

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

TERRY GAUTHIER)
c/o ROBERT GAUTHIER,)
)
Employee/Claimant)
) OJCC Case No. 05-009676-TWS
vs.)
) Accident date: 11/8/2002
WALT DISNEY WORLD)
)
Employer)
)
and)
)
LIBERTY MUTUAL INSURANCE CO.)
)
)
Carrier)
) **Judge: Thomas W. Sculco**

FINAL COMPENSATION ORDER

After proper notice to all parties, a hearing was held on this claim in Orlando, Orange County, Florida on November 3, 2010. Present at the hearing was Attorney Glen D. Wieland for the Employee, Attorney Derrick E. Cox for the Employer/Carrier.

This Order addresses the Petition for Benefits filed with DOAH on 02/09/2010.

At hearing the evidence consisted of the testimony of:

Robert Gauthier.

DOCUMENTARY EVIDENCE:

- #1 Claimant's: Hearing Information Sheet
- #2 E/C's: Hearing Information Sheet
- #3 Judge's: Pretrial Stipulation dated July 20, 2010
- #4 Claimant's: Deposition/attachments of Vivian Charneco, M.D.
October 15, 2010
- #5 Claimant's: Prescription from Segundo A. Imbert, M.D.
- #6 Claimant's: Composite
- #7 E/C's: Order from Circuit Judge Jeffords D. Miller
August 23, 2006

After hearing all of the testimony and evidence presented, and after having resolved any and all conflicts therein, the undersigned Judge of Compensation Claims makes the following findings of fact and conclusions of law: The issues for determination, as narrowed by the parties at the final hearing, are: 1-claimant's claims for reimbursement of mileage expenses in 3 different categories; a-Travel by Robert Gauthier (claimant's guardian) from his home in Oklawaha to pick up claimant at her home in St. Cloud and take her to the office of guardian attorney D'Lugo; b-Travel by Robert Gauthier from his home in Oklawaha to pick up claimant at her home in St. Cloud and take her to medical appointments with Dr. Imbert and/or Dr. Carencro; and c-travel by

Robert Gauthier from his home in Oklawaha to pick up claimant at her home in St. Cloud and take her back to his home in Oklawaha for "therapy"; 2-Costs, and 3-attorneys' fees.

The E/C took the positions that: a-the mileage relating to travel to the guardian attorney was not permitted by the circuit court order establishing the guardianship, and that the claim was premature because the circuit court has not yet determined the reimbursable guardianship expenses; b-travel by Robert Gauthier to pick claimant up and take her to medical appointments was not reimbursable; and c-Travel by Robert Gauthier to pick up claimant and bring her back to his home was not for medically necessary treatment and was not reimbursable. The parties agreed that if entitlement to reimbursement is found in any of these categories that the exact amounts owed will be handled administratively, with jurisdiction reserved to resolve any disputes.

BACKGROUND

The claimant, Terry Gauthier, was raped in the course and scope of her employment on 11/8/02. As a result of the attack she developed severe psychiatric issues, which resulted in a determination of partial incapacity by the Osceola Circuit Court, and the establishment of a guardianship with her father, Robert Gauthier, as guardian. The E/C paid the costs of establishing

this guardianship.

At this time, the E/C has accepted claimant as permanently and totally disabled ("PTD"). Claimant has treated with psychiatrists Dr. Carlos Ruiz, Dr. Segundo Imbert, and currently Dr. Vivian Charneco.

On 7/25/09 Dr. Charneco wrote a note stating: "To whom it may concern: I have recommended that ms. Gauthier visit her father every second week, for seven days, as part of her treatment program." At her deposition of October 15, 2010, Dr. Charneco testified regarding this recommendation:

Q. Doctor, based upon a reasonable degree of medical certainty, is it medically necessary for Terri Gauthier's therapeutic treatment program for her to visit her parents periodically?

A. That is correct.

Q. And can you tell us how often you recommend that and why?

A. well, my understanding is that she was visiting her parents, I believe it was twice a month for a period of time. And one of the things that we've been trying to do is to have her be more independent and less dependent on her family. At the same time, she really - because of her tendency to isolate and misunderstand the situations around her, she tends not to know how to socialize properly, how to interact with other people.

