

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

Tameika Hanson,
Employee/Claimant,

OJCC Case No. 15-023926GBH

vs.

Accident date: 6/18/2015

ARC Broward Inc./York Risk Services
Group,
Employer/Carrier/Service Agent.

Judge: Geraldine B. Hogan

FINAL COMPENSATION ORDER

This matter came before the undersigned Judge of Compensation Claims pursuant to the petitions for benefits filed on January 29, 2016 and February 4, 2016. The primary issue was Claimant's request for authorization of Dr. Edward Suarez as her "one-time change" of physician under sec. 440.12(2) (f) Fla. Stat. (2013). Claimant also requested authorization of Dr. Suarez's recommendations that included physical therapy, aquatic therapy and outpatient pain management. After considering the evidence and argument of counsel, I find that the carrier authorized Dr. Kenneth Jarolem within 5 days of receiving a written request from the Claimant for an alternate provider. Additionally, I find that physical therapy, aquatic therapy and outpatient pain management are not medically necessary.

Stipulations:

1. The undersigned has jurisdiction over the parties and subject matter.
2. That venue of the claim is in Broward County.
3. There was an employer/employee relationship on the date of accident.
4. The accident and injury to the Claimant's low back were accepted as compensable.

Claims:

1. Authorization of physical therapy
2. Authorization of aquatic therapy
3. Authorization of outpatient pain management
4. Authorization and payment of Dr. Edward Suarez, M.D. as Claimant's change in primary care physician and/or alternate treating physician and for necessary treatment of work-related injuries.

5. Attorney's fees and costs

Defenses:

1. All medically necessary and causally related treatment has been timely provided.
2. E/C timely authorized Dr. Kenneth Jarolem as Claimant's one-time change; Dr. Edward Suarez is not authorized.
3. No Costs and Attorney's fees due.

Exclusion of Witnesses:

Claimant filed an amended witness list on August 15, 2016 listing as a witness, for the first time, "Leslie Pimentel, Secretary Gallagher Law Group, Impeachment." E/C objected to the witness testifying and asserted that they were prejudiced by not having an opportunity to depose the witness prior to the final hearing. Claimant's counsel argued that he intended to call Ms. Pimentel as an impeachment and rebuttal witness. He further asserted that he was not required to list impeachment and rebuttal witnesses with specificity prior to the final hearing as long as the witness appeared at the hearing to provide testimony.

Fla. Admin. Code Rule 60Q-6.113(2)(e) requires the written pretrial stipulation to include the names, addresses, and telephone numbers of all witnesses, including impeachment and rebuttal witnesses. Additionally, 60Q-6.113(6) requires that witness lists, exhibit lists, supplements, and amendments served, and exhibits exchanged less than 30 days before the final hearing must be approved by the judge or stipulated to by the parties. Claimant never filed a motion requesting the JCC to approve the amended witness list, filed one day prior to the final hearing, and E/C did not stipulate to the untimely amendment. Therefore, I sustained E/C's objection to the testimony of Leslie Pimentel.

Claimant's counsel also asserted that Ms. Pimentel was added as a witness one day prior to trial because counsel for E/C asserted, in his pretrial memorandum, that the fax confirmation, regarding the request to the adjuster for a one-time change, was never provided to E/C's attorney. The adjuster's deposition was taken on April 11, 2016. At that time she provided sworn testimony that she never received a faxed correspondence from Claimant's counsel prior to February of 2016. Additionally, the deposition of Anita Snelling was taken on June 3, 2016. She was questioned at length about an October 13, 2015 fax from Claimant's counsel, which she testified the carrier did not receive. Therefore, Claimant's counsel was on notice, more than 30 days prior to the final hearing, of E/C's assertion that the carrier did not receive a faxed correspondence from his office on October 13, 2015.

Mr. Gallagher, Claimant's counsel, also sought to call himself as a witness at the time of the final hearing. Counsel for E/C asserted that Mr. Gallagher never listed himself as a witness in the pretrial stipulation or subsequent amendment. Mr. Gallagher asserted that as an attorney of

record he was not required to list himself as a witness. He further argued that as an attorney in this matter he can testify, as well as provide legal argument. Counsel for E/C argued that he needed to have notice of Mr. Gallagher's intention to testify so that he would have an opportunity to depose him prior to the final hearing. I found that advising E/C at the time of trial that he intended to testify was untimely and sustained E/C's objection to the testimony of Attorney Gallagher.

Findings of Fact and Conclusions of Law:

1. Claimant injured her back within the course and scope of her employment. Treatment included pain management, medication and physical therapy. She testified that she was released from the doctor sometime in September [of 2015]. After her last visit with the authorized orthopedist, the Claimant felt that she needed additional treatment because she continued to have severe pain.
2. The Claimant selected Dr. Suarez as an alternate provider after reviewing a list of physicians at her attorney's office. She understood that her attorney requested the authorization of Dr. Suarez as an alternate provider on her behalf. She did not receive a response directly from the carrier regarding this request. She saw Dr. Suarez in December of 2015. Treatment provided by Dr. Suarez included pain medication and he submitted other recommendations to the carrier.
3. After seeing Dr. Suarez in December of 2015 the Claimant received an automated phone message reminding her that she had an appointment with another doctor. The message did not provide the doctor's name and address. It was her understanding that the appointment was with a doctor selected by the carrier as an alternate provider. However, she assumed Dr. Suarez was authorized because he received payment for his service.
4. The Claimant testified that she called the adjuster after she received the phone message, but the adjuster never returned her calls. She called her attorney regarding the message, and was advised that the appointment was not made by her attorney. The Claimant testified that she would prefer to continue seeing Dr. Suarez.

