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WEEK OF
OCT 23 2017

FINAL ORDERS FROM JUDGES OF COMPENSATION CLAIMS

WHAT HAPPENS IF E/C AUTHORIZES AND PROVIDES NAME OF PHYSICIAN WITHIN FIVE DAYS AFTER REQUEST FOR ONE TIME CHANGE BUT PHYSICIAN LATER REFUSES TO TREAT CLAIMANT?

Debra McClelland v. Highlands County School Board/Ascension Insurance, OJCC 16-028092RAA, September 25, 2017

Claimant requested a one-time change of physician and two days later, the E/C sent authorization and medical records to Dr. Padgett to be the one-time change doctor. E/C also sent notification to claimant's attorney that Dr. Padgett was being authorized. The E/C was aware that Dr. Padgett had not agreed to accept the claimant as a patient. On three separate times, the E/C followed up with Dr. Padgett regarding the status of the authorization. About a month after the request for the one-time change, Dr. Padgett notified the E/C that it was not accepting the claimant as a patient. On the same day, the E/C authorized a different physician and two days later the new physician agreed to accept the claimant as a patient. The claimant was notified of such authorization. (*cont. on page 2*).

1 **FINAL ORDERS FROM JUDGES OF COMPENSATION CLAIMS**

2 **FIRST DISTRICT COURT OF APPEALS CASES**

3 **UPDATES FROM NERET, FINLAY & NGUYEN**

Physcian Refuses to Treat

E/C followed one-time change rules; but physican refused to treat claimant.

CONTINUED ON PAGE 2

Psychologist's Testimony

Psychiatrist v. Psychologist testimony - which would be suffice to deny psychiatric treatment?

SEE PAGE 3

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The question before the Judge was whether this constituted timely authorization of a one-time change under the statute. Claimant argued that doctor is not authorized until the doctor agrees to accept the claimant as a patient. E/C argued that act of notifying claimant that doctor had been authorized is sufficient to meet definition of "authorize" under section 440.13(2)(f).

Judge acknowledged that there is no reported case addressing this issue. Judge began analysis by recognizing that E/C informing claimant of a particular doctor within five days is sufficient to meet the requirements of the statute. *HMSHOST Corp., v. Frederic*, 102 So. 2d 668 (Fla. 1st DCA 2012). The Judge also relied upon the cases which indicate that "a timely response does not require the E/C to actually contact or schedule an appointment with the new doctor."

The Judge ruled that every case should be evaluated by the totality of the circumstances. Allowing the E/C to just name the doctor without taking any action would allow for abuse. On the other hand, requiring that authorization means an acceptance by the physician to treat is not supported by case law addressing this issue thus far. The Judge found that logic dictates that if under existing current holdings, the E/C is not required to contact a doctor in order to comply with section 440.13(2)(f), obtaining the doctor's agreement to treat the patient is also not required to meet the statute. E/C acted diligently in trying to provide the one-time change.

NFN'S TAKE

- Timely authorization requires naming physician and making efforts to get him authorized. In this case E/C contacted 5 physicians for potential one-time change, contacted Dr. Padgett three times after sending medical records and authorized new one-time change within five days after Dr. Padgett notified E/C it was not accepting care.
- Authorize physician within five days and name physician.
- If potential physician wants to review records before, get records to him/her right away. Explore alternative names of one-time change and document your file. Follow up with physician after you send medical records. If physician refuses to accept treatment, authorize alternative within five days.
- Final Order has been appealed to First DCA. More guidance to follow if an opinion is written.

WHEN IN DOUBT DO NOT RELY ON DWC-25s- GO TO THE SOURCE

Oscar Sanchez v. Hillsborough Area Regional Transit/Commercial Risk Management, OJCC No. 15-003981MAM, September 29, 2017

Claimant who suffered a neck injury and had neck surgery was placed at MMI orthopedically on October 9, 2015 and psychiatrically on November 11, 2015. When claimant's authorized orthopedic retired, a new physician was authorized who saw the claimant on March 13, 2017 and completed a DWC-25 noting no changes to either MMI or work restrictions but also recommended additional neck surgery. At the next visit on May 23, 2017, a DWC-25 was completed which placed the claimant on a no work status and surgery was scheduled for June 16, 2017. The DWC-25 was subsequently amended to read "no change" instead of "no work." No testimony was presented regarding such change.

