047

IN THE SUPREME COURT

OF THE STATE OF FLORIDA

CLOYD E. CLAIR,

Petitioner,

v.

CASE NO. 83,213

GLADES COUNTY BOARD OF COMMISSIONERS and INSURANCE SERVICING & ADJUSTING COMPANY,

Respondents.

BRIEF OF RESPONDENTS

ON PETITION FOR REVIEW DIRECTED TO THE DISTRICT COURT OF APPEAL, FIRST DISTRICT OF THE STATE OF FLORIDA

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STATEMENT OF THE FACTS

Respondents, Glades County Board of Commissioners and Insurance Servicing & Adjusting Company, object to the Statement of the Facts in the Petitioner's initial brief as incomplete. This brief will refer to Petitioner/Appellant/Claimant as "Claimant," and to Respondents/Appellees/Employer-Carrier as "Employer/Carrier." The Claimant suffered a compensable back injury when she was working for the Glades County Sheriff's Department on November 3, 1983. (R 283). Before the accident, she had been a patient of Dr. Crowley, her chiropractor. (R 274). The Claimant had first seen Dr. Crowley in 1982, after injuring her back lifting heavy objects while moving down from up north. (R 126-28). After the Claimant injured her back at work in 1983, Dr. Crowley was initially authorized by the carrier to treat her. (R 274). She has received continuous and regular chiropractic treatment from Dr. Crowley since the 1983 accident. (R 274). Dr. Crowley believes that this type and frequency of treatment will be needed indefinitely. (R 124). Claimant was born in September, 1949, so she would have been thirty-four years of age on the date of the 1983 accident, and would be forty-four years of age as of the date of this brief. (R 61).

The issue to be determined by the Judge of Compensation Claims was whether the continuing treatment was reasonable and necessary under Section 440.13, Florida Statutes (1983). (R 274). The Claimant relied upon the deposition testimony of

Dr. Crowley to support her position that the continuing treatment was reasonable and necessary. (R 108-99, 274). The Employer/Carrier relied upon the deposition testimony of Dr. Conant, an orthopedic surgeon, and the deposition testimony of Dr. Arpin, a neurosurgeon. (R 201-39, 240-59, 274). The Claimant objected to the testimony of Dr. Conant regarding whether the treatment was reasonable and necessary based upon the assertion that the question regarding chiropractic care was outside of Dr. Conant's expertise and specialty. (R 218). No objection was made to the qualifications of Dr. Arpin to testify regarding whether the chiropractic care after March 9, 1989, was medically necessary. (R 248, 249). *See Clair v. Glades County Board of Commissioners,* 19 Fla. L. Weekly D222, D225 at n.6 (Fla. 1st DCA Jan. 25, 1994).

The compensation order emphasized particularly the testimony of Dr. Joy Arpin, a highly respected and leading neurosurgeon. (R 277). She diagnosed Claimant's condition as mild myofascial syndrome, which simply requires the Claimant to undertake an exercise program. (R 277). It was the opinion of Dr. Arpin that the type of exercises which would be most appropriate for the Claimant would be exercises which the Claimant could do for herself without assistance from therapists or a formal exercise program. (R 277). Dr. Arpin testified that the Claimant's reliance on weekly chiropractic treatment was not in her best interest and should be stopped.

(R 277). Instead of relying on unending chiropractic treatments, the Claimant should engage in the exercise program suggested by Dr. Arpin. (R 277). The chiropractic treatment has continued for an inappropriately long period of time, and the Claimant's only real hope for relief is found in self-exercise. (R 277).

Dr. Arpin testified that the Claimant had a normal examination, with no neurological signs. (R 244). The examination revealed no muscle spasms or trigger point problems. (R 244). In fact, the examination revealed nothing abnormal. (R 244). The Claimant's MRI scan was normal. (R 245). Her x-ray series and bone scan were also completely normal. (R 245). In another examination several years later, the Claimant's signs remained unchanged. (R 247). Her examination was normal, with normal motor sensory reflexes and normal flexibility of the lumbar and cervical spine. (R 247). Dr. Arpin testified that the diagnosis of mild myofascial syndrome remained unchanged from the 1988 examination until the 1991 examination. (R 247). The Claimant had refused to follow the exercise program prescribed by Dr. Arpin in favor of continued chiropractic care. (R 247). Dr. Arpin testified:

> Normal people don't need to have a chiropractor to manipulate them every week, and she's basically normal. And if she has mild muscle pain, she needs to exercise for it like everybody else who lives in this world has mild muscle pain

from time to time and the way to get through it is to exercise.

(R 250, L 17-22).

Dr. Arpin testified that the Claimant has never tried to exercise by herself, and that it was her opinion that the Claimant had not given exercise a fair chance. (R 251). No one requires ongoing care for mild myofascial stretch injuries (R 252). Any injury suffered by the Claimant in 1983 is completely healed, and the Claimant does not require chiropractic care or medical care for the healed injury. (R 252). Any injury the Claimant suffered in 1983 is now gone. (R 252).

Dr. Conant's testimony was consistent with the testimony of Dr. Arpin. (R 277). Since his testimony was based on medical records alone, his opinions were accepted over the opinions of Dr. Crowley only because they were consistent with the opinions of Dr. Arpin. (R 278). Dr. Conant testified that there was no medical necessity for any chiropractic treatment after April, 1984. (R 224).

The compensation order recognized that the testimony of Dr. Crowley regarding the reasonableness and necessity of chiropractic treatment conflicted with the testimony of Dr. Arpin and Dr. Conant. (R 278). The JCC resolved the conflict by accepting the opinion testimony of Dr. Arpin and Dr. Conant over the testimony of Dr. Crowley. (R 278). The order points out that the Claimant has received chiropractic care from Dr. Crowley for an extremely extended period of time for a soft

tissue injury. (R 278). The order recognized and accepted that the Claimant is still in constant pain. (R 278). This fact itself raises questions regarding the effectiveness of Dr. Crowley's treatment. (R 278). The JCC was concerned that the Claimant has foregone the recommended exercise in favor of weekly chiropractic treatments which offer only very temporary relief. (R 278). The JCC accepted Dr. Arpin's opinion that the Claimant needs an exercise program instead of this extraordinarily lengthy course of chiropractic treatment. (R 278).

STATEMENT OF THE CASE

The Employer/Carrier accepts the Statement of the Case in the Petitioner's initial brief as accurate, but point out that it is incomplete and that much of the information is irrelevant to this proceeding. The JCC accepted the testimony of a neurosurgeon and an orthopedic surgeon regarding whether continued chiropractic care was "medically necessary" under Section 440.13(2)(a), Florida Statutes (1983). (R 277-28). The Claimant had objected at one point to the qualifications of the orthopedic surgeon to testimony regarding whether chiropractic treatment was appropriate, reasonable and necessary. (R 218). Later in the deposition, Dr. Conant testified without objection that there was no medical necessity for any chiropractic treatment after April, 1984. (R 224). No objection was raised to the testimony of the neurosurgeon on the same issues. (R 248). Both medical physicians testified, also without objection, that there is no medical necesity for treatment of any injury which arose out of the 1983 incident. (R 220, 240, 252). The claim for payment of chiropractic charges was denied, and the Claimant filed a pro se notice of appeal on November 3, 1991. (R 278-79, 282-86).

After the parties had filed their briefs on the merits, the District Court entered an order on December 1, 1992. A copy of the order is included in the appendix to this brief. In the order, the Court stated that the briefs did not

adequately address the "fundamental issue" regarding whether Section 440.13 permits physicians outside the practicing peer group of the physician whose care is requested to opine as an expert that the requested care is not reasonable and necessary. The parties were directed to file supplemental briefs on this new issue. The Court subsequently entered an opinion affirming the compensation order, but certifying the following question as a question of great public importance:

> Whether Section 440.13, Florida Statutes, permits a physician, practicing outside the peer group of the physician whose care was authorized, to opine as an expert that the furnished care is not reasonable and necessary?

In the opinion, the Court apparently concluded that the statute contemplates that only a member of a physician's "practicing peer group" may testify regarding the medical necessity of treatment under the statute. Nonetheless, the Court found that it was bound by its own contrary decision rendered five months earlier in *Alford v. G. Pierce Woods Memorial Hospital*, 621 So. 2d 1380 (Fla. 1st DCA 1993). A copy of the *Alford* opinion is included in the appendix to this brief. Under *Alford*, a physician from a different peer group may not testify unless the record establishes that the expert has training and experience in the skills of the different discipline to establish that the witness is, in fact, an expert in that different discipline. The Court held that the JCC erred in relying upon the testimony of Dr. Conant. However, it held that under *Alford*, the JCC properly relied on

the opinion of Dr. Arpin because it must be assumed that Dr. Arpin was fully qualified to testify about chiropractic medicine based upon the failure of the Claimant to object to her qualifications to testify on that question.

In an opinion concurring in part and dissenting in part, Judge Kahn agreed that the decision is controlled by *Alford*. However, he could not agree with the majority that *Alford* was incorrectly decided. He also could not agree that anything in the case warrants certification to the Florida Supreme Court. He dissented from the suggestion that *Alford* was wrongly decided, and from the decision to certify the case. Judge Kahn reasoned that competent substantial evidence existed in the record to support discontinuation of care, including chiropractic care, and stated:

> A paucity of the majority opinion deals with the testimony of Dr. Conant and Dr. Arpin. These doctors did not merely state that weekly chiropractic treatment should be terminated. Dr. Conant testified that he saw no medical basis to support the finding of necessity for any treatment of the claimant after April 26, 1984. He supported this conclusion with a detailed assessment of the claimant's condition as of 1984. In May 1984, claimant had full trunk mobility and no neurological deficits. Subsequently she had full range of lumbar and cervical motion. She had no evidence of any radiculopathy or myelopathy. She was normal neurologically. Dr. Conant was unable to identify any objective basis for claimant's continuing subjective complaints after April 26, 1984. Dr. Joy Arpin, a board certified neurological surgeon practicing in Cape Coral, found claimant to be normal, with no neurological findings. Studies ordered

> by Dr. Arpin revealed a normal MRI scan, a normal dorsal spine,, a normal cervical spine, a normal lumbar spine, and a normal bone scan.
>
> 19 Fla. L. Weekly D224 (Kahn, J., concurring in part and dissenting in part).

The concurring and dissenting opinion reviewed the authority of medical, osteopathic, podiatric and chiropractic physicians under the applicable Florida Statutes. The opinion notes that the statutes qualify medical and osteopathic physicians in the broadest manner, and that their qualifications and licensure would appear to encompass those areas of practice allowable for podiatrists and chiropractors. The statutes do not suggest an automatic disqualification of medical doctors to give testimony such as the testimony upon which this JCC relied. It was the opinion of Judge Kahn that the task of the District Court was to determine whether the decision to deauthorize or authorize treatment is supported by competent substantial evidence without the rather rigid approach urged by the majority opinion.

The matter was never considered en banc by the First District Court of Appeal.

SUMMARY OF ARGUMENT

This case is not appropriate for discretionary review. A review of recent decisions of the First District Court of Appeal reveals an intra-district conflict. Judges Webster, Barfield, Kahn and Smith believe that an expert witness need not be a member of the "practicing peer group" of the physician in question in order to testify whether treatment is medically necessary. Judges Ervin and Zehmer disagree. The situation should be resolved by the District Court en banc under Fla. R. App. P. 9.331. The Employer/Carrier also objects to considering this issue which was never raised by the Claimant in the District Court or before the Judge of Compensation Claims. The issue was raised by the District Court after the briefs on the merits had been filed.

In order to avoid unnecessary repetition, the Employer/Carrier adopts the majority opinion in *Alford v. G. Pierce Woods Memorial Hospital*, 621 So. 2d 1380 (Fla. 1st DCA 1993), and the concurring and dissenting opinion of Judge Kahn in the instant case. In addition, the Employer/Carrier point out that the statutory definition of "medically necessary" is divided into two parts. In order to be "medically necessary," the specific service must be appropriate to the patient's diagnosis. Section 440.13(1)(c), Florida Statutes (1983). It is this portion of the statute which is at issue in this case. The second part of the definition of "medically necessary" relates to the general nature of the service itself, not the

appropriateness of the service to the patient's diagnosis. The service must be one which is widely accepted by the practicing peer group, should be based on scientific criteria, and should be determined to be reasonably safe. *Id.* The Employer/Carrier have never taken the position that the services rendered by Dr. Crowley would not be widely accepted by chiropractors in general. The concept of a "practicing peer group" relates to this facet of the statutory definition. It does not in any way limit the fact that in most cases, the determination of medical necessity will mean that the factfinder must determine whether the particular service is appropriate to the patient's diagnosis. The evidence in this case and the findings by the trier of fact indicate that the Claimant's diagnosis is mild myofascial syndrome. The evidence in this case and the findings of the trier of fact also indicate that the only appropriate treatment is home exercise, not decades of chiropractic treatment. There is competent substantial evidence in the record to support the determination that the Claimant's injury has healed completely, and that she is completely normal. The Claimant did not object to Dr. Arpin and Dr. Conant rendering their opinions regarding a diagnosis or the need for further treatment.

