OA 10-31-94

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

CLOYD E. CLAIR,

Appellant,

vs. CASE NO.: 83,213

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

Appellees.
_____/

ON APPEAL FROM THE FIRST DISTRICT COURT OF APPEAL

INITIAL BRIEF OF AMICUS CURIAE AMERICAN INSURANCE ASSOCIATION

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INTRODUCTION

Amicus Curiae, American Insurance Association ("AIA"), files this brief in support of the appellees, Glades County Board of Commissioners and Insurance Servicing & Adjusting Company.

STATEMENT OF CASE

AIA adopts and incorporates by reference the Statement of the Case as recited by the appellant in its initial brief, as modified by the appellees in their answer brief. AIA further states that it filed its Motion for Leave to Appear as Amicus Curiae on August 25, 1994. The court granted AIA's motion by order dated August 29, 1994.

STATEMENT OF THE FACTS

AIA adopts and incorporates by reference the Statement of the Facts as recited by the appellees in their answer brief as well as those facts contained in the opinion of the First District Court of Appeal in *Cloyd E. Clair v. Glades County Board of Commissioners and Insurance Servicing & Adjusting Company*, 635 So.2d 84 (Fla. 1st DCA 1994).

On November 3, 1983, the appellant injured her back in a work related accident. The Employer/Carrier accepted the injury as compensable. At that time the Employer/Carrier authorized her claim for continued palliative care with an authorized chiropractor. Subsequently, the Employer/Carrier sought to de-authorize the chiropractic care. A judge of compensation claims

(JCC) denied appellant's claim for continued palliative care with an authorized chiropractor. The JCC accepted the expert opinion of a neurosurgeon and an orthopedic surgeon that the appellant's continued chiropractic treatment was neither reasonable nor necessary.

The First District Court of Appeal, while affirming the decision of the JCC based upon the court's recent decision in *Alford v. G. Pierce Woods Memorial Hospital*, 621 So.2d 1380 (Fla. 1st DCA 1993), opined that its decision in ***Alford*** was incorrectly decided. It was the opinion of the court that under the provisions of §440.13, Fla. Stat., a physician, practicing outside of the peer group of the physician whose care had been authorized, may not under any circumstances, opine as an expert that the furnished care is not reasonable and necessary.

Because of the disagreement by the majority of the court's panel to the decision of the court in *Alford v. Woods Memorial Hospital*, supra, the court certified 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?"

SUMMARY OF ARGUMENT

This case involves the narrow issue as to whether the Florida Workers' Compensation law permits a physician outside the peer group of the physician whose care has been authorized to opine as an expert that the furnished care is not reasonable and necessary. The court's suggestion that §440.13, Fla. Stat., does not permit such a physician to offer such expert opinion is;

(a) inconsistent with and contrary to the provisions of §440.13, Fla. Stat.;

(b) abrogates the Florida Evidence Code provision relating to the admissibility of expert testimony; and

(c) is inconsistent with established law in Florida as to when, and under what circumstances, the trier of fact may utilize expert testimony.

Section 440.13, Fla. Stat., does not prohibit a physician outside the peer group of the physician whose care has been authorized to opine as an expert that the furnished care is not reasonable and necessary. To the contrary, established Florida law on the use of and admissibility of expert opinion permits, under appropriate circumstances, a physician outside of the peer group of the physician whose care has been authorized under §440.13, Fla. Stat., to opine as an expert that the furnished care is not reasonable and necessary.

ARGUMENT

> "SECTION 440.13, FLORIDA STATUTES, DOES NOT PROHIBIT A PHYSICIAN, PRACTICING OUTSIDE OF THE PEER GROUP OF THE PHYSICIAN WHOSE CARE HAS BEEN AUTHORIZED, TO OPINE AS AN EXPERT THAT THE FURNISHED CARE IS NOT REASONABLE AND NECESSARY.

The First District Court of Appeal certified the following question to the Florida Supreme Court as one of great 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? (Emphasis supplied).

The better question would be whether §440.13, Fla. Stat., **prohibits** 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 applicable provisions of §440.13, Fla. Stat., do not prohibit 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. While §440.13 does not specifically address this issue, it clearly does not prohibit such testimony. As will be discussed below, such expert testimony is consistent with Florida's Evidence Code and established law relating to the admissibility of expert testimony and opinion in Florida.

