STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGES OF COMPENSATION CLAIMS
PORT ST. LUCIE DISTRICT OFFICE

Dianne Alexander,
Employee/Claimant,

vs.

St. Lucie Public Schools/Relation
Insurance Services of Florida,
Employer/Carrier/Servicing Agent.
_____/

OJCC Case No.: 19-013133KFO

Accident date: 12/11/2018

Judge: Keef F. Owens

FINAL COMPENSATION ORDER

This cause was heard before the undersigned in Fort Pierce, St. Lucie County, Florida on June 30, 2020, upon the Petition for Benefits filed on December 10, 2019 (Docket Number (DN) 28). Charles Wade, Esq. was present by telephone on behalf of the claimant. Gary M. Schloss, Esq. was present by telephone on behalf of the employer/servicing agent.

The issues which remained to be addressed at the time of the hearing included:

1. Authorization and payment of an alternative pain management specialist as claimant is dissatisfied with Dr. Slobasky.

2. Attorney's fees and costs.

The defenses raised included:

1. E/SA has authorized Dr. Miguel Rivera as the claimant's one time change in pain management physicians.

2. General denial as to attorney's fees and costs.

The following documentary items were received into evidence:

Judge's Exhibits:

Exhibit #1: Petition for Benefits filed on December 10, 2019 (DN 28).

Exhibit #2: Attachments to Petition for Benefits filed on December 10, 2019 (DN 29).

Exhibit #3: Response to Petition for Benefits filed on December 11, 2019 (DN 30).

Exhibit #4: Mediation Conference Report filed on March 26, 2020 (DN 32).

Exhibit #5: Uniform Statewide Pretrial Stipulation filed on April 21, 2020 (DN 33).

Exhibit #6: Pretrial Order and Notice of Final Hearing entered on April 21, 2020 (DN 34).

Exhibit #7: "Claimant's Trial Memorandum of Law" filed on June 26, 2020 (DN 46) (admitted for argument purposes only).

Exhibit #8: "Employer/Servicing Agent's Trial Memorandum" filed on June 26, 2020 (DN 49) (admitted for argument purposes only).

Joint Exhibits:

Exhibit #1: Deposition of Kathy Sears taken on June 10, 2020, and attachments filed on June 26, 2020 (DN 45).

Claimant's Exhibits:

None.

Employer/Servicing Agent's Exhibits:

Exhibit #1: "E/SA's Motion and Notice of Admitting Medical Records Pursuant to 440.29(4)" filed on May 29, 2020 (DN 41).

Exhibit #2: Medical records of Dr. Slobasky filed on June 26, 2020 (DN 48).

At the hearing, there were no live witnesses. In making my findings of fact and conclusions of law, I have carefully considered and weighed all the evidence presented to me. Although I will not recite in explicit detail the witness' testimony and may not refer to each piece of documentary evidence, I have attempted to resolve all of the conflicts in the testimony and evidence. Based on the foregoing and the applicable law, I make the following findings.

The undersigned has jurisdiction of the parties and the subject matter. The stipulations of the parties are adopted and shall become part of the findings of fact herein. The documentary exhibits offered by the parties are admitted into evidence and shall become part of the record, unless otherwise noted.

Factual background

The claimant, Dianne Alexander, was injured within the course and scope of her employment with St. Lucie Public Schools on December 11, 2018. As a result of her accident, the claimant received authorized pain management treatment with Dr. Michael Slobasky.

On December 9, 2019, the claimant's attorney sent a fax to the adjuster advising: "This is the Claimant's good faith effort to resolve the following issue(s): 1. Authorization and payment of an alternative pain management specialist as claimant is dissatisfied with Dr. Slobasky."

The following day, on December 10, 2019, the adjuster wrote: "I am in receipt of the attached one time change request in pain management physicians dated 12/9/19 and received on 12/10/19. Please be advised we are authorizing Dr. Miguel Rivera as Ms. Alexanders' one time change in pain management physicians and will advise of appointment date and time under separate cover." The adjuster agreed to authorize Dr. Rivera prior to confirming that Dr. Rivera would accept the claimant as a patient.