Dr. Arpin and Dr. Conant offer the Claimant a complete cure with minimal effort on her part. Dr. Crowley offers a lifetime of weekly chiropractic treatments. Judge Turnbull

had to make a determination of fact in this interdisciplinary dispute regarding how the Claimant's best interest should be served. He concluded, based upon competent substantial evidence, that continued chiropractic treatment was not appropriate to the diagnosis of mild myofascial syndrome.

The cases cited in the Claimant's brief on the merits and in this brief reveal that the Courts have determined the qualifications of expert witnesses in interdisciplinary disputes based upon the facts of each case. Where a chiropractor testifies about a need for psychiatric care, a problem arises. However, there is a substantial overlap in the types of injuries treated by orthopedists, neurosurgeons and chiropractors. Where there is a dispute among the disciplines, the law provides for a resolution of that dispute based upon the facts. Neither the letter nor the spirit of the statutory definition of "medically necessary" requires any particular qualifications for expert witnesses on the issue. The Judge of Compensation Claims exercises discretion in determining those qualifications, and that discretion is subject to appellate review. There is no basis for determining that the discretion was abused in this case in any way.

ARGUMENT REGARDING JURISDICTION

This case presents a unique situation of intra-district conflict which the District Court did not resolve by hearing or rehearing en banc. In *Alford v. G. Pierce Woods Memorial Hospital*, 621 So. 2d 1380 (Fla. 1st DCA 1993), Judge Ervin wrote a dissenting opinion in which he disagreed with the majority's interpretation of Section 440.13, Florida Statutes (1983). In the instant case, Judge Ervin is the only member of the panel who also participated in the *Alford* decision. In this case, Judge Ervin wrote the majority opinion, in which Judge Zehmer concurred. The majority opinion states that Judge Ervin's dissenting opinion in *Alford* was correct. The opinion paraphrases and refines the dissenting opinion in *Alford*. However, the Court did not go so far as to overrule *Alford*.

There is clearly a difference of opinion among the Judges of the First District Court of Appeal regarding the interpretation of this statute. Judge Smith sat on a panel with Judges Kahn and Webster in a case in which *Alford* was cited as authority for the proposition that an orthopedist may render an opinion on chiropractic care. *Spears v. Gates Energy Products*, 621 So. 2d 1386, 1387 n.2 (Fla. 1st DCA 1993). Judges Webster and Barfield (the majority in *Alford*) and Judges Kahn and Smith believe that an expert witness need not be a member of the "practicing peer group" of the physician in question in order to testify whether treatment is

medically necessary. Judges Ervin and Zehmer disagree. This situation is exactly the type of situation which should be resolved by the District Court en banc under Fla. R. App. P. 9.331. The fact that a majority of Judges on the First District bench did not order that the proceedings be determined en banc may be some indication that the *Alford* decision represents the opinion of that majority.

This Court has postponed its decision regarding jurisdiction. The Employer/Carrier respectfully suggests that this case is not a proper case for the Court to exercise its discretion to grant review. A denial of review would mean that the *Alford* decision is controlling. It would also indicate that this Court will not exercise its discretionary jurisdiction to resolve intra-district conflicts. If this Court takes jurisdiction under the circumstances, it would encourage the Judges who hold the minority view in intra-district conflict to seek to overrule the majority by certifying a question of great public importance in a case where the two Judges who hold the minority view happen to sit on a panel together. It would also encourage that certification in cases like this case, where the litigants never raised the question.

The Employer/Carrier also objects to consideration of this issue which was never raised by the Claimant in the District Court or before the Judge of Compensation Claims. The issue was raised solely by the District Court after the

briefs on the merits had been filed. The Employer/Carrier suggests that the Claimant did not preserve the issue for review by the District Court or by this Court.

ARGUMENT ON MERITS

WHETHER SECTION 440.13, FLORIDA STATUTES, PERMITS A PHYSICIAN, PRACTICING OUTSIDE THE PEER GROUP OF THE PHYSICIAN WHOSE CARE WAS AUTHORIZED, TO OPINE AS AN EXPERT THAT THE FURNISHED CARE IS NOT REASONABLE AND NECESSARY?

The majority in *Alford v. G. Pierce Woods Memorial Hospital*, 621 So. 2d 1380 (Fla. 1st DCA 1993), held that in determining whether any particular care is "medically necessary" under Section 440.13(2)(a), Florida Statutes (1983), a judge of compensation claims is not limited to considering the testimony of expert witnesses who are members of the same "practicing peer group" as the physician whose services are in question. The qualifications of an expert witness in a workers' compensation case are determined by the trier of fact, and the exercise of discretion in making that determination will not be reversed absent a clear showing of error. *Id.* at 1382. In *Alford*, the Court found that there was competent substantial evidence to support the finding that chiropractic manipulation would not be "medically necessary" under the statute because it would be inappropriate to that claimant's medical condition. The Court relied only upon the testimony of an orthopedic surgeon in making its determination of medical necessity. As recognized in both the majority opinion and in the concurring and dissenting opinion in the instant case, the *Alford* holding is directly applicable to the circumstances presented here. In order to avoid unnecessary

repetition, the Employer/Carrier adopt the reasoning of the majority opinion in *Alford*. They also adopt the reasoning expressed by Judge Kahn in his concurring and dissenting opinion in this case. Judge Kahn's opinion substantially expands upon the reasoning of *Alford* and applies that reasoning to this factual situation. The physicians in this case were clearly testifying within their areas of expertise, and there is nothing in the record to indicate that the Judge of Compensation Claims abused his discretion in considering their testimony when deciding whether further chiropractic care is "medically necessary" under the statute. There was but a single objection to all of the opinion testimony of Dr. Arpin and Dr. Conant, so the question was not preserved in any event.

Instead of simply echoing the opinions of Judges Webster, Barfield and Kahn, the Employer/Carrier offer this further analysis. Section 440.13(2)(a) provides that an employer must furnish such treatment as is "medically necessary." The only connection between the term "medically necessary" in the statute and any consideration of a "practicing peer group" is contained in the statutory definition of "medically necessary" under Section 440.13(1)(c), which states:

> "Medically necessary" means any service or supply used to identify or treat an illness or injury which is appropriate to the patient's diagnosis, consistent with the location of service and with the level of care provided. The service should be widely accepted by the practicing peer group, should be based on

> scientific criteria, and should be determined to be reasonably safe. The service may not be of an experimental, investigative, or research nature, except in those instances in which prior approval of the division has been obtained. The division shall promulgate rules providing for such approval on a case-by-case basis when the procedure is shown to have significant benefits to the recovery and well-being of the patient.
>
> Section 440.13 (1)(c), Florida Statutes (1983).

Neither the District Court nor the Claimant have addressed the fact that there are two distinct parts of that statutory definition. Before a service is "medically necessary," it must be appropriate to the patient's diagnosis. That factor is the critical factor in this case, because Dr. Arpin and Dr. Conant testified that the treatment was not appropriate to the Claimant's diagnosis. There is competent substantial evidence in the record to support the determination that the Claimant's injury has healed completely, and that she is completely normal.

The language in the statutory definition regarding "practicing peer group" has nothing to do with this case at all. The Employer/Carrier have not objected to the services in question as not being widely accepted by the "practicing peer group," not reasonably safe, experimental, investigative or in the nature of research. That facet of the statutory definition of "medically necessary" was never an issue in this case at any time. It relates to the nature of the medical service in general, not the appropriateness of that service

for the particular claimant's diagnosis. An employer/carrier is not required to provide services which are not widely accepted by the practicing peer group. The Employer/Carrier in this case has never argued that the services rendered by Dr. Crowley are widely not accepted by chiropractors. However, they dispute that weekly chiropractic treatment for fifty or more years is appropriate to this patient's diagnosis, since the diagnosis is that she suffers from nothing more than ordinary, mild muscle pain. The Claimant can cure this minor problem by performing some exercises which Dr. Arpin suggested. She does not need treatment of any kind, so Dr. Crowley's services are not appropriate for the Claimant's diagnosis.

The Petitioner's entire argument is based upon the representation made in the first sentence of the first full paragraph on page 12 of her brief. In that sentence, she interprets Section 440.13(1)(c), in the following manner:

> Therefore when a patient requests a certain type of treatment by a physician licensed under the appropriate section pursuant to 440.13(1)(f), determining whether treatment is medically necessary or not is to be made by the "practicing peer group" as the treatment must be accepted by same.
>
> (Brief at 12).

There is nothing in the statute which even remotely indicates that the determination of whether treatment is medically necessary is to be made by the "practicing peer group." In connection with any consideration of "practicing peer group,"

the statute rejects as not "medically necessary" any services which are not widely accepted by that practicing peer group. There is nothing in the statute which limits diagnosis of the Claimant's injury or illness to members of any "practicing peer group." The fact that the statute expressly limits the considerations of a "practicing peer group" to determining the nature of services instead of the medical necessity of services indicates that the legislature did not intend to impose any mechanical requirements upon a judge of compensation claims in determining whether particular treatment is appropriate to the patient's diagnosis.

The question presented to the Judge of Compensation Claims in this case was whether Dr. Crowley's treatment was appropriate to the patient's diagnosis. Both Dr. Arpin and Dr. Conant testified regarding the claimant's diagnosis without any objection as to their qualifications to testify. There also was no objection to the qualifications of either physician to testify that chiropractic manipulation was not in the Claimant's best interest. There was no objection to the testimony by Dr. Arpin and Dr. Conant regarding their competence and qualifications to testify that the Claimant could cure this minor problem by a simple exercise program. Both Dr. Conant and Dr. Arpin testified that the Claimant's minor injury from 1983 had completely healed. There was no objection to their qualifications or competence to testify regarding this fact. The testimony of Dr. Arpin and Dr.

Conant constitutes competent substantial evidence to support the determination that the continued and endless treatments by Dr. Crowley were not appropriate to the Claimant's diagnosis of mild myofascial syndrome. Judge Turnbull had to decide between the diagnoses by Dr. Arpin and Dr. Conant on the one hand and Dr. Crowley on the other. He accepted the diagnosis as determined by Dr. Arpin and Dr. Conant, and rejected Dr. Crowley's diagnosis. It is a simple fact that the decades of weekly treatment proposed by Dr. Crowley would be inappropriate for this Claimant's diagnosis.

Both the letter and the spirit of the statute were followed. In this case, the real question to be decided by the Judge of Compensation Claims was one of the best interest of the Claimant. Dr. Arpin and Dr. Conant offer the Claimant a complete cure with minimal effort on her part. Dr. Crowley offers a lifetime of discomfort and weekly chiropractic treatments. While it is true that the statutes are interpreted liberally in favor of the Claimant, the law must be administered and interpreted in fairness to both sides. *State ex rel. Iowa National Mutual Insurance Company v. Florida Industrial Commission,* 151 So. 2d 636, 640 (Fla. 1963). The "most favorable remedy" concept does not mean that a claimant is entitled to whatever he or she may want. A claimant should be treated in such a manner that his or her best interest is served. In the instant case, the impartial trier of fact had to make a determination regarding how that

best interest should be served. The Claimant does not want to exercise in order to relieve her minor problem. The Employer/Carrier does not want to pay for fifty years of weekly chiropractic treatments where the injury from 1983 has completely healed, and where the Claimant has refused to follow a simple exercise program which would give her complete relief. The trier of fact came to the obvious conclusion that Dr. Crowley's continued chiropractic treatment was not medically necessary or appropriate to the diagnosis of mild myofascial syndrome. That decision was made by an impartial Judge after reviewing the arguments and evidence presented by both sides of the controversy. The Claimant cannot argue that there is no competent, substantial evidence to support a finding that continued care is not medically necessary for this Claimant's diagnosis. The diagnosis is that the injury has healed completely. There was no objection to the opinions which apprised the Judge of that diagnosis. There is no evidence which would support a determination that continued care is necessary if that diagnosis is accepted.

This case is not a "standard of care" case, in which a physician is called to testify regarding the quality of care rendered by a physician from another specialty. Nonetheless, the standard of care cases are instructional. In those cases, the expert witness invades the other physician's specialty to render an opinion regarding the standard of care for that specialty. Dr. Conant and Dr. Arpin did not render an opinion

regarding the standard of care for chiropractic physicians. In fact, there is nothing in the record regarding the standard of care for chiropractic physicians, since the standard of care was not at issue. The question presented to the trier of fact was whether continued treatment for this healed injury was medically necessary. It is a simple fact that no treatment is appropriate to or causally related to the 1983 accident. The testimony of Dr. Arpin and Dr. Conant related to the diagnosis of the Claimant, and not to the quality of care rendered by Dr. Crowley.