The question before the Judge was whether the claimant was entitled to TTD benefits commencing on May 23, 2017. Both claimant and E/C argued about MMI date and meaning of the DWC-25 without direct evidence from the physician who completed the DWC-25. Judge awarded TTD.

NFN'S TAKE

- TTD can be awarded post MMI even if the MMI date was not rescinded or modified such as when claimant subsequently undergoes a surgery.
- Don't make it hard on the Judge to make findings regarding MMI with questionable competent substantial evidence.

IS TESTIMONY FROM A PSYCHOLOLIGT GOOD ENOUGH TO DENY PSYCHIATRIC TREATMENT?

Karen Wetzel v. LifeLink Foundation, Inc./Zenith Insurance Co., OJCC No. 16-003425EHL (Sept. 2017)

The Judge answered this question in this opinion involving a claimant who sustained a compensable physical injury and wanted psychiatric treatment. Claimant admitted that she had become depressed after she attended a mediation in which she found out that a resignation of employment would be a pre-requisite to settlement. The claimant was able to continue working for the employer for several months after the mediation until she went on short term disability for a reason unrelated to her compensable accident. Ultimately, she was terminated when her FMLA leave expired. Claimant's attorney, also at the hearing, attempted to elicit testimony from the claimant that she was depressed due to her increased pain from the accident.

Claimant retained a psychiatric IME who diagnosed her with adjustment disorder and recommended treatment. Claimant's IME also attributed the diagnosis to the accident and to the compensable injuries. Claimant's IME was aware of psychiatric treatment 30 years previously but was not aware of any recent use of psychotropic medication or psychiatric treatment. Claimant's IME also admitted that claimant told him that she became depressed when she realized the employer did not want her working anymore.

E/C retained a psychologist IME who admitted that he had reviewed medical records evidencing symptoms of anxiety and depression for several years prior to the accident. Claimant also admitted to E/C's IME that she had been taking psychotropic medication since 2003.

At Final Hearing, claimant argued that Judge could not rely on testimony from psychologist as Section 440.093(2) requires evidence from a "licensed psychiatrist." The E/C argued that claimant had waived such objection because claimant did not object to the testimony at the time of the deposition or in the pretrial stipulation. Judge overruled objection on the basis that waiver occurs if a timely objection would have allowed an opportunity to cure the defect and the JCC found that timely objection would not have changed fact that IME was psychologist and not psychiatrist.

Judge excluded testimony from E/C IME and was left only with testimony of claimant's IME. Nevertheless, Judge was bound to the requirement that claimant had the burden to prove by clear and convincing evidence that her depression and need for treatment was caused by a psychiatric manifestation of her physical injuries. Judge found that given claimant's statement as to the cause of her depression being her finding out she would have to resign and fact that claimant's IME was unaware of prior use of psychotropic medication, there was no clear and convincing evidence to award psychiatric care.

NFN'S TAKE

- Need evidence from a psychiatrist not a psychologist.
- Could probably get away with testimony from psychologist but in conjunction with testimony from a psychiatrist. In other words, if psychologist was acting under the direction and control of psychiatrist, testimony would probably be admissable.
- Clear and convincing evidence means there is no doubt.
- If claimant fails to object to evidence from psychologist at the deposition and pretrial hearing, why is E/C not entitled to rely on such failure to object? Judge held that waiver only occurs if objection would have allowed E/C to cure defect. Could a request for a psychiatric IME have cured the defect?
- Final Order has been appealed to First DCA. More guidance to follow if an opinion is written.