Section 440.13(2)(a), Fla. Stat., provides in pertinent part as follows:

> "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, and prostheses, and other medically necessary apparatus..." (Emphasis supplied).

Pursuant to the provisions of §440.13(2)(d), if the employer fails to provide such treatment, 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 of the treatment subject to approval by a JCC.

Under §440.13(1)(d), the legislature defined the term "medically necessary" to mean as follows:

> "... 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." (Emphasis supplied).[1]

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[1]The definition of "medically necessary," is found in §440.13(1)(m), as amended by section 17 of Chapter 93-415, Laws of Florida. The reference to "practicing peer group" has been deleted. The pertinent provision of §440.13(1)(m) now reads: "The service should be widely accepted among practicing health care providers." The definition of "health care provider" remains unchanged and is found in §440.13(1)(i), section 17, Chapter 93-415, Laws of Florida, and provides in pertinent part: "Health Care

Neither §440.13(2)(a), nor §440.13(2)(d) reference or prohibit a physician, who is 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. Indeed, these statutory provisions do not delineate how the JCC is to make the ultimate determination as to the reasonableness and necessity of a particular treatment, care or attendance. However, it is clear that a service or supply is medically necessary if the service or supply is used to treat an injury which is "appropriate" to the patient's diagnosis, and which is consistent with the location of service and with the level of care provided. In addition, the service should be widely accepted by the practicing peer group to be considered "medically necessary." Further, in order to be medically necessary, the service or supply should not be of an experimental, investigative, or research nature, except in those instances in which prior approval of the Division of Workers' Compensation ("Division") has been obtained.

Accordingly, in order for a service or supply to be "medically necessary" the following conditions should be considered:

(1) The supply or service should be appropriate to the patient's diagnosis;

(2) The service or supply should be consistent with the location of service and with the level of care provided;

Provider" means a physician or any recognized practitioner... The Florida Statutes in 1983 did not provide a definition of "practicing peer group." The 1993 Florida Statutes likewise do not provide a definition of "practicing peer group."

(3) The service should be widely accepted by the practicing peer group;

(4) The service or supply should be based on scientific criteria;

(5) The service or supply should be determined to be reasonably safe;

(6) 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 term "practicing peer group" is not defined by the statute. However, it is safe to assume that "practicing peer group" would mean "similar health care provider." In order for an employer to be required to furnish certain treatment to an injured employee, the treatment recommended must be deemed "medically necessary." In order for the treatment to be "medically necessary" numerous conditions, hereinabove specified, must be met, including, but not limited to, that the service should be widely accepted by the practicing peer group. This can only mean, for example, that if a chiropractor suggested a particular treatment for a patient, the specified treatment, service or supply should be widely accepted by other licensed chiropractors and/or similar healthcare providers. However, even if a particular treatment for a particular patient is widely accepted by similarly licensed physicians, such acceptance is but one factor to be considered in determining whether or not the treatment is medically necessary. All of the conditions of §440.13(1)(d), defining the term

"medically necessary" should be met. Section 440.13(2)(d), places an additional requirement that the proposed treatment be "reasonable." Section 440.13(2)(d), Fla. Stat., provides in pertinent part:

> "If the employer fails to provide such treatment, care and attendance after request by the injured employee, the employer may do so at the expense of the employer, the **reasonableness** and the **necessity** to be approved by a judge of compensation claims." (Emphasis supplied).

Accordingly, the JCC is required to determine whether or not the proposed service or supply is reasonable, as well as necessary, and, therefore, appropriate to the patient's diagnosis. All of the above-referenced criteria should be considered by the JCC. In making this determination, a classic case for the use of expert opinion is created. The First District Court of Appeal's attempt to construe the term "peer review" found in §440.13(1)(f), and the term "peer review committee" found in §440.13(1)(g) to somehow limit the JCC to a consideration of the expert opinions of physicians practicing within the peer group of the physician whose care was authorized, is not statutorily mandated and is, indeed, contrary to the expressed provisions of §440.13(1)(d), (2)(a), (d), Florida Statutes. The fact that the service or treatment proposed should be widely accepted by the practicing peer group is but a criterion to consider in determining whether or not a service or treatment is medically necessary and does not limit the expert testimony to "the practicing peer group."

Indeed, a "peer review" and the "peer review committee" as defined in §440.13(1)(f)(g), Fla. Stat., relate specifically to "utilization review" as defined in §440.13(1)(i). "Utilization review" and "overutilization review" are specifically authorized pursuant to §440.13(2)(c) and are separate and distinct procedures under the workers' compensation law and have no relationship to the determination by the JCC as to whether or not a service or supply is "medically necessary," as well as reasonable.

