O/A 10-31-94

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

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APPELLANT'S REPLY TO THE AMICUS CURIAE

ON APPEAL FROM THE FIRST DISTRICT COURT OF APPEAL

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PREFACE

The Appellant is CLOYD E. CLAIR, hereinafter referred to as "Claimant". The Appellees, employer and carrier are GLADES COUNTY BOARD OF COMMISSIONERS and INSURANCE SERVICING & ADJUSTING COMPANY, hereinafter referred to as "Employer/Carrier" or "E/C". The Amicus Curiae, AMERICAN INSURANCE ASSOCIATION, shall be referred to as the "Amicus" or "Amicus Curiae." References to the record on appeal will be denoted as "(R.)". References to the Claimant's Reply Brief to the Appellee's Answer Brief shall be denoted as ("RB") followed by the respective page number. References to the Amicus Curiae Brief shall be denoted as ("AB") followed by the respective page number.

SUMMARY OF ARGUMENT

In sum, the Florida legislature has chosen to limit who can determine what care is "medically necessary" by specifically limiting definitions within section 440.13, Fla. Stat. (1983),[1] to "peers." Had the legislature intended to broaden the definition of medically necessary to include a more comprehensive definition, such as in medical malpractice, section 766.102, Fla. Stat. (1993), or even section 90.702, Fla. Stat. (1993), then it would have so included same. Further, an expanded five condition definition although plausible, would be impractical and cause confusion unless all such conditions could be determined by the practicing peer group licensed under the same authority. Lastly, it cannot be imagined that the legislature did not intend similar statutory definitions of "peer," appearing in sister sections of the workers' compensation statute in the definitions of "peer review" and "peer review committee" to used as guidance, but instead intended a broader medical malpractice or evidence code definition <u>outside</u> the workers' compensations statute, over similar peer definitions <u>within</u> section 440.13, Fla. Stat.

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[1] All references to chapter 440 are to the 1983 edition unless otherwise delineated.

ARGUMENT

Counsel for the Amicus Curiae has re-written the issue certified to this Court as:

> Whether section 440.13, Fla. Stat. prohibits a physician, practicing outside the peer group of the physicians whose care was authorized, to opine as an expert that the furnished care is not reasonable and necessary.

The Claimant contends that the intent and structure of the statute should be considered and not just the notion that since the statute does not prohibit such testimony then it is safe to assume that it permits same.

The Amicus Curiae brief has stated that section 440.13, Fla. Stat. (1983), defining "medically necessary" is essentially separated into five separate elements or parts. Although arguably there are five parts to the definition of whether treatment is medically necessary, it is the Claimant's position that in determining whether the treatment is medically necessary, section 440.13(1)(c), Fla. Stat., should be read *in pari materia* with other definitions within Chapter 440, Fla. Stat., and with the other elements within the definition of medically necessary itself.

The element that has caused much concern is the component that the service must be accepted by the "practicing peer group." The Amicus brief has stated that in considering these five elements that it is safe to assume "practicing peer group" under the workers' compensation statute and "similar health car provider"

under the medical malpractice statute are the same. [AB. p.7]. It is not safe to "assume" such a leap. Such an assumption should not be made primarily because all references to any type of "peer committee" or "peer review" under section 440.13, Fla. Stat., are much more restrictive than under the definition of "similar health care provider" as provided by section 766.102, Fla. Stat. (1993). *See* 440.13(1)(d), (e), Fla. Stat. (1983).

Under section 440.13, Fla. Stat., similar references to "peer" are limited to "physicians licensed under the same authority." *See* sections 440.13(1)(g), (e). Fla. Stat. (1983). Under section 766.102, Fla. Stat. (1993), the definition of "similar health care provider" is much broader than that of "peer" under chapter 440. Section 766.102, Fla. Stat., provides that a similar health care provider may not only be a physician who is licensed under the same authority, as limited in section 440.13, Fla. Stat., but also a physician who is (1) trained and experienced in the same discipline or school; (2) practices in the same area; (3) is certified in the same specialty; or (4) possesses enough training, experience of knowledge in the same field. Therefore, there are essentially many ways a physician may be a "similar health care provider" under section 766.102, Fla. Stat., but only one way a physician may be a "peer" under section 440.13, Fla. Stat.

Since it is highly unlikely, if not impossible, that "practicing peer group" and "similar health care provider" are the same, the Amicus brief's position is therefore incorrect as the definitions are diametrical to each other. The Amicus brief has stated that "all of the conditions of section 440.13(1)(d),[2] defining the term 'medically necessary' should be met." [AB. p. 7-8]. The service or treatment at bar was not determined by the practicing peer group, [chiropractors], to be medically necessary as the JCC relied upon testimony of a physician outside the practicing peer group. Therefore, even if Amicus counsel's proposition were true, it has not been satisfied as all five of the conditions have not been met as the physician [an orthopedic surgeon] outside the practicing peer group [chiropractors] has determined if the service was medically necessary. If such an expansive definition of practicing peer group was intended then surely the legislature would have so specified as it had in section 766.102, Fla. Stat. Section 440.13(1)(b) of the workers' compensation statute has also defined health care provider. Common sense would dictate that the term health care provider or a similar term would have been interjected within the definition of medically necessary had the legislature intended such a broad definition

