

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGE OF COMPENSATION CLAIMS
MIAMI-DADE COUNTY DISTRICT**

EMPLOYEE:

Markel Chirino-Diaz
7424 Byron Avenue, Unit #5
Miami Beach, FL 33141

And 15329 SW 69 Lane
Miami, FL 33193

EMPLOYER:

Southeast Personnel Leasing, Inc.
2739 U.S. Highway 19 N.
Holiday, FL 34691

CARRIER/SERVICING AGENT:

Lion Insurance Company Serviced by:
Packard Claims Administration, Inc.
P.O. Box 1549
Tarpon Springs, FL 34688

ATTORNEY FOR EMPLOYEE:

Richard Zaldivar, Esquire
2600 SW 3rd Ave., Ste. 300
Miami, FL 33129

ATTORNEY FOR E/C:

Robert S. Gluckman, Esquire
1280 SW 36th Ave., Ste. 100
Pompano Beach, FL 33069

OJCC No.: 08-029832SMS

D/A: 4/29/07

JCC: Sylvia Medina-Shore

COMPENSATION ORDER

THIS CAUSE came before the undersigned Judge of Compensation Claims for a final hearing on 1/25/10 regarding petition for benefits (PFB) filed 9/10/09.

Procedural History:

1. On 10/31/08, claimant filed a PFB claiming various indemnity and medical benefits, including authorization of alternate treating physician.
2. A final hearing was scheduled on same PFB for 4/30/09.
3. On 4/29/09, claimant filed his voluntary dismissal of all pending PFBs. The 4/30/09 final hearing was cancelled.

4. On 9/10/09, the claimant filed a PFB claiming authorization of alternate treating physician.

5. Mediation was attended by the parties on 10/28/09 and pre-trial on 12/4/09.

6. The 1/25/10 final hearing was noticed on 11/10/09.

7. At the 1/25/10 final hearing, claimant's counsel moved for a continuance as the claimant was out of the country. Apparently, the claimant called his attorney and advised that he would be out of the country until 2/21/10. However, there is no information as to the date the claimant called his counsel nor the reason for claimant's departure to another country.

8. E/C objected to the continuance of the final hearing as the instant issue has been outstanding for almost two years. The final hearing was properly noticed and no good faith basis was provided as to claimant's sudden departure from the U.S.

9. The motion for continuance was denied. A party is expected to appear, if he or she so desires, to the final hearing absent good cause. As no good cause was provided by the claimant, the 1/25/10 final hearing was held.

10. However, claimant's ore tenus motion for the undersigned to reserved jurisdiction over unmediated PFBs filed 11/24/09 and 11/30/09 was granted. A future final hearing shall be held on same PFBs.

Claims:

1. Authorization of alternate treating physician.

2. Attorney's Fees and Costs.

3. The PFB filed 6/3/09 for authorization of or reimbursement of prescription medication was voluntarily dismissed by the claimant at the final hearing.

Defenses:

1. The request was timely authorized with Dr. Bruce Berkowitz in accordance with §440.1 3(2)(f).
2. Costs, and attorney's fees are not due or owing.
3. The Employer/Carrier seeks costs per §440.34(3).

Documentary Exhibits:

JCC-

1. Pre-trial Stipulation e-filed on 12/4/09.

Joint Exhibits-

- A. Deposition of Mary Merrill taken 4/27/09.
- B. Deposition of Mary Merrill taken 1/20/10.

Claimant-

1. Trial Memorandum solely for I.D. purposes.

E/C-

1. Trial Memorandum solely for I.D. purposes.

Findings of Fact and Conclusions of Law:

1. The Claimant is a 44-year-old male who worked for Southeast Personnel Leasing as a parking attendant. On April 29, 2009, the Claimant was allegedly walking up a ramp when he slipped and fell, reporting an injury to his lower back and buttocks. The Claimant was diagnosed with a lumbar contusion and degenerative disc disease at L5-S 1. He received pain management under the care of Dr. Christopher Vendryes who placed him at Maximum Medical Improvement ("MMT") from a pain management standpoint on April 8, 2009 and deferring an

impairment to his orthopedist. He was released to full duty with no permanent work restrictions. The Claimant also treated with orthopedist Dr. Gary Kelman who placed him at overall MMI on May 4, 2009 with a 1% PIR to the body as a whole. He released the Claimant to full duty with no permanent work restrictions.

2. The Claimant filed a Petition for Benefits on October 31, 2008. In the mediation agreement of February 3, 2009 claimant withdrew the claim for an IME, and on April 29, 2009 he filed a Notice of Voluntary Dismissal of this Petition for Benefits. The Claimant filed another Petition for Benefits on April 29, 2009, and May 6, 2009, both of which were dismissed on May 11, 2009 and June 5, 2009 respectively for administrative insufficiency. The Claimant filed additional Petitions for Benefits on June 29, 2009, and on June 30, 2009, both of which were also dismissed for Lack of Specificity.

