

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

Luis Sierra,)	
Employee/Claimant,)	
)	OJCC Case No. 12-018887MGK
vs.)	
)	Accident date: 8/15/2011
Natures Flowers/Florists' Insurance)	
Company, Florists' Insurance Company,)	Judge: Margret G. Kerr
and Florists' Mutual Insurance Company,)	
Employer/ Carrier/ Servicing Agent.)	

FINAL MERITS ORDER

THIS CAUSE came before the undersigned Judge of Compensation Claims (hereinafter "JCC"), for a Merits Hearing on November 4, 2013, regarding the Petitions for Benefits (PFBs) filed May 14, 2013. Three later petitions, filed August 23, 2013, September 17, 2013 and October 31, 2013, were not yet ripe as they have not been mediated. Jurisdiction is specifically reserved on these outstanding petitions. The Claimant was represented by Ivette Gonzalez Esq., and the Employer/Carrier/Servicing Agent (hereinafter "E/C/SA"), was represented by Rex Hurley Esq. and Kate Albin Esq.. This Order ensues.

EXHIBITS:

CLAIMANT:

1. Claimant Amendment to Pre Trial Stipulation filed 9/20/2013.
2. Claimant Amendment to Pre Trial Stipulation filed 10/3/2013.
3. Deposition of Dr. Kaplan taken on 10/16/2013 and filed on 10/30/2013 - FOR FACT PURPOSES ONLY. The E/C/SA objected based on relevancy, objection overruled. The E/C/SA further objected that the doctor was giving opinion testimony in violation of FS 440.13(5)(e). As the testimony given does not relate to the Claimant, but rather to the fact of what a psychiatrist does as part of his practice, objection overruled.
4. Deposition of Dr. Ballweg taken on 1/9/2013 and filed on 10/30/2013.

5. Deposition of Dr. Ballweg taken on 10/23/2013 and filed on 10/30/2013. The E/C/SA requested a ruling on the objections raised at the deposition.¹
6. Deposition of Dr. Trombly (Claimant's IME) taken on 3/26/2013 and filed on 10/30/2013. The E/C/SA objected based on relevancy, objection overruled.
7. Deposition of adjuster, Robert Kemp, taken on 8/22/2013 and filed on 10/30/2013.
8. Deposition of adjuster, Robert Kemp, taken on 12/14/2012 and filed on 10/30/2013. The Claimant objected to the attachment of E/C/SA exhibits 1 & 2 letters from attorney Hurley to Drs. Ballweg and Pagan as unauthenticated – objection sustained.
9. Copy of letter from Judge Harnage to EMA physician, Dr. Chiron dated 5/18/2013.
10. EMA report of Dr. Chiron dated 4/10/2013 and joint letter from both attorneys with response from Dr. Chiron.

E/C/SA:

1. Deposition of Dr. Pagan taken on 3/4/2013 filed on 10/30/2013. The Claimant objected to relevance – objection overruled. The Claimant objected to the attachments of exhibits – objection overruled as not raised at the time of the deposition.
2. Deposition of Dr. Pagan taken on 9/16/2013 filed on 10/30/2013. The Claimant objected to exhibits as hearsay – objection overruled.
3. Deposition of Dr. Chiron taken on 7/25/2013 filed on 9/6/2013

JCC:

1. IDENTIFICATION ONLY – Trial memoranda of both the Claimant and the E/C/SA.
2. Order Approving Pre Trial Stipulation filed 8/22/2013.

LIVE WITNESSES:

1. Luis Sierra - Claimant.
2. Isabel Sierra – Claimant's wife.

¹ On page 11, lines 16-20, E/C/SA objects to speculation – overruled as the testimony recounts facts.

Page 21 lines 24-24, page 22 lines 1-4 E/C/SA objects to mischaracterization – overruled.

Page 22 line 20, E/C/SA objects to speculation – sustained.

Claimant Exhibit #2, E/C/SA objects as not IME, EMA or authorized treating physician – objection overruled as to deposition of Dr. Kaplan for fact purposes, sustained as to using the deposition for any medical opinion as it relates to the Claimant. Expert may rely on otherwise inadmissible evidence, but the evidence itself remains inadmissible. Page 24 lines 5-13, E/C/SA objects as not IME, EMA or authorized treating physician and to mischaracterization-sustained.

Page 24 lines 22-25 and page 25 lines 1-2, E/C/SA objects as not IME, EMA or authorized treating physician - sustained.

Claimant Exhibit #3, E/C/SA objects to hearsay, authenticity, not IME, EMA or authorized treating physician - sustained

CLAIMS (as listed in the Claimant's trial memorandum):

1. Authorization of Psychiatrist as recommended by this Court's [sic] ordered EMA, Dr. Harlan S. Chiron, M.D. on 4/10/2013 and 5/2/2013 respectively.
2. Reserve jurisdiction on attorney fees and Costs.

