

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

Donald Pagano,
Employee/Claimant,

OJCC Case No. 89-003269WWA

vs.

Accident date: 10/10/1989

Allen Green Construction/Safeco Insurance Co.
Employer/ Carrier/Servicing Agent.

COMPENSATION ORDER

Claimant seeks authorization for surgery and attendant care following surgery. The Employer/Carrier contends both claims are premature and that the claim for attendant care does not meet other statutory requirements. I conclude the claim for surgery is ripe for adjudication and that surgery should be authorized. The claim for attendant care is not ripe and is dismissed.

PROCEDURAL HISTORY

Claimant filed a petition for benefits (PFB) on March 19, 2013, seeking “authorization of and payment for surgery and all recommended aftercare pursuant to the February 15, 2013 recommendation of Dr. Khanna...” That PFB also sought attorney’s fees and costs. Claimant also filed a PFB on February 19, 2013, seeking an orthopedic mattress, attorney’s fees, and costs. The parties agreed at mediation on June 17, 2013, that the Employer/Carrier had provided the mattress. The pretrial stipulation was filed on July 15, 2013. Claimant’s unopposed motion to admit medical records filed on August 9, 2013, was granted on August 13, 2013. The same day, the parties filed a joint stipulation, attaching a prior order awarding medical benefits entered by Judge Portuallo in 2007. Dr. Khanna’s deposition was filed on September 4, 2013, and the parties filed their trial memoranda on September 5, 2013. The final hearing was held on September 9, 2013. J. Lance Gilbert appeared on behalf of the Claimant. Robert J. Osburn, Jr.

appeared on behalf of the Employer/Carrier.

JCC EXHIBITS

1. PFB filed March 19, 2013.
2. Pretrial stipulation filed July 15, 2013.
3. Joint Stipulation as to Facts, Records, and April 25, 2007 Order, filed August 13, 2013.

CLAIMANT EXHIBITS

1. Medical records composite filed August 9, 2013.
2. Deposition of Dr. Rohit Khanna taken August 1, 2013, filed September 4, 2013.
3. Claimant's trial memorandum filed September 5, 2013 (for argument purposes only).

EMPLOYER/CARRIER EXHIBITS

1. Employer/Carrier's trial memorandum filed September 5, 2013 (for argument purposes only).

WITNESSES

In addition to Dr. Khanna's deposition testimony, Donald Pagano testified live at the final hearing.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The stipulations of the parties are accepted and adopted.
2. Claimant sustained compensable injuries in an industrial accident on October 10, 1989. At the request of another authorized physician, he saw a neurosurgeon, Dr. Khanna, for a consultation on February 15, 2013. Dr. Khanna had seen Claimant in 2011, and had recommended conservative nonsurgical treatment for Claimant's back condition at that time. This time, however, Dr. Khanna recommended surgery, an L4-5, L5-S1 complete discectomy

with a right-sided facetectomy and foramotomy, with interbody fusion and pedicle screw fixation.

3. I accept Dr. Khanna's unrefuted testimony concerning the medical necessity of the surgery and its causal relationship to the industrial accident. Although the Employer/Carrier asserted in the pretrial stipulation that the surgery is not causally related to the industrial accident and not medically necessary, the only defense to the surgery raised in the Employer/Carrier's trial memorandum and at the final hearing is that the claim is premature, that there is no current recommendation for surgery because Claimant has not stopped smoking. I reject this defense.

4. Dr. Khanna testified that Claimant will need to stop smoking cigarettes at least two weeks prior to the surgery. He also testified that Claimant reported to his office on July 29, 2013, that he had cut down to one or two cigarettes a day. Claimant testified at the final hearing that he had not smoked at all in roughly a month, and emphasized that it had been at least two weeks since he had smoked.

5. The recommendation for surgery is not speculative or hypothetical. Dr. Khanna is clear that he wants to perform the procedure. Admittedly, he stated in his February 15, 2013, report that Claimant would need to stop smoking before surgery. He testified in his August 1, 2013, deposition that this needs to happen at least two weeks prior to the surgery to improve the chances of a positive outcome. But Dr. Khanna was unambiguous in his report and deposition testimony that the surgery is currently recommended. This is not a case where the treating physician refuses to address the need for surgery until the patient stops smoking. Here, the need for surgery has been determined. Quitting smoking is simply a preparation for the surgery. Consequently, the claim for authorization for surgery was ripe when the PFB was filed on March 19, 2013, and is ripe for adjudication now. See M.D. Transport v. Paschen, 996 So. 2d 902, 904

(Fla. 1st DCA 2008) (holding psychiatric claim became concrete when claimant's treating physician wrote letter recommending psychiatric care); Soriano v. Gold Coast Aerial Lift, Inc., 705 So. 2d 636, 638 (Fla. 1st DCA 1998) (holding that a claim for a neurosurgical consult was ripe when one authorized physician recommended it even though the other did not). I also accept Claimant's unrefuted testimony that he has stopped smoking completely so he can have the surgery. The Employer/Carrier should therefore authorize the procedure subject, obviously, to Dr. Khanna's willingness to perform the operation.

6. Claimant also seeks authorization for "aftercare" following surgery. Dr. Khanna stated in his report and testified in his deposition that Claimant will require some custodial care postoperatively. He testified that whether this care should be provided at an inpatient rehabilitation facility or at home would depend on a postsurgical assessment of Claimant's condition. He testified further that the extent of the care required will have to be addressed after surgery. Unlike the very specific recommendation for surgery, Dr. Khanna's recommendation for postoperative custodial care is vague.

7. Even though this case involves a 1989 date of accident, the applicable statute for attendant care is the statute in effect when the care is given. Bronson's Inc. v. Mann, 70 So. 3d 637, 641 (Fla. 1st DCA 2011). Section 440.13(2)(b), Florida Statutes (2013), requires attendant care to be prescribed in writing specifying the time periods for such care, the level of care required, and the type of assistance required. Because Dr. Khanna testified the extent of the care required cannot be addressed until after surgery, the claim for aftercare must be dismissed as not ripe, due, and owing. The Employer/Carrier, of course, has a continuing obligation to provide medically necessary care and attendance, and a duty to apprise Dr. Khanna of the need for a sufficiently specific written prescription for attendant care. James W. Windham Builders, Inc. v.

Overloop, 951 So. 2d 40, 43 (Fla. 1st DCA 2007). If Claimant believes the Employer/Carrier has failed to meet those obligations, he may file a PFB after surgery seeking attendant care benefits.

ORDERED and ADJUDGED:

1. The Employer/Carrier shall authorize surgery as recommended by Dr. Khanna.
2. The claim for “aftercare” is dismissed without prejudice.
3. Jurisdiction is reserved as to the claims for attorney’s fees and costs contained in the PFB filed on February 19, 2013, and the PFB filed on March 19, 2013.

DONE AND ELECTRONICALLY TRANSMITTED VIA EMAIL TO THE ATTORNEYS LISTED BELOW this 12th day of September, 2013, in Daytona Beach, Volusia County, Florida.



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