FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D20-3511

MICHAEL SHELTON,

Appellant,

v.

PASCO COUNTY BOARD OF
COUNTY
COMMISSIONERS/COMMERCIAL
RISK MANAGEMENT, INC.,

Appellees.

On appeal from an order of the Office of the Judges of Compensation Claims.
Edward R. Almeyda, Judge.

Date of Accident: February 13, 2008.

October 6, 2021

PER CURIAM.

We review an order of the Judge of Compensation Claims (JCC) denying Claimant's petition for impairment benefits. Claimant raises five issues on appeal. We affirm as to all but one without comment, reverse as to the JCC's failure to appoint an alternate expert medical advisor (EMA) after striking the

appointed EMA's opinions based on Claimant's *Daubert*[1] objection, and remand with instructions concerning the parties' stipulation regarding the left ventricular hypertrophy (LVH) condition.

Factual Background

Because of conflicts in the medical evidence[2], the JCC appointed an expert medical advisor. In the order on appeal, the JCC struck the EMA's testimony and denied the claims. Claimant moved for rehearing on various issues and argued that the JCC should have appointed a successor EMA and should not have ruled on the compensability *vel non* of the LVH because the parties stipulated at hearing that the LVH was compensable and not an issue for adjudication.

Discussion

Section 440.13(9)(c), Florida Statutes (2017), mandates the appointment of an EMA when a conflict exists in the medical evidence. Here, the EMA's appointment was necessitated because of several conflicts in the medical evidence and striking the EMA's testimony and report did not resolve those conflicts. Hence, the JCC should have appointed a successor EMA. *See e.g., Falk v. Harris Corp.*, 267 So. 3d 578, 579 (Fla. 1st DCA 2019) (because EMA offered no independent opinion regarding the medical issues in conflict, the JCC should have stricken him and appointed an alternate EMA).

At the beginning of the hearing, the parties stipulated that Claimant's LVH was compensable, and agreed this was no longer at issue; yet, the JCC in his final order found Claimant's LVH was not compensable. This Court has held that a joint stipulation of the parties is binding on the JCC. *Sullivan v. NuCO2, LLC/Broadspire*, 308 So. 3d 659, 664 (Fla. 1st DCA 2020) (citing

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[1] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), codified at section 90.702, Florida Statutes.

[2] The conflicts were the causal relationship of Claimant's LVH to the employment, the date of maximum medical improvement, and the correct impairment rating.

Marin v. Aaron's Rent To Own, 53 So. 3d 1048, 1050 (Fla. 1st DCA 2010)); *see also Sapp v. Berman Bros.*, 884 So. 2d 1080 (Fla. 1st DCA 2004) (stipulations should not be ignored or set aside without a showing of fraud, overreaching, misrepresentation, or some other basis that would void the agreement)). Accordingly, the JCC erred in finding the LVH was not compensable.

We therefore affirm in part, reverse in part, and remand to the JCC with instructions to appoint a successor EMA and approve the parties' stipulation regarding the Claimant's LVH.

AFFIRMED in part, REVERSED and REMANDED in part.

LEWIS, MAKAR, and BILBREY, concur.

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

Bill McCabe, Longwood, and Tonya A. Oliver, Tampa, for Appellant.

Warren K. Sponsler, Tampa, for Appellees.