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

Sandra Baxley, Employee/Claimant, vs. Apalachee Correctional Institute/Division of Risk Management, Employer/Carrier/ Servicing Agent.	)	OJCC Case No. 06-031239JJL Accident date: 4/26/2004

FINAL ORDER

AFTER DUE NOTICE to the parties, a Final Hearing on this matter was held in Tallahassee, Leon County, Florida, on March 3, 2009. The parties were represented by counsel as indicated below. The undersigned Judge of Compensation Claims has jurisdiction of the parties and the subject matter.

The litigation history of this matter shows that the subject Petition for Benefits (PFB) was filed on September 9, 2008.[1] The employer filed its Response to PFB on 9/18/2008. The issues were mediated on November 7, 2008, at which time the mediation was recessed and reconvened on December 18, 2008. Mediation resulted in an impasse. The case was pre-tried on January 9, 2009 and tried on March 3, 2009.

At the Final Hearing, the claimant sought the following

[1] A similar PFB was filed on August 28, 2008, but it did not contain the signature of counsel for the employee and presumably was re-filed when this oversight was corrected.

benefits:

1. Authorization and provision of an EMG/NCV testing of the employee's bilateral lower extremities as recommended by Dr. Stephen Sykes, M.D., and Dr. William McCrae, M.D.;

2. Authorization and provision of a physical therapy evaluation for walker and bathtub seat as recommended by Dr. Stephen Sykes, M.D., and Dr. William McCrae, M.D.;

3. Authorization and provision of lumbar epidural injections as recommended by Dr. Stephen Sykes, M.D., and Dr. William McCrae, M.D.;[2]

4. A reasonable attorney's fee for claimant's counsel of record; and

5. The cost of these proceedings.

The claim was defended on the following grounds:

1. All causally related medically necessary treatment has been timely provided;

2. The work accident is not the major contributing cause of the need for treatment recommended by Dr. Stephen Sykes, M.D.;

3. Employer/Carrier denies claimant's entitlement to costs and attorney's fees at their expense; and

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[2] The PFB requested "lumbar radiculopathy" not lumbar epidural shots. But the claim for epidural shots was raised as an issue in the parties' pretrial statement and the employer/carrier did not object and posed its defenses to the claim. *See* Sabal Transport v. Brooks, 666 So.2d 1032 (Fla. 1st DCA 1996); City Laundry & Linen v. Coster, 465 So.2d 641 (Fla. 1st DCA 1985) (parties are bound by pretrial stipulation absent good cause for modification, even where the issues therein stated were not properly claimed in a claim/petition for benefits.)

4. Should the employer/carrier be the prevailing party, they seek the costs of these proceedings.

The parties have entered into the following stipulations:

1. The Judge of Compensation Claims has jurisdiction of the parties and the subject matter of this claim.

2. Venue properly lies in Gadsden County, Florida; however, upon the request and consent of the parties, this matter was tried in Tallahassee, Leon County, Florida.

3. Notice of Hearing and Notice of Injury were properly furnished and received as required by the Workers' Compensation Law.

4. On April 26, 2004, the claimant was employed by the captioned employer and on that date sustained an injury by accident to her low back and right and left leg arising out of and within the course and scope of said employment.

5. Counsel for the parties agree that any claims for an entitlement to and the amount of attorney's fees at the expense of the employer/carrier regarding previously filed PFBs wherein past due benefits were secured by employee's counsel are reserved for a later hearing.

At the trial of this cause, the following Exhibits were admitted into evidence.

Claimant's Exhibits

1. Petitions for Benefits filed 8/28/2008 and 9/9/2008 *(Employer/Carrier's objection to the attachment to said PFBs from Dr. Sykes was overruled since that record was previously received in evidence as part of the doctor's medical records.)*

2. Composite of medical records of Dr. William McCrae, M.D.

3. Composite of medical records of Dr. Stephen Sykes, M.D. *(Employer/Carrier's objection as to timeliness of the filing of said records was withdrawn on the record.)*

Employer/Carrier's Exhibits

1. Deposition of Dr. Christopher Rumana, M.D., taken 2/12/2009, together with exhibits.

2. Response dated 9/18/2008 to pending PFB.

Joint Exhibits

1. Deposition of Dr. Vildan Mullen, M.D., taken 2/9/2009, together with exhibits.

2. Pretrial Stipulation filed 1/7/2009.

The following individual testified live before me:

