Final Hearing. In said motion, E/C sought to add the apportionment defense. Claimant's counsel filed a written objection opposing the motion and the undersigned issued an Order on February 1, 2012 denying the Motion for Leave to Amend. Notwithstanding the entry of the Order on February 1, 2012, at final hearing on February 7, 2012, Claimant withdrew her objection and agreed E/C could raise apportionment as a defense.

The psychiatric evaluation deemed reasonable and medically necessary by both Drs. Feanny and Aparacio is for the purpose of evaluating Claimant's psychiatric condition and to ascertain whether its etiology is rooted to the industrial accident. The rationale of Grainger, where major contributing cause was deemed irrelevant for the purpose of ordering an evaluation because "[i]t is the purpose of the diagnostic testing and evaluation, not the results thereof, that determines the compensability of such services" similarly applies to apportionment where the evaluation addresses etiology. Accordingly, the apportionment defense does not apply to the psychiatric evaluation.

Unlike the psychiatric evaluation, Dr. Feanny's recommendation for an evaluation by a neurosurgeon was not for the purpose of determining etiology of a medical condition. Rather, the only evidence in this regard establishes that Dr. Feanny made the recommendation in order to determine whether Claimant is a surgical candidate. Apportionment applies to the neurosurgical evaluation and the undersigned accepts Dr. Aparacio's opinion that 51% is related to the industrial accident and 49% is related to the preexisting condition.

11. Claimant asserts that because this is a managed care case, she has the right to select the specialist physician from a list of network providers furnished by E/C. No evidence whatsoever as to the terms and conditions of the managed care arrangement in place was submitted. The adjuster was questioned about the managed care plan and advised that the Carrier directs all treatment under the managed care plan. E/C Ex. B at 11.

Section 440.134(6)(b)10 requires that the managed care plan contain a provision for the selection of a primary care provider by the employee from primary care providers in the provider network. Pursuant to Section 440.134(1)(k), the primary care provider may be a family practitioner, general practitioner, or internist physician licensed under Chapter 458, or family

practioner, general practitioner, or interest osteopathic physician licensed under Chapter 459, a chiropractor, podiatric physician, optometrist, or dentist.

There is no statutory requirement that gives the injured worker the right to select any specialty physician. Given the absence of the terms and conditions of the managed care arrangement in place, as well as the lack of any statutory authority conferring the right to select the specialty physician to the injured worker, Claimant's request for the right to select her own specialty physicians is denied.

12. Entitlement to E/C paid attorney's fees and costs is granted in part as to the legal services rendered and costs incurred in securing the benefits awarded herein. Based on the foregoing, it is hereby

ORDERED AND ADJUDGED as follows:

1. Claimant's request for authorization of an evaluation with a psychiatrist is granted.

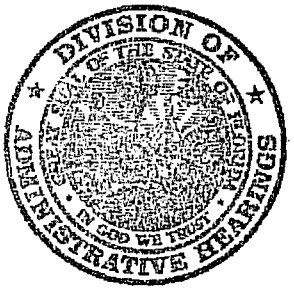
2. Claimant's request for authorization of an evaluation with a neurosurgeon is granted, subject to apportionment of 51% for the industrial accident and 49% for the preexisting condition.

3. Claimant's request for the right to select her own specialty physicians is denied.

4. Entitlement to E/C paid attorney's fees and costs is granted in part as to the legal services rendered and costs incurred in securing the benefits awarded herein. The undersigned retains jurisdiction over all issues relating to attorney's fees and costs.

5. The PFB filed on June 28, 2011 is dismissed with prejudice, subject to the reservation of jurisdiction on attorney's fees and costs.

DONE AND ORDERED in Chambers, Lauderdale Lakes, Broward County, Florida.



Kathryn S. Pecko

KATHRYN S. PECKO
JUDGE OF COMPENSATION CLAIMS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Order was entered by the Judge of Compensation Claims and a copy was served by electronic transmission on MARCH 12 2012 to the parties' counsel of record or by mail if parties are unrepresented.

Marsha M. Malone
Secretary to the Judge of Compensation Claims