

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGES OF COMPENSATION CLAIMS
FORT MYERS DISTRICT OFFICE
OJCC#09-014135KAS
DATE OF ACCIDENT: 4/16/2007

WILLYNDA KELLER,
CLAIMANT,

v.

FAMILY DOLLAR,
EMPLOYER

JUDGE: KATHY A. STURGIS

AND

RISK ENTERPRISE MANAGEMENT,
CARRIER/SERVICING AGENT.

REVISED FINAL COMPENSATION ORDER

After proper notice to the parties the above captioned workers' compensation case came for final hearing before the undersigned on February 15, 2010, in Fort Myers, Lee County, Florida, on the petition for benefits docketed on May 31, 2009/June 1, 2009. The Claimant was represented by Michael Reese, Esquire, and the Employer/Carrier ("E/C") was represented by Jonathan Cooley, Esquire. The evidence closed on February 15, 2010 after closing arguments. An Final Compensation Order was entered on March 5, 2010. E/C filed a Motion to Vacate and For Rehearing on March 15, 2010. A hearing on that motion was held on March 25, 2010 with both attorneys present. After hearing argument of counsel the prior order was vacated and this Revised Final Compensation Order entered.

CLAIMS

1. Authorization of a replacement pain management specialist for Dr. Reggie Augusthy, who declined to further treat the Claimant and discharged her from his practice; and
2. Costs and attorney's fees.

DEFENSES

1. Dr. Preudhomme remains authorized; and
2. No costs and attorney fees are due.

DEFENSE CLAIM

Employer/Carrier is seeking prevailing party costs from the Claimant under 440.34(3).

EXHIBITS

The following exhibits were received into evidence without objection:

- Exhibit #1: Petition for benefits docketed on May 31, 2009/June 1, 2009;
- Exhibit #2: June 29, 2009 Response to Petition for Benefits;
- Exhibit #3: Mediation Report;
- Exhibit #4: Composite of the Pretrial Stipulation and Order and Notices of Final Hearing;
- Exhibit #5: Claimant's trial memorandum for purposes of argument only;
- Exhibit #6: E/C's trial memorandum for purposes of argument only;
- Exhibit #7: Deposition transcript of Dr. Augusthy with exhibits; and
- Exhibit #8: Deposition transcript of Dr. Preudhomme with exhibits.

LIVE WITNESSES

The Claimant, Wyllinda Keller.

ARGUMENTS OF COUNSEL

Claimant asserts that the "one time change" language used by the E/C in its response to the Claimant's petition for benefits invokes Section 440.13(2) (f) (Fla. Stat. 2007), regarding the statutory one time change of treating doctors. Claimant argues that the petition sought a replacement for Dr. Augusthy and not her one time change. Dr. Augusthy discharged the Claimant from his care stating in writing that he was no longer able to continue as her physician and urging her to continue her treatment with another physician as soon as possible. Claimant was seeking a replacement physician and not a one time change.

E/C contends that since they authorized Dr. Preudhomme to treat the Claimant, and Claimant has attended appointments with Dr. Preudhomme, what the Claimant is really seeking at the merits hearing is an advisory opinion as to whether or not she's exhausted her statutory one time change in treating physicians; an issue that is not ripe, due or owing at present. However, although not argued at the hearing, the Employer/Carrier's trial memorandum, urges the Court to enter an order finding that the Carrier has provided Dr. Preudhomme as a replacement for Dr. Augusthy.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In making findings of fact and conclusions of law regarding these claims and defenses, I have carefully considered and weighed all the evidence, although I may not specifically reference each piece. I observed the candor and demeanor of the witnesses testifying in person and resolved any conflicts in the testimony and evidence. Based upon the testimony, stipulations and exhibits and after careful consideration of the arguments of counsel, the following findings are made:

FINDINGS OF FACT

1. I have jurisdiction over the subject matter and parties.
2. Venue is properly in Lee County, Florida
3. I adopt as findings of fact the stipulations of the parties as set forth in the pre-trial stipulation as follows:
 - a. Employer/Employee relationship on date of accident.
 - b. Workers' Compensation insurance coverage in effect on date of accident.
 - c. Timely notice of injury was given.
4. It is undisputed that Willynda Keller, the Claimant, sustained a compensable low back injury as the result of an industrial accident arising out of and in the course and scope of work performed in her covered employment with the subject employer on April 16, 2007 when she was injured while unloading merchandise from a truck.
5. The E/C has accepted compensability of this claim and provided medical care including lumbar surgery by Dr. Fuchs, and post-surgical pain management.
6. It is undisputed that the authorized treating pain management physician, Dr. Augusthy, discharged the Claimant from his practice on April 15, 2009. (Ex. 7 and Ex. 1)
7. Claimant still needed on ongoing pain management care when Dr. Augusthy discharged her from his care. (Ex. 7).
8. It is undisputed that the E/C authorized Dr. Preudhomme to treat the Claimant and that the Claimant is receiving treatment with Dr. Preudhomme.
9. The E/C filed its response to the May 31, June 1, 2009 petition on June 29, 2009 stating that, "Employer/Carrier is authorizing a one time change in pain management physician to Dr. Preudhomme." (Ex. 2)
10. Dr. Preudhomme began treating the Claimant on July 24, 2009. (Ex. 8)