On December 10, 2019, the claimant's attorney filed a Petition for Benefits seeking the same benefit: "Authorization and payment of an alternative pain management specialist as claimant is dissatisfied with Dr. Slobasky."

A Response to Petition for Benefits was filed on December 11, 2019. It stated that a prior response to the good faith request was sent on December 9, 2019, which indicated the employer/servicing agent were authorizing Dr. Miguel Rivera.

The adjuster attempted to contact Dr. Rivera's office on December 11, 2019. She left a voicemail with his workers' compensation coordinator. The adjuster's note of that date states: "Contacted orthopaedic Center of Vero Beach to attempt to schedule an appointment with Dr. Rivera for one time change in pain management. Was transferred to WC coordinator, Taylor, and left a voice mail for a return call."

Dr. Rivera's workers' compensation coordinator responded to the message on December 16, 2019. She advised the adjuster that she must send the claimant's medical records for Dr. Rivera's review. The adjuster did so on the same day. She also sent a form that indicated that Dr. Rivera was authorized as a one-time change physician. The adjuster's note of that date indicates that Dr. Rivera's office instructed the adjuster to send the medical records "with authorization."

The next action on this issue did not occur until January 2, 2020. On that date, the adjuster attempted to contact Dr. Rivera's office to determine the status of the records review and to schedule the appointment. She left a message. The adjuster testified that she did not call back sooner because she assumed Dr. Rivera was still reviewing the records and she was waiting for a call from their office.

On January 6, 2020, the adjuster assigned a nurse case manager to assist with the medical management of the one-time change.

The nurse case manager contacted Dr. Rivera's office on January 7, 2020. A note of that date indicates that Dr. Rivera's office wanted to know whether the claimant would be agreeable to injections.

On January 9, 2020, Dr. Rivera's office left a voicemail for the nurse case manager advising that Dr. Rivera would see the claimant, but he would not provide pain medication. He would only order injections or physical therapy. The nurse case manager attempted to schedule an appointment on that date. However, when she spoke to Dr. Rivera's office on the same day, Dr. Rivera's staff advised that Dr. Rivera would no longer agree to see the claimant because the claimant was not interested in injections and Dr. Rivera would not prescribe pain medications across county lines.

As a result, on January 9, 2020, the nurse case manager contacted another physician. Specifically, she contacted Dr. Mark Rubenstein's office. Dr. Rubenstein also wanted to review the claimant's records. The records were sent to Dr. Rubenstein on January 9, 2020.

On January 13, 2020, Dr. Rubenstein's office contacted the employer/servicing agent and advised they agreed to accept care. An authorization form was sent by Dr. Rubenstein's office to the adjuster, and the adjuster signed the agreement and authorization and faxed it to Dr. Rubenstein's office on the same date.

On January 13, 2020, the nurse case manager sent a letter to the claimant's attorney advising of a February 3, 2020, appointment with Dr. Rubenstein. This was the first available appointment date.

The claimant refused to treat with Dr. Rubenstein and asserted that she had the right to choose the one-time change in physicians.

Legal analysis

The claimant seeks authorization of an alternative pain management physician. The employer/servicing agent's defense to this claim is that they timely authorized Dr. Miguel Rivera.

Section 440.13(2)(f), Fla. Stat., provides:

> Upon the written request of the employee, the carrier shall give the employee the opportunity for one change of physician during the course of treatment for any one accident. Upon the granting of a change of physician, the originally authorized physician in the same specialty as the changed physician shall become deauthorized upon written notification by the employer or carrier. The carrier shall authorize an alternative physician who shall not be professionally affiliated with the previous physician within 5 days after receipt of the request. If the carrier fails to provide a change of physician as requested by the employee, the employee may select the physician and such physician shall be considered authorized if the treatment being provided is compensable and medically necessary.

In the instant case, following the claimant's request for authorization of a one-time change in physicians, the employer/servicing agent advised the claimant that they were authorizing Dr. Miguel Rivera. Thirty days later, Dr. Rivera still had not agreed to treat the claimant. In fact, on that date, he advised that he refused to see the claimant. Due to Dr. Rivera's refusal to treat the claimant, the employer/servicing agent were compelled to select another pain management physician, Dr. Mark Rubenstein. The claimant refused to see this physician, arguing she had become entitled to select the one-time change.

