IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

MANUEL CESPEDES, JR.,

Appellant,

v.

YELLOW TRANSPORTATION, INC. (URC) / GALLAGHER BASSETT SERVICES, INC.,

Appellees.
_____/

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 1D12-0677

Opinion filed April 24, 2013.

An appeal from an order of the Judge of Compensation Claims.
Thomas G. Portuallo, Judge.

Date of Accident: March 20, 2006.

Kimberly A. Hill of Kimberly A. Hill, P.L., Fort Lauderdale, for Appellant.

William H. Rogner and Scott B. Miller of Hurley, Rogner, Miller, Cox, Waranch & Westcott, P.A., Winter Park, for Appellees.

THOMAS, J.

In this workers' compensation appeal, Claimant challenges an order of the Judge of Compensation Claims (JCC) that denies in part Claimant's claim for workers' compensation benefits. Claimant argues the JCC erred by (1) improperly

shifting onto Claimant the burden to prove the compensable injury was the major contributing cause (MCC) of his disability and need for surgery; (2) finding that the medical services at issue did not constitute "emergency care or services," and that lack of notice to the Employer/Carrier (E/C) precluded authorization or payment; and (3) finding the opinion testimony from the emergency room physician, Dr. Acebal, is not admissible pursuant to the "self-help" provisions contained in chapter 440. We reverse on the first two grounds raised.

We affirm without further comment the JCC's conclusion that opinion testimony from Dr. Acebal is not admissible evidence under the "self-help" provisions contained in chapter 440. But we conclude that Dr. Acebal provided emergency care and services to Claimant, as he was legally compelled to do under section 440.13(3)(b), Florida Statutes. Because the injury requiring emergency care and services was a compensable workplace injury (and here, there is no dispute over the fact that the services were medically necessary), the emergency services and care provided by Dr. Acebal were also "compensable" under section 440.13(3)(b). Thus, Dr. Acebal thereby became eligible to be paid for these services. Based on these conclusions -- established without reliance on Dr. Acebal's medical opinion testimony -- we conclude that Dr. Acebal, by providing compensable care, became an "authorized treating provider" for the purposes of section 440.13(5)(e), Florida Statutes (2005). Thus, we hold that

Dr. Acebal's medical opinion testimony was admissible in the proceedings before the JCC.

In light of Dr. Acebal's medical opinion testimony, which was not rebutted or impeached in any significant way, we conclude that the surgery performed by Dr. Acebal was performed to treat an emergency medical condition. Because we conclude that the JCC improperly shifted the burden of proof onto Claimant regarding the MCC of his need for surgical treatment, and further erred by finding the medical services provided by Dr. Acebal did not constitute compensable "emergency care or services" under section 440.13(1)(f), Florida Statutes (2005), we reverse and remand for entry of an order finding the medical services provided by Dr. Acebal compensable and awarding any benefits due as a result of this finding.

BACKGROUND

On March 20, 2006, Claimant injured his lower back in the course and scope of his employment. The E/C accepted Claimant's accident as compensable, and authorized treatment of his lumbar spine with Dr. Christopher Brown. Claimant declined surgical treatment, and in September 2006, Dr. Brown placed Claimant at maximum medical improvement (MMI) with a compensable 6% permanent impairment rating for the L5-S1 disc herniation.

From 2006 through 2010, Claimant returned to Dr. Brown on several

occasions due to recurrent low back pain. In December 2010, Claimant agreed to undergo epidural steroid injections, and was referred to Dr. Joel Salamon for pain management and the first injection, which was authorized by the E/C. Dr. Brown saw Claimant twice after his pain management referral, and on those visits Claimant reported significant improvement in his symptoms. Claimant was scheduled for a second injection, but before receiving this second injection, he developed significant back and leg pain and had difficulty standing.

On March 19, 2011, Claimant was admitted to and treated in the emergency room at Kendall Regional Medical Center (KRMC) with a sedative and an injectable pain medication before discharge. Claimant's pain resumed the following day, and he returned to the KRMC emergency room and was admitted under the care of Dr. Pablo Acebal, a neurosurgeon. Dr. Acebal ordered an MRI, which revealed a massive herniated disc at L5-S1 that was severely compressing the nerve roots of the spine. Based on his observation that Claimant was immobilized and in "unbearable pain," Dr. Acebal recommended prompt surgery at L5-S1 to treat the condition.

The same day, Dr. Acebal contacted Dr. Brown and offered to transfer Claimant's surgery to Dr. Brown as a professional courtesy. Dr. Acebal advised Dr. Brown that Claimant needed surgery because he had a "huge disc." According to Dr. Acebal, had Dr. Brown given any indication that he would have operated on

Claimant "quite quickly" (meaning the next day), he would have transferred Claimant to Dr. Brown's care. Nevertheless, Dr. Brown advised Dr. Acebal that if Claimant's condition was emergent and required surgery, "he probably shouldn't be transferred." In deposition, Dr. Brown opined that if Claimant could have been transferred, as offered by Dr. Acebal, then the surgery would be "more of an elective type of thing" and "he really doesn't need to be transferred," because Claimant could be treated on an outpatient basis. On March 22, 2011, Dr. Acebal performed surgery on Claimant at L5-S1.

