STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGE OF COMPENSATION CLAIMS
WEST PALM BEACH DISTRICT OFFICE

Johnathon M. Spain, Employee/Claimant, vs. **General Caulking and Coatings,** Employer, and **Chartis Claims, Inc., and AIG Claim Services, Inc.,** Carrier/Servicing Agent.	)	**OJCC Case No.** 09-015025MAD **Accident date:** 9/30/2008 **Judge:** Mary A. D'Ambrosio

FINAL COMPENSATION ORDER

AFTER PROPER NOTICE TO ALL PARTIES, a Final Merits Hearing was held on August 16, 2011. Present for the hearing were: Claimant, Johnathon Spain, Claimant's Counsel, Thomas Hedler and Employer/Carrier's Counsel, Michael Kiner.

The issue before me is authorization of surgery as recommended by Dr. Ragab, attorney's fees and costs. The Claimant alleges the Employer/Carrier has waived its right to assert a defense of medical necessity pursuant to F.S. 440.13(3)(d) and (3)(i) by its failure to respond timely to the Claimant's request for authorization. The Employer/Carrier defends the claim on the basis of 1) medical necessity and 2) major contributing cause of need for the surgery. The medical evidence is in dispute and an EMA, Dr. Clinton Davis, was appointed.

The Petition for Benefits at issue was filed on August 19, 2010. The Claimant testified before me. Counsel for the parties presented oral argument and submitted written Trial Memoranda.

CLAIMS

1. Authorization and payment of surgery recommended by Dr. Ragab.

2. Attorney's fees and costs.

DEFENSES

1. Surgery is not medically necessary;

2. Accident is not major contributing cause of need for surgery should same be found to be medically necessary;

3. No attorney's fees or costs are due and owing.

EXHIBITS

1. Pretrial Stipulation and Order - Judge's Exhibit #1;

2. Deposition Transcript of Dr. Lenard - Claimant's Exhibit #1;

3. Deposition of Dr. Ragab- Claimant's Exhibit #2;

4. Deposition of Kim Tran, Adjuster – Claimant's Exhibit #3;

5. Petition for Benefits (8/19/10) and Response to Petition for Benefits (9/14/10) – Claimant's Composite Exhibit #4;

6. Deposition and Exhibits of Dr. Maniscalco- Employer/Carrier's Exhibit #1;

7. Deposition of Dr. Clinton Davis, EMA - Employer/Carrier's Exhibit #2;

8. Order Appointing an EMA – Employer/Carrier's Exhibit #3.

FINDINGS OF FACT

1. The undersigned Judge of Compensation Claims has jurisdiction of the parties and subject matter of the claim.

2. The stipulations of the parties are approved and adopted by the undersigned.

3. The Claimant appeared before me and testified in this case. I find the Claimant to be a credible witness and have accepted his testimony. Claimant suffered a compensable injury and has received authorized medical care from orthopedic surgeons, pain management and a psychiatrist. He was evaluated by the Employer/Carrier's IME, Dr. Maniscalco, and by the Expert Medical Advisor, Dr. Davis. The Claimant has been advised that a two level lumbar fusion is recommended by Dr. Lenard and Dr. Ragab. He is aware that the success rate of the surgery is only 50 to 60%, but would like to have the surgery nevertheless as he feels it will improve his ability to function and relieve his pain. The Claimant has not returned to work since the accident and wishes to return to the workforce.

4. Dr. Lenard is an orthopedic spine surgeon who was authorized as the Claimant's one-time change. He evaluated the Claimant on January 7, 2010 and April 8, 2010. He raised the issue of a two-level fusion for the Claimant, but because he felt the Claimant did not have a clear case for a fusion, he recommended a second, neurosurgical opinion. His objective findings were a loss of lordosis on the MRI scan consistent with spasm, facet arthropathy and a small protrusion at L5-S1. He opined in deposition, after learning that Dr. Ragab had also recommended surgery, that surgery was medically necessary.

