

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

Lisa LoBello,
Employee/Claimant,

OJCC Case No. 20-001279MS

vs.

Accident date: 2/18/2016

City of Miami Beach Police Dept. and
Corvel Corporation,
Employer/Carrier/Service Agent.

Judge: Sylvia Medina-Shore

_____ /

COMPENSATION ORDER

This matter came before the undersigned Judge of Compensation Claims for a final hearing on 7/17/2020 via zoom video regarding petition for benefits (PFB) filed 1/16/2020. Audrey M. Castro, Esquire represents the claimant. T. Peter Nguyen, Esquire represents the employer and carrier (E/C).

Claims:

1. Compensability of claimant's back injuries, discogenic pain, annular tear, lumbar spondylosis and pain in the right sacroiliac region/right side of hip.
2. Authorization of medical care and treatment with board certified orthopedic physician, Dr. Jonathan Gottlieb to evaluate/treat the claimant for discogenic pain.
3. Authorization and approval of appointment with board certified orthopedic physician, Dr. Jonathan Gottlieb to evaluate/treat the claimant for discogenic pain.
4. Attorney's fees and cost.
5. All other claims within the 1/16/2020 PFB were voluntarily dismissed by claimant on 7/14/2020.

Defenses:

1. Compensability of pre-existing personal degenerative condition & spondylosis is denied.
Only a temporary exacerbation of pre-existing/idiopathic condition was approved due to mechanics of injury “bending over.”
2. Major contributing cause (MCC) of discogenic condition was not caused by any activity associated with the essential job functions required by employment with employer. No increased risk of alleged injury due to any activities required by employment. Mere occurrence of any injury at work, without more compelling evidence, is not enough to establish compensability.
3. Medical necessity for follow-up with Dr. Gottlieb is over 51% not work related. Dr. Gottlieb transferred care to Dr. Marin.
4. No attorney’s fees and costs due or owing.
5. Entitlement to costs reserved.
6. E/C seeks costs from claimant per F.S. 440.34(3)

Claimant’s Responses to E/C’s Affirmative Defenses:

1. Objection to the opinions of Dr. Saff as he is not an authorized physician, IME, or EMA.
2. Estoppel and waiver as E/C failed to deny claim 120 days from inception of provision of benefits.

Documentary Exhibits and Evidentiary Rulings on Admissibility of Documentary Exhibits:**JCC-**

1. Pre-trial stipulation filed 5/6/2020 (DE#22) *is* admitted into evidence.

Claimant-

1. Deposition of Dr. Daniel Marin taken 6/12/2020 and filed 7/14/2020 (DE#54) with

exhibits (DE#41-43) and continuation of deposition of Dr. Marin taken 6/19/2020 filed 7/14/2020 (DE#45) *are* admitted into evidence.

2. Deposition of Cathy Reid, the adjuster filed 7/14/2020 (DE#55) *is* admitted into evidence. Exhibits 7, 9-12 in DE#56-57 *are not* admitted into evidence as E/C's objections are sustained. All other exhibits in DE#56-57 and DE#66 *are* admitted into evidence.
3. Medical records of authorized treating physicians, Dr. Gottlieb filed 7/15/2020 (DE#62), USA Sports Therapy (DE#64), and Dr. Amar Rajadhyasksha filed 7/16/2020 (DE#67) *are not* admitted into evidence. E/C's objections to *are* sustained.

Claimant listed these medical records in the 5/6/2020 pre-trial stipulation and E/C listed their objections of lack of authentication and hearsay. On 7/15/2020, claimant filed these medical records on the docket.

The day before the 7/17/2020, claimant filed a motion to admit these medical records per F.S. 440.29(4). E/C objects asserting violation of due process and prejudice. Claimant argues the medical records were secured from E/C more than 30 days from the final hearing and therefore, E/C had them in their possession. E/C does not dispute this point. Further, claimant argues F.S. 440.29(4) only requires the medical records (not the motion) be served on E/C at least 30 days before the final hearing. E/C disagrees with claimant's interpretation of F.S. 440.29(4).