On March 23, 2011, the E/C denied any future medical care based on the adjuster's conversation with the workers' compensation coordinator in Dr. Brown's office. The adjuster was advised that Claimant had informed Dr. Brown's office that "he was in the emergency room, an MRI had been done, and they were going to set him up for emergency surgery." On March 25, 2011, Claimant's wife faxed Claimant's hospital records to the adjuster, but the E/C's adjuster did nothing with these records because the claim was already denied in its entirety.

Thereafter, Claimant filed a petition for benefits seeking, among other benefits, temporary indemnity benefits (as he remained on modified work duty following the surgery), authorization for continued treatment with Dr. Brown, and compensability of the surgery performed by Dr. Acebal. The E/C contested all of

these claims based on the following defenses: "industrial accident not the MCC of temporary disability; industrial accident no longer the MCC of the current need for treatment as Claimant underwent surgery with an unauthorized physician; such surgery was unauthorized and did not constitute emergency care; carrier not placed on timely notice of alleged emergency care; and surgery not medically necessary or causally related to accident."

At hearing, Claimant attempted to offer into evidence the opinion testimony of Dr. Acebal. The E/C objected, arguing that Dr. Acebal's medical opinion was not admissible under section 440.13(5)(e) because he was not an "authorized physician, independent medical examiner, or expert medical advisor." The JCC sustained the E/C's objection, concluding that Dr. Acebal's medical opinion was inadmissible, and admitted the doctor's deposition for "fact purposes only."

The E/C presented deposition testimony of Dr. Brown that the compensable injury was not the MCC of Claimant's surgery, but Dr. Brown could not determine the MCC, because he was unaware of any other potential causes of Claimant's need for treatment. Dr. Brown further testified that although he did not observe Claimant or his condition at KRMC, Claimant's surgery was not performed on an emergency basis. According to Dr. Brown, an "emergent reason for surgery would be cauda equina syndrome where a patient would either lose control of his bowel or bladder and have a large disc compressing the nerves that control those organs,

and in the absence of such signs, there is no need for an immediate surgery." Dr. Salamon, Claimant's pain management physician, testified that back pain is "never" an emergency.

In the order on review, the JCC found that the E/C failed to show a break in the causal chain regarding the compensability of Claimant's compensable back injury. Nevertheless, the JCC found that Claimant failed to prove the compensable injury was the MCC of the need for surgery. The JCC further found that Claimant failed to satisfy his burden to persuade the JCC that Dr. Acebal's "unauthorized" care and services constituted "emergency services and care," or that the E/C received timely notice of the alleged emergency care. Consequently, the JCC denied compensability of the surgery performed by Dr. Acebal and the temporary indemnity benefits associated with the surgery.

ANALYSIS

The Compensable Injury

Initially, Claimant argues that the JCC relied upon an incorrect legal standard by concluding that Claimant failed to prove his compensable injury was the MCC of the need for emergency treatment and indemnity benefits. Claimant's argument has merit, as the JCC erred by concluding that Claimant failed to sufficiently establish the compensability of the L5-S1 disc herniation, the injury at issue.

To the extent a JCC's order turns on a resolution of the facts, the standard of review is competent, substantial evidence (CSE); to the extent it involved an interpretation of law, the standard is de novo. See Mylock v. Champion Int'l, 906 So. 2d 363, 365 (Fla. 1st DCA 2005). Once compensability of an injury is established, a carrier can no longer contest that the accident is the MCC of the injury. See Engler v. Am. Friends of Hebrew Univ., 180 So. 3d 613, 614 (Fla. 1st DCA 2009) ("Once compensability is established, an E/C can no longer contest that the accident is the MCC of the injuries at issue."); § 440.13(1)(e), Fla. Stat. (2005) (defining "compensable" as "a determination by a carrier or [JCC] that a condition suffered by an employee results from an injury arising out of and in the course of employment."); § 440.09(1)(a)-(b), Fla. Stat. (2005) (explaining major contributing cause analysis requires comparison of relative causal relationships between preexisting, subsequent, and compensable injuries); see generally Jackson v. Merit Elec., 37 So. 3d 381, 383 (Fla. 1st DCA 2010) (concluding carrier seeking to absolve itself from responsibility for medical treatment necessitated by a compensable injury must "demonstrate a break in the causation chain, such as the occurrence of a new accident or that the requested treatment was due to a condition unrelated to the injury . . . .").

Here, because the E/C stipulated that Claimant's L5-S1 disc herniation was a compensable injury and provided compensable treatment for this condition for the

better part of five years, and further, because the medical records and opinions of Dr. Brown and Dr. Salamon establish that the L5-S1 disc herniation was caused in major part by Claimant's compensable accident, Claimant met his burden of persuasion to establish a causal relationship between his workplace accident and the L5-S1 disc herniation. To avoid responsibility for treatment of the L5-S1 herniation, the E/C attempted to demonstrate a break in the causation chain between the accident and this injury, and sought to prove that the surgery was to treat a medical condition unrelated to the compensable injury.

