Communications with Medical Providers Pursuant to N.C. Gen. Stat. § 97-25.6

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Communication with Healthcare Providers

N.C. Gen. Stat. § 97-25.6(a)

Allows the parties to have reasonable access to all relevant medical information, including medical records, reports, and information necessary to the fair and swift administration and resolution of workers' compensation claims, while limiting unnecessary communications with and administrative requests to healthcare providers.

Communication with Healthcare Providers

N.C. Gen. Stat. § 97-25.6(a)

It is important to still "protect the employee's right to a confidential physician-patient relationship . . ."

The statute acknowledges N.C. Gen. Stat. § 8-53: Communications between physician and patient.

No person, duly authorized to practice physic or surgery, shall be required to disclose any information which he may have acquired in attending a patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or to do any act for him as a surgeon, and no such information shall be considered public records under G.S. 132-1. Confidential information obtained in medical records shall be furnished only on the authorization of the patient, or if deceased, the executor, administrator, or, in the case of unadministered estates, the next of kin. Any resident or presiding judge in the district, either at the trial or prior thereto, or the Industrial Commission pursuant to law may, subject to G.S. 8-53.6, compel disclosure if in his opinion disclosure is necessary to a proper administration of justice. If the case is in district court the judge shall be a district court judge, and if the case is in superior court the judge shall be a superior court judge. (1885, c. 159; Rev., s. 1621; C.S., s. 1798; 1969, c. 914; 1977, c. 1118; 1983, c. 410, ss. 1, 2; c. 471.)

Communication with Healthcare Providers

N.C. Gen. Stat. § 97-25.6(a)

As a result, N.C. Gen. Stat. § 97-25.6 only allows access to “relevant medical information” and not all of Employee’s medical records.

Communication with Healthcare Providers

"Relevant medical information" is defined in (b) to include any medical record, report, or information that is:

1. restricted to the particular evaluation, diagnosis, or treatment of the injury or disease for which compensation, including medical compensation, is sought;

2. reasonably related to the injury or disease for which the Employee claims compensation; or

3. related to an assessment of the Employee's ability to return to work.

Communication with Healthcare Providers

QUESTION

Can Employer request Employee's primary care physician records per N.C. Gen. Stat. § 97-25.6?

Communication with Healthcare Providers

Per N.C. Gen. Stat. § 97-25.6 (c), there are three types of communication with healthcare providers:

1. Requests for medical records;
2. Written communication with healthcare providers; and
3. Oral communication with healthcare providers

Communication with Healthcare Providers

The methods provided for by N.C. Gen. Stat. § 97-25.6(c) are tiered, such that the previous method must be exhausted before moving on to another type of communication. For example:

- Employer must have an issue/question that cannot be answered by reviewing medical records before writing the doctor

- Before setting up an oral communication there needs to be an issue that is not addressed in the medicals and not answered via written communication (this may occur when a doctor responds to written communication)

Communication with Healthcare Providers

- Importantly, N.C. Gen. Stat. § 97-25.6(h) provides that the Employer does not need the express permission of the Employee to communicate with a healthcare provider “about non-substantive administrative matters” like requesting medical bills and scheduling appointments.

Requesting Medical Records

N.C Gen. Stat. § 97-25.6(c)(1)

- Employers may write healthcare providers directly to request medical records "containing relevant medical information" even where the Employer has denied the claim and is not paying medical benefits

- If medical records are sought from a provider for whose treatment the Employer is not paying, the Employer **must** provide contemporaneous written notice of the records request to the Employee or his attorney

- Copies of all records received must be provided to the Employee within 30 days of receiving the records

Requesting Medical Records

- “Contemporaneous” is not defined in the statute
  - Presumed what is meant is the request is copied and submitted to Employee at same time and by exact same method as made to the provider

Requesting Medical Records

QUESTION

Why doesn't Employer have to give notice of a request for medical records from a provider it is paying?

Requesting Medical Records

QUESTIONS

What does this mean for discovery?

If the information is equally available to Employer, does Employee have to provide it?

Is it a discovery violation for a defendant to even ask for this information per Rule 04 NCAC 10A .0605(5) (requiring certification “that the information requested is not known or equally available to the requesting party . . ..”)?