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[2]The Amicus Curiae brief has cited the 1993 edition of "medically necessary" as stated in section 440.13(1)(d), Fla. Stat. (1993). This footnote is of no consequence, but only meant to avoid confusion as the cite has changed from 440.13(1)(c) in 1983 to 440.13(1)(d) in 1993.

especially since the legislature obviously thought about such term as to even include it in the definition section itself of section 440.13, Fla. Stat. Further, it is doubtful that such similar limiting definitions of "peer" would have been used had such an expansive view been the intent of the legislature in drafting section 440.13, Fla. Stat. Under the Amicus position, the only means by which all five conditions in this case could be met is by using the expansive definitions of section 766.102, Fla. Stat. and section 90.702, Fla. Stat.

However, when reading the definition of medically necessary *in pari materia* with other provisions within the definition of medically necessary, it becomes apparent that logic and common sense would dictate that even if there are five separate conditions to be met, that these five conditions should be determined based upon the testimony of the physician in the "practicing peer group." This practicing peer group would be the same as other "peer" provisions in section 440.13, Fla. Stat. -- that of physicians licensed under the same authority as the physician who rendered the care. *See e.g.*, 440.13 (1)(e), Fla. Stat. (1983). To determine whether a service is appropriate to the patient's diagnosis using physicians outside the practicing peer group would be contrary to the intent of the statute, common sense and logical interpretation. For instance, under the Amicus position, if someone outside the practicing peer group, in this case

a neurosurgeon and orthopedic surgeon, determined that a service was not appropriate to the patient's diagnosis there would be no reason to even continue to the remaining four conditions, in effect rendering them useless. It would be impossible that a physician outside the practicing peer group could determine that a treatment or service was not appropriate to the diagnosis, yet then in the end the service be continued just because it is accepted by the peer group, was not experimental, and was based on scientific criteria and was consistent with the level and location of care. There would be no need for such treatment. The Amicus has made the first factor of whether the treatment is appropriate to the patient's diagnosis so critical that it has in effect smothered the other conditions.

Common sense and logic would dictate that since the "service" must be determined to be appropriate by some physician and the "service" must be accepted by the practicing peer group that this physician or physicians be licensed under the same authority as the physician who rendered the treatment. Similarly, it would be hard to conceive the JCC determining whether the "service" is consistent with location and level of care provided without testimony from the same physician who determined the treatment was appropriate. If one doctor determined a treatment was appropriate, reason would have it that the same doctor or a physician from the same licensed

authority would have to testify to the level and location of service. Under the Amicus position it is theoretically possible to have a neurosurgeon testify as to the appropriateness of the care and an orthopedic surgeon testify as to the level of the neurological service. This could be possible even though the orthopedic surgeon does not practice in the area of neurology, just because there is some type of "overlap" or the orthopedic surgeon has some general knowledge of neurological treatment, but yet is theoretically unfamiliar with the level of care as he/she does not practice in the same area. Further, whether the treatment is experimental or reasonably safe should also be determined by physicians in the same peer group.

Furthermore, if these five conditions can be determined by a similar health care provider, there could theoretically be five differently licensed physicians testifying as to the five conditions. This process still fails to answer whether the service or care is medically necessary as all these conditions would make up one definition of medically necessary and the JCC would be left with potentially five different opinions. Such application would also give more weight to whatever physician determines the "appropriateness" of the treatment, because as stated earlier, if this doctor testifies that the treatment is not appropriate, there is

no need to continue to answer the remaining conditions under the definition of medically necessary.

In sum, the Florida legislature has chosen to limit who can determine what care is medically necessary by specifically limiting definitions within section 440.13, Fla. Stat., to "peers." Had the legislature intended to broaden the definition of medically necessary to include a more comprehensive definition, such as in medical malpractice [766.102, Fla. Stat.] or even section 90.702, Fla. Stat., of the evidence code then it would have so included same. As evidence, the legislature was cognizant of the term health care provider and similar broader definitions, yet chose not to use them in the definition of medically necessary. This is evidenced by the definition of health care provider under section 440.13(1)(b), Fla. Stat. Further, an expanded five condition definition although plausible, would be impractical and cause confusion unless all such conditions could be determined by the practicing peer group licensed under the same authority. Lastly, it cannot be imagined that the legislature did not intend similar statutory definitions of "peer," appearing in sister sections of the workers' compensation statute in the definitions of "peer review" and "peer review committee" to used as guidance, but instead intended a broader medical malpractice or evidence code definition <u>outside</u> the workers'

compensations statute, over similar peer definitions within section 440.13, Fla. Stat.

