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

Mark Saulnier,
Employee/Claimant,

vs.

Anchor Aluminum/Guarantee Insurance Company,
Employer/Carrier/Servicing Agent.
_____/

OJCC Case No. 13-009206MAM

Accident date: 8/1/2011

Judge: Mark Massey

ORDER ADDRESSING PENDING PETITIONS FOR BENEFITS AND PENDING MOTIONS

This cause came for hearing before the undersigned Judge of Compensation Claims on 5/27/14. Present and representing the claimant was Alexandra Nadal, Esquire. Present and representing E/C was Kate Albin, Esquire. This was scheduled as a final hearing pursuant to petitions for benefits filed 11/7/13, 11/12/13, and 1/21/14.

The parties attended mediation on 2/12/14. The pre-trial stipulation was filed 3/21/14. Subsequent to the mediation and pre-trial, claimant filed additional petitions on 3/25/14, 3/26/14, 4/4/14, and 5/16/14. Prior to the hearing, claimant filed a Motion to Continue/Consolidate and a Motion to Reserve Jurisdiction. E/C objected to both, and both were addressed at the outset of the scheduled hearing, as will be further discussed below.

The PFB filed 11/7/13 (for payment of a prescription) was resolved at mediation and is no longer at issue (except for attorney's fees and costs).

The PFB filed 11/12/13 (for authorization of a smoking cessation program) was still at issue as of the time of the hearing, but voluntarily dismissed without prejudice at the hearing, for the reasons outlined below.

RESERVATION OF JURISDICTION

The PFB filed 1/21/14 was for "payment of medical bill" to Lower Keys Medical Center [LKMC] for date of service 8/17/11. This was initially denied by E/C. The parties reached an impasse on the issue at mediation. On the pre-trial, claimant listed the issue as "payment of medical bill attached to [1/21/14] PFB." E/C put forth as its defense "Lower Keys Medical Center not an authorized provider & E/C not responsible for their bill." Upon receipt of E/C's portion of the pre-trial, claimant then added "authorization of Lower Key MC." E/C objected to claimant's "amendment" of the pre-trial, arguing that the claim for "authorization" of LKMC

was a new and different claim which had not been raised in any petition and had not been mediated, and could therefore not be included on the pre-trial or heard at the scheduled final hearing.

Apparently in response to E/C's objection, claimant filed a PFB on 3/25/14 for "authorization of medical treatment of Lower Keys Medical Center." Further, claimant filed a PFB on 4/4/14 for "authorization of Lower Keys Medical Center" and "payment to Lower Keys Medical Center for admittance date of 8/17/11." Counsel for claimant confirmed at the hearing that all of the LKMC claims were for payment of the bills related to date of service 8/17/11 (or, stated differently, retroactive authorization of the treatment provided on that date), rather than for continued authorization or authorization of ongoing treatment at that facility. So they are all claiming the same thing, and the later petitions were filed solely in response to E/C's objection.

In an Amendment to Pre-Trial Stipulation filed 4/1/14, E/C rescinded their position on the LKMC bill somewhat. Specifically, E/C stated they had requested the medical notes from Lower Keys Medical Center for the date of service in question "in order to review for payment. Upon receipt of the medical notes . . . the carrier will pay same per the fee schedule if the treatment was causally related to the industrial accident of August 1, 2011."

At the hearing herein, claimant's counsel initially indicated that E/C's statement in the 4/1/14 Amendment to Pre-Trial Stipulation as to payment of the LKMC bill satisfactorily resolved the issue. However, claimant wished to reserve the right to readdress the issue or pursue payment at a later date in the event the bill was ultimately not paid. The undersigned found this to be inconsistent and procedurally impermissible; the petition is either resolved or it is not resolved. If it is resolved, it cannot be raised again at a later proceeding; and if it is not resolved, it would need to be tried at the instant hearing.

In the meantime, claimant had moved to reserve jurisdiction on the petitions filed 3/25/14, 3/26/14, 4/4/14, and 5/16/14 on the grounds that those petitions had not yet been mediated, and were therefore not procedurally ripe for adjudication, presumably referring to section 440.192(9), Fla. Stat.

To the extent that the 3/25/14 and 4/4/14 petitions contained claims related to the LKMC treatment and bill, E/C objected to a reservation of jurisdiction on the grounds that those claims were not materially different from the LKMC claim contained in the 1/21/14 petition, which had been mediated.

After a somewhat lengthy discussion, I found that the 1/21/14 petition should be considered as voluntarily dismissed without prejudice. There was no reason to reserve jurisdiction on the 1/21/14 petition, or to continue the hearing on that petition. Further, it could not be declared resolved, yet leave the claimant with the opportunity to re-open it at a later date as noted above. However, jurisdiction will be reserved as to the LKMC claims contained in the petitions filed 3/25/14 and 4/4/14. I found that this would have the same practical effect as if the claimant had exercised his absolute right to voluntarily dismiss the 1/21/14 petition without

prejudice, and then re-file it later (in this case, on 3/25/14 and/or 4/4/14), and it would therefore be treated as though this is what happened.

In the alternative, I find that E/C's objection and argument that the 3/25/14 and 4/4/14 LKMC claims are not materially different than the 1/21/14 claim, is inconsistent with and contrary to E/C's argument raised in their Objection to Claimant's Amendment to Pre-Trial filed 3/24/14, in which they argued the exact opposite.

