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

Theotas Williams, II, Employee/Claimant, vs. Archer Western Contractors/Gallagher Bassett Services, Inc., Employer/ Carrier/Servicing Agent.	)	OJCC Case No. 09-001033JJL Accident date: 6/13/2008

FINAL ORDER

AFTER DUE NOTICE to the parties, a Final Hearing on this matter was held in Tallahassee, Leon County, Florida, on September 30, 2009. The parties were represented by counsel as indicated below. The undersigned Judge of Compensation Claims has jurisdiction of the parties and the subject matter.

The litigation history of this matter reflects that the four Petitions for Benefits (PFBs) which were the subject matter of this hearing were filed on January 14, 2009, May 6, 2009, July 9, 2009 and July 19, 2009. The matter was mediated on April 30, 2009 and again on July 16, 2009. Mediation resulted in an impasse. The parties filed their Uniform Statewide Pretrial Stipulations on May 29, 2009. A subsequent pretrial conference was scheduled for August 7, 2009 but the parties did not file a pretrial stipulation to address the additional issues raised by additional petition. This resulted in counsel for the parties having to file somewhat convoluted and, at times, untimely amendments to amend the single pretrial stipulation. The final hearing scheduled for July 29, 2009 was continued at the

request of the claimant and rescheduled and held on September 30, 2009.

At the final hearing, the claimant sought the following benefits:

1. Authorization of pain management care with Dr. Frank Collier, M.D., a physiatrist;

2. Payment or reimbursement of the medical expenses incurred by the claimant resulting from Dr. Collier's medical care;

3. Authorization for diagnostic facet blocks as recommended by Dr. Collier;

4. Authorization for physical therapy program as recommended by Dr. Collier;

5. Authorization for transportation to and from medical appointments;

6. Compensation for temporary partial disability (TPD) benefits from March 6, 2009 to the present and continuing; and

7. Interest and penalties on all past due payments of compensation;

8. A reasonable attorney's fee for claimant's counsel of record; and

9. The cost of these proceedings.

The claim was defended on the following grounds:

1. The medical opinion testimony of Dr. David Seaton, Ph.D, are not admissible in that Dr. Seaton is not a "physician" as defined in F.S. 440.13(1)(a). *(Claimant's objection to this defense was overruled although this defense was more in the nature of an evidentiary objection rather than a technical defense);*

2. No admissible objective medical evidence that the requested medical care is medically necessary or causally related to the claimant's work accident;

3. The requested pain management care was previously authorized and provided by the carrier with Dr. Kirk Mauro, M.D.;

4. The medical opinion testimony of Dr. Frank Collier, M.D., is inadmissible in that Dr. Collier is not an authorized treating physician, independent medical examiner (IME), or expert medical advisor (EMA);

5. No TPD benefits are due or owing; and

6. Employer/Carrier denies claimant's entitlement to penalties, interest, costs and attorney's fees at their expense.

The parties have entered into the following stipulations:

1. The Judge of Compensation Claims has jurisdiction of the parties and the subject matter of this claim.

2. Venue properly lies in Leon County, Florida.

3. Notice of Hearing and Notice of Injury were properly furnished and received as required by the Workers' Compensation Law.

4. On June 13, 2008, the claimant was employed by the captioned employer and on that date sustained an injury by accident arising out of and within the course and scope of said employment earning an average weekly wage of $740.97 per week yielding a compensation rate of $494.01 per week.

At the trial of this cause, the following Exhibits were admitted into evidence.

Claimant's Exhibits

1. Petitions for Benefits filed 1/14/2009, 5/6/2009, 7/9/2009 and 7/13/2009. Other pending PFBs filed on 9/18/2009 and 9/22/2009 had not been mediated and, therefore, were not the subject matter of this hearing and are reserved for later hearing.