While the Claimant cites a number of cases where the Courts have not permitted testimony by one specialist regarding another specialty, a review of those cases indicates that they provide no guidance for this situation. The result in each case was dictated by the particular facts. The Claimant also overlooks the fact that there are even more cases where the contrary result was reached. *Infra*. In *Faife v. L. Luria & Son,* 587 So. 2d 610 (Fla. 1st DCA 1991), the First District Court held that a chiropractor is not qualified to address psychiatric problems. The Employer/Carrier suggests that there would be very little overlap between conditions treated by a psychiatrist and conditions treated by a chiropractor. In the instant case, no one has disputed that there is a substantial overlap between the fields of neurosurgery and orthopedic surgery and the field of chiropractic medicine, and that chiropractors, neurosurgeons

and orthopedic surgeons are qualified to diagnose this type of problem. The situation in *Caldwell v. Halifax Convalescent Center,* 566 So. 2d 311 (Fla. 1st DCA 1990), is similar, where the Court held that an orthopedist was not competent to testify regarding the need for psychiatric care. In *Norrell Corp. v. Carle,* 509 So. 2d 1377 (Fla. 1st DCA 1987), the Court held that a surgeon could not render an opinion on the question of the cause of the Claimant's depression, because that diagnosis went beyond his area of expertise. In the instant case, no one has disputed that both Dr. Arpin and Dr. Conant may properly evaluate and diagnose the Claimant's condition. *Romero v. Waterproofing Systems of Miami,* 491 So. 2d 600 (Fla. 1st DCA 1986), similarly involved a surgeon who expressed an opinion regarding the need for psychiatric care, where the opinion went beyond the surgeon's area of expertise. Finally, in *Metropolitan Transit Authority v. Bradshaw,* 478 So. 2d 115 (Fla. 1st DCA 1985), the Court held that the chiropractor could not testify regarding the need for psychiatric help, because the opinion went beyond the chiropractor's expertise. The situation is the same as the situation in *Faife, supra.*

In *Catron v. Bohn,* 580 So. 2d 814 (Fla. 2d DCA 1991), *review denied,* 591 So. 2d 183 (Fla. 1991), the Court found that in a proper case a neurologist may testify regarding the standard of care for a chiropractor, because a neurologist practices in "a related field of medicine." *Id.* at 518-19.

The Court noted that the evidence and the applicable statutes defined the practice of chiropractic in such a manner that it clearly was a "related field of medicine" to neurology, thereby qualifying the neurologist to testify. 580 So. 2d at 819. The applicability of the Court's reasoning to the instant case is apparent, even though Dr. Arpin is a neurosurgeon instead of a neurologist.

In *Green v. Goldberg*, 630 So. 2d 606 (Fla. 4th DCA 1993), the Court cited *Catron v. Bohn* for the proposition that the statute regarding the standard of care in a medical malpractice action does not exclude a specialist in one field from testifying against a specialist in another field. In that case, an oncologist was permitted to testify regarding the standard of care for a surgeon in diagnosing breast cancer. In *Mezrah v. Bevis*, 593 So. 2d 1214 (Fla. 2d DCA 1992), the Court held that a pathologist could testify regarding the standard of care for a gynecologist. In *Hernandez v. Virgin*, 505 So. 2d 1369 (Fla. 3d DCA 1987), the Court held that two anesthesiologists should have been permitted to testify regarding the standard of care for an orthopedic surgeon, where the claim of negligence arose from actions taken in an operating room after a life-threatening emergency arose. The trial court in *Wright v. Schulte*, 441 So. 2d 660 (Fla. 2d DCA 1983), *review denied*, 450 So. 2d 488 (Fla. 1984) was held to have erred in refusing to allow a

pathologist to testify regarding the standard of care for a surgeon.

The only Florida case, other than *Alford,* which is particularly relevant to the issue presented in this case is *Van Sickle v. Allstate Insurance Company,* 503 So. 2d 1288 (Fla. 5th DCA 1987). In that case, the question was whether particular chiropractic care and treatment was "reasonable and necessary" as required by the restrictive wording in an insurance policy. The Court noted that the question involved an opinion as to whether the care was "reasonable and necessary," and not an opinion as to the prevailing standard of care. 503 So. 2d at 1288 n.2. The Court held that an expert in orthopedic medicine is not, for that very reason, unqualified from being sufficiently knowledgeable about chiropractic healing as to render an expert opinion on the reasonableness of chiropractic care and treatment in a particular case. The Court noted that expertise in the field of orthopedic medicine may be relevant to expertise on the necessity and reasonableness of chiropractic care and treatment in a particular case, and that a particular orthopedic surgeon may be possessed of "special knowledge or skill" about chiropractic healing to qualify him or her as an expert witness under Fla. R. Civ. P. 1.390(a) or Section 90.702, Florida Statutes (1985). The Court held that the qualifications of an expert witness and the perimeters of his expertise are conclusions of fact to be determined by the

trial judge, and that those conclusions would be affirmed on appeal if supported by competent evidence.

The applicability of the holding in *Van Sickle* is apparent. However, the opinions of Dr. Arpin and Dr. Conant impose into the field of chiropractic medicine less than the opinion of the expert in *Van Sickle*. Dr. Arpin and Dr. Conant merely testified under the statute regarding whether continued care is medically necessary for the Claimant. The Claimant's injury has healed, and continued care is unnecessary. The physicians testified regarding the Claimant's diagnosis, and whether any treatment was appropriate to that diagnosis. The qualifications of the witnesses to testify on those issues was never questioned. The determination by the Judge of Compensation Claims that those two physicians were competent to testify is supported by competent substantial evidence. The inquiry should end at that point. Although the Claimant represents at the bottom of page 15 of her brief that no court has considered the exact combinations of physicians at bar, the Claimant apparently has overlooked *Van Sickle*. The Claimant also has overlooked the decision in *Catron v. Roger Bohn, D.C., P.A., supra*, regarding the overlap between disciplines.

The extensive reference by the Claimant to utilization review is clearly inappropriate. This case does not involve a claim of overutilization. While it is true that Section 440.13(1)(g), Florida Statutes (1983), authorizes review by a

peer review committee for cases where there is a claim of "overutilization," this case does not involve such a claim. At the hearing before the Judge of Compensation Claims, the parties stipulated that this case does not involve a claim of overutilization, and that no administrative remedy was appropriate. (R 14-16). The issue raised by the Claimant and tried by the Judge of Compensation Claims was whether continued care was medically necessary for this healed injury. The Claimant cannot at this point go back and assert a failure to exhaust administrative remedies.

Contrary to the Claimant's argument on page 14, the carrier has not attempted to prove that the chiropractic care received by the Claimant was excessive, unreasonable and unnecessary. The issue presented to the Judge of Compensation Claims was whether continued treatment for the Claimant was medically necessary as defined by the statute. The statute contains no limitation on the nature of the testimony which may be considered by the Judge of Compensation Claims in making that factual determination. Neither the Claimant nor the majority opinion in the instant case has taken the position that Dr. Arpin and Dr. Conant were not fully qualified to testify that the continued care was medically necessary for the Claimant's diagnosis.

As the First District Court noted in *Ullman v. City of Tampa Parks Department*, 625 So. 2d 868 (Fla. 1st DCA 1993)(en banc), in workers' compensation cases it is appropriate to

encourage results that comport with logic and common sense, rather than results founded solely upon inelastic, judge-crafted rules. 625 So. 2d at 873. It comports with logic and common sense that inter-disciplinary disputes will arise in workers' compensation cases, where physicians from different disciplines have opposing views regarding the medical necessity of further treatment. There is no provision in the statutes for applying a mechanical rule that physicians from only one particular specialty may testify regarding the nature of treatment which is medically necessary for the claimant's diagnosis. The only mechanical rule which has even been suggested is found in the dissent in *Alford* and in the majority opinion in this case. The requirement is suggested but not imposed without any basis in the law, the facts or reason and logic. The majority in *Alford* and the concurring and dissenting opinion in this case properly hold that the determination of whether treatment is medically necessary for the Claimant's diagnosis is a question of fact to be decided by the Judge of Compensation Claims. The Judge of Compensation Claims must determine, within his or her discretion, whether a particular expert witness is qualified to testify regarding diagnosis and medical necessity under the circumstances. That discretion is reviewable for abuse, and the factual findings are reviewable based upon the competent substantial evidence rule. Any other conclusion is not based

upon the law, the facts or the best interest of the Claimant as determined by an impartial finder of fact.

CONCLUSION

The First District Court of Appeal erred in suggesting that its own decision in *Alford v. G. Pierce Woods Memorial Hospital* was decided incorrectly. Nonetheless, the Court reached the proper conclusion for the wrong reasons, and the Employer/Carrier, Glades County Board of Commissioners/Insurance Servicing & Adjusting Company request that the decision be affirmed or that review be denied.

Respectfully submitted,

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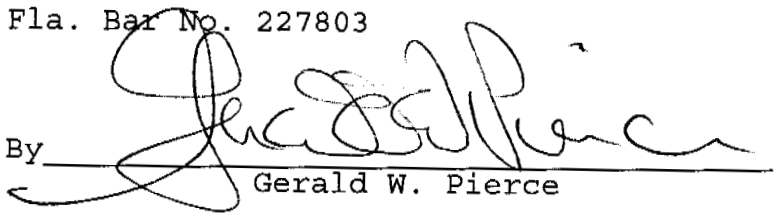
By 
Gerald W. Pierce

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by regular United States Mail to BRIAN C. BLAIR, ESQUIRE, 2138-40 Hoople Street, Fort Myers, Florida, 33901, this 31st day of March, 1994.

Gerald W. Pierce

IN THE SUPREME COURT

OF THE STATE OF FLORIDA

CLOYD E. CLAIR,

Petitioner,

v. CASE NO. 83,213

GLADES COUNTY BOARD OF
COMMISSIONERS and INSURANCE
SERVICING & ADJUSTING COMPANY,

Respondents.

APPENDIX TO
BRIEF OF RESPONDENTS

ON PETITION FOR REVIEW DIRECTED TO THE DISTRICT COURT OF APPEAL, FIRST DISTRICT OF THE STATE OF FLORIDA

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At that time, he released the claimant to return to work. As the JCC noted in the order:

> From April, 1990 through March, 1991 the Claimant admitted that he did not conduct a good faith job search during this time. Claimant testified that he took out various loans and sold several personal items in addition to attempting to engage in "horse trading" and classic car repairs. . . . In March, 1991 the Claimant began his own business, called Terra Tanks, in which the claimant built aquarium tanks and sold them to various pet shops in the area on a consignment basis.

Accordingly, competent substantial evidence also supports the finding that the claimant has set upon a course of self employment and voluntarily taken himself out of the employment market.

We reverse the finding that the claimant's "other current physical problems are not related to the injuries sustained by the claimant in his industrial accident of March 12, 1990." This finding is not supported by competent substantial evidence. The JCC cited the opinion of Dr. Greenberg in support of this determination. Dr. Greenberg did not see the claimant until approximately one month after the bicycle accident. Dr. Greenberg was not asked if any of the low back pain could be attributed to the industrial accident or if all of the low back pain was a result of the bicycle accident.

The claimant's primary current complaint is low back pain. The claimant testified that his low back complaints were no different after the bicycle accident than before. Dr. Beard testified that the claimant continued to have low back pain the last time he saw him prior to the bicycle accident and that the bicycle accident aggravated the low back problem, but he could not apportion between the two accidents. Dr. Beard also stated that the treatments subsequent to the bicycle accident through October 22, 1990 were reasonable and necessary as a result of the original industrial accident and that the claimant should have treatment after October 22, 1990. We therefore remand for further findings regarding whether any of the claimant's low back pain is related to the March 12, 1990 industrial accident, and, if so, payment of medical bills, including those for chiropractic treatments, incurred subsequent to the bicycle accident which were necessary due to the industrial accident.

Further findings are also necessary regarding authorization of future chiropractic treatment. This Court has recognized that a physician may render an opinion on the advisability or necessity of chiropractic treatment, if the physician is sufficiently informed of what treatment modality will be employed by the chiropractor. *See Alford v. G. Pierce Woods Memorial Hospital*, 621 So. 2d 1380 (Fla. 1st DCA 1993). In *Alford*, it was noted that there could be little question regarding the orthopedic surgeon's qualifications to offer opinion as to the likely effect of unusual or abnormal movement of the spine upon one suffering from arthritis in the spine. In the present case, Dr. Greenberg, a neurologist, testified that his recommendation would be to hold off on the chiropractic treatments because the claimant's symptoms seemed to intensify. Dr. Greenberg also testified, however, that he did not know the sort of treatment the chiropractor was providing.

Finally, we reverse the denial of payment of the outstanding medical bill of Mease Hospital. The JCC erroneously noted in the findings of fact that the claimant was seen at the Morton Plant Hospital emergency room on March 12, 1990. The record, however, indicates that the claimant was taken to Mease Hospital by ambulance after the automobile accident. We remand for further findings regarding payment of Mease Hospital.

AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings. (BOOTH, BARFIELD and ALLEN, JJ., CONCUR.)

* * *

Workers' compensation—Medical benefits—Chiropractic treatment—Judge of compensation claims properly relied on expert testimony of neurosurgeon in denying claims for continuation of chiropractic care—A physician of a different peer group from that of the physician sought to be authorized may be qualified as an expert to opine that the requested care is not reasonable and necessary—Question certified whether section 440.13, Florida Statutes, permits a physician, practicing outside the peer group of the physician whose care was authorized, to opine as an expert that the furnished care is not reasonable and necessary

CLOYD E. CLAIR, Appellant, v. GLADES COUNTY BOARD OF COMMISSIONERS and INSURANCE SERVICING & ADJUSTING COMPANY, Appellees. 1st District. Case No. 91-3997. Opinion filed January 25, 1994. An Appeal from an order of the Judge of Compensation Claims. Dan F. Turnbull, Judge. Dawn E. Perry-Lehnert of Harry A. Blair, P.A., Fort Myers, for Appellant. Gerald W. Pierce of Henderson, Franklin, Starnes & Holt, P.A., Fort Myers, for Appellees.

