STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGES OF COMPENSATION CLAIMS
FT. LAUDERDALE DISTRICT OFFICE

Osvaldo Sanchez, Employee/Claimant,	)	
vs.	)	OJCC Case No. 11-007716JJL
Daily Bread Food Bank /Selective Insurance Company, Employer/Carrier/Servicing Agent.	)	Accident Date: 11/19/2010 Judge John J. Lazzara

FINAL ORDER

AFTER DUE NOTICE to the parties, a Final Hearing on this matter was held on October 24, 2011 in Ft. Lauderdale, Broward County, Florida and simultaneously in Tallahassee, Leon County, Florida by way of the Division of Administrative Hearing's Video Teleconferencing System. The parties were represented by their counsel as indicated below. The undersigned Judge of Compensation Claims has jurisdiction of the parties and the subject matter.

The litigation history of this matter reflects that two (2) Petitions for Benefits (PFBs) were filed on June 15, 2011 and on July 11, 2011. The issues were mediated on August 9, 2011, recessed, and reconvened and completed on August 15, 2011 with the resolution of some issues. The pretrial statement and stipulation was filed on August 30, 2011 and the case proceeded to trial on October 24, 2011.

At the Final Hearing, the claimant sought the following benefits:

1. Provision of prescription medication, to wit: Medrol Dosepack, as prescribed by Dr. William Tejeiro, M.D.;

2. Payment of the medical charges of Dr. Tejeiro for dates of services of 3/31/2011 through 6/13/2011 for a total amount of $557.00;

3. Authorization and payment of Dr. Tejeiro for evaluation and treatment and the sum total of $918.00;

4. Authorization of physical therapy as prescribed by Dr. Tejeiro;

5. Provision of a lumbosacral support as prescribed by Dr. Tejeiro;

6. Provision of prescription medication, to wit: Ibuprofen 800 mg as prescribed by Dr. Tejeiro; and

7. Costs and attorney's fees at the expense of the employer/carrier.

The claim was defended on the following grounds:

1. Dr. William Tejeiro , M.D., was not authorized at the time of office visits for the date of services doe which the claimant is requesting payment;

2. Dr. Tejeiro was not authorized at the time he prescribed the Medrol Dosepack;

3. All treatment requested, provided, and recommended by Dr. Tejeiro is not medically necessary, nor causally related to the industrial accident;

4. Dr. Tejeiro was not authorized at the time he recommended physical therapy, lumbosacral support, and Ibuprofen;

5. The physical therapy, lumbosacral support and Ibuprofen that Dr. Tejeiro recommended is not medically necessary, nor causally related to the work accident; and

6. Employer/Carrier denies claimant's entitlement to costs and attorney's fees at their expense.

The parties have entered into the following stipulations:

1. The Judge of Compensation Claims has jurisdiction of the parties and the subject matter of this claim.

2. Venue properly lies in Broward County, Florida.

3. There was an employer/employee relationship on the date of accident;

4. Notice of Hearing was properly furnished and received as required by the Workers' Compensation Law.

5. On November 19, 2010, the captioned claimant, Osvaldo Sanchez, was employed by the captioned employer as a local delivery truck drive and on that date sustained and suffered a compensable injury to his low back by accident arising out of and within the course and scope of said.

At the trial of this cause, the following Exhibits were admitted into evidence.

Claimant's Exhibits

1. Composite of two (2) PFBs filed on 6/15/2011 and 7/11/2011 *(Employer/Carrier's hearsay objection to the attachments to the PFBs was sustained because Dr. Tejeiro had not been authorized to evaluate or treat the claimant when he rendered his medical opinions and thus his opinions cannot be accepted under § 440.29(4), Florida Statutes. Nevertheless, said attachments are received in evidence solely for the purpose of showing compliance with § 440.02(40) and § 440.192(2)(h) & (i), Florida Statutes), and not for the truth or opinions stated therein).*

2. Composite of medical records of Dr. William Tejeiro, M.D., Dr.

Jonathan Hyde, M.D., and Concentra Medical Centers. *(Employer/Carrier's hearsay objection as to Dr. Tejeiro's medical reports prior to 4/29/2011 is sustained because Dr. Tejeiro was not authorized to evaluate and/or treat the claimant until then. Hearsay objections in regards to the medical records of Dr. Hyde and Concentra Medical Centers are denied since they were authorized medical providers and said records were received in evidence under § 440.29(4), Florida Statutes).*

3. Deposition of Dr. William V. Tejeiro, M.D., taken 10/20/2011.

4. Composite of Responses to PFBs filed on 7/7/2011 and 7/28/2011.

5. Correspondence from claimant's attorney to adjuster dated 4/29/2011 (e-filed on 10/20/2011).

6. *(Marked for identification only).* Claimant's Trial Summary.