2. (Proffered only) Employee's sixth amendment to pretrial stipulated dated May 28, 2009, which amendment was filed on 9/21/2009. *(Employer/Carrier's objection to the inclusion of the claim for psychiatric care is sustained as untimely. However, that portion of the amendment regarding the withdrawal of independent medical examiner (IME) of Dr. Collier is overruled for the reason stated below.)*

3. Deposition of Dr. David Berg, M.D.

4. Deposition of Dr. Pankaj Chokhawala, M.D. *(Employer/Carrier's objection to the doctor's opinions is overruled in that Dr. Chokhawala was appropriately designated as the claimant's IME.)*

5. Deposition of Dr. Frank Collier, M.D. (Employer/Carrier's motion to strike Dr. Collier's medical opinions on the grounds that he was not an authorized treating physician, IME or expert medical advisor (EMA) was overruled for the reasons stated herein).

6. Deposition of Cathy Conlin.

7. Deposition of Ruth Huffman, R.N.

8. Deposition of Dr. Kirk Mauro, M.D.

9. Deposition of Dr. Christopher Rumana, M.D.

10. Deposition of Dr. David Seaton, Ph.D. *(Employer/Carrier's objection to Dr. Seaton's opinions within his expertise of*

neuropsychology was overruled.)[1]

11. Composite of e-mails dated 1/7/2009; 4/30/2009; and 5/1/2009.

12. *(Proffered only)* Carrier's payout ledger.

13. Claimant's Trial Memorandum *(Marked for identification only and not received in evidence).*

14. Composite of response to the four PFBs which are the subject matter of this hearing.

Employer/Carrier's Exhibits

1. Employer/Carrier's Hearing Information Sheet. *(Marked for identification only and not introduced in evidence).*

Joint Exhibits

1. Pretrial Stipulation and Order entered June 1, 2009, together with claimant's supplemental pretrial amendments 1 to 5 and the employer/carrier's supplemental pretrial amendment of 8/27/2009.

The following individuals testified live before me:

1. Theotas Williams, II, the claimant.

2. Linda Carr Williams, the claimant's mother.

After due consideration of this matter and after having the opportunity to review and consider the aforesaid exhibits which were admitted into evidence, and having observed and considered the candor and demeanor of the witnesses who appeared and testified before me, and having endeavored to resolve all conflicts of facts in the

[1] Bishop v. Baldwin Acoustical & Drywall, 696 So.2d 507 (Fla. 1st DCA 1997) (psychologists are competent to testify as to the existence of organic brain damage, Executive Car & Trust Leasing v. DeSerio, 468 So. 2d 1027 (Fla. 1st DCA 1995), a psychologist cannot testify that an accident resulted in physical injury causing organic brain. Haas v. Seekell, 538 So. 2d 1333 (Fla. 1st DCA 1989). Since psychologist are not medical doctors, they cannot render an opinion as to physical cause of brain damage, considered in Florida to be a medical subject. DeSerio, 468 So. 2d at 1029.

evidence presented herein, I hereby make the following findings of fact and conclusions of law:

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 herein are hereby approved and adopted as findings of fact and are incorporated herein by reference;

3. In my determination herein I have attempted to distill all the testimony and salient facts together with the findings and conclusions necessary to the resolution of this matter. I have not necessarily attempted to summarize the substance of the claimant's testimony or the testimony of any live or deposition witness, nor have I attempted to state nonessential facts. Because I have not done so should not be construed that I have failed to consider all of the evidence.

4. Any and all issues raised in the petitions for benefits described above which were the subject matter of the final hearing and not reserved for later hearing, but which issues were not tried at the hearing are presumed resolved or, in the alternative, deemed abandoned by the employee/claimant and therefore **denied.** *See* Betancourt v. Sears Roebuck & Co., 693 So.2d 253 (Fla. 1st DCA 1997).