Written Communication with Healthcare Providers

- Employers may communicate with *authorized* healthcare providers in writing without Employee's express authorization specifically for purposes of obtaining relevant medical information **not in medical records**
- Employer must give the claimant "contemporaneous written notice of the request"
- Any response to the written request must be provided to the Employee within 10 days of receipt

Written Communication may request information such as but not limited to the following:

- Diagnosis of Employee's condition
- The appropriate course of treatment
- Anticipated time Employee will be out of work
- Relationship, if any, of the Employee's condition to the employment
- Work restrictions resulting from condition
- Approval of job description being **offered by Employer** can include job description without Employee approval
- The anticipated time the Employee will be restricted
- Any permanent impairment resulting from the injury

Oral Communications with Healthcare Providers

- Employer may orally ask questions of *authorized* healthcare provider provided that information requested is not already included in medical records or available by means of written communication

- Employer must give Employee prior notice of purpose of the oral communication and allow Employee opportunity to participate

- If Employee chooses not to participate in the oral communication, Employer must provide Employee with summary of the communication within 10 days

Submitting Information to Medical Providers

N.C. Gen. Stat. § 97-25.6(d)

- In addition to written communication, an Employer may submit "relevant medical information not already contained in the Employee's medical records" to *authorized* healthcare providers pursuant to specific protocol.

- Generally pertains to surveillance, medical records from other medical providers, etc.

Submitting Information to Medical Providers

Protocol for submission of additional information to providers:

- Provider's medical records must already be received by parties
- Employer must notify the Employee in writing about intent to submit additional information and provide Employee with the information to be submitted (i.e. surveillance)
- Employee has 10 business days from date of transmission to consent or object to the submission

Submitting Information to Medical Providers

- On Employee's consent, or in the absence of response within 10 business day period, Employer may submit information directly to provider

- If Employee timely objects, Employee can request protective Order from Commission preventing written communication and disclosure

Submitting Information to Medical Providers

- Employee's filing for protective Order prevents Employer from communicating with healthcare provider until Commission determines whether proposed communication and additional information are pertinent and necessary to the administration and resolution of the claim
- If there is an objection but no motion for protective Order, then Employer can submit documentation to healthcare provider
- In determining whether to allow the additional information, Commission will consider whether it is pertinent to and necessary for the fair and swift administration of the claim and whether the information can be obtained by other means

Motions, Responses and Protective Orders

Please reference Appendix B in your materials for this portion of the presentation

QUESTIONS

May Employer communicate with a § 97-25 IME physician?

May Employer conduct what amounts to a written deposition?

What do you do if Employer submits additional information without following subsection (d)?

More Protective Orders

N.C. Gen. Stat. § 97-25.6(f)

- Upon motion by an employee or the health care provider from whom medical records, reports, or information are sought, or with whom oral communication is sought

- Or upon its own motion, for good cause shown, the Commission may make any Order

- Which justice requires to protect an employee, health care provider, or other person from unreasonable annoyance, embarrassment, oppression, or undue burden or expense.

This is a “catch all” provision allowing for more protective Orders in addition to those allowed by § 97-25.6(d)(4).

Other Methods of Communicating with Medical Providers

- The statute allows for “other forms of communication with a healthcare provider” if
  - Valid written authorization is voluntarily given and signed by Employee
  - There is an agreement of the parties
  - Authorized by the Commission upon a showing that the information sought is necessary for the administration of the claim and is not otherwise reasonably obtainable under this section or through discovery

Payment to Providers for Time Communicating

N.C. Gen. Stat. § 97-25.6(i)

- The Commission is to establish annually any appropriate medical fee to compensate health care providers for time spent communicating with Employer or Employee.

- Each party bears its own costs of the communication.

Who is Covered by this Statute?

N.C. Gen. Stat. § 97-25.6(k)

- The term "employer" means the employer, the employer's attorney, and the employer's insurance carrier or third-party administrator;

- The term "employee" means the employee, legally appointed guardian, or any attorney representing the employee.

Provider Liability

N.C. Gen. Stat. § 97-25.6(j)

No cause of action shall arise and no health care provider shall incur any liability as a result of the release of medical records, reports or information pursuant to this Article

Questions?

