

**STATE OF FLORIDA
 DIVISION OF ADMINISTRATIVE HEARINGS
 OFFICE OF THE JUDGES OF COMPENSATION CLAIMS
 FORT MYERS DISTRICT OFFICE**

David Isajiw)	
)	
Employee/Claimant,)	
)	
vs.)	OJCC Case No. 10-001780EDS
)	
Frank Crum.)	Accident Date: June 5, 2009
)	
Employer,)	
)	JUDGE: E. Douglas Spangler
and)	
)	
Frank Winston Crum Ins./Broadspire)	
)	
Carrier/Servicing Agent.)	

FINAL COMPENSATION ORDER

A Merit Hearing concerning a Petition for Benefits docketed on August 23, 2010 was conducted by the undersigned on March 10, 2011 in Fort Myers, Lee County, Florida. The Petition demanded among other things authorization of medical care in the form of a work conditioning program allegedly authorized by Dr. John Sarzier.^{1/2} Attorneys James Schmitt and Michael Reese represented the Employee/Claimant. Attorney Jonathan Cooley represented the Employer/Servicing agent.

The Claimant and the adjuster, Tekoah Meredith of Broadspire, testified at the hearing. After reviewing the testimony received at the hearing, the documentary evidence, and the written and oral arguments of counsel for the parties, I conclude that Claimant did not meet his burden of proof and present any competent evidence that the work conditioning program was not authorized and completed in accordance with the

¹ A more detailed list of the issues and defenses tried, and the documentary evidence submitted by the parties supporting same are contained in the Appendix to this Order.
² Any issues raised by way of Petitions for Benefits filed in advance of this hearing, but which were not dismissed or tried at the hearing, are presumed resolved or, in the alternative, deemed abandoned by the Claimant and, therefore, Denied and Dismissed with prejudice as a result of this Order. See *Scotty's Hardware v. Northcutt* 883 So. 2d 859 (Fla. 1st DCA 2004).

recommendation of Dr. Sarzier. Accordingly, the Petition for Benefits must be Denied and Dismissed, with prejudice. The reasons for these conclusions follow.

Background and Findings of Fact

There is no question but that the Claimant sustained a serious compensable neck and cervical injury on June 5, 2009. Claimant drove tow trucks for Coastland Towing Company, a client company of Frank Crum. On June 5, 2009, while attempting to maneuver a broken-down ambulance into position for towing, he slipped and injured his neck. The nature of the injury and the medical care which has been provided up to July, 2010 were not in question in this matter.

Claimant contends he should have received the full benefit of a work conditioning program recommended by Dr. Sarzier, the treating neurosurgeon, on July 15, 2010. He filed a Petition for Benefits demanding authorization of this program on August 23, 2010.

The adjuster, Tekoah Meredith, received the petition on August 25, 2010 and, on August 30, 2010, issued a Response to Petition For Benefits which indicated that the work conditioning program was authorized and would be coordinated with NSI, a medical services firm contracted by Broadspire, the servicing agent. The response to the petition was timely. Section 440.13 (3)(i), Florida Statutes (2010).

Claimant went to one session at Sports Specialty and Rehab Center, but could not remember the date, stating it was sometime in August or September, 2010. Sports Specialty is the same location where he had previously received physical therapy. Claimant believed he was supposed to attend more than one appointment and was under the impression that he would undergo many hours of training, based on what he was allegedly told while at his appointment. He never returned because he later learned he was not scheduled to go for any more appointments.

Dr. Sarzier did sign a recommendation form in July, 2010 which referenced a work conditioning program. He does not usually rely on work conditioning programs for his patients. He had no independent recollection of why he made such a recommendation in this case. He surmised it was possible that the request originated with another physician in his group who was supervising the physical rehabilitation.

The form signed by Dr Sarzier is part of the chart and records attached to his deposition. Beyond the words “work conditioning,” initials identified by Dr. Sarzier as his and a date of “7/10,” the form contains no other indications of what the “work conditioning” being referenced by the form would entail.