The "utilization review" and "overutilization review" procedures are used to de-authorize previously authorized care of a patient **without order** of the JCC and is to be conducted by a "peer review committee" composed of physicians licensed under the same authority as the physician who rendered the services being reviewed. Utilization review can also be used to authorize a service or supply. Utilization review is an internal procedure and is not a legal procedure. This review occurs at the Employer/Carrier level. The utilization review procedure, however, is not related to the situation where the employer has failed to provide a certain treatment or is now refusing to continue previously authorized treatment. Instead, in the case of utilization review, the peer review committee is, on its own volition, determining whether previously approved and provided care should be de-authorized as being not in the best interest of the injured employee. However, as in the present case, where the employer is refusing to continue treatment previously authorized, the JCC must determine whether the requested service or supply is

"medically necessary" and "reasonable." In making such determination, the JCC must necessarily rely upon expert opinion. This determination is made in a legal/judicial proceeding. Sections 440.13(1)(d), (2)(a)(d), Fla. Stat., do not prohibit the JCC from considering all appropriate expert opinion after the JCC has made a determination as to the competency of the expert to provide the requested opinion.

Such conclusion is consistent with Florida's Evidence Code and the established law in Florida relating to the admissibility of expert opinion.

Section 90.702, Fla. Stat., provides as follows:

> "If scientific, technical, or specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to evidence at trial."

The purpose of an expert witness, by whomever called, is to offer guidance to the trier of fact on matters beyond his/their understanding. *Flanagan v. State*, 586 So.2d 1085, (Fla. 1st DCA 1991). As such, in order to admit expert opinion, the subject must be beyond the common understanding of an average laymen, and the witness must have such knowledge as will probably aid the trier of fact in its search for truth. *Buchman v. Seaboard Coastline Railroad Co.*, 381 So.2d 229 (1980).

The trier of fact has the initial responsibility of determining the qualifications and range of subjects on which the

expert witness is allowed to testify, and its determination will not be disturbed on appeal in absence of a clear showing of abuse of discretion. *Guy v. Kight*, 431 So.2d 653 (5th DCA 1983), review denied 436 So.2d 100; *Rivers v. State*, 425 So.2d 101 (1982). Likewise, it is well established in Florida jurisprudence that the trier of fact has considerable discretion in determining the qualification of an expert. *Reinhart v. Seaboard Coastline R. Co.*, 422 So.2d 41 (1982) reviewed denied 431 So.2d 988. The question of whether a person is qualified to testify as an expert on a particular subject is a question of law. *Daniels v. State*, 381 So.2d 707 (1979).

Thus, in general, there are four requirements for determining the admissibility of expert testimony. These four requirements are:

(1) The opinion evidence be helpful to the trier of fact;

(2) The witness be qualified as an expert;

(3) That the opinion evidence can be applied to the evidence offered at trial;

(4) That the evidence not present substantial danger of unfair prejudice outweighing its probative value.

Holiday Inns, Inc., v. Shelburne, 576 So.2d 322 (4th DCA 1991).

Based on these criteria, witnesses have been allowed to provide expert opinion at trial even where the witness is not presently engaged in the practice of his avowed expertise (witness was qualified to testify as an expert on the effect of alcohol upon

the human body where, not withstanding his present occupation as a store-owner, he previously had been employed as a highway patrol trooper for twenty-seven years and was presently a breathalyzer and intoxilyzer instructor at a junior college, *Brown v. State*, 477 So.2d 609 (1st DCA 1985); **an orthopedist was allowed to render an opinion on chiropractic care,** *Spears v. Gates Energy Products*, 621 So.2d 1386 (1st DCA 1993); **an orthopedic surgeon was allowed to opine whether, from a medical standpoint, chiropractic manipulation of the spine would be likely to help or harm a workers' compensation claimant,** *Alford v. G. Pierce Woods Memorial Hospital*, 621 So.2d 1380 (Fla. 1st DCA 1993); a general practitioner who was familiar with the claimant's shoulder injury, monitored claimant's condition and prescribed heart medication was allowed to render an opinion on whether the combined effect of claimant's shoulder injury and heart condition rendered claimant permanently totally disabled under the workers' compensation law, *Rodrigues v. Howard Industries*, 588 So.2d 646 (Fla. 1st DCA 1991); **an expert in orthopedic medicine was not, for that very reason, unqualified to render expert opinion on the reasonableness of chiropractic care and treatment,** *Van Sickle v. Allstate Insurance Co.*, 503 So.2d 1288 (Fla. 5th DCA 1987); trial court was deemed to have erred in excluding the testimony of a physician that movement of the plaintiff created quadriplegia regardless of physician's non-specialization in the diagnosis of spinal cord injury, such non-specialization going to the weight rather than the admissibility of the testimony, *Botte v. Pomeroy*, 497 So.2d 1275 (Fla. 4th DCA); a

