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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

HUBERT MERAYO, M.D.,

Petitioner,

vs.

DOAH Case No.: 09-000018

DEPARTMENT OF FINANCIAL SERVICES,

Respondent.

**MOTION FOR RECONSIDERATION
REGARDING ADMISSION OF "EMA REPORT"**

Respondent, DEPARTMENT OF FINANCIAL SERVICES ("Department" or "DFS"), pursuant to Rule 28-106.204, Florida Administrative Code, moves for reconsideration of the Department's proffered Exhibit 6, the "EMA Report,"¹ at the hearing held on February 23, 2009. In support, Respondent states:

1. The instant dispute arose between the health care provider and the employer/carrier, pursuant to section 440.13(7), Florida Statutes.
2. The Department came to the scheduled hearing prepared to present its case through the presentation of documentary and testimonial evidence, including the exhibits identified in the parties' Joint Pre-Hearing Stipulation filed February 20, 2009 – and within the two to four hours time allotted for the scheduled hearing.²

¹ References to the "EMA Report" are to document, dated November 5, 2008, setting forth the findings and opinions of Dr. Norman Guthrie, M.D., who was contracted by the Department to serve as an Expert Medical Advisor in this matter, pursuant to section 440.13(9), Florida Statutes.

² Prior to filing the Joint Pre-Hearing Stipulation, counsel of record for the Petitioner and Respondent agreed to request the record to remain open in order to allow the Petitioner and/or the EMA to testify via deposition, if necessary. However, on February 19, 2009, the undersigned was advised that the Petitioner would appear in person and testify at the scheduled hearing. See attached e-mail, submitted herewith, marked "Exhibit A."

Despite such agreement, after having conducted exhaustive but largely irrelevant direct examination of the Petitioner for over three hours, counsel who appeared at the hearing objected to scheduling of the EMA's deposition.

3. The following relevant facts were admitted via Joint Pre-Hearing Stipulation:

10. Dr. Merayo diagnosed M.P. as suffering from major depressive disorder, recurrent, severe, without psychotic features, recommended continued individual and group therapy, and initiated more aggressive medication treatment regiment for M.P.'s psychiatric symptoms.
11. Petitioner declared M.P. to have reached maximum medical improvement on August 23, 2005. He assigned a permanent impairment rating of 15%, and opined that she was unable to work due to her compensable injury.
12. M.P. continued treatment with Dr. Merayo in 2006, during which she attended thirty group sessions and nine individual therapy sessions.
13. The individual therapy sessions are recorded on a format in which there is a brief subjective statement of the patient and then a checklist form.
14. On the checklist form, the various therapeutic modalities which Dr. Merayo employed included cognitive behavioral therapy, individual therapy, working on anger management and anxiety control, as well as supportive therapy and occasionally insight oriented therapy.
15. All of the individual therapy sessions are recorded as being forty-five minutes in length.
16. M.P. continued treatment with Dr. Merayo in 2007, during which she attended twelve individual therapy sessions.
17. No group therapy sessions are documented.
18. Records for the individual therapy sessions continued to indicate cognitive behavioral therapy, individual therapy, insight oriented therapy, supportive therapy, and other more specific modalities at times, including anxiety control.
19. The subjective reports indicated in Dr. Merayo's notes focus on continued depression and anxiety and difficulty with chronic pain – except for one occasion, on August 21, 2007, when the patient reported that her father had died the night before.
20. Further discussion regarding her father's death is not reported in any subsequent records.
22. The treatment provided by Dr. Merayo and the documentation (medical records) for the dates of service for which reimbursement was disallowed was no different from the treatment and documentation for the dates of service for which reimbursement was allowed.

At 4:30 p.m, after completion of direct, cross and redirect examination of the Petitioner (who was not originally anticipated to testify given the limited time scheduled for the hearing), the Department moved to continue the hearing and to reconvene on a later date. Such motion was opposed by counsel for Petitioner and was denied.

27. On September 25, 2008, the Department entered an Order Referring Matter for Expert Medical Advisor Review (EMA), pursuant to section 440.13(9)(f), Fla. Stat., in order to assist the Department in resolution of the reimbursement dispute. The Department's Order provided as follows:

All documents on record at this time in this matter shall be provided to the EMA with a request that he or she answer the following:

Whether the type, intensity and duration of the evaluation and treatment provided on April 11, 2007, August 21, 2007, September 18, 2007, October 16, 2007, December 11, 2007, and January 22, 2008, are consistent with the medically necessary standard of care for the clinical problem(s) documented by the Petitioner in the medical record of the Injured Employee? Please identify the standard(s) of care that support the opinion provided.

