

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

William Phares,
Employee/Claimant,

OJCC Case No. 11-020246JAW

vs.

Accident date: 5/6/2011

School Board of Lee County/Johns Eastern
Company, Inc./Lee County Public Schools,
Employer/Carrier/Service Agent.

Judge: Jack A. Weiss

_____ /

FINAL COMPENSATION ORDER

This matter came before the Judge of Compensation Claims for final hearing on October 31, 2016, in Fort Myers, Florida, on petition for benefits filed May 4, 2016. Julio Fernandez, Esquire, appeared for Claimant. Jonathan Cooley, Esquire, appeared for Employer/Carrier. The claim filed is for authorization of Dr. Hershkowitz as Claimant's authorized treating neurosurgeon per section 440.13(2)(f), one-time change provision, along with costs and attorney's fees. EC defends the claim, stating that Dr. Correnti is authorized as the one-time change, as Dr. Lin was authorized timely but refused to treat, and attorney's fees and costs are not due and owing. Documents and exhibits admitted into evidence are listed in the appendix.

In making my findings of fact and conclusions of law, though I will not recite in explicit detail the testimony and may not refer to each piece of documentary evidence, I have carefully considered and weighed all the evidence presented to me. Based on the foregoing and the applicable law, I make the following findings:

FINDINGS OF MATERIAL FACT

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 in the pretrial stipulation are hereby approved and adopted as findings of fact and are incorporated herein by reference.

3. Carol Aaron testified via deposition taken October 12, 2016. She is a Senior Legal Adjuster for the Carrier, and has been with them since March 1, 2005. She has been handling the May 5, 2011, claim since August 29, 2011. Per Ms. Aaron, she received the Claimant's written request for a one-time change on April 13, 2016, at 8:48 p.m. The request for the one-time change was sent by Claimant's counsel to EC's counsel, via e-mail, earlier that day around 3:45 p.m. Ms. Aaron was not copied directly on the e-mail. She received it when her lawyer forwarded it to her later that day.

Ms. Aaron authorized the one-time change with Dr. Lin the next morning, April 14, 2016, at 8:21 a.m., when she sent a letter to Dr. Lin authorizing him for evaluation and treatment of Claimant. She also sent a letter via facsimile to Claimant's counsel at 9:01 a.m. advising him that Dr. Lin was authorized as Claimant's one-time change physician.

Dr. Lin, however, declined to see Claimant. Ms. Aaron learned this from Dr. Lin's office around 2:00 p.m. on April 14, 2016. Therefore, that same day, Ms. Aaron contacted Dr. Henn's office to see if he would agree to evaluate and treat Claimant as the one-time change, but he too declined to see Claimant. Therefore, that same day, Ms. Aaron contacted Dr. Correnti's office to see if he would accept Claimant as the one-time change physician. Per the request of Dr. Correnti's office, Ms. Aaron sent them the notice of injury and a copy of the medical records to include the diagnostic studies so that the doctor could review them and determine if he would agree to see Claimant.

The records were sent to Dr. Correnti's office via facsimile, and Ms. Aaron spoke with Lily in Dr. Correnti's office on April 15, 2016, to confirm that they had received what they had requested. On April 20, 2016, Dr. Correnti agreed to accept Claimant as the one-time change physician. The initial evaluation was scheduled for May 11, 2016, at 11:00 a.m. On April 20, 2016, Ms. Aaron generated an appointment letter for Claimant advising him of this appointment, with an arrival time of 10:30 a.m., and asking him to bring his x-rays and diagnostic studies. The letter was sent via U.S. Mail to Claimant that day. The letter was also sent via facsimile that day around noon to Claimant's counsel.

DISCUSSION

Based on the testimony presented at the hearing, review of the documents admitted into evidence, and upon consideration of the written and oral arguments of counsel for the parties, the undersigned concludes the EC timely responded to Claimant's request for a one-time change with the offer of Dr. Lin, and when Dr. Lin refused to accept the assignment, the EC acted reasonably and timely in offering an alternative one-time change with Dr. Correnti.

Claimant argues that EC failed to provide the name of Claimant's new treating physician, Dr. Correnti, within five calendar days of the request for a one-time change, and that the provision of Dr. Lin "was ineffective to prevent operation of the 5-day rule as this attempted change in the authorized physician was illusory due to the fact that he is no longer accepting workers' compensation patients, and thus it did not actually provide the substantive benefit intended by the statute." Claimant presents no evidence, however, that the adjuster offered Dr. Lin knowing that Dr. Lin would not accept Claimant as a patient. The only evidence before the JCC is that the adjuster offered Dr. Lin to Claimant as the one-time change in physician and

authorized Dr. Lin for evaluation and treatment. In *HMSHOST Corp. v. Frederic*, 102 So. 3d 668 (Fla. 1st DCA 2012), the court held the employer/carrier complied with section 440.13(2)(f) when they identified the one-time change physician within five days even though they did not actually contact the doctor within the five days.

