

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

Kim Lankford,
Employee/Claimant,

OJCC Case No. 15-000096EDS

vs.

Accident date: 3/17/2014

Express Scripts/Travelers Insurance,
Employer/Carrier/Servicing Agent.

Judge: E. Douglas Spangler

COMPENSATION ORDER

THIS CAUSE came on to be heard on October 12, 2017 to consider the merits of the Petition for Benefits (PFB) filed by the Claimant on March 3, 2017. The Claimant was represented at the hearing by her attorney Jason Kobal. The Employer/Carrier (E/C) was represented by attorney Gregory White.

The Petition demanded that the E/C provide the Claimant with authorized medical care because that care was not being provided by the authorized treating physician, and costs and attorney's fees. The E/C defended primarily on the basis that the March 3, 2017 PFB was not timely and was barred by the Statute of Limitations. The E/C argued additionally that the industrial accident was not the major contributing cause of the need for additional medical care; and that additional medical care was not medically necessary.

The Claimant testified at the hearing. Additional testimony from the adjuster Elizabeth Ludwig, and treating physician Dr. Edward Demmi, M.D. was presented and received by deposition.¹ Each party filed written memoranda of fact and law.

Based on the pleadings, the testimony of the witnesses and the arguments of counsel the undersigned finds that there is clear and convincing evidence that the E/C failed to furnish and provide the medical benefit it agreed to furnish to the Claimant in a Response to a PFB filed by the Claimant on August 1, 2016 prior to the expiration of the Statute of Limitations; and the Claimant has proven the elements of an estoppel consistent with Gauthier v. Florida International University and the Petition for Benefits at issue herein will not be dismissed based on the Statute of Limitations. However, on the merits of the demand for additional medical treatment in the pending PFB, Dr. Demmi, M.D. testified that the Claimant was not in need of any additional medical care or testing as of July 20, 2015, and the Claimant presented no additional competent medical evidence to suggest that such evaluation or additional care was medically necessary. Consequently, the Claimant's demand for continued medical care on her right knee and the pending Petition for Benefits must be denied. The reasons for these determinations follow.

Uncontroverted Material Facts

¹ A list of the documents and exhibits admitted into evidence is contained in the appendix to this order.

1. Claimant sustained a compensable knee injury while working for the employer on March 17, 2014.
2. Claimant was treated for her compensable injury at U.S. Healthworks and Dr. Edward Demmi, M.D. through April 30, 2014; and then again on July 6, 2015 and July 20, 2015.
3. Claimant reached Maximum Medical Improvement as of April 30, 2014 and the two evaluations in July 2015 resulted in Dr. Demmi concluding that no additional evaluations or testing was necessary.
4. Claimant filed a Petition for Benefits on August 1, 2016 seeking additional medical care which was within one year of the date the E/C had paid Dr. Demmi for the July 2015 evaluations.
5. The E/C responded to the August 1, 2016 PFB on August 5, 2016 and noted that authorization for additional care was approved and had been faxed to U.S. Healthworks, but that Claimant would be responsible for copay.
6. Dr. Demmi confirmed that the facsimile from the E/C had been received by U.S. Healthworks and a copy was in the Claimant's medical chart.
7. Claimant testified that she did not become aware that U.S. Healthworks had been authorized to see her again until she was deposed on September 30, 2016. Thereafter, she attempted to be seen at U.S. Healthworks but was never permitted to make an appointment by U.S. Healthworks staff, and has never been seen there again. Claimant alleged she attempted to set an appointment on numerous occasions, in person and telephonically, but was not allowed by staff to do so.
8. Claimant voluntarily dismissed her August 1, 2016 PFB on October 10, 2016 without any reservation of jurisdiction for determination of attorney's fees or costs.
9. Dr. Demmi testified that U.S. Healthworks maintains a paper file documenting the claimant's contact with them. He indicated that any contact from the Claimant in the form of a request by the Claimant for an office visit would be noted in that chart and the chart does not contain any such notations.
10. Claimant's attorney filed the instant PFB on March 3, 2017 when he became aware that the Claimant had never been seen at U.S. Healthworks since filing the PFB on August 1, 2016.
11. The Employer/Carrier had timely provided the Claimant with the informational brochure which advised the Claimant of her rights and the statute of limitations.
12. The E/C had sent Dr. Demmi an authorization to evaluate the Claimant by facsimile on August 5, 2016.
13. The E/C asserted the defense of Statute of Limitations in the initial response to the March 3, 2017 PFB.

Discussion
Estoppel to Assert the Statute of Limitations

There is no question that the E/C has met its burden to establish the affirmative Statute of Limitations defense. The E/C has demonstrated that the March 3, 2017 Petition for Benefits was

filed in excess of one year from the date the E/C last provided benefits for the Claimant, even including the additional days the statute would have been tolled while the August 1, 2016 PFB was pending, and more than two years after the compensable accident occurred on March 17, 2014. It is stipulated that the Claimant was properly on notice as to the limitations periods.