7. MRI report of 12/7/2010.

Employer/Carrier's Exhibits

1. Deposition of Osvaldo Sanchez taken 7/28/2011.

2. Deposition of Dr. Jonathan Hyde, M.D., together with exhibits, taken on 10/5/2011 and Exhibit # 2 to Dr. Hyde's deposition e-filed on 10/24/2011 *(Claimant's objection to Exhibit # 2 to Dr. Hyde's deposition is overruled and received under § 440.29(4). Moreover, counsel for the employee failed to timely object during the deposition to the attachments of Dr. Hyde's medical reports to his deposition of 10/5/2011 and, therefore, said objection is deemed waived).*

Joint Exhibits

1. Deposition of Lisa Sabattini, together with adjuster's notes, taken on 10/12/2011.

2. Pretrial stipulation and Order Approving Stipulation entered on 8/31/2011.

The following individual testified live before me:

1. Osvaldo Sanchez, the claimant. His testimony was presented with the assistance of a duly sworn Spanish Interpreter, Alberto Varella.

After due consideration of this matter and after having the opportunity to review and consider the aforesaid exhibits which were admitted into evidence, and having observed and considered the candor and demeanor of the witnesses who appeared and testified before me, and having endeavored to resolve all conflicts of facts in the evidence presented herein, I hereby make the following findings of fact and conclusions of law:

1. The undersigned Judge of Compensation Claims has jurisdiction of the parties and the subject matter of this claim;

2. The stipulations entered into by and between the parties herein are hereby approved and adopted as findings of fact and are incorporated herein by reference;

3. In my determination herein I have attempted to distill all the testimony and salient facts together with the findings and conclusions necessary to the resolution of this matter. I have not necessarily attempted to summarize the substance of the claimant's testimony or the testimony of any live or deposition witness, nor have I attempted to state nonessential facts. Because I have not done so should not be construed that I have failed to consider all of the evidence.

4. Any and all issues raised in the petition or petitions for benefits described above which was the subject matter of the final hearing, but which issues were not tried at the hearing are presumed resolved or, in the alternative, deemed abandoned by the employee/claimant and therefore **denied.** *See* Betancourt v. Sears Roebuck & Co., 693 So.2d 253 (Fla. 1st DCA 1997).

5. On November 19, 2010, the captioned claimant, Osvaldo Sanchez, who is 44 years of age, was employed by Feeding South Florida, through a employee leasing company, Alpha Staff, Inc., as a local truck delivery driver. On that date the employer/carrier has stipulated that Mr. Sanchez suffered a compensable accident and accepted the claimant's low back injury as related to the work accident.[1] In spite of said stipulations, the employer/carrier has asserted that the treatment provided, requested and recommended by Dr. William Tejeiro, M.D., an orthopedist, was and is not medically necessary, nor causally related to the work accident of 11/19/2010.

6. The evidence shows that the claimant previously injured his low back on 8/26/2009 while working for the predecessor company of Feeding South Florida. Employer/Carrier accepted that accident as compensable and authorized Dr. Jonathan Hyde, M.D., a board certified orthopedic surgeon, to evaluate and treat the claimant's low back injury. In addition to Dr. Hyde's treatment, the claimant also treated with Dr. William Tejeiro, M.D., an orthopedist, who it appears the claimant was referred to by his attorney.

Following the subject 11/19/2010 work accident, the employer/carrier

[1] See the parties' Uniformed Statewide Pretrial Stipulation filed on 8/30/2011 and received in evidence as Joint Exhibit # 2.

authorized Concentra Medical Centers (Concentra) to provide care to the claimant. Concentra's medical records reflect that claimant was diagnosed with a lumbosacral strain on 11/22/2010. Their records also indicate that on 11/24/2010 he was allowed to return to work with restrictions consisting of no lifting over 15 lbs., no bending more than four (4) times per hour and no pushing or pulling over 15 lbs. of force. Ultimately, Concentra recommended that the claimant follow-up with treatment with an orthopedic specialist and the employer/carrier again authorized Dr. Hyde to evaluate and treat the claimant as medically necessary.