5. On June 13, 2008, the captioned claimant, Theotas Williams, II, who is 26 years of age and a high school graduate, was employed by the captioned employer as a laborer and on that date sustained and suffered a compensable injury by accident arising out of and within the course and scope of the claimant's employment with said employer

when he was struck by a motor vehicle that ran off the road. Mr. Williams was rendered unconscious for a period time and transported to Tallahassee Memorial Regional Medical Center (TMRMC). He sustained multiple trauma consisting of head injury, fractured ribs, bi-lateral collapsed lungs and fractures of his right lower extremity requiring surgery.

6. The claimant was initially treated by Dr. Christian Berg, M.D., an orthopedic surgeon, who surgically repaired the claimant's right leg and due to the severity of the fractures required intramedullary rodding and nailing. Dr. Berg eventually placed the claimant at maximum medical improvement (MMI) on March 12, 2009 with a 6% permanent impairment rating (PIR) of the body as a whole regarding the injury to his lower extremity. Dr. Berg released the claimant to work full duty with no specific restrictions.

7. Because of the claimant's neck and back injuries resulting from the work accident, Dr. Berg ordered MRIs of the claimant's cervical and lumbar areas. The cervical MRI showed a C4-5 posterior and posterolateral disc herniation with some extrusion. The MRI of the lumbar spine reflected a small left foraminal annular tear at L5-S1. Based on these findings and the claimant's complaints, Dr. Berg referred the claimant to Dr. Christopher Rumana, M.D., a board certified neurosurgeon. Dr. Rumana performed an evaluation of the claimant's neck and back and opined that Mr. Williams was not a surgical candidate and essentially had no further to offer. Nevertheless, he referred the claimant to Dr. Kirk Mauro, M.D., a physiatrist, for conservative treatment of the claimant's spinal

symptomatology.

8. Dr. Mauro saw the claimant on only two occasions. The first visit was on 9/8/2008. At that time he diagnosed the claimant with work-related trauma occurring 6/13/2008 with right tibial fracture, musculoligamentous complaints involving the cervical and lumbar spine, and with a possibility of mild traumatic brain injury. Because of the latter condition, Dr. Mauro referred the claimant to Dr. David Seaton, M.D., a neuropsychologist, for cognitive evaluation, and to Dr. Charles Maitland, M.D., for a neuro-ophthalmology evaluation for some visual deficit. Dr. Mauro also prescribed additional physical therapy for the claimant's neck and low back to improve the claimant's ability with standing, walking and to improve his deconditioning. Dr. Mauro found that the claimant was capable of full-time sedentary employment.

9. The claimant's second and final visit with Dr. Mauro was on October 16, 2008. Dr. Mauro understood that Dr. Seaton did not find any traumatic brain injury; although, he had not reviewed Dr. Seaton's report at the time. During that visit Dr. Mauro testified that he perceived that the claimant refused and would not cooperate with certain movements of the low back the Mr. Williams was asked to perform during the exam, and also believed the claimant was uncooperative with regard to his physical therapy and home program. Consequently, Dr. Mauro felt that his hands were tied with regard to further treatment and abruptly discharged him from his care that day and placing him at MMI with a 0% PIR with regard to his cervical and lumbar spine based on a lack of evidence of objective abnormality

despite Mr. Williams subjective complaints of pain. The doctor found no restrictions in regard to the claimant's neck and back condition.

Mr. Williams disputes Dr. Mauro's assertion that he was uncooperative. He claimed convincingly that he tried to cooperate with Dr. Mauro's request to the best of his ability but was restricted by his pain. During this last visit with Dr. Mauro, the claimant's mother, Linda Carr Williams, and Nurse Case Manager, Ruth Huffman, were present and both seemed to be taken aback by Dr. Mauro's abrupt action when he left the room and discharged the claimant. This additional testimony supports the claimant's position that he was not intentional obstructive or uncooperative with Dr. Mauro instructions.

