FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D19-3275

JOE SULLIVAN,

Appellant/Cross-Appellee,

v.

NUC02, LLC/BROADSPIRE,

Appellees/Cross-Appellants.

On appeal from an order of the Judge of Compensation Claims.
Robert L. Dietz, Judge.

Date of Accident: August 29, 2016.

December 9, 2020

PER CURIAM.

Claimant appeals the Judge of Compensation Claims' (JCC's) order apportioning his claim for impairment benefits (IBs) due under section 440.15(3)(c), Florida Statutes (2016), as well as his claim for medical care. The Employer/Carrier (E/C) cross-appeal the JCC's award of IBs based on a total permanent impairment rating (PIR) of 18% and his authorization of Dr. Steen to treat an aggravation of a preexisting shoulder condition. Because we find that the E/C, by operation of the 120-day rule in section 440.20(4), Florida Statutes (2016), waived the right to contest the compensability of the preexisting condition, we reverse the JCC's application of apportionment. At the same time, we affirm the issues on cross-appeal.

I.

In August 2016, Claimant injured his right shoulder in a compensable workplace accident. The initial MRI scan revealed significant preexisting changes and a massive rotator cuff tear. Dr. Leung, an authorized treating provider, recommended surgery. The E/C subsequently authorized Dr. Steen, an orthopedic surgeon, as Claimant's one-time change of physician under section 440.13(2)(f), Florida Statutes (2016). Dr. Steen performed right shoulder surgery in February 2017.

In January 2018, Dr. Steen placed Claimant at maximum medical improvement with an 18% PIR. In mid-March 2018, Dr. Steen signed a letter prepared by the E/C's attorney stating that the workplace accident aggravated Claimant's preexisting condition and that an apportionment of "60%/40% is reasonable." A few days later, Dr. Steen checked off the E/C's form indicating that the preexisting condition, not the workplace injury, was the major contributing cause (MCC) for any future medical care or work restrictions.[1] The next month, the E/C deauthorized Dr. Steen from providing further care and reduced Claimant's IBs under the apportionment provision of section 440.15(5)(b), Florida Statutes (2016).

Claimant filed petitions for benefits seeking full payment of IBs based on the 18% PIR and authorization of medical care with Dr. Steen for the right shoulder. In their defenses, the E/C asserted that IBs were properly apportioned based on Dr. Steen's opinion, that further orthopedic care was either not due or should be apportioned, and that the compensable workplace injury, which was limited to an aggravation of the preexisting condition, is no longer the MCC of the need for medical care. In response to the MCC defense, Claimant raised waiver under the 120-day rule in section 440.20(4).

[1] Dr. Steen retracted this opinion and testified that the workplace injury was, and remained, the MCC of Claimant's right shoulder condition.

II.

During the course of litigation, the JCC appointed Dr. Torres as an expert medical advisor (EMA) to address disagreements in medical opinion on certain issues, including apportionment, among Dr. Steen, Dr. Kollmer (Claimant's independent medical examiner (IME)), and Dr. Friedman (the E/C's IME). *See* § 440.13(9)(c), Fla. Stat. (2016) (providing that, when there is disagreement in medical opinion, the JCC must appoint an EMA, whose opinion is presumptively correct). Dr. Torres opined that the workplace accident permanently aggravated the preexisting condition and is the MCC of the need for treatment to include palliative care, but not future shoulder replacement surgery. He stated that authorization of either a pain management physician or an orthopedic surgeon would be appropriate to provide palliative care. He attributed 70% of the right shoulder condition to the workplace injury and 30% to the preexisting condition; nevertheless, he opined that 100% of the work restrictions were caused by the workplace injury.

Dr. Torres testified that the objective evidence of the preexisting condition was apparent before surgery was performed and that his "assumption would be that [the carrier was] aware of [Claimant's] pre-existing condition and agreed to provide the treatment based on the opinions of the treating physicians at the time." He indicated he did not know of any preexisting impairment and, in response to the JCC's specific question, would not add any additional PIR for the preexisting condition to the 18% PIR previously assigned by Dr. Steen. Although Dr. Torres assessed a total PIR of 12%, he could not say that Dr. Steen's 18% PIR was incorrect as it was based on the measurements Dr. Steen had at the time.