The claimant makes two arguments. First, the claimant argues that because the doctor the employer/servicing agent ultimately provided was different from the doctor they initially authorized, the claimant is entitled to select the alternative physician. Second, the claimant argues that even if the employer/servicing agent are permitted to authorize a doctor and

subsequently provide a different doctor, the doctor they provided was not provided in a reasonable time.

With respect to the first argument, the claimant argues that under the very recent opinion of *City of Bartow v. Flores*, -- So. 3d -- (Fla. 1st DCA May 29, 2020), the employer/servicing agent must authorize the alternative doctor within five days following a request for a change in physicians and provide the doctor within a reasonable time. The claimant argues the doctor authorized must be the same doctor actually provided. In the instant case, the employer/servicing agent authorized Dr. Rivera but provided Dr. Rubenstein. As a result, the issue is whether the doctor provided and the doctor authorized must be the same in order for the employer/servicing agent to be entitled to select the alternative physician.

Once again, the relevant provision states: "The carrier *shall authorize* an alternative physician who shall not be professionally affiliated with the previous physician within 5 days after receipt of the request." (emphasis added). The plain language of the statute requires the carrier to "authorize" an alternative physician. The plain meaning of "authorize" is "to endorse, empower, justify, or permit by or as if by some recognized or proper authority." *Merriam Webster Dictionary* (2020 online ed.).

Accordingly, based on the plain language of the statute, and the plain meaning of "authorize," the statutory provision requires that within five days of the receipt of a request for a change in treating physicians, the employer/servicing agent must permit an alternative physician to treat the claimant. The statute does not provide that treatment must take place within five days, or event that an appointment must be coordinated within five days, only that permission to treat the claimant must be provided to the physician within five days.

This construction of the word "authorize" is consistent with the use of the word "authorization" in the statutory paragraph which immediately follows section 440.13(2)(f) and which addresses the same subject matter: the authorization of a physician. Specifically, the legislature's use of "authorize" in section 440.13(2)(f) should be considered in conjunction with section 440.13(3), Fla. Stat. The latter section explains the role of "authorization" of health care providers:

> (3) Provider eligibility; ***authorization***.—
>
> (a) As a condition to eligibility for payment under this chapter, ***a health care provider*** who renders services ***must receive authorization from the carrier*** before providing treatment. This paragraph does not apply to emergency care. (emphasis added).

This statutory provision makes it clear that it is the carrier that provides authorization, and it is the heath care provider that is granted authorization. The health care provider must receive authorization prior to providing treatment. Once the health care has received authorization from the carrier, they are "authorized" and they are considered an "authorized provider" and they may provide treatment.

This construction of the plain meaning of "authorize" and the statutory application of "authorization" is also consistent with the usage employed by the employer/servicing agent and the doctors' offices in this matter. The adjuster's notes state: "She [i.e., Dr. Rivera's staff] advised to either fax to her . . . or email to her . . . the medical records *with authorization* for Dr. Rivera's review . . . ." (12/16/19); "VM from Jessi/Rubenstein's office stating MD agreed to accept care, she is *sending the authorization* to Kathy." (1/13/20 note); "NCM faxed *the initial authorization* to eval/treat form to Dr. Rubenstein's office for the 2/3/20 appointment." (1/13/20

note) (emphasis added). In all of these contacts, consistent with section 440.13(3)(a), it is the carrier that authorizes and the physician that receives authorization.

Incidentally, the adjuster's notes reveal that authorization was not provided to any provider until at earliest December 16, 2019 (in the case of Dr. Rivera) and January 13, 2020 (in the case of Dr. Rubenstein). Stated another way, no doctor was authorized within five days of receipt of the request for a change in treating physicians.

The plain language of section 440.13(2)(f) does not state, with respect to the issue of authorization, that within five days of receipt of the request for a one-time change in treating physicians that the employer/servicing agent must simply advise the claimant of the identity of the physician they intend on authorizing at some point in the future. However, the case law is clear that this is how section 440.13(2)(f) is to be applied by the judges of compensation claims.