10. In Dr. Mauro's deposition, the doctor agrees that the claimant requires ongoing care for his spinal injuries. Dr. Mauro also admitted that if the claimant had been cooperative, he would have continued to treat him. Moreover, due to Mr. Williams' perceived uncooperative attitude the doctor had no choice but to discharge him and place him at MMI for his neck and back.

11. The claimant was next seen by Dr. Seaton. He explained that the claimant's cognitive defects were primarily preexisting in nature and would not likely be helped with speech therapy or cognitive re-mediation. Dr. Seaton felt the claimant suffered from major depression and post-traumatic stress disorder which impacted his preexisting cognitive problems. He found that the claimant would benefit from counseling and recommended additional care.

12. Because the claimant was not receiving any medical care for his spinal injuries since he had been discharged by Dr. Mauro he

sought the services of his attorney who filed a PFB on 1/14/2009 claiming authorization for ongoing counseling and pain management. The PFB was dated 1/8/2009. Interestingly on 1/7/2009, Mr. Goldman sent an e-mail to Mr. Bennett's law office addressed to Mr. Bennett's secretary, Elaine Green. The e-mail advised Mr. Bennett that claimant was dissatisfied with Dr. Mauro's prior care and treatment and requested a one-time change of medical provider from Dr. Mauro. Mr. Goldman, on behalf of the claimant, requested that either Dr. Frank Collier, M.D. or Dr. Orlando Floret, M.D., physicians not located in the North Florida Panhandle area, be provided. There was no response to said e-mail.

13. After conversations held by counsel for the parties during state mediation on April 30, 2009, Mr. Bennett, defense counsel, e-mailed Mr. Goldman stating that his office had in fact received Mr. Goldman's e-mail of 1/7/2009 but that he had not been brought to his attention. Mr. Bennett wrote that although he did not believe the e-mail request constituted a "written request of the employee" to invoke the provisions of F.S. 440.13(f), (one-time change of physicians) that he would forward the same to the employer/carrier immediately. The following day, 5/1/2009, Mr. Bennett again e-mailed Mr. Goldman stating that he had communicated with his client (the carrier) about the request for a one-time change. Nevertheless, Mr. Bennett requested that a written request be made directed to the carrier for the purposes of a response from the carrier. This communication was met with the filing of a second PFB on 5/6/2009 requesting authorization of Dr. Collier for pain management, payment of his

medical bills, and additional medical benefits.

14. The deposition of Cathy Conlin, the carrier's adjuster in this matter, reflects that she had a conversation with her attorney, Mr. Bennett, regarding the one-time change issue on or about April 30, 2009 or May 1, 2009. She testified that it was the carrier's position that until she received an actual written document from the claimant requesting a one-time change, the law provided no obligation to provide an alternative medical provider. During her deposition on September 18, 2009 she reviewed the e-mails between counsel (Claimant's Exhibit # 11) but nevertheless had not provided an alternative medical provider thorough the date of the final hearing.

15. The primary issue here regarding claim fo medical care and the admissibility of the medical evidence introduced by the claimant is whether or not Mr. Goldman's e-mail of January 7, 2009 directed to Mr. Bennett's secretary constitutes a "written request" for a one-time change of physician as contemplated by the statute. Section 440.13(2)(f), Fla. Statutes, in pertinent part provides that:

> "Upon the written request of the employee, the carrier shall give the employee the opportunity for one change of physician during the course of treatment for any accident...and the carrier shall authorize an alternative physician...within five (5) days after receipt of the request. If the carrier fails to provide a change of physician as requested by the employee, the employee may select a physician and such physician shall be considered authorized if the treatment is compensable and medically necessary."

