

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

Jean Claude Pierre,
Employee/Claimant,

OJCC Case No. 13-009847MGK

vs.

Accident date: 4/15/2013

FTS USA, LLC, FTS USA, LLC d.b.a.
Unitek USA, LLC, FTS USA
LLC/Gallagher Bassett Services, Inc.,
Insurance Company of Pennsylvania, and
Zurich American Insurance Company,
Employer/Carrier/Service Agent.

Judge: Margret G. Kerr

**FINAL EVIDENTIARY ORDER ON EMPLOYER/CARRIER'S MOTION FOR
SUMMARY FINAL ORDER**

THIS CAUSE came before the undersigned Judge of Compensation Claims on December 4, 2015 upon Employer/Carrier's Motion for Summary Final Order filed 10/20/2015. The Employer/Carrier Agent "E/C" was represented by Andrew R. Borah Esq., and the Claimant was represented by Nick J. Panebianco Esq. This Order ensues:

EXHIBITS:

E/C:

1. Motion for Summary Final Order with attachments filed 10/20/2015 (ID#427).
2. Uniform Statewide Pretrial Stipulation filed 8/4/2015 (ID#347).

CLAIMANT:

1. Claimant's verified Response to Motion for Summary Final Order with attachments filed 12/3/2015 (ID#443).

1. On 9/14/2015, Claimant filed eleven separate petitions for benefits seeking various benefits. E/C argues four of those petitions and a subsequent petition filed on 10/19/2015 should be dismissed under the two dismissal rule pursuant to Rules of Procedure for

Workers' Compensation Adjudication 60Q-6.116(2) see also *Mieses v. Applebees*, 14 So.3d 1228 (Fla. 1st DCA 2009). E/C further argues two of the petitions, which seek payment by the E/C of the Claimant's IME should be dismissed as a matter of law pursuant to F.S. 440.13(5)(a).

2. Claimant argues the E/C's motion is fatally flawed as it is not verified, the E/C has no standing to claim relief as they were not the party of interest at the time the dismissed petitions were filed, certain of the duplicative petitions were filed only as a result of a scrivener's error, the claims which were voluntarily dismissed were not identical and therefore not subject to the two dismissal rule, and certain claims for medications covered different periods of time and were therefore not subject to the two dismissal rule. Claimant therefore argues there are sufficient questions of fact to make a Summary Final Order improper.

3. Rule 60Q-6.120(1) states the "judge may enter a summary final order when such an order would be dispositive of the issues raised by the subject petition."

4. When determining whether there are any genuine issues of material fact, this Tribunal must draw all inferences in favor of the party opposing summary judgment, in this case, the Claimant. *Padilla v. Collins Contracting*, 22 So.3d 124 (Fla. 1st DCA 2009) citing *Thomas v. Eckerd Drugs*, 987 So.2d 1262 (Fla. 1st DCA 2008).

5. Rule 60Q-6.116(2) Rules of Procedure for Workers' Compensation Adjudication states:

A claim may be dismissed by the claimant or petitioner without an order by filing, or announcing on the record, a voluntary dismissal at any time before the conclusion of the final hearing. Unless otherwise stated in the notice, the dismissal is without prejudice, except that a second notice of voluntary dismissal shall operate as an adjudication of denial of any claim or petition for benefits previously the subject of a voluntary dismissal.

6. In *Mieses v. Applebee's*, 14 So.3d 1228 (Fla. 1st DCA 2009), the First District Court of Appeal held claimant's earlier dismissal of all her pending petitions for benefits operated as an adjudication of denial as to time periods that were at issue in more than one petition.

7. I do not find merit in Claimant's argument the motion is fatally flawed as it is not verified. Rule 60Q-6.120 outlines the requirements and procedures for a Motion for Summary Final Order and imposes no requirement the motion must be verified.

8. Claimant next argues the E/C has no standing to claim relief as they were not the party of interest at the time the dismissed petitions were filed. The parties entered into an Agreed Order on retroactively substituting FTS USA, LLC as the correct employer in this matter. As FTS USA, LLC is the only listed employer, I conclude they have standing to file the motion as to the outstanding petitions for benefits.