Also part of Dr. Sarzier’s chart and records is a record dated September 1, 2010 from Sports Specialty & Rehab Center which references that the Claimant was evaluated on that date for a work conditioning program and included recommendations for a treatment plan. The document contained a signature over a typed name of James Stoeberl, MSPT. A second document dated September 3, 2010, called a Physician Letter, is in the chart. This record also contains a signature over the typed name of James Stoeberl. The contents of the letter could lead to different conclusions regarding if recommendations regarding the work conditioning program were made or not.³

The adjuster indicated the work conditioning program was no longer authorized because NSI, the medical services firm, could not receive any confirmation of the medical recommendation for the work conditioning program.

Conclusions of Law

Claimant has the burden to prove he is entitled to the benefits he has demanded. *Florida Retail Federation SIF and Claims Center v. Nofal*, 18 So. 3d 721 (Fla. 1st DCA 2009); *Mitchell v. XO Communications, etc.*, 966 So. 2d 489 (Fla. 1st DCA 2007). The Claimant must present evidence that the finder of fact determines is not only competent, but is persuasive. There is no burden on the party opposing the demand to present any evidence. The Claimant failed to prove what, if anything, the Employer/Carrier is required to do regarding the work conditioning program which was authorized on August 30, 2010.

In this case, the evidence presented by the Claimant would support a finding that

³ The fact that these documents are included in a medical chart received from the treating physician, which is admitted in the record, does not mean that these documents are competent evidence of any material fact in issue and can be used by the undersigned to support a finding of fact. They are unauthenticated, and the contents are hearsay and cannot support any findings of fact.

Dr. Sarzier initialed a form dated 7/10 which contained a reference to work conditioning. That form was attached to a Petition for Benefits filed on August 23, 2010 and was received by the adjuster on August 25, 2010. On August 30, 2010, the adjuster responded to the Petition for Benefits by indicating work conditioning would be authorized. Claimant attended one appointment at Sports Specialty & Rehab Center, most likely on September 1, 2010.

Beyond that, the Claimant failed to present competent admissible evidence as to what further, if anything was planned for the work conditioning program. Claimant's own testimony about what he was told by the person he spoke to during his appointment as to the expectations for further appointments is incompetent hearsay and cannot be relied upon to support a finding of fact. Similarly, the September 1, 2010 and September 3, 2010 documents contained in Dr. Sarzier's chart attached to the deposition are unauthenticated hearsay and cannot support findings of fact.

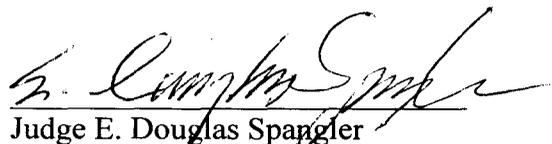
Alternatively, if the two records in Dr. Sarzier's chart were to be considered, their contents are not sufficient to support a finding that a plan for a work conditioning program had been authorized by Dr. Sarzier. The September 1, 2010 form, which did contain recommendations for a work conditioning program, was not endorsed by Dr. Sarzier either on the form or in his deposition. Thus, there is no evidence of the physician's approval of these recommendations. Curiously, the Physician Letter dated September 3, 2010 addressed to Dr. Sarzier indicated the frequency of visits expected to complete the plan involved "0" visits on each week listed in the letter. Consequently, it would appear that no future visits were expected by the author of the letter.

WHEREFORE it is **Ordered** and **Adjudged**:

The Petition for Benefits docketed on August 23, 2010 is denied and dismissed with prejudice.

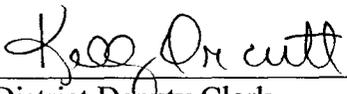
DONE AND ENTERED in Fort Myers, Florida.




Judge E. Douglas Spangler
Judge of Compensation Claims

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Order was entered and a true copy furnished to the parties and their counsel on the 11th day of March, 2011.



District Deputy Clerk

APPENDIX

David F. Isajiw v. Frank Crum/Crum Services
OJCC #10-001780EDS

ISSUES

- 1) Authorization of work conditioning program as recommended by Dr. John Sarzier
- 2) Costs and attorney's fees

DEFENSES

- 1) The work conditioning program was authorized
- 2) Demur to costs and attorney's fees

DOCUMENTARY EVIDENCE

- 1) Deposition of Tekoah Meredith completed on February 7, 2011, with attachments
- 2) Deposition of Dr. John Sarzier completed on February 1, 2011 with attachments