

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGES OF COMPENSATION CLAIMS
ST. PETERSBURG DISTRICT OFFICE

Edward Guido,
Employee/Claimant,

vs.

Judge: Stephen L. Rosen

Bimbo Bakeries USA d/b/a Sara Lee
Bakeries,
Employer,

OJCC Case No. 12-028344SLR

Accident date: 11/21/2011

York Risk Services Group,
Carrier/Servicing Agent.

**FINAL EVIDENTIARY ORDER SUSTAINING THE EMPLOYER/CARRIER'S
DAUBERT MOTION IN LIMINE AND DENYING APPOINTMENT OF ADDITIONAL
EXPERT MEDICAL ADVISOR**

This Cause came on for hearing before the undersigned Judge of Compensation Claims on October 31, 2013. The claimant, Edward Guido, was represented by Bradley G. Smith, Esq. The Employer, Bimbo Bakeries USA d/b/a Sara Lee Bakeries, and the Carrier, ACE USA/ESIS were represented by Rex A. Hurley, Esq. and Matthew Troy, Esq.

Judge's Exhibits:

1. Petition for benefits filed July 24, 2013, with attachments. The employer/carrier objected to the report of Dr. Walker as hearsay, but because Dr. Walker's deposition was taken and appears as an exhibit in this order, authentication has been accomplished in the objection is overruled.
2. Response to petition for benefits filed September 5, 2013.
3. Report of expert medical advisor Rodolfo Eichberg, M.D. dated June 7, 2016.
4. Petition for benefits filed June 18, 2013.

5. Response to petition for benefits filed June 28, 2013.

Claimant's Exhibits:

1. Motion to appoint expert medical advisor filed September 3, 2013, with attachments including report of the employer/carrier's independent medical examiner, Arthur Forman, M.D. The employer/carrier objected to the report of its own independent medical examiner, but the objection is untimely and is overruled.

2. Deposition of Charles Walker, M.D. taken September 3, 2013, with attachments.

Employer/Carrier's Exhibits:

1. Response to claimant's motion to appoint expert medical advisor filed September 12, 2013, with attachments.

2. Daubert motion in limine to exclude testimony of Dr. Walker filed September 12, 2013.

After hearing arguments of the parties and otherwise being fully apprised of the facts and applicable law herein, I find that:

1. I have jurisdiction of the subject matter and the parties and the exhibits are admitted into evidence.

2. The employer/carrier maintains that the opinions of Dr. Walker should be excluded from evidence in that his deposition testimony demonstrates his opinions do not meet the Daubert admissible expert opinion evidentiary standard adopted by the State of Florida effective July 1, 2013 under F. S. 90.702 and F. S. 90.704. Although the instant case arose in 2011, I find that the amendments to the above statutes as of July 1, 2013 are procedural rather than substantive and are, therefore, applicable to the case at bar.

3. Under Daubert as applied in Florida, a trial judge is the "gatekeeper" to make the determination as to whether a party has presented admissible expert testimony that can make it to

a jury. In a Workers' Compensation proceeding, the Judge of Compensation Claims is both the judge and the jury.

4. A Judge of Compensation Claims, as the trier of fact, has multiple evidentiary options in various types of proceedings under the Florida Worker's Compensation Act and the 60 Q rules of procedure:

A. In a trial on the merits of a claim, a Judge of Compensation Claims may disregard Daubert objections, admit the expert's opinion, and then rely on another expert's opinion in coming to the JCC's decision. A Judge of Compensation Claims need only state the evidence upon which he or she relies in awarding or denying benefits; the JCC does not have to rationalize evidence he or she does not rely on.

B. In a motion to appoint an expert medical advisor, as in the instant case, a Judge of Compensation Claims must find a conflict in the opinions of 2 healthcare providers before appointing the EMA. While an EMA may rely on the opinions of inadmissible evidence as an expert, the JCC must rely on admissible medical evidence in order to first find the conflict in medical opinions to support the appointment of an expert medical advisor. If there is no admissible medical evidence which leaves only a single medical opinion, there can be no conflict in medical opinion, therefore, no appointment of an expert medical advisor. A Judge of Compensation Claims cannot rely on a single medical opinion in order to appoint an expert medical advisor. Thus, the Daubert standard must be ruled on when a motion in limine is filed asking a JCC to reject an expert medical opinion.

5. In the instant case, I find that the claimant has not requested specific psychiatric treatment but has used a psychiatrist for the purpose of establishing a claim for medical care for an unspecified pain disorder. The employer/carrier has had an independent medical examination with a psychiatrist who gives psychiatric rather than physical opinions.

6. In previous litigation in this claim, I have appointed an expert medical advisor to determine issues regarding the claimant's physical injury and treatment thereof, if any, from the industrial

accident. The parties have stipulated that each is entitled to an additional independent medical examination and neither objects to this additional independent medical examination by a psychiatrist of each parties' choosing. The employer/carrier objects to the appointment of a 2nd expert medical advisor as there is no provision for this in F. S. 440.13. However, because of the findings in this order, I do not reach this issue.

7. I reject the claimant's request for appointment of an expert medical advisor in that, in the medical evidence presented to me, I do not find a conflict in opinions between 2 healthcare providers on the basis that the opinions of Dr. Walker, a psychiatrist, do not meet the Daubert standard of admissible opinion evidence in Florida. Dr. Walker gives opinion testimony regarding the claimant's physical status and he has not been qualified as an expert other than in psychiatry. Pursuant to F. S. 440.13 (5) (a), "An independent medical examiner may not render an opinion outside his or her area of expertise, as demonstrated by licensure and applicable practice parameters."

8. Additionally, Dr. Walker's opinions are not based on a review of the entire record which includes the prior expert medical advisors opinion, has not reviewed the current DSM-5 regarding psychiatric of pain disorder and whether it is still a viable diagnosis, and Dr. Walker's diagnosis of "pain disorder associated with both psychological factors and a general medical condition" is vague and does not include specific medical conditions related to the industrial accident.

9. Therefore, I find that the claimant has not provided admissible conflicting opinions of 2 healthcare providers in order to establish the appointment of an expert medical advisor at this time.

10. This order is strictly confined to the appointment of the expert medical advisor and shall not be in any way construed as a ruling on the merits of the claim. That ruling shall be held in abeyance until such time as the report and/or of is received into evidence.

THEREFORE,

1. The employer/carrier' s motion in limine is **GRANTED**.
2. The claimant's motion to appoint an expert medical advisor is **DENIED**.

DONE AND ORDERED in chambers in St. Petersburg, Pinellas County, Florida.

DONE AND MAILED this 31st day of October, 2013, in St. Petersburg, Pinellas County, Florida.



**Stephen L
Rosen**

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