

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGES OF COMPENSATION CLAIMS
WEST PALM BEACH DISTRICT OFFICE

Rosalba Trejo,
Employee/Claimant,

OJCC Case No. 14-013426SHP

vs.

Accident date: 12/2/2013

First Watch Restaurants, Inc./PMA
Insurance Group,
Employer/Carrier/Servicing Agent.

Judge: Shelley H. Punancy

AMENDED MERIT ORDER

AFTER DUE AND PROPER NOTICE, this cause came on to be heard on 8/4/15, in Palm Beach County, Florida. The Claimant was represented by William Haro, Esquire. The Employer/Carrier/Servicing Agent was represented by Christine M. Tomasello, Esquire. This Order resolves the issues raised in the Petition for Benefits filed on 12/10/14.

A. Claims:

1. Provision/authorization of extracorporeal shock wave therapy (ESWT) per Dr. Hodor.
2. Attorney's fees/costs per section 440.34.

B. Defenses:

1. Extracorporeal shock wave therapy is experimental in nature. Daubert §90.702.
2. Extracorporeal shock wave therapy not causally related to accident.
3. Extracorporeal shock wave therapy is not reasonable or medically necessary.
4. No current recommendation for extracorporeal shock wave therapy from any authorized provider, IME or EMA.

5. The Claimant violated Fla. Stat. §440.105 by failing to fully disclose all sources of income on the DWC-19 forms submitted to the Employer/Carrier for all periods at issue.
6. Attorney's fees and costs not due or owing per section 440.34.
7. Employer/Carrier seeks payment of reasonable costs per section 440.34(3).

C. Documentary Exhibits:

Court:

1. Composite: Pretrial Stipulation/Order-4/27/15; Employer/Carrier/Servicing Agent's Motion to Amend Pretrial Stipulation filed 7/10/15/Order 7/28/15; Claimant's Pretrial Amendment filed 7/10/15; Claimant's Motion to Strike IME- Dr. Seltzer's Deposition Testimony and Medical Opinions filed 7/25/15; Employer/Carrier/Servicing Agent's Response filed 7/31/15; Order-7/25/15; Employer/Carrier/Servicing Agent's Second Motion to Amend Pretrial Stipulation filed 7/28/15/Claimant's Notice of Objection-Response; and Order 7/29/15.

Claimant:

1. Petition for Benefits filed 12/10/14.
2. Merit Order-1/21/15.
3. Deposition-Ms. Hammond, PMA Ins. Grp. Adjuster-12/5/14 and 6/30/15 with attachments.
4. Deposition-Dr. Hodor with attachments-7/27/15.

Claimant Proffer:

5. Claimant Deposition-10/23/14-Employer/Carrier/Servicing Agent objection-Relevance-Sustained.

6. Request to Produce 1/30/15-Employer/Carrier/Servicing Agent objection-Relevance-Hearsay, Authenticity-Sustained.
7. Motion to Compel Better Response to Request to Produce-3/6/15-Employer/Carrier/Servicing Agent objection-Relevance, Hearsay, Authenticity-Sustained.
8. 1/31/15... E-Mails-Employer/Carrier/Servicing Agent objection-Relevance, Hearsay, Authenticity-Sustained.

Employer/Carrier/Servicing Agent (E/C/SA):

1. Deposition-Dr. Seltzer-7/21/15-Claimant objection-Daubert grounds per section 90.702, Florida Statutes (2013)- Ruling reserved-see Findings of Fact/Conclusions of Law.