(ERVIN, J.) In this workers' compensation case, appellant/claimant appeals the judge of compensation claims' (JCC's) denial of her claims for continued palliative care with an authorized chiropractor, and payment of the chiropractor's outstanding bills, exercise equipment, membership in either a gym or a therapeutic exercise program, penalties, interest, costs, and attorney's fees. Because we consider that the issue in the instant case is controlled by the decision of this court in *Alford v. G. Pierce Woods Memorial Hospital*, 621 So. 2d 1380 (Fla. 1st DCA 1993), we affirm. Nevertheless, we also consider that, for the reasons expressed *infra*, *Alford* was incorrectly decided, and therefore certify a question to the Florida Supreme Court regarding whether a physician practicing outside the peer group of the physician authorized to treat an employee is qualified to offer an opinion that the continuation of such furnished care is not reasonable and necessary.

On November 3, 1983, appellant injured her back in a work-related accident, which was accepted by the employer/carrier (E/C) as compensable. In 1986, her right to future compensation benefits was settled by a lump-sum payment that did not affect her entitlement to future medical benefits. She continued to be treated by Dr. Crowley, a chiropractor. Subsequently the E/C discontinued payments of the chiropractor's bills and, in support thereof, produced the deposition testimony of Dr. Arpin, a neurosurgeon, and Dr. Conant, an orthopedic surgeon, both of whom stated that claimant's continued chiropractic treatment was neither reasonable nor necessary.

Appellant testified at the hearing that she continued to suffer pain in her back, legs, and shoulders, and the only relief she has received is temporary easement of the pain by the chiropractic treatments. Contrary to the testimony of Drs. Arpin and Conant, Dr. Crowley testified that continuing chiropractic care was in fact reasonable and necessary. In accepting the opinion testimony of Drs. Conant and Arpin over that of Dr. Crowley, the JCC noted that claimant had been furnished chiropractic treatment during an extremely long period of time for essentially a soft tissue injury, yet remained in constant pain. The judge considered that her ongoing pain raised a question concerning the continued effectiveness of Dr. Crowley's treatment. The judge also accepted Dr. Arpin's opinion that reliance upon weekly chiropractic treatment was not in the claimant's best interest and should be terminated, and that claimant's needs would be better served by her enrollment in an exercise program.

At the outset of the hearing on the claims, appellant's attorney specifically objected to the opinion testimony of Drs. Arpin and Conant, arguing that chiropractic physicians "should be judged by their own peers in that sense as to what's reasonable chiropractic care, not someone—outside that specialty that may have prejudice against that whole type of treatment and not understand it, even though they may be a medical doctor." Nevertheless, the JCC determined that further chiropractic care was not reasonable and necessary, based upon the opinion testimony of Drs. Conant and Arpin, and did not specifically address the argument claimant's attorney raised at the hearing.

Appellant, initially unrepresented by counsel on her appeal,

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filed a rambling, digressive brief which raised numerous points, including whether Dr. Crowley's treatment was properly denied, and whether her treatment was reasonable and necessary. Thereafter, an attorney filed a reply brief on appellant's behalf; but, after considering the briefs, and because *Alford*, which involved the same issue, was pending, we ordered the parties in the instant case to file supplemental briefs addressing the issue of whether Section 440.13, Florida Statutes, permits a physician, practicing outside the peer group of the physician whose care had been authorized, to opine as an expert that the furnished care is not reasonable and necessary.

In questioning whether Drs. Arpin and Conant are qualified to express such opinion, we note that Section 440.13(2)(a), Florida Statutes (1983),[1] provides in part:

> The carrier shall not deauthorize a health care provider furnished by the employer to provide remedial treatment, care, and attendance, without the agreement of the employer, unless a deputy commissioner determines that the deauthorization of the health care provider is in the *best interests of the injured employee. Any list of health care providers developed by a carrier* not including pharmacists from which health care providers are selected to provide remedial treatment, care, and attendance *shall include representation of each type of health care provider defined in s. 440.13(3)(d)1.d, Florida Statutes, 1981, and shall not discriminate against any of the types of health care providers as a class.*

(Emphasis added; footnote omitted.)

Section 440.13(3)(d)1.d, Florida Statutes (1981), referred to in subsection 1(2)(a) above, provides:

> "Health care provider" means a physician licensed under chapter 458, an osteopath licensed under chapter 459, a chiropractor licensed under chapter 460, a podiatrist licensed under chapter 461, an optometrist licensed under chapter 463, a pharmacist licensed under chapter 465, or a dentist licensed under chapter 466.

In our interpretation of the above provisions, we have stated that an E/C may be responsible for unauthorized medical care when a claimant has requested medical treatment by one of the classes of physicians described in the statute, but the E/C has instead offered alternative treatment from a different class, if it later appears that the requested treatment was reasonable and medically necessary. *Kirkland v. Harold Pratt Paving, Inc.*, 518 So. 2d 1320, 1324-1325 (Fla. 1st DCA 1987), *review denied*, 525 So. 2d 878 (Fla. 1988). For example, if an E/C extends only orthopedic or neurological care after a claimant has specifically requested chiropractic care, the E/C's offer "does not meet the statutory obligation to authorize a chiropractor in those instances where a claimant requests chiropractic care that is ultimately found to be reasonable and necessary." *Id.* at 1325. This does not mean that an E/C is required to offer a list of health care providers solely from the class of providers requested by an employee; however, the "carrier's list of health care providers must include a representative of each type of provider defined in Section 440.13(1)(f), Florida Statutes."[2] *Deriso v. Great W. Meats*, 534 So. 2d 748, 749 (Fla. 1st DCA 1988).

The above opinions clearly state that during the *selection* process of a requested list of physicians, discrimination against a specific requested class may occur if an E/C fails to offer a representative from such class. We consider that section 440.13 may also reasonably be interpreted as stating that discrimination occurs as well during the *deauthorization* process if a JCC relies upon the testimony of a physician practicing outside the peer group of the physician whose care was furnished in reaching any decision to deny such treatment. This conclusion, we think, is reinforced by reading the above provisions of subsections 440.13(2)(a) and 440.13(3)(d)1.d *in pari materia* with those of subsection 440.13(1)(c), defining the term "medically necessary" as

> *any service or supply used to identify or treat an illness or injury which is appropriate to the patient's diagnosis*, consistent with the location of service and with the level of care provided. *The service should be widely accepted by the practicing peer group*, should be based on scientific criteria, and should be determined to be reasonably safe.

(Emphasis added.)

The above provision requires the requested or supplied medical service to "be widely accepted by the practicing peer group." We consider, by examining the legislative reference to the term "peer,"[3] that it was not reasonably within the legislature's contemplation that physicians of one school of practice be deemed qualified to give opinions regarding the appropriateness of treatment provided by physicians of another school or community of practice. For example, section 440.13(1)(e) defines "peer review committee" as meaning "a committee composed of physicians *licensed under the same authority as the physician who rendered the services being reviewed.*" (Emphasis added.) Admittedly, the term "peer review committee" is not used in relation to a requested change or deauthorization of the health care provided an employee, but rather is specifically applied to review of overutilization of services rendered by health care providers; nonetheless, it appears that ordinarily only physicians of the same practice as the physician whose services are reviewed serve on peer review committees. *Cf. Lamounette v. Akins*, 547 So. 2d 1001, 1002 (Fla. 1st DCA 1989) (to determine whether chiropractic physician overutilized services rendered to an injured employee, the physician's records were submitted to the Chiropractic Peer Review Committee).

Our interpretation of section 440.13(3) is consistent with the general rule recognizing that physicians of one school of practice are incompetent to testify in malpractice actions against physicians of other schools regarding whether such physicians' treatments conformed with the requisite degree of skill and care in their practice areas. Defendants in such actions are entitled to limit such opinion testimony to that of competent practitioners of their own schools of medicine.[4] 61 Am. Jur. 2d *Physicians, Surgeons, & Other Healers* § 353 (1981).

In questioning whether physicians from a different licensed practicing peer group from that provided to the claimant are not qualified to express an opinion as to the reasonableness and necessity of the care furnished, we have not overlooked section 90.702 of the Florida Evidence Code, which broadly states that "a witness [may be] qualified as an expert by knowledge, skill, experience, training, or education,"[5] yet we find nothing in section 440.13 evincing any legislative intent to incorporate the provisions of section 90.702. It is a well-recognized statutory maxim that a more specific statute dealing with a particular subject (here section 440.13) controls over a statute that covers the same subject more generally. *Department of Health & Rehab. Servs. v. American Healthcorp of Vero Beach, Inc.*, 471 So. 2d 1312, 1315 (Fla. 1st DCA 1985), *opinion adopted*, 488 So. 2d 824 (Fla. 1986).

We are nevertheless constrained to affirm, based upon this court's prior decision in *Alford v. G. Pierce Woods Hospital*, holding that a physician of a different peer group from that of the physician sought to be authorized may be qualified as an expert under section 90.702 to opine that the requested care is not reasonable and necessary. Under *Alford*, there must be a showing on the record that an orthopedist, for example, has training and experience in chiropractic skills of sufficient magnitude to establish that the witness is, in fact, an expert in chiropractic medicine. *Alford*, 621 So. 2d 1380, 1382-83. *Accord Spears v. Gates Energy Prods.*, 621 So. 2d 1386, 1387 (Fla. 1st DCA 1993).

In the case at bar, the E/C failed to show that either Dr. Conant or Dr. Arpin was qualified to testify in the area of chiropractic medicine, as neither physician was asked a single question about his or her "knowledge, skill, experience, training, or education" in that field, as is required by section 90.702. *Alford*. Although claimant objected at deposition to Dr. Conant's lack of expertise to offer an opinion, she made no such objection during

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the deposition of Dr. Arpin, and thus failed to preserve the issue for appellate review in regard to Dr. Arpin's testimony.[6] We conclude, therefore, that the JCC erred in relying upon the expert testimony of Dr. Conant, but properly relied, under *Alford*, on the opinion of Dr. Arpin in denying the claims for continuation of chiropractic care, as we must assume that she was fully qualified to testify about chiropractic medicine.

Nevertheless, claimant did preserve the issue of whether section 440.13 permits a physician, practicing outside the peer group of a physician whose care has been authorized, to testify as an expert on the reasonableness of the furnished care, notwithstanding that such physician may be qualified to testify as an expert under 90.702. Accordingly, because it appears that the issues raised in both this case and in *Alford* may be recurring, we certify the following question to the Florida Supreme Court as one of great public importance:

WHETHER SECTION 440.13, FLORIDA STATUTES, PERMITS A PHYSICIAN, PRACTICING OUTSIDE THE PEER GROUP OF THE PHYSICIAN WHOSE CARE WAS AUTHORIZED, TO OPINE AS AN EXPERT THAT THE FURNISHED CARE IS NOT REASONABLE AND NECESSARY?

AFFIRMED. (ZEHMER, C.J., CONCURS. KAHN, J., DISSENTS WITH OPINION.)

(KAHN, J., concurring in part and dissenting in part.) This case is controlled by *Alford v. G. Pierce Woods Memorial Hospital*, 621 So. 2d 1380 (Fla. 1st DCA 1993), and accordingly I concur in affirmance. I cannot agree with the majority, however, that *Alford* was incorrectly decided; nor can I agree that anything raised in this case warrants certification to the Florida Supreme Court. Accordingly, I dissent from the suggestion that *Alford* was wrongfully decided, and from the decision to certify this case to the supreme court.

A paucity of the majority opinion deals with the testimony of Dr. Conant and Dr. Arpin. These doctors did not merely state that weekly chiropractic treatment should be terminated. Dr. Conant testified that he saw no medical basis to support the finding of necessity for any treatment of the claimant after April 26, 1984. He supported this conclusion with a detailed assessment of the claimant's condition as of 1984. In May 1984, claimant had full trunk mobility and no neurological deficits. Subsequently she had full range of lumbar and cervical motion. She had no evidence of any radiculopathy or myelopathy. She was normal neurologically. Dr. Conant was unable to identify any objective basis for claimant's continuing subjective complaints after April 26, 1984. Dr. Joy Arpin, a board certified neurological surgeon practicing in Cape Coral, found claimant to be normal, with no neurological findings. Studies ordered by Dr. Arpin revealed a normal MRI scan, a normal dorsal spine, a normal cervical spine, a normal lumbar spine, and a normal bone scan.

The JCC accepted the testimony of Drs. Conant and Arpin. Thus, competent substantial evidence exists in this record to support discontinuation of care, including chiropractic care.

In a recent unanimous pronouncement of this court, sitting en banc, we stated, "In workers' compensation cases, as in civil cases, we are mindful of the need to encourage results that comport with logic and common sense, rather than results founded solely upon inelastic judge-crafted rules." *Ullman v. City of Tampa Parks Department*, 625 So. 2d 868, 873 (Fla. 1st DCA 1993). Since I subscribe to this reasoning, I find it necessary to consider the consequences of the majority's suggestion that deauthorization must be based upon testimony of a physician licensed under the same authority as the physician who rendered the services being reviewed. Slip Op. 7. Such a limitation, while applicable to peer review committees, is not applicable to the JCC's determination as to the appropriateness of care, nor is the majority's reasoning in this regard supported by the various statutes regulating Florida physicians and referenced by the majority at Slip Op. 5.