DEFENSES: (as listed in the E/C/SA's trial memorandum):

1. Dr. Chiron has withdrawn his recommendation for a psychiatrist.
2. A psychiatrist is not medically necessary.
3. Reserve jurisdiction on attorney fees and costs.

In making the determinations set forth below, I have attempted to detail the salient facts together with the findings and conclusions necessary to resolve the issues. I have not attempted to painstakingly summarize the substance of the parties' arguments, not the support given to my conclusions by the various documents submitted and accepted into evidence; nor have I attempted to state non essential facts. Because I have not done so, does not mean that I have failed to consider all of the evidence. In making my findings of fact and conclusions of law in this claim, I have carefully considered and weighed all evidence submitted to me. I have considered arguments of counsel and the respective parties, and analyzed statutory and decisional law of Florida.

After due consideration of the 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 witness who appeared and testified before me, and having endeavored to resolve all conflicts of facts in the evidence presented herein, I hereby make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

1. The undersigned Judge of Compensation Claims has jurisdiction over the parties and the subject matter of this case.
2. The parties' stipulations and agreements, set forth in the Pre Trial Compliance Questionnaire are accepted, adopted and made an order of the office of the Judge of Compensation Claims.
3. Any and all issues raised by way of Petitions for benefits ("PFB"), but which

issues were not dismissed or tried at hearing, are presumed resolved, or in the alternative, deemed abandoned by the Claimant and, therefore, are Denied and Dismissed with prejudice. See, *Scotty's Hardware v. Northcutt*, 883 So.2d 859 (Fla. 1st DCA 2004). Jurisdiction is reserved on the issues raised in the August 23, 2013, September 17, 2013 and October 31, 2013 petitions for benefits as they have not yet been mediated and are therefore not ripe.

4. The Claimant is a 45 year old employee of Nature's Flowers who injured his low back on 8/15/2011. The accident was accepted as compensable and medical benefits provided. At the present time, the main treating physicians are neurologist Dr. Gail Ballweg, and neurosurgeon Dr. Luis Pagan, who is the Claimant's one time change in treating physician.

5. Dr. Pagan placed the Claimant at MMI and assigned a 5% PPI rating to the body as a whole on 9/4/2012, opining that he was not a surgical candidate.

6. The Claimant underwent an IME with Dr. Ryan Trombly, also a neurosurgeon on 12/18/2012. Dr. Trombly opined that the Claimant was "doing poorly from a neurologic point of view", was not at MMI and was a surgical candidate for a discectomy at L4-5.

7. Due to the conflict in the opinions between Drs. Pagan and Trombly, Dr. Harlan Chiron was appointed as the EMA.

8. Dr. Chiron saw the Claimant on 4/10/2013 and issued his EMA report, which provided an extensive medical history. After examining the Claimant, Dr. Chiron diagnosed "low back syndrome with MRI evidence of herniated disc at L3-4 and L4-5".

9. In response to the specific questions posed to him as part of the EMA process, Dr. Chiron opined that the Claimant was at MMI for the work related injuries sustained on 8/15/2011 with a 6% PPI rating, and he recommended that the Claimant be seen by a psychiatrist and undergo a conditioning program to strengthen his core and increase his flexibility.

10. On April 26, 2013, due to Dr. Chiron's recommendation to a psychiatrist, as well as the fact that Dr. Chiron failed to address the need for surgery, the parties wrote a joint letter to Dr. Chiron asking for clarification as to whether a psychiatrist or a physiatrist was recommended, and whether the Claimant was a surgical candidate.

11. Dr. Chiron responded in a letter dated 5/2/2013 which stated that the initial report contained a typographical error, and that the recommendation was for a physiatrist, not a psychiatrist and that the Claimant was not a surgical candidate. He also outlined work restrictions of no lifting over 20lbs, limited sitting, ambulating to pain tolerance, and no stooping

or bending.

12. In deposition, Dr. Chiron reiterated that the recommendation made was for a physiatrist and that the Claimant should undergo a conditioning program to strengthen his core and increase his flexibility.

13. He went on to testify that the physical therapy recommended by Dr. Pagan would satisfy his recommendation for a physiatrist and that no other physiatrist services were needed beyond the therapy recommended by Dr. Pagan. In fact the purpose of the recommendation for a physiatrist was to “start him on a strengthening program and make sure he was doing his exercises properly”.

14. Dr. Chiron went on to testify that if the Claimant underwent the physical therapy program recommended by Dr. Pagan, a physiatrist was no longer necessary, assuming that the therapist gave the Claimant conditioning exercises. Dr. Chiron opined that Dr. Pagan could oversee the type of therapy and then there is no need for a physiatrist. What was important was that the Claimant not go to therapy and simply be given hot packs, but should also undergo conditioning exercises.