1. Sandra Baxley, the employee.

After due consideration of this matter and after having the opportunity to review and consider the aforesaid exhibits which were admitted into evidence, and having observed and considered the candor and demeanor of the witnesses who appeared and

testified before me, and having endeavored to resolve all conflicts of facts in the evidence presented herein, I hereby make the following findings of fact and conclusions of law:

1. The undersigned Judge of Compensation Claims has jurisdiction of the parties and the subject matter of this claim;

2. The stipulations entered into by and between the parties herein are hereby approved and adopted as findings of fact and are incorporated herein by reference;

3. In my determination herein I have attempted to distill the testimony and salient facts together with the findings and conclusions necessary to the resolution of this matter. I have not necessarily attempted to summarize the substance of the claimant's testimony or the testimony of any live or deposition witness, nor have I attempted to state nonessential facts. Because I have not done so should not be construed that I have failed to consider all of the evidence.

4. Any and all issues raised by way of the petition or petitions for benefits which are the subject matter of the final hearing, but which issues were not tried at the hearing are presumed resolved, or in the alternative, deemed abandoned by the employee/claimant and therefore **denied.** *See* Betancourt v. Sears Roebuck & Co., 693 So.2d 253 (Fla. 1st DCA 1997).

5. On April 26, 2004, the captioned claimant, Sandra Baxley, who is 55 years of age and a high school graduate with one year of college, was employed by the State of Florida, Department of Corrections, as a Correctional Officer, and on that date sustained and suffered a compensable injury by accident arising out of and within the course and scope of the claimant's employment with said employer at the Apalachee Correctional Institute in Gadsden County, Florida. The claimant testified that on that date she slipped and fell on a puddle of water and did the "splits" causing her to fall to the floor. She claims that she was assisted up by co-employee. She stated that she then reported the incident to her supervisor.

6. The claimant stated that following the fall she began to experience low back and leg pain, with sharp pain in her back and shooting pain in her legs. She was referred to the Jackson Hospital Emergency Room who referred her to the Bay Walk-In Clinic. At the clinic she received medication and was given a neurological referral.

7. Ms. Baxley testified that since her accident she has good and bad days regarding her low back pain. She states that her authorized treating physicians, when Dr. Vildan Mullen, M.D., pain management specialist, had nothing further to offer her, were Dr. Stephen Sykes, M.D., and then Dr. William McCrae,

M.D., both presumably pain management physicians in Alabama. The employee testified that the pain down her legs is getting worse and that her right leg gives out when it buckles. She says that her right leg becomes numb, loses control of the leg, and takes certain medication for "nerve damage." She testified that she wants all of the testing and treatment recommended by Dr. Sykes and Dr. McCrae.

8. Ms. Baxley testified that she has been receiving Social Security Disability (SSD) benefits for the last two years based on her "facet joint syndrome." She denies any subsequent or intervening accidents that have changed her back condition since the date of the accident. She volunteered that she never had back problems before her work accident.

On cross-examination it was brought out that her last day of work with this employer was September 22, 2006; approximately, 2 ½ years after her work accident of 4/26/2004. She was terminated on March, 2007, the reasons for which were rather vaguely described at the Final Hearing. Ms. Baxley has filed an appeal of her involuntary termination.

9. Ms. Baxley testified that when she returned to work after her accident she did not use a walker or a cane. Since then based on the recommendations by her new physicians, she has purchased a walker at Goodwill and has been using it

occasionally for the last couple of weeks. Ms. Baxley testified that she has trouble bending over in the shower and that her husband helps her wash her back and feet. She believes that her symptoms have progressively worsened over time.

10. The employee claims that she should be awarded the testing and treatment recommended by her currently authorized treating physicians, Drs. Sykes and McCrae. She argues that these benefits should be provided because the employer/carrier should be estopped from denying them since they authorized the physicians recommending these procedures and because they accepted the injuries claimed in the PFB as compensable.[3] I reject this argument since an employer/carrier may accept that the industrial accident resulted in some injury to the worker, yet later challenge the accident is the major contributing cause of entitlement to benefits or contest the causal relationship between the compensable injury and the condition for which the worker seeks benefits. *See* Checkers Restaurant v. Wiethoff, 925 So.2d 348 (Fla. 1st DCA 2006).