3. The claimant argues that despite E/C authorizing Dr. Berkowitz as an alternate treating physician on 11/5/08 in response to a 10/31/08 PFB, the 10/31/08 PFB was voluntarily dismissed. Accordingly, E/C should have authorized the alternate treating physician within 5 days of the 6/30/09 PFB. As E/C failed to do same, claimant argues that he gets to select the alternate treating physician. After considering all the evidence and the case law, I reject claimant's argument.

4. Upon a written request of the employee, the E/C shall give the Claimant a one-time change of physician during the course of treatment for any one accident.. which the Carrier shall authorize within 5 days after receipt of the request. §440.1 3(2)(f). Under this provision, only the E/C has the right to select the alternate physician, not the Claimant. Sunbelt Health Care & AHS v. Galva, 7 So. 2d 556, 560-561 (Fla. 1st DCA 2009).

5. It is well established that the E/C is no longer required to offer the Claimant a

choice of physicians when he requests a one time change in physicians. Butler v. Bay Center & Chubb Ins. Co., 947 So. 2d 570, 573 (Fla. 1st DCA 2006). As such, once the Claimant exercises this right and the E/C timely complies, the Claimant is not entitled to a second, one-time change in physicians, and an order which grants a second one-time change in physicians should be reversed. Sunbelt Health Care, 7 So. 2d at 561. This was a limitation imposed on the Claimant, who runs the risk of receiving another physician with whom he may also be unsatisfied with. Butler 947 So. 2d at 573.

6. In the instant case, the Claimant filed a Petition for Benefits on October 31, 2008 requesting a one-time change in physicians to replace Dr. Gary Kelman the treating orthopedist, which the E/C received on November 3, 2008. (Mary Merrill depo. P.6-8). On November 5, 2009, the E/C contacted Dr. Bruce Berkowitz's office and scheduled an orthopedic appointment for November 13, 2008 at 1:15pm. (Depo. P. 8). On November 6, 2008 an appointment letter was sent by the E/C to the Claimant's attorney with the appointment information, and a Response to the Petition for Benefits was also issued that date confirming the timely authorization. (Depo. P. 7). Also, on November 6, 2008 the E/C contacted Monty Transportation and authorized transportation for the Claimant to his appointment. (Depo. P. 29-30).

7. The Claimant's attorney received notification of the appointment, and sent a fax to the E/C on November 10, 2008 stating that Dr. Berkowitz was not acceptable and to cancel the appointment. On November 11, 2008, the E/C sent a fax to opposing counsel stating that the doctor remained authorized. The Claimant did not show for this appointment, and on January 29, 2009 the E/C rescheduled the appointment for February 5, 2009. (Depo. P. 8-9). The Claimant never showed for this appointment, and the doctor would not reschedule due to the Claimant's non-compliance. Id.

8. I find E/C timely authorized the Claimant's request for a one-time change in physicians and the Claimant seeks a second, one-time change in physicians which is impermissible under §440.13(2)(f), and as expressly prohibited in Sunbelt Health Care & AHS v. Galva, 7 So. 2d 556, 560-561 (Fla. 1st DCA 2009). It is the E/C's choice, and not that of the Claimant, as to which physician will be authorized as the one-time change in physicians. The court has made it clear that where a claimant merely is dissatisfied with the E/C's selection, this will not be controlling. Therefore, I find claimant is not entitled, per the law, to a second alternate treating physician. The claimant can avail himself of the authorization with Dr. Berkowitz, but to date has refused.

9. The claimant refers to a PFB that was filed on 6/30/09 for alternate treating physician. To that extent, I find that E/C had already authorized the alternate orthopedic physician, Dr. Berkowitz, in response to the 10/31/08 PFB. Per the law, claimant only gets one alternate treating physician. The 6/30/09 PFB was dismissed for lack of specificity via a 9/3/09 order. However, upon claimant filing the subject PFB of 9/10/09, E/C *reiterated* that Dr. Berkowitz was authorized for the one time change.

10. Alternatively, claimant argues that Dr. Berkowitz is too far away from his residence. However, no evidence was provided to that effect. In fact, the evidence supports that transportation was provided to the claimant for prior doctor's appointments. I find claimant and/or claimant's counsel are the cause for the delay in claimant receiving care, if any recommended, by the alternate treating physician. Moreover, the unlawful refusal of the claimant in attending the appointments with Dr. Berkowitz is generating continued unwarranted litigation and costs associated with same. While the parties have availed themselves of the workers' compensation legal system, said legal system should not be utilized as a personal "playground".

WHEREFORE, IT IS ORDERED:

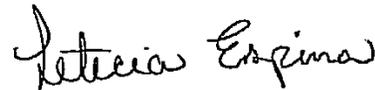
1. Claim for authorization of alternate treating physician is denied.
2. Jurisdiction is reserved on entitlement to and amount of attorney's fees and costs, if any due, for a future hearing, in the event the parties are unable to amicably resolve it.



Sylvia Medina-Shore
Judge of Compensation Claims

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the instant Compensation Order has been furnished by U.S. Mail to the parties as listed above and to the attorneys of record via e-mail to: ZaldivarPA@gmail.com and zzevallos@hrmcwbroward.com this 28th day of January, 2010.



Secretary to JCC