Employer/Carrier/Servicing Agent Proffer:

2. Motion to Amend Pretrial Stipulation to add the defense-violation of section 440.105, Fla. Stats.; deposition of payroll records custodian-Casa D'Angelo with attached Claimant payroll records and DWC-19 forms completed by Claimant filed 7/10/15; Claimant's Notice of Objection and Response/Motion to Strike Fraud/Misrepresentation Defense with attachments filed 7/10/15; Order 7/28/15; and Motion to Vacate 7/28/15 Order (for purpose of Appeal).
3. Deposition-Records Custodian-Casa D'Angelo-Ms. Petinakis. Claimant objection-not listed on Pretrial Stipulation, hearsay, and lack of authentication-Sustained. (for purposes of Appeal).
4. DCW-19 forms sent to Claimant 12/5/14 attached to deposition of adjuster. Claimant objection-hearsay, double hearsay, authenticity-Sustained. (for purposes of Appeal).

5. DWC-19 forms signed by Claimant 3/20/15. Claimant objection-hearsay, double hearsay, authenticity-Overruled.

D. Stipulations:

1. I have jurisdiction of the parties and subject matter of the claim.
2. The claims raised in the Petition for Benefits filed on 11/26/14 and 2/13/15 resolved at Mediation on 4/22/15 with jurisdiction reserved as to the claims for attorney's fees and costs.

E. Testifying before me was the Claimant, Ms. Trejo, with the aid of a Spanish language interpreter.

I have carefully considered and weighed all evidence presented. I observed the candor and demeanor of the witness who testified before me. I have resolved all conflicts in the evidence. I have considered the argument of counsel, statutory, and case law authority. I now make the following findings of fact and conclusions of law:

Findings of Fact:

1. The stipulations of the parties are approved and adopted.
2. While working as a cook for the Employer, Claimant struck her right upper extremity against a metal stand in the kitchen on 12/2/13. The accident resulted in injury to Claimant's right elbow, forearm, and wrist. Medical care and treatment was authorized.
3. Claimant came under the care of Dr. Hodor, orthopedic surgeon, on 7/17/14. He testified that Claimant's initial area of trauma was the lateral epicondyle. Over the course of treatment and having been doing substitutive activities, Claimant developed problems with her medial epicondyle as well, according to Dr. Hodor. He explained that in changing the way she was doing things Claimant obtained some improvement in her

lateral epicondyle, but created symptoms in the medial epicondyle and ultimately some ulnar nerve symptoms. Dr. Hodor injected Claimant's medial epicondyle on 11/4/14.

4. On 12/9/14, Claimant reported receiving 10-12 days of relief from pain following the injection, but denied complete resolution of her pain. Dr. Hodor maintained Claimant on a restricted work status, advised her to use her air cast at work, and recommended that she consider extracorporeal shock wave therapy (ESWT).
5. Claimant continued with complaints of swelling and pain around the joints of her right hand and about her wrist and hand down towards the index metacarpal. On 2/10/15, Dr. Hodor documented the case manager's advice that the Carrier would not authorize the ESWT.
6. In that the ESWT was not authorized and Claimant continued with chronic pain symptoms, on 3/25/15 Dr. Hodor prescribed a TENS unit. Claimant received the unit on 4/10/15. On 4/14/15, she reported using the unit one time a day initially. By 6/9/15, Claimant had increased the use of the unit to two times a day with reported decrease in pain over the lateral epicondyle and in some of the radiation to the mid forearm.
7. At the request of the Employer/Carrier/Service Agent, Claimant underwent an IME with Dr. Seltzer, orthopedic surgeon-upper extremities, hand, and wrist on 6/23/15.

Conclusions of Law:

1. The Claimant seeks authorization and provision of extracorporeal shock wave therapy (ESWT) per Dr. Hodor.
2. Dr. Hodor's recommendation for ESWT and referral to Dr. Levitt, a physician who had performed ESWT and written articles about it, was made on 12/9/14.