Thank you!

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ARTICLE 1. Appendix A

Workers' Compensation Act.

Section

§97-25.6. Reasonable access to medical information.

(a) Notwithstanding any provision of G.S. §8-53 to the contrary, and because discovery is limited pursuant to G.S. §97-80, it is the policy of this State to protect the employee's right to a confidential physician-patient relationship while allowing the parties to have reasonable access to all relevant medical information, including medical records, reports, and information necessary to the fair and swift administration and resolution of workers' compensation claims, while limiting unnecessary communications with and administrative requests to health care providers.

(b) As used in this section, "relevant medical information" means any medical record, report, or information that is any of the following:

(1) Restricted to the particular evaluation, diagnosis, or treatment of the injury or disease for which compensation, including medical compensation, is sought.

(2) Reasonably related to the injury or disease for which the employee claims compensation.

(3) Related to an assessment of the employee's ability to return to work as a result of the particular injury or disease.

(c) Relevant medical information shall be requested and provided subject to the following provisions:

(1) Medical records. – An employer is entitled, without the express authorization of the employee, to obtain the employee's medical records containing relevant medical information from the employee's health care providers. In a claim in which the employer is not paying medical compensation to a health care provider from whom the medical records are sought, or in a claim denied pursuant to G.S. §97-18(c), the employer shall provide the employee with contemporaneous written notice of the request for medical records. Upon the request of the employee, the employer shall provide the employee with a copy of any records received in response to this request within 30 days of its receipt by the employer.

(2) Written communications with health care providers. – An employer may communicate with the employee's authorized health care provider in writing, without the express authorization of the employee, to obtain relevant medical information not available in the employee's medical records. The employer shall provide the employee with contemporaneous written notice of the written communication. The employer may request the following additional information:

a. The diagnosis of the employee's condition.

b. The appropriate course of treatment.

c. The anticipated time that the employee will be out of work.

d. The relationship, if any, of the employee's condition to the employment.

e. Work restrictions resulting from the condition, including whether the employee is able to return to the employee's employment with the employer of injury as provided in an attached job description.

f. The kind of work for which the employee may be eligible.

g. The anticipated time the employee will be restricted.

h. Any permanent impairment as a result of the condition.

The employer shall provide a copy of the health care provider's response to the employee within 10 business days of its receipt by the employer.

(3) Oral communications with health care providers. – An employer may communicate with the employee's authorized health care provider by oral communication to obtain relevant medical information not contained in the employee's medical records, not available through written communication, and not otherwise available to the employer, subject to the following:

a. The employer must give the employee prior notice of the purpose of the intended oral communication and an opportunity for the employee to participate in the oral communication at a mutually convenient time for the employer, employee, and health care provider.

b. The employer shall provide the employee with a summary of the communication with the health care provider within 10 business days of any oral communication in which the employee did not participate.

(d) Additional Information Submitted by the Employer. – Notwithstanding subsection (c) of this section, an employer may submit additional relevant medical information not already contained in the employee's medical records to the employee's authorized health care provider and may communicate in writing with the health care provider about the additional information in accordance with the following procedure:

(1) The employer shall first notify the employee in writing that the employer intends to communicate additional information about the employee to the employee's health care provider. The notice shall include the employer's proposed written communication to the health care provider and the additional information to be submitted.

(2) The employee shall have 10 business days from the postmark or verifiable facsimile or electronic mail either to consent or object to the employer's proposed written communication.

(3) Upon consent of the employee or in the absence of the employee's timely objection, the employer may submit the additional information directly to the health care provider.

(4) Upon making a timely objection, the employee may request a protective order to prevent the written communication, in which case the employer shall refrain from communicating with the health care provider until the Commission has ruled upon the employee's request. If the employee does not file with the Industrial Commission a request for a protective order within the time period set forth in subdivision (2) of subsection (d) of this section, the employer may submit the additional information directly to the health care provider. In deciding whether to allow the submission of additional information to the health care provider, in part or in whole, the Commission shall determine whether the proposed written communication and additional information are pertinent to and necessary for the fair and swift administration and resolution of the workers' compensation claim and whether there is an alternative method to discover the information. If the Industrial Commission determines that any party has acted unreasonably by initiating or objecting to the submission of additional information to the health care provider, the Commission may assess costs associated with any proceeding, including reasonable attorneys' fees and deposition costs, against the offending party.