So one of the things that we've come up with was to maintain the visits with her parents on a monthly basis, because that's an opportunity that they have to do, "normal things", such as going shopping, going places with people that she trusts and feels comfortable with. And she feels protected by them. And this is a way of bringing some normalcy to her life. (deposition of Dr. Charneco, at 12).

TRAVEL REIMBURSEMENT CLAIMS

- A. *Travel by Robert Gauthier (claimant's guardian) from his home in Oklawaha to pick up claimant at her home in St. Cloud and take her to the office of guardian attorney D'Lugo*

The employer/carrier "is obligated to pay for the services of a guardian only to the extent that those services were incurred in and about the handling of the claimant's rights, duties, and responsibilities under Chapter 440." *Florida Cypress Gardens v. Lavoy*, 932 So. 2d 542 (Fla. 1st DCA 2006). Here, the employer/carrier concedes that the guardian's travel at issue in this case related to claimant's workers compensation case. However, they argue that reimbursement cannot be ordered in this worker's compensation case until the circuit court first determines what expenses are reimbursable.

On the contrary, there is nothing in chapter 440 or in the appellate case law addressing guardianship issues under chapter 440 that precludes the judge of compensation claims from determining what "services were incurred in and about the handling of the claimant's rights, duties, and responsibilities under Chapter 440" prior to the guardian's expenses being addressed in circuit court. In addition, contrary to the employer/carrier's contention, there is nothing in the circuit

court order that precludes reimbursement of a guardian's reasonable travel expenses. Consequently, as I find that the travel requested relating to the guardianship was reasonable and related to claimant's workers' compensation case, I find such expenses reimbursable by the employer/carrier.

B Travel by Robert Gauthier from his home in Oklawaha to pick up claimant at her home in St. Cloud and take her to medical appointments with Dr. Imbert and/or Dr. Charneco

Clearly, claimant is entitled to reasonable travel costs for visits to authorized physicians. The claim here, however, is for reimbursement of the travel costs of claimant's father and guardian to take claimant to her medical appointments. The determinative question, therefore, is whether claimant has established that having her father drive her to and from medical appointments is medically necessary as a result of her compensable injury. Based on the evidence presented, I find that claimant has failed to satisfy her burden of proof on this issue.

I recognize that claimant has suffered a terrible ordeal, and that having her father attend and provide transportation to medical appointments is much appreciated by her. However, in order to hold the E/C responsible for such an expense, which generously would be at the outer limit of awardable expenses under Chapter 440, medical necessity must be clearly established by the evidence. Here, Dr. Charneco acknowledges in her

testimony that Mr. Gauthier has accompanied claimant to most of her medical appointments, and that she developed a plan to "begin a process where Terry will come to the visits by herself."

(deposition of Dr. Charneco, at 13). Dr. Charneco does not address, however, whether alternative transportation arrangements would be acceptable, and never clearly states that Robert Gauthier's transportation and attendance is medically necessary for claimant's care and treatment. Consequently, the claim for reimbursement for Robert Gauthier's mileage reimbursement for transporting claimant to and from her medical appointments is denied.

C. *Travel by Robert Gauthier from his home in Oklawaha to pick up claimant at her home in St. Cloud and take her back to his home in Oklawaha for "therapy"*

On this issue, Dr. Charneco clearly states that it is medically necessary for claimant to visit her parents' house once per month as part of her therapeutic treatment program.

Notwithstanding this testimony, the E/C argue that such visits are not "medical care" under Section 440.13(2)(a), and therefore that mileage reimbursement cannot be awarded for such visits.

Rather, the E/C relies on *Timothy Bowser Construction Co. v. Kowalski*, 605 So.2d 885 (Fla. 1st DCA 1992) in arguing that claimant's visits to her family once per month are similar to

various "quality of life" activities such as visits to the beach, the grocery store, the movies, and the mall that were found not to be medical care or attendance. *Id.* at 887. In interpreting *Kowalski*, the E/C argue that any activity not performed or supervised by an authorized provider does not constitute medical care or attendance under Section 440.13(2)(a), and that therefore claimant's "therapy" with her parents necessarily falls outside the scope of medical care under Chapter 440.

