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

Irma Nieblas,
Employee/Claimant,

vs.

Four Points by Sheraton/The Simplex/Guarantee Insurance Company,
Employer/Carrier/Servicing Agent.
_____/

OJCC Case No. 13-016297MAM

Accident date: 3/31/2013

Judge: Mark A. Massey

FINAL EVIDENTIARY ORDER ON E/C'S MOTION FOR SANCTIONS

This cause came for hearing before the undersigned Judge of Compensation Claims on 05/22/15. Present and representing the claimant was David Abramovici, Esquire. Present and representing E/C was Andrew Borah, Esquire. The subject of the hearing was E/C's Motion for Sanctions filed 04/10/15.

Although the motion was initially based on sections 440.32(2) and (3), F.S., E/C announced at hearing that the reference to 440.32(2) was being withdrawn, and they would be traveling solely under 440.32(3). It was further decided at the outset of the hearing that this order will determine entitlement to sanctions only, with jurisdiction reserved as to amount if applicable.

The following items (listed by docket number) were admitted into evidence: 58, 52, 56, 57, 59, 62, 75, 66, 74, 76, 80, 48.

FINDINGS OF FACT

Claimant suffered a left knee injury in an industrial accident on 03/31/13. E/C accepted the accident and injury as compensable and some benefits including medical care have

previously been provided. However, benefits are currently being denied, on the basis that the left knee injury is resolved, further treatment is not medically necessary, and the industrial accident is no longer the major contributing cause of any disability or need for treatment.

Claimant has been represented by her current counsel since approximately 09/18/13. Various petitions for benefits have been filed and resolved. The petition at issue here is dated 03/25/15 and included claims for (1) an IME with Dr. Aparicio; and (2) "compensability of the industrial accident and all resulting injuries."

In response to the 03/25/15 petition, E/C filed a Motion for Summary Final Order ("MSFO") on 04/01/15, arguing that claimant is not entitled to an E/C-paid IME as a matter of law, based on the statute in effect on the date of accident. (The MSFO did not address the claim for "compensability" because, according to E/C's counsel, this was thought to be simple pre-printed, boiler-plate language as is often seen in petitions, and not an actual claim, especially since compensability had never been denied).

On 04/10/15, claimant filed a response to the MSFO, in which claimant raises two arguments. First, claimant acknowledges that each party is responsible for the cost of their own IME under section 440.13(5), but argues that under 440.134(9) (sic)[1], an E/C may be responsible for the cost of a claimant's IME, if the claim is governed by a managed care arrangement, and alleges that "Claimant has to date not been provided with any documents that show whether or not this claim is covered under a managed care arrangement." Second, claimant argues that she "is seeking compensability of the claim for all resulting injuries as a result of this industrial accident. . . . The Claimant in this case has been denied further medical treatment to her left knee by the Employer/Carrier on the basis of it not being medically necessary and/or major

[1] This presumably refers to section 440.134(6)(c)9.

contributing cause and that the Claimant's work related left knee condition has resolved." Based on both of these arguments, claimant asserts that there are "clearly factual issues" which must be resolved.

E/C filed a reply to claimant's response, also on 04/10/15. Included within the reply was the instant motion for sanctions. In the reply, E/C point out that on 03/02/15 the parties completed a pre-trial stipulation in which *both parties* checked "No" to the question of whether the claim was governed by a managed care arrangement (Question 12). In addition, E/C placed into evidence a Response to Request to Produce which had been provided to claimant's counsel on 10/21/13 and which, in response to the requests for managed care documents, asserts that the claim is not governed by managed care. Therefore, E/C argue that it is "incredulous and sanctionable" for claimant's counsel to now claim he is not aware of whether the claim is governed by managed care.

As to claimant's assertion that "compensability" is an issue, E/C point out that in the same pre-trial stipulation, *both parties stipulate* to compensability, and also point out that claimant has previously received medical care and benefits based on the stipulated compensable injury (and, because more than 120 days have elapsed since the initial provision of benefits, E/C have waived their right to deny compensability).

