IN THE SUPREME COURT OF FLORIDA

CLOYD E. CLAIR,

Appellant,

vs.

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

Appellees.

Case No: 83,213
1st DCA Case No: 91-03997

APPELLANT'S INITIAL BRIEF

ON APPEAL FROM THE FIRST DISTRICT COURT OF APPEAL

BRIAN C. BLAIR, ESQ.
BLAIR & BLAIR, P.A.
Attorney for Appellant
2138-40 Hoople Street
Fort Myers, Florida 33901
(813) 334-2268

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases Page

Statutes

PREFACE

The Appellant is CLOYD E. CLAIR, hereinafter referred to as "Claimant". The employer is GLADES COUNTY BOARD OF COMMISSIONERS, hereinafter referred to as "Employer". The carrier/servicing agent is INSURANCE SERVICING AND ADJUSTMENT COMPANY, hereinafter referred to as "Carrier." References to the record on appeal will be connoted as "(R.)".

STATEMENT OF THE FACTS

The Claimant injured her back on November 3, 1983. (R. 272). The Employer accepted this injury as compensable (R. 47) and authorized medical care under Dr. Crowley. (R. 273). The Claimant was also treated by Dr. Fifer who placed Claimant at MMI on May 4, 1984. (R. 268). At that time Dr. Fifer indicated that Claimant was still experiencing a dysfunction in the lumbar spine and that chiropractic care by Dr. Crowley was recommended. (R. 268). The Carrier paid for Claimant's continued treatment by Dr. Crowley until March 3, 1989 (R. 118), when it filed a Notice to Controvert (R. 60) essentially stating that continued treatment was for complaints unrelated to the industrial injury and/or palliative in nature. Although the Carrier failed to pay the submitted bills, Dr. Crowley continued to treat Claimant. (R. 120). A dispute then arose as to the validity of the claim for palliative care and litigation ensued.

STATEMENT OF THE CASE

Claimant was injured in the course of employment on November 3, 1983. (R. 272). Upon agreement of the parties venue was transferred from District "L" to District "M" in March, 1986. (R. 269). Thereafter, upon a joint petition dated March 3, 1986 the parties agreed to a lump sum settlement of future indemnity benefits excluding entitlement to future medical benefits. (R. 262-267).

The instant appeal stems from the Claim for Benefits for continued palliative care and other relief (R. 53) and Application for Hearing (R. 57) filed by the Claimant on October 16, 1990. Several pretrial conferences were held. (R. 3; 46). The Claim for Benefits (R. 53) requested recognition of Dr. Lois Crowley, D.C., as an authorized treating chiropractor; payment of Dr. Crowley's outstanding medical bills; reimbursement of medical mileage; exercise equipment; membership in a gym or a therapeutic exercise program; and penalties, interest, costs and attorney fees. (R. 272-273). The Employer's/Carrier's defenses alleged that Dr. Crowley was de-authorized as further chiropractic treatment was no longer necessary; there was no medical need for exercise equipment, a therapeutic exercise program, nor membership in a gymnasium; the claimed medical mileage was for unauthorized and medically unnecessary treatment; and penalties, interest, costs and attorney fees were not owed. (R. 273).

After the final hearing on October 10, 1991 (R. 272) the court found that Claimant sustained a compensable back injury which occurred while she was working for the Employer on November 3, 1983. (R. 273). Having determined that the central issue in this case was whether Dr. Crowley was authorized, the court found that Dr. Crowley was initially authorized by the Employer to treat Claimant's injury (R. 274) and that the Carrier on several occasions de-authorized and subsequently re-authorized Dr. Crowley's care. (R. 275). The court also found

that the Carrier allegedly attempted to de-authorize Dr. Crowley by letter dated July 26, 1988 (R. 275) but such letter was never received by Dr. Crowley nor was it placed into evidence (R. 275) and therefore Dr. Crowley remained authorized to treat the Claimant. (R. 279). This issue was thus decided favorably for the Claimant and is not appealed.

