Doctors - A Matter of Choice

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In 2001, the Florida legislature for the first time addressed a maximum number of physician changes during the course of treatment for any one accident in F.S. §440.13(2)(f)(2001). Just two years later the legislature amended the statute, effective October 1, 2003, to provide:

Upon the written request of the employee, the carrier shall give the employee the opportunity for one change in physician during the course of treatment for any one accident. The employee shall be entitled to select another physician from among not fewer than three carrier-authorized physicians who are not professionally affiliated. Upon the granting of a change of physician, the originally authorized physician in the same speciality as the changed physician shall become deauthorized upon written notification by the employer or carrier. The carrier shall authorize an alternative physician who shall not be professionally affiliated with the previous physician within five days after receipt of the request. If the carrier fails to provide a change of physician as requested by the employee, the employee may select the physician and such physician shall be considered authorized if the treatment being provided is compensable and medically necessary.

There have been significant court cases involving this issue.

The One-Time Change Rule

In the case of *Butler v. Bay Center/Chubb Insurance Co.*, 947 So. 2d 570 (Fla. 1st DCA 2006), the First District Court of Appeal (DCA) was asked to address "(1) Whether the employer/carrier's authorization of claimant's pain management physician was timely; (2) and if timely, whether claimant may refuse treatment and immediately request a one-time change in her treating physician.".

The First DCA agreed with the Judges of Compensation Claims (JCC) that the initial physician had been timely authorized and concluded that it could not award the specific physician sought by claimant."

The court noted that as "the treatment was timely authorized, the JCC was required to determine whether Claimant could request a one-time change in her treating physician without first being treated by the authorized physician."

On this final issue before the court, it was concluded "[t]he legislature's use of the language 'change... during the course of treatment' clearly indicates a claimant must be currently receiving treatment by a physician before she may request a 'change.' Logically, if a claimant never attended the initial appointment with the authorized physician, then she cannot 'change' that physician because she was never treated by the physician. If never treated, the procedural right to request a one-time 'change of physi-

cian during the course of treatment' does not attach. Therefore, before requesting another authorized physician, a claimant must at least begin treatment with the physician the claimant seeks to change."

Based on the issues before the court in Butler, the First DCA rendered two opinions that are binding on the lower courts: (1) if an employer/carrier timely authorizes medical care in response to a petition for benefits, the employer/carrier retains the right to specify which treating physician to authorize for the claimant; and (2) before requesting a one-time change in physician, a claimant must begin treatment with the physician the claimant seeks to change.

The First DCA also issued two non-binding opinions on issues that were not before the court. These opinions, known as *dicta* because the issues were not properly before the court, may be used as persuasive authority before the lower courts. In *dicta,* the court held: (1) the claimant may choose his physician if a change is not authorized within a reasonable time by the employer/carrier. The carrier does not have to authorize the physician, but must merely pay any amount personally expended by the claimant for treatment or care that would have been compensable and medically necessary; and (2) the right to a one-time change is a procedural right and thus the claimant is only permitted one change in authorized physicians, no matter the number and variety of treatments needed by the claimant and regardless of the date of accident.

Additional Rulings

In *Pitts v. DynCorp/AIG Claim Services, Inc.,* OJCC No. 90-002930 (March 3, 2008), Judge Nolan Winn, of the Pensacola District Office, addressed the findings from Butler. In Pitts, the employer/carrier argued, pursuant to Butler v. Bay Center, that an employee was entitled to only one change of physician during the course of treatment for any one accident, regardless of the date of accident.

Judge Winn found that in Butler, the court was not required to rule on the substantive aspects of F.S. §440.13(2)(f), and the opinion regarding the retroactive application of F.S. §440.13(2)(f) to dates of accident before the statutory change was non-binding *dicta*. Judge Winn determined that based on the 1990 date of accident, Pitts was still entitled to another change in physician even though she had already received a previous change in physician.

Judge Winn acknowledged the binding opinion from Butler and held that who chooses the physician is procedural, and thus retroactive to the claimant's 1990 date of accident. The claimant was thus allowed an additional change in physician, but the carrier was granted the choice of that physician.

In the case of *Johns v. Santa Rosa County Auditorium/Santa Rosa County Risk Management*, OJCC No. 07-010741 (September 6, 2007), Judge Winn addressed another area of *dicta* from the Butler v. Bay Center opinion. The Butler court held the claimant may choose his physician if a change is not authorized within a reasonable time by the employer/carrier. The carrier does not have to authorize the physician, but must pay any amount personally expended by the claimant for treatment or care that would have been compensable and medically necessary.

In Johns, Judge Winn found the employer/carrier failed to authorize an alternate one-time change in physician within five (5) days of the Petition for Benefits. After finding a petition for benefits was a "written" request for the change in physician, the judge held the claimant's specific choice of physician was "therefore the authorized treating health care provider in this matter and has been so authorized since the sixth (6th) day after the Employer received the Petition."

