STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGES OF COMPENSATION CLAIMS
TALLAHASSEE DISTRICT OFFICE

Gerald Montgomery,
Employee/Claimant,

vs.

State of Florida DOC - Cross City CI/Division of Risk Management,
Employer/Carrier/Servicing Agent.
____________________________________/

OJCC Case No.: 18-011651JLN

Accident date: 05/18/2017

Judge: Jacquelyn L. Newman

## FINAL COMPENSATION ORDER AWARDING AUTHORIZATION OF MEDICAL CARE

**THIS CAUSE** came before the undersigned Judge of Compensation Claims ("JCC") for a final hearing in Tallahassee, Leon County, Florida, on June 7, 2024, on the Petition for Benefits filed September 15, 2023. The final hearing was conducted via Zoom video conference. Kristine Callagy, Esquire, appeared at the hearing on behalf of the Claimant, Gerald Montgomery, who appeared at the hearing and testified. Deborah Eldridge, Esquire, appeared at the hearing on behalf of the Employer/Carrier. Bethany Bobo appeared at the hearing and testified on behalf of the Employer/Carrier. Exhibits admitted into evidence are listed in the Appendix.

## STATEMENT OF THE ISSUES

At issue here is the Claimant's request for authorization, scheduling, and provision of a psychiatrist for treatment of post-traumatic stress disorder ("PTSD"), previously accepted and treated under the Claimant's May 18, 2017, accident date involving a left knee injury. Attorney's fees and costs have also been requested. The Employer/Carrier has denied authorization for additional treatment with a psychiatrist, arguing that the statute of limitations has expired regarding the Claimant's May 18, 2017, accident date. The Claimant contends that the Employer/Carrier should be estopped from asserting a statute of limitations defense because it failed to schedule an appointment for the Claimant with a new psychiatrist after a timely request for same and the Claimant relied on the representations of the Carrier's nurse case manager that an appointment would be scheduled. The Claimant also contends that the statute of limitations has not expired under *Ortiz v. Winn-Dixie, Inc.*, 361 So. 3d 889 (Fla. 1st DCA 2023).

## FINDINGS OF FACT

In making my findings of fact, I have reviewed and considered all the evidence presented. Based on that evidence, I find as follows:

1. The stipulations agreed to by the parties in the Uniform Statewide Pretrial Stipulation filed February 13, 2024, are accepted and adopted.

2. On May 18, 2017, the Claimant was employed with the Department of Corrections ("Employer") as a correctional officer when he was injured in an accident arising out of and within the course and scope of his employment. While involved in a "use of force" incident with two inmates at the Cross City Correctional Institution, the Claimant fell to the ground and injured his left knee. The Employer/Carrier later authorized the Claimant to receive orthopedic care for his knee injury from Dr. Troy Lowell. The Employer/Carrier also authorized the Claimant to seek psychiatric care for treatment of PTSD from Dr. Timothy Byrd along with counseling services with therapist Scotty Lusk. The Claimant received regular care from Dr. Byrd and Mr. Lusk until the early part of 2022 when Dr. Byrd retired from practice. The Claimant was last seen by Dr. Byrd on January 19, 2022. His last therapy appointment with Mr. Lusk was on March 31, 2022.

3. The Division of Risk Management ("Carrier") partnered with AmeriSys to provide medical case management for the Claimant's workers' compensation claim, including the coordination and scheduling of the Claimant's medical appointments. Marti Hanuschik, a nurse case manager with AmeriSys, testified that she was an acting nurse case manager on the Claimant's case in July 2022 and made several attempts at that time to call and send faxes to Dr. Byrd to determine the status of the Claimant's care. Her nurse case manager notes indicate that Dr. Byrd's phone number was a "non-working number" and there was a busy signal with each call. Ms. Hanuschik left a note for the permanent case manager, Erica Holness, to follow-up with Dr. Byrd's office. But no further activity was initiated on the Claimant's case until January 23, 2023. On that date, Ms. Holness unsuccessfully attempted to call Dr. Byrd's office. When she could not get through to Dr. Byrd, Ms. Holness called and spoke with the Claimant. Ms. Holness's notes from that date indicate that the Claimant advised her that Dr. Byrd retired in May 2022 and that he had not seen his therapist since that time. No further action was taken by a nurse case manager with AmeriSys to contact a psychiatrist or to schedule an appointment for the Claimant after that date.