Authorization of a One-Time Change

5. The deposition of the adjuster, Carmen Clark, was taken on April 11, 2016. Ms. Clark was assigned to handle this case on September 1, 2015. The authorized medical providers were U.S. Healthworks, Westside Regional and Dr. Feanny, an orthopedist. Dr. Feanny placed the Claimant at maximum medical improvement on September 24, 2015 with a 5% impairment rating. September 24, 2015 was the Claimant's last office visit with Dr. Feanny. Dr. Kenneth Jarolem, an orthopedist, was authorized on February 9, 2016 as a one-time change in physician. The adjuster scheduled an appointment with Dr. Jarolem for March 9, 2016.
6. The Adjuster received a Petition for Benefits on February 4, 2016 that requested

authorization of payment to Dr. Edward Suarez as Claimant's change in primary care physician and/or alternate treating physician. She filed a Response to the February 4, 2016 PFB on February 9, advising that a one-time change was authorized with Dr. Kenneth Jarolem.

7. The adjuster sent an email to defense counsel on February 5, 2016 regarding the appointment with Dr. Jarolem and her attorney advised that he would make opposing counsel aware of the appointment. She testified that she had a copy of an appointment letter sent by E/C's attorney to Claimant's attorney on February 5th.
8. The adjuster testified that there were faxed correspondences in the claims file sent by Claimant's attorney. One was a good faith letter dated January 28, 2016. The carrier received another fax from Claimant's attorney on February 3, 2016. The February 3, 2016 fax was "attached" on February 4, 2016. This fax requested authorization and payment of Dr. Edward Suarez as Claimant's change in primary physician and alternate treating physician and necessary treatment of work-related injuries. The adjuster did not respond to the February 3, 2016 faxed correspondence.
9. The adjuster testified that she received Dr. Suarez's Notification of Initial Treatment attached to a January 29, 2016 petition for benefits. According to the payout ledger the carrier issued payment to Dr. Edward Suarez on February 4, 2016 for a December 9, 2015 date of service. The adjuster testified that Dr. Suarez was inadvertently paid by the carrier because a claims supervisor approved the payment when the adjuster was out of the office. The adjuster testified that she sent a letter to Dr. Suarez requesting reimbursement on March 9 [2016].
10. The adjuster testified that the February 4, 2016 PFB was the first time she received a request for a change in physician. She testified that she did not have an October 13, 2015 fax from the Claimant's attorney.
11. The adjuster testified she receives faxes by email from clerical staff. She explained that the fax number is an email address. Marion Wright and Anita Snelling are the employees responsible for receiving faxes for the carrier.
12. The deposition of Anita Snelling was taken on June 3, 2016. Ms. Snelling works for the carrier as a claims assistant. Her job duties include receiving incoming faxes and attaching them to files. She receives faxes from one, of two, fax numbers for the carrier.
13. Claimant's counsel asserted that on October 13, 2015 he faxed the carrier a request for a one-time change in treating physician for the Claimant. He asserted that the request was faxed to (561) 988-0360. Ms. Snelling testified that she is responsible for documents faxed to (561) 988-0360. Prior to her deposition, she reviewed all of the faxes received on her fax number on October 13, 2015. She received 43 faxes on that day and none of the faxes received were in reference to the Claimant. She looked for any document received from the "Gallagher Law Group" and anything in reference to "Tameika

Hanson” as the employee or claimant.