A medical doctor in Florida is authorized to diagnose, treat, operate, or prescribe *for any human disease, pain, injury, deformity, or other physical or mental condition* (e.s.). § 458.305, Fla. Stat. (1993). Osteopathic physicians have "the same rights as physicians and surgeons of other schools of medicine with respect to the treatment of cases or holding of offices in public institutions." § 459.011(2), Fla. Stat. (1993).[7] Practitioners of podiatric medicine in Florida may engage in "the diagnosis or medical, surgical, palliative, and mechanical treatment of ailments of the human foot and leg, and may prescribe drugs that relate to this scope of practice." § 461.003(3), Fla. Stat. (1993).

The definition of practice of chiropractic, which is the field involved in the present case, is far more specifically delineated by the Florida Statutes. In general, a chiropractic physician may "examine, analyze, and diagnose the human living body and its diseases by the use of any physical, chemical, electrical, or thermal method; use the xanthene for diagnosing; phlebotomize . . .; and use any other general method of examination for diagnosis and analysis taught in any school of chiropractic." § 460.403(3)(b), Fla. Stat. (1993). Chiropractic physicians may "adjust, manipulate, or treat the human body by manual, mechanical, electrical or natural methods; by the use of physical means or physiotherapy, including light, heat, water, or exercise; by the use of acupuncture; or by the administration of foods, food concentrates, food extracts, and proprietary drugs and may apply first aid and hygiene, but chiropractic physicians are expressly prohibited from prescribing or administering to any person any legend drug, from performing any surgery (except as specifically provided in the statute), or from practicing obstetrics." § 460.403(3)(c), Fla. Stat. (1993). Chiropractic physicians "may analyze and diagnose physical conditions of the human body to determine the abnormal functions of the human organism and to determine such functions as are abnormally expressed and the cause of such abnormal expression." § 460.403(3)(e), Fla. Stat. (1993).

A review of these statutory standards reveals that medical doctors and osteopathic physicians are qualified and licensed in the broadest manner. Their qualifications and licensure would appear to encompass those areas of practice allowable for podiatrists and chiropractors. The regulatory statutes do not, then, suggest an automatic disqualification of medical doctors to give testimony such as that relied upon by the JCC in this case. Moreover, under the suggestion of the majority, two board-certified orthopedic surgeons, one licensed as an osteopath and one licensed as a medical doctor, would be incompetent to testify as to the need for care rendered by the other. Similarly, an orthopedic surgeon specializing in foot surgery would be incompetent to comment on the need for the attention of a podiatrist. I seriously doubt the legislature intended such a result when it listed the various classes of health care providers and their licensing chapters in section 440.13(3)(d)1.d, Florida Statutes (1981). Slip Op. 4-5. Quite simply, I conclude, as did the majority in *Alford*, that our task as a reviewing court is to determine whether the JCC's decision to deauthorize (or to authorize) treatment is supported by competent substantial evidence. I see no need for the rather rigid approach urged by the majority in the present case.

The record in this case indicates that Clair, by her own stipulation (as reflected by the washout settlement), reached maximum medical improvement in the spring of 1984 with a 1% permanent physical impairment. A judge of compensation claims, with ample evidentiary support, has now decided that no need exists to require the employer/carrier to provide additional chiropractic care, many years after the injury and the washout settlement. This case should be marked "CLOSED."

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[1]In that section 440.13 has undergone numerous changes since 1983, the year of claimant's compensable accident, all references to section 440.13 in this opinion relate to the 1983 version, except as otherwise indicated.

[2]This provision is currently renumbered 440.13(1)(h), and includes medical physicians, osteopaths, chiropractors, podiatrists, optometrists, and dentists.

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440.13(1)(h), Fla. Stat. (Supp. 1992).

[3]Although peer is not defined in section 440.13, the term is commonly defined as "a person or thing of the same rank, value, quality, ability, etc." *Webster's New World Dictionary* 1048 (2d college ed. 1980).

[4]The general rule has been modified by statute in Florida. *See* 766.102(2), Fla. Stat. (1991).

[5]§ 90.702, Fla. Stat. (1991).

[6]Preservation of error in this case is governed by Florida Rule of Civil Procedure 1.330(d)(3)(A), which requires an objection to an expert's qualifications, under circumstances such as those at bar, to be made during the deposition. § 440.30, Fla. Stat. (1991); *Suburban Propane v. Estate of Pitcher*, 564 So. 2d 1118, 1121 (Fla. 1st DCA 1990); *Quinn v. Mallard*, 358 So. 2d 1378, 1382 (Fla. 3d DCA 1978).

[7]Currently in Florida, osteopathic physicians hold board certification in the following specialty fields of practice: Addictive Diseases, Anatomic Pathology, Anesthesiology, Critical Care Medicine, Dermatology, Emergency Medicine, Endocrinology, Gastroenterology, General Practice, Internal Medicine, Cardiology, Hematology, Oncology, Diseases of the Chest, Hematology/Oncology, Neurology, Neurological Surgery, Nephrology, Nuclear Medicine, Obstetrics and Gynecology, Obstetrical-Gynecological Surgery, Ophthalmology, Otorhinolaryngology and Oral-Facial Plastic Surgery, Otolaryngology, Otorhinolaryngology, Orthopedic Surgery, Psychiatry, Pediatrics, Plastic and Reconstructive Surgery, Preventive Medicine/Aerospace Medicine, Preventive Medicine/Occupational Medicine, Proctology, Pulmonary Conditions, Radiology, Diagnostic Radiology, Rheumatology, Rehabilitation Medicine, Roentgenology, Diagnostic, Thoracic Cardiovascular Surgery, Thoracic Surgery, Urological Surgery, and Sports Medicine. *Florida Osteopathic Medical Association, Yearbook and Directory 1993-1994.*

* * *

WILLIAMS v. STATE. 1st District. #93-1386. January 25, 1994. Appeal from the Circuit Court for Escambia County. AFFIRMED. *Seabrook v. State*, 18 Fla. L. Weekly S642 (Fla. Dec. 16, 1993).

* * *

Criminal law—Sentencing—Enhancement—Thirty-year sentence for third degree murder with firearm is illegal because third degree murder is second degree felony for which maximum penalty cannot exceed fifteen years' incarceration—Sentence cannot be enhanced for use of a weapon when its use is an essential element of crime charged—A defendant cannot agree to an illegal sentence

ERIC EUGENE VICKERS, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 93-04015. Opinion filed January 26, 1994. Appeal pursuant to Fla. R. App. P. 9.140(g) from the Circuit Court for Hillsborough County; B. Anderson Mitcham, Judge.

(PER CURIAM.) Eric Eugene Vickers appeals the denial of his motion to correct illegal sentence in which he asserts he was improperly sentenced to thirty years' imprisonment for a second degree felony. We agree that the sentence is illegal.

Originally, Vickers was charged with first degree murder and robbery. In a negotiated agreement, Vickers pled guilty to the lesser charge of third degree murder with a firearm; the armed robbery charge was nolle prossed. The agreed term of imprisonment was thirty years with a three year minimum mandatory.

Vickers correctly argues that the sentence is illegal because a conviction for third degree murder is a second degree felony for which the maximum penalty cannot exceed fifteen years' incarceration.

The trial court denied the motion to correct the sentence, finding that the sentence was properly enhanced because a firearm was used in the murder. The holding is based upon the fact that the supreme court did not decide *Gonzalez v. State*, 585 So. 2d 932 (Fla. 1991)[1] until seventeen months after the sentence was imposed in this case. The court indicated that the supreme court ruling should not be applied retroactively.

The trial court's reliance upon the timing of the issuance of *Gonzalez* is misplaced. Prior to the date sentence was imposed, this court and other courts have held that a sentence cannot be enhanced for the use of a weapon when its use is an essential element of the crime charged. *See Franklin v. State*, 541 So. 2d 1227 (Fla. 2d DCA 1989), *approved*, *Gonzalez v. State*, 585 So. 2d 932 (Fla. 1991); *Cherry v. State*, 540 So. 2d 146 (Fla. 4th DCA 1989); *Pinkerton v. State*, 534 So. 2d 425 (Fla. 5th DCA 1988); *Stinson v. State*, 520 So. 2d 680 (Fla. 1st DCA 1988).

A defendant cannot agree to an illegal sentence, therefore, we reverse and remand for the court to resentence Vickers within the fifteen year maximum sentence range or allow him to withdraw his plea and to proceed accordingly. (SCHOONOVER, A.C.J. and PATTERSON and ALTENBERND, JJ., Concur.)

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[1]In *Gonzalez*, the supreme court ruled that the use of a firearm is an essential element of the offense of third degree murder with a firearm and that the sentence could not be enhanced due to the use of a firearm.

* * *

Criminal law—Sentencing—Guidelines—Departure—Overcrowding of prisons is not a valid reason for downward departure from guidelines

STATE OF FLORIDA, Appellant, v. CHUCK MOORE, Appellee. 2nd District. Case No. 93-02303. Opinion filed January 28, 1994. Appeal from the Circuit Court for Lee County; James H. Seals, Judge. Robert A. Butterworth, Attorney General, Tallahassee, and Anne Y. Swing, Assistant Attorney General, Tampa, for Appellant. James Marion Moorman, Public Defender, and Cecilia A. Traina, Assistant Public Defender, Bartow, for Appellee.

(SCHOONOVER, Judge.) The state challenges the judgments and sentences imposed upon the appellee, Chuck Moore, after he pled nolo contendere to possession of cocaine and possession of drug paraphernalia. We reverse.

The appellee agreed to plead nolo contendere to possession of cocaine and possession of drug paraphernalia if the trial court would impose specific sentences. In exchange for his plea, the appellee was to receive a sentence of "time served" on the misdemeanor paraphernalia charge and would only be required to serve eleven months in the county jail on the felony charge of possession of cocaine. The state objected to the proposed agreement on the ground that it would result in an improper downward departure sentence. The appellee's guidelines scoresheet reflected a permitted sentence of four and one-half to nine years incarceration. The trial court, over the state's objection, accepted the appellee's plea and sentenced him according to the agreement. The state filed a timely notice of appeal.

Since the appellee's sentence was a downward departure from his permitted guidelines sentence, in order to be valid, the sentence must be supported by a proper reason for departing. *See State v. Morales*, 522 So. 2d 464 (Fla. 4th DCA 1988). At the appellee's sentencing hearing, the trial court stated that he was departing from the permitted sentencing range because of the overcrowding in the state prison system. A downward departure sentence based upon overcrowding of prisons is not a valid reason for departure. *State v. Caride*, 473 So. 2d 1362 (Fla. 3d DCA 1985). We, accordingly, reverse and remand.

Since the appellee agreed to plead to the charges filed against him on the condition that he receive a sentence that we have herein determined to be improper, upon remand, the appellee should be given the opportunity to withdraw his plea and go to trial. *Caride*.

Reversed and remanded. (RYDER, A.C.J., and THREADGILL, J., Concur.)

* * *

Criminal law—Sentencing—Mandatory minimum—Consecutive mandatory minimum sentences for trafficking in cocaine and conspiracy to traffic in cocaine reversed where facts showed single criminal episode—Guidelines—Departure—Upward departure sentence affirmed where two of sentencing judge's three reasons for departure were valid—Evidence supported existence of sufficient amount of cocaine for conviction of trafficking in cocaine—Evidence supported conviction of conspiracy to traffic in cocaine

TODD FITZGERALD FRAZIER, Appellant, v. STATE OF FLORIDA, Appellee. 2nd District. Case No. 92-01779. Opinion filed January 28, 1994. Appeal from the Circuit Court for Pinellas County; Brandt C. Downey, III, Judge. James Marion Moorman, Public Defender, Bartow, and Brad Permar, Assistant Public Defender, Clearwater, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Davis G. Anderson, Jr., Assistant Attorney Gene

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Jessie ALFORD, Appellant,

v.

G. PIERCE WOODS MEMORIAL HOSPITAL and State of Florida/Division of Risk Management, Appellees.

No. 91-3297.

District Court of Appeal of Florida, First District.

July 7, 1993.

Rehearing Denied Aug. 24, 1993.

Employee brought action seeking authorization of chiropractic treatment for her work related injury. The Judge of Compensation Claims, Dan F. Turnbull, Jr., J., refused to authorize chiropractic treatment. Employee appealed. The District Court of Appeal, Webster, J., held that an orthopedic surgeon was qualified to testify that chiropractic manipulation would have been inappropriate given employee's arthritic condition.

Affirmed.

Ervin, J., filed a dissenting opinion.

1. Workers' Compensation ⇐1165

The Florida Evidence Code applies to workers' compensation proceedings.

2. Appeal and Error ⇐971(2)
Evidence ⇐546

Generally, the determination of a witness' qualifications to express an expert opinion is peculiarly within the discretion of the trial judge, whose decision will not be reversed absent a clear showing of error. West's F.S.A. § 90.702.