"Course of Treatment" Issue

Another issue in F.S. §440.13(2)(f) which was mentioned in Butler, but not addressed in depth, is the issue of "course of treatment." In *Aguirre v. Schuff Steel/CNA*, OJCC No. 05-021676 (February 22, 2007), Judge John Thurman, of the Orlando District Office, was asked to determine if a claimant was still considered in the "course of treatment" after being placed at maximum medical improvement.

The employer/carrier argued the claimant was not entitled to a one-time change in physicians as the claimant was at maximum medical improvement and was thus no longer in the course of treatment pursuant to the requirement in Butler v. Bay Center.

Judge Thurman concluded there was no legal distinction between palliative and remedial care for the purposes of authorizing medical care, treatment and attendance, and the claimant was thus entitled to a one-time change even after being placed at maximum medical improvement.

The same issue was considered in *Elias v. Newell Transport, Inc./JUA and St. Paul Travelers*, 06-023939 (August 20, 2007). In that claim, the employer/carrier argued the claimant's right to a one time change could only be maintained during the course of treatment. Judge Charles Hill of the Miami District Office accepted the testimony of the only authorized physician that the claimant completed his course of treatment and recovered from his injury as of March 28, 2005. Judge Hill thus held the claimant's right to the one change in physician sought was extinguished on March 28, 2005.

While the First DCA opinion in Butler v. Bay Center may have seemed a clear interpretation of Florida Statute §440.13(2)(f)(2003), subsequent lower court opinions demonstrate there is still much debate as to the correct meaning and application of the statute.

Butler v. Bay Center provides guidance to the lower courts with both binding and persuasive findings; however, the lower courts seem reluctant to accept the persuasiveness of the *dicta* in Butler, thus resulting in increased uncertainty in the interpretation of §440.13(2)(f)(2003).

Original publication: Spring 2008 Workers' Compensation Special Supplement

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Article Addendum

Since writing the above article, the Florida First District Court of Appeals has released two opinions which provide clarification for the one-time change in physician issue.

In the case of *Certified Human Services vs. Wilson*, Case No: 1d07-3802 (Fla. 1st DCA 2008), the court provided an in-depth analysis of the one-time change in physician. In that case, the claimant's authorized primary care physician discharged the claimant and released the claimant to full-duty work with no restrictions for his low back strain. The doctor specifically indicated that "no future treatment was anticipated for the patient." When the claimant attempted to obtain additional treatment at the clinic, he was told his case had been closed, and he was no longer entitled to workers' compensation benefits. At that point, the claimant sought a one-time change in physician.

The employer/carrier argued the claimant was not entitled to a one-time change on two grounds: 1) Pursuant to the primary care physician's testimony and office note that the claimant's accident was no longer the major contributing cause of the claimant's need for treatment of his back; and 2) The claimant was no longer in the "course of treatment" at the time he made his request, and thus failed to satisfy the statutory requirement.

The court held the use of the word "shall" in Section 440.13(2)(f), meant the one-time change was mandatory, regardless of whether the initial authorized doctor opined that a compensable accident was no longer the major contributing cause of the claimant's need for treatment. It was also mandatory regardless of the employer/carrier's position as to the necessity of either the change in physician or the treatment proposed and/or rendered by the new physician. The court noted the statute afforded the employer/carrier the opportunity to retain control over the choice of authorized doctor if they timely authorized the claimant's request for a change; however, if after authorizing the one-time change, the employer/carrier was still of the opinion the treatment recommended or provided was unnecessary or unrelated to the industrial accident, the employer/carrier could then deny authorization of such treatment pending resolution of the issue by the Judge of Compensation Claims.

On the same date, the 1st DCA released the opinion of *Dawson vs. John's Eastern Co.*, Case No: 1d07-6236 (Fla. 1st DCA 2008). In that case, the claimant challenged denial of her request for a one-time change in physician. The claimant's authorized physician attributed 51% of the need for treatment to degeneration and 49% to the work accident. The employer/carrier thus denied the one-time change in physician. The claimant subsequently filed a Petition for Benefits seeking the one-time change of physician.

The Judge of Compensation Claims found that, because the claimant presented no evidence to rebut the doctor's opinion as to major contributing cause of the need for treatment, she was not entitled to a one-time change in physician. The Judge of Compensation Claims also found the provision did not allow for a one-time change in physician for the sole purpose of establishing a causal connection between a compensable injury and the continued need for treatment. The 1st DCA held that the use of the word "shall" in Section 440.13(2)(f), meant that the one-time change

was mandatory, regardless of the employer/carrier's position as to either change of physician or the new physician's treatment.

The 1st DCA thus made it clear that the employer/carrier must provide a one-time in physician, regardless of whether the initial authorized doctor opines the compensable accident is no longer the major contributing cause of the claimant's need for treatment or if the initial authorized doctor discharges the claimant from care. The court established that the employer/carrier retains control of choice over the one-time change physician and is still able to deny authorization if they believe the recommendations made by the one-time change physician are not medically necessary and causally related to the work accident.