31. On or about November 5, 2008, the contracted EMA, Norman D. Guthrie, M.D., submitted the report requested by the Department. Among the EMA's findings were:

From the clinical status of the claimant/patient indicated in Dr. Merayo's notes, it is clear that [M.P.] she has continued to struggle emotionally and with chronic pain despite aggressive treatment provided by Dr. Merayo;

Following a declaration of maximum medical improvement it is anticipated that the frequency and to some degree, the intensity of therapeutic treatment would gradually decrease with the ultimate expectation that therapeutic follow-ups . . . would be necessary on an every two to three month basis, requiring at most, four to six such appointments per year;

Follow-up visits after MMI can be managed with sessions of twenty to twenty-five minutes, so that Dr. Merayo's standard forty-five minute appointments "suggest a pattern of over-utilization."

32. Dr. Guthrie recognized that "[g]iven the nature of psychiatric treatment, there are occasionally reasons caused by incidents in a patient's life, which require a more frequent treatment protocol for a period of time to address an incident."
33. Dr. Guthrie's report also acknowledged the apparent inconsistency in the Carrier's "pattern of disallowance" and opined that "to be consistent with a typical follow-up approach, one visit (September 18, 2007) should be considered as necessary and therefore . . . authorized."
34. However, given the absence of documentation in Dr. Merayo's records suggesting extraordinary circumstances for which additional services may be appropriate, and:

given the expectation of follow-up care requiring four to at most six appointments per year with twenty to twenty-five minute appointments

subsequent to an maximum medical improvement declaration . . . Dr. Meryo's continued monthly appointments of forty-five minutes duration suggest a pattern of over-utilization of services of services and specifically, this would involve the questioned dates of April 11, 2007, August 21, 2007, October 16, 2007, December 11, 2007, and January 22, 2008).

4. Stipulations of Fact numbered 31 through 34 set forth above include direct quotes and paraphrasing of the findings and opinions set forth in the EMA Report.

5. The detailed and comprehensive Joint Pre-Hearing Stipulation identified exhibits to be offered at the hearing for which the parties stipulated as to the "authenticity and admissibility," including the "EMA Report;" and also specifically provided for the parties to note any objections as to the exhibits or reservations as to the admissions.

6. No such objections or reservations were identified by either party.

7. As the party asserting entitlement to reimbursement for its services, Petitioner has the burden of proof in these proceedings, by a preponderance of the evidence. § 120.57(1)(j), Fla. Stat.; Dept. of Transportation v. J.W. C. Co, Inc., 396 So.2d 778, 785-787 (Fla. 1st DCA 1981); The Biscayne Institute v. Agency for Health Care Administration, DOAH Case Nos. 03-1837, 03-1838 and 03-3890, Recommended Order entered June 15, 2004, adopted in toto by AHCA Final Order 04-0420-FOF-OLC, November 1, 2004.

8. At the scheduled hearing, the Petitioner testified to his own opinion (for over three hours) that the services he provided to the injured claimant/employee (M.P.) were medically necessary.

9. Such self-serving testimony, without more is insufficient to overcome the presumption of correctness that attaches to the EMA's opinion, 440.13(9)(c), Florida Statutes. Pierre v. Handi Van, Inc., 717 So.2d 1115 (Fla. 1st DCA 1998), particularly where, during cross-examination the Petitioner admitted that the documentation of his services was only "probably 90%" compliant with rule 64B8- 9.003, Florida Administrative Code.

10. Upon the Department's proffer of the "EMA Report" at the scheduled hearing, the exhibit was not accepted or admitted as record evidence upon which the presiding officer could/would base any finding of facts, due to objection of counsel in attendance at the hearing.