14. Ms. Snelling testified that the faxes come through the server and then to her as an email. She did not believe faxes could be diverted to ‘junk mail’. She did not check junk emails when looking for an October 13, 2015 fax from Claimant’s attorney.
15. Ms. Snelling provided a detailed explanation of how she looked for an October 13, 2015 fax from Claimant’s attorney. She brought up the server account, filtered out 10/13/15 and went through each fax individually. She further explained that faxes come from the server as a PDF document, attached to an email. She attaches the PDF document to a file and deletes the email. She can delete the email, but she cannot delete the faxed document from the server. According to her testimony, if a fax did not “go through” it would not come up on the server. That was the only reason she could provide for not receiving a faxed document.
16. Sec. 440.13 (2) (f) Fla. Stat. (2015) provides, in pertinent part, that, “Upon the written request of the employee, the carrier shall give the employee the opportunity for one change of physician during the course of treatment for any one accident... The carrier shall authorize an alternative physician who shall not be professionally affiliated with the previous physician within 5 days after receipt of the request. If the carrier fails to provide a change of physician as requested by the employee, the employee may select the physician and such physician shall be considered authorized if the treatment being provided is compensable and medically necessary.”
17. Even if the Claimant’s attorney faxed a request for a one-time change to the carrier on October 13, 2015, the evidence does not support a finding that the request was received by the carrier on that date.
18. The adjuster testified that February 4, 2016 was the first time she received a request for a one-time change. She testified that she did not have an October 13, 2015 fax from the Claimant’s attorney. The adjuster testified that she sent an email to defense counsel on February 5, 2016 and he indicated that he would make opposing counsel aware of the appointment. She testified that she had a copy of a letter sent by him to Mr. Gallagher on February 5th notifying him of that appointment with Dr. Jarolem.
19. Dr. Suarez was not authorized as the Claimant’s one-time change. Although the carrier inadvertently paid Dr. Suarez for the December 9, 2015 evaluation, the carrier had not yet received a request for an alternate provider. Sec. 440.13 (2) (f) requires the Claimant to first submit a written request and then allow the carrier five days to respond. Claimant saw Dr. Suarez before the adjuster received the request for an alternate provider.

**Authorization of
Physical Therapy, Aquatic Therapy and Outpatient Pain Management**

20. Dr. Michael Feanny, an orthopedic surgeon, first saw the Claimant on August 13, 2015.

He opined that the Claimant had a lumbar disk protrusion at L5-S1. This opinion was based on his physical examination, patient history and review of diagnostic testing that had been done. He prescribed anti-inflammatory medication and physical therapy. He did not believe the Claimant was a surgical candidate and he placed her a MMI on September 24, 2015 with a 5% whole body impairment based on the work-related injury.

21. Dr. Feanny testified that, as of the last time he saw the Claimant, aquatic therapy, physical therapy, and pain management were not medical necessary. He did not believe physical therapy or hydrotherapy would change the Claimant's condition. He stated that medication and home exercises may help with pain relief. According to Dr. Feanny's testimony, the Claimant was given instructions on home exercises.
22. Dr. Edward Suarez, a physiatrist, evaluated the Claimant on December 9, 2015. The Claimant complained of back pain that radiated into her left leg. He testified that from the records it appeared that the Claimant had an L5-S1 disc herniation and she was released to work with restrictions. Dr. Suarez sent an Initial Notification of Treatment to the carrier on December 10, 2015. He recommended physical therapy and also suggested physical therapy with aquatic therapy. Additionally, he gave the Claimant medication for pain and muscle relaxation.
23. Dr. Suarez testified that he received payment for the December 9, 2015 visit on February 4, 2016. On March 9, 2016 he received a correspondence from the carrier advising that payment of his bill was an error and requesting a refund.
24. I find that Dr. Suarez was not an authorized treating provider, independent medical examiner or expert medical advisor. Therefore, his opinions are not admissible. Additionally, Dr. Suarez's opinions were based, in part, on his review of Dr. Feanny's records. He stated that all he had was a report from Dr. Feanny and he did not have the MRI.
25. Dr. Feanny's opinions, regarding additional treatment, are more credible than the opinion of Dr. Suarez. Dr. Feanny's opinions were based, not only on the physical examination and patient history, but also on a review of diagnostic testing. Therefore, I accept the opinion of Dr. Feanny and find that aquatic therapy, physical therapy, and pain management are not medical necessary.

WHEREFORE, it is ORDERED and ADJUDGED that,

1. The claim for authorization of physical therapy is DENIED.
2. The claim for authorization of aquatic therapy is DENIED.
3. The claim authorization of outpatient pain management is DENIED.

4. The claim for authorization and payment of Dr. Edward Suarez, M.D. as Claimant's change in primary care physician and/or alternate treating physician and for necessary treatment of work-related injuries is DENIED.
5. The claims for attorney's fees and costs are DENIED.
6. Any objections not ruled upon are deemed overruled.

DONE AND ORDERED this 16th day of September, 2016 in Lauderdale Lakes, Broward County, Florida.



Geraldine B. Hogan
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Appendix

Judge's Exhibits

1. Pretrial Stipulations
2. PFB filed on 1/29/2016
3. PFB filed on 2/4/2016
4. Responses to Petition for Benefits filed on 2/9/2016 (composite)

Joint Exhibit

1. Deposition Transcript of Carmen Clerk with exhibits

Claimant's Exhibits

1. Claimant's Trial Summary (Identification)
2. 07/08/2016 Deposition Transcript of Edward Suarez (with exhibits)
3. Claimant's Amended Witness List for Final Merits Hearing on August 16, 2016 filed on 8/15/2016 (Docket ID#29)
4. Claimant's Witness and Exhibit List for Final Merits Hearing on August 16, 2016 filed on 8/12/2016 (Docket ID # 28)

E/C's Exhibits

1. Trial Memorandum (Identification)
2. Deposition Transcript of Michael P. Feanny, M.D. with exhibit
3. Deposition Transcript of Anita Snelling with exhibit
4. PFB filed 10/14/2015

Live Testimony: Tameika Hanson