15. Dr. Pagan testified that in June 2013, he ordered formal physical therapy for the Claimant, consisting of a home exercise program, general conditioning for his abdominal and back muscles, stretching exercises and pain modalities. The order itself specifically requires general conditioning, stretching, pain modalities and home exercise program.

16. The reason he made the recommendation for formal therapy was because the Claimant appeared to be having difficulty understanding what his home exercise programs were, and also the possibility that he would get some palliation from his increased pain level.

17. Dr. Pagan testified in deposition that he does not recommend a physiatrist as the program he had already recommended on 6/20/2013 satisfied the recommendations made by Dr. Chiron for a program to strengthen the Claimant’s core and increase his flexibility.

18. Dr. Pagan also testified that the report of Physical Therapy Services demonstrates that the therapy provided to the Claimant was core strengthening, pain modalities and stretching.

19. The report of Physical Therapy Services, Inc dated 7/11/2013 shows that the goals of the therapy were to decrease muscle tightness, soft tissue and joint restrictions to normal limits, develop good ergonomic knowledge, proper body mechanics and joint protection during ADL’s and in the work environment, demonstrate CORE strength 4/+5 with proper back

stabilization, good endurance, no muscle spasms, a low back pain level 1/10 and range of motion within normal limits, work performance in related activities be improved and correct demonstration by patient of home exercise program.

20. Dr. Ballweg testified that while she felt that a referral to a physiatrist could help the Claimant, she defers to Dr. Pagan regarding the Claimant's treatment altogether. She further agreed that Dr. Pagan was not only capable of any physical therapy program that the Claimant needs, but that he does it "all the time" and in fact used to do it himself.

21. The Claimant's wife, Isabel Sierra, testified that she attended medical appointments with her husband and had observed no improvement in her husband's condition, even with physical therapy.

22. The Claimant testified that he underwent 12 sessions of physical therapy as ordered by Dr. Pagan in June 2013. The therapy consisted of leg exercises, electrical stimulation and water massages. He testified that the therapy seemed to help at the time, but the relief was not permanent. He was instructed to do primarily the same exercises at home with the exception of the electrical stimulation and water therapy.

23. The Claimant expressed a strong desire to improve his medical condition and resume his pre injury life both at work and with his family. The Claimant expressed frustration at having made no improvement under the care of Dr. Pagan, and went on to testify that at his most recent visit with Dr. Pagan in September 2013, the doctor had ordered additional testing.

24. There is no doubt and the testimony, both lay and medical, is uncontroverted that the Claimant is experiencing very real pain.

25. Both the Claimant and his wife testified that they wanted a referral to a physiatrist because they believed that this would aid the Claimant's recovery. Neither the Claimant, nor his wife however, demonstrated precise knowledge of what a physiatrist does and specifically how that would assist the Claimant's recovery.

26. More importantly, the undersigned is constrained by the statutory rigors of FS 440 et seq. "Remedial treatment, care, and attendance, including work-hardening programs or pain-management programs . . . shall be considered as covered treatment only when such care is given based on a referral by a physician as defined in this chapter". F.S. 440.13(2)(a).

27. The only question before the undersigned therefore, is whether a referral to a physiatrist is appropriate based on the EMA physician, Dr. Chiron's recommendation.

28. The responsibility for establishing a treatment plan rests with Claimant's authorized physicians. Dr. Chiron has rescinded his recommendation based upon the care being overseen and recommended by Dr. Pagan. Dr. Ballweg has deferred to Dr. Pagan for the Claimant's treatment plan in its entirety, and Dr. Pagan has specifically testified that a referral to a physiatrist is not medically necessary. Absent a finding of medical necessity from an IME, EMA or authorized treating physician, a referral for medical treatment is not compensable. *Diamond R. Fertilizer v. Davis*, 567 So. 2d 451 (Fla. 1st DCA 2006).

29. The burden is on the Claimant to show that he is entitled to the additional medical treatment requested. I find that the Claimant has failed to carry that burden.

30. I find that Dr. Pagan did order general conditioning (including core strengthening), stretching, pain modalities and a home exercise program as required by Dr. Chiron.

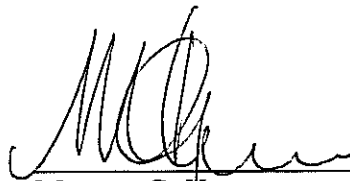
31. I further find that Dr. Chiron rescinded his recommendation for a physiatrist based on the understanding that Dr. Pagan had provided the level of physical therapy recommended by him.

Based on the foregoing, it is hereby:

ORDERED AND ADJUDGED THAT:

1. The claim for a physiatrist as recommended by Dr. Chiron is DENIED.
2. Jurisdiction is retained on the issue of attorney fees and costs.
3. The 5/14/2013 Petition for Benefits is DISMISSED with prejudice.

DONE AND EMAILED/MAILED this 12th day of November, 2013, in Miami, Dade County, Florida.



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