The JCC found that the E/C failed to prove the occurrence of a subsequent accident or injury. Further, the JCC explicitly found there was no identifiable cause for Claimant's low back condition other than the compensable accident and injury, and specifically rejected Dr. Brown's medical opinion that Claimant suffered a subsequent accident or injury to his back. Significantly, the E/C's adjuster testified that the only medical basis for its MCC defense was Dr. Brown's medical report, which was completed after Claimant's injection but before his surgery, indicating that Claimant was feeling better. Thus, because the JCC rejected the assertion that Claimant suffered a subsequent injury that could have been the MCC of the L5-S1 herniation, along with all medical opinions founded upon this proposition, and because the E/C produced no affirmative evidence of another competing cause of the L5-S1 herniation, Claimant satisfied his burden of

persuasion of establishing the compensability of the L5-S1 herniated disc.

Having established that Claimant's L5-S1 herniated disc is the compensable injury at issue, we now turn to whether the JCC erred by finding that Dr. Acebal did not provide compensable emergency care and services, which we conclude is critical to the legal issue of whether Dr. Acebal's medical opinion testimony was admissible.

Emergency Care and Services

The JCC erred as a matter of law in ruling that the medical services provided by Dr. Acebal to Claimant did not constitute "emergency care or services" for the L5-S1 herniated disc. Under section 440.13(1)(f), "emergency services and care" is defined in section 395.002(10), Florida Statutes (2005) as:

> (10) "Emergency services and care" means medical screening, examination, and evaluation by a physician, or, to the extent permitted by applicable law, by other appropriate personnel under the supervision of a physician, to determine if an emergency medical condition exists and, if it does, the care, treatment, or surgery by a physician necessary to relieve or eliminate the emergency medical condition . . . .

An "emergency medical condition," as defined in section 395.002(9)(a), Florida Statutes (2005), means:

> (a) A medical condition manifesting itself by acute symptoms of sufficient severity, **which may include severe pain**, such that the absence of immediate medical attention could reasonably be expected to result in any of the following:
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> 1. Serious jeopardy to patient health, including a pregnant

woman or fetus.
2. Serious impairment to bodily functions.
3. Serious dysfunction of any bodily organ or part.

(Emphasis added.)

Notwithstanding the fact that Dr. Acebal did not obtain authorization **from the carrier** before providing medical services, there is no dispute that Claimant was permitted to introduce the doctor's factual testimony regarding Claimant's admission to the emergency room, including Claimant's appearance, complaints, diagnosis and treatment. See Office Depot, Inc. v. Sweikata, 737 So. 2d 1189, 1191 (Fla. 1st DCA 1999). The issue of whether emergency care or services has been provided can, under appropriate circumstances, be established by non-expert testimony. See Univ. of Fla. Bd. of Trustees v. Stone ex rel. Stone, 92 So. 3d 264 (Fla. 1st DCA 2012).

Under section 395.002(10), "emergency services and care" begin when a physician undertakes a medical screening, examination, or evaluation to determine whether an emergency medical condition exists. See § 395.002(10), Fla. Stat. (2005). Thus, the questions that arise as to whether emergency care or services have been provided -- which are related to, but not dispositive of, the issue of whether such care is compensable under chapter 440 -- are the following: (1) whether the service provider is a licensed physician (or other appropriate personnel acting under the supervision of a physician); (2) whether an evaluation,

screening, or examination was conducted by that physician (or other authorized personnel); and (3) whether such care was undertaken by the physician with the intent of determining "if an emergency medical condition exists." See § 395.002(10), Fla. Stat. (2005). Under normal circumstances, these simple questions can be answered without resort to medical opinion testimony. If each of the questions is answered in the affirmative, then under section 395.002, and thereby under section 440.13(2), "emergency services and care" have been provided.

Based on the uncontradicted record evidence here, Dr. Acebal is a physician licensed to practice in the state of Florida, and he evaluated Claimant based on Claimant's admission to the emergency room. The record further demonstrates that Dr. Acebal performed screening, evaluations, and an examination to determine if an emergency condition existed. Thus, under the standards set forth in sections 395.002(10) and 440.13(1)(f), Dr. Acebal provided "emergency services and care" to Claimant. Here, it appears that the JCC perhaps placed undue focus on only the surgery, and did not consider the pre-surgical evaluations and screenings provided by the doctor on an emergency basis. Thus, we conclude that the JCC erred in finding Dr. Acebal did not provide emergency services of any sort for the L5-S1 herniated disc.

Nevertheless, simply because emergency care was provided does not make

such care "compensable" under chapter 440. Neither does this fact alone render the providing physician eligible for payment under chapter 440, nor does the fact that a doctor who provides some compensable emergency care make all care provided by this doctor compensable. Rather, the "compensability" of emergency care under chapter 440, and the providing physician's eligibility for payment for such care, is dependent on additional elements contained in the Workers' Compensation Law.