I find E/C timely raised authenticity and hearsay objections in the pre-trial stipulation. Therefore, claimant needed to file a F.S. 440.29(4) motion or schedule the depositions of the doctors. Claimant did neither. Instead, on the day before the final hearing, claimant filed the motion. I find this did not provide E/C with due process thus

prejudicing them.

I acknowledge workers' compensation cases should be tried on their merits wherever possible. However, the Florida Evidence Rules of Evidence apply to workers' compensation proceedings. *U.S. Sugar v. Henson*, 823 So.2d 104, 106 (Fla.2002); *Alford v. G. Pierce Woods Mem'l Hosp.*, 621 So.2d 1380, 1382 (Fla. 1st DCA 1993).

A JCC is bound by the evidence presented by the parties in accordance with the Florida Evidence Rules. Where a violation of the rules of evidence results in prejudice to a party, as here, the evidence must be excluded.

4. Trial memorandum for I.D. purposes filed 7/15/2020 (DE#39) *is* admitted into evidence.

E/C-

1. Deposition of the claimant filed 7/13/2020 (DE#39) *is* admitted into evidence.
2. Deposition of Dr. Rolando Garcia filed 7/13/2020 (DE#40, 46-51) *are* admitted into evidence. E/C's *Daubert* objection is overruled as explained further.

At the deposition of Dr. Garcia on 7/9/2020, claimant objected to his opinions regarding causation and the need for treatment as they are not based on reliable principles or methods as applied to the facts of this case, and are based on insufficient facts and data. After carefully considering Dr. Garcia's testimony, I find his opinions are timely and based on sufficient facts and data, his testimony is the product of reliable principles and methods and he applied the principles and methods reliably to the facts of the case.

I find Dr. Garcia was provided with sufficient facts and data regarding claimant's accident, complaints and medical treatment with the authorized physicians. While he did

not review the physical therapy notes and initial report of Dr. Amar, claimant made Dr. Garcia aware of her treatment with these physicians and therapists.

Dr. Garcia personally viewed claimant's 3/5/16 and 10/17/18 MRIs. As a board certified orthopedic spine surgeon, I find Dr. Garcia is in the best position to provide an opinion as to MRI findings and causal relationship and treatment to claimant's industrial injuries. To that extent, I find these are the same objective studies and medical records the authorized physicians (Dr. Marin) relied on in arriving at their treatment recommendations and opinions.

3. Trial memorandum for I.D. purposes filed 7/14/2020 (DE#53) *is* admitted into evidence.

Findings of Facts and Conclusions of Law:

Claimant's Testimony-

1. Claimant testified via zoom video at the final hearing. On 7/21/2008, claimant was employed as a patrol officer for the employer herein and thereafter ascended to her current position as a Police Detective.
2. I accept claimant's testimony that she had no prior back problems. While claimant suffered prior accidents including a low back injury, there is no evidence claimant was left with any permanent injury or restrictions. She worked full-duty in her Detective duties, at times assisting with patrol officer functions requiring physically challenging work.
3. On 2/18/2016, claimant was getting ready to work-out in the on-duty police gym. She picked up her work backpack, weighing approximately 20 to 25 pounds, from the bench with her left hand and felt a "pop" in her low back and low back pain. She sat down and believed she just pulled a muscle. Claimant went to the gym but only undertook

stretching exercises for her back. She did not work out. Over the weekend, she took aspirin and applied heat and ice to her back. However, by the following Monday, claimant's low back pain radiated to her legs.