The claimant also relies on F.S. 440.13(3)(d), which in pertinent part provides that if an authorized medical provider requests treatment, the employer has only three days to respond thereto; otherwise, the treatment is deemed medically necessary. St. Augustine Marine Canvas and Upholstery v Lunsford, 917 So.

[3] See the parties' pretrial stipulation received in evidence as Joint Exhibit # 2.

2d 280, 285 (Fla. 1st DCA 2005). However, there is nothing in the composite of medical records of Drs. Sykes and McCrae (Claimant's Exhibits # 2 & 3) indicating when or if their recommendations for further treatment were furnished to the carrier by the doctors. Neither of these physicians testified at the final hearing nor were their depositions taken and introduced in evidence, except for their medical records. Nevertheless, counsel for the employee argues that the carrier certainly had notice of the doctors' written recommendation/referral for further testing and treatment after receipt of the attachment to the PFB which contained Dr. Sykes' Physician Order of 5/30/2008 and Dr. McCrae's record of 8/20/2008. The carrier's response prepared on 9/18/2008 shows that the carrier received the 8/28/2008 PFB on 9/10/2008 (8 days). Therefore the carrier's response per F.S 440.13(3) (d) was made more than 72 hours late. Counsel for the employee asserts that the recommended testing is therefore statutorily deemed medically necessary and the carrier should be ordered to provide the same. Although F.S. 440.13(3) (d) may satisfy the requirement the requested medical care is medically necessary, it alone does not satisfy the major contributing cause requirement under F.S. 440.09(1), when such defense is properly plead. Such statutory interpretation would prompt an absurd

result if a treating physician requests a referral for a medical condition or disease completely unrelated to the work accident, and because the carrier fails to timely respond must provide the medical service. F.S 440.13(3) (d) must be read *in pari materia* with F.S 440.13(2(a) & (c), which provides that medical care must be medically necessary "as a result of a ***compensable injury.***" *See* Elmer v. Southland Corp., 34 Fla. L. Weekly D466 (Fla. 1st DCA February 27, 2009).

11. I find that the employee's reliance on F.S. 440.13(3) (d) in this instance is misplaced and insufficient for an award of the claimed medical benefits. The employee has failed to demonstrate the work accident or compensable injury is the major contributing cause for the need for the injections

12. Nevertheless, the claims for EMG/NCV testing and for "physical therapy evaluation for walker and bathtub seat" *(sic)* would be considered medically necessary under F.S. 440.13(3) (d) because the carrier did not timely respond to the requests of the authorized treating physicians. In regard to these claimed medical benefits, the employer/carrier also asserted that the compensable work accident, or the accepted back injury, is not the major contributing of the need for the recommended testing and treatment, an indispensable element of proof required under F.S. 440.09(1). The employer/carrier also correctly argues that

there is no medical evidence that, even though the claimant initially sustained a compensable back injury, Ms. Baxley's subjective complaints of pain are supported by objective relevant medical findings as F.S. 440.09(1) requires. The employer/carrier contends that the industrial accident occurred approximately five years ago. That Ms. Baxley has undergone extensive treatment and testing with numerous physicians consisting of physical therapy, epidural steroid injections, multiple EMGs, MRIs and x-rays, and has been prescribed numerous medications, all with little to no benefit. Moreover, medical testimony of Dr. Vildan Mullin, M.D., claimant's former authorized treating pain management physician, and Dr. Christopher Rumana, M.D., a board certified neurosurgeon, who performed an employer/carrier independent medical examination (IME), both show that there is no objective medical evidence or findings to explain the claimant's subjective complaints or the degree of pain she expresses.

The claimant also has the burden of overcoming the employer/carrier's defenses by showing that her work accident is the major contributing cause of her current need for a physical therapy evaluation regarding a walker and bathroom seat, the additional testing, and the lumbar injections. I find no such medical evidence was presented by Ms. Baxley. The medical

records of Dr. Sykes and Dr. McCrae simply do not rise to the necessary level of sufficiency or credibility to defeat the depositional testimony of Dr. Rumana and Dr. Mullin, which I find more logical, consistent, and of greater expertise in spite of they not having seen the employee over 1 ½ years ago. Moreover, the medical evidence suggests that Ms. Baxley's current symptoms may be from her degenerative disc disease recognized as a condition she suffers by Dr. Rumana, Dr. Mullin and Dr. McCrae.

