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

EMPLOYEE:
Federic Tamargo
10370 SW 210th Terrace
Miami, FL 33189

ATTORNEY FOR EMPLOYEE:
Toni Villaverde, Esquire
1430 South Dixie Highway, Suite #319
Coral Gables, FL 33146

EMPLOYER:
FrankCrum
100 S. Missouri Avenue
Clearwater, FL 33756

ATTORNEY FOR EMPLOYER/CARRIER:
Andrew R. Borah, Esquire
1280 SW 36th Avenue, Suite #100
Pompano Beach, FL 33069

CARRIER:
Frank Winston Crum Insurance
Serviced by: Broadspire
P.O. Box 14345
Lexington, KY 40512

OJCC No: 12-019789DAL
D/A: 03/10/2011
JUDGE: Daniel A. Lewis

FINAL COMPENSATION ORDER

AFTER DUE NOTICE to the parties, a Final Merits Hearing was conducted before the undersigned Judge of Compensation Claims (JCC) on April 10, 2014 in Lauderdale Lakes, Broward County, Florida. The petition for benefits which came on for adjudication was filed on December 12, 2012.

By my prior Final Compensation Order entered on August 6, 2013, the claimant was ordered to submit to an evaluation with an expert medical advisor (EMA) in the specialty of orthopedic surgery. Jurisdiction was reserved over the claims presented in this cause pending the results of the EMA evaluation.

The claimant attended the evaluation with the appointed EMA, Dr. Aparicio, on September 18, 2013. Subsequent to that evaluation, the employer/carrier agreed to re-authorize

Dr. Evans as the claimant's treating neurosurgeon and agreed to authorize Dr. Salamon for medically necessary and causally related pain management treatment. The employer/carrier also agreed to pay temporary indemnity benefits. A Joint Stipulation was drafted which purportedly reflected the parties' agreement.

However, a dispute arose as to whether the Joint Stipulation resolved all of the then pending issues. The claimant contends that the pending claims for authorization of pain management physician Dr. Ray, payment of Dr. Ray's medical bill, and authorization of Dr. Ray's recommendations for treatment were not resolved or addressed by the Joint Stipulation.

Consequently, on January 10, 2014, the employer/carrier filed a Motion to Put Conclusion of Final Hearing Back on Calendar. By my Order entered on February 24, 2014, the employer/carrier's Motion to Put Conclusion of Final Hearing Back on Calendar was granted, and the Final Hearing on the remaining pending issues was scheduled for April 10, 2014. By that Order, the parties were also advised that no new evidence would be taken at the Final Hearing other than that which was previously admitted at the August 2, 2013 Final Hearing; in other words, I would rule on the pending claims based on the evidence previously submitted.

At this Final Hearing, I took judicial notice of my Final Compensation Order entered on August 6, 2013, since that Order recited the parties' claims and defenses, contained medical summaries and made evidentiary determinations which are applicable to the remaining claims. I also took judicial notice of my Order on Employer/Carrier's Motion to Put Conclusion of Final Hearing Back on Calendar entered on February 24, 2014 and of the claimant's Motion to Designate IME and Order entered thereon on May 21, 2013. I have also considered, as argument, the employer/carrier's Motion to Put Conclusion of Final Hearing Back on Calendar as well as the claimant's Response thereto, the claimant's Trial Summary filed on April 9, 2014 and the

employer/carrier's Hearing Information Sheet for Conclusion of Final Hearing filed on April 9, 2014.

After careful consideration and review of the evidence and argument presented, I make the following findings of ultimate facts and conclusions of law:

1. As indicated, the claims remaining for adjudication are authorization of pain management physician Dr. Ray, payment of Dr. Ray's medical bill, and authorization of Dr. Ray's recommendations for treatment; specifically, authorization of pain management, authorization of a neurosurgical consultation, authorization of epidural injections, myofascial release and trigger point injections, and provision of melatonin as a sleep aid. The only defense asserted by the employer/carrier applicable to these claims was that no benefits would be due or owing after the claimant's September 7, 2011 motor vehicle accident, as that accident was a subsequent intervening cause and the basis for any current treatment needed.