4. The Claimant testified at hearing that he recalled speaking with Ms. Holness on January 23, 2023. He advised her that Dr. Byrd had retired the year before and that he would need a new psychiatrist in the Ocala or Gainesville areas. The Claimant testified that Ms. Holness told him at that time that she would find him a new psychiatrist. The Claimant, however, never received a call back from Ms. Holness with the name of a new psychiatrist or an appointment date. Although he tried to speak with her again regarding his need for a new psychiatrist, his calls and voicemails went unanswered. The Claimant testified that he did not alert his attorney of his lack of an authorized psychiatrist until September 2023 because he

assumed that the nurse case manager was working to find him a new psychiatrist and he relied on her statement to him that she would find him a new doctor.

5. The Carrier's claims adjuster, Bethany Bobo, testified that there was no action taken by any claims adjuster with the Carrier to authorize a new psychiatrist for the Claimant after Dr. Byrd retired. Adjuster notes show that, in February 2023, the adjuster sent an email to Ms. Holness to see if the Claimant had a follow-up appointment with Dr. Byrd. The adjuster did not receive a response. A second email sent in March 2023 also went unanswered. Still, adjuster notes indicate that no further action was taken at that time and a new psychiatrist was not authorized. Ms. Bobo testified that the typical protocol when an authorized treating physician retires is for the nurse case manager to talk with the adjuster and then locate another physician within the same practice or with a new practice group to provide treatment to the Claimant. Here, although the nurse case manager knew that Dr. Byrd had retired, those steps were not taken. In May 2023, when Ms. Bobo was assigned to the case, she reviewed the file but did not authorize a psychiatrist for the Claimant. Instead, she investigated whether the statute of limitations had run on the claim.

6. The Claimant filed a Petition for Benefits on September 15, 2023, seeking authorization, scheduling, and provision of medical care with a board certified psychiatrist to treat his PTSD because of the retirement of his authorized physician. The Employer/Carrier filed a Response to Petition for Benefits, on October 11, 2023, denying authorization of treatment with a psychiatrist because the statute of limitations had expired.

7. Having evaluated the Claimant's credibility and demeanor at the time of his live testimony, I find him to be credible and accept his testimony. I find that his testimony about his conversation with Erica Holness on January 23, 2023, is corroborated by the testimony of Ms.

Hanuschik and Ms. Bobo. Nurse case manager notes and adjuster notes confirm that the Claimant spoke with Ms. Holness on January 23, 2023, regarding Dr. Byrd's retirement, but no alternate psychiatrist was ever authorized for him. Both Ms. Hanuschik and Ms. Bobo testified that standard protocol would have required the nurse case manager or adjuster to authorize a new physician upon the retirement of the former one. I specifically accept the Claimant's testimony that he relied on the statement of the nurse case manager that a new psychiatrist would be authorized for further treatment of his PTSD. I find that the Claimant relied on her statement to his detriment in not pursuing a claim for a new psychiatrist sooner because he assumed that one would be provided to him without further action.

## CONCLUSIONS OF LAW

8. The Office of the Judges of Compensation Claims has jurisdiction over the parties and the subject matter of this claim.

9. Any claims ripe for adjudication at the time of this hearing that were not pursued by either party (even where no evidence was produced and no ruling was made) will be presumed resolved and the issues waived. *Betancourt v. Sears Roebuck & Co.*, 693 So. 2d 253 (Fla. 1st DCA 1997).

10. The Claimant now seeks authorization of a new psychiatrist for treatment of PTSD relating to his May 18, 2017, left knee injury. The Employer/Carrier has denied authorization for additional treatment with a psychiatrist, arguing that the statute of limitations has expired regarding the Claimant's May 18, 2017, accident date. The statute of limitations is found in section 440.19(1), Florida Statutes (2017), and states:

> Except to the extent provided elsewhere in this section, all employee petitions for benefits under this chapter shall be barred unless . . . the petition is filed within 2 years after the date on which the

> employee knew or should have known that the injury or death arose out of work performed in the course and scope of employment.

§ 440.19(1), Fla. Stat. (2017). Subsection (2) provides a tolling exception:

> Payment of any indemnity benefit or the furnishing of remedial treatment, care, or attendance pursuant to either a notice of injury or a petition for benefits shall toll the limitations period set forth above for 1 year from the date of such payment.

§ 440.19(2), Fla. Stat. (2017).

11. The statute of limitations is an affirmative defense. As a result, an employer/carrier has the burden of raising that defense and proving that the petition for benefits is time barred under section 440.19(1). *Palmer v. McKesson Corp.*, 7 So. 3d 561, 563 (2009). To carry that burden, the employer/carrier must establish the date of injury and the date of the filing of the petition, and must prove that the claimant filed the petition more than two years after the date of injury. It is undisputed that the Claimant here was injured on May 18, 2017, and the Petition for Benefits at issue was filed on September 15, 2023. I find that the Employer/Carrier here has established a prima facie case that the Petition for Benefits is untimely because it was filed more than two years after the date of accident. The Petition for Benefits is therefore barred by the statute of limitations unless an exception applies or there is cause to toll it.