In *HMSHost Corp. v. Frederic*, 102 So. 3d 668 (Fla. 1st DCA 2012), the court held: "The E/C's informing Claimant of a particular doctor's name within five days of receiving the request satisfied section 440.13(2)(f), even though the E/C did not contact the doctor." In *Gadol v. Masoret Yehudit, Inc.*, 132 So. 3d 939, 940 (Fla. 1st DCA 2014), the court held: "An E/C timely responds by informing the claimant of the new doctor's name; a timely response does not require the E/C to actually contact or schedule an appointment with the new doctor." Most recently, the court has held: "Here, Claimant concedes that the E/C named an alternative physician and notified him of the physician's name within five calendar days of receipt of the written request. Thus, the third sentence of section 440.13(2)(f), requiring the carrier to timely 'authorize,' was satisfied." *City of Bartow v. Flores,* -- So. 3d -- (Fla. 1st DCA May 29, 2020).

There is no dispute that the employer/servicing agent advised the claimant within five days of her request that they intended to authorize Dr. Rivera. Accordingly, the undersigned is compelled to find that the employer/servicing agent "authorize[d] an alternative physician . . . within 5 days after receipt of the request."

One of the difficulties with equating authorization of a physician with advising the claimant of the name of a physician, as opposed to actually extending authorization to a physician and securing confirmation that the physician will actually agree to treat the claimant, is demonstrated in the instant case. Although the employer/servicing agent advised the claimant that they intended to authorize Dr. Rivera, Dr. Rivera refused to see the claimant. This was not determined until thirty (30) days after the claimant was advised that Dr. Rivera would be her authorized pain management physician.

Accordingly, for a period of at least thirty days, Dr. Rivera was the "authorized doctor" in this matter. He was deemed authorized as a matter of law because his name was provided to the claimant within five days of the request for a change. Yet Dr. Rivera never agreed to see the claimant, affirmatively refused to see the claimant, did not see the claimant, and will not be seeing the claimant.

This conundrum leads to the somewhat bizarre legal posture in which this matter comes before the undersigned. There is a single claim in this matter: authorization of a change in pain management physicians. There is a single defense in this matter: "E/SA has authorized Dr. Miguel Rivera as the Claimant's one time change in pain management physicians." As a result, the sole defense to the claim for a change of doctors is that the employer/servicing agent "authorized" a physician who has not, and will not, see the claimant.

It is in this context that the undersigned must determine whether the one-time change doctor actually provided to the claimant must be the same doctor initially identified by the employer/servicing agent within five days of the request for a change. It must be determined whether by naming Dr. Rivera within five days, but instead scheduling an appointment with Dr. Rubenstein on January 13, 2020, set to take place on February 3, 2020, the employer/servicing agent retained the right to choose the physician in this matter. The case law addressing section 440.13(2)(f) does not appear to address this factual pattern.

The statute itself also does not appear to address this issue. If the statute was intended to mean that the employer/servicing shall, in fact, authorize a physician within five days, then there would be no expectation that the doctor authorized by the employer/servicing agent would subsequently refuse to see the claimant. Accordingly, the statute would not need to address this contingency.

If "authorize" is construed to simply mean identifying the physician that the employer/servicing agent intend to serve as the change to the claimant, then the physician actually provided should be the same physician. First, part of the value of requiring the employer/servicing agent to identify the physician is that the claimant can contact the physician directly to determine the status of authorization (in the traditional sense of the word) and the scheduling of an appointment. If the claimant is given the name of a physician that will not treat him or her, then knowing that name is of little use to the claimant. In the instant case, the claimant was told she would be seeing Dr. Rivera. However, unbeknownst to the claimant, for a period of time the employer/servicing agent had abandoned the attempt to authorize Dr. Rivera and were attempting to authorize Dr. Rubenstein. During this period, the claimant was not

provided Dr. Rubenstein's name, did not know that Dr. Rubenstein was going to be authorized, and could not have contacted Dr. Rubenstein's office to determine the status of authorization.