On 04/13/15, E/C filed an affidavit of the adjuster which attests that the claim is not and has never been governed by managed care, and also that compensability was previously accepted has never been denied, and benefits including medical care have previously been provided.

On 04/14/15, four days after E/C's reply to claimant's response to the MSFO, claimant filed a Notice of Voluntary Dismissal. Notably, however, claimant dismissed *only* the claim for

an IME, leaving the claim for "compensability" intact and pending.

In the meantime, also on 04/10/15, E/C filed a MSFO on the issue of "compensability." Claimant filed a response to the MSFO on 05/12/15, again pointing out the current denial of benefits, which claimant argues "can be termed as a 'denial of compensability' as well" under existing case law. Nevertheless, on 05/13/15, claimant voluntarily dismissed the remainder of the 03/25/15 petition, including the claim for "compensability."

ANALYSIS

Section 440.32(3), F.S. (2013) provides that every pleading, motion, and other paper of a party represented by an attorney shall be signed by the attorney of record, and "[t]he signature of an attorney constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." If the JCC finds that a pleading or other paper has been signed in violation of this section, he or she shall impose an appropriate sanction, which may include a reasonable attorney's fee and costs.

E/C argue that the 03/25/15 petition was signed in violation of section 440.32(3) and therefore sanctions should be imposed. In regard to the IME claim, I find that claimant's counsel knew or should have known prior to filing the petition, that the claim was not governed by a managed care arrangement. The parties had in fact stipulated to such just a few weeks prior. Further, that information had been provided to claimant's counsel in the response to his initial

request to produce in October 2013. Claimant's counsel could neither confirm nor deny his receipt of that October 2013 response; and in regard to the pre-trial stipulation, claimant's counsel basically argued that you can't always rely on the checking of a box on the pre-trial, because it may be inadvertently erroneous. Therefore it is better to proceed with an abundance of caution.

In regard to the claim for "compensability," I reject claimant's argument that a *denial of benefits* can be considered the equivalent of a *denial of compensability* under the statute and case law. This is at best a misunderstanding or misreading of the Florida workers' compensation law as it currently exists, and as it has been interpreted by the appellate court. Claimant's counsel argues repeatedly that compensability is a "broad concept" subject to broad interpretation. Yet, the very case cited by claimant's counsel, *Babahmetovic v Scan Design Florida, Inc.* (1D14-2986, Opinion filed May 1, 2015), actually supports the position of E/C, as the latest in a long line of cases which carefully distinguish between the concept of compensability, on the one hand, and the concept of entitlement to benefits on the other hand. See, e.g., *Checkers Restaurant v Wiethoff*, 925 So. 2d 448 (Fla. 1st DCA 2006).

The proper inquiry under 440.32(3) is whether, *at the time a pleading is filed*,[2] the signer of the pleading had performed a "reasonable inquiry," and that based on such inquiry, could reasonably believe that the pleading was:

a. Well grounded in fact; and

b. Warranted by existing law or a good faith argument for the extension, modification or

[2] Compare, 440.32(1) (proceedings instituted *or continued* without reasonable ground); and 440.32(2) (proceedings *maintained or continued* frivolously). 440.32(3) is based strictly on what the signer of the pleading knew or should have known after reasonable inquiry, at the time the pleading was filed – regardless of whether or how long it was continued or maintained thereafter, or how soon it was dismissed thereafter.

reversal of existing law; and

c. Not interposed for any improper purpose.

IME/Managed Care

Here, claimant's counsel argues that it was not improper to have filed a petition for an E/C-paid IME, because claimant did not know at the time whether the claim was governed by managed care. This argument is problematic for two reasons. First, it is difficult to understand how claimant could not be aware that managed care was not involved here, given the pre-trial stipulation completed just a few weeks prior, as well as the response to the initial request to produce (which is presumably designed and intended to obtain that very information). Further, a review of the docket indicates that petitions for medical care had been filed and litigated previously, and managed care was never raised as an issue or a defense to any of those petitions. But even giving claimant the benefit of the doubt on these matters, even if I were to find that there was room for uncertainty as to whether managed care applied, a "reasonable inquiry" would have provided the answer in fairly short order. However, it appears that such an inquiry was not performed here. The better practice would be to find out first, then file; rather than file first, then find out.