9. Claimant further argues certain of the duplicative petitions were filed only as a result of a scrivener's error. The Notice of Voluntary Dismissal addresses each petition filed individually and does not raise any issue that any of the petitions were filed in error. Had the multiple petitions indeed been filed in error, it is incumbent on the Claimant to correct the error by filing a Notice of Error pursuant to Rule 60Q-6.108(h). There is no assertion by Claimant any notice of error was filed regarding any petition filed in error and therefore the claims have proceeded through the litigation process. The voluntary dismissal exactly matches the petitions as they were originally filed.

10. I find no support for Claimant's retroactive assertion of error and conclude the petitions were filed as intended.

11. The Claimant next argues the claims which were voluntarily dismissed were not identical, and certain claims for medications covered different periods of time and were therefore not subject to the two dismissal rule. This argument is addressed below:

Provision of Monthly psychiatric Medications

12. On 4/8/2015, Claimant filed a Petition for Benefits (ID#246), seeking provision of Trazadone and Cymbalta per a prescription from Dr. Punjwani dated 4/7/2015.

13. On 4/16/2015, Claimant filed a Petition for Benefits (ID#274), seeking provision of monthly Trazadone and Cymbalta per Dr. Punjwani report dated 4/1/2015.

14. On 4/16/2015, Claimant filed a second for Benefits (ID#275), seeking provision of monthly Trazadone and Cymbalta per Dr. Punjwani report dated 4/1/2015.

15. On 8/3/2015, Claimant filed a Petition for Benefits (ID#345), seeking provision of per Dr. Punjwani report dated 7/22/2015.

16. On 9/14/2015, Claimant filed an Amended Notice of Voluntary Dismissal (#365) in which he dismissed the 4/8/2015 (#246), 4/16/2015 (#274) and 4/16/2015 (#275) petitions.

17. On 9/14/2015 Claimant filed a Petition for Benefits (ID#355), seeking provision of Trazadone and Cymbalta per a prescription from Dr. Punjwani dated 4/7/2015.

18. On 9/14/2015 Claimant filed a Petition for Benefits (ID#359), seeking provision of monthly Trazadone and Cymbalta per Dr. Punjwani report dated 4/1/2015.

19. Claimant argues certain of the claims were sufficiently different such that a question of fact remains as to whether the two dismissal rule applies.

20. The two petitions for benefits filed 4/16/2015 (#274,275) were dismissed on 9/14/2015 (#365). Both petitions were for identical benefits based on an identical report dated 4/1/2015 from Dr. Punjwani. On the same day as the Claimant voluntarily dismissed the petitions, he filed a new petition for the identical benefits (#359).

21. As the benefits claims in the 9/14/2015 petition (#359) had been dismissed twice by the Claimant, they are subject to the two dismissal rule and the third petition claiming these benefits is barred.

22. The 8/3/2015 petition (#347) seeks the same medications as are contained in the prior petitions, however the claim is based on a report from Dr. Punjwani dated 7/22/2015, which had not previously been claimed. I conclude there is sufficient question of fact as to whether the benefits are different from those previously claimed that the petition must remain for adjudication on the merits.

23. The 9/14/2015 petition (#355) seeks the same medications as are contained in the prior petitions, however the claim is based on a report from Dr. Punjwani dated 4/7/2015, which had previously been claimed in only one petition and been dismissed. I conclude there is sufficient question of fact as to whether the benefits are different from those previously claimed that the petition must remain for adjudication on the merits.

One Time Change in Treating Neurologist

24. On 10/10/2014 Claimant filed a petition for benefits (#163) seeking a replacement neurologist, not a 1 time change in neurologist.

25. On 11/18/2014 Claimant filed a petition for benefits (#172) seeking a 1 time change in neurologist.

26. On 4/13/2015 Claimant filed a petition for benefits (#260) seeking a replacement physician and/or 1 time change in neurologist.

27. On 5/5/2015 Claimant filed a petition for benefits (#326) seeking a replacement neurologist.

28. On 2/9/2015 Claimant filed Notice of Voluntary Dismissal (#196) dismissing the 10/10/2014 and 11/18/2014 petitions (#163,172).

29. On 9/14/2015 Claimant filed an amended Notice of Voluntary Dismissal (#365) dismissing the 4/13/2015 and 5/5/2015 petitions (#260,326).

30. On 9/14/2015 Claimant filed a petition for benefits (#357) seeking a replacement physician and/or 1 time change in neurologist.