These additional elements are the following. First, of course, the care must be medically necessary. An employer has an obligation to provide "such medically necessary remedial treatment, care, and attendance for such period as the nature of the injury or the process of recovery may require," including emergency care. See § 440.13(2)(a), Fla. Stat. (2005). Additionally, under section 440.13(3)(b), emergency care is "compensable" if the "injury requiring emergency care arose as a result of" the workplace accident. Thus, such care must be not only "emergency" care, but it must also be "medically necessary," and the care must be provided for a compensable injury.

Here, Claimant's herniated disc is the compensable workplace injury; based on the JCC's findings, no other identifiable or credible competing cause of the injury was established. Further, there is no dispute that the emergency services provided by Dr. Acebal were for the L5-S1 herniated disc, nor is there a dispute

regarding the medical necessity of these services. Thus, under chapter 440, Dr. Acebal provided "compensable" emergency services, and by doing so, he became eligible for payment for his services, not by the carrier's authorization, but by express statutory authorization. See § 440.13(3)(a)-(b), Fla. Stat. (2005).

Having established that Dr. Acebal provided Claimant emergency services and care compensable under chapter 440, we now decide whether Dr. Acebal's medical opinion testimony was admissible under section 440.13(5)(e), Fla. Stat. (2005). For the reasons that follow, we hold that a proper interpretation of section 440.13(5)(e) permits admission of medical opinion testimony from a physician who is first proven, through other admissible testimony or other permissible means, to have provided emergency care and services, compensable under chapter 440.[1]

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[1] We are mindful of our opinion in Chudnof-James v. Racetrac Petroleum, Inc., 827 So. 2d 369 (Fla. 1st DCA 2002), where we concluded that the only evidence to support the causal relationship or the medical necessity of the emergency treatment was the opinion of the emergency room physician; however, we concluded that the opinion of the emergency room physician was inadmissible under section 440.13(5)(e). Thus, the claimant failed to prove by admissible evidence that the emergency care was compensable.

Here, based on admissible lay and expert testimony, and based on the absence of a legal controversy as to the compensability of Claimant's injuries for which emergency treatment was provided, there is no dispute regarding the causal relationship, the medical necessity, or the compensability of the emergency care provided. Thus, Chudnof-James does not control the outcome here. Nevertheless, in light of this court's holding in Chudnof-James, and our opinion here today, a doctor not authorized by the carrier cannot offer medical opinion testimony until it is first proven by independently admissible testimony that the physician in question

Section 440.13(5)(e) -- "Authorized Treating Provider"

Section 440.13(5)(e), Florida Statutes (2005), provides, in its entirety:

> (e) No medical opinion other than the opinion of a medical advisor appointed by the judge of compensation claims or the department, an independent medical examiner, or an authorized treating provider is admissible in proceedings before the judges of compensation claims.

The plain language of this statutory provision limits the witnesses who can provide medical opinion testimony to an expert medical advisor to only one "appointed by the [JCC]," an independent medical examiner, or an "authorized" treating physician. The purpose of section 440.13(5)(e) -- which is a restriction on the right to call witnesses of one's choosing in a legal proceeding -- is to exclude from evidence the medical opinions of treating physicians who have **not** provided compensable care and services

Here, the E/C, and in turn, the JCC, posit that the physicians falling under the class titled "authorized treating provider" include those physicians authorized **by only a carrier** (and perhaps an employer), and no one else. Nevertheless, the statute contains no such limiting prepositional phrase, and considering that section 440.13(5)(e) is a **restriction** on the right to call witnesses or offer testimony in a

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provided compensable care authorized by law. Unless it is so stipulated, the allegedly "unauthorized" physician cannot, through his own medical opinion testimony, prove his own authorization status.

legal proceeding, the lack of such an express qualifier is significant.

Although we recognize that under most circumstances the term "authorized treating provider" pertains to a doctor authorized by a carrier or employer, we presume that the Legislature did not intend to create discord between sections 440.13(3)(a)-(b), entitling an emergency care provider to be paid by an E/C for compensable emergency services, and section 440.13(14), stating that a health care provider cannot charge a claimant for compensable care, and section 440.13(5)(e), which, if read as urged by the E/C, would preclude a provider of compensable emergency services from testifying in a meaningful way about the medical services provided.

We further observe that neither "authorize" nor "authorized" has been defined within chapter 440; thus, these words are to be given their common and ordinary use meaning, not favoring one party or another. See § 440.015, Fla. Stat. (2005) ("[T]he laws pertaining to workers' compensation are to be construed in accordance with the basic principles of statutory construction and not liberally in favor of either the employee or employer."). "Authorize" means "to empower; to give a right or authority to act"; and "authorized" is "sometimes construed as equivalent to 'permitted'; or 'directed', and denotes one who is 'possessed of a legal or rightful power.'" See Black's Law Dictionary 134 (6th ed. 1990). The plain and ordinary meaning of "authorized" does not connote authority or legal

rights granted only by an insurance carrier. Indeed, although under ordinary circumstances it will be the carrier that has authorized a physician, this court's precedent has established that where a carrier has wrongfully denied care under chapter 440, a JCC is empowered to "authorize" a physician, and once authorized, that medical provider's opinion is admissible under section 440.13(5)(e). See Parodi v. Fla. Contracting Co., Inc., & Summit Holdings, 16 So. 3d 958 (Fla. 1st DCA 2009). It follows that a medical provider is "authorized" for the purpose of section 440.13(5)(e) if that provider has provided compensable medical care and services under chapter 440, whether through authorization from a carrier or, as here, from the Legislature.

