

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

Augustin Torres,  
Employee/Claimant,

OJCC Case No. 10-014278NPP

vs.

Accident date: 8/26/2009

Infrasource/Gallagher Bassett Services,  
Inc.,  
Employer/Carrier/Service Agent.

Judge: Neal P. Pitts

**FINAL EVIDENTIARY ORDER**

This matter came on for hearing on the 13th day of June, 2014, pursuant to Claimant's Motion For Order Striking Or Excluding Opinion Testimony And Motion Granting Change In Treating Physician, filed by the claimant with DOAH on May 6, 2014, to which the employer/carrier, has filed a written objection and response with DOAH on May 8, 2014. There is pending a petition for benefits filed on October 3, 2013 in which the claimant is seeking authorization for an electric scooter which is scheduled for a merits' hearing on July 15, 2014.

**The following documents were admitted into evidence:**

**Claimant's Exhibits:**

1. Employee/Claimant's Motion For Order Striking Or Excluding Opinion Testimony And Motion Granting Change In Treating Physician, filed by the claimant with DOAH on May 6, 2014;

2. Letter dated April 30, 2014 from Andrew R. Borah to Juan L. Alvarez; and
3. Affidavit Of Authorized Treating Provider, Bruce Epstein, M.D.

**Employer/Carrier's Exhibit:**

1. Employee/Claimant's Motion For Order Striking Or Excluding Opinion Testimony And Motion Granting Change In Treating Physician, filed by the claimant with DOAH on May 30, 2014.

**SUMMARY OF EVIDENCE:**

1. The claimant sustained a compensable accident on August 26, 2009 when he was working as a flagman and was struck by an automobile. His compensable physical injuries include multiple orthopedic injuries to his knees, shoulder, lumbar spine, peroneal nerve injury, and others. He has been accepted as permanently and totally disabled.
2. There was a prior claim for non-professional attendant care and a claim for an electric scooter or wheelchair. The claimant's authorized neurologist, Dr. Bruce Epstein wrote a prescription for non-professional attendant care for 8 hours per day. He also wrote a script for the scooter/wheelchair.

3. On March 14, 2014, the parties attended mediation and reached an agreement resolving the past attendant care issue. The E/C further agreed to provide future non-professional attendant care so as it was medically necessary. After agreeing to provide the attendant care benefits, the E/C apparently contracted a company to perform surveillance on the claimant. The surveillance was obtained on March 26, 2014, March 30, 2014, and April 19, 2014. By letter dated April 30, 2014, counsel for the E/C provided claimant's counsel with copies of the surveillance.
4. On May 1, 2014, counsel for the E/C met with Dr. Epstein and provided him with edited versions of the surveillance. Dr. Epstein in his affidavit acknowledges that the video surveillance had been edited and thus was not the entire version of the surveillance. On May 5, 2014, he executed an affidavit in which he expressed the opinion that the claimant no longer required attendant care nor the electric scooter.
5. The parties agree that there have been no discovery violations related to the video surveillance.

Based upon the forgoing, it is therefore,

CONSIDERED, ORDERED, AND ADJUDGED as follows:

1. The claimant is seeking to have the undersigned strike the testimony and opinions of Dr. Epstein from the upcoming hearing on the claim for authorization of the electric scooter or wheelchair on grounds that the E/C has tainted his testimony through the "mini-trial" which it is alleged to have conducted on May 1, 2014 when its counsel provided him with edited copies of video surveillance. According to the claimant's argument, the furnishing of an unauthenticated video to an authorized treating physician does not constitute a discussion of the employee's medical condition permitted by §440.13(4)(c), Fla. Stat., but rather a mini trial and/or the deliberate undermining of the physician/patient relationship. The claimant further argues that while the physician should have access to the free flow of medical records and medical information regarding the claimant, surveillance is not medical information, and therefore, should not be permitted.
2. The claimant relies upon *Holiday Inn v. Mirta RE*, 643 So.2d 13 (Fla. 1<sup>st</sup> DCA 1994) as authority for his position. In *Holiday Inn v. Mirte RE*, the appellate court held that the E/C cannot hold ex parte conferences with a treating physician after an "adversarial relationship" had developed. According to *Holiday Inn v. Mirta RE*, an adversarial relationship exists once a claim

has been filed.

3. The *Holiday Inn v. Mirta RE* decision is predicated upon the 1991 version of §440.13(2)(f), Fla. Stat. based upon the compensable accident involved in that case having occurred on May 27, 1991. The 1991 version of the statute allowed the furnishing of medical records to the E/C's representative and for discussions concerning the medical condition of the injured employee but it restricted this communication and information to conditions relating to the work place injury. Effective January 1, 1994, this statute was amended to permit *ex parte* discussions and conferences between the claimant's health care provider and the employer or its attorney. Such discussions, however, were still restricted to conditions relating to the work place injury. Effective July 1, 2003, this statute was amended further to now provide "an employee who reports an injury or illness alleged to be work-related waives any physician/patient privilege with respect to any condition or complaint reasonably related to the condition for which the employee claims compensation."
4. I conclude that *Holiday Inn v. RE* has been overturned by the 2003 amendment as it relates to showing video surveillance to an authorized provider when the claimant has filed a claim for non-professional attendant care benefits. By necessity, the claimant's ability to engage in ordinary activities of everyday

life, or the inability to do so, based upon the effects of a compensable injury is a consideration by a treating physician regarding whether to prescribe non-professional attendant care. The claimant's activities and functional abilities potentially depicted on video surveillance reasonably would be related to the condition for which the employee claims compensation. Thus, under the 2003 version of this statute, it would be permissible to show such video surveillance to the authorized treating physician in an *ex parte* communication setting involving the E/C's counsel.

5. Based upon the above analysis, and the above evidence which does not reflect any indication of a discovery violation or that the surveillance video was intentionally recreated to deceive the physician or was not the claimant, and without more, I conclude that there is no legal or factual basis at this time to strike Dr. Epstein's deposition testimony and opinions predicated upon the mere showing of the video surveillance to Dr. Epstein at an *ex parte* conference involving the Dr. Epstein and E/C's counsel. Accordingly, claimant's Motion For Order Striking Or Excluding Opinion Testimony And Motion Granting Change In Treating Physician, filed by the claimant with DOAH on May 6, 2014, is hereby denied.

DONE AND MAILED this 18<sup>th</sup> day of June, 2014, in Orlando, Orange County, Florida.

*Neal P Pitts*

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Neal P. Pitts  
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