5. Dr. Ragab is an authorized spine surgeon who evaluated the Claimant on June 14, 2010. Dr. Ragab reviewed the MRI films and reports from December 11, 2008 and April 19, 2010. He diagnosed degenerative disc disease at L5-S1 and a tear at L5-S1 with stenosis. On examination, the Claimant had limited range of motion, pain and tenderness. He testified that the degenerative disease was related to the work injury and the work injury was the major contributing cause of the need for surgery. He recommended a fusion of L5-S1 with instrumentation. He testified the surgery was medically necessary.

6. Dr. Maniscalco evaluated the Claimant as an Employer/Carrier IME on February 9, 2011. He personally reviewed the MRI. He had no objective findings on physical exam of any spinal or neurological injury. It was his opinion that based upon the Claimant's exaggerated responses, he would be hesitant to recommend surgery. He opined that surgery is not medically necessary.

7. Upon timely filed motion by the Employer/Carrier, Dr. Clinton Davis was appointed by the Judge as an expert medical advisor to address the dispute between Dr. Ragab and Dr. Maniscalco. Specifically, he was requested to give an opinion on the diagnosis of the Claimant's lumbar spine, the future medical care recommended which is medically necessary and causally related, maximum medical improvement, permanent impairment rating (if at MMI) and work restrictions.

Dr. Davis performed an examination on April 8, 2011 and gave deposition testimony. He felt that the Claimant had no obvious annular tear on the MRI film. On examination, the Claimant had a slow, guarded gait and less than normal range of motion with pain. The Claimant had no detectable definite spasm of the spine, and had a normal neurological examination of the lower extremities. Dr. Davis diagnosed a soft tissue injury, probable small tear superimposed on degenerative disease at L4-5 and L5-S1. He opined that the aggravation of the pre-existing degenerative disease caused a permanent injury with a 3% permanent impairment rating. He assigned a maximum lifting restriction of 30 pounds. He felt quite strongly that surgery was not the right treatment for the Claimant. Specifically, he felt the Claimant was not the "right patient" for surgery and did not have the "right pathology". He felt that Dr. Lenard and Dr. Ragab's opinions were unreasonable, but could not explain why, other than citing to experience of the physician. He did opine that the annular tear is a soft tissue injury

superimposed over degenerative disc disease and the annular tear was related to the compensable injury.

8. The adjuster, Kim Tran, testified by deposition. She has been handling the Claimant's file since the carrier received notice of the claim. She testified that on or about August 2, 2010, she received Dr. Ragab's recommendation for surgery. She sent the recommendation to an in-house nurse case manager for utilization review. A Petition for Benefits was filed on August 19, 2010 and received by the Carrier on August 25, 2010. She filed a Response to Petition for Benefits on September 14, 2010. The Response is in evidence as Claimant's Exhibit #4. The Response references the pending utilization review.

CONCLUSIONS OF LAW

1. In making my conclusions of law, I have carefully considered and weighed all the evidence that was submitted to me, have observed the candor and demeanor of the witness appearing before me and I have resolved all conflicts in the testimony and evidence.

2. As to the issue of reasonableness and medical necessity, I find that the Employer/Carrier has forfeited its right to contest reasonableness and medical necessity, for its failure to respond to the request for authorization of surgery within three business days or ten days pursuant to sections 440.13(3)(d) and (i), Fla. Stat. (2003). The request for authorization of surgery was made as early as August 2, 2010. The Employer/Carrier did not respond to the request until September 14, 2010, more than ten days after the request. "While these sections do not require an Employer/Carrier to authorize a referral request within the time specified, they do require an Employer/Carrier to respond. If there is no response, the plain language of the section provides that the Employer/Carrier has consented to the medical necessity of the treatment." Elmer v. Southland Corporation, 5 So. 3d 754 (Fla. 1st DCA 2009).