12. Once a prima facie case is established that a Petition for Benefits is untimely under section 440.19(1), the burden shifts to the Claimant who seeks to extend or avoid the statute of limitations. *Palmer*, 7 So. 3d at 564. The Claimant may establish the applicability of the tolling exception found in section 440.19(2), if it has been less than one year from the date of "payment of any indemnity benefit or the furnishing of remedial treatment, care or attendance." § 440.19(2), Fla. Stat. (2017). The Claimant last received medical treatment for his May 18, 2017, accident on March 31, 2022. Thus, the Employer/Carrier contends that section 440.19(2),

Florida Statutes, only tolls the statute of limitations until March 31, 2023. The Claimant's Petition for Benefits, dated September 15, 2023, however, was filed after that date.

13. The Claimant argues that the Employer/Carrier should be estopped from asserting a statute of limitations defense because it failed to schedule an appointment for the Claimant with a new psychiatrist after a timely request was made. The Claimant argues that he detrimentally relied on the representations of the Carrier's nurse case manager that an appointment would be scheduled for him and, because of that reliance, failed to file a timely claim for authorization of a psychiatrist.

14. Section 440.19(4), Florida Statutes (2017), provides that an employer/carrier may be estopped from raising a statute of limitations defense. Section 440.19(4), states:

> If a claimant contends that an employer or its carrier is estopped from raising a statute of limitations defense and the carrier demonstrates that it has provided notice to the employee in accordance with s. 440.185 and that the employer has posted notice in accordance with s. 440.055, the employee must demonstrate estoppel by clear and convincing evidence.

§ 440.19(4), Fla. Stat. (2017). The Claimant concedes that there is no issue with the Employer/Carrier having complied with the notice requirements of sections 440.185 and 440.055. The Claimant must therefore establish estoppel by proof that is clear and convincing. *Id.*; *see also Crutcher v. School Bd. of Broward Cnty.*, 834 So. 2d 228 (Fla. 1st DCA 2002). In order to establish estoppel, the Claimant is required to prove that (1) the Employer/Carrier misrepresented a material fact; (2) the Claimant relied on the misrepresentation; and (3) the Claimant changed his position to his detriment because of the misrepresentation. *See Deere v. Sarasota County Sch. Bd.*, 880 So. 2d 825, 826 (Fla. 1st DCA 2004) (holding that the JCC was required to consider whether the employer/carrier should be estopped from denying benefits based on a statute of limitations defense after the adjuster erroneously advised the claimant that she had no further right to benefits).

15. As addressed, I accept the Claimant's testimony as credible and find that the Employer/Carrier's representative misrepresented a material fact — that the Claimant would be authorized to treat with a new psychiatrist after the retirement of Dr. Byrd — when she spoke to the Claimant in January 2023. I find that the Claimant relied on this misrepresentation and changed his position to his detriment because of the misrepresentation. The Claimant trusted that the nurse case manager would authorize a new psychiatrist and, because of that reliance, he failed to contact his attorney or to file a claim for a new psychiatrist before the limitations period allegedly expired in March 2023. I find this evidence to be clear and convincing and I accept the Claimant's allegations without hesitancy. *See McKesson Drug Co. v. Williams*, 706 So. 2d 352, 353 (Fla. 1st DCA 1998) (defining "clear and convincing evidence" as evidence of a quality and character that produces a firm belief or conviction in the JCC, without hesitancy, as to the truth of the allegation sought to be established).

16. I reject the argument of the Employer/Carrier that the Claimant's testimony about what Ms. Holness told him during their phone conversation on January 23, 2023, is hearsay and inadmissible. The statement from the Claimant is not hearsay because it is not being offered to prove the truth of the matter asserted.[1] The statement is being offered to prove detrimental reliance. Out-of-court statements may be offered for many purposes other than to prove the truth of the matter asserted. *North v. State*, 221 So. 3d 1235, 1237 (Fla. 2nd DCA 2017). An out-of-court statement may be admissible to establish the material effect that the statement had on a

[1] *See* § 90.801(1)(c), Fla. Stat. (2017).

listener regardless of whether that statement is true. *Id.* "When a statement is offered to prove what a person thought after the person heard the statement, it is being offered to prove the person's state of mind and is not hearsay."[2] *Jenkins v. State*, 189 So. 3d 866, 869 (Fla. 4th DCA 2015).