Second, as argued by the claimant, if there is no relationship between the physician identified as the authorized provider by the employer/servicing agent within five days of the request and the physician the employer/servicing agent actually provide, then the five-day requirement is effectively meaningless. An employer/servicing agent could simply identify any physician within five days (without having made any effort to contact the doctor or confirm the doctor will treat the claimant) and simply provide a different physician at a later date. Carriers and servicing agents could simply provide any name within five days in order to preserve their right to select the doctor. This would be tantamount to simply acknowledging that the claimant has the right to a one-time change, which the First District Court of Appeal has already determined is not sufficient to retain the right to select the authorized doctor. *See Harrell v. Citrus County School Bd*., 25 So. 3d 675 (Fla. 1st DCA 2010) ("Allowing an E/C to comply with its statutory duty by generally acknowledging its statutory obligation to provide a change would emasculate the statute and the five-day time period.").

Pursuant to *City of Bartow v. Flores*, -- So. 3d -- (Fla. 1st DCA May 29, 2020), the employer/servicing agent have two obligations upon receipt of a request for a one-time change if they want to retain the right to select the doctor: (1) they must provide the claimant the alternative doctor's name within 5 days and (2) they must timely provide the doctor. If the doctor provided is not the doctor named by the employer/servicing agent within five days, then the first obligation is largely meaningless.

The employer/servicing agent argue that the claimant's interpretation of the statutory provision would mean that if within five days of the request for a change the employer/servicing agent identify a doctor who subsequently moves out of state or retires then they will lose the right to select the treating physician because the doctor that actually provides care will necessarily be different than the doctor the employer/servicing agent originally named. This result does not seem inappropriate. If the employer/servicing agent are so cavalier in selecting a physician that they choose a physician who has retired or relocated without any investigation as to that provider's availability, and if they identify that physician as the authorized provider, then they have effectively identified no physician at all.

Once again, this highlights the difficulties caused by defining "authorized" to mean simply giving a name to the claimant. If the name is of a physician who has retired or relocated, then the employer/servicing agent have simply provided the claimant with a name of a retired or relocated physician the claimant stands no chance of seeing. It strains the definition of "authorize" to characterize this factual pattern as "authorization." Presumably, if the employer/servicing agent actually contact the proposed provider in order to extend authorization, they will learn of the provider's plan to retire or other potential impediments to the actual receipt of care and they can choose another provider accordingly.

Advising the claimant that a physician is "authorized" when the physician refuses to see the claimant is of little benefit to the claimant and does little to satisfy the employer/servicing agent's obligation to provide medical care to the claimant. Requiring the physician identified by the employer/servicing agent within five days to be the same physician that actually provides

treatment to the claimant incentivizes the employer/servicing agent to identify a physician that will actually treat the claimant.

Accordingly, for all the foregoing reasons, I accept the claimant's argument that in order to retain the right to choose a treating physician, the physician actually provided must be the same physician that the employer/servicing agent identify within five days.

The undersigned shall address the claimant's alternate argument as well. The claimant argues that even if the doctor ultimately provided by the employer/servicing agent is permitted to be different than the doctor they initially advised was authorized, the doctor was not timely provided in this matter.

Pursuant to *City of Bartow v. Flores*, -- So. 3d -- (Fla. 1st DCA May 29, 2020), the undersigned must determine whether the employer/servicing agent timely provided Dr. Rubenstein: "Whether the E/C timely 'provides' the alternate physician and retains the right of selection is a fact-based question to be determined by the JCC." I find that Dr. Rubenstein was not provided in a timely manner.

In *Flores*, the court affirmed the judge of compensation claims' determination that the change in physicians was not timely provided. In *Flores*, the time from the request for a change until the date of the first appointment was 63 days. In the instant case, the time from the request for a change until the date of the first appointment was 56 days. Accordingly, the delay was very similar.

An examination of the facts of *Flores* reveals that the employer/servicing agent in the instant case were much more proactive, even if the result was approximately the same.

However, there was a significant gap in the instant case during which nothing was done to move the process of securing a new provider forward.

The records requested by Dr. Rivera were provided on December 16, 2019. No follow up was made until January 2, 2020, and that was only to leave a voicemail. Dr. Rivera's office was not successfully contacted until January 7, 2020. As a result, there was a period of sixteen (16) days when no effort was made to move the process forward and a period of twenty-one (21) days between actual contact. In the context of a statute which requires "authorization" within five days, it is difficult to characterize a 16-day period of inactivity as timely.