4. Claimant drove herself to Baptist Kendall West Hospital and reported the accident to her supervisor while in the waiting room. She underwent treatment with Dr. Amar, orthopedic spine surgeon including physical therapy. Claimant was not happy with Dr. Amar's treatment and the prescribed physical therapy so she requested a one-time change.
5. Claimant then treated with Dr. Gottlieb who referred her to pain management. Dr. Marin, pain management physician, provided claimant with 2 nerve blocks and 2 ablation injections. She received temporary relief from the ablation injections. She also underwent physical therapy with a different provider who targeted the treatment to her injuries. Dr. Marin recommended claimant return to Dr. Gottlieb for consideration of a discogram. She has not returned to Dr. Gottlieb as E/C has not authorized the appointment.
6. Presently, claimant experiences constant low back pain. She cannot sit or stand for a long time. She is able to undertake her work as a Police Detective as the employer provided reasonable accommodations regarding her utility belt. The back pain has changed claimant's active lifestyle for the worse.
7. Claimant found Dr. Marin's treatment helpful. She wants to return to Dr. Gottlieb for further treatment. She is currently utilizing her health insurance to receive physical therapy from the provider previously authorized by E/C.
8. After viewing claimant's demeanor, I find her credible. I find she has a genuine desire to improve her physical condition and return to her prior active lifestyle.

The Adjuster's Deposition Testimony-

9. Cathy Reid, the adjuster testified the 2/28/2016 accident was accepted as compensable and that E/C did not issue a "120-day" pay and investigate letter. Baptist Kendall West Hospital and Dr. Amar were authorized to treat the claimant. Dr. Gottlieb was thereafter authorized as claimant's one-time change in doctor from Dr. Amar.
10. Dr. Gottlieb, orthopedic surgeon referred claimant for pain management treatment. Dr. Daniel Marin was authorized and treated claimant.
11. In November of 2019, one year after Dr. Marin began his treatment of the claimant E/C submitted Dr. Marin's discogram recommendation for peer review. E/C provided the peer review doctor with all medical reports in their possession. In addition, E/C requested diagnostic testing reports from different providers.
12. On 12/5/2019, the adjuster sent Dr. Marin the peer review report as well as notifying claimant all treatment was denied. On same date, the adjuster issued a notice of denial of further medical treatment as claimant's degenerative disc disease was not caused by the accident and the accident was no longer the MCC for need for treatment/temporary exacerbation abated.
13. I note the key issues of this case could have been resolved if either party questioned the adjuster with more specificity.

Compensability of Claimant 2/18/2016 Accident and Affirmative Defense of Estoppel-

14. The adjuster testified the accident was accepted as compensable and she authorized and paid for medical treatment in the ensuing four years. This is further confirmed by E/C's response to question #7 in the pre-trial stipulation. I find E/C accepted the instant accident as compensable.

15. The parties did not argue compensability of the accident at the final hearing. Thus, I find E/C has waived this defense and conclude the accident is compensable.

MCC of Claimant's Current Medical Condition:

16. Once a claimant has established compensability of an injury, an employer/carrier cannot challenge the causal connection between the work accident and the injury, but only the causal connection between the injury and the requested benefit. *Perez v. Southeastern Freight Lines*, 159 So. 3d 412 (Fla. 1st DCA 2015).

17. E/C asserts the evidence supports that claimant's industrial injuries are no longer the MCC for the requested medical benefits. Specifically, E/C takes the position that claimant's pre-existing degenerative changes and temporary exacerbation of these changes were no longer the cause of the requested medical treatment.

18. In response, claimant asserts E/C waived their right to deny the causal connection between the industrial injuries and the requested treatment citing to 440.20(4). Claimant argues E/C needed to deny the requested medical treatment within 120-days from provision of the medical treatment for the alleged exacerbation of the claimant's degenerative changes and E/C did not do so.

19. The issue in this case is: when did E/C have notice that claimant's industrial current medical condition is no longer related to the initial compensable industrial accident. Once E/C is on notice, they have 120 days to accept or deny the requested treatment.