The JCC accepted Dr. Torres's EMA opinions on apportionment as presumptively correct and awarded IBs based on a 13% PIR (70% of the total 18% PIR). In addition to the apportioned IBs, the JCC awarded the authorization of Dr. Steen, but only to provide palliative care for the aggravation of the preexisting condition. He rejected Claimant's argument that, because the E/C accepted compensability of the preexisting

condition, as well as its aggravation, under section 440.20(4), apportionment is not available here.

III.

To the extent an issue turns on resolution of the facts, our review standard is CSE; to the extent it involves an interpretation of law, the standard is de novo. *See Benniefield v. City of Lakeland*, 109 So. 3d 1288, 1290 (Fla. 1st DCA 2013).

Under section 440.09(1), the "accidental compensable injury must be the major contributing cause [MCC] of any resulting injuries." Paragraph (b) of this section further provides that when a work-related injury combines with a preexisting disease or condition to cause or prolong disability or the need for treatment, the E/C must pay benefits "only to the extent that the injury arising out of and in the course of employment is and remains more than 50 percent responsible for the injury as compared to all other causes combined and thereafter remains the [MCC] of the disability or need for treatment." § 440.09(1)(b), Fla. Stat. (2016). This court has previously recognized that section 440.09(1)(b) applies when the need for treatment or benefits is caused by the combination of an employment accident with a preexisting injury or condition that is unrelated to the accident. *E.g., Pizza Hut v. Proctor*, 955 So. 2d 637 (Fla. 1st DCA 2007).

Here, the JCC accepted the E/C's defense that the workplace injury was limited to an aggravation of a preexisting condition and was no longer the MCC of the need for benefits. He rejected Claimant's waiver argument based on section 440.20(4), which states:

> If the carrier is uncertain of its obligation to provide all benefits or compensation, the carrier shall immediately and in good faith commence investigation of the employee's entitlement to benefits under this chapter and shall admit or deny compensability within 120 days after the initial provision of compensation or benefits as required . . . . Additionally, the carrier shall initiate payment and continue the provision of all benefits and compensation as if the claim had been accepted as

> compensable, without prejudice and without admitting liability. . . . A carrier that fails to deny compensability within 120 days after the initial provision of benefits or compensation . . . waives the right to deny compensability, unless the carrier can establish material facts relevant to the issue of compensability that it could not have discovered through reasonable investigation within the 120-day period.

According to Claimant, the E/C accepted, not just the aggravation, but also the preexisting condition as compensable, by providing related benefits and failing to deny compensability of the same before the end of the 120-day period.

As this Court previously explained:

> Once aware of the need for medical benefits for a particular condition or injury, the carrier has three options: pay, pay and investigate within 120 days, or deny. *Bynum Transp., Inc. v. Snyder*, 765 So. 2d 752 (Fla. 1st DCA 2000); *see also Kestel v. City of Cocoa*, 840 So. 2d 1141, 1142 (Fla. 1st DCA 2003). A condition or injury may be deemed compensable if the carrier begins payment for that condition or injury and fails to investigate within the 120 days, or fails to deny compensability within that time period. *Kestel*, 840 So. 2d at 1142.

Teco Energy, Inc., v. Williams, 234 So. 3d 816, 822 (Fla. 1st DCA 2017). The correct analysis for the application of the 120-day rule requires the following findings: (1) the date the E/C first provided the benefits; (2) the specific identity of the injury for which the benefits were provided; and (3) whether the E/C timely denied compensation of that injury within the 120-day period immediately following the first provision of benefits for that injury. *Id*. (citing *Sierra v. Metro. Protective Servs.*, 188 So. 3d 863, 867 (Fla. 1st DCA 2015)).