7. Dr. Hyde saw the claimant on 12/10/2010 for the work accident of 11/19/2010. As stated above he had previously treated the claimant since the 5/12/2010 visit for a slip and fall accident at work on 8/26/2009. The doctor found that the claimant had reached maximum medical improvement (MMI) at the time with 0% permanent impairment rating (PIR) with regard to the 8/26/2009 accident and without any work restrictions.

8. When Dr. Hyde saw the claimant on 12/10/2010 he was not aware that the claimant had suffered another on-the-job injury on 11/20/2009. The claimant presented with a translator and Dr. Hyde thought the visit was simply an additional follow-up for the 2009 accident. Mr. Sanchez essentially complained of low back pain. Dr. Hyde personally reviewed and interpreted the claimant's lumbar MRI of 12/7/2010, which he found did not demonstrate any herniated disc in the lumbar spine, nor any neuroforaminal or spinal canal compromise. He did note a very slight change in the hydration signal at L4-L5. He ultimately interpreted the study as normal. However, the radiology report of Dr. Kevin Mendez, M.D.,

reported a small central disc herniation that flattens the thecal sac with no neural foraminal encroachment. The report also shows bulging discs at L3-L4 with no neural foraminal encroachment or canal stenosis, and at L4-L5 with minimal bilateral neural foraminal encroachment and no canal stenosis. Dr. Hyde admitted that he did not review Dr. Mendez's report but that his review and interpretation of the MRI scan showed that the claimant did not have any significant protrusion and, therefore, the scan was interpreted as a normal scan. He pointed out that Dr. Mendez's report also did not reflect any type of nerve root encroachment or compression of the nerve roots, nor did the report describe any differences in the disc hydration signals.

9. Although, Dr. Hyde said that he did not specifically compare the MRI reports of 2009 and 2010, based on his reading and the fact that there was no mention of any significant issues at L5-S1, he would have been surprised if there were any differences between the two, in spite of the reports themselves. He opined that there was no objective evidence of any injury sustained by Mr. Sanchez on 11/19/2010 and that Mr. Sanchez did exhibit symptom magnification during his visit of 12/10/2010. The doctor concluded that there were no objective findings of traumatic or chronic disease, that the claimant's self-described pain did not follow any particular dermatome, nor did it correlate with any anatomic objective findings of back or leg pain. In other words, the claimant had only subjective complaints of pain.

Dr. Hyde opined that no further treatment or follow-up care was necessary that the Medrol Dosepack, physical therapy and lumbosacral support were not

medically necessary. He said that the claimant's subjective complaint of pains could be easily treated with over-the-counter medication and that the work accident of 11/19/2010 was not the major contributing cause of the claimant's low back condition.

10. Presumably because Dr. Hyde did not recommend any follow-up care, the claimant's attorney eventually referred him to Dr. William Tejeiro, M.D., an orthopedist, by his attorney. Dr. Tejeiro saw the claimant on 3/17/2011 for the work accident of 11/19/2010. There was no request made by the claimant or his attorney of the carrier for authorization of additional medical care or change in physician.[2]

11. Four (4) months after last seeing Dr. Hyde, on 4/29/2011 the claimant faxed to the carrier his written request for a one-time change in orthopedic to replace Dr. Hyde. Because the adjuster was working out of her home rather than the carrier's office, claimant's written request of 4/29/2011 did not come to her attention until the state mediation conference of 8/15/2011. At that time, the employer/carrier agreed to authorize Dr. Tejeiro as the claimant's choice of a one-time change of physician. Dr. Tejeiro was authorized to evaluate the claimant on 9/6/2011, which the doctor followed up by submitting his report on 10/10/2011. Relying on the opinions of Dr. Hyde, the carrier then denied all further care by Dr. Tejeiro as being not medically necessary or causally related to the work accident of 11/19/2010, and advised Dr. Tejeiro accordingly.

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[2] The employee argues that the note of the adjuster, Lisa Sabattini, of 12/13/2010 reflects that the claimant told his medical case manager that he was "unhappy with Dr. Hyde and wants to change" physicians. The note goes on to state that the medical case manager "informed him he would have to put it in a written request for his one-time change of" physician to the adjuster." Section 440 requires that the one-time change be made by "written request of the employee" for the obvious reason of avoiding a "he said, she said" situation.

