

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGE OF COMPENSATION CLAIMS
Lakeland District**

EMPLOYEE:

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3453 Avenue K NW
Winter Haven, FL 33880

EMPLOYER:

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CARRIER:

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ATTORNEY FOR EMPLOYEE:

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ATTORNEY FOR EMPLOYER/CARRIER:

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1560 Orange Avenue, Suite 500
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OJCC CASE NO.: 05-034288MHH
D/A: 9/3/2003

FINAL COMPENSATION ORDER

A final hearing was held before Mark H. Hofstad, Judge of Compensation Claims on March 3, 2009 relative to petitions for benefits filed on June 6, 2008 and June 25, 2008. Present and representing the Employee was Laurie Miles, Esquire. Present and representing the Employer/Carrier was Derrick E. Cox, Esquire. Following the merits hearing, the parties were requested to submit written closing arguments. Following the submission of the closing arguments, the record closed on March 12, 2009.

The two issues for trial were authorization of continued medical treatment for the September 3, 2003 accident and payment of a medical bill to Florida Hospital Medical Center in the amount of \$844.00 for a service date of April 16, 2007, plus costs and attorney's fees. The claims were defended on the grounds that res judicata precludes all further benefits, that the major contributing cause of the Claimant's disability and need for treatment is unrelated to the September 3, 2003 accident, that the statute of limitations bars all further claims, and that the April 16, 2007 medical bill was not authorized by the Employer/Carrier.

In making findings of fact and conclusions of law in this claim, the court has carefully
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considered and weighed all of the evidence presented at trial. The court has observed the candor and demeanor of the witnesses and resolved all conflicts in the testimony and evidence. After consideration of all the evidence presented, and after having resolved any conflicts therein, the court makes the following findings:

1. Lakeland District is the proper venue and this court has jurisdiction over the parties and the subject matter.
2. The stipulations of the parties are accepted by the court and incorporated herein.
3. The court finds that the doctrine of res judicata bars all further medical care and treatment for the September 3, 2003 accident. Therefore, the Claimant's petition seeking authorization for future medical care and treatment with Dr. Rubin is hereby denied and dismissed with prejudice.
4. In reaching its decision on this issue, the court finds that the Claimant filed a petition for benefits which was docketed on February 6, 2007, relative to the industrial accident of September 3, 2003. This petition requested "continuing medical care under the supervision of Dr. Jerry A. Rubin of her left hand, wrist and thumb for the December 1, 2005 date of accident." The Claimant filed a petition for benefits which was docketed on February 6, 2007, regarding the December 1, 2005 date of accident requesting "continued medical care under the supervision of Dr. Jerry A. Rubin of her left hand, wrist and thumb for the December, 2005 date of accident." The Claimant filed a petition for benefits on November 15, 2006, relative to the September 3, 2003 date of accident requesting, "medical care and treatment as the nature of the injury and the process of recovery require including but not limited to authorization of surgical correction of the right hand for A1 pulley involvement with tenopathy from the middle greater than index, greater than ring, greater than small as per Dr. Belsole's IME report dated June 7, 2006." The court considers this last petition to contain a scrivener's error regarding the right hand reference as all litigation involved the Claimant's left hand. Further, the petition specifically listed the left hand, wrist and thumb as the injured body parts.

On page one of the November 15, 2007 order, the following issue was listed:

Authorization for continued medical care on the Claimant's left hand, wrist and thumb to be provided by Dr. Rubin regarding injuries sustained by the Claimant in the accidents of September 3, 2003 and/or December 1, 2005.

On page two of the November 15, 2007 order, the following defense was asserted:

Neither accident on September 3, 2003 or December 1, 2005 or repetitive trauma are the major contributing cause of the current request for medical care.

At the prior merits hearing on September 13, 2007, the Judge of Compensation Claims accepted the opinion of Dr. Gray, the EMA physician in this case. On page eight of the November 15, 2007 order, the JCC accepted Dr. Gray's opinion that no further treatment for the injuries sustained in the September 3, 2003 accident was reasonably medically necessary. The JCC further found that the Claimant failed to present clear and convincing evidence for the JCC to reject the opinions of Dr. Gray, whose opinions were by law presumed to be correct. Accordingly, in the order dated November 15, 2007, the JCC denied and dismissed the petitions docketed on November 15, 2006 and February 6, 2007 with prejudice.