3. Administrative Law and Procedure ⇐459
Workers' Compensation ⇐998

Orthopedic surgeon possessed qualifications necessary to permit him to opine whether, from a medical standpoint, chiropractic manipulation of the spine would be likely to help or harm a workers' compensation claimant, where surgeon tried to read a lot of chiropractic literature, was familiar with general chiropractic treatment, and had training in some forms of manipulation.

4. Workers' Compensation ⇐998

Evidence supported decision of judge of compensation claims to deny workers' compensation claimant's request to authorize chiropractic treatment as not medically necessary, orthopedic surgeon testified that he had reservations about using chiropractic treatment in the circumstances.

Brian O. Sutter, Port Charlotte, Bill McCabe, Longwood, for appellant.

Michael F. Tew of Tew & Truitt, P.A., Fort Myers, for appellees.

WEBSTER, Judge.

In this workers' compensation case, claimant seeks review of an order which denied her claim seeking authorization of chiropractic treatment. We conclude that the record contains competent substantial evidence to support the order. Therefore, we affirm.

It is undisputed that claimant sustained injuries "arising out of and in the course of employment" on two occasions. In December 1988, claimant injured her neck, back, shoulders, knee and left elbow. In September 1989, after claimant had been released to return to full-duty work, she injured her fingers.

Since her first injuries, claimant has been treated by Dr. Howard Kessler, a board-certified orthopedic surgeon. Dr. Kessler has diagnosed claimant as suffering from "cervical and lumbar spondylosis or arthritis." He opined that claimant had suffered from "a pre-existing arthritic condition which was exacerbated by her work related injury." According to Dr. Kessler, because of her arthritis, claimant was not going to "get better." She would continue to experience good periods and bad periods, as she had for some time. Dr. Kessler said that there was little that he could offer claimant in the way of new treatment. He had prescribed physical therapy (which had in-

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cluded traction, heat, ultrasound and electrical stimulation) for some time, for temporary relief of claimant's symptoms; and recommended that claimant continue to receive physical therapy "as needed."

Claimant testified that the physical therapy prescribed by Dr. Kessler provided only temporary relief from her symptoms. She said that she wanted to be treated by Dr. Louis Kirschner, a chiropractor, because her husband had been treated successfully by Dr. Kirschner, and she felt that Dr. Kirschner could achieve similar results with her.

Dr. Kirschner testified that he is a chiropractic physician. Based upon his examination of claimant, Dr. Kirschner diagnosed claimant as suffering from cervical neuralgia, cervical myofascitis, a strain or sprain of the thoracic spine, a lumbar strain or sprain, sacroiliac disorder and temporal mandibular joint pain-dysfunction syndrome. Based upon his diagnosis, Dr. Kirschner concluded that claimant "was a candidate for chiropractic therapy ... [b]asically adjustments or manipulations to correct the osseous disrelationships of her entire spine and sacroiliac joints." In addition, he said that he would use "traction in the low back," "[e]xercises" and "some electrical stimulation." He opined that "chiropractic treatment would be beneficial to [claimant] because the key thing here is to get the vertebrae that are out of place, or what we call subluxated, back into their proper respective position and functioning again." He saw nothing about claimant's condition to suggest that it would be inappropriate to treat her in such a way.

Over objection that he was unqualified to render such opinions, Dr. Kessler testified that he tried to "read a lot of chiropractic literature"; that he was "familiar with the general nature of treatment modalities that a chiropractor ... offers"; and that he had "had training in some forms of manipulation." He testified that, within a reasonable degree of medical probability, it was his opinion that, while "manipulation in the proper hands in the proper situation is beneficial," in claimant's case manipulation might well "be harmful for her." He explained that "arthritic joints which would be placed through a motion that they would not normally be placed through in some respects would be like going through the trauma or the initial accident that the patient describes. It could increase the symptoms." He also testified that the treatments other than manipulation which were normally used in the practice of chiropractic were not significantly different from those already available to claimant through physical therapy.

The judge of compensation claims concluded that Dr. Kirschner should not be authorized because (1) based upon Dr. Kessler's testimony, manipulation would be inappropriate, given claimant's condition; (2) other than manipulation, claimant was already receiving essentially the same treatment that Dr. Kirschner recommended; and (3) claimant's request was "motivated by unrealistic expectations," because she believed that chiropractic treatment would result in "a cure." Claimant's principal argument on appeal is that the conclusions of the judge of compensation claims are not supported by competent substantial evidence because Dr. Kessler, an orthopedic surgeon, was not qualified to render opinions on the subject of the appropriateness of chiropractic treatment; therefore, Dr. Kirschner's testimony that chiropractic treatment was appropriate was uncontroverted. We are unable to accept claimant's argument.

Section 440.13(2)(a), Florida Statutes (1991), requires the employer to "furnish to the employee such *medically necessary* remedial treatment, care, and attendance by a health care provider and for such period as the nature of the injury or the process of recovery may require ..." (emphasis added). Section 440.13(1)(d), Florida Statutes (1991), defines "medically necessary," in relevant part, as follows:

> "Medically necessary" means any service or supply used to identify or treat an illness or injury which is appropriate to the patient's diagnosis, consistent with the location of service and with the level of care provided. The service should be widely accepted by the practicing peer

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> group, should be based on scientific criteria, *and should be determined to be reasonably safe. ...*

(Emphasis added.) While it may well be true, as claimant argues, that in the majority of cases only a similar "health care provider" will possess the qualifications necessary to permit him or her to testify regarding whether requested care or treatment is "medically necessary," that is not so in this case.

[1, 2] The Florida Evidence Code applies to workers' compensation proceedings. *See, e.g., Martin Marietta Corp. v. Roop*, 566 So.2d 40 (Fla. 1st DCA 1990); *Odom v. Wekiva Concrete Products*, 443 So.2d 331 (Fla. 1st DCA 1983). This includes section 90.702, which relates to testimony by experts. As a general rule, "[t]he determination of a witness's qualifications to express an expert opinion is peculiarly within the discretion of the trial judge, whose decision will not be reversed absent a clear showing of error." *Ramirez v. State*, 542 So.2d 352, 355 (Fla.1989). *See also* Charles W. Ehrhardt, *Florida Evidence* § 702.1 at 469 (1992 ed.). We fail to see why a different standard should be applied in workers' compensation cases.

[3] There can be no question but that, as an orthopedic surgeon, Dr. Kessler possesses the qualifications necessary to permit him to offer opinions regarding the effect of arthritis upon a person's joints in general, and spine in particular. Likewise, there can be little question regarding Dr. Kessler's qualifications to offer opinions as to the likely effect of unusual or abnormal movement of the spine upon one suffering from arthritis. Such opinions are clearly based upon his knowledge acquired as an orthopedic surgeon. The only real question presented is whether Dr. Kessler possesses enough knowledge about chiropractic manipulation to be able to render an opinion as to the effect of such movement upon the spine of someone like claimant, who is suffering from arthritis. Dr. Kessler testified that he tried to "read a lot of chiropractic literature"; that he was "familiar with the general nature of treatment modalities that a chiropractor ... offers"; and that he had "had training in some forms of manipulation." We believe that such testimony was sufficient to permit the judge of compensation claims to conclude that Dr. Kessler knew enough about chiropractic manipulation to opine whether, *from a medical standpoint*, such movement of the spine would be likely to help or to harm claimant. In fact, we fail to see any meaningful distinction between such testimony and testimony that, within a reasonable degree of medical probability, a particular type of unusual or abnormal movement, such as might occur during a fall or an auto accident, would be likely to cause damage to the spine, or a cervical or lumbar sprain or strain. Clearly, an orthopedic surgeon would be permitted to offer the latter opinions.

Finally, we note that, but for the fact that this is a workers' compensation case, the operative facts are virtually indistinguishable from those in *Van Sickle v. Allstate Ins. Co.*, 503 So.2d 1288 (Fla. 5th DCA 1987). In *Van Sickle*, the plaintiff sued her insurer when it refused to pay for certain chiropractic treatments. The issue tried was whether the treatments had been " 'reasonable and necessary' " (*id.* at 1288 n. 2) regarding injuries allegedly sustained in an auto accident. At trial, plaintiff objected to a question posed by the insurer to its expert witness, who was an orthopedic surgeon, as to "whether or not the chiropractor's spinal and neck manipulations might worsen [plaintiff's] condition." *Id.* at 1290. Initially, the trial judge sustained the objection. However, after the expert testified that he had some familiarity with manipulation based upon a course he had taken and some observation during residency, the trial judge allowed the expert to testify that "he was fearful of spinal manipulation being done on persons, such as [plaintiff], who had arthritic or other degenerative problems." *Id.*

On appeal by plaintiff, the court affirmed. The majority explained its decision as follows:

> An orthopedic physician duly and regularly engaged in the practice of orthopedic medicine with special professional

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training and experience in orthopedic medicine is not thereby alone necessarily an expert as to every, or any, aspect of chiropractic healing because these two fields are not the same discipline or school of practice. However, expertise in the field of orthopedic medicine may be relevant to expertise on the necessity and reasonableness of chiropractic care and treatment in a particular case, and a particular orthopedic physician may also be possessed of "special knowledge or skill" ... about chiropractic healing as to be qualified as an "expert witness" entitled to testify in the form of an opinion about some aspect of that subject.

The qualification of an expert witness and the perimeters of his expertise are conclusions of fact to be determined advisedly by the trial judge and affirmed on appeal if supported by competent evidence.

Id. at 1288–89 (footnote omitted). In her concurring opinion, Judge Sharp pointed out that

> it is clear that orthopedic medicine encompasses the causes of injuries to the spine, neck and bones in the hand and wrist, as well as what kinds of medical treatment are suitable to cure or remedy such injuries.... Further, [the orthopedic surgeon] was shown to have sufficient knowledge about the techniques of spinal manipulation (which perhaps all orthopedic surgeons would not have), in order to permit him to testify about the effects of spinal manipulation on an arthritic or degenerative spine.

Id. at 1290.

[4] We agree with the analysis contained in both the majority and special concurring opinions in *Van Sickle*. We conclude that the record contains competent substantial evidence to sustain the finding of the judge of compensation claims "that chiropractic manipulation would be inappropriate given the claimant's arthritic condition." Accordingly, the evidence is sufficient to support the decision of the judge of compensation claims to deny the request to authorize Dr. Kirschner, because the requested chiropractic treatment was not "medically necessary." Therefore, we affirm.

AFFIRMED.

BARFIELD, J., concurs.

ERVIN, J., dissents with written opinion.

ERVIN, Judge, dissenting.

I would reverse the order denying appellant's claim seeking authorization of chiropractic treatment for the reason that the only evidence supporting the denial was the opinion testimony of Dr. Kessler, an orthopedic physician, which, in my judgment, is incompetent because of the unique provisions of Section 440.13, Florida Statutes (1987). In so concluding, I think it helpful to discuss some additional facts not recited in the majority's opinion.

While under the care of Dr. Kessler, claimant testified that she had received 221 physical therapy treatments, and that her pain had not abated, but in fact had become more severe during the three years following the occurrence of her injuries. Claimant stated that it was her fervent desire to be able to do the things that she had always done before the work-related accidents; that she wished to live a normal life, explaining, "I am just 42 years old and I plan on doing a whole lot of things with my life besides hurting. I just want some relief." Contrary to Dr. Kessler's testimony stating that chiropractic manipulation might be harmful to claimant, Dr. Kirschner, a chiropractic physician, considered that such treatment would be beneficial to her and further opined that if claimant did not receive such relief, she would eventually develop weakness in the ligaments, including the discs in the lumbar sacral spine, which would predispose her to disc and possible nerve root problems in the lower extremities.

If the present case involved only a contest of conflicting opinions by two physicians licensed in different fields of practice, I could agree with the majority that the order should be affirmed because it would be supported by competent, substantial evidence. The threshold question requiring

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decision, however, is whether Dr. Kessler, a physician not licensed within the practicing peer group whose care claimant requested, was qualified under the provisions of section 440.13 to express the opinion that chiropractic treatment was not reasonable and necessary.

In our interpretations of section 440.13(3) pertaining to a claimant's specific request for chiropractic care, we have held that an employer's provision of an orthopedist did not satisfy the employer's statutory obligation, and that the employer was therefore required to pay for chiropractic treatment if such treatment was determined to be reasonable and necessary by a judge of compensation claims (JCC). *City of Hialeah v. Jimenez*, 527 So.2d 936 (Fla. 1st DCA 1988); *Kirkland v. Harold Pratt Paving, Inc.*, 518 So.2d 1320 (Fla. 1st DCA 1987), *review denied*, 525 So.2d 878 (Fla. 1988). We have, moreover, recognized that the care offered by orthopedists may be functionally different from chiropractic care. *Gust K. Newberg Constr. Co. v. Warren*, 449 So.2d 934, 935 (Fla. 1st DCA 1984). Indeed, in a different context, we have stated that an orthopedist's opinion as to the need for psychiatric care is not competent, substantial evidence as to that issue. *Caldwell v. Halifax Convalescent Ctr.*, 566 So.2d 311, 313 (Fla. 1st DCA 1990); *Norell Corp. v. Carle*, 509 So.2d 1377, 1379 (Fla. 1st DCA 1987).

