IN THE SUPREME COURT OF FLORIDA

CLOYD E. CLAIR,

Appellant,

vs.

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

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

Appellees.

APPELLANT'S REPLY BRIEF

ON APPEAL FROM THE FIRST DISTRICT COURT OF APPEAL

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

TABLE OF CONTENTS

Page

Table of Citations.....3

Preface.....4

Argument.....5

Certificate of Service.....17

TABLE OF CITATIONS

Cases Page

Alford v. G. Pierce Woods Memorial Hosp., 621 So. 2d 1380 (Fla. 1st DCA , (1993)..... .7,11, 12, 14, 15

Catron v. Bohn, 580 So. 2d 814 (Fla. 2d DCA 1991).....10, 11

Cloyd E. Clair v. Glades County Bd. of Comm'rs, 19 Fla. L. Weekly D222, 222-23 (Fla. 1st DCA Jan. 25, 1994).....5

Green v. Goldberg, 630 So. 2d 606 (Fla. 1st DCA 1993).....15

Spears v. Gates Energy, 621 So. 2d 1386 (Fla. 1st DCA 1993).....14, 15

Ullman v. City of Tampa Parks Dep't, 625 So. 2d 868 (Fla. 1st DCA 1993).....7

Van Sickle v. Allstate Ins. Co., 503 So. 2d 1288 (Fla. 5th DCA 1987).....16

Statutes

Sec. 90.702, Fla. Stat. (1993).....12

Sec. 440.13, Fla. Stat. (1983).....13

Sec. 440.13(1)(c), Fla. Stat. (1983).....6

Sec. 440.13(1)(g), Fla. Stat. (1983).....8

Sec. 766.102(2)(b), Fla. Stat. (1993).....10, 11

Sec. 766.102(2)(c), Fla. Stat. (1993).....9

Florida Rules of Appellate Procedure

Rule 9.030(a)(2)(A)(v).....5

Rule 9.030(a)(2)(A)(vi).....5

PREFACE

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

ARGUMENT

The Claimant objects to the statement of the facts which state, several times in different manners, that the Claimant failed to object to the testimony of Dr. Conant as to the medical necessity of the treatment [chiropractic care]. (AB. 2, 6]. Claimant's attorney of record at the time objected to any testimony regarding any chiropractic diagnosis, no matter how it is termed. (R. 218). The district court of appeal even recognized that the objection to Dr. Conant's testimony was preserved. *Cloyd E. Clair v. Glades County Bd. of Comm'rs*, 19 Fla. L. Weekly D222, 222-23 (Fla. 1st DCA Jan. 25, 1994).

The Claimant also objects to the argument regarding jurisdiction contained in the E/C's Answer Brief. As basis for the objection the Claimant relies on Fla.R.App.P. 9.120(d) which in pertinent part states "[i]f jurisdiction is invoked under rules 9.030(a)(2)(A)(v) or (a)(2)(A)(vi)(certifications by the district courts to the supreme court), no briefs on jurisdiction shall be filed."(emphasis added). Jurisdiction for this appeal was invoked pursuant to Fla.R.App.P. 9.030(a)(2)(A)(v). Although, the jurisdictional argument is contained in the Answer Brief and not a separate brief on jurisdiction, the Claimant contends that what the E/C cannot do directly, it cannot do indirectly by including such argument within its Answer brief.

The basis of the E/C's primary argument is that the chiropractic treatment was not "medically necessary" under section 440.13(1)(c). The E/C supports this argument by stating that the JCC properly relied on the testimony of Dr. Arpin and Dr. Conant, who were both "clearly testifying within their areas of expertise." (AB. 17). Further, the E/C relies on its innovative statutory construction by stating that section 440.13(1)(c) should be read as a two-part subsection and dissected into essentially two sub-definitions to make up the definition of "medically necessary," even though it appears cohesively in one subsection. Part one of this definition states that Drs. Arpin and Conant only "diagnosed" the chiropractic treatment as not medically necessary. The E/C states that reference to the peer group later in the definition of medically necessary only relates to treatment and not the diagnosis. (AB 21). This makes up part two of the definition.