On June 6, 2008, the Claimant filed a petition for benefits relative to the September 3, 2003 industrial accident requesting, "medical care and treatment as the nature of the injury and the process of recovery require including but not limited to a follow-up appointment with Jerry Rubin, M.D., the Claimant's authorized treating orthopaedic hand surgeon. The Claimant requested a follow-up appointment be scheduled by the Employer/Carrier on February 1, 2008 as advised by Dr. Rubin's office and again on May 19, 2008 as this follow-up appointment has not been provided to date. Copies of the requests and confirmations of the same are attached hereto and incorporated herein by reference."

The court finds that the Claimant has again petitioned for medical care and treatment which was previously denied at a final hearing and based on the findings of an expert medical advisor. The court finds that re-litigation of the issues is barred by the

doctrine of res judicata. The court further finds that there is no basis to disturb the findings and decisions referenced in the November 15, 2007 compensation order. The court finds that all of the medical depositions previously admitted into evidence were again admitted at this merits hearing, along with the updated deposition of Dr. Belsole. In Dr. Belsole's deposition of February 27, 2009, Dr. Belsole admitted that the Claimant's condition was unchanged from when he evaluated her on June 6, 2006.

In Florida Department of Transportation v. Juliano, 801 So.2d 101 (Fla. 2001), the Florida Supreme Court held that under the doctrine of res judicata:

A judgment on the merits rendered in a former suit between the same parties or their privies, upon the same cause of action, by a court of competent jurisdiction, is conclusive not only as to every matter which was offered and received to sustain or defeat the claim, but as to every other matter which might with propriety have been litigated and determined in that action. . . . Thus, the doctrine of res judicata provides finality of the judgments, predictability to litigants, and stability to judicial decisions.

The Claimant's request for continued medical care with Dr. Rubin for the September 3, 2003 accident was previously litigated. An order was entered on November 15, 2007. The Claimant chose not to appeal that order. Therefore, the order is final. The court finds that the issue was ripe at the prior final hearing, that there was no material mistake of fact in the prior order which was not appealed, and that there has been no evidence of a change in circumstances to support an alternate finding in this case. The doctrine of res judicata precludes this court from entering a new order on this same issue. The Florida Supreme Court stated that the doctrine of res judicata provides finality to the judgment, predictability to litigants, and stability to judicial decisions. None of these goals will be achieved if this court enters an order contrary to the order previously entered on November 15, 2007. Therefore, all further medical care and treatment for this claim is barred under the doctrine of res judicata. Since the court has determined that these benefits are barred by res judicata, the court makes no findings relative to the other defenses raised by the Employer/Carrier regarding the claim for continuing medical care

and treatment. Moreover, all claims for costs and attorney's fees regarding this issue are hereby denied with prejudice.

5. The Claimant has also sought a finding that the Employer/Carrier was responsible for payment for a left thumb CMC splint prescribed by Dr. Jerry Rubin and provided through Florida Hospital on April 16, 2007. The Employer/Carrier did make payment for this splint on January 8, 2008, but at the time of the trial, the Employer/Carrier alleged that this was an erroneous payment and that the statute of limitations barred an award of this benefit as the Employer/Carrier last provided benefits with payment of indemnity benefits on February 28, 2007 and the petition for benefits was not filed until June 3, 2008, more than a year later. However, after considering all of the testimony and evidence, the court finds that the Employer/Carrier is responsible for payment for this splint.

First, the court has considered the evidence concerning the provision of the splint. On April 2, 2007, Dr. Rubin, the Claimant's authorized treating physician, requested authorization of the left thumb CMC splint. However, the Employer/Carrier took no action to provide this splint to the Claimant. On April 16, 2007, the Claimant secured this splint through Florida Hospital. On September 13, 2007, the court held a final hearing in this case regarding other claims for medical care and treatment. However, at the time of this hearing, the Employer/Carrier had not denied compensability of the splint. Rather, it was not until December 18, 2007 that the Employer/Carrier issued the first denial controverting responsibility for the splint. Nonetheless, on January 8, 2008, the Employer/Carrier did make payment for the splint after initially denying this bill. Unaware that the Employer/Carrier had made payment of this bill, the Claimant filed a petition for benefits on June 3, 2008 for payment of the bill for the splint from Florida Hospital. On June 11, 2008, the Employer/Carrier denied this petition for benefits and at the time of the trial, the Employer/Carrier maintained the position that this payment was in error. The Claimant's uncontroverted testimony established that she wore this splint at

work for seven to eight months after it was provided on April 16, 2007 and that the Employer was aware that the need for the splint was due to the work injury.