In this case, the JCC identified the correct analysis and made the following relevant findings:

> (1) . . . the carrier first provided benefits, in the form of authorized medical treatment, for the aggravation of the pre-existing right shoulder degenerative condition, on September 16, 2016, from Dr. Brien Leung; (2) . . . the identity of the condition for which treatment was authorized and provided included a full thickness tear of the supraspinatus tendons with moderate atrophy in both muscles, thickening and diffuse tendinitis in the subscapularis tendon, arthrosis and spurring on the right acromioclavicular joint, and a torn retracted biceps tendon based on the MRI performed September 26, 2016. The accepted authorized condition in the Pretrial was "aggravation of a pre-existing right shoulder degenerative condition". . . [;] (3) The [E/C's] denial following the receipt of Dr. Friedman's IME report of October 15, 2018 . . . was based on the accident no longer being the [MCC] of the compensable condition.

Although the JCC also found that the E/C were on notice that Dr. Leung was providing treatment for an aggravation of the preexisting condition "no later than the receipt of the September 26, 2016 MRI," and yet continued to treat this condition until October 2018, he concluded the 120-day rule did not apply.

But CSE does not support some of these factual findings, and the case law does not support the JCC's conclusions. Dr. Leung, one of the first treating physicians, never mentioned any preexisting condition in his medical reports. Thus, no evidence supports any implication in the JCC's first finding that the E/C affirmatively accepted the compensability of only an aggravation based on the express opinions of Dr. Leung. In contrast, CSE *does* support the JCC's finding that the E/C were on notice of the preexisting condition by virtue of the diagnostic test results. *See, e.g.*, *Mims v. Confederated Staffing*, 940 So. 2d 518, 520 (Fla. 1st DCA 2006) (reversing JCC's rejection of 120-day rule in light of medical records documenting preexisting condition because "[t]he statute does not . . . provide that the carrier have nothing less than actual notice, but rather that it have sufficient information to enable it to deny compensability within 120 days").

The record here contains no evidence the E/C undertook any investigation, or even actually recognized the existence of a preexisting condition despite being on notice, until their attorney contacted Dr. Steen in March 2018. It follows that the E/C never directed any provider to treat a work-related *aggravation* only or otherwise limited their authorization of treatment of the right shoulder. In fact, the JCC expressly found that the identity of the condition for which treatment was authorized and provided included *all* the findings shown in the initial MRI. Significantly, the E/C appear to concede that they limited their authorization to treatment of an aggravation only *after* they received Dr. Steen's response. At this point, of course, Claimant had undergone surgery and been placed at MMI. And, the E/C deauthorized Dr. Steen just one month later.

In short, the only evidence that the E/C limited their acceptance to an aggravation of a preexisting condition—and not the entire right shoulder condition to include both the aggravation and the preexisting condition—is their deauthorization of Dr. Steen in April 2018 and their unsupported assertion in the September 27, 2018, pretrial stipulation. Both of these events occurred more than 120 days after the E/C initially provided benefits for the preexisting condition as aggravated by the workplace accident. And, the E/C have not shown that they could not have discovered the material facts of this preexisting condition and its aggravation until after the running of the 120-day period. Thus, the E/C cannot deny compensability of the preexisting condition. *See* § 440.20(4), Fla. Stat. (2016).

The apportionment provision of section 440.15(5)(b), Florida Statutes (2016), states that:

> If a compensable injury, disability, or need for medical care, or any portion thereof is a result of aggravation or acceleration of a preexisting condition, or is the result of merger with a preexisting condition, *only the disabilities and medical treatment associated with such compensable injury shall be payable under this chapter*, excluding the degree of disability or medical conditions existing at the time of the impairment rating or at the time of the accident . . . .

(Emphasis added). Because the accepted compensable injury here includes the preexisting condition, in addition to the permanent aggravation caused by the workplace injury, apportionment does not, and cannot, apply. The JCC, therefore, erred when he apportioned the final PIR and limited medical authorization to treatment of the right shoulder aggravation.

