

FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D19-0713

2K SOUTH BEACH HOTEL, LLC
and CONTINENTAL INDEMNITY
Co.,

Appellants,

v.

MARLENE MUSTELIER,

Appellee.

On appeal from an order of the Judge of Compensation Claims.
Jeffrey I. Jacobs, Judge.

Date of Accident: September 8, 2013.

January 15, 2020

ON MOTION FOR REHEARING AND WRITTEN OPINION

B.L. THOMAS, J.

In this workers' compensation case, the Employer/Carrier (E/C) appeal an order of the Judge of Compensation Claims (JCC) which awarded benefits. We deny the motion for rehearing, and grant the motion for written opinion to explain why we affirm the order and reject the five issues asserted on appeal.

Claimant, a housekeeper for the E/C, developed complex regional pain syndrome (CRPS) after a right shoulder injury on September 8, 2013. The E/C accepted the CRPS as compensable, and authorized doctors who prescribed water therapy and psychiatric treatment. When the E/C authorized only six weeks' worth of water therapy and denied the psychiatrist, Claimant filed petitions for benefits (PFBs) seeking those benefits.

Just three weeks before the final hearing, the date of which had previously been continued, an authorized doctor testified in deposition that when he had last seen Claimant in-office she was ambulating with a cane, which was not prescribed. This information was new; it was not in the doctor's medical notes. In response to this new development, the E/C obtained surveillance of Claimant in the week before the final hearing, which did not show her using a cane but showed her using her right arm and hand in an unrestricted manner. When deposed the day before the final hearing, Claimant testified she had never used a cane.

At 5:11 a.m. on the morning of the final hearing, the E/C moved to admit the surveillance or alternatively to continue the final hearing. A few minutes later, they moved to amend the pretrial stipulation (to add a misrepresentation defense and to "clarify" their witness and exhibit lists to include the surveillance evidence) or alternatively to continue the final hearing. At 8:25 a.m., they filed the surveillance report, and they gave it to Claimant "when we got here this morning" for the final hearing.

At the final hearing, the E/C proffered the surveillance evidence, and elicited testimony from Claimant that, even though she has pain when her right hand is touched, her right hand had nail polish on it, applied "four or five days ago" not professionally but by her friend. In the final order, the JCC denied the E/C's motions, finding prejudice to Claimant and no good cause for the E/C's delay, and awarded Claimant the requested benefits. After granting the E/C's motion for rehearing in part, the JCC amended the order to add a discussion of "bad faith" to the analysis of good cause and clarified that he found the late addition of a misrepresentation defense would violate Claimant's due process rights.

On appeal, the E/C first argue that the JCC should have admitted the surveillance evidence, or at least should have granted a continuance. This argument fails because (a) the undisputed facts constitute competent substantial evidence (CSE) to support the finding that Claimant was prejudiced by surprise and that the prejudice was incurable, *see Binger v. King Pest Control*, 401 So. 2d 1310 (Fla. 1981); (b) even though the record supports the JCC's finding that there is no allegation the E/C acted in bad faith, the primary inquiry is whether there is prejudice to the objecting party, *see Boyle v. JA Cummings, Inc./FARA*, 212 So. 3d 1060, 1061 (Fla. 1st DCA 2017) (holding that JCC's job when faced with late discovery is to "consider prejudice, of which good cause is but one component"); and (c) the record—particularly the fact that the case had previously been continued—supports the JCC's finding that to grant the E/C's motions would work against efficiency.

Second, the E/C argue that the JCC erred as a matter of law by denying the motion to amend the pretrial stipulation. But the standard of review is abuse of discretion, *see E. Airlines v. Griffin*, 654 So. 2d 1194 (Fla. 1st DCA 1995) (reviewing for abuse of discretion JCC's ruling on motion to amend pretrial stipulation), and the JCC did not abuse his discretion in this case where the motion was not a mere "clarification" of the witness list, because the original pretrial stipulation listed only "Surveillance rep, if any," in contravention of the instructions to "[l]ist the specific and full names of all witnesses" as well as to specify "live **or** by deposition," and the lateness of the motion to add a misrepresentation defense was not excusable. The misrepresentation defense concerned Claimant's inability to use her arm, but the lateness was caused entirely by the timing of this particular surveillance. This instance of surveillance was late only because it was conducted to determine whether Claimant was using a cane, but it cannot be used to allege misrepresentation regarding cane use because it does not contradict Claimant's testimony that she was not using a cane. What happened here was nothing more than the E/C, upon receipt and review of the surveillance, deciding to change their litigation strategy—which does not justify amending a pretrial stipulation. *See Marin v. Aaron's Rent To Own*, 53 So. 3d 1048, 1050 (Fla. 1st DCA 2010) ("[A] party's mere change of litigation strategy, without more, provides insufficient grounds to set aside a binding agreement.").

Third, the E/C argue that the JCC should have let them call the surveillance representatives live as rebuttal or impeachment witnesses to Claimant's testimony that even to touch her right hand is painful, because it was evident at the hearing that Claimant's hand was manicured. The E/C has not demonstrated reversible error, because Claimant herself acknowledged under oath that her hand was manicured, the E/C did not allege that the surveillance establishes the fact of the manicure, and the surveillance could not give direct evidence that the manicure was not subjectively painful.

Fourth, the E/C contend that the JCC erred as a matter of law by awarding water therapy for six months under Dr. Kirkpatrick's prescription, rather than six weeks under Dr. Font-Rodriguez's, because Dr. Kirkpatrick's was never authenticated. This argument fails because Dr. Kirkpatrick's prescription was expressly received into evidence as an attachment to one of the PFBs without any qualification such as that the attachments were received solely to fulfill pleading requirements; Dr. Font-Rodriguez testified both that he agrees with Dr. Kirkpatrick's prescription and that his own six-week prescription was artificially limited by his program for electronic record keeping and was not meant to limit the medical care; and the JCC's rejection of Dr. Font-Rodriguez's opinion was limited only to his opinion about home health care so did not include his opinion about water therapy.

Last, the E/C argue that the JCC erred by awarding a psychiatric evaluation and treatment as prescribed by Dr. Font-Rodriguez. They posit that the JCC should have rejected evidence from Dr. Font-Rodriguez because his referral for such was based on subjective complaints, his referral might have been withdrawn until allegedly reasserted by letter of December 2018, and that letter was not established as a medical record and was objected to as hearsay. The E/C's argument fails because CSE supports the JCC's findings that Claimant's feelings of despair led Dr. Font-Rodriguez to diagnose her with anxiety, nervousness, and adjustment disorder, which he attributed to her CRPS, and for which he prescribed psychiatric evaluation and treatment. This satisfies the "objective relevant medical findings" requirement in section 440.09(1), Florida Statutes, without any need to rely on the letter.

AFFIRMED.

OSTERHAUS and BILBREY, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

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