11. Counsel who appeared at the hearing on February 23, 2009, did not participate in the preparation or execution of the parties' Joint Pre-Hearing Stipulation; and further is not a "counsel of record" in this proceeding, pursuant to rule 28-106.105, Florida Administrative Code.³

12. Allowing counsel who is not "counsel of record" and who failed or refused to participate in any part of the drafting or execution of the Joint Pre-Hearing Stipulation⁴ to interject his opposition to any part of the Joint Pre-Hearing Stipulation (including admissibility of the EMA Report) amounts to "trial by ambush" contrary to the intent and purposes of Florida's Administrative Procedure Act. See generally: Florida Bar v. Moses, 380 So.2d 412, 415 (Fla. 1980) (clear intent of Florida's Administrative Procedure Act is to increase flexibility and informality in the administrative process by expanding public access to agency rationale and action, consistent with minimal administrative due process rights for those whose rights are affected by agency action); John E. Pilcher, Phyllis Reppen, et al v. Bay County and Dept. of Environmental Regulation, DOAH Case Nos. 90-0254 and 6913, Final Order entered January 9, 2002, OGC Case Nos. 90-1198, 89-1674, 19-1606 ("trial by ambush" will not be permitted in an administrative hearing that has been purposefully designed to allow for informal access to the quasi-judicial process).

13. Sustaining counsel's objection to the admissibility of the EMA report despite the clear stipulation entered into by counsel of record amounts to rewarding counsel's "ambush."

³ 28-106.105, F.A.C., provides that only counsel or qualified representatives who file a request for hearing have entered an appearance in the proceeding and shall be as counsel or qualified representative or record. All others who seek to appear shall file a notice of appearance.

⁴ Per counsel's admission on the record at hearing.

14. Such a result was overturned by the Third District Court of Appeal, in Heimer v. Travelers Insurance Company, 400 So.2d 771 (Fla 3rd DCA 1981), where it held "we will not tolerate a result which rewards parties for their recalcitrance."

15. This is not a case where Petitioner could possibly complain that he was not aware of the EMA Report. The Petitioner testified at hearing that he received the "Order Referring Matter to Expert Medical Advisor," and that he elected not to supplement the record to be reviewed by the EMA with documentation not previously submitted to the Department. And, upon receipt of the Department's Determination which specifically referenced the EMA Report, the Petitioner, through counsel of record, filed a Petition for Administrative Hearing, and stipulated to the admissibility of the EMA report.

16. Despite the detailed and comprehensive Joint Pre-hearing Stipulation entered into in this case, counsel who appeared at the scheduled hearing raised repeated objections to the admissibility of the EMA report, thus necessitating the Department to request the record remain open in order to schedule the deposition of the EMA – and even that request was objected to by counsel for Petitioner (at hearing).

17. **Evidence that is admitted via stipulation is not hearsay** – particularly where counsel of record had opportunity to recite any objections or reservations as to the use of such evidence in the Joint Pre-Hearing Stipulation. Gilman Paper Company v. Newman, 398 So.2d 887 (Fla. 1st DCA 1981) (parties' stipulation to admissibility of map cures any problems regarding hearsay and authenticity); Commercial Carrier Corporation v. Fox, 400 So.2d 154 (Fla. 1st DCA 1981) (stipulation identified medical report which would be admitted into evidence without objection, but did not preclude admitting additional medical reports which were not specified in the stipulation); Bazan v. Gambone, 924 So.2d 952 (Fla. 3rd DCA 2006) (guardian ad litem report is not hearsay when admitted into evidence by stipulation of the parties). See also: Heck v. M.H., 627 So.2d 1325 (Fla 3rd DCA 1993).

18. Since Petitioner stipulated to the admissibility of the EMA Report and to the recitation of findings and opinions included in the EMA report as "Facts That are Admitted and Will Require No Proof at Hearing," any problems regarding hearsay of the EMA Report were cured, Gilman Paper Company, 398 So.2d 887, Bazan v. Gambon, 924 so.2d 952.

19. Courts are required to look with favor on stipulations designed to simplify, shorten, or settle litigation and save costs to parties, and such stipulations should be encouraged and enforced by courts unless good cause is shown to the contrary. Esch v. Forster, 123 Fla. 905, 168 So. 299 (Fla. 1936). See also: City Laundry & Linen Supply v. Coster, 465 So.2d 641 (Fla. 1st DCA 1985)(parties are bound by pre-trial stipulation absent good cause for modification); Bazan v. Gambone, 924 So.2d 952 (Fla. 3rd DCA 2006); Gilman Paper Company v. Newman, 398 So.2d 887 (Fla. 1st DCA 1981); Commercial Carrier Corporation v. Fox, 400 So.2d 154 (Fla. 1st DCA 1981).