We now address whether emergency care providers who provide compensable care are "authorized" to provide treatment under the Workers' Compensation Law. For the reasons that follow, we answer this question in the affirmative, and we conclude that physicians who provide compensable emergency care under chapter 440 are both "authorized" and required by legislative enactment to provide such care.

Emergency Providers

Although all other physicians providing compensable care under chapter 440 must receive express authorization "**from the carrier"**[2] to be eligible for payment

[2] We observe that in section 440.13(3)(a), but not in section 440.13(5)(e), the

for treatment provided to an injured worker, this rule does not apply to emergency care physicians. See § 440.13(3)(a), Fla. Stat. (2005). By legislative decree, "all licensed physicians and health care providers in this state shall be required to make their services available for emergency treatment of any employee eligible for workers' compensation benefits," with or without authorization from the carrier. See § 440.13(3)(a), Fla. Stat. (2005) (explaining that physician's eligibility for payment for emergency services is not conditioned on authorization from carrier). Significantly, "To refuse to make such treatment available is cause for revocation of a license." See id.

Under the language of section 440.13(3)(a), routine medical care must be authorized by the carrier, and only through such authorization may a physician become eligible for payment (except where the self-help provisions of section 440.13(2)(c) are at play). Cf. Lakeland Reg'l Med. Ctr. v. Murphy, 695 So. 2d 895 (Fla. 1st DCA 1997) (holding claimant cannot "authorize" doctor under chapter 440), with Parodi 16 So. 3d at 962 (rejecting argument that "authorization of a physician can emanate only from the unassailable discretion of an employer or carrier," and holding a JCC may "authorize" a physician where the E/C has

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Legislature qualified the term "authorization" by adding the phrase "from the carrier." If, however, the term "authorization" uniquely signals only that power emanating from a carrier's express grant of authority, there would be no need for the Legislature to have qualified the term "authorized" in section 440.13(3)(a) by the phrase "from the carrier," as such language would be surplusage.

wrongfully denied care). In the instance of emergency care, however, all licensed physicians are both permitted and required to provide such care. Hence, a physician's right and duty to provide and be compensated for emergency care, rather than emanating from authorization by a carrier, derives from express statutory authorization. Thus, based on a reasonable and harmonious reading of the statutory provisions involved in compensable emergency care, we conclude that where, as here, the admissible medical and lay testimony establishes that a physician has provided compensable emergency medical services, that physician's medical opinion testimony is thereafter admissible as an "authorized treating provider" under section 440.13(5)(e). In Miller Electric Company v. Oursler, a case released on April 22, 2013, two days prior to our opinion here, we held that a medical provider not authorized by the carrier cannot offer admissible medical opinions, **until and unless it is first established that this provider furnished compensable care that was medically necessary**. Miller Elec. Co., v. Oursler, No. 1D12-2385 (Fla. 1st DCA April 22, 2013). The facts in Oursler are distinguishable from this case because the claimant in Oursler failed to sufficiently establish that the medical care at issue was compensable or medically necessary, rendering the unauthorized physician's testimony in Oursler inadmissible. Id.

Applying our conclusions to the facts presented here, Dr. Acebal, having provided medically necessary and compensable emergency care to Claimant, was a

treating provider "authorized" to provide such care under chapter 440. Thus, because Dr. Acebal was an "authorized treating provider" as established by other admissible evidence and testimony, his medical opinion testimony was admissible.

The Surgery

Having established that Dr. Acebal's medical opinion was admissible, we now must decide the issue of whether the JCC erred in determining that the surgery performed by Dr. Acebal was not compensable emergency medical care. Dr. Acebal, unlike Dr. Brown and Dr. Salamon, observed Claimant in the hospital setting, and he testified that Claimant was immobile, in "unbearable pain," and could not move or stand. Although Claimant did not have cauda equina syndrome, Claimant's symptoms included a massive herniated disc, associated weakness and numbness, "unbearable" pain, and inability to move -- conditions which, according to Dr. Acebal's unimpeached testimony, impaired Claimant's ability to walk, a bodily function. Further, if this condition was not ameliorated, it could have caused serious jeopardy to Claimant's health, such as cauda equina syndrome.

The JCC, however, found Claimant's surgery was not emergent in nature, based on Dr. Brown's testimony that an emergent reason for surgery would be cauda equina syndrome, and Dr. Salamon's testimony that back pain is "never" an emergency. This was legal error, because section 395.002(9)(a) does not limit an emergency to certain medical signs, such as cauda equina syndrome, and it does

not exclude back pain. See § 395.002(9)(a), Fla. Stat. (2005). Instead, this statutory provision specifically provides that an "emergency medical condition . . . may include severe pain." Contrary to the testimony of both Drs. Brown and Salamon, **under the statute**, an individual need not actually suffer a loss of bodily function or serious dysfunction to a body part to meet the emergency definition; rather, the question is whether in "the absence of immediate medical attention" such effects might reasonably be expected to occur. See § 395.002(8)(a), Fla. Stat. (2011).