Attempts to distinguish utilization review as inapplicable to the case at bar are inaccurate. These attempts are made to avoid, for analogous purposes, the use of the definitions of "peer review" and "peer review committee" that are defined within section 440.13, Fla. Stat. First, although utilization is conducted by a peer review committee, its purpose, as the Amicus states, is to determine whether previously authorized care should be deauthorized. [AB. 9]. This review is conducted by peers licensed under the same authority as the physicians who rendered the services. *See* section 440.13(1)(e), (g), Fla. Stat. In the case at bar, the JCC is essentially conducting the same procedure as a utilization review in determining whether the service is reasonable and necessary -- to determine if previous authorized medical care should be deauthorized and terminated. Whether the JCC ultimately determines the treatment was reasonable and necessary or whether the peer review committee determines this is not a distinguishing factor. Because in this case, or any case for that matter, the JCC makes his decision as to the reasonableness and necessity of the care relying upon testimony of physicians. Both the JCC and the peer review committee base their decisions on whether to terminate treatment relying upon testimony and presentation by physicians. By the JCC determining the

reasonableness and necessity of care, the same action is just taken one step further. The testimony on which the same decision is based should not be changed just because someone else is making the ultimate decision to terminate treatment.

Both procedures accomplish the same end -- termination of treatment. Logic requires that termination under one procedure based upon review and testimony of physicians licensed under the same authority also mandates that termination under another procedure occur by those same peers licensed under the same authority. Lastly the Claimant fails to see how another provision within the workers' compensation chapter is not analogous yet numerous medical malpractice cases outside the workers' compensation statute are analogous. Further, as stated *supra,* the medical malpractice statute is clearly more broad than intended by the workers' compensation statute concerning testimony and thus not analogous.

Although case law has held that workers' compensation proceedings are subject to rules of evidence, the cases cited in the Amicus brief all only concern the hearsay exception and should be read to hold only that workers' compensation proceedings are subject to the Florida Rules of Evidence to the extent that such rules preclude the admission of hearsay testimony. *See e.g., Martin Marietta Corp. v. Roop,* 566 So. 2d 40 (Fla. 1st DCA 1990)(concerning hearsay); *Odom v. Wekiva Concrete Prod.,*

443 So. 2d. 331 (Fla. 1st DCA 1983)(concerning applicability of hearsay exception and citing six cases, all concerning applicability of hearsay exception).

Further, there is no reference within Chapter 440 that specifically incorporates or even infers application of section 90.702, Fla. Stat., to the workers' compensation statute. In fact, the opposite appears to have been the legislative intent. The Florida legislature specifically chose to limit specific sections of 440.13, Fla. Stat., with the term "peer." Although "practicing peer group" has not *per se* been defined, it is helpful to glean intent from other section within 440.13, Fla. Stat., that have used the term "peer" and already defined same. All references and definitions of peer refer to physicians licensed under the same authority. Yet the Amicus would have this Court define it in another way, expanding it to include all physicians who meet the test of section 766.102, Fla. Stat. or section 90.702, Fla. Stat., which if defined this way would be detrimental to the other sections and to the overall intent of section 440.13, Fla. Stat. In essence, the specific statute, here 440.13, Fla. Stat., using and defining peer should control over the more general, section 90.702, Fla. Stat. or section 766.102, Fla. Stat. *See Clair v. Glades County Bd. of Comm'rs,* 635 So. 2d 84 (Fla. 1st DCA 1994); *Board of Trustees v. Alvarez,* 563 So. 2d 1110 (Fla. 2d DCA 1990).

Lastly, even should this Court determine that section 766.102, Fla. Stat. or section 90.702, Fla. Stat., apply to this case, as previously stated in the Claimant's Reply Brief to the Appellee's Answer Brief and adopted herein neither Dr. Arpin nor Dr. Conant was qualified as an expert under either section 766.102, Fla. Stat., or section 90.702, Fla. Stat., as neither possessed the necessary skill, knowledge or experience to be qualified as an expert or were not licensed under the same authority or field. [RB. 11-16]. Therefore, the cases cited by the Amicus are clearly distinguishable and inapplicable as in all those cases there was testimony that each physician testifying outside his specialty or area of practice had some knowledge, skill or experience in that outside field in which he or she was testifying as to qualify as an expert, bar *Cloyd E. Clair v. Glades County Bd. of Comm'rs*, 635 So. 2d 84 (Fla. 1st DCA 1994).

Additionally all the case cited in the Amicus brief apply the broader more comprehensive test of either section 766.102, Fla. Stat or section 90.702, Fla. Stat., not the more specific limiting "peer" test as intended by the legislature to be used specifically with the workers' compensation statute.

CONCLUSION

Expert testimony regarding an opinion as to whether treatment is medically necessary should be limited to physicians licensed under the same authority as the

physician who rendered the treatment. This application would be consistent with the intent and similar limiting provisions of section 440.13, Fla. Stat.

Wherefore in light of the foregoing, the Claimant respectfully requests this Court to reverse the compensation order or in the alternative remand it with instructions that Dr. Crowley's care of Claimant/Appellant be reviewed by her peers to determine whether such is reasonable, necessary and appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been furnished to GERALD W. PIERCE, ESQUIRE, Henderson, Franklin, Starnes & Holt, P.A., Post Office Box 280, Fort Myers, Florida 33902 and J. RILEY DAVIS, ESQUIRE, Katz, Kutter, Haigler, Alderman, Marks & Bryant, P.A., 106 East College Avenue, Tallahassee, Florida 32301 by U.S. Mail this 7th day of October, 1994.

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