31. The Claimant sought a 1 time change in treating physicians in two petitions, 11/18/2014 and 4/13/2015 (#172,260), which he subsequently voluntarily withdrew.

32. On the same day as the Claimant voluntarily dismissed the second petition, he filed a new petition for the identical benefits (#357).

33. As the benefit claimed in the 9/14/2015 petition (#357) had been dismissed twice by the Claimant, it are subject to the two dismissal rule and the third petition claiming this benefits is barred.

Provision of Psychiatric Evaluation and Treatment per Dr. Punjwani.

34. On 4/14/2015 Claimant filed a petition for benefits (#263) authorization of a psychiatric evaluation and treatment per IME, per Punjwani questionnaire dated 4/2/2015

35. On 4/16/2015 Claimant filed a petition for benefits (#274) seeking authorization for psychiatric attendance, testing and treatment, monthly psychiatric medical management, and weekly individual therapy per Dr. Punjwani's report dated 4/1/2015, and payment of IME with Dr. Punjwani in the amount of \$1,500.00.

36. On 4/16/2015 Claimant filed a petition for benefits (#275) seeking authorization for psychiatric attendance, testing and treatment, monthly psychiatric medical management, and weekly individual therapy per Dr. Punjwani's report dated 4/1/2015, and payment of IME with Dr. Punjwani in the amount of \$1,500.00.

37. On 4/16/2015 Claimant filed a petition for benefits (#277) seeking treatment with Dr. Punjwani under the self help provision.

38. On 9/14/2015 Claimant filed an Amended Notice of voluntary Dismissal (#365) dismissing the 4/14/2015 (#263), 4/16/2015 (#274), 4/16/2015 (#275), and 4/16/2015 (#277) petitions.

39. On 9/14/2015 Claimant filed a petition for benefits (#359) seeking authorization for psychiatric attendance, testing and treatment, monthly psychiatric medical management, and weekly individual therapy, and payment of IME with Dr. Punjwani in the amount of \$1,500.00.

40. The two petitions for benefits filed 4/16/2015 (#274,#275) were dismissed on 9/14/2015 (#365). Both petitions were for identical benefits. On the same day as the Claimant voluntarily dismissed the petitions, he filed a new petition for the identical benefits (#359).

41. As the benefits claims in the 9/14/2015 petition (#359) had been dismissed twice by the Claimant, they are subject to the two dismissal rule and the third petition claiming these benefits is barred.

Payment of Claimant IME with Dr. Punjwani

42. On 9/14/2015 Claimant filed a petition for benefits (#359) seeking payment of Claimant his IME with Dr. Punjwani.

43. E/C argues the claim should be denied as a matter of law per 440.13(5)(a), as claimant must pay for his own IME, and the parties have stipulated this case is not governed by managed care.

44. Claimant argues he is not requesting the E/C to pay for the IME, and in fact claimant has already attended and paid for the IME. Rather, he is preserving his right for reimbursement of the cost of the IME should he prevail at Final Hearing.

45. Claims for prevailing party costs may be raised at any time and are not properly the subject of a petition for benefits.

46. The language of the claim contained in the petition does not specify prevailing party costs, but rather is clear on its face it is seeking payment of the Claimant's IME, a claim which is inappropriate for this date of accident as a matter of law.

Provision of Replacement Neurologist.

47. On 10/10/2014 Claimant filed a petition for benefits (#163) seeking a replacement neurologist, not a 1 time change in neurologist.

48. On 4/13/2015 Claimant filed a petition for benefits (#260) seeking a replacement physician and/or 1 time change in neurologist 5/5/2015.

49. On 2/9/2015 Claimant filed Notice of Voluntary Dismissal (#196) dismissing the 10/10/2014 petition (#163).

50. On 9/14/2015 Claimant filed Notice of Voluntary Dismissal (#365) dismissing the 4/13/2015 petition.

51. On 9/14/2015 Claimant filed a petition for benefits (#362) seeking a replacement physician.

52. The Claimant sought a replacement neurologist in two petitions, 10/10/2014 and 4/13/2015 (#163,260), which he subsequently voluntarily withdrew.

53. On the same day as the Claimant voluntarily dismissed the second petition, he filed a new petition for the identical benefits (#362).