13. The depositional testimony of Dr. Mullin shows that he first saw the claimant on 1/2/2007. At the time of the visit the claimant had undergone physical therapy, taken pain medication, had the use of a TENS unit, had made several trips to the emergency room when she had an increase in her pain level, and had epidural injections with only temporary relief. In his clinical examination Dr. Mullin found positive signs of "facet loading on the right and left side; and decreased range of motion of the lumbar sacral spine as well as a positive supine leg raising test." A lumbar MRI of 2005 showed no disc herniation, but did show minor disc bulging at L3-4 and some facet degeneration from L3-S1. The MRI of 2006 showed basically a normal reading but the doctor treated the patient in accord with the 2005 MRI because it fit his physical examination

findings at the time. Dr. Mullin's initial diagnosis was that of back pain chronic, secondary to degenerative disc disease, and possible facet degeneration.

Dr. Mullin recommended additional lumbar epidural steroid injections even though Ms. Baxley had such injections in the past with little relief. He noted that the first injection produced little pain relief and the second injection of 3/8/2007 produced almost no pain relief. The claimant continued with complains of low back and leg pain, which he found were secondary to degenerative disc disease and possible disc herniation. Because Ms. Baxley complained of numbness in her leg, the doctor ordered an EMG of the lower extremities. The EMG was normal.

Dr. Mullin testified that he had nothing further to offer the claimant in way of treatment and had no explanation for her pain level. He recommended a second opinion and discharged the claimant with approximately one month supply of pain medication. The claimant eventually returned to see the doctor on 7/30/2007 to review a functional capacity evaluation (FCE) that was performed on 7/10/2007. She was found to be capable of medium-light work.

14. Dr. Mullin candidly admitted that initially he thought the claimant's pain complaints could be explained by objective

medical finding. However, after reviewing the normal EMG which he had ordered he disagreed with his initial findings, because if the complaints had objective medical findings they would have shown up on the EMG demonstrating either nerve damage or irritation. Dr. Mullin went on to state that even if a repeat EMG performed at this time showed positive findings, that one could not relate those positive findings to the work accident 5 years earlier in view of the initial EMG not reflecting any objective findings. Dr. Mullin said that if the claimant had suffered any injury in 2004, it would have shown up a couple of months thereafter. Therefore, if any objective findings would be reflected on a repeat EMG, such findings would be related to "something else" and not the work accident.

Nevertheless the doctor stated that it would be wise to do a repeat MRI and see if there was any correlation with the 2005 MRI. However, there is no claim made for a lumbar MRI. He further stated there was no need for an EMG unless a repeat MRI showed a different picture over that of the 2005 MRI.

15. Dr. Mullin was not able to give an opinion within a reasonable degree of medical certainty whether the need for a walker and shower seat was attributable to the work accident. He stated that when he last saw the claimant on 7/30/2007 there were no objective medical findings to substantiate the need for

any further treatment.

On cross-examination, he stated that he disagreed with the diagnosis of Dr. Sykes and McCrae consisting of lumbosacral spondylosis with myelopathy because the MRIs of 2005 and 2006 did not show such condition. Dr. Mullin went on to state that such diagnosis could only be made on the basis of an MRI or x-rays. There is no evidence presented by way of the medical reports of Dr. Sykes and Dr. McCrae of such MRI or x-ray finding.

Although Dr. Mullin stated that one could perform an NCV just to "clear the air," there is no indication that it would be related to any compensable condition. Twin Cities Hospital v. Cantrell, 894 So.2d 1038 (Fla. 1st DCA 2005) (error to award RSD evaluation based on treating physician's opinion that such evaluation was an "option," not that it was medically necessary or related to the industrial accident.) Moreover, he said that in the event new findings were seen, such findings would not point to a relationship to the claimant's work accident because of the passage of time. He stated that these problems happen "because of degeneration of the discs," a progressive condition for which there is no evidence as being related to the claimant's work accident.