The court then addressed whether Dr. Crowley's treatment of Claimant was chiropractically "reasonable or necessary." The court found that the "chiropractic treatment involved in this matter is not appropriate (reasonable or necessary)." (R. 279). In reaching this conclusion the court relied on the deposition testimony of Dr. Joy Arpin (R. 240-259), a neurosurgeon who examined the Claimant on three separate occasions and the deposition testimony of Dr. Richard H. Conant, (R. 201-239), an orthopedic surgeon that never examined the Claimant. (R. 276-277). Great weight was given to Dr. Arpin's testimony that the Claimant could exercise at home to improve her condition and that continued "reliance upon weekly chiropractic treatment was not in the Claimant's best interest and should be stopped." (R. 277). The court also opined that the Claimant would be better served by obtaining care from a physical medicine and rehabilitation practitioner as opposed to weekly chiropractic care that offers only temporary relief. (R. 278). The court also expressed concern as to the effectiveness of Dr. Crowley's continued treatment given the fact that the Claimant still remains in pain. (R. 278). The Judge of Compensation Claims issued the Final Order dated November 5, 1991 denying the claim for benefits.

Claimant filed a *pro se* Notice of Appeal on December 5, 1992 (R. 282-284) along with an Affidavit of Insolvency. (R. 286-287). An Insolvency Order was issued by the court on January 8, 1992. (R. 291-292). Claimant filed a *pro se* brief which was stricken by order of the Court dated March 13, 1992 with leave to refile. Appellant filed an incomplete initial brief *pro se* on April 16, 1992. Appellee responded to the

initial brief in a likewise incomplete manner after this Court's order of April 28, 1992 which denied Appellee's motion to strike Appellant's initial brief. The parties stipulated and the Court ordered that the Appellant be granted additional time to reply. The undersigned counsel accepted this case on a *pro bono publico* basis on June 23, 1992. The First District Court of Appeal then issued an opinion dated January 25, 1994, in which it certified the issue *infra* to the Florida Supreme Court as one of great importance.

SUMMARY OF THE ARGUMENT

Similar provisions in section 440.13, Fla. Stat. (1983), which provide for the commencement of treatment, if it is medically necessary, and the termination of treatment, when such is overutilized, should be used as a guide in determining whether treatment is reasonable and necessary using similar interpretation. Thus a physician, practicing outside the peer group of the physician whose care was authorized, and who opines as an expert that the furnished care is not reasonable and necessary should be limited to physicians licensed under the same authority. This is consistent with other provisions which also govern commencing and/or termination of treatment.

Further, in the alternative, if physicians licensed outside the same authority are permitted to opine as to the reasonableness and necessity of such care, a proper predict as to the physicians knowledge and skill in the same area as the treatment being administered must be shown as consistent with *Alford v. G. Pierce Woods Memorial Hosp.*, 621 So. 2d 1380 (Fla. 1st DCA 1993).

ARGUMENT

ISSUE

WHETHER SECTION 440.13, FLORIDA STATUTES (1983), 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 JCC, in determining that the Claimant's treatment was neither reasonable nor necessary, relied on the depositions of two doctors, not licensed under the same authority in which the treatment was being administered, over that of a single doctor licensed in the same field as the treatment being administered. (R. 220; 248). This type of reasoning is flawed and its practical impact on workers' compensation law in the future will most certainly be contrary to the intent of the statute.

There are several pertinent parts to section 440.13, Fla. Stat.,[1] which are pertinent to this appeal. Primarily, section 440.13(2)(a) provides:

> Subject to the limitation 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 periods as the nature of the injury or process of recovery may require, including medicines, medical supplies, durable medical equipment, orthoses, prostheses, and other medically necessary apparatus. (emphasis added)

To trace the procedure in determining the reasonableness and necessity of medical treatment and eventually the legislative intent on the discontinuation of same it will be helpful to look at several other provision in Chapter 440. Any claimant when in need of medical care, must request care of a doctor licensed under section 440.13(1)(f). The employer is then obligated to provide care that is "medically necessary" pursuant to section 440.13(2)(a). Medically necessary is defined as:

---

[1]All references to section 440.13 refer to the 1983 version.