Based on the evidence presented, I find that neither Mr. Bennett nor the carrier had any knowledge that the claimant was requesting a one time change of physician from Dr. Mauro until April 30, 2009 or

May 1, 2009, when Mr. Bennett was furnished a copy of the 1/7/2009 e-mail from Mr. Goldman and discussed it with his client, the carrier. Mr. Bennett candidly admitted that there was such an e-mail in his file but that it had not been brought to his attention. Even though he thought that the e-mail request was insufficient to constitute a written request, he represent to counsel for the claimant that he would "forward this to the e/c immediately." Mr. Bennett acknowledged that he in fact had communicated to the carrier Mr. Williams' request for the one-time change, but still insisted that a "written request" be directed to the carrier with a copy to him. This would be surplusage in view of the previous e-mail communications between the attorneys and defense counsel's statement that he would relay the request to the carrier. I find the carrier here had actual knowledge that the claimant was requesting a one-time change when this was communicated to them on April 30, 2009 or May 1, 2009 as confirmed by Ms. Conlin. Although the statute provides for a "written request", I find that the purpose of section 440.13(2)(f), Fla. Stat., is to permit the employer/carrier to maintain control of the timing and scheduling of medical care if they provide a timely response to a written request. *See* Dawson v Clerk of the Circuit Court - Hillsborough County, 991 So. 2d 407 (Fla. 1st DCA 2008). I further find that there is nothing that prohibits an employer/carrier from allowing a one-time change of physician following an oral request. Perez v Rooms to Go, 997 So. 2d 511 (Fla. 1st DCA 2009; Tri-City Electric v Werner, 5 So. 3d 752 (Fla. 1st DCA 2009).

Moreover, section 440.13(9)(c), Fla. Stat., which appears similar

to section 440.13(2)(f), requires that a judge of compensation claims grant a request for an EMA after written request by the employer/carrier. However, in Helmsman Mgmt. Serv. v Garner, 725 So. 2d 1188 (Fla. 1st DCA 1998), the court reversed the JCC's refusal to grant the employer/carrier's oral request for an EMA because the judge found the request was untimely. The appellate court held that the employer/carrier's oral request was timely as it was made as soon as they learned of the medical providers' disagreement of opinions. Therefore, I find that since the carrier failed to timely respond to the claimant's request for a one-time change of physician within five (5) days after they had actual knowledge of said request on or about April 30, 2009, Dr. Collier is statutorily deemed the claimant's authorized physician since I find his evaluation and treatment to be medically necessary and related to his compensable injuries.

16. Having found that Dr. Collier is deemed the claimant's authorized physician pursuant to F.S. 440.13(2)(f), his medical opinions and testimony are received in evidence as such. Dr. Collier opined that the claimant needs ongoing care for the treatment of his spinal injuries which he sustained in his work accident of 6/13/2008. he testified that his evaluation, recommended care, and medical charges are reasonable and directed to the claimant's compensable spinal injuries. He also stated the claimant has not reached MMI. His general impression from his one time evaluation was that the claimant suffered from mechanical-type back pain, right knee pain and neck pain with no evidence of neurologic deficits or myelopathic changes. He found that these conditions were related to the

claimant's compensable work accident and that Mr. Williams would continue to need treatment for the same. He found that the claimant was capable of modified duty work capacity with restrictions consisting of occasional overhead activities, no lifting more than a maximum of 25 lbs. and 20 to 15 lbs. repetitively, and no crawling or kneeling.

17. The claimant was also evaluated by Dr. Pankaj Chokhawala, M.D., a psychiatrist. Dr. Chokhawala was designated as the claimant's IME. He diagnosed the claimant with chronic post-traumatic stress disorder, major depression and chronic pain. He recommended supportive psychotherapy and medication management. He found that the claimant had not reached MMI psychiatrically. The pending claim for psychiatric care which has not been mediated was not an issue at this hearing. He placed some restrictions on Mr. Williams which I did not find to be particularly significant considering the cursory nature of his examination.

18. Therefore, in regards to the medical claims herein, I find sufficient evidence based on the medical opinions of Dr. Collier and Dr. Mauro that the claimant still needs medical care regarding his spinal injuries which the carrier has not provided. That Dr. Mauro, considering the circumstances surrounding the claimant's last visit with him, would not be acceptable to the claimant regardless of Dr. Mauro's willingness to continue to treat. I also find that the treatment recommendations by Dr. Collier are reasonable and medically necessary for the claimant's compensable spinal injuries and that the employer/carrier should provide the same.