In no previous opinion, however, have we expressly decided whether a physician, not licensed within the same school of practice as that requested by an employee, is qualified to express an opinion as to the reasonableness and necessity of the practitioners' care, pursuant to the provisions of section 440.13, notwithstanding that the witness may satisfy the qualifications of an expert, as provided in Section 90.702, Florida Statutes, by reason of his knowledge and education. I am of the view that Dr. Kessler is not qualified by virtue of section 440.13 to give any such opinion, and it is therefore immaterial, for the reasons stated *infra*, that he may otherwise be qualified as an expert under section 90.702. In reaching this conclusion, I refer to section 440.13(1)(c), which defines "medically necessary" as

> *any service or supply used to identify or treat an illness or injury which is appropriate to the patient's diagnosis,* consistent with the location of service and with the level of care provided. *The service should be widely accepted by the practicing peer group,* should be based on scientific criteria, and should be determined to be reasonably safe.

(Emphasis added.)

The above language requires that the requested service "be widely accepted by the practicing peer group." I think it obvious, by examining the legislative reference to the term "peer," that it was not reasonably within the legislature's contemplation that physicians of one school of practice would be considered qualified to give opinions regarding the appropriateness of requested treatment by physicians of another licensed school or community of practice. Although peer is not defined in section 440.13, the dictionary defines it as "a person or thing of the same rank, value, quality, ability, etc." *Webster's New World Dictionary* 1048 (2d college ed. 1980).

When comparing the statutory term, "practicing peer group," with the term "peer review committee," used in other portions of section 440.13, I think it reasonably clear, given the definition of peer, that the former term means simply the same licensed school of practice. In so saying, I note that section 440.13(1)(e) defines "peer review committee" to mean "a committee composed of physicians *licensed under the same authority as the physician who rendered the services being reviewed.*" (Emphasis added.) While the term "peer review committee" is not used in regard to that portion of section 440.13(3) relating to a requested change in the health care provided an employee, but rather is specifically applied to review of overutilization of services rendered by health care providers, I consider that the manner in which the term is otherwise applied in the statute demonstrates that the legislature intended that only licensed physicians of the same school as the physician whose care is re-

quested are qualified to state whether the requested care is reasonable and necessary. Moreover, it appears that in common practice only those physicians of the same community as the physician whose services are reviewed serve on review committees. *See, e.g., Lamounette v. Akins*, 547 So.2d 1001, 1002 (Fla. 1st DCA 1989) (to determine whether chiropractic physician over utilized services he rendered to the injured employee, the physician's records were submitted to the Chiropractic Peer Review Committee).

My interpretation of section 440.13 is consistent with the general rule recognizing that physicians of one school are incompetent to testify in malpractice actions against physicians of other schools regarding whether such physicians' treatment conformed with the requisite degree of skill and care in their practice area, and that defendants in such actions are entitled to limit testimony to that of competent practitioners of their own schools of medicine.[1] 61 Am.Jur.2d *Physicians, Surgeons, & Other Healers* § 353 (1981).

The majority, however, *ante* at 5, refers to the Florida Evidence Code, specifically section 90.702, relating to the testimony of experts, which provides in part that "a witness [may be] qualified as an expert by knowledge, skill, experience, training, or education." The majority reasons therefrom that because Dr. Kessler adequately demonstrated his expertise in the subject of his opinion, competent, substantial evidence exists to support the order entered. The majority refers as well to *Martin Marietta Corp. v. Roop*, 566 So.2d 40 (Fla. 1st DCA 1990), and *Odom v. Wekiva Concrete Products*, 443 So.2d 331 (Fla. 1st DCA 1983), as stating that the Evidence Code applies to the Workers' Compensation Law. Those cases hold only that the portion of the Evidence Code which precludes the admission of hearsay evidence applies to workers' compensation proceedings. Neither opinion supports the majority's conclusion that section 440.13 permits a physician outside the practicing peer group of another physician to testify that the requested treatment of a member of the different group is not reasonable or necessary. And I find nothing in section 440.13 evincing any legislative intent to incorporate the provisions of section 90.702 therein. Indeed, Section 90.103(1), Florida Statutes (1987), states that the Evidence Code applies to the same proceedings to which the general law of evidence applied before the effective date of the code, "*[u]nless otherwise provided by statute.*" (Emphasis added.)

It is axiomatic that a more specific statute (here section 440.13) dealing with a particular subject is controlling over a statute that covers the same subject more generally. *Department of Health & Rehab. Servs. v. American Healthcorp of Vero Beach, Inc.*, 471 So.2d 1312, 1315 (Fla. 1st DCA 1985), *opinion adopted*, 488 So.2d 824 (Fla.1986). As an example, Professor Ehrhardt observes: "The Florida Legislature has enacted special limitations on the qualifications of experts in medical malpractice actions." Charles W. Ehrhardt, *Florida Evidence* § 702.1, at 468 (1992). Thus, section 766.102(2)(c), Florida Statutes (1991), restricts the expert testimony of health care providers to "similar health care providers," as defined in section 766.102(2)(a) or (b), as practitioners in the malpractice defendant's speciality or the same school of practice. Subsection (2)(c), however, permits one who does not meet the definition of similar health care provider to submit expert testimony as to the prevailing professional standard of care in a given field of medicine if such person, "to the satisfaction of the court, possesses sufficient training, experience, and knowledge as a result of practice or teaching in the specialty of the defendant or practice or teaching in a related field of medicine.... within the 5–year period before the incident giving rise to the claim."

Although section 766.102(2)(c) relaxes the general rule precluding one who is not a

1. The general rule has been modified by statute in Florida. *See* § 766.102(2), Fla.Stat. (1991), and discussion *infra*.

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similar health care provider from offering an opinion against one from a different medical discipline or specialty, it is important to observe that the provision requires that before such person may qualify as an expert to testify whether a defendant's action conformed to the prevailing professional standard of care, the witness must, at the very minimum, have training, experience, and knowledge in a "*related field of medicine.*" (Emphasis added.) For example, in *Cross v. Lakeview Ctr., Inc.*, 529 So.2d 307 (Fla. 1st DCA 1988), a clinical psychologist was held not competent to express an opinion as an expert that the defendant, a psychiatrist, did not deviate from the psychiatric standard of care by not performing certain psychological tests, in that the psychologist did not possess training, experience, or knowledge as a result of practice or teaching in a related field of medicine. By analogy, the legislature of Montana enacted a workers' compensation statute restricting the making of impairment ratings to licensed medical physicians only. *See Weis v. Division of Workers' Compensation of Dep't of Labor & Indus.*, 232 Mont. 218, 755 P.2d 1385 (1988). *And see, e.g., Wacker v. Park Rural Elec. Co-op., Inc.*, 239 Mont. 500, 783 P.2d 360 (1989) (chiropractor disqualified from testifying as to a plaintiff's impairment rating in a personal injury action).

Because the language of a particular statute may restrict the right of a person from rendering an opinion in a given case, notwithstanding that such person may otherwise meet the qualifications of an expert witness pursuant to section 90.702, the majority's reliance on *Van Sickle v. Allstate Insurance Co.*, 503 So.2d 1288 (Fla. 1st DCA 1987), is simply inapposite to a proper resolution of the present issue. The court in *Van Sickle* affirmed a trial court's order permitting an orthopedic physician to testify as to the reasonableness and necessity of chiropractic care in an action brought by an insured against his no-fault insurer to compel the insurer to pay for such care. Unlike the case at bar, no statutory language was implicated limiting the right of a physician of a different school of practice from that of the physician whose requested services were under review to offer an opinion as to the appropriateness of such treatment.

If the only limitation placed upon Dr. Kessler's right to testify was as provided in section 90.702, I could agree with the majority that the JCC did not abuse his discretion in deciding that Dr. Kessler, an orthopedic surgeon, possesses the necessary knowledge, education, etc., to opine that chiropractic care was not reasonable and necessary. Because, however, the provisions of the more specific section 440.13 restrict such testimony to the same practicing peer group or discipline as that from which the treatment is sought, the opinion testimony of a physician from a different practicing peer group must be considered incompetent as to the reasonableness and necessity of such solicited care. And, as the only competent evidence submitted to that issue was from Dr. Kirschner, a physician within the same practicing peer group, the JCC's order denying the claim for chiropractic treatment should be reversed and the cause remanded with directions that the claim be approved.

Everett W. SPEARS, Appellant,

v.

GATES ENERGY PRODUCTS and Scott Wetzel Services, Appellees.

No. 91-4064.

District Court of Appeal of Florida, First District.

July 19, 1993.

Workers' compensation claimant appealed from order of Judge of Compensation Claims (JCC), Elwyn M. Akins, J., which denied his claim for medical care and temporary partial disability benefits. The District Court of Appeal held that: (1) JCC,

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DISTRICT COURT OF APPEAL, FIRST DISTRICT

Tallahassee, Florida 32399-1850
Telephone (904)488-6151

DATE: December 1, 1992

CASE NO.: 91-3997

CLOYD E. CLAIR vs. GLADES COUNTY BOARD OF COMMISSIONE
Appellant/Petitioner Appellee/Respondent et al.

BY ORDER OF THE COURT:

After examination of the briefs by appellant and appellee, it appears that the issue relating to whether the judge of compensation claims properly denied appellant's claim for recognition of Dr. Crowley as an authorized treating chiropractor, together with denial of payment of her outstanding chiropractic charges, did not adequately address the more fundamental issue regarding whether Section 440.13, Florida Statutes, permits physicians outside the practicing peer group of the physician whose care is requested to opine as an expert that the requested care is not reasonable and necessary.

We note from the record, that claimant's attorney, during final hearing on the claim, argued that a determination of what constitutes reasonable chiropractic care should not be based upon an opinion by a physician outside the field of chiropractic, and requested the judge to address such issue (R-21-22). However, in denying the claim for chiropractic care and for the services rendered by the chiropractor, and in determining that such care

was not reasonable and necessary, based upon the opinion testimony of an orthopedic surgeon and a neurosurgeon, the judge's order did not specifically address the argument raised by claimant's attorney at the hearing. Accordingly, appellant and appellee are directed to file supplemental briefs addressing the following issue: Does Section 440.13, Florida Statutes (1983), permit testimony by a physician outside the practicing peer group of the physician whose care is requested to opine as an expert that such care is not reasonable and necessary?

Appellant shall have 15 days from the date of this order in which to file her supplemental brief directed to the above issue, and appellee shall have 10 days after service of same in which to file its supplemental brief. No reply brief shall be entertained.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

Jon S. Wheeler

Jon S. Wheeler, Clerk

By: Laurie Black
Deputy Clerk

DISTRICT COURT OF APPEAL
SAT CITO SI RECTE
FIRST DISTRICT
STATE OF FLORIDA

Copies:

Cloyd E. Clair
Anthony J. Diamond
Gerald W. Pierce

Dawn E. Perry-Lehnert
Chad J. Motes

week, he shall receive his full weekly wages. If his wages at the time of the injury exceed $20 per week, compensation shall not exceed an amount per week which is:

(a) Equal to 100 percent of the statewide average weekly wage, determined as hereinafter provided for the year in which the injury occurred; however, the increase to 100 percent from 66⅔ percent of the statewide average weekly wage shall apply only to injuries occurring on or after August 1, 1979; and

(b) Adjusted to the nearest dollar.

For the purpose of this subsection, the "statewide average weekly wage" means the average weekly wage paid by employers subject to the Florida Unemployment Compensation Law as reported to the department for the four calendar quarters ending each June 30, which average weekly wage shall be determined by the department on or before November 30 of each year and shall be used in determining the maximum weekly compensation rate with respect to injuries occurring in the calendar year immediately following. The statewide average weekly wage determined by the department shall be reported annually to the Legislature.

(3) Monthly wage-loss benefits shall not exceed 4.3 times the maximum weekly benefit as computed pursuant to subsection (2).

(4) The provisions of this section as amended effective July 1, 1951, shall govern with respect to disability due to injuries suffered prior to July 1, 1959. The provisions of this section as amended effective July 1, 1959, shall govern with respect to disability due to injuries suffered after June 30, 1959, and prior to January 1, 1968. The provisions of this section as amended effective January 1, 1968, shall govern with respect to disability due to injuries suffered after December 31, 1967, and prior to July 1, 1970. The provisions of this section as amended effective July 1, 1970, shall govern with respect to disability due to injuries suffered after June 30, 1970, and prior to July 1, 1972. The provisions of this section as amended effective July 1, 1972, shall govern with respect to disability due to injuries suffered after June 30, 1972, and prior to July 1, 1973. The provisions of this section, as amended effective July 1, 1973, shall govern with respect to disability due to injuries suffered after June 30, 1973, and prior to January 1, 1975.

History.—s. 12, ch. 17481, 1935; CGL 1936 Supp. 5966(12); s. 5, ch. 18413, 1937; s. 1, ch. 21824, 1943; ss. 1, 3, ch. 26876, 1951; s. 1, ch. 59-151; s. 1, ch. 67-239; s. 1, ch. 70-172; s. 1, ch. 72-198; ss. 3, 4, ch. 73-127; s. 7, ch. 74-197; ss. 3, 23, ch. 78-300; ss. 7, 124, ch. 79-40; s. 21, ch. 79-312; s. 3, ch. 80-236.