3. Claimant filed a PFB for ESWT on 12/10/14. On 12/11/14, Ms. Hammonds, adjuster with PMA, received the office note and DWC-25 prepared by Dr. Hodor on 12/9/14. She did not undertake any investigation as to the MCC or medical necessity of the treatment. She testified that she declined to authorize the ESWT because the Carrier considered it to be experimental. In all of her years of experience in handling claims she had never seen such a request from a medical provider, according to Ms. Hammonds.
4. Initially, the Employer/Carrier/Servicing Agent took the position that ESWT is experimental in nature and therefore not compensable. No evidence to support the position was presented. In fact, Dr. Hodor's unrefuted testimony is that ESWT is based on scientific criteria, is reasonably safe, should aid in Claimant's recovery, and is not experimental at this point.
5. The Employer/Carrier/Servicing Agent submit that ESWT is not causally related to the 12/2/13 accident and is not reasonable or medically necessary. Because Claimant's work-related accident/injuries have been accepted as compensable and medical care has been provided, the Claimant argues that the Employer/Carrier/Servicing Agent has waived said defenses or is estopped from asserting them. It is well settled that once compensability is established an Employer/Carrier can no longer contest that the accident is the MCC of the injuries at issue. However, whether there is still a connection between the need for specific treatment or benefits and the industrial accident can still be contested. See Engler v. Am. Friends of Hebrew Univ., 18 So. 3d 613 (Fla. 1st DCA 2009).
6. The Employer/Carrier/Servicing Agent rely upon the opinions of Dr. Seltzer for the denial of the ESWT. Claimant objected to the Employer/Carrier/Servicing Agent's IME with Dr.

Seltzer by alleging that no medical dispute existed to give rise to the IME. In the instant case, Claimant requested a medical treatment that the Employer/Carrier/Servicing Agent declined to provide. To create a dispute concerning medical benefits, an Employer/Carrier is required to deny a Claimant's request for medical benefits. See Bellamy v. Golden Flake Snack Foods, Inc., 97 So. 3d 941 (Fla. 1st DCA 2012). I find under these facts that the Claimant's objection is properly overruled.

7. Dr. Seltzer obtained Claimant's report of mechanism of her injury; performed a physical examination; and reviewed medical records of MD NOW, Dr. Hersch, and Dr. Krebsbach. The first time he had Dr. Hodor's records (7/17/14-6/9/15) available for review was about one hour before he was deposed on 7/21/15. As such, he did not have the benefit of the records on 6/23/15 nor at the time the IME report was transcribed. Dr. Seltzer could not recall whether he saw the reports of any diagnostic studies obtained by Dr. Hodor. Dr. Seltzer believed Claimant mentioned that she had been using a TENS unit to treat her elbow symptoms, but did not follow with an inquiry regarding the specifics.
8. The Claimant raised a Daubert objection to Dr. Seltzer's opinion testimony and the Employer/Carrier/Servicing Agent did so with respect to Dr. Hodor's opinion testimony.
9. In Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), the Court announced a new standard for determining the admissibility of expert scientific testimony. Under the new test, the judge must make "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts in issue". Id. In 2013, the Florida Legislature amended section 90.702 of the Florida Evidence Code to reflect the

Daubert standard and provide a three-part test to be used in determining the admissibility of expert opinion testimony. Florida Evidence Code, section 90.702 (effective 7/1/13).

As amended, section 90.702 now provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion or otherwise, if;

1. The testimony is based upon sufficient facts or data;
2. The testimony is the product of reliable principles and methods; and
3. The witness has applied the principles and methods reliably to the facts of the case.

10. Dr. Seltzer opined that the mechanism of injury in 2013 as described by the Claimant (she accidentally banged her elbow against a piece of metal along the walkway) at the time of his IME and as noted in the medical records he reviewed, could not cause the right elbow pain complaints as voiced by the Claimant at the IME in 2015. He opined that Claimant was at MMI, had no work restrictions, that no further work injury related medical care was warranted or medically necessary, and that Claimant's present medical conditions are not work related.

11. Dr. Seltzer testified that he based his opinions upon Claimant's medical history, physical exam findings, published medical studies generally accepted in the medical community, and applications of the results and findings of the research he read to the facts of the case. He attends several courses on the different pathology of upper extremities. That

knowledge formed part of the integral process of his analysis of the Claimant, according to Dr. Seltzer.