IV.

On cross-appeal, the E/C challenge the JCC's acceptance of Dr. Steen's 18% PIR over the EMA's 12% PIR. In the final order, the JCC explained the EMA's PIR opinion was not in response to "a question submitted to him based on the disputes. As a result, it does not carry the presumption."[2] The JCC accepted the 18% PIR as "the initial stipulation of the parties based on Dr. Steen's calculations." This Court has held that a joint stipulation of the parties is binding on the JCC. *See, e.g., Marin v. Aaron's Rent To Own*, 53 So. 3d 1048, 1050 (Fla. 1st DCA 2010).

The E/C contend that the JCC erred in failing to accept the EMA's 12% rating as presumptively correct because this was a disputed issue and the subject of a disagreement in medical opinion. In the pretrial stipulation, the E/C listed Dr. Steen's 18% PIR, but added that an IME, yet to be announced, "has not assigned a PIR yet." But at the same time, the E/C defended the IB claim on the ground that these benefits were correctly paid "based on Dr. Steen's apportionment opinion that 40% of the claimant's 18% PIR was due to the claimant's personal, pre-existing medical condition." Although the E/C assert that they later tried, unsuccessfully, to amend the pretrial stipulation, the existing record does not provide enough information to show an attempt to add a defense expressly disputing the total 18% PIR.

[2] The parties appear to agree that the questions posed to the EMA did not expressly include this question. Although the E/C moved to add questions for the EMA, their motion listing these questions does not appear in the record.

The E/C also argue that the JCC erred when he awarded the claim for continued medical care with Dr. Steen because they have the right to control the selection of treating physicians. *See e.g., Carmack v. State, Dep't of Agric.*, 31 So. 3d 798, 800 (Fla. 1st DCA 2009) (holding that employer/carrier retain right to select physician even when care is wrongfully denied and that section 440.13, generally, has "long been interpreted to make clear that the employer controls the right of selection of the treating physicians" (*citing TW Serv., Inc. v. Aldrich*, 659 So. 2d 318, 322 (Fla. 1st DCA 1994))). But the E/C did select and authorize Dr. Steen in response to Claimant's request for a one-time change of physician.

Thus, the issue here is whether the E/C properly deauthorized Dr. Steen in April 2018. "[O]nce an injured employee establishes a satisfactory physician-patient relationship with an authorized physician, the employer/carrier may not deauthorize that physician without the employee's prior agreement or without the approval of the JCC." *Scott v. Bisanti Servs., Inc.*, 634 So. 2d 292, 294-95 (Fla. 1st DCA 1994) (*citing Stuckey v. Eagle Pest Control Co.*, 531 So. 2d 350 (Fla. 1st DCA 1988); *see also Marine Max, Inc. v. Blair*, 268 So. 3d 839 (Fla. 1st DCA 2019) (affirming continued authorization of treating physician because CSE supported JCC's findings that claimant established satisfactory patient-physician relationship and that employer/carrier did not have valid reason for deauthorization). As a general rule, unilateral deauthorization of an authorized treating physician is not permitted.

The statute and case law provide only a few exceptions to the general rule. The E/C contend that their deauthorization was valid because Dr. Steen indicated in March 2018 that the workplace injury was no longer the MCC of the need for medical care. A shift in the MCC could provide a valid reason, but the E/C did not ultimately prevail on this issue. Not only did Dr. Steen recede from this opinion, the EMA's testimony also establishes that the workplace injury was, and remains, the MCC for medical care. Although the EMA attributed the need for any future surgery to the preexisting condition, the E/C, as found here, waived the right to contest the compensability of this condition.

Accordingly, we REVERSE that portion of the JCC's order apportioning the claims for indemnity and medical benefits, AFFIRM the issues on cross-appeal, and REMAND for entry of an order consistent with this opinion.

RAY, C.J., and B.L. THOMAS and KELSEY, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

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