Having made these findings of fact, the court further finds that the Employer/Carrier cannot dispute that the Claimant's authorized medical provider's written request for the splint as well as the billing were timely received. The evidence indicates that the Employer/Carrier did not deny responsibility for payment of the splint until December 18, 2007. Thus, the court finds that the care was not timely challenged as unreasonable or unnecessary. [See *Lowrey v. Jim Bassitts Auto*, 566 So. 2d 303 (Fla. 1st DCA 1990)]. Furthermore, F.S. 440.13(d) provides that a carrier who fails to respond to a written request for authorization of medical treatment by the close of the third business day after receipt of the request consents to the medical necessity for the requested treatment. As the court has found that the Employer/Carrier did not deny this claim until December 18, 2007, the court finds that the requested treatment was not timely denied.

In addition, F.S. 440.12(e) requires carriers to adopt procedures for receiving, reviewing and responding to requests for authorization. It appears that the Employer/Carrier in the instant case had such a procedure in effect. The review process led to payment of the bill on January 8, 2008. Because the Employer/Carrier eventually paid the bill, and based upon the totality of the facts and circumstances, the court finds that the Employer/Carrier waived any and all arguments that the splint was not medically necessary and that payment of the splint was not the responsibility of the Employer/Carrier.

With respect to the Employer/Carrier's assertion that this claim was barred by the statute of limitations, the court finds that payment of the bill for the splint on January 8, 2008 tolled the statute of limitations for another year as the Employer/Carrier had initially denied this treatment on December 18, 2007. Ordinarily, the provision of medical care for tolling of the statute of limitations is considered to be the date on which the medical treatment is furnished by an authorized physician. However, this general rule is not applicable if there is a question as to the Employer/Carrier's acceptance of

responsibility for such care. While the court finds that this Employer/Carrier had ultimately waived the right to deny the care by failing to respond to the request for care, the Employer/Carrier did issue a Notice of Denial on December 18, 2007. Thus, when the Employer/Carrier made payment of the bill on January 8, 2008, after having denied the same, the Employer/Carrier tolled the statute of limitations for one year. Alternatively, the court also finds that the statute of limitations was being tolled by the Claimant's use of the brace at work for seven to eight months after April 16, 2007. The court accepts the Claimant's uncontroverted testimony on this point establishing the requisite Employer knowledge of the use of this brace. As such, the statute of limitations was tolled at least until November 16, 2007 and the Claimant filed her June 3, 2008 petition for benefits well within a year from this date. As such, the statute of limitations does not bar this claim.

Similarly, the court finds that the doctrine of res judicata also does not bar this claim as the Claimant had no notice that the Employer/Carrier was controverting this bill until December 18, 2007, well after the earlier hearing in this matter. With no knowledge of this denial, the Claimant had no basis for believing that this benefit would have been ripe, due and owing to have claimed the same for judicial determination. Therefore, the court finds that the Employer/Carrier was responsible for payment of the April 16, 2007 bill from Florida Hospital for provision of the left thumb CMC splint.

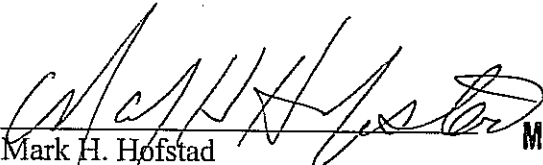
WHEREFORE, it is ORDERED AND ADJUDGED that:

1. All claims for continued medical care and treatment, including continued authorization of Dr. Rubin, are hereby denied with prejudice. Moreover, all claims for costs and attorney's fees relative to this claim are denied with prejudice.
2. The Employer/Carrier is responsible for the cost of the thumb splint previously provided to the Claimant. The bill has been paid. Reimbursement is denied.
3. Counsel for the Claimant has established entitlement to a reasonable attorney fee and

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reimbursement of reasonable costs relative to the benefit secured. Jurisdiction is reserved should the parties be unable to reach agreement thereon.

DONE AND ORDERED in Chambers in Lakeland, Polk County, Florida on this 19 day of MAY 19 2009, 2009.


Mark H. Hofstad
Judge of Compensation Claims
MAY 19 2009

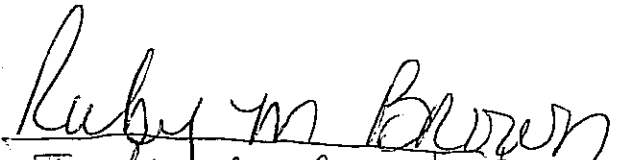
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing order was entered on this 19 day of MAY 19 2009, 2009, by the Judge of Compensation Claims, and that a copy thereof was sent to the parties identified above.

EMPLOYEE:

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7005 3110 0002 1670 4113


Judicial Assistant

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OJCC Case #05-034288MHH
Merits Hearing Order

** Transmit Conf. Report **

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** Transmit Conf. Report **

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