54. As the benefit claimed in the 9/14/2015 petition (#362) had been dismissed twice by the Claimant, it are subject to the two dismissal rule and the third petition claiming this benefits is barred.

Payment of Claimant IME with Dr. Jeffrey Steinberg.

55. On 9/14/2015 Claimant filed a petition for benefits (#367) seeking payment of Claimant IME with Dr. Jeffrey Steinberg.

56. Again E/C argues the claim should be denied as a matter of law per 440.13(5)(a), as claimant must pay for his own IME, and the parties have stipulated this case is not governed by managed care.

57. Again Claimant argues he is not requesting the E/C to pay for the IME, and in fact claimant has already attended and paid for the IME. Rather, he is preserving his right for reimbursement of the cost of the IME should he prevail at Final Hearing.

58. Claims for prevailing party costs may be raised at any time and are not properly the subject of a petition for benefits.

59. The language of the claim contained in the petition does not specify prevailing party costs, but rather is clear on its face it is seeking payment of the Claimant's IME, a claim which is inappropriate for this date of accident as a matter of law.

Provision of Psychiatric Evaluation and Treatment per Dr. Steinberg.

60. On 4/16/2015 Claimant filed a petition for benefits (#274) seeking authorization for psychiatric attendance, testing and treatment, monthly psychiatric medical management, and weekly individual therapy per Dr. Punjwani's report dated 4/1/2015.

61. On 4/16/2015 Claimant filed a petition for benefits (#275) seeking authorization for psychiatric attendance, testing and treatment, monthly psychiatric medical management, and weekly individual therapy per Dr. Punjwani's report dated 4/1/2015.

62. On 4/16/2015 Claimant filed a petition for benefits (#277) seeking treatment with Dr. Punjwani under the self help provision.

63. On 5/15/2015 Claimant filed a petition for benefits (#328) seeking a psychiatric evaluation and treatment per Dr. Steinberg.

64. On 9/14/2015 Claimant filed an Amended Notice of voluntary Dismissal (#365) dismissing the 4/16/2015 (#274), 4/16/2015 (#275), 4/16/2015 (#277) and 5/15/2015 (#328) petitions.

65. On 10/19/2015 Claimant filed a petition for benefits (#421) seeking psychiatric evaluation and treatment.

66. The petitions for benefits filed 4/16/2015(#274,275,277) and 5/15/2015 (#328) were dismissed on 9/14/2015 (#365). The petitions all sought evaluation and treatment with a psychiatrist and were therefore for identical benefits. On 10/19/2015 the Claimant filed a new petition for the identical benefits (#421).

67. As the benefits claims in the 10/19/2015 petition (#421) had been dismissed twice by the Claimant, they are subject to the two dismissal rule and the third petition claiming these benefits is barred.

68. After a comprehensively reviewed the pleadings in their entirety and considered the arguments of counsel.

Based on the above,

IT IS ORDERED:

1. After considering the pleadings in their entirety, the Employer/Carrier's Motion for Summary Final Order is granted in part and denied in part.
2. The claims contained in the petition for benefits filed 9/14/2015 (ID#359), seeking provision of monthly Trazadone and Cymbalta per Dr. Punjwani report dated 4/1/2015, authorization for psychiatric attendance, testing and treatment, monthly psychiatric medical management, and weekly individual therapy, and payment of IME with Dr. Punjwani in the amount of \$1,500.00 are dismissed with prejudice.

3. The claim contained in the petition for benefits filed 9/14/2015 (ID#357), seeking provision of a 1 time change in neurologist is dismissed with prejudice.
4. The claims contained in the petition for benefits filed 9/14/2015 (ID#367), seeking payment of the Claimant's IME with Dr. Jeffrey Steinberg is dismissed with prejudice.
5. The claim contained in the petition for benefits filed 9/14/2015 (ID#362), seeking a replacement neurologist is dismissed with prejudice.
6. The claim contained in the petition for benefits filed 10/19/2015 (ID#421) for provision of an evaluation and treatment with a psychiatrist is dismissed with prejudice.
7. All other claims contained in the petitions for benefits remain as filed and will proceed for appropriate adjudication on the merits.

DONE AND ORDERED this 16th day of December, 2015, in Miami, Miami-Dade County, Florida.



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