While such a bright-line rule is not an unreasonable reading of *Kowalski*, such an interpretation would seem to conflict with other appellate decisions that address medical care under Chapter 440. "Hydrotherapy" at a local public pool, without any apparent involvement or supervision by the prescribing physician, has been recognized as reasonable and necessary medical care. See *Kraft Dairy Group v. Cohen*, 645 So.2d 1072 (Fla. 1st DCA 1994). See also *Escambia County Board of County Commissioners v. Phipps*, 553 So.2d 269 (Fla. 1st DCA 1989) (recognizing hydrotherapy at local YMCA as reasonable and necessary medical care). In addition, the undersigned judge of compensation claims has ordered an E/C to provide personal training to a claimant based on medical testimony establishing its medical necessity. *Dedo v. Pine Castle Christian Academy*, OJCC# 02-01571 (June 12, 2007). Thus, while no doubt the vast majority of medically necessary care is performed or directly supervised by an authorized provider, it

does not appear to be an absolute requirement.

Consequently, the determination of whether claimant's prescribed monthly visits to his parents for "therapy" qualify as compensable transportation costs, or if they are non-compensable "quality of life" activities, must be made based on the specific evidence presented. Based on the evidence and argument presented, this is a very close and difficult issue to resolve. However, differences between the activities found non-compensable in *Kowalski* and claimant's therapeutic visits to her parents here support reimbursement in this case.

First, the physician's prescription in *Kowalski* for claimant "to participate in any activity in which a man of claimant's age would normally participate" is extremely broad and open-ended, and included visits to the beach, grocery store, the movies, and the mall. In my view, the result in *Kowalski* epitomizes the saying that "bad facts make bad law". The doctor's prescription was so extreme and open ended that it is almost inconceivable that such a transportation award could have been affirmed.

In contrast, Dr. Charneco's recommendation in this case is far more reasonable and narrowly tailored to the claimant's unfortunate and difficult situation. Moreover, unlike in *Kowalski*, Dr. Charneco is not prescribing that claimant engage in ordinary "quality of life" activities. Rather, her prescription is for claimant to visit her parents, a much more specific and

limited situation. If claimant's parents take her to the mall or the beach, then under *Kowalski* the E/C would arguably not be responsible for such transportation costs. But at this time, the only claim is for reimbursement of Robert Gauthier's mileage to bring claimant to his house once per month, as prescribed by Dr. Charneco. Based on the evidence presented, I find that such travel is for medically necessary care and treatment. Consequently, I find that Robert Gauthier's mileage for such travel should be paid by the E/C.

WHEREFORE it is hereby **ORDERED** and **ADJUDGED** that:

1. The claim for travel by Robert Gauthier (claimant's guardian) from his home in Oklawaha to pick up claimant at her home in St. Cloud and take her to the office of guardian attorney D'Lugo is GRANTED.
2. The claim for travel by Robert Gauthier from his home in Oklawaha to pick up claimant at her home in St. Cloud and take her to medical appointments with Dr. Imbert and/or Dr. Charneco is DENIED and DISMISSED WITH PREJUDICE.
3. The claim for travel by Robert Gauthier from his home in Oklawaha to pick up claimant at her home in St. Cloud and take her back to his home in Oklawaha for "therapy" is GRANTED.
4. Claimant's counsel is entitled to reasonable attorneys' fees and costs from the E/C for securing the above benefits. Jurisdiction is reserved to determine the amount of attorneys' fees and costs owed.

DONE AND ORDERED in Chambers at Orlando, Orange County,
Florida this 9 day of December, 2010.

Thomas W. Sculco

Thomas W. Sculco
Judge of Compensation Claims
400 West Robinson Street, Suite 608N
Orlando, Florida 32801-1701

This is to certify that a true and correct copy of the foregoing
Order has been furnished by electronic or U.S. Mail to the
parties and counsel listed below.

Yadira Suarez

Digitally signed by Yadira
Suarez
Date: 2010.12.09 15:59:18
-05'00'

Assistant to Judge Sculco

Served by Electronic Mail:

Glen D. Wieland, Esquire

Derrick E. Cox, Esquire

Terry Gauthier c/o Robert Gauthier

Walt Disney World

Liberty Mutual Insurance Company