> 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)

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. Although "peer group" is not *per se* defined in chapter 440, "peer review" and "peer review committee" are defined in section 440.13(1)(d) and (e) respectively. Peer review is essentially defined by peer review committee. Peer review committee in turn is defined as "a committee composed of physicians licensed under the same authority as the physician who rendered the services being reviewed." *See* 440.13(1)(e), Fla. Stat. (1983)(emphasis added). Therefore, in order to attain the initial medical service, the treatment itself must first be accepted by the peer group of the physician who is rendering the particular service. For example, if the injured employee were to request treatment by an osteopath, the employer under 440.13(2)(a) would be obligated to grant such a request as long as it is "medically necessary." The treatment would be considered "medically necessary" if it was accepted by the same practicing peer group -- i.e., a peer group made up of osteopaths. It would strain the confines of the statute to say that a podiatrist could determine whether a request for an osteopath would be medically necessary. It is therefore obvious that the intent of the legislature was that when deciding whether to grant treatment as to its necessity it would be determined by a group of the same peer group of doctors as the doctor rendering the service.

On the opposite side of granting treatment is the discontinuation of treatment. One possible way to discontinue

treatment is through an overutilization review. Section 440.13, Florida Statutes, states that an evaluation as to whether medical care provided is reasonable, necessary and appropriate is to be accomplished through the use of a utilization review. As defined by the statute:

> "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 upon 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 . . .
>
> *See* Section 440.13(1)(g), Fla. Stat. (1983)(emphasis added).

Under this section any review conducted as to the reasonableness, necessity or appropriateness of the care rendered to a patient by a particular physician is to be done by a group of that physician's peers. Therefore, in order to discontinue or take away treatment that is currently being performed on a claimant, the employer/carrier must seek a utilization review of the physician rending such care. This review is to be conducted by "physicians licensed under the same authority as the physician who rendered the services being reviewed." *See* 440.13(1)(e), Fla. Stat. (1983). Certainly the intent of the legislature, as shown squarely by the language of the statute, was not to allow physicians licensed in a different field as the physician rendering the treatment to determine there was overutilization of treatment and discontinue same.

In sum to illustrate polar ends of the requests for medical treatment, when treatment is requested it must be accepted by peers licensed under the same statute as the physician rendering such treatment, not by a physician licensed under a different statute. At the geometrically polar end, one way to terminate

treatment by a particular doctor is to utilize the peer review committee under the overutilization provisions of section 440. Suspension of such treatment is again determined by a group of peers licensed under the same statute as the physician rendering such care. To use our example above, in determining whether an osteopath's services have been overutilzed, the legislature did not intend to allow podiatrists on the review panel -- only peers.

It is therefore the Claimant's position in the present appeal that what a physician cannot do directly, he or she may not do indirectly. For example, if in a utilization review a physician not licensed under the same authority as the physician rendering the care may not sit on the review committee to possibly terminate services, then why may a physician indirectly testify singularly and accomplish the same end -- termination of treatment of another doctor not licensed under the same authority.

The carrier in the case at bar has attempted to prove that the chiropractic care received by the claimant was excessive, unreasonable and unnecessary by virtue of two independent medical evaluations. One of these evaluations was accomplished by Dr. Arpin through actual physical evaluation of the claimant. The other opinion was given by Dr. Conant based solely upon medical records furnished to him by the carrier. Dr. Arpin, a neurologist (R. 243), and Dr. Conant, an orthopedic surgeon (R. 205), are licensed pursuant to section 458, Florida Statutes. Dr. Crowley is licensed as a chiropractor pursuant to section 460, Florida Statutes, neither Dr. Arpin nor Dr. Conant can be considered Dr. Crowley's peers for purposes of reviewing the care she has rendered to the claimant.

In arranging for the independent medical evaluations it would have been more appropriate for the carrier to seek the opinion of another chiropractor. This would have allowed for the evaluation of Dr. Crowley's treatment by one familiar with,

and without prejudice to, the type of treatment received by the claimant. It would also have been more in keeping with the intent of the statute which requires evaluation by a group of a physician's peers. Had the legislature intended evaluation to be accomplished in another manner it would not have explicitly defined the terms "peer review" and "peer review committee". Therefore, it should be considered inappropriate for a physician practicing outside the peer group to opine as an expert that the care of the treating physician is not reasonable and necessary.