As to the other (non-LKMC) claims raised in the petitions filed 3/26/14 (authorization of physical therapy), 4/4/14 (compensability of back, left lower extremity, and foot drop), and 5/16/14 (hand specialist closer to claimant's residence, return visit to PCP, and authorization of a psychiatrist), E/C objected to a reservation of jurisdiction on the grounds that the claims have been "well known" to the claimant for "quite some time," and certainly well prior to the pre-trial herein, yet were not raised and cannot now be raised or have been waived.

I disagree with E/C that the claims in the 3/26/14, 4/4/14 and 5/16/14 petitions have been waived. There is no dispute that the claims have not been mediated. As a result, adjudication of those claims is precluded by section 440.192(9) absent an agreement of the parties to the contrary, of which there is none in this case.

In summary, jurisdiction is hereby reserved as to all claims contained in the 3/25/14, 3/26/14, 4/4/14 and 5/16/14 petitions. Those issues are currently scheduled to be mediated on 7/31/14, with a pre-trial conference on 8/4/14, and a final hearing on 10/21/14.

MOTION FOR CONTINUANCE

As to the 11/12/13 petition for authorization of a smoking cessation program, claimant filed this claim apparently on the basis of Dr. Khouri's repeated admonitions to the claimant to stop smoking in order for his hand to heal properly. Shortly following the mediation, E/C scheduled the deposition of Dr. Khouri, which took place on 5/5/14. In his deposition, which the undersigned reviewed in preparation for the hearing, Dr. Khouri testified that he had not recommended or prescribed a smoking cessation program for this claimant, nor does he generally do this for any of his patients. Therefore Dr. Khouri's testimony supported the position of E/C rather than the claimant on the issue of reasonableness and medical necessity of a smoking cessation program, and arguably left the claimant with no evidence to support the claim.

According to claimant's counsel, they were "surprised" by the deposition testimony of Dr. Khouri, and they did not "anticipate" him to testify as he did. As a result, claimant scheduled an IME. However, the IME is not set to take place until 6/16/14 and the IME physician's deposition is not set to take place until 7/14/14.

Claimant requested that the final hearing of 5/27/14 be continued until after his IME and IME deposition have taken place. Further, claimant requested that the smoking cessation issue be consolidated with the other issues on which jurisdiction has been reserved. Claimant's

motion for continuance/consolidation was filed on Friday, 5/23/14, less than 24 business hours prior to the scheduled final hearing. E/C filed an objection later the same day.

After hearing and considering the arguments of counsel, I found that circumstances beyond the control of the requesting party had not been demonstrated, and that a continuance was not warranted. Further, I find that the motion for continuance was untimely.

I specifically found that claimant had had ample time to fully investigate the smoking cessation claim and determine if he had viable evidence to support it. The petition was filed on 11/12/13 and the final hearing of 5/27/14 was scheduled immediately thereafter. Therefore claimant had over six months from the time the petition was filed (and over three months from mediation) to prepare for this issue. It was E/C, not claimant, who scheduled the deposition of Dr. Khouri. Although claimant might have scheduled it if E/C had not done so, it would not have occurred any earlier than it did, and claimant took no other action to prepare proof to support the claim.

I further found that the fact that a witness does not testify the way one side or the other "anticipated" is not the type of circumstance beyond the control of the party which is contemplated by the statute governing continuances. This is so regardless of whether the testimony is by deposition or live at hearing. It is a fact of life for trial lawyers that witnesses, including expert witnesses, do not always testify as you anticipate them to. On any given day with any given witness, the testimony may go your way and may not go your way. This is especially so in a *discovery* deposition.

Finally, I found that the motion to continue was untimely in two respects. First, by waiting until after the deposition of Dr. Khouri (which was taken less than 30 days prior to the hearing) to make a contingency plan, claimant assumed the risk of the testimony being unfavorable and being left with no evidence to support his claim. Second, even if I were to accept claimant's "surprise" to be legitimate grounds for a continuance, Dr. Khouri's deposition was taken on 5/5/14, twenty-two days before the hearing (and claimant asserts the IME and IME deposition were set immediately thereafter, although he did not specify exactly when), yet claimant waited until less than one full business day to file the motion.

Upon my denying the motion for continuance, claimant's counsel advised that they were voluntarily dismissing the 11/12/13 petition without prejudice.

CONCLUSION

Claimant's Motion for Consolidation/Continuance is denied.

Claimant's Motion to Reserve Jurisdiction is granted in part and denied in part as explained herein.

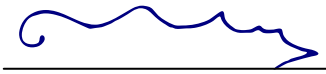
The 11/7/13 petition is resolved and closed except for attorney's fees and costs.

The 11/12/13 petition is voluntarily dismissed without prejudice.

The 1/21/14 petition is voluntarily dismissed without prejudice.

Jurisdiction is reserved as to all claims contained in the 3/25/14, 3/26/14, 4/4/14, and 5/16/14 petitions.

DONE AND ORDERED this 29th day of May, 2014, in Miami, Dade County, Florida.



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I HEREBY CERTIFY that the foregoing order was posted to the DOAH website www.jcc.state.fl.us