The employee argues that because the carrier failed to timely provide him with a one-time change within 5 days of his written request of 4/29/2011 for a one-time change of physicians, Dr. Tejeiro became authorized under § 440.13(2)(f), Florida Statutes, which provides that if "the carrier fails to (timely) provide a change of physician as requested by the employee, the employee may select a physician and such physician shall be authorized if the treatment being provided is compensable and medically necessary." *(emphasis added).* The claimant further argues that any treatment provided by Dr. Tejeiro prior to 4/29/2010 and thereafter is compensable. I disagree. The court has held that although a one-time change of physicians under §440.13(2)(f) is mandatory," if, after authorizing the one-time change the E/C are still of the opinion that the treatment recommended or provided is unnecessary, or unrelated to the industrial accident, the E/C can deny authorization for such treatment pending resolution for the issue by the JCC." Providence Property & Casualty v. Wilson, 990 So.2d 1224,1225 (Fla. 1st DCA 2008). It is the claimant's burden of establishing that the treatment provided and recommended by Dr. Tejeiro is both medically necessary and causally related to the captioned work accident.

12. Mr. Sanchez testified that on 11/19/2010, while picking up food donations, he lifted a heavy box and injured his back. He claims that he reported the accident to his supervisor, George Camil, and was ultimately sent to Concentra, where he was provided with physical therapy and medication. He was put on light duty work, but not able to work since there was no light duty available with his employer. He was off for approximately eight (8) days after which time he asked to

be released to return to work because he needed to do so financially. Mr. Sanchez was eventually referred to Dr. Hyde and saw him on 12/10/2010. He claims that Dr. Hyde was abrupt and did not treat him in a professional manner that day. He states that Dr. Hyde did not want to see him, and he could not recall any physical exam performed by Dr. Hyde which is disputed by Dr. Hyde's medical records. He says that he eventually came under the care of Dr. Tejeiro and with his care his condition improved somewhat, helping him to return to work. He is currently not working because of the pain and Dr. Tejeiro's no work restrictions.

13. On cross-examination, Mr. Sanchez admitted he had seen Dr. Tejeiro for the work accident of 11/19/2010 and that he was referred to Dr. Tejeiro by someone other than his attorney, which is inconsistent with Dr. Tejeiro's testimony.

14. I found that Mr. Sanchez was not particularly credible after hearing his testimony on cross-examination where he stated that he had no recollection of a clinical examination on 12/10/2010 by Dr. Hyde. It is apparent that Mr. Sanchez did not like what Dr. Hyde had to say.

15. As stated above, the employer/carrier ultimately, albeit late, granted the claimant's written request for a one-time change in physician and authorized Dr. William V. Tejeiro, M.D., to evaluate the claimant. Dr. Tejeiro is not board certified orthopedist. He does not perform spine surgery as does Dr. Hyde. His deposition was taken on 10/20/2011; wherein, he stated that he first saw the claimant on 3/17/2011, four months after the 11/19/2010 accident. He received a history of the claimant reinjuring his lumbar spine. He admitted that he had earlier treated the claimant for his injury of 8/26/2009 which he said resulted in a

herniated disc at L1-L2, bulging disc at L4-L5 and L3-L4 with no foraminal stenosis and no findings of herniation. Dr. Tejeiro testified that he reviewed the MRI report of the scan performed on 12/7/2010 by Dr. Mendez, and he found the same was consistent with a new injury. He claims the central herniated disc at L5-S1 was not present in the MRI report of 9/25/2009. He opined that bilateral foraminal encroachment would cause neurologic symptoms.

Dr. Tejeiro's opinions in regard to the findings in the MRI report of 12/7/2010 are in conflict with the interpretations of actual scan by Dr. Hyde. Based on his interpretation of the MRI of 12/7/2010, Dr. Tejeiro recommended treatment consisting of lumbar support, Motrin and Demerol twice a day, physical therapy three (3) to four (4) times per week, and also recommended pain management. He also found that the claimant was unable to work. He stated that the nerve conduction study of 12/16/2009 relating to the work accident of 8/26/2009 (which was prior to the captioned accident) suggested sensory radiculopathy and that the MRI of 9/26/2009 was also not normal.