A search of the case law construing section 440.13, Fla. Stat. (1983), reveals several cases that may prove illustrative. In *Faife v. L. Luria & Son*, 587 So. 2d 610 (Fla. 1st DCA 1991), the First District Court of Appeal held that a chiropractor was not qualified to address psychiatric problems. An orthopedic surgeon's opinion as to the need for psychiatric care was also held not to be competent and substantial evidence as to the necessity of treatment in *Caldwell v, Halifax Convalescent Center*, 566 So. 2d 311 (Fla. 1st DCA 1990). *See also Norrell Corp. v. Carle*, 509 So. 2d 1377 (Fla. 1st DCA 1987)(holding that orthopedic surgeon's opinion as to depression was beyond scope of expertise); *Romeo v. Waterproofing System of Miami*, 491 So. 2d 600 (Fla. 1st DCA 1986)(holding a general surgeon's opinion as to psychological problems was beyond a general surgeon's expertise); *Metropolitan Transit Auth. v. Bradshaw*, 478 So. 2d 115 (Fla. 1st DCA 1985)(holding that chiropractor's opinion as to psychiatric needs of claimant is beyond expertise of chiropractor).

As case law supports, physicians licensed under one authority are unable to testify as to the necessity and/or reasonableness of care rendered by a physician licensed under another authority. Although the exact combination of physicians and/or doctors at bar, a chiropractor and orthopedic surgeon, has not been specifically addressed as to each doctor's ability to testify as to the others care, it would be illogical and

inconsistent with case law to allow physicians from another licensed field to testify as to other's treatment.[2]

Although it is the Appellant's position that only physicians who are duly licensed under the same authority may testify as to the reasonableness and necessity of that same care and not doctors licensed through another authority, Appellant in the alternative claims that her case is clearly distinguishable from *Alford v. G. Pierce Woods Memorial Hosp.*, 621 So. 2d 1380 (Fla. 1st DCA 1993). Appellant is in accord with the majority of the First District Court of Appeal in this case. As pointed out by the majority, the Employer/Carrier failed to demonstrate that Drs. Conant or Arpin were qualified to testify in the area of chiropractic medicine. See *Cloyd E. Clair v. Glades County Bd. of Comm'rand Ins. Servicing & Adjusting Co.*, 19 Fla. L. Weekly D222, 223 (Fla. Jan. 25, 1994). Further, Drs. Conant and Arpin were not asked any questions regarding any possible skills or training he possessed regarding chiropractic medicine or any type of manipulation. From the rationale of *Alford* it appears the primary justification for the court permitting the testimony of the orthopedic surgeon in determining whether the chiropractic treatment was beneficial was based upon the orthopedic surgeon's testimony that he "read a lot of chiropractic literature;" was "familiar with the general nature of treatment modalities that a chiropractor offers;" and "had training in some form of manipulation." *Alford*, 621 So. 2d at 1381, 1382. The First District Court of Appeal also relied on *Van Sickle v. All State Ins. Co.*, 503 So. 2d 1288 (Fla. 5th DCA 1987), stating the case was indistinguishable from *Alford*. *Id.* at 1382. In *Van Sickle*, the court too allowed an orthopedic surgeon to render testimony as to results of current

---

[2] Although *Alford v. G. Pierce Woods Memorial Hosp.*, 621 So. 2d 1380 (Fla. 1st DCA 1993) has been decided on this issue, it is the Appellee's position as with majority in the lower court that *Alford* was incorrectly decided. *Cloyd E. Clair v. Glades County Bd. of Comm'r and Ins. Servicing & Adjusting Co.*, 19 Fla. L. Weekly D222 at 222 (Fla. Jan. 25, 1994)

chiropractic treatment. *Van Sickle*, 503 So. 2d at 1290. However, it must be noted that this testimony was allowed over a prior sustained objection by the claimant's attorney, only after the JCC determined that the orthopedic surgeon had "some familiarity with manipulation." *Id.*

The *Alford* Court, quoting *Van Slick*, stated in its opinion that *Van Slick* was affirmed on appeal. *Alford*, agreeing with *Van Slick*, quoted it as stating:

> An orthopedic physician duly and regularly engaged in the practice of orthopedic medicine with special professional training and experience in orthopedic medicine is not thereby alone necessarily an expert as to every, or an, aspect of chiropractic healing because these two fields are not the same discipline or school of practice.
>
> *Alford*, 621 So. 2d at 1383, *quoting Van Slick*, 503 So. 2d at 1288-89. (emphasis added)

The *Alford* Court went on to adopt the following *Van Slick* reasoning placing a caveat on the above reasoning:

> However, expertise in the filed of orthopedic medicine may be relevant to the expertise on the necessity and reasonableness of chiropractic care and treatment in a particular case, and a particular orthopedic surgeon may also be possessed of "special knowledge or skill" . . . about chiropractic healing as to qualify as an "expert witness" entitled to testify in the form of an opinion about some aspect of that subject.
>
> *Id.* at 1383.