12. I find that the expert testimony of Dr. Seltzer as an orthopedist with a specialty in upper extremities as it relates to issues such as MMI, work restrictions, the reasonableness/medical necessity of further injury related treatment, and whether a Claimant's present condition is work related, is the type of expert opinion that has been previously deemed reliable by the appellate court. Accordingly, I take judicial notice of the evidence. However, I find that his opinions are not predicated on sufficient facts or data (he did not have the benefit of Dr. Hodor's records when he performed the IME or at the time the IME report was prepared). Accordingly, I give little or no weight to Dr. Seltzer's opinions.
13. Dr. Seltzer does not use extracorporeal shock wave therapy. He does not know anyone in his group of 17 surgeons that use it, nor any other orthopedic surgeon in the medical community currently using it. He believed ESWT is used by podiatrists on the Achilles tendon at times for chronic pain. He was sure he had read literature regarding ESWT, but he discounted it as it was not something he was interested in. Dr. Seltzer testified that he did not review any medical journals or treatises at the time of the IME or at the time the IME report was generated. He did not do any follow-up review or research regarding ESWT when he obtained Dr. Hodor's records on 7/21/15. It appears that Dr. Seltzer has little or no knowledge regarding ESWT so as to be able to render an opinion pro or con.
14. Dr. Hodor testified that ESWT does physiologic work on the tissues. It has been used over the years in the treatment of various musculoskeletal disorders such as lateral

epicondylitis-elbow. He testified that ESWT has been used in the medical community for the elbow pain/symptoms Claimant has. He testified that he is knowledgeable regarding this type of therapy, having personally researched it. There are peer accepted medical studies/articles regarding ESWT and they have noted the efficacy of the therapy. He cited to an article written by Dr. Levitt on ESWT found in the Journal of Bone and Joint Surgery 2004-Electrohydraulic High Energy Shock Wave Treatment for Chronic Plantar Fasciitis. ESWT produces encouraging results, lasting often for years after its application. Generally it is a one episode application done generally in a surgical center with some sedation, according to Dr. Hodor.

15. I find that Dr. Hodor's testimony withstands a Daubert challenge. It is based on sufficient facts and data including review of Claimant's medical records, the history she provided, her subjective complaints and objective exam findings, and diagnostic test results. I find that Dr. Hodor's opinion takes into account methods and principles used by many physicians over the years as reflected in medical literature and peer accepted medical studies and articles. Lastly, I find that Dr. Hodor applied those principles and methods reliably to the facts of this case.

16. I accept Dr. Hodor's opinion that ESWT is reasonable and medically necessary as treatment for Claimant's condition, that the work related injury is the MCC of Claimant's ongoing symptoms, and that ESWT is appropriate for Claimant's diagnosis and status of recovery.

According to Dr. Hodor, 12/9/14 (the date he first recommended ESWT) would have been the critical time to provide it for the Claimant because she had failed to progress to

where he hoped she would get. In that ESWT was not authorized, Dr. Hodor prescribed a TENS unit, a device used more strictly for pain. He testified that the TENS unit is duplicative of ESWT. When Claimant was last seen on 6/9/15, the modality he was proceeding with was the TENS unit, according to Dr. Hodor. He testified that he would not give Claimant the ESWT at this point based on her current symptoms. He had documented Claimant's report of having some improvement using the TENS unit. If Claimant regresses, he would (again) state that ESWT should be considered. If Claimant fails with the TENS unit, the ESWT would be reasonable and medically necessary, according to Dr. Hodor.

17. The Employer has a duty to furnish to the employee such medically necessary remedial treatment, care, and attendance for such period as the nature of the injury or the process of recovery may require. F.S. 440.13 (2) (a). In the instant case, ESWT was recommended for treatment of Claimant's epicondylitis in December 2014. Unable to obtain authorization for the treatment, Dr. Hodor recommended a TENS unit for which approval was given. When last seen on 6/9/15, the Claimant reported some decrease in pain with use of the TENS unit. In view of this, when deposed on 6/27/15 Dr. Hodor elected to proceed with the TENS unit, and would not again recommend ESWT unless Claimant's condition regressed on she failed the TENS unit. At trial, Claimant testified that she does not obtain lasting relief with the TENS unit.