In avoidance of this defense the Claimant has argued, aggressively, that the E/C should be estopped from asserting the defense because she relied to her detriment on the E/C's assertion in the Response to the August 1, 2016 PFB that U.S. Healthworks had been authorized to see her, but U.S. Healthworks never permitted her to be reevaluated there. Claimant argued that the elements of an equitable estoppel existed in this case because the Claimant received a representation from the E/C that she was authorized to return to U.S. Healthworks; that in reliance on that representation she dismissed her then pending Petition for Benefits; and, that the representation made by the E/C that U.S. Healthworks was authorized to evaluate the Claimant proved to be untrue because U.S. Healthworks never allowed the Claimant to set an appointment.

To demonstrate an estoppel the Claimant must show by clear and convincing evidence² that the E/C misrepresented a material fact; the Claimant relied upon the misrepresentation; and the Claimant changed her position to her detriment because of the misrepresentation. City of Dania v. Zipoli 204 So.3d 52, 54 (Fla.1st DCA 2016). The E/C argued that the Carrier did not commit any misrepresentation because it had promptly authorized Dr. Demmi to conduct the evaluation and that position had not changed. However, this argument fails to acknowledge uncontroverted evidence that the Claimant had testified she had been unsuccessful in getting U.S. Healthworks to set an appointment, and had, in reliance on the E/C's authorization of Dr. Demmi to evaluate her, dismissed her pending PFB. This was to her detriment because the dismissal invigorated the Statute of Limitations which had been tolled by the August 1, 2016 PFB. Finally, the E/C asserted a Statute of Limitations defense to the new PFB filed in March 2017 which totally reversed its previous agreement to allow the Claimant to be evaluated again by Dr. Demmi.

To accept the E/C's argument of "no change in position" would mean that all the E/C had to do was merely fax an authorization to the physician and it had met all its obligations required under the statute. However, that is not what the statute contemplates. In this case when the E/C agreed to allow the Claimant to be re-evaluated by Dr. Demmi in response to the August 1, 2016 PFB the carrier was charged with the knowledge that a year earlier, on July 20 2015, Dr. Demmi opined that the Claimant was no longer in need of any further medical care for her injury and he discharged her. However, rather than rely upon that state of facts, the Carrier agreed to authorize another evaluation with Dr. Demmi. This agreement effectively granted the Claimant's demand made in the PFB. The legal effect of that is tantamount to an agreement that the evaluation was medically necessary as contemplated in section 440.13 (2)(a) F.S. Pursuant to that statute it is the DUTY of the E/C to FURNISH the evaluation which implies more than merely "authorizing" that an evaluation occur. In this case there is no evidence that the E/C took any affirmative steps to place the stipulated medically necessary evaluation in the hands of the Claimant. Although an appointment was authorized, the E/C took no other steps or action to ensure that an appointment was actually set. The effect of the statute on the agreement of the parties as evidenced by the Response to the PFB was the E/C would actually furnish the evaluation, which is how the Claimant understood the response. However, the E/C did not do so.

² See Gauthier v. Florida International University 38 So.3d 221, 224 (Fla. 1st DCA 2010)

This omission on the part of the E/C places the facts of this case under the holding of the Court in Gauthier, supra. In that case the Court held that when it is clear from the evidence that the E/C failed to act when it was under a duty to do so, and the Claimant is misled to her detriment due to the E/C's omission, as has occurred here, the E/C should be estopped from relying on the statute of limitations. That logic applies here where the E/C failed to meet an obligation to furnish the agreed upon evaluation as mandated upon it by the statute. As the result, the Statute of Limitations defense to the present PFB as asserted herein fails.

Claimant's Demand for Additional Medical Care

Once the August 1, 2016 PFB was dismissed it no longer exists for any judicial action. The Claimant's only pending PFB was filed on March 3, 2017. The substantive demand in the March 3, 2017 PFB is a request for "authorization of medical care for the right knee as no medical treatment has been provided." Unfortunately, for the Claimant, in the present hearing she presented no medical evidence that she has a medical necessity for continued ongoing care to her right knee. The only competent medical evidence admitted into evidence was the testimony of Dr. Demmi who testified that as of the last time he evaluated the Claimant, on July 20 2015, she was at maximum medical improvement and required no follow up. The Claimant has, therefore, not met her burden to prove with competent substantial objective medical evidence that she requires additional medical care to her right knee, and the demand in the March 3, 2017 Petition for Benefits must be denied.

Based on the foregoing, it is

Ordered the Petition for Benefits filed on March 3, 2017 is denied and dismissed, with prejudice.

DONE AND SERVED this 20th day of October, 2017, in Tampa, Hillsborough County, Florida.



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APPENDIX
Exhibits

Claimant Exhibit

1. Trial Memorandum with three attached exhibits.

Joint Exhibits

1. Deposition of adjuster Elizabeth Ludgwick
2. Deposition of Dr. Edward Demmi, M.D.

Employer/Carrier Exhibit

1. Notice of Voluntary Dismissal filed on October 10, 2016.
2. Trial Memorandum

JCC Exhibits

1. Petition for Benefits dated March 3, 2017; Response to PFB filed on March 8, 2017; Petition for benefits filed on August 1, 2016 ; Response to PFB filed on August 5, 2016.
2. Notice of Final Hearing; mediation conference report dated June 26, 2017; Pre-Trial Stipulations filed on June 28, 2017.
3. Claimant's Motion to Bifurcate; Order Denying Motion to Bifurcate.
4. Claimant's Motion for Summary Final Order; E/C Response to Motion for Summary Final Order; Order Denying Motion for Summary Final Order