The undisputed cause of Claimant's pain in the emergency room was the herniated disc, which is the compensable injury at issue. The surgery performed by Dr. Acebal was thus medically necessary. Dr. Acebal's testimony regarding the serious risks that Claimant faced had the surgery not been performed on an immediate basis went unrebutted and unimpeached, and this testimony meets the statutory definition of an emergency condition contained in sections 395.002(8)(a) and 440.13(1)(f). Thus, the JCC erred as a matter of law by relying on Dr. Brown's definition of an emergency and finding Claimant failed to satisfy his burden to prove that Dr. Acebal's in-hospital evaluation and back surgery constituted "emergency services and care" under section 440.13(1)(f).

Finally, we hold that the JCC erred by ruling that Dr. Acebal's emergency surgery was not compensable, because section 440.13(3)(b) requires the

emergency provider to give the E/C timely notice of the emergency treatment. Under section 440.13(3)(b), Florida Statutes (2005), an emergency health care provider is required to notify the Carrier by "the close of the third business day after it has rendered" emergency medical care. It is undisputed that neither Dr. Acebal nor any other party from KRMC ever notified the Employer or Carrier after Dr. Acebal's treatment. Section 440.13(3)(b) does not, however, set forth any penalty **to a claimant** for an emergency health care provider's failure to provide timely notice of emergency treatment to an E/C. "Courts should give statutory language its plain and ordinary meaning, and may not add words that were not included by the legislature." See Germ v. St. Luke's Hosp. Ass'n, 993 So. 2d 576, 578 (Fla. 1st DCA 2008). To the extent that this statutory notice requirement might affect the amount of money that Dr. Acebal is entitled to receive, as opposed to his eligibility for payment or the compensability of the treatment, the JCC has no jurisdiction over any billing disputes between Dr. Acebal and the E/C. See J.B.D. Bros. v. Miranda, 25 So. 3d 1271 (Fla. 1st DCA 2010) (explaining JCC lacks jurisdiction over billing dispute between carrier and medical provider). Because the language of section 440.13(3)(b) does not indicate the Legislature intended that an emergency health care provider's failure to comply with the notice provisions contained therein renders a **claimant** responsible for the payment for emergency medical treatment, we decline to adopt such an interpretation here.

Based on the foregoing, the JCC's denial of Claimant's claim for compensability of the emergency surgery performed by Dr. Acebal, and resulting denial of requested temporary indemnity benefits, was error as a matter of law. We reverse and remand for entry of an order finding all of the medical services provided by Dr. Acebal compensable, from the evaluation to the surgery, and for the award of any benefits due as a result of this finding.

AFFIRMED in part, REVERSED in part, and REMANDED for proceedings consistent with this opinion.

WOLF, J., CONCURS; MARSTILLER, J., CONCURS IN PART AND DISSENTS IN PART WITH OPINION.

MARSTILLER, J., concurring, in part; dissenting, in part.

I concur in the majority opinion insofar as it affirms the JCC's conclusion that Dr. Acebal's medical opinion testimony was not admissible under the self-help provisions of section 440.13(2)(c), Florida Statutes.

However, I dissent from the majority opinion insofar as it reverses the order on appeal concluding that (1) the JCC incorrectly ruled that Claimant had the burden to prove his compensable injury was the MCC of his need for surgery, and (2) the JCC erroneously found the "medical services provided by Dr. Acebal did not constitute compensable 'emergency care or services' under section 440.13(1)(f), Florida Statutes (2005)[.]" (Maj. op. at 3). As to the second ground for reversal, I respectfully disagree with the majority's reasoning and conclusions regarding Dr. Acebal's provision of compensable emergency care, his status as an authorized treating physician, and ultimately, the admissibility of his medical opinion that Claimant had an emergency medical condition. The reasoning employed directly conflicts with our decision *Miller Electric Co., v. Oursler*, No. 1D12-2385 (Fla. 1st DCA April 22, 2013). I do not believe Dr. Acebal's opinion was admissible. And absent his opinion, Claimant failed to establish he had an emergency medical condition necessitating the surgery Dr. Acebal performed. For this reason, I further conclude the first ground for reversal—the incorrect ruling on Claimant's burden of proof as to the MCC for the surgery—is harmless error.

Therefore, I would affirm the JCC's denial of medical benefits.

In a nutshell, the majority's reasoning goes as follows. Under section 395.002(10), Florida Statutes (2005), "emergency services and care" begin when a physician screens, examines, or evaluates a patient to determine whether the patient has an emergency medical condition. Fact evidence independent of Dr. Acebal's medical opinion establishes that Dr. Acebal screened, examined, and evaluated Claimant to determine if an emergency medical condition existed. Therefore, Dr. Acebal provided "emergency services and care" to Claimant. (Maj. op. at 11-12). Said pre-surgery "emergency services and care" constitute compensable emergency care because the services were medically necessary, and because Claimant's injury was the result of a workplace accident (and previously deemed compensable). Having provided compensable emergency services, Dr. Acebal became an authorized treating physician, eligible for payment, by operation of subsections 440.13(3)(a) and (b), Florida Statutes (2005). (Maj. op. at 13). As an authorized treating physician, Dr. Acebal's medical opinion testimony was admissible under section 440.13(5)(e), Florida Statutes (2005). His opinion, "which was not rebutted or impeached in any significant way," establishes that Claimant's back surgery was performed to treat an emergency medical condition. The JCC erred in finding otherwise, and therefore, the denial of medical benefits must be reversed.