Here, Claimant's argument yields a strange result if the EC could have complied with the statute by simply identifying Dr. Lin within five days and not contacting the doctor for an appointment until greater than five days later. Instead, the adjuster actually contacted the doctor's office and, upon learning he would not accept Claimant as a patient, the adjuster immediately contacted an alternate physician. In fact, the adjuster next contacted Dr. Henn, and when he rejected serving as the one-time change she then contacted Dr. Correnti. Per Dr. Correnti's request she sent him the notice of injury and medical records, confirming that his office received the information on April 15, 2016. Five days later, on April 20, 2016, Dr. Correnti advised the adjuster that he would accept Claimant as a patient and the adjuster notified Claimant that day of an appointment for May 11, 2016.

Claimant argues that had they received a response from the EC by April 18, 2016 that disclosed Dr. Correnti as the one-time change there would have been no final hearing. But the case law requires the EC to name a physician within five days; it does not require that the EC actually contact the doctor within the five days. Certainly an employer/carrier has to be able, in the short time they have to choose a one-time change physician, to be able to offer a replacement if the doctor they choose declines to accept the assignment. Claimant's position is that the EC has to offer a doctor that it knows will agree to serve as the one-time change physician, and that this must occur within five calendar days of the request for the one-time change. The

undersigned rejects that argument. Instead, the undersigned reads the statute and case law to apply a reasonableness standard in obtaining an appointment, so long as the EC timely responds with the name of a specific physician within five days, even if the appointment ends up with a different physician from the one originally named because the initial doctor selected declines the assignment.

In addition, the undersigned finds Claimant's reliance on Judge Hill's reasoning in *Jackson v. City of Pompano Beach*, OJCC # 14-020882MRH (Apr. 22, 2016), to be misplaced, as there is no evidence before the undersigned that the EC offered Dr. Lin as the one-time change in an effort to give itself more time to name another doctor. More to the point, unlike in *Jackson*, here the EC actually authorized Dr. Lin to serve as the one-time change and there is no evidence the EC ever rescinded their authorization of Dr. Lin. Claimant does not argue that Dr. Lin is willing to evaluate and treat Claimant as the one-time change and that the EC is pulling a "bait-and-switch." Instead, Claimant argues that because he was not told of Dr. Lin's unwillingness to serve as the one-time change physician and the substitution of Dr. Correnti within five calendar days then the EC is barred from selecting the one-time change physician, even though the only evidence before the JCC is that the adjuster acted timely in naming the one-time change physician at the outset and acted reasonably and timely in finding an alternate when she learned Dr. Lin would not accept Claimant as a patient.

Accordingly, it is:

ORDERED AND ADJUDGED:

1. The claim for authorization of Dr. Hershkowitz as Claimant's authorized treating neurosurgeon per section 440.13(2)(f), one-time change provision, is DENIED.

2. The claim for costs and attorney's fees is DENIED.

DONE AND SERVED this 29th day of November, 2016, in Ft. Myers, Lee County,
Florida.



Jack A. Weiss
Judge of Compensation Claims
Division of Administrative Hearings
Office of the Judges of Compensation Claims
Ft. Myers District Office
4379 Colonial Boulevard, Suite 200
Ft. Myers, Florida 33966
(239)938-1159
www.fljcc.org

COPIES FURNISHED:

Johns Eastern Company, Inc./Lee County Public Schools
6015 Resource Lane
Lakewood Ranch, FL 34211
wcfax@johnseastern.com

Julio Daniel Fernandez, Esq
Law Office of Julio D. Fernandez, PLLC
P.O. Box 1946
Lehigh Acres, FL 33970
julio@jdfernandezlaw.com, adela@jdfernandezlaw.com

Jonathan L. Cooley, Esquire
Hurley Rogner Miller Cox Waranch & Westcott P.A.
4460 Camino Real Way, Suite 2
Fort Myers, FL 33966
jcooley@hrmcw.com, mdriscoll@hrmcw.com

APPENDIX – DOCUMENTARY EVIDENCE AND EXHIBITS

JCC Exhibits

1. Petition for benefits filed 5/4/2016 (DN 14)
2. Response to petition for benefits filed 5/5/2016 (DN 15)
3. Mediation conference report issued 8/3/2016 (DN 19)
4. Uniform pretrial stipulation and pretrial compliance questionnaire filed 8/31/2016 (only the 9 pages of the pretrial stipulation) (DN 23)
5. Pretrial order and notice of final hearing issued 8/31/2016 (DN 24)
6. Claimant trial memorandum filed 10/26/2016 (argument only) (DN 30)
7. EC trial memorandum filed 10/28/2016 (argument only) (DN 36)

Joint Exhibits

1. Deposition of Carol Aaron taken 10/12/2016 (DN 44)

Claimant Exhibits

1. Emails from Julio Fernandez to Jonathan Cooley from 4/13/2016 and 4/27/2016 (DN 40)
2. Correspondence from Carol Aaron to Julio Fernandez dated 4/14/2016 (DN 41)
3. Email from Jonathan Cooley to Julio Fernandez dated 4/27/2016 with attachment from Carol Aaron to Claimant dated 4/20/2016 (DN 42)
4. Emails between Julio Fernandez and Jonathan Cooley from 4/27/2016 to 5/2/2016 (DN 43)

Employer/Carrier Exhibits

1. Email from Carol Aaron to Julio Fernandez dated 4/14/2016 (DN 38)
2. Fax from Carol Aaron to Julio Fernandez dated 4/20/2016 (DN 39)