2. As my Final Compensation Order entered on August 6, 2013 reflects, specifically footnote 4 on page 9 thereof, the claimant saw pain management physician Dr. Ray on his own after the March 10, 2011 industrial accident. The claimant saw this physician on one occasion, on December 5, 2012. However, the report of Dr. Ray was not introduced into evidence since the employer/carrier's objection to the admission of Dr. Ray's medical report was sustained on the basis of hearsay and lack of authentication. The claimant did not proffer Dr. Ray's excluded medical report.

3. The claimant first seeks authorization of pain management physician, Dr. Ray. The claimant contends that Dr. Ray was authorized by virtue of the self-help provisions of section 440.13(2)(c), Fla. Stat. However, the evidence reveals the claimant saw Dr. Ray after he came under the care of internist Dr. Franco, and the self-help provisions only apply where the

employer/carrier fails to provide initial treatment or care. *See* section 440.13(2)(c), Fla. Stat., Carmack vs. State of Florida, Department of Agriculture, 31 So. 3d 798 (Fla. 1st DCA 2009) (holding that the insertion of the word "initial" into the statute evinces the intent of the Legislature to restrict the application of that subsection to only the circumstances described therein; that is, the "beginning" of treatment for a particular condition), Miller Electric Company vs. Oursler, 113 So. 3d 1004 (Fla. 1st DCA 2013). Since Dr. Ray did not provide initial treatment or care, the self-help provision is inapplicable.[1]

4. Moreover, and as the employer/carrier points out, even assuming *arguendo* that Dr. Ray's care was authorized by virtue of application of the self-help provisions of the statute, which I do not find, the employer/carrier is not obligated to accept the claimant's selection of a doctor for future medical care. Carmack vs. State of Florida, Department of Agriculture, 31 So. 3d at 800, Butler vs. Bay Center, 947 So. 2d 570 (Fla. 1st DCA 2006). Consequently, the claimant's claim for authorization of pain management physician Dr. Ray shall be, and the same is hereby, denied.[2]

5. The claimant next seeks payment of Dr. Ray's medical bill. As indicated, the claimant saw Dr. Ray on one occasion. Dr. Ray was not authorized by the employer/carrier to evaluate or treat the claimant. Instead, the employer/carrier took the defensive position that no benefits were due after the claimant's September 7, 2011 motor vehicle accident, as that accident was a subsequent intervening cause and the basis for any current treatment needed. As stated, I have

[1] By my August 6, 2013 Final Compensation Order, Dr. Franco's care was found to be compensable and authorized under the self-help provisions of the statute.

[2] I would further note that, contrary to the claimant's position that Dr. Ray was authorized by operation of the statute, the claimant filed a Motion on May 20, 2013 requesting that Dr. Ray be designated as the claimant's independent medical examiner (IME). The claimant's Motion reflected that counsel for the employer/carrier agreed to the request, and an Order was entered by the undersigned on May 21, 2013 granting the claimant's Motion to Designate Dr. Ray as his IME physician. Under the statute, each party is bound by his or her selection of an independent medical examiner, and the examiner may not also be a treating provider unless the parties agree. Section 440.13(5)(a) and (b), Fla. Stat.

found the self-help provisions to be inapplicable, since Dr. Ray's care was not initial treatment. In addition, except for emergency type care, prior authorization is generally required as a prerequisite to an employer/carrier's responsibility for medical care. Here, no evidence was presented that the unauthorized care afforded by Dr. Ray was rendered on an emergency basis. *See, e.g.*, Sierachi vs. Pizza Hut, 599 So. 2d 678 (Fla. 1st DCA 1992).

6. Moreover, the parties' Pretrial Stipulation filed on January 10, 2013, which was admitted into evidence at the August 2, 2013 Final Hearing as Judge's Exhibit #1, reflects that the parties did not agree to handle the payment of the claimed medical bills administratively, and the medical bill of Dr. Ray was not offered into evidence at the August 2, 2013 Final Hearing. Nor was any evidence presented as to the amount of Dr. Ray's medical bill. Consequently, I cannot determine whether the amount of the bill or the treatment rendered was reasonable or necessary. *See* Thomas vs. Yoder Brothers, Inc., 882 So. 2d 442 (Fla. 1st DCA 2004) (holding that an order directing payment of medical bills is improper unless the medical bills are placed in evidence or there is clear and unequivocal testimony as to the amount of the bills), Metropolitan Dade County vs. Moss, 568 So. 2d 492 (Fla. 1st DCA 1990). As such, the claimant's claim for payment of the medical bill of Dr. Ray shall be, and the same is hereby, denied.[3]