16. Dr. Tejeiro testified that the claimant's symptoms both objective and subjective were consistent with his findings of the MRI of 12/7/2010 and found that the claimant was not malingering and that all treatment he had performed and recommended was necessary. However, a thorough review of his depositional testimony clearly shows that Dr. Tejeiro did not render any opinion as to whether or not the work accident of 11/19/2010 was the major contributing cause of the claimant's low back condition. Dr. Hyde opined that it was not. Section 440.09(1), Florida Statutes, requires that "establishment of the causal relationship between a

compensable accident and injuries for conditions that are not readably observable must be by medical evidence only" and that "the major contributing cause must be demonstrated by medical evidence only." Here the employer/carrier accepted the accident as compensable as well as the low back injury. However, they dispute that the medical treatment rendered and recommended by Dr. Tejeiro is medically necessary and causally related to the 2010 work accident. When the causal nexus is contested, under § 440.09(1), Florida Statutes, the claimant must establish that the work accident and any resulting manifestation or disability not only must be established to a reasonable degree of medical certainty but that "the accidental compensable injury must be the major contributing cause" of any resulting conditions.

The medical evidence here shows that Dr. Hyde found no objective medical findings of an injury on 11/19/2010. Furthermore, he stated that the 2010 work accident was not the major contributing cause of the claimant's current condition. Therefore, I find that the claimant here failed to present any medical evidence that the 2010 work accident was the major contributing cause of his resulting current low back condition. In regard to the interpretation of the MRI of 12/7/2010, I accept the opinions of Dr. Hyde over those of Dr. Tejeiro because Dr. Hyde is a board certified orthopedic surgeon who specializes in disorders of the spine; while, Dr. Tejeiro is a general orthopedist and is not board certified. I find that Dr. Hyde is more qualified as an medical expert to comment on the claimant's low back condition than is Dr. Tejeiro. Moreover, Dr. Hyde actually reviewed the claimant's MRI films, while Dr. Tejeiro on the other hand only relied on the interpretation of

the radiologist as documented in the MRI report. Since Dr. Hyde actually reviewed the MRI films he was in a much better position to provide a more accurate assessment of the claimant's condition as compared to Dr. Tejeiro. Finally , I also concluded based on the totality of his depositional testimony, that Dr. Tejeiro seemed more of an advocate for the claimant and was not as objective as Dr. Hyde.

17. Because the carrier did not timely provide the claimant with a one-time change in physician once they received the written request of 4/29/2011, claimant was entitled to choose Dr. Tejeiro as his authorized physician. But this would have been for any treatment rendered after 4/29/2011. The only treatment provided by Dr. Tejeiro after that time was on 5/9/2011 prior to the authorized visit to evaluate the claimant on 9/6/2011. All of the treatment which Dr. Tejeiro had recommended and provided the claimant consisting of physical therapy, lumbosacral support, and medication was all made prior to 4/29/2011.[3]

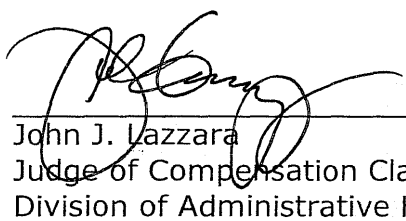
18. Having accepted the opinions of Dr. Hyde over those of Dr. Tejeiro, I find that the medical treatment rendered by Dr. Tejeiro and recommended by him was and is neither medically necessary nor causally related to any low back injury the claimant might have suffered on 11/19/2010. Moreover, any medical expenses incurred by the claimant for treatment by Dr. Tejeiro, even if medically necessary must be still be denied because said bills were not placed in evidence at the Final Hearing, nor was there stipulation by the parties to handle the matter administratively. Martin Marietta Court v Glumb, 523 So. 2d 1190 (Fla. 1st DCA 1988) (generally an order directing payment of medical bills is improper unless the

[3] According to the application of § 440.13(2)(f), Florida Statutes, May 9, 2010 would have been sixth days following the request for a one-time change in physician of April 29, 2011.

medical bills are placed in evidence or where there is clear and unequivocal testimony as to the amount of the bills); Metropolitan Dade County v Moss, 568 So. 2d 492 (Fla. 1st DCA 1990) (order requiring payment of past medical bills is not supported by competent substantial evidence when the claimant fails to either submit the medical bills in evidence or introduce testimony as to the amount of the charges). It is

WHEREFORE, it is **ORDERED** that the claims for workers' compensation benefits as raised in Petitions for Benefits filed on 6/15/2011 and 7/11/2011 of the claimant, Osvaldo Sanchez, are hereby **DENIED** and **DISMISSED**.

DONE AND ORDERED at Tallahassee, Leon County, Florida.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing order was entered and a true copy was furnished by electronic transmission on this 22nd day of November, 2011 to counsel of record and the parties by regular U.S. mail.

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