CONCLUSIONS OF LAW

Under Chapter 440 an employer shall furnish a claimant medically necessary remedial treatment, care, and attendance for such period as the nature of the injury or process of recovery may require . . . including pain management. It is undisputed that the care sought by the Claimant was causally related to her industrial accident and was reasonably medically necessary. When Dr. Augusthy discharged the Claimant he indicated that she was still in need of pain management care. The E/C authorized Dr. Preudhomme to provide pain management care to the Claimant.

The 'one time change' language in E/C's response to the petition for benefits created confusion for the Claimant as to whether the E/C authorized the requested benefit in authorizing Dr. Preudhomme. The response was filed more than 14 days after the petition for benefits resulting in the E/C technically denying the requested benefit, however the response indicating authorization was filed within 30 days of the petition. The parties mediated and went to a merits hearing on the issue of authorization of a replacement doctor.

E/C's argument that Claimant is really seeking an advisory opinion on whether the Claimant has exhausted her one time change is found to be persuasive. The only issue technically before the undersigned is whether the E/C authorized Dr. Preudhomme as a replacement for Dr. Augusthy. However, it appears that Claimant's primary concern is that by agreeing to treat with Dr. Preudhomme, given the E/C's designation of him as a one time change, that she has not extinguished her right under the statute to request a future one time change of physician. This is what Claimant's counsel argued at the initial hearing and in his trial memorandum.

It is undisputed that the E/C authorized Dr. Preudhomme to provide pain management treatment to the Claimant, and Claimant has received treatment. A new pain management physician was not authorized until after the filing of the petition for benefits, therefore as to the May 31/ June 1, 2009 Petition for Benefits the claimant is the prevailing party, not the E/C. However, since Claimant did not have her first appointment with Dr. Preudhomme until July 24, 2009, Claimant may be entitled to an E/C paid attorney's fee for obtaining the authorization of Dr. Preudhomme to treat her in place of Dr. Augusthy. Jurisdiction is reserved as to the issue of whether Claimant is entitled to E/C paid fees and costs for securing that authorization.

The merits hearing really addressed a semantic technicality with implications affecting the rights of the parties, and went forward on that basis. The practical effect of E/C's qualified (by the use of the one time change language) authorization of Dr. Preudhomme is that medical care with a pain management physician was authorized and provided to the Claimant and that Dr. Augusthy is no longer authorized. The immediate result for the Claimant is the same whether Dr. Preudhomme is a one time change or merely a replacement for Dr. Augusthy--Claimant is receiving authorized pain management treatment. The issue of whether Claimant still retains her statutory right to receive a one time change in treating physicians was not raised by the petition for benefits and therefore is not properly before the undersigned and no ruling, express or implied, is made as to that issue. Any ruling in that regard would in fact be an advisory opinion.

The necessity for the merits hearing was in great part due to the choice of language used by the E/C in its response to the petition for benefits. E/C is not found to be the prevailing party at the merits hearing and the petition for benefits it addressed, and no Claimant paid costs are due to E/C.

IT IS HEREBY ORDERED AND ADJUDGED THAT

1. The E/C has authorized Dr. Preudhomme to provide pain management treatment to the Claimant.
2. Claimant may be entitled to attorney's fees and taxable costs from the E/C for having obtained the authorization of pain management treatment with Dr. Preudhomme after Claimant was discharged by Dr. Augusthy. Jurisdiction is reserved as to the issues of both entitlement to and quantum of said fees and costs in the event the parties are unable to agree upon same.
3. E/C's claim for prevailing party costs from Claimant is denied.

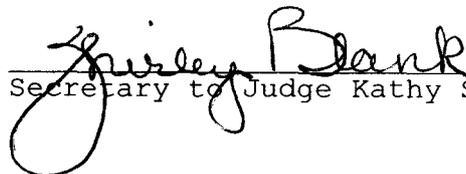
29th **DONE AND ORDERED** in Fort Myers, Lee County, Florida on this the March day of March, 2010.



Kathy A. Sturgis
Judge of Compensation Claims
Division of Administrative Hearings
Office of the Judges of Compensation Claims
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Fort Myers, Florida 33966
(239) 938-1159

CERTIFICATE OF ENTRY AND MAILING OF ORDER

THIS IS TO CERTIFY that the above Order was entered in the Office of the Judge of Compensation Claims and a copy was served by regular U.S. Mail or e-mail on each party shown below and their respective attorneys, on this the 29 day of March, 2010.



Secretary to Judge Kathy Sturgis

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