At that time, the claimant's medical records were in Dr. Rivera's possession for his review. The amount of records sent are not clear, but the medical records of Dr. Putney and Dr. Slobasky have been submitted to the undersigned and are only 44 pages in length. Accordingly, it does not appear that the delay was due to the need of the physician to review voluminous records.

It is recognized that the employer/servicing agent are somewhat dependent upon the physician's office in their effort to timely provide care. However, this does not mean that the employer/servicing agent can fail to timely provide care and attribute any delay to the physician's office. In some instances it may be necessary to prod the physician's office into action. This appears to be exactly what happened on January 7, 2020, when the nurse case manager contacted Dr. Rivera's office, and a decision was made by Dr. Rivera by January 9, 2020. Prior to that time (from December 16 through January 2), there was a gap of with no effort to follow up for a period of sixteen days.

The claimant requested a one-time change in treating physicians on December 9, 2019. Ultimately, the employer/servicing agent did not secure an agreement by a physician to treat the claimant until January 13, 2020. This was only the second physician the employer/servicing agent attempted to secure.

In considering whether the provision of care is timely, the effect of deauthorization should also be considered. Another difficulty with defining "authorize" to simply mean the date on which the employer/servicing agent advise the claimant of the name of the doctor they have selected to serve as the claimant's doctor and intend to authorize (even if they have made no contact with that doctor) is that the previously authorized doctor is immediately deauthorized.

This issue highlights an ambiguity within the statute. The statutory language includes two potential triggering clauses which cause deauthorization of the initial authorized provider:

> *Upon the granting of a change of physician,* the originally authorized physician in the same specialty as the changed physician shall become deauthorized *upon written notification by the employer or carrier*. (emphasis added).

This language could be read to mean that "upon the granting of a change of physician" (i.e., upon notice to the claimant of the identity of the physician the employer/servicing agent have selected to be the one-time change) the originally authorized physician is automatically deauthorized. Another interpretation of the language could be that the originally authorized doctor does not become deauthorized until there is "written notification by the employer or carrier" provided to the originally authorized doctor.

The former interpretation appears to be the controlling interpretation. *See City of Bartow v. Flores*, -- So. 3d -- (Fla. 1st DCA May 29, 2020) ("During this unreasonably long waiting period, Claimant was without authorized medical care *due to the automatic de-authorization of*

the treating physician."; "The second sentence instructs that upon a claimant's exercise of that right, *the authorized treating physician is automatically deauthorized*." (emphasis added)).

Based upon this construction, in the instant case, Dr. Slobasky became deauthorized on December 9, 2019. The employer/servicing agent were not able to secure an agreement with an alternative pain management physician to see the claimant until January 13, 2020, with an appointment date of February 3, 2020. Accordingly, the claimant went approximately 35 days without an authorized pain management provider.

The employer/servicing agent argue that the claimant could have returned to Dr. Putney in the meantime. However, it is unclear whether this would have been of much assistance to the claimant. The employer/servicing agent sent a questionnaire to Dr. Putney in which she opined that no medical treatment was required as a result of the claimant's work-related accident. The questionnaire is dated December 3, 2019. In any event, even if she returned to Dr. Putney, the claimant would have been without a pain management physician.

Having considered the above-referenced factors (and those identified in *Flores*) I find that the employer/servicing agent did not timely provide the alternative physician in this matter.

For all the foregoing reasons, I find that the claimant is entitled to select the one-time change in treating pain management physicians.

It is **ORDERED and ADJUDGED**:

1. The claim for authorization of an alternative pain management physician is granted. The employer/servicing agent shall authorize Dr. Anthony Rogers to serve as the claimant's pain management physician.

2. The claim for attorney's fees and costs is granted. The undersigned reserves jurisdiction over the amount of attorney's fees and costs in the event the parties cannot amicably resolve the same.

Done and electronically served on Counsel and Servicing Agent this 13th day of July, 2020, in Fort Pierce, St. Lucie County, Florida.

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