7. Lastly, the claimant seeks authorization of Dr. Ray's recommendations for treatment; specifically, authorization of pain management, authorization of a neurosurgical consultation, authorization of epidural injections, myofascial release and trigger point injections, and provision of melatonin as a sleep aid. At the time of the August 2, 2013 Final Hearing, the claimant offered

[3] As an alternative basis for payment of Dr. Ray's bill, the claimant claimed that Dr. Ray was his independent medical examiner. As such, the expense of Dr. Ray's evaluation might be a litigation cost. However, I am not adjudicating at this time whether Dr. Ray's medical bill is properly taxable against the employer/carrier as a litigation cost, pursuant to Fla. Admin. Code R. 60Q-6.124(3). Such a determination is beyond the scope of this hearing and the claims presented, and should be brought as a verified motion for attorney's fees and/or costs in accordance with the procedural requirements of Rule 60Q-6.124(3). At a hearing on a verified motion for fees and/or costs, I will determine whether the expense of the evaluation is properly taxable as a cost against the employer/carrier.

into evidence only Dr. Ray's medical report; no deposition, medical records custodian or testimony of Dr. Ray was offered. As indicated, Dr. Ray's medical report was not introduced into evidence as the employer/carrier's objection to the admission of the report was sustained on the basis of hearsay and lack of authentication. Consequently, I do not have before me evidence of Dr. Ray's recommendations for treatment.[4]

8. More significantly, however, is that after the August 2, 2013 Final Hearing, as well as at this Final Hearing, the employer/carrier stipulated and agreed that pain management physician Dr. Salamon has been authorized to provide medically necessary and causally related pain management treatment. According to the employer/carrier, the claimant is currently treating with Dr. Salamon. At this Final Hearing, the claimant agreed that the claim for authorization of pain management is no longer at issue, the neurosurgical consultation has been provided, and the employer/carrier has authorized the requested injections. Consequently, I find these claims to have been resolved and rendered moot by the parties' stipulations.[5]

9. The only remaining issue pertaining to the claim for authorization of Dr. Ray's recommendations for treatment is the provision of melatonin as a sleep aid. As stated, while I do not have Dr. Ray's recommendations for treatment before me, there is other competent substantial evidence of record to support the claim for provision of melatonin. Internist Dr. Franco also testified that it would be reasonable and medically necessary for the claimant to have a sleep aid such as melatonin as the result of the work injury. (Deposition of Dr. Franco, page 19,

[4] Although the claimant contends Dr. Ray was not deposed because of the expense associated with doing so, case law instructs us that the cost of the deposition of a doctor is not a sufficient excuse for not taking it, particularly since that cost is paid by the employer/carrier, and not the claimant, if the claim is found to be compensable. Peters vs. Armellini Express Lines, 527 So. 2d 266 (Fla. 1st DCA 1988).

[5] The claimant's claim for an updated MRI scan of the claimant's back, raised for the first time at this Final Hearing, was not one of the issues presented for adjudication at the time of the August 2, 2013 Final Hearing.

lines 16-21). I accept the opinion of Dr. Franco in this regard. Consequently, this claim shall be, and the same is hereby, granted.

10. Pursuant to the parties' January 10, 2013 Pretrial Stipulation, jurisdiction shall be reserved for a later hearing to determine the claimant's entitlement to recover his attorney's fees and taxable costs from the employer/carrier, in accordance with section 440.34(3), Fla. Stat. Jurisdiction shall also be reserved to determine the amount of the fees and costs which may be due.

DONE AND ORDERED at Lauderdale Lakes, Broward County, Florida this 10th day of April, 2014.

Honorable Daniel A. Lewis
Judge of Compensation Claims

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Final Compensation Order on as furnished this 10th day of April, 2014 by electronic transmission to the parties' counsel of record and by U.S. mail to the parties.

Secretary to Judge of Compensation Claims