After sorting through this interpretation, the Claimant's position is that such interpretation is not the intent of the legislature or normal statutory construction. The E/C in its own brief states that "[t]he trier of fact came to the obvious conclusion that Dr. Crowley's continued chiropractic treatment was not <u>medically necessary or appropriate to the diagnosis</u> of mild myofascial syndrome." (AB 22). The E/C itself does not follow its own interpretation. The E/C states that "medically necessary" as defined in section 440.13(1)(c) can essentially be broken

down into two definitions inside of one. The first definition being whether the treatment was necessary via a doctor's diagnosis. The second being once there is a diagnosis the treatment administered via this diagnosis must be accepted by the practicing peer group. These two "separate" definitions make up one definition of "medically necessary." Statements made by the E/C are incorrect. The E/C itself states that the treatment was not either medically necessary or appropriate to the diagnosis. One cannot state medically necessary is defined into two separate definitions, one of which is being appropriate to the diagnosis and then state them as separate findings. This would essentially allow a term used to define medically necessary to stand as its own term outside of the definition.

The JCC himself framed the issue as whether the chiropractic treatment was "reasonable and necessary." (R.276). Even *Alford v. G. Pierce Wood Memorial Hosp.*, 621 So. 2d 1380, 183 (Fla. 1st DCA 1993), allowed the testimony of an orthopedic surgeon as to the "necessity and reasonableness" of chiropractic treatment. *Alford*, 621 So. 2d 1380, 1383. Attempts to characterize these terms as being defined as "appropriate to the diagnosis" is a mere attempt to cloud the issue.

If clearly thought out, the E/C's position is not in conjunction with *Ullman v. City of Tampa Parks Dep't*, 625 So. 2d 868, 873 (Fla. 1st DCA 1993)(*en banc*), which holds

that in workers' compensation cases results should be logical and adhere to common sense. Under the E/C's position any doctor, from any field, could testify as to the "diagnosis" of the claimant as long as he/she does not testify to the quality of the care rendered without being from the practicing peer group. (AB. 23). However, under this scenario there would be no limitation as to what type of doctor could testify as to the "diagnosis" of the patient, thereby resulting in numerous doctors testifying as to what each doctor determines the patient's diagnosis concerns and the treatment which is needed. Then under the E/C's position whatever treatment was "diagnosed" would then have to be accepted by the practicing peer group. If the legislature intended such a definition for "medically necessary" it would not have placed the sentences in question under one subsection. The sentences and the definition of medically necessary along with other provisions regarding termination of treatment should be read *in pari materia* allowing for the peer group to decide the necessity and reasonableness of same.

Second, as stated above there would be no limitation as to who could state what the patient's diagnosis is. This result would allow several doctors to "diagnose" another doctor's treatment as not "medically necessary." The only limitation Claimant sees that the E/C stated is the test used in medical malpractice cases[1] or that there be a

[1]The E/C has made note that the Claimant has made reference to section 440.13(1)(g) regarding utilization review and how same is

substantial overlap in the practice fields. Again, this would only result in confusion and possibly result in the termination of necessary treatment. For example, a general practitioner or a general surgeon will always have substantial overlap with many fields of medicine. This cannot be the intent of the legislature -- that doctors licensed under broad fields of medicine may have carte blanche to terminate other more specialized doctors' treatment.

Further, the cases cited by the E/C concern the "standard of care" in medical malpractice actions. Although contention is made that they are instructional, the precedental value is questionable at best. The "standard of care" concerns the measure of the quality and quantity of care or services, not whether the treatment is appropriate to the diagnosis. The standard of care cases are more along the lines of what the "practicing peer group" is to decide under the E/C's split-definition of medically necessary.

Lastly, under the lengthy number of the "standard of care" cases cited by the E/C, the following test emerges when deciding whether to allow a doctor from one field to testify as the quality of care of a doctor of another field. Under section 766.102(2)(c), a health care provider may

---

inapplicable. Claimant has not and does not claim this appeal concerns over-utilization, but only to use the utilization section as an illustration of how treatment of a claimant is terminated in other areas of workers' compensation law -- by peers licensed under the same authority. Claimant has at least remained within Chapter 440. Thereby, if medical malpractice cases are analogous then surely how treatment is terminated within another section of the workers' compensation code is also applicable.