20. Petitioner's tactic of "trial by ambush" should be taken to task over further proceedings presently scheduled to be conducted solely in order to bear out or corroborate the already existing record of the proceedings; and counsel's objections made at hearing must be overruled allowing for closure of the record and determination of the issues based on the record evidence, pursuant to the parties' stipulations as to the authenticity and admissibility of the EMA Report.

21. This is so particularly given the financial burden to the Department who has already compensated the EMA for rendering his opinion - which opinion by law has a nearly conclusive effect, pursuant to section 440.13(9)(c), Florida Statutes. Advanced Masonry Systems v. Molina, ---So.2d ---, 2009 WL 400371 (Fla. 1st DCA, Feb. 19, 2009), Mobile Medical Industries v. Quinn, 985 So.2d 33 (Fla. 1st DCA 2008), Fitzgerald v. Osceola County Sch. Bd., 974 So.2d 1161 (Fla. 1st DCA 2008).

22. In the interests of judicial and administrative economy, and pursuant to established precedent, the Department respectfully requests the presiding officer reconsider

ruling on Petitioner's objection, and accept and admit the proffered exhibit and the recitals made therein - without subjecting the parties to further needless administrative burden and expense of taking deposition of the contracted Expert Medical Advisor (scheduled for March 18, 2009),

23. Inasmuch as the instant issue is likely to recur, the fact that the Department has scheduled the EMA for deposition in accordance with the presiding officer's instructions does not make the instant motion moot, so that Petitioner respectfully requests scheduling of oral argument and ruling on the instant motion.

24. The undersigned e-mailed a copy of this motion to counsel for the Petitioner prior to filing the instant motion, and left messages requesting reply as whether Petitioner intends to file responsive pleading. No reply was received prior to the time of filing.

WHEREFORE, the Department respectfully requests reconsideration of the hearing officer's determination that the EMA Report constitutes hearsay and is insufficient evidence upon which to base fact findings, without more.

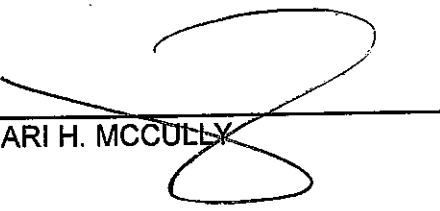
Respectfully submitted this 6th day of March, 2009.

Counsel for Respondent

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via ☐ FACSIMILE ☒ E-Mail ☒ US MAIL ☐ OVERNIGHT MAIL or ☐ Hand-Delivery to counsel of record for the Petitioner: Mario R. Arango and Adrienne L. Hauser, 2150 Coral Way, Fourth Floor, Miami, FL 33145, on this 10th day of March, 2009.


MARI H. MCCULLY

CC: Edward DeVarona
D. Robert "Bobby" Wells

Mari McCully

From: ALH, Esq. [tabby305@yahoo.com]
Sent: Thursday, February 19, 2009 7:59 PM
To: Mari McCully
Subject: Re: Pena, Marcia v. Ross Stores: Dr. Merayo

Hi, I just had a chance to check email for the first time today! I made very minor changes to the Stip (additions) and I will attach a copy of it to this email. We decided to submit Merayo's old deposition from the WC case, the one you have seen as well as presenting him live. I looked at the other Joint Pre-Hearing Stip and it looks fine. I will send them to you tomorrow for filing. You are the one who files it, right? Let me know if anything else is needed.

Ciao!

~ALH

~ "Imagination is the only weapon in the war against reality" Jules de Gautier ~
 ~expectations are only resentments under construction~

From: Mari McCully <Mari.McCully@myfloridacfo.com>
To: Tabby305@yahoo.com
Sent: Thursday, February 19, 2009 4:20:19 PM
Subject: FW: Pena, Marcia v. Ross Stores: Dr. Merayo

Did you finish the stips? Your receptionist says that both you and Nancy are gone.

From: Nancy Salazar [mailto:NSalazar@lawd-a.com]
Sent: Thursday, February 19, 2009 1:45 PM
To: Mari McCully
Subject: RE: Pena, Marcia v. Ross Stores: Dr. Merayo

Thank you!!! They are in the middle of completing the Pre-Trial.

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From: Mari McCully [mailto:Mari.McCully@myfloridacfo.com]
Sent: Thursday, February 19, 2009 12:10 PM
To: Nancy Salazar
Subject: Pena, Marcia v. Ross Stores: Dr. Merayo
Importance: High

Exhibit A

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