20. Case law has provided the following analysis to determine application of the 120-day rule under subsection 440.20(4): (1) the date E/C first provided benefits for the injury; (2) the identity of the specific injury for which benefits were provided; and (3) whether E/C timely denied the compensability of the injury for which it provided benefits. *Sierra* at

867. See *Sierra v. Metropolitan Protective Services*, 188 So. 3d 863, 867 (Fla. 1st DCA 2015).

The First Date E/C Provided Benefits for the Injuries for which it provided benefits:

21. The 10/17/2018 MRI revealing degenerative discs L3-L4 through L5-S1 is in evidence (attached to the adjuster's deposition). E/C paid for the 10/17/2018 MRI on 11/13/2018. Further, the adjuster provided the 10/17/2018 MRI report to the peer view for his review.
22. E/C did not dispute they had the 10/17/2018 in their possession. Accordingly, I find E/C knew of the existence of claimant's degenerative disc changes on 11/13/2018 and provided treatment by paying for the MRI on same date and subsequent medical treatment with Dr. Marin.

The Identity of the Specific Injury for which benefits were provided-

23. I find E/C provided medical treatment for claimant's degenerative discs L3-4 through L5-S1, hypertrophy of facet joints more evident at L4-L5 and L5-S1 and very mild bilateral neural foramina narrowing at L3-L4 through L4-5 (as revealed in the 10/17/2018 MRI).

Whether E/C timely denied the compensability of the injury for which it provided benefits:

24. Despite knowing of the existence of claimant's lumbar degenerative condition at least as of 11/13/2018, E/C did not deny claimant's injuries including the pre-existing degenerative condition until 12/5/2019, in excess of one year from the 10/17/2018 MRI. I find E/C maintained a willful wall of ignorance concerning claimant's pre-existing degenerative changes. Accordingly, I find E/C waived their right to deny the causal connection (MCC) between the claimant's industrial injuries (degenerative lumbar discs included) to the requested treatment.

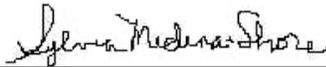
Medical Necessity-

25. Having found E/C accepted claimant's degenerative disc findings of the 10/17/2018 MRI as compensable, the undersigned must now determine whether the requested medical treatment is medically necessary. Claimant bears the burden of proof.
26. E/C relies on the opinions of Dr. Rolando Garcia who conducted an IME on 5/28/2020. Dr. Garcia opined the claimant's lumbar MRI findings on 3/5/16 and 10/17/18 are all caused by degenerative changes, pre-existing the accident in question. He further opines the major contributing cause and medical necessity for any further medical lumbar treatment is not the accident rather, the pre-existing bulging discs with annular fissure all due to the pre-existing degenerative changes. He further opined the discogram recommended by Dr. Marin is not medically necessary.
27. Claimant relies on Dr. Marin who opined that while claimant has pre-existing degenerative changes to her lumbar spine, the instant accident is the major contributing cause of the annular tear at L3-4. He further claimant's work injuries are the MCC for the need for further medical treatment.
28. I accept the opinions of Dr. Marin that claimant follow-up orthopedic care with Dr. Gottlieb is medical necessary as it relates to claimant's compensable industrial injuries. I further note that while Dr. Garcia opined claimant's lumbar sprain/strain did not necessitate further medical treatment, Dr. Garcia opined claimant can go to an orthopedic surgeon to treat for her degenerative changes (Pg. 18 of Dr. Garcia's deposition).
29. As I find E/C accepted claimant's degenerative lumbar changes as compensable as a matter of law, I find the opinions of Drs. Marin and Garcia support further orthopedic care with Dr. Gottlieb is medically necessary.

ORDERED:

1. Claimant's back injuries, discogenic pain, annular tear, lumbar spondylosis and pain in the right sacroiliac region/right side of hip are compensable.
2. E/C shall authorize evaluation and treatment with board certified orthopedic physician Dr. Jonathan Gottlieb for claimant's compensable injuries.
3. Claimant's attorney is entitled to an E/C paid attorney's fees and cost for securing the benefits herein. Jurisdiction is reserved to determine the amount of the fees and costs for a future fee and costs hearing in the event the parties are unable to resolve it.

DONE AND E-SERVED this 28th day of July, 2020, in Miami, Dade County, Florida.



Sylvia Medina-Shore
Judge of Compensation Claims

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