Before addressing the deficiencies in the majority's reasoning, I set out what, in my view, is the correct analysis in this case.

The crux of this case is whether Claimant had an emergency medical condition justifying the surgery Dr. Acebal performed, making it compensable medical care under section 440.13(3)(b). "Emergency medical condition" means

> A medical condition manifesting itself by acute symptoms of sufficient severity, which may include severe pain, such that the absence of immediate medical attention could reasonably be expected to result in any of the following:
>
> 1. Serious jeopardy to patient health, including a pregnant woman or fetus.
> 2. Serious impairment to bodily functions.
> 3. Serious dysfunction of any bodily organ or part.

§ 395.002(9)(a), Fla. Stat. (2005). Clearly, medical opinion testimony is necessary to establish the existence of an emergency medical condition. Claimant sought to use the testimony of Dr. Acebal, the physician who attended him in the emergency room, for that purpose.

A medical opinion is not admissible in a workers' compensation proceeding unless it is given by "a medical advisor appointed by the [JCC] . . . , an independent medical examiner, or an authorized treating physician[.]" § 440.13(5)(e), Fla. Stat. (2005). Dr. Acebal was neither appointed by the JCC nor was he an independent medical examiner. But he did treat Claimant, so the question is whether he was an **authorized** treating physician.

We held in *Oursler*, No. 1D12-2385, that the opinion of a medical provider not authorized by the carrier is inadmissible in a workers' compensation proceeding unless it is first **independently established** that the provider furnished compensable, medically necessary medical care. As we explained in depth:

> Because some medical care from unauthorized providers can later be determined to be covered by workers' compensation by operation of law, such as that care given in emergency situations or in a period during which an E/C wrongfully denies medical care, such providers' medical opinions can become admissible as a matter of law. To demonstrate that the care at issue is or was authorized as a matter of law, however, claimants must first convince the JCC, via admissible evidence, of certain prerequisite facts, set forth in section 440.13(2)(c), Florida Statutes. See Parodi v. Fla. Contracting Co., Inc., 16 So. 3d 958 (Fla. 1st DCA 2009).
>
> . . .
>
> Once these facts are proven to the satisfaction of the JCC, the care from unauthorized providers becomes authorized, and only then do the medical opinions of those providers become admissible.
>
> . . .
>
> First, some of these prerequisite facts – for example, that a claimant made a specific request – are not medical opinions, but can be established by any admissible evidence (including lay testimony). **Second, other prerequisite facts – for example, that the unauthorized care is or was compensable** (compensability generally indicating that the care is/was causally related to the compensable injury to the degree required by chapter 440) – **are matters of medical opinion and as such require medical opinion evidence.**
>
> . . .
>
> The import of these [ ] observations is that **a claimant seeking either to establish that certain care**

> **from unauthorized providers should be authorized, or to introduce medical opinions ordinarily excluded by section 440.13(5)(e),** can establish the factual circumstances of the care at issue with "fact-purposes only" evidence from the provider of that care, **but must also present medical opinions from another source, one who is already qualified under section 440.13(5)(e) to provide medical opinions, to establish (if at issue and challenged) the compensability . . . of the care at issue.**

(*Oursler*, slip op. at 5-8) (emphasis added).

Because Dr. Acebal did not have the carrier's authorization to perform Claimant's back surgery, under *Oursler*, Claimant had to establish authorization as a matter of law—i.e., that the treatment given is compensable—in order to rely on Dr. Acebal's opinion testimony. This, Claimant could only accomplish through independent medical opinion testimony. "Emergency care is not compensable under [chapter 440] unless **the injury requiring emergency care** arose as a result of a work-related accident." § 440.13(3)(b), Fla. Stat. (2005) (emphasis added). Claimant produced no medical opinion, independent of Dr. Acebal's, that Claimant suffered a condition requiring emergency care causally related to his compensable condition. *See* § 440.09(1), Fla. Stat. (2005) ("Establishment of the causal relationship between a compensable accident and injuries for conditions that are not readily observable must be by medical evidence only, as demonstrated by physical examination findings or diagnostic testing."). Absent proof that Dr. Acebal provided compensable emergency care—and thus that he is an authorized

treating physician by operation of law—his medical opinion testimony was not admissible and was properly excluded by the JCC. Accordingly, the JCC correctly denied Claimant's request for medical benefits.