17. The employer/carrier is under a continuing obligation, once it has knowledge of an employee's injury, to place needed benefits in the hands of the injured worker. *Wood v. McTyre Trucking Co., Inc*., 526 So. 2d 739, 741 (Fla. 1st DCA 1988). This requires an employer to offer or furnish benefits when the employer knows, or reasonably should know, that such benefits are due. *Id.* Here, I find that the Employer/Carrier's representative was made aware in January 2023 that the Claimant's psychiatrist retired and that authorization of a new psychiatrist was needed. This occurred before the Claimant's statute of limitations would have expired. Moreover, had representatives of the Employer/Carrier followed up on their medical inquiries in July 2022, they could have discovered then that authorization of a new psychiatrist was needed. I find that the Employer/Carrier here had an obligation to furnish continuing medical benefits to the Claimant but failed to do so.

18. I find the facts here are similar to those found in *Gauthier v. Florida International University*, 398 So. 3d 221 (Fla. 1st DCA 2010). In *Gauthier*, the employer/carrier failed to obtain a date of maximum medical improvement or an impairment rating from the medical provider that it authorized to treat the claimant's injury. As a result of its omission, the claimant did not receive the impairment benefits to which she was entitled and, unaware of her entitlement

[2] Even if the statement was hearsay, I find that the statement is an admission. The statement offered by the Claimant against the Employer/Carrier is a statement by the Employer/Carrier's representative, Ms. Holness, concerning a matter within the scope of her employment. *See* § 90.803(18)(d), Fla. Stat. (2017).

to such benefits, failed to file a timely claim, losing her opportunity to toll the statute of limitations. *Id.* at 225. The court held that the employer/carrier was estopped from relying on a statute of limitations defense because the claimant demonstrated that the employer/carrier failed to act when it was under a duty to do so and that claimant was misled to her detriment due to the omission. *Id.* The court has repeatedly held that an employer/carrier will be estopped from asserting the statute of limitation as a defense when it, either intentionally or otherwise, misleads the claimant as to his rights or available benefits with the result of the claimant failing to timely file a claim. *See Raymond v. Rapid Express Parcel Delivery of Tampa*, 548 So. 2d 278, 279 (Fla. 1st DCA 1989).

19. Here, the Employer/Carrier was obligated to authorize a new psychiatrist and advised the Claimant that a new psychiatrist would be authorized — but then failed to do so. The Claimant relied on this misrepresentation, resulting in his failure to timely file a claim for the needed benefit. The Employer/Carrier is therefore estopped from asserting a statute of limitations defense and the Claimant's Petition for Benefits, filed September 15, 2023, is not barred by the statute of limitations.

20. Because I have determined that the Employer/Carrier is estopped from asserting a statute of limitations defense, I need not address the Claimant's alternative argument that the Claimant's statute of limitations has not expired under *Ortiz v. Winn-Dixie, Inc.*, 361 So. 3d 889 (Fla. 1st DCA 2023).[3]

[3] *See Ortiz v. Winn-Dixie, Inc.*, No. 1D21-0885, 2023 WL 5809750 (Fla. 1st DCA Sept. 1, 2023).

21. No other defense to the claim for authorization of a psychiatrist has been raised by the Employer/Carrier. The Claimant's request for authorization of a psychiatrist is therefore granted.

WHEREFORE, it is **ORDERED AND ADJUDGED** that:

1. The claim for authorization, scheduling, and provision of a psychiatrist for treatment of the Claimant's PTSD is GRANTED.

2. The claim for costs and attorney's fees is GRANTED.

3. Jurisdiction is reserved to determine the amount of the fees and costs due if the parties cannot agree.

**DONE AND SERVED** this 27th day of June, 2024, in Tallahassee, Leon County, Florida.

Jacquelyn Newman

Jacquelyn L. Newman
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## APPENDIX

**These documents were admitted into evidence:**

Judge's Exhibits:

1. Petition for Benefits, filed September 15, 2023 (Docket ID Number "DN" 27);
2. Response to Petition for Benefits, filed October 11, 2023 (DN 29);
3. Uniform Statewide Pretrial Stipulation, filed February 13, 2024 (DN 39);
4. Claimant's Trial Memorandum, filed June 4, 2024 (argument only) (DN 55); and
5. Employer/Servicing Agent's Trial Memorandum, filed June 5, 2024 (argument only) (DN 57 - 58).

Joint Exhibits:

1. Deposition of Bethany Bobo, taken May 30, 2024 (DN 53);
2. Deposition of Marti Hanuschik, with exhibits, taken May 24, 2024 (DN 56); and
3. Employer/Carrier's payout ledger, filed June 5, 2024 (DN 59).