3. I reject the Employer/Carrier's argument that it somehow has more than ten days to respond by virtue of its right to have an IME or EMA appointed to resolve the conflict. Acceptance of this argument would vitiate the plain language and intent of sections 440.13(3)(d) and (i) Fla. Stat. All that is required of the Employer/Carrier within three or ten days is a response, not necessarily a denial or authorization. City of Panama City v. Bagshaw, 36 Fla. L. Weekly D1582 (Fla. 1st DCA 7/22/11).

4. The Employer/Carrier retain its right to contest that surgery is as a result of a compensable injury. Despite their waiver of medical necessity, the causal connection between the compensable injury and requested treatment must exist. City of Panama City v. Bagshaw, 36 Fla. L. Weekly D1582 (Fla. 1st DCA 7/22/11).

The Employer/Carrier argue that the opinion of Dr. Davis, the expert medical advisor, is controlling absent clear and convincing evidence to the contrary and, as such, the surgery should be denied. The Employer/Carrier argues that the major contributing cause of the need for surgery is the degenerative disc disease and not the annular tear. I find the record to be devoid of any evidence of prior back injury or treatment for the lumbar spine. Dr. Davis opined that the Claimant had age-appropriate degeneration in the spine which preexisted the date of accident. The records in evidence are devoid of any indication or opinion that the degenerative disc disease would have independently required any level of treatment, either before or after the Claimant's accident, without the addition of the annular tear caused by the compensable injury. I find that the normal, aged condition should not be considered a contributing, legal cause of Claimant's need for surgery and therefore, the major contributing cause standard does not apply. Bysczynski v. United Parcel Services, Inc., 53 So. 3d 328 (Fla. 1st DCA 2010). I find there to be objective medical evidence that the Claimant sustained an annular tear at L5-S1 which

necessitated treatment including medication and injections and that the major contributing cause of the need for surgery is the annular tear caused by the compensable accident. I find there to be clear and convincing evidence from the opinions of Dr. Lenard and Dr. Ragab that the industrial injury which consists of an annular tear is the cause of the need for surgery.

I reject Dr. Davis' opinion as to major contributing cause as Claimant's pre-existing degenerative disk disease did not require any treatment until the industrial accident and the annular tear injury which resulted. Dr. Davis could not explain his opinion that Dr. Lenard and Dr. Ragab's opinions were "unreasonable", other than stating that the surgery was not the appropriate treatment for the Claimant and his pathology. I find that this opinion is more relevant to the issue of medical necessity, which the Employer/Carrier has waived the right to assert. I find the opinions of Dr. Lenard and Dr. Ragab to be clear and convincing evidence that there is a causal connection between the need for the surgery and the annular tear injury, sustained in the compensable accident.

5. I find that the Claimant has met his initial burden of proof concerning compensability of the lumbar condition. The burden shifts to the Employer/Carrier to provide medical evidence that the causal connection between the compensable back injury and requested treatment was broken. The Employer/Carrier has not demonstrated any break in the chain of causation, such as the occurrence of a new accident or that the requested treatment was due to a condition unrelated to the injury which the Employer/Carrier had accepted as compensable. Jackson v. Merit Electric, 37 So.3d 381 (Fla.1st DCA 2010).

WHEREFORE, it is

ORDERED AND ADJUDGED that:

1. The claim for authorization of surgery recommended by Dr. Ragab is granted. The Employer/Carrier shall authorize the surgery recommended by Dr. Ragab.

2. The Employer/Carrier shall pay a reasonable attorney's fee and taxable costs to Thomas Hedler, Esquire. Jurisdiction is reserved as to a determination of the amount if the parties are unable to agree.

3. Counsel for the parties shall be responsible for providing a copy of this Final Compensation Order to their respective clients.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida, this 14 day of September, 2011.

Mary A. D'Ambrosio

Mary A. D'Ambrosio
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Final Compensation Order was entered on the 14th day of September, 2011, and that a copy thereof was electronically served on counsel.

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Secretary to Judge of Compensation Claims