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

James Deal,
Employee/Claimant,

vs.

Skyline Corporation/OneBeacon Ins. Co.,
Employer/Carrier/Servicing Agent.
_____/

OJCC Case No. 03-044625 MRH
Accident date: 4/15/1974
Judge: Marjorie Renee Hill

FINAL COMPENSATION ORDER

THIS CAUSE came on for final hearing on March 12, 2014.[1] Claimant was represented by Douglas Glicken and the Employer/Carrier was represented by David Beach. At the hearing, the E/C and Claimant entered into a stipulation regarding all benefits sought by Claimant with the exception of Claimant's request for continued authorization of Dr. Keown. Accordingly, this Final Compensation Order addresses only the claim for continued authorization of Dr. Keown, which was contained in the Petition for Benefits filed on November 5, 2013.

FINDINGS OF FACT

It is uncontested that Claimant, who is 85 years old, sustained a compensable accident on April 15, 1974, and is entitled to medical treatment. The only issues are whether Claimant is entitled to treat with Dr. Keown, who was his authorized treating physician for approximately 28 years, and whether Dr. Keown voluntarily stopped treating Claimant.

The carrier authorized Claimant to treat with Dr. Keown from July 1988 through December 12, 2006. Dr. Keown practices in Georgia, where Claimant resided after the accident. (Keown depo. pp. 6-8, 13; Claimant depo. p. 7). As part of his treatment, Dr. Keown prescribed physical therapy several times per week. Initially, the carrier authorized that treatment, but subsequently reduced authorized physical therapy to monthly. (Keown depo. pp. 15, 17).

On May 19, 2005, Dr. Keown noted Claimant's condition was worsening and he needed physical therapy three times per week "to get back to where he was before his therapy was taken away from him." (Keown depo. p. 17). On June 23, 2005, Dr. Keown had a phone conversation with Debbie Morrow, the adjuster on Claimant's file. (Keown depo. p. 17). Dr. Keown noted Ms. Morrow laughingly stated she could not understand why Claimant needed therapy at all, since the accident happened 30 years ago. She "literally made fun of the way the prescription [for physical therapy] was written, states it didn't even say therapy, and she was quite unprofessional and disrespectful. . ." (Keown depo. pp. 19-20).

[1] The parties' stipulations, claims, defenses, witnesses and exhibits, all of which were considered in rendering this Order, are listed in Appendix A attached to this Order.

Between May 2006 and December 2006, Dr. Keown received approximately 10 letters from Mark Spangler, the E/C's attorney at that time. (Keown depo. pp. 17, 27-29). On or about August 30, 2006, Dr. Keown received a four-page letter from Mr. Spangler. The letter was copied only to Ms. Morrow and Mr. Beach, another of the E/C's attorneys. Neither Claimant nor his counsel was copied with the letter. (Keown depo. pp. 20-22; Aug. 30, 2006 letter).

The letter informed Dr. Keown of his basic rights and responsibilities under the Florida Statutes, and stated the carrier had performed a utilization review investigation and had a peer review report. After citing Florida Statutes and the various provisions contained therein, the last page of the letter states "I hope you find the following attached statutory provisions enlightening as an alternative to the agency's investigation. The employer-carrier is willing to discuss other options which would resolve the dispute concerning overutilization and improper utilization." Based on this letter, Dr. Keown believed he was being investigated by the State of Florida. (Keown depo. pp. 23-24; Aug. 30, 2006 letter).

On or about September 22, 2006, Dr. Keown received a "Notice of Disallowance" from the carrier. That notice/letter, in relevant part, states "[t]he purpose of this letter is to inform you of the conclusions and findings from the carrier's completed utilization review and investigation." (Keown depo. pp. 62-64).

On or about November 16, 2006, Dr. Keown received a letter from Mr. Spangler, which indicates it enclosed three redacted peer review reports from two psychiatrists and one orthopedic physician. Nothing in the peer review reports indicates the names of the doctors or medical practices that allegedly performed the peer review. Neither Claimant nor his counsel was copied with the letter. (Keown depo. pp. 27-28; Nov. 16, 2006 letter).

On or about December 12, 2006, Dr. Keown received a letter from Mr. Spangler, which indicated it summarized a December 11, 2006 phone conversation between Mr. Spangler and Dr. Keown. The letter "confirms the Carrier's proposed terms for settlement of the reimbursement dispute." In sum and in relevant part, the letter indicates it is a "contract" between the parties to resolve the allegations of overutilization resulting in a reimbursement dispute pursuant to sections 440.13(6),(7), and (8), Florida Statutes. (Dec. 12, 2006 letter).