testify as an expert in an action if he: (1) is a similar health care provider; or (2) is not a similar health care provider but, who possesses sufficient training, expertise and knowledge so as to provide expert testimony. However, defining "similar health care provider" is essential in order to use this analogy. Under section 766.102(2)(b) a physician who is licensed as a specialist, as Dr. Arpin and Conant are at bar, will be considered a similar health care provider if they are: (1) trained and experienced in the same specialty; and (2) certified in the same specialty. Dr. Arpin is a board certified neurological surgeon and Dr. Conant is an orthopedic surgeon. (R.207, 243). Neither Dr. Arpin or Conant meet these criteria and therefore under the E/C's cases should not be allowed to testify as they are certified under a different specialty than Dr. Crowley. The certainly do not possess training or experience in the chiropractic field. *See infra.*

Although the E/C has cited *Catron v. Bohn*, 580 So. 2d 814 (Fla. 2d DCA 1991), for the proposition that a chiropractor and a neurosurgeon are similar health care providers and therefore allowed to testify as experts, *Catron* should be limited to its facts. In *Catron* the Second District Court of Appeal did not decide whether a chiropractor was a specialist under section 766.102(2)(b) and found no need to as the chiropractic patient was referred to the neurosurgeon in that case. Further, the court allowed the testimony of the neurosurgeon regarding

the standard of care provided by a chiropractor because another chiropractor had referred the patient to the neurosurgeon. The specific holding in *Catron* stated that the neurosurgeon in that case should be allowed to testify because:

> "Logic and reason mandates that when *any* health care provider is treating or diagnosing a patient for a condition, and the prevailing standard of care for *that* treating or diagnosing health care provider requires that he refer the patient for the treatment or diagnosis to a specialist, then such specialist should be considered in every such case a 'similar health care provider' for the purposing of testifying as an expert."

Catron v. Bohn, 580 So. 2d at 818

A review of the record does not disclose that Dr. Crowley referred the Claimant to Drs. Arpin and Conant. In fact, Dr. Conant had never seen the Claimant. Furthermore, applying this analysis, if a neurosurgeon sent a patient to a chiropractor, and chiropractic medicine is determined to be a specialty under section 766.102(2)(b), then the chiropractor could testify as the standard of care of the neurosurgeon as long as he or she is "trained in the treatment or diagnosis for that condition" and was referred to a specialist. *Catron*, 580 So. 2d 814, 818.

Furthermore, assuming arguendo that *Alford* is decided correctly and that the *Alford* rationale is applied there is

still error in this case. Under *Alford* the majority explicitly accepted the testimony of an orthopedic surgeon over objection. The reasoning for this acceptance was because the orthopedic surgeon possessed training in manipulation, read chiropractic literature and was familiar with the general nature of chiropractic treatment. *Alford*, 621 So. 2d at 1381. The majority in *Alford* then discussed how a doctor may also possess necessary knowledge and skill under section 90.702, Fla. Stat., to become an expert. The majority then stated that "a <u>particular</u> orthopedic physician <u>may</u> 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 <u>some</u> aspects of that subject." *Id.* at 1383(emphasis added). The majority also made it clear that an orthopedic physician with "training and experience in orthopedic medicine is not thereby alone necessarily an expert as to every, or any, chiropractic healing because these two are not the same discipline or school of practice." *Id.* The majority clearly allowed the testimony of the orthopedic surgeon because he possessed skill and knowledge in the area of chiropractic medicine. The majority did not say that <u>all</u> orthopedic surgeons may testify as to chiropractic medicine -- only those who demonstrate knowledge of the discipline. Section 90.702 was used to enforce this reasoning as under that section the expert must be qualified by knowledge, skill or experience.

Using *Alford's* own analysis in the case at bar does not qualify Drs. Arpin and Conant as experts in chiropractic care. Neither possessed any skill or knowledge of chiropractic medicine. Of importance is the JCC's Order dated November 5, 1991. In that order Judge Turnbull noted that the only reason he accepted the testimony of Dr. Conant was the fact that it was consistent with Dr. Arpin's, who was a highly respected physician. (R.278). The basis for this statement was that Dr. Conant had not examined the patient, seen the patient or even compiled the report he was testifying from. (R.211). Further, a review of the testimony of Dr. Arpin relied upon by the JCC which in effect piggy-backed Dr. Conant's testimony is also an abuse of discretion and does not meet even the standards set out in *Alford supra*. Dr. Arpin when asked about her findings on a follow-up visit in May 1991 via referencing the chiropractic visits the Claimant had endured, answered:

Q. [D]id you have the chiropractor's treatment of her?

A. I have written notes.

Q. Can you tell if she was being manipulated during that time or --

A. I don't know what - - you see what this means. I don't know what.

Q. You didn't review them [the chiropractic notes] really, did you?

A. Absolutely not, but if I review them now, I wouldn't know what they mean. It's like a different religion.

Chiropractor's terminology and assessment of what goes on in the body is totally different than the rest of the medical world. (R. 255-55).