In sum, I find that no reasonable inquiry was made as to whether managed care applied, prior to the filing of the petition for IME. Further, the request for an E/C-paid IME was not well grounded in fact, and was not warranted by existing law. (Claimant did not argue that there was a basis for extending, modifying or reversing existing law). I do not believe that the petition was filed for any improper purpose, nor do I believe there was any malice or bad faith behind it. Rather, I simply believe it was misguided and something that could have easily been avoided.

Compensability

Although I disagree with claimant's argument that a denial of benefits can be considered the equivalent of a denial of compensability, I do acknowledge that "compensability," like MCC and many other things in the workers' compensation law, can tend to be a fluid concept which morphs and changes over time. Nevertheless, I find it difficult to avoid a conclusion that the claim for compensability was not well grounded in fact, given that compensability had already been accepted, the right to deny compensability had been waived by the passage of time, compensability had been stipulated to, and benefits had been provided (even though they are currently being denied). I also find it difficult to avoid a conclusion that the claim for compensability was not warranted by existing law, as this is one issue on which the case law is fairly clear and well established at this point. (Again claimant did not argue that there was a basis for extending, modifying or reversing existing law). Again I do not believe that the claim was filed for any improper purpose, nor do I believe there was any malice or bad faith behind it, but again it is something that could have easily been avoided by more careful pleading.

21-day Safe Harbor

Claimant argues that the motion for sanctions, contained within the 04/10/15 Reply to Claimant's Response to MSFA, is procedurally defective or otherwise not valid because E/C failed to comply with the 21-day "safe harbor" provisions of Rule 60Q-6.125(4), F.A.C. However, E/C argue that the 21-day safe harbor does not apply to motions for sanctions filed under section 440.32, F.S., which does not contain such a provision. Neither side was able to cite any authority directly on point to this issue, nor is the undersigned aware of any.

Section 440.32 provides for certain, specific sanctions to be imposed in three specific

situations. Subsection (1) permits "the judge of compensation claims or any court having jurisdiction of proceedings in respect of any claim or compensation order," to assess costs, not including fees, against a party who has instituted or continued proceedings without reasonable ground; subsection (2) permits "the judge of compensation claim or any court having jurisdiction of proceedings in respect to any claims or defense," to assess costs, including fees, against an attorney who maintains or continues proceedings frivolously (and also requires the judge to report the attorney to the Florida bar); and subsection (3) permits "the judge of compensation claims or any court having jurisdiction of proceedings," to impose "an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney fee," if it is determined that a pleading, motion or other paper was signed in violation of the standards contained therein.

The text of section 440.32 does not contain a 21-day safe harbor or similar provision.

Rule 60Q-6.125 provides for certain, specific sanctions to be provided in two specific situations. Subsection (1) permits "the judge" (defined as a judge of compensation claims, see Rule 60Q-6.102(8)) to "subject a party or attorney to one or more of the following sanctions: striking of claims, petitions, defenses, or pleadings; imposition of costs or attorney's fees; or such other sanctions as the judge may deem appropriate," if the party or attorney fails to comply "with the provisions of these rules or any order of the judge." Subsection (2) provides for the imposition of sanctions against an attorney or unrepresented party who files a pleading or other document, or who presents argument before the judge at a hearing, in violation of the provisions of subsection (2), paragraphs (a) through (d). Although the provisions of 60Q-6.125(2)(a)

through (d) are similar to the provisions of section 440.32(3), they are not the same. They contain additional and/or different criteria from what is in the statute.

Reading the statute and the rule in conjunction with one another, it is apparent to me that the **statute** provides for the imposition of sanctions: by a JCC or any other judge having jurisdiction; if that judge determines that the specific provisions of the statute have been violated; and, if a violation is found, the sanction may consist of those specifically listed in the statute. The **rule** provides for the imposition of sanctions: by a JCC (only); if the JCC finds either a failure to comply with the 60Q rules or any order, or a violation of subsection (2)(a)-(d); and, if a violation is found, the sanction can either be one of those specifically listed, or "such other sanction as the judge may deem appropriate," but "shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated."