The terms of the "contract" were that Dr. Keown would withdraw as Claimant's authorized treating physician and would not treat Claimant for the work accident, although he could continue to treat Claimant for non-work accident related conditions. The "contract" provided the parties stipulated the agreement was not obtained by coercion or duress, and any allegations of coercion or duress by either party would be considered a breach of contract, with liquidated damages of $10,000.00 plus attorney fees and costs. Dr. Keown agreed not to seek reimbursement for any unpaid dates of service, and the carrier agreed to terminate the utilization review investigation. Neither Claimant nor his counsel was copied with the letter. Dr. Keown signed the letter on December 15, 2006. (Keown depo. pp. 29-30, 65; Dec. 12, 2006 letter).

As a result of all of the letters Dr. Keown received from Mr. Spangler, he believed there was an ongoing investigation, that he was being investigated by the State of Florida, and that he had "overutilized" and was in violation of Florida law. (Keown depo. pp. 30-31, 59-60).

Notably, despite the letters from Mr. Spangler to Dr. Keown indicating the contrary, the E/C never began an overutilization review process with the Agency for Health Care Administration (ACHA) or the Department of Financial Services. (Morrow trial testimony). The E/C did not do anything to alert ACHA to conduct a utilization review; the E/C did not seek an adjudication of overutilization from a Judge of Compensation Claims; and Ms. Morrow did not know why the carrier, through letters sent by Mr. Spangler, would imply there was a pending utilization review. (Morrow trial testimony). The E/C did not notify Claimant or his counsel of the correspondence between Mr. Spangler and Dr. Keown. (Morrow trial testimony).

By letter dated December 19, 2006 from Mr. Spangler to Claimant's then counsel, Anthony Cortese, Mr. Spangler informed Mr. Cortese that "it is my understanding that [Dr. Keown] has withdrawn as this claimant's treating physician." The letter offered three physicians from whom Claimant could select. (Dec. 19, 2006 letter).

Had Dr. Keown not received the letters from Mr. Spangler, he would never have agreed to stop treating Claimant. (Keown depo. p. 31). When Dr. Keown informed Claimant about the letters and "contract," both Claimant and Dr. Keown were "very upset" and Dr. Keown felt like he was "abandoning" Claimant. (Keown depo. p. 32). Dr. Keown is willing to continue treating Claimant for his workers' compensation injuries because he believes no one knows Claimant's needs better. (Keown depo. pp. 32, 66). After signing the "contract," Dr. Keown continued to treat Claimant for his non-work accident related conditions. (Keown depo. pp. 8, 39-40, 50-51, 54-55, 57; Claimant depo. pp. 21-22, 24, 28).

Claimant believed Dr. Keown stopped treating him for his workers' compensation injuries because the workers' compensation carrier "fired him." (Claimant depo. pp. 22-24). Claimant wants to continue to treat with Dr. Keown for his workers' compensation injuries. (Claimant depo. pp. 57-58). The carrier provided Claimant with alternate treatment.

CONCLUSIONS OF LAW

It is well established that a claimant's substantive rights are established by the law in effect on the date of the accident. *See Styles v. Broward County School Board,* 831 So. 2d 212 (Fla. 1st DCA 2002). The medical benefits to which a claimant is entitled are a substantive right. *See e.g., Russell v. P.I.E. Nationwide,* 668 So. 2d 696 (Fla. 1st DCA 1996); *S. Bakeries v. Cooper,* 659 So. 2d 339 (Fla. 1st DCA 1995); *Gonzalez v. Publix,* 654 So. 2d 634 (Fla. 1st DCA 1995). Thus, the law in effect on the date of a compensable accident controls the medical benefits to which a Claimant is entitled. *See e.g. Torres v. Yoder Bros.*, 614 So. 2d 45 (Fla. 1st DCA 1993) (addressing statute regarding deauthorization of care in effect on date of accident).

Claimant's injury occurred on April 15, 1974. Consequently, the substantive law in effect at that time controls. Section 440.13(2), Fla. Stat. (1973), in relevant part, provides:

> If an injured employee objects to the medical attendance furnished by the employer, it shall be the duty of the employer to select another physician to treat the injured employee unless the division determines that a change in medical attendance is not for the best interests of the injured employee; provided that the division may at any time, for good cause shown, in its discretion order a change in such remedial attention, care, or attendance. It shall be unlawful for any employer or representative of any insurance company or insurer to coerce or attempt to coerce a sick or injured employee in the selection of a physician, or surgeon . . . that the sick or injured employee may require . . ." *Id.*

Here, Claimant never objected to the medical treatment provided by Dr. Keown. Consequently, under the law in effect at the time of Claimant's accident, the carrier had no authority to select another physician. Even if I were to apply the law in effect at the time the letters and "contract" were sent to Dr. Keown, under the facts of this case, the E/C did not have the right to change Claimant's physician, because it did not undergo any overutilization process.