The reasoning in *Alford* which allowed the testimony of the orthopedic surgeon regarding chiropractic care was a result of the orthopedic surgeon's "special knowledge and skill" regarding chiropractic care. In the case at bar the doctors relied upon by the JCC had no such special skill as to qualify him as an expert. At least no such skill was testified to by either doctor.

Therefore, in the alternative, the case at bar is clearly distinguishable from *Alford* as no predicate was laid by the Employer/Carrier as in *Alford* or *Van Slick* that either doctor testifying on its behalf had any particular skill or knowledge as to chiropractic medicine or forms of manipulation.

This reasoning is also in conformity with section 90.702, Fla. Stat., (1993), which relates to testimony by experts. Under section 90.702 a witness must be qualified as an expert to opine by knowledge, skill, experience, training or education. The Appellant's contends that the First District Court of Appeal majority erred when it stated that the JCC correctly relied on the opinion of Dr. Arpin, under *Alford*, as it assumed he was an expert and fully qualified. *See Cloyd E. Clair v. Glades County Bd. of Comm'r and Ins. Servicing & Adjusting Co.*, 19 Fla. L. Weekly D222, 224 (Fla. Jan. 25, 1994). Although it has been held that generally the determination as to a witness' qualifications to express an expert opinion are within the discretion of the trial judge, this ruling will not be reversed absent clear error. *Alford v. G. Pierce Woods Memorial Hosp.*, 621 So. 2d. 138 at 1382 (Fla. 1st DCA 1993). In *Alford*, unlike at present, there was testimony that the orthopedic surgeon had some skill and knowledge of chiropractic medicine. No such showing was made at bar. Therefore, both under *Alford* and section 90.702, the Employer/Carrier and/or the JCC failed to demonstrate and/or find the orthopedic surgeons whom the JCC relied upon possessed any requisite skill or knowledge of chiropractic medicine. This is finding of fact not an assumption.

CONCLUSION

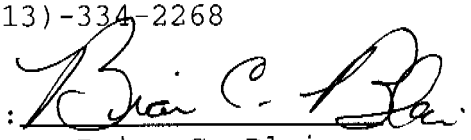
In sum, although the issue presented has not been specifically addressed before, bar *Alford*, which is distinguishable from this appeal, by looking to sister provisions of Chapter 440 for guidance in interpretation it is clear that the legislature intended for only doctors licensed

under the same authority to testify and determine the appropriate and necessity of care administered under the licensed authority in question.

Further, *Alford* and *Van Slick* are clearly distinguishable in that in both cases there was a predicate laid by the Employer/Carrier that each orthopedic surgeon testifying had some skill or knowledge in the area of chiropractic medicine. Furthermore, the *Alford* court adopted the *Van Slick* rationale that just because the physician is a licensed orthopedic surgeon, who is broadly licensed under statute, does not necessarily mean that such doctor is an expert in the chiropractic field. No such predicate was presented in the present appeal that either doctor had any knowledge or skill as to chiropractic medicine.

Based upon the above Appellant, Cloyd Clair, respectfully requests that the compensation order be reversed or in the alternative remanded with instructions that Dr. Crowley's care of Claimant/Appellant be reviewed by her peers to determine whether such is reasonable, necessary and appropriate.

BLAIR & BLAIR, P.A.
Attorney for Appellant
2138-40 Hoople Street
Fort Myers, Florida 33901
(813)-334-2268

By: 
Brian C. Blair
Fla. Bar No. 0973084

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been furnished to GERALD W. PIERCE, ESQUIRE, Post Office Box 280, Fort Myers, Florida 33902 by U.S. Mail this 14th day of March, 1994.

BLAIR & BLAIR, P.A.
Attorney for Appellant
2138-40 Hoople Street
Fort Myers, Florida 33901
(813)-334-2268

By: Brian C. Blair
Brian C. Blair
Fla. Bar No. 0973084