When read and compared in this manner, it appears that the statute and the rule provide for: distinctly different sanctions; in distinctly different circumstances; based on distinctly different conduct. And, while the statute is not limited to JCC's, the rule is limited to JCC's. Therefore, it appears to me that the rule provides an alternative (to the statute) and independent basis for pursuing sanctions, rather than merely the procedural method for pursuing sanctions under the statute.

The 21-day safe harbor provision is contained in 60Q-6.125(4)(a). Therefore the structure of the rule is as follows:

(1) Judge may impose sanctions based on failure to comply with rules or order

(2) Pleadings and other documents filed, and arguments presented, must comply with subsection (2), paragraphs (a)-(d)

(3) If judge determines that subsection (2) has been violated, judge may impose an appropriate sanction

(4) "How Initiated. (a) A motion for sanctions ***under this rule*** shall be made separately from other motions or requests ***and shall describe the specific conduct alleged to violate subsection (2).*** It shall be served but not filed unless the challenged paper, claim, defense, allegation, or denial is not withdrawn or appropriately corrected within 21 days after service of the motion . . ." (emphasis added)

Therefore, the 21-day provision in 6.125(4) appears to apply to motions brought *under* 6.125, and more specifically to motions alleging violations of 6.125(2). It is worth noting again that 6.125(2) contains different and additional standards of conduct which are *not* contained in section 440.32(3). It is also worth noting again that the statute itself does not contain a 21-day safe harbor or similar provision as does the rule. To the extent that the statute and the rule differ, the statute controls. See *Heymann v Free*, 913 So. 2d 11 (Fla. 1st DCA 2005).

Based on the foregoing, I respectfully reject claimant's contention that the 21-day safe harbor provision contained in Rule 60Q-6.125(4) applies to motions for sanctions brought under section 440.32, F.S. I find that it does not apply, and E/C were not required to serve the motion at least 21 days before it was filed.

CONCLUSION

As a point of emphasis, although I am granting the motion for sanctions, I do so with some hesitation. The decision is based strictly on the criteria contained in section 440.32(3), and in particular on the "well grounded in fact" and warranted by existing law" provisions. Based on

those criteria and on the facts presented, I am constrained to find that E/C are entitled to sanctions, notwithstanding the fact that the IME claim was withdrawn within a few days after claimant's counsel was reminded that managed care did not apply, and that the claim for compensability was withdrawn – albeit somewhat later than it should have been, but still at a relatively early stage. While those might be relevant factors under 440.32(1) or (2), they are not relevant to 440.32(3). It is unfortunate that the matter got to the stage it did, but hopefully in the future, situations like this can be and will be avoided through more careful pleading.

WHEREFORE it is hereby ORDERED AND ADJUDGED as follows:

1. E/C's Motion for Sanctions is GRANTED as to entitlement.
2. Jurisdiction is reserved as to amount.

DONE AND ORDERED this 12th day of June, 2015, in Miami, Dade County, Florida.

Mark A. Massey
Judge of Compensation Claims
Division of Administrative Hearings
Office of the Judges of Compensation Claims
Miami District Office
401 Northwest 2nd Avenue, Suite N-918
Miami, Florida 33128-3902
(813)664-4000
www.fljcc.org

COPIES FURNISHED:

Guarantee Insurance Company
PO Box 958470
Lake Mary, FL 32795
alepore@pnigroup.com

David G. Abramovici, Attorney
David G. Abramovici, PA
5124 Hollywood Blvd.
Hollywood, FL 33021
davidgabramovici@bellsouth.net

Andrew R. Borah, Esquire
Hurley, Rogner, Miller, Cox, Waranch &Westcott, P.A.
1280 SW 36th Avenue, Suite 100
Pompano Beach, FL 33069
aborah@hrmcw.com,sfournier@hrmcw.com

I HEREBY CERTIFY that the foregoing order

was posted to the DOAH website

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