The claim for authorization for transportation is premature since there is no evidence that the employer/carrier will or has denied the same when needed. Moreover, there no evidence that the claimant advised the carrier of the extent of medical mileage or the cost incurred for past medical appointments. The claimant offered no evidence to establish entitlement to past transportation or mileage expenses thus the claim for that benefit should be denied.

19. Mr. Williams also claims payment of TPD benefits from 3/6/2009 to the present and continuing. As stated above, I find that the claimant has not reached overall MMI and therefore would be eligible for temporary indemnity benefits. Dr. Berg's restrictions were non-specific and minimal at best, and Dr. Seaton's restrictions and limitations appear to be primarily directed to the claimant's preexisting cognitive problems, except for the anxiety issue. I find no clear indication that Mr. Williams cannot drive except for not having a valid driver's license. Dr. Collier imposed certain restrictions and limitations, but I do not find these are so restrictive to prevent the claimant from some modified duty work.

There is no evidence that Mr. Williams has made any effort to look for modified employment. While a job search is not an absolute requirement for temporary indemnity benefits, it is still necessary for the claimant to show a causal connection between the industrial injury and a resulting loss of earnings, and an unsuccessful job search may be a pertinent factor in determining whether the claimant has satisfied that burden. Barfield v Universal Forrest Products, 813 So. 2d 285 (Fla. 1st DCA 2002). Moreover, even if an injured worker

has been released for work prior to reaching MMI and fails to "return to or look for work" that injured worker is not "automatically" entitled to TTD or TPD benefits where he fails to satisfy that burden once released to work. D'Andrea v Wal-Mart Stores, 711 So. 2d 1373 (Fla. 1st DCA 1998). Therefore, for all of the foregoing reasons, I find that the claim for TPD benefits through the date of the final hearing should be denied.

20. Because the claimant prevailed on some, but not all, of the issues raised in his PFBs, the claimant is entitled to an award of attorney's fees under F.S. 440.34(3), together with costs, but only on such benefits and time reasonably spent in obtaining them as were secured for the claimant through the efforts of his attorney.

WHEREFORE, it is **ORDERED** that the employer/carrier:

1. Furnish to the claimant medical treatment with Dr. Frank Collier, M.D., and such further remedial treatment, care and attendance as recommended by Dr. Collier, for such period as the nature of the compensable injuries or the process of recovery may require;

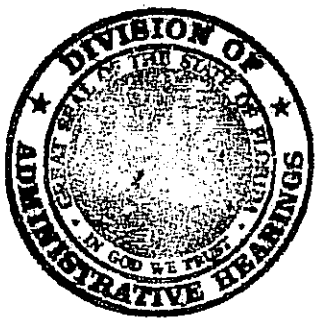
2. Pay the medical bills incurred for the evaluation and treatment provided by Dr. Frank Collier, M.D., in accordance with the medical surgical fee schedule;

3. Pay claimant's attorney, Richard J. Goldman, Esquire, a reasonable attorney's fee in an amount to be determined at a later time or by agreement of the parties subject to approval of the undersigned judge; and

4. Pay the costs of these proceedings.

IT IS FURTHER ORDERED that the claims for medical transportation and for temporary partial disability benefits, together with interest and penalties, from March 6, 2009 through the date of this final hearing are hereby **DENIED.**

DONE AND ORDERED at Tallahassee, Leon County, Florida.



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Certificate of Service

I HEREBY CERTIFY that the foregoing Order was entered and a true copy furnished by U.S. Mail on this 6th day of November, 2009 to the parties and their attorneys, if represented, listed below at the following addresses:

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Secretary to
Judge of Compensation Claims

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