16. Also testifying on behalf of the employer/carrier was

Dr. Christopher Rumana, M.D., a board certified neurosurgeon. Dr. Rumana saw the claimant only one occasion on 10/16/2007, as the carrier's independent medical examiner (IME). The claimant's primary complaint at the time was low back pain. His physical exam found that the claimant complained of soreness but that some of her complaints were "somewhat exaggerated." He reviewed the claimant lumbar MRI of 5/24/2004 and found it essentially normal. A second lumbar MRI of 5/13/2005 was found to be normal for her age. A third MRI of 6/22/2007 showed minimal disc bulging at L3-4, L4-5, but essentially normal for the claimant's age. Dr. Rumana found that Dr. Mullin's EMG report of 5/7/2007 showed that it too was normal. Relying on those tests for his diagnosis and opinion as well as his medical record review, he opined that the claimant could have suffered a lumbar strain from her slip and fall accident and that his best diagnosis was chronic lumbar strain. He found Ms. Baxley was capable of sedentary to light duty work, but should avoid prolonged bending/stooping. He found that Ms. Baxley was not a surgical candidate and that further pain management was not needed since she received no benefit from such care. I find that Dr. Rumana's medical opinions and impressions regarding further treatment are similar to those of Dr. Mullin, and accept the same.

17. Dr. Rumana in his deposition of 2/12/2009 testified that no further medical treatment was recommended, nor was any further imaging studies necessary. He found that the claimant had reached maximum medical improvement (MMI) for her chronic lumbar strain approximately one year following her accident, April 26, 2005, with a 3% permanent impairment rating. He found that no further treatment was medically necessary or causally related to the claimant's work accident.

18. Dr. Rumana also testified that he disagreed with Dr. Mullin's initial diagnosis of lumbar spondylosis with myelopathy and unspecific myalgia because there was no spinal cord problem at that level and, therefore, it was not "a feasible diagnosis." Dr. Rumana, like Dr. Mullin, opined that further testing wouldn't reveal anything for which treatment would benefit Ms. Baxley. The doctor found that based on his clinical examination and the testing he reviewed, there was "no clear sign of any anatomic injury" and that the claimant had shown minimal to no benefit from any of the prior treatment provided to her. He stated that the findings on the MRI of 5/25/2004 were normal for a person of the claimant's age, and were not related to any acute traumatic injury.

During cross-examination by employee's counsel, he concluded that it was more of a stretch to relate essentially

normal radiographic findings to the employee's physical complaints from the accident rather than simply say that the findings were normal for a person of her age.

19. Based on the greater weight of the medical evidence presented in this case, I find the diagnosis of Dr. Sykes and Dr. McCrae questionable and therefore their recommendations would be likewise be questionable. I accept the opinions of Doctors Rumana and Mullin over their opinions regarding the issues raised here. Even assuming that their treatment recommendations are statutorily deemed to be medically necessary, there is simply insufficient objective medical evidence presented by the employee to explain or support her subjective complaints as being attributable to her work accident 5 years earlier or the initially-accepted compensable back injury. Therefore, the claimant having failed to sustain her burden of proof that the work accident of 4/26/2004 or resulting compensable back injury is the major contributing cause of the current need for the testing recommended by Dr. Sykes and McCrae, the same must be denied. In addition, I find here subjective physical complaints for which the medical benefits are being recommended, are not supported by objective relevant medical findings.

WHEREFORE, it is **ORDERED** that the claims of the employee,

Sandra Baxley, for the medical benefits claimed in subject Petitions for Benefits based on her injury by accident arising out of and within the course and scope of employment on 4/26/2004, are hereby **DENIED**.

DONE AND ORDERED at Tallahassee, Leon County, Florida.

John J. Lazzara
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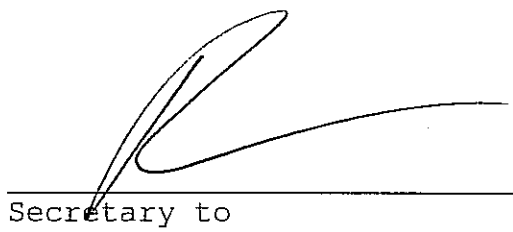
Certificate of Service

I HEREBY CERTIFY that the foregoing Order was entered and a true copy furnished by regular mail on this 26th day of March, 2009 to the parties and their attorneys listed below at the following addresses:



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