FIRST DISTRICT COURT OF APPEAL OPINIONS

HOW TO TREAT IMPAIRMENT RATINGS FOR DIAGNOSIS OF ATRIAL FIBRILLATION AND ATRIAL FLUTTER

Jonathan Race v. Orange County Fire Rescue/Johns Eastern Co., Inc.
Case No. 1D17-0882 (September 15, 2017)

The First District Court of Appeal Per Curiam affirmed the Final Compensation Order from the JCC dated January 31, 2017. While the absence of an opinion prevents binding effect, it certainly is persuasive as to how these type of cases should be handled.

Claimant, a firefighter, was diagnosed with atrial fibrillation on February 8, 1999. He received medical treatment, and he was placed at MMI in July 2002 with a 25% permanent impairment rating. Then on May 21, 2013, he experienced an episode of irregular rapid heartbeats. Claimant had an ablation which was not successful and subsequently experienced episodes of atrial flutter and atrial fibrillation. As a result of this new incident on May 21, 2013, he received a new diagnosis of atrial flutter. He was placed at MMI on September 5, 2013 by his treating cardiologist who assigned him a 25% permanent impairment rating. This impairment rating was assigned for both the atrial fibrillation and the atrial flutter.

The E/C handled each incident separately and had two separate accident dates, the February 8, 1999 accident and the May 21, 2013 accident. Claimant had an IME with cardiologist who opined that Claimant had a 27% permanent impairment rating. Two questions of first impression were addressed by the Judge: 1) Is the Claimant entitled to Impairment Income Benefits based on the new impairment rating as a result of a new accident; and 2) is the E/C entitled to an offset/credit for Impairment Income Benefits already paid should a new impairment rating be assigned for the new May 21, 2013 accident?

The E/C first argued that the claim for Impairment Income Benefits based on a new impairment rating was barred by the doctrine of res judicata/collateral estoppel. This argument was rejected because the Judge found that the facts and evidence at issue were not the same as previously when an adjudication was made at a prior hearing. The claimant had a new diagnosis, a new period of disability, and the medical problems were different than before. The original diagnosis following the first accident was atrial fibrillation and now he had an additional diagnosis of atrial flutter.

The Judge found that the claimant was entitled to impairment income benefits for the new May 21, 2013 accident because claimant had new incapacity, was entitled to temporary total disability benefits, and was paid temporary total disability benefits. The Judge reasoned that if the claimant was entitled to TTD for the new accident, why should he not be entitled to IIBs also?

An EMA was appointed who opined that based on the impairment guidelines, the claimant classified under Class 3 with a 38% permanent impairment rating which included both the atrial fibrillation and atrial flutter. The EMA opined that given the new accident and new diagnosis, he did not agree that the claimant still had a 25% impairment rating, which had been previously assigned.

The Judge rejected the EMA's opinion regarding the impairment rating by looking at the Florida Impairment Guidelines and finding that there was clear and convincing unrebutted medical evidence that after MMI the claimant did not have any symptoms which were a pre-requisite to a Class 3 impairment rating. The Judge accepted the claimant's IME opinion that the impairment rating was 27%. Because the cardiac arrhythmia as a whole prior to May 21, 2013 had given the claimant a 25% impairment rating, the new 27% impairment rating only comprised of an additional 2% impairment rating attributable to the May 21, 2013 incident. According to the Judge, the 27% impairment rating was not new and totally independent.

The claimant appealed and the First District Court of Appeal affirmed the Final Order without an opinion.

NFN'S TAKE

- Atrial fibrillation and Atrial Flutter will be treated as two different types of arrhythmias so when dealing with two separate events with these diagnosis you are probably dealing with two separate dates of accident.
- There is probably not a separate impairment rating for each condition but both arrhythmias are considered when assigning an impairment rating.
- There is an argument for offsetting or getting a credit for payment of prior IIBs if new condition cannot be rated independently.
- When analyzing impairment benefits under the Florida Impairment Guidelines, always look at symptoms.
- Question that remains unresolved. Can an IME perform a record review only and render an opinion on impairment ratings?

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