clinical psychologist to whom a neurosurgeon referred a patient was allowed to testify concerning the existence of organic brain damage, based upon results of a battery of common-used psychological tests, even though the psychologist lacked a medical degree, such fact affecting the weight of the testimony, rather than the admissibility, *Executive Car and Truck Leasing, Inc. v. DeSerio*, 468 So.2d 1027 (Fla. 4th DCA 1985), reviewed denied 480 So.2d 1293; one may be qualified to give expert testimony on standard of care in a medical malpractice action even though he is not of the same specialty or branch of medicine as the defendant, *Wright v. Schulte*, 441 So.2d 660, (Fla. 2nd DCA 1983), review denied 450 So.2d 488.

Accordingly, in all cases where the legislature has not specifically provided otherwise, the qualification of an expert witness to testify and the parameters of his expertise are conclusions of fact to be determined advisedly by the trier of fact and affirmed on appeal if supported by competent evidence. *Van Sickle v. Allstate Insurance Company*, supra. In a medical malpractice action, the requirements for an expert to testify in judgment of another health care provider's actions or inactions are defined by §766.102, Fla. Stat. This provision specifically allows a physician who has sufficient training, experience and knowledge in a related field, to testify against a physician who is not practicing in the same specialty. In otherwords, a specialist in

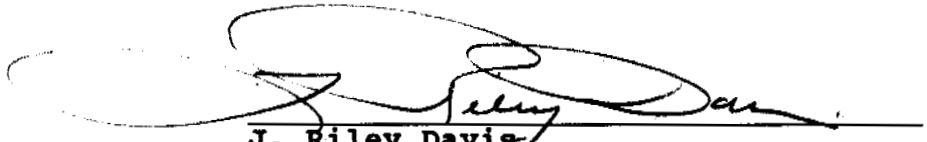
one field is allowed to testify against a specialist in another field. See *Green v. Goldberg*, 630 So.2d 606 (Fla. 4th DCA 1993); *Catron v. Bohn*, 580 So.2d 814 (Fla. 2nd DCA 1991).

Clearly, the legislature did not intend that a determination as to the medical necessity for a particular treatment under the workers' compensation law be more restrictive as to who is allowed to provide expert opinions relating to the medical necessity of the treatment than what is allowed in the way of expert opinion as to the competency of a practicing physician. Accordingly, the construction of §440.13 by the First District Court of Appeal in the case sub-judice suggests an absurd result not intended by the legislature.

It is well established in Florida jurisprudence that the Florida Evidence Code applies to workers' compensation proceedings. *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 rule of law was reaffirmed by the First District Court of Appeal in *Alford v. G. Pierce Woods Memorial Hospital*, 621 So.2d 1380 (Fla. 1st DCA 1993), where an orthopedic surgeon was allowed to testify as an expert witness and opine whether a chiropractic manipulation of the spine would likely help or harm a workers' compensation claimant. For the reasons heretofore discussed, such decision is consistent with the Florida Evidence Code and the purpose and intent of the workers' compensation law.

CONCLUSION

The decision and reasoning of the First District Court of Appeal in the case of *Alford v. G. Pierce Woods Memorial Hospital*, supra., should be affirmed by this court and a decision rendered that §440.13, Fla. Stat., **does not prohibit** 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 where said physician can be qualified as an expert pursuant to the provisions of §90.702, Fla. Stat.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Amicus Curiae Brief was furnished by U.S. Mail this 2nd day of September, 1994 to: Brian C. Blair, Esq., Blair & Blair, P.A., 2138-40, Hoople Street, Fort Myers, Florida 33901 and to Gerald W. Pierce, Esq., Henderson, Franklin, Starnes and Holt, P.A., Post Office Box 280, Fort Myers, Florida 33902-0280.

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