440.13 Medical services and supplies; penalty for violations; limitations.—

(1) As used in this section, the term:

(a) "Health care facility" means any hospital licensed under chapter 395 and any health care institution licensed under chapter 400.

(b) "Health care provider" means a physician or any recognized practitioner, including a certified registered nurse anesthetist, providing skilled services pursuant to the prescription of or under the supervision or direction of a physician.

(c) "Medically necessary" means any service or supply used to identify or treat an illness or injury which is appropriate to the patient's diagnosis, consistent with the location of service and with the level of care provided. The service should be widely accepted by the practicing peer group, should be based on scientific criteria, and should be determined to be reasonably safe. The service may not be of an experimental, investigative, or research nature, except in those instances in which prior approval of the division has been obtained. The division shall promulgate rules providing for such approval on a case-by-case basis when the procedure is shown to have significant benefits to the recovery and well-being of the patient.

(d) "Peer review" means an evaluation by a peer review committee, after utilization review, of the appropriateness, quality, and cost of health care and health services provided a patient, based on medically accepted standards.

(e) "Peer review committee" means a committee composed of physicians licensed under the same authority as the physician who rendered the services being reviewed.

(f) "Physician" means a physician licensed under chapter 458, an osteopath licensed under chapter 459, a chiropractor licensed under chapter 460, a podiatrist licensed under chapter 461, an optometrist licensed under chapter 463, or a dentist licensed under chapter 466.

(g) "Utilization review" means the initial evaluation of appropriateness in terms of both the level and the quality of health care and health services provided a patient, based on medically accepted standards. Such evaluation shall be accomplished by means of a system which identifies the utilization of medical services, based on medically accepted standards, and which refers instances of possible inappropriate utilization to the division for referral to a peer review committee or to obtain opinions and recommendations of expert medical consultants recommended by the division and approved by the three-member panel referred to in paragraph (4)(a) to review individual cases for which administrative action may be deemed necessary.

(2)(a) Subject to the limitations specified in s. 440.19(1)(b), the employer shall furnish to the employee such medically necessary remedial treatment, care, and attendance by a health care provider and for such period as the nature of the injury or the process of recovery may require, including medicines, medical supplies, durable medical equipment, orthoses, prostheses, and other medically necessary apparatus. The carrier shall not deauthorize a health care provider furnished by the employer to provide remedial treatment, care, and attendance, without the agreement of the employer, unless a deputy commissioner determines that the deauthorization of the health care provider is in the best interests of the injured employee. Any list of health care providers developed by a carrier not including pharmacists from which health care providers are selected to provide remedial treatment, care, and attendance shall include representation of each type of health care provider defined in s. 440.13(3)(d)1.d., Florida Statutes, 1981, and shall not discriminate against any of the types of health care providers as a class.

(b) If the employer fails to provide such treat-

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ment, care, and attendance after request by the injured employee, the employee may do so at the expense of the employer, the reasonableness and the necessity to be approved by a deputy commissioner. The employee shall not be entitled to recover any amount personally expended for such treatment or service unless he has requested the employer to furnish the same and the employer has failed, refused, or neglected to do so or unless the nature of the injury required such treatment, nursing, and services and the employer or the superintendent or foreman thereof, having knowledge of such injury, has neglected to provide the same. Nor shall any claim for medical, surgical, or other remedial treatment be valid and enforceable unless, within 10 days following the first treatment, except in cases where first-aid only is rendered, and thereafter at such intervals as the division by regulation may prescribe, the health care provider or health care facility giving such treatment or treatments furnishes to the employer, or to the carrier if the employer is not self-insured, a report of such injury and treatment on forms prescribed by the division; however, a deputy commissioner, for good cause, may excuse the failure of the health care provider or health care facility to furnish any report within the period prescribed and may order the payment to such employee of such remuneration for treatment or service rendered as the deputy commissioner finds equitable. Along with such reports, the health care provider shall furnish a sworn statement that the treatment or services rendered were reasonable and necessary with respect to the bodily injury sustained. The sworn statement shall read as follows: "Under penalty of perjury, I declare that I have read the foregoing; that the facts alleged are true, to the best of my knowledge and belief; and that the treatment and services rendered were reasonable and necessary with respect to the bodily injury sustained."

(c) Each medical report obtained or received by the employer, the carrier, or the injured employee, or the attorney for any of them, with respect to the remedial treatment, care, and attendance of the injured employee, including any report of an examination, diagnosis, or disability evaluation, shall be filed with the Division of Workers' Compensation within 15 days after receipt of the report. A medical report not previously filed with the division shall not be received in evidence in a contested case unless the party offering the report has furnished a copy thereof to the opposing party or his attorney at least 5 days prior to the hearing at which it is offered. The health care provider or health care facility shall also furnish to the injured employee, or to his attorney, on demand, a copy of each such report without charge to the injured employee, except actual cost to the health care provider or health care facility furnishing the copy. Each such health care provider or health care facility shall provide to the division such additional information with respect to the remedial treatment, care, and attendance that the division may reasonably request as part of its investigation of a claim filed by an injured worker for benefits under this chapter.

(d) The employer shall provide appropriate professional or nonprofessional custodial care when the nature of the injury so requires; but family members may not be paid for such care when the services they provide do not go beyond those which are normally provided by family members gratuitously.

(3) If an injured employee objects to the medical attendance furnished by the employer pursuant to subsection (2), it shall be the duty of the employer to select another physician to treat the injured employee unless a deputy commissioner determines that a change in medical attendance is not for the best interests of the injured employee; however, a deputy commissioner may at any time, for good cause shown, in the deputy commissioner's discretion, order a change in such remedial attention, care, or attendance. It is 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, surgeon, or other attendant or remedial treatment, nursing or hospital care, or any other service that the sick or injured employee may require; and any employer or representative of any insurance company or insurer who violates this provision is guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083. The health care provider or health care facility providing services pursuant to this section shall be paid for the services solely by the employer or its insurance carrier, except for payments from third parties who have been determined to be liable for such payment.

(4)(a) All fees and other charges for such treatment or service, including treatment or service provided by any hospital or other health care provider, shall be limited to such charges as prevail in the state for similar treatment of injured persons and shall be subject to rules adopted by the division, which shall annually incorporate a schedule of maximum reimbursement allowances for such treatment or service as determined by a three-member panel, consisting of the Insurance Commissioner and two members to be appointed by the Governor, subject to confirmation by the Senate, one member who, on account of previous vocation, employment, or affiliation, shall be classified as a representative of employers, the other member who, on account of previous vocation, employment, or affiliation, shall be classified as a representative of employees. The schedule shall have statewide applicability and shall be uniform throughout the state. An individual health care provider shall be paid either his usual charge for a treatment or service or the maximum reimbursement allowance, whichever is less. In determining the prevailing charges for the schedule, the panel shall first approve the body of medical and hospital data which it finds representative of charges for such treatment. Using the approved body of data when arrayed, the panel shall establish a percentile upon which a schedule of maximum reimbursements will be calculated. In establishing the maximum reimbursement schedule, the panel shall consider the following:

1. The usual remuneration for service or treatment;
2. The impact upon cost to employers; and
3. The impact upon cost to the health care system.

(b) There is created an advisory committee to

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aid and assist the panel in determining schedules of maximum charges for hospital treatment and services payable through workers' compensation benefits to be appointed by and serve at the pleasure of the Insurance Commissioner.

(c) The Division of Workers' Compensation of the Department of Labor and Employment Security is empowered to investigate health care providers and health care facilities to determine if they are in compliance with the rules adopted by the division or if they are requiring unjustified treatment, hospitalization, or office visits. If the division finds that a health care provider or health care facility has made such excessive charges or required such treatment, services, hospitalization, or visits, the health care provider or health care facility may not receive payment under this chapter from a carrier, employer, or employee for the excessive fees or unjustified treatment, hospitalization, or visits; and, furthermore, the health care provider or health care facility is liable to return to the carrier or self-insurer any such fees or charges already collected.

(d)1. The division shall develop and implement, or contract with a qualified entity to develop and implement, utilization review of the services rendered by a physician, which services are paid for in whole or in part pursuant to this chapter.

2. The division shall contract with a private nonprofit foundation to provide peer review of health care services rendered pursuant to this chapter. Under the terms of such contract, the foundation shall establish and maintain a procedure by which a peer review committee shall review the services rendered by a physician, which services are paid for in whole or in part pursuant to this chapter. Such review shall occur upon a determination by the division that information referred to it by the entity responsible for utilization review contains reliable information that a physician is rendering services in a manner which may be inappropriate with respect to either the level or the quality of care. The report and recommendations of the peer review committee shall be submitted to the division for such action as may be necessary in accordance with this section.

3. By accepting payment pursuant to this chapter for remedial treatment rendered to an injured employee, a health care provider shall be deemed to consent to submitting all necessary records and other information concerning such treatment to utilization review and peer review as provided by this section. Such health care provider shall further agree to comply with any decision of the division pursuant to subparagraph 4.

4. If it is determined that a physician improperly overutilized or otherwise rendered or ordered inappropriate medical treatment or services, or that the cost of such treatment or services was inappropriate, the division may order the physician to show cause why he should not be required to repay the amount which was paid for the rendering or ordering of such treatment or services and shall inform him of his right to a hearing under the provisions of s. 120.57. If a hearing is not requested within 30 days of receipt of the order and the division director decides to proceed with the matter, a hearing shall be conducted, a prima facie case established, and a final order issued. If the final order, including judicial review if the order is appealed, is adverse to the physician, the division shall provide the licensing board of the physician with full documentation of such determination.

5. The criteria or standards established for the utilization review shall be adopted by the division as rules pursuant to chapter 120. The referral by the entity responsible for the utilization review, the decision of the division to refer the matter to the peer review committee, the establishment by the foundation of the procedures by which a peer review committee reviews the rendering of health care services, and the review proceedings, report, and recommendation of the peer review committee are not subject to the provisions of chapter 120.

6. The provisions of s. 768.40 apply to any officer, employee, or agent of the division and to any officer, employee, or agent of any entity with which the division has contracted pursuant to this section.

(5) An injured employee is entitled, as a part of his remedial treatment, care, and attendance, to reasonable actual cost of transportation to and from the doctor's office, hospital, or other place of treatment by the most economical means of transportation available and suitable in the individual case. When the employee is entitled to such reimbursement for transportation by private automobile, it shall be presumed, in the absence of proof, that the actual cost is the amount allowed by the state to employees for official travel.

History.—s. 13, ch. 17481, 1935; CGL 1936 Supp. 5966(13); s. 6, ch. 18413, 1937; CGL 1940 Supp. 8135(14-a); s. 2, ch. 20672, 1941; s. 2, ch. 21824, 1943; s. 1, ch. 22814, 1945; s. 1, ch. 25244, 1949; s. 1, ch. 28241, 1953; s. 2, ch. 57-225; ss. 1, 2, ch. 63-91; ss. 17, 35, ch. 69-106; s. 363, ch. 71-136; s. 5, ch. 75-209; s. 3, ch. 77-290; ss. 4, 23, ch. 78-300; s. 16, ch. 79-7; ss. 8, 124, ch. 79-40; ss. 7, 21, ch. 79-312; s. 4, ch. 80-236; s. 1, ch. 82-46; s. 1, ch. 83-45; s. 1, ch. 83-303; s. 4, ch. 83-305.

[1]**Note.**—The citation to "Florida Statutes, 1981" was inserted by the editors to clarify the reference to "s. 440.13(3)(d)1.d." Former sub-subparagraph (3)(d)1.d. was repealed by s. 4, ch. 83-305. *See* present paragraphs (1)(b) and (f), defining the terms "health care provider" and "physician," respectively, which paragraphs were enacted by s. 4, ch. 83-305.

[2]**Note.**—Repealed effective October 1, 1990, by s. 1, ch. 82-46, and scheduled for review pursuant to s. 11.611 in advance of that date.

440.14 Determination of pay.—

(1) Except as otherwise provided in this chapter, the average weekly wages of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation and shall be determined, subject to the limitations of s. 440.12(2), as follows:

(a) If the injured employee has worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of 13 weeks immediately preceding the injury, his average weekly wage shall be one-thirteenth of the total amount of wages earned in such employment during the 13 weeks. As used in this paragraph, the term "substantially the whole of 13 weeks" shall be deemed to mean and refer to a constructive period of 13 weeks as a whole, which shall be defined as a consecutive period of 91 days, and the term "during substantially the whole of 13 weeks" shall be deemed to mean during not less than 90 percent of the total customary full-time hours of employment within such period considered as a whole.

(b) If the injured employee has not worked in

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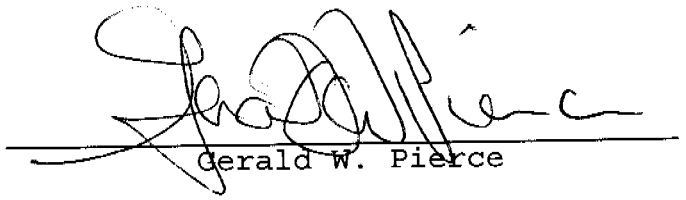
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by regular United States Mail to BRIAN C. BLAIR, ESQUIRE, 2138-40 Hoople Street, Fort Myers, Florida, 33901, this 31st day of March, 1994.



Gerald W. Pierce