Claimant can hardly imagine that the intent of section 440.13 or the medical malpractice standard test for qualifications to testify as an expert should be stretched to these confines by allowing a doctor [Arpin] from another field to testify as to treatment that she knows nothing about and does not even understand the terminology of the discipline just because there is some type of "overlap" in their fields or she diagnosed a treatment that she does not even understand as unnecessary. Where do these "overlaps" terminate? Furthermore, the only reason the JCC allowed Dr. Conant's testimony was the fact that it was "piggy-backed" in on the corresponding testimony of a well respected neurosurgeon -- Dr. Arpin. [R.278]. Therefore, Dr. Arpin's testimony does not qualify as an expert and should be disallowed and Dr. Conant's testimony should be disallowed as it only was originally allowed because it was carried in by Dr. Arpin's concurrence.

This is analogous to the case of *Spears v. Gates Energy Prod.*, 621 So. 2d 1386 (Fla. 1st DCA 1993), in which an orthopedist disqualified himself in a workers' compensation case by specifically testifying that he did not have much knowledge of chiropractic treatment. There the First District Court of Appeals reversed the JCC in his reliance on such testimony to deny chiropractic care. Therefore, Dr.

Arpin has essentially disqualified herself like the orthopedist in *Spears* as she testified she did not know anything about chiropractic care or treatment. The E/C's reliance on *Spears* to support the proposition that an orthopedist may testify as to chiropractic care is misguided as this case relies on *Alford supra*, which itself begs the question being reviewed today. Trying to expand this workers' compensation claim into the realm of medical malpractice cases is even beyond the *Alford* holding, the very case the E/C seeks to uphold as *Alford* at least requires special knowledge skill or training in order to testify as a expert in other fields.

The cases cited by the E/C regarding medical malpractice also demonstrate that most if not all of the physicians had some special knowledge or skill regarding the treatment or condition he/she was testifying about regarding another physician's specialty. *See e.g., Green v. Goldberg*, 630 So. 2d 606, 607-08 (Fla. 1st DCA 1993)(Dr. testified as he was familiar with biopsy procedure and also possessed experience and knowledge in same filed). In this appeal one witness had never seen the patient or even made the report regarding the Claimant. The other witness admits she does not even know about chiropractic care, and it appears as foreign language to her. Dr. Arpin also admitted that she in essence does not even recognize chiropractic treatment other than for physical therapy type involvement. (R.255). Therefore,

there can hardly be any knowledge, experience or skill in an area a doctor does not even recognize.

The opinion of *Van Sickle v. Allstate Ins. Co.*, 503 So. 2d 1288 (Fla. 5th DCA 1987), directly supports the conclusion that Drs. Arpin and Conant's testimony should have been excluded and the E/C distinction is incorrect. The *Van Sickle* Court also stated that an orthopedist could possibly render an opinion regarding the necessity and reasonableness of chiropractic care if he/she possessed "'special skill or knowledge' about chiropractic healing to be qualified as an expert witness." *Van Sickle*, 503 So. 2d at 1289(emphasis added). Again these attributes are not present with Drs. Arpin and Conant. The E/C's attempt to distinguish the *Van Sickle* case by stating that Drs. Arpin and Conant testified as to the "diagnosis" of the patient and treatment appropriate to that diagnosis and not whether the treatment was necessary and reasonable as in *Van Sickle* is incorrect. (AB. 26-27). The JCC in the lower court determined that the issue was whether the treatment was "reasonable and necessary," not some hybrid "appropriate to the diagnosis." (R.276). Therefore, as in *Alford* the *Van Sickle* Court also stated that an orthopedist may testify as an expert in the "reasonableness and necessity" of chiropractic care if the orthopedist possesses some special skill, knowledge or experience in the field of chiropractic medicine. Also as in both *Alford* and *Van Sickle*, as in this

case, the issue was termed as the reasonableness and necessity of the care, not the diagnosis of the care.

Wherefore in light of the foregoing, the Appellant respectfully requests this Court to reverse the compensation order 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.

Respectfully submitted,

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

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 19th day of April, 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