The E/C's assertion that Claimant and his prior counsel acquiesced in Claimant's treatment with another physician and, in fact, selected the other physician is disingenuous. Neither Claimant nor his prior counsel was copied with the letters sent by Mr. Spangler to Dr. Keown. Thus, Claimant's prior counsel did not know the basis for Dr. Keown's "voluntary" withdrawal as Claimant's treating physician.

Essentially, the sole basis upon which the E/C now relies for not continuing to authorize Dr. Keown, is that, based on the "contract" between Mr. Spangler and Dr. Keown, Dr. Keown voluntarily stopped treating Claimant. However, Dr. Keown signed the "contract" to stop treating Claimant only because, based on the letters he received from Mr. Spangler, he believed he was under investigation for overutilization or violating Florida law for his treatment of Claimant. It is uncontested that the representations regarding an ongoing overutilization investigation were false. Dr. Keown has always been and remains willing to treat Claimant for his work accident related conditions as he has done for approximately 28 years, and but for the E/C's misleading representations, he would never have agreed to stop treating Claimant.

The E/C asserts that based on the "contract" between the E/C and Dr. Keown, any assertion or insinuation by Dr. Keown that he was coerced to stop treating Claimant constitutes a breach of contract. However, if the E/C believes it has a valid enforceable contract between itself and Dr. Keown, or that it did not obtain Dr. Keown's agreement to enter such contract through misrepresentation, or that such contract does not somehow violate public policy or legislative intent regarding the medical treatment the E/C provides to injured workers, the proper venue for such contract enforcement action is in circuit court. As the parties correctly note, the Judge of Compensation Claims lacks the jurisdiction to address the merits of such actions.

In sum, Claimant was satisfied with Dr. Keown and wants to continue treating with him. Dr. Keown wants to continue treating Claimant. The E/C's sole argument supporting its refusal to continue authorizing Dr. Keown is the "contract" between itself and Dr. Keown that Dr. Keown voluntarily withdrew from treating Claimant. The E/C obtained Dr. Keown's withdrawal by misleading and inaccurate representations, and without those misleading and inaccurate representations, Dr. Keown would have continued to treat Claimant.

Under these circumstances, I find good cause to order a change in Claimant's authorized treating primary care physician back to Dr. Keown, the physician with whom Claimant has had an established patient/physician relationship for approximately 28 years, as such change is in Claimant's best interest. *See generally, Cal Kovens Construction v. Lott*, 473 So. 2d 249 (Fla. 1st DCA 1985) (applying later version of statute and holding e/c may not interfere in an established physician/patient relationship through de facto deauthorization of care); *Williams v. Triple J Enterprises*, 650 So. 2d 1114, 1116 (Fla. 1st DCA 1995) (applying later version of statute and noting it is the Judge of Compensation Claims' responsibility to prevent such an injustice (de facto deauthorization of care), and she had the jurisdiction to do so).

Based on the foregoing, it is hereby **ORDERED** A**ND ADJUDGED** that:

1. The claim for continued authorization of Dr. Keown is **GRANTED.**
2. The claim for costs and attorney fees is **GRANTED.** Jurisdiction is reserved to determine the amount if the parties cannot agree.

DONE and ELECTRONICALLY SERVED this 1st day of April, 2014, in Chambers, in Alachua County, Florida.

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APPENDIX A

Relevant Stipulations

1. The Judge of Compensation Claims has jurisdiction over the parties.
2. An employer/employee relationship existed on the date of the accident.
3. Workers' compensation insurance coverage was in effect on the date of the accident.
4. The accident is accepted as compensable.
5. The neck, shoulder and back injuries are related to the accident.
6. The E/C will provide all benefits requested by Claimant in the November 5, 2013 Petition for Benefits, under the terms to which counsel stipulated at the hearing, with the exception of the claim for continued authorization of Dr. Keown, which will be tried on the merits.

Claimant Issues

1. Continued authorization of Dr. Kevin Keown to treat Claimant's compensable conditions, as the carrier inappropriately attempted to de-authorize this authorized physician.
2. Costs and attorney fees.

Employer/Carrier Defenses

1. All reasonable and medically necessary treatment has been and continues to be provided.
2. Advanced Healthcare remains authorized to treat Claimant and all appropriate medical treatment is being provided.
3. No costs or attorney's fees are due or owing.

Joint Exhibits

1. Deposition of James Deal taken November 14, 2013
2. Letters from Mark Spangler, Esquire to Dr. Kevin Keown

Claimant Exhibits

1. Deposition of Dr. Garland Martin, with attachments, taken March 4, 2014

Employer/Carrier Exhibits

1. Correspondence to Anthony Cortese, Esquire from Mark Spangler, dated December 19, 2006
2. Medical records from Advanced Healthcare

Judge Exhibits

1. Claimant trial memorandum (argument only)
2. E/C trial memorandum (argument only)

Live Testimony

1. James Deal
2. Debora Morrow