There is no question that Claimant had a severe disc herniation, was in significant pain, and needed surgery. But Claimant failed to prove he had an emergency medical condition causally related to a workplace injury, and thus that he is entitled to employer-paid medical benefits for the surgery Dr. Acebal performed. The majority endeavors to ameliorate this result by finding a way to make Dr. Acebal's medical opinion testimony admissible. It does so by simply determining that Dr. Acebal provided compensable emergency care, thereby rendering him an authorized treating physician, even though Claimant presented no independent medical opinion evidence establishing compensability, contrary to the rule set forth in *Oursler*. The majority reasons:

> Under section 395.002(10), "emergency services and care" begin when a physician undertakes a medical screening, examination, or evaluation to determine whether an emergency medical condition exists. See § 395.002(10), Fla. Stat. (2005). Thus, the questions that arise as to whether emergency care or services have been provided . . . are the following: (1) whether the service provider is a licensed physician (or other appropriate personnel acting under the supervision of a physician); (2) whether an evaluation, screening, or examination was conducted by that physician (or other authorized personnel); and (3) whether such care was undertaken by the physician with the intent of determining "if an emergency medical condition exists." See §

> 395.002(10), Fla. Stat. (2005). . . . If each of the questions is answered in the affirmative, then under section 395.002, and thereby under section 440.13(2), "emergency services and care have been provided."
> . . .
> [T]here is no dispute that the emergency services provided by Dr. Acebal were for the L5-S1 herniated disc [a work-related injury], nor is there a dispute regarding the medical necessity of these services. Thus, under chapter 440, Dr. Acebal provided "compensable" emergency services, and by doing so, he became eligible for payment for his services, not by the carrier's authorization, but by express statutory authorization. See § 440.13(3)(a)-(b), Fla. Stat. (2005).

(Maj. op. at 11-14). There are several problems with this reasoning, apart from its inconsistency with *Oursler*.

First, it rests on an incorrect application of section 395.002(10), conflating emergency services (screening, examination, evaluation) and emergency care (medical care, treatment, surgery). The statute provides:

> "Emergency services and care" means medical screening, examination, and evaluation by a physician . . . to determine if an emergency medical condition exists ***and, if it does,*** **the care, treatment, or surgery by a physician necessary to relieve or eliminate the emergency medical condition**[.]

§ 395.002(10), Fla. Stat. (2005) (emphasis added). Thus, screening, examination and evaluation are preliminary services provided to a person who, as Claimant did here, presents to the emergency room with a medical complaint. The plain language of section 395.002(10) distinguishes those services from the post-

evaluation medical care or treatment. Under the statute, if examination, etc., determines that "an emergency medical condition exists," **then** a physician provides "the care, treatment, or surgery necessary to relieve or eliminate the emergency medical condition." Therefore, to establish the employer's responsibility under section 440.13(3)(b) to pay for the panoply of "emergency services and care" set out in section 395.002(10), a claimant must prove, through an independent and admissible medical opinion, that an emergency condition existed that is causally related to the compensable injury and which necessitated medical treatment.

Second, the majority's reasoning is inconsistent with and ignores the plain language of section 440.13(3)(b) because it allows for a finding that compensable emergency care was given without prior proof that an emergency condition existed. As the statute makes clear, it is the existence of an emergency medical condition—"the injury requiring emergency care"—that makes treatment of such a condition compensable under that provision. In other words, medical treatment is not compensable emergency care unless the injured employee/claimant had an emergency medical condition—a question that, in a workers' compensation proceeding, can only be answered by medical opinion testimony independent of that given by the treating physician. *See Oursler*.

Third, the majority's reasoning yields a holding with worrisome implications

beyond the facts of this case. Under today's decision, all emergency room physicians now become authorized treating physicians as a matter of law (assuming the employee/claimant's injury or condition at issue arose from a work-related accident) simply by providing screening, examination, and evaluation services. Worse, if a physician provides compensable emergency care merely by screening and examination, and thereby becomes an authorized treating physician as a matter of law under section 440.13(3)(b) **before** determining that the employee/claimant had an emergency medical condition (again, assuming the injury or condition at issue arose from a work-related accident), a claimant need only prove the subsequent medical treatment received was medically necessary. The question of whether the claimant suffered an emergency medical condition requiring emergency medical care becomes irrelevant.

This court's holding in *Oursler* controls the outcome of this case. Under *Oursler*, Claimant could not rely on Dr. Acebal's opinion testimony before establishing, through independent medical opinion testimony, that Dr. Acebal provided compensable emergency care. Because Claimant did not carry his burden, the JCC correctly denied the claim for medical benefits.

But even assuming Dr. Acebal's testimony was admissible, as the majority concludes, reversing the JCC's order is still inappropriate because there was contrary medical opinion testimony about whether Claimant suffered an

emergency medical condition. The majority asserts that Dr. Acebal's testimony "was not rebutted or impeached in any significant way." (Maj. op. at 3). Respectfully, it is not the province of the appellate court to determine how much weight conflicting evidence should be given. There was testimony from two of Claimant's carrier-authorized treating physicians that his condition did not require emergency surgery. Thus, the JCC based its decision on evidence in the record. *See generally Fortner v. Town of Longboat Key*, 74 So. 3d 1102, 1102 (Fla. 1st DCA 2011) (stating that decision by JCC in favor of party without burden of proof need not rest on competent, substantial evidence).

For all the foregoing reasons, I would affirm the order on appeal.