18. At the time the petition for benefits was filed on 12/10/14, the claim for the ESWT treatment was ripe because it was based on the recommendation and referral by Dr. Hodor. See Soriano v. Gold Coast Aerial Lift, Inc., 705 So. 2d 636 (Fla. 1st DCA 1998)

(stating that the claim for a neurosurgical consultation was ripe because the authorized treating doctor recommended it); See also M.D. Transport v. Paschen, 996 So. 2d 902 (Fla. 1st DCA 2008) (stating that the claim for psychiatric care was ripe because claimant's doctor wrote a letter recommending it).

19. Similar to the situation in Soriano, the fact that Dr. Hodor had to adjust his treatment recommendations to the TENS unit due to the E/C's failure to comply with its statutory duty, which he stated had slowed claimant's recovery (see Dr. Hodor's deposition page 49), and that he was saying at the time of his deposition that ESWT was not required at that time does not render claimant's request for the ESWT treatment "unripe." Indeed, Dr. Hodor testified that if the TENS unit ultimately proved unsuccessful, then he would once again recommend the ESWT treatment.
20. Pursuant to Dr. Hodor's testimony, the doctor continues to want the ESWT to be authorized in the event the TENS unit treatment is unsuccessful or Ms. Trejo regresses. Indeed, there's no evidence he withdrew his recommendation for ESWT based on the provision of the TENS unit, rather he merely held that recommendation in abeyance pending the outcome of the TENS unit treatment, and he did so only because he was forced by the E/C's denial of the ESWT therapy.
21. The Employer/Carrier/Service Agent further alleges that the recommended ESWT treatment is not reasonably medically necessary.
22. The Claimant asserts that because the Employer/Carrier/Service Agent failed to timely respond to the referral for this medical treatment by the close of the third or tenth business day of the referral, as required by section 440.13(3)(d) and (i), Florida Statutes

(2013), the Employer/Carrier/Servicing Agent consented to the medical necessity of the ESWT treatment.

23. I find claimant's argument regarding the Employer/Carrier/Servicing Agent consenting to the medical necessity of the ESWT treatment to be both compelling and meritorious. See Elmer v. Southland Corp., 5 So. 3d 754 (Fla. 1st DCA 2009) (reversing the denial of a claim for pain management because the E/C failed to timely respond to a referral for that care, as required by sections 440.13(3)(d) and (i)); Pearson v. BH Transfer, 163 So. 2d 1280 (Fla. 1st DCA 2015) (reversing denial of authorization for spinal surgery on the grounds that the surgery was not medically necessary because the E/C failed to timely respond to the request under section 440.13(3)(i) and remanding for entry of an order awarding the surgery).

24. As indicated previously, on 12/11/14, Ms. Hammonds, adjuster with PMA, received the office note and DWC-25 prepared by Dr. Hodor on 12/9/14 recommending the ESWT treatment. She did not undertake any investigation whatsoever as to the MCC or medical necessity of the treatment.

25. Given the Employer/Carrier/Servicing Agent's failure to timely respond to the referral for medical treatment, as required by sections 440.13(3)(d) and (i), as well as the case law cited above, the Employer/Carrier/Servicing Agent consented to the medical necessity of the ESWT treatment.

Based on the foregoing, it is;

ORDERED AND ADJUDGED:

1. The claim for authorization and provision of ESWT by Dr. Hodor on 12/9/14 is Granted.

2. The claim for attorney's fees/costs per section 440.34 is Granted.

DONE AND ORDERED this 4th day of December, 2015, in West Palm Beach, Palm Beach County, Florida.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order was E
mailed on this 4th day of December, 2015.

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