(e) Any medical records or reports that reflect evaluation, diagnosis, or treatment of the particular injury or disease for which compensation is sought or are reasonably related to the injury or disease for which the employee seeks compensation that are in the possession of a party shall be furnished to the requesting party by the opposing party when requested in writing, except for records or reports generated by a retained expert.

(f) Upon motion by an employee or the health care provider from whom medical records, reports, or information are sought, or with whom oral communication is sought, or upon its own motion, for good cause shown, the Commission may make any order which justice requires to protect an employee, health care provider, or other person from unreasonable annoyance, embarrassment, oppression, or undue burden or expense.

(g) Other forms of communication with a health care provider may be authorized by any of the following:

(1) A valid written authorization voluntarily given and signed by the employee.

(2) An agreement of the parties.

(3) An order of the Industrial Commission issued upon a showing that the information sought is necessary for the administration of the employee's claim and is not otherwise reasonably obtainable under this section or through other discovery authorized by the rules of the Commission.

(h) The employer may communicate with the health care provider to request medical bills or a response to a pending written request, or about nonsubstantive administrative matters without the express authorization of the employee.

(i) The Commission shall establish an appropriate fee to compensate health care providers for time spent communicating with the employer or employee. Each party shall bear its own costs for said communication.

(j) No cause of action shall arise and no health care provider shall incur any liability as a result of the release of medical records, reports, or information pursuant to this Article.

(k) For purposes of this section, the term "employer" means the employer, the employer's attorney, and the employer's insurance carrier or third-party administrator; and the term "employee" means the employee, legally appointed guardian, or any attorney representing the employee. (2005; 2011; 2012.)

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Display Complete Text of **Chapter 97. Workers' Compensation Act.**

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Appendix B

NORTH CAROLINA INDUSTRIAL COMMISSION

I.C. NO. [redacted], Employee-Plaintiff, v. [redacted] Employer, SELF-INSURED, ([redacted] Servicing Agent), Defendant.

PLAINTIFF'S OBJECTION TO DEFENDANTS' PROPOSED CORRESPONDENCE TO THE AUTHORIZED TREATING PHYSICIAN & PLAINTIFF'S MOTION FOR A PROTECTIVE ORDER PPURSUANT TO N.C. GEN. STAT. §97-25.6(d)(4) before Executive Secretary Meredith R. Henderson.

NOW COMES Plaintiff, by and through counsel, and respectfully objects to Defendants' proposed correspondence to the authorized treating physician in this case, Dr. Peter Gemelli. Plaintiff prays unto this Honorable Commission for a Protective Order prohibiting Defendants from presenting this correspondence to Dr. Gemelli, in support of which she alleges and shows as follows

1. Plaintiff suffered a compensable injury to her neck on June 18, 2007. As a result of this compensable injury, Plaintiff suffers from neck, arm and shoulder pain. (See Attached Exhibit A);

2. On August 22, 2013, Defendants proposed to send correspondence and medical records from Plaintiff's primary care physician to Dr. Gemelli. (See Attached Exhibit B);

3. Plaintiff has consented to sending Plaintiff's primary care medical records to Dr. Gemelli. Plaintiff has also consented to proposed questions 1 and 7, should Defendants wish to ask those questions. Plaintiff has objected to questions 2, 3, 4, 5, and 6 on the basis that they are misleading, they do not state the correct legal standard and because some are confusing as written. Plaintiff proposed alternate questions for Defendants' consideration and requested a response by 4:00 PM today. Plaintiff has not yet received a response and thus requests a protective order preventing Defendants from sending Defendants' proposed correspondence to Dr. Gemelli. (See Attached Exhibit C);

4. Section 97-25.6(d) of the General Statutes allows a defendant to submit "additional relevant medical information" not already contained in the employee's medical records to the employee's medical providers under limited circumstances. The employee must consent to this request before the defendants can submit such information to the provider. Also, the statute requires that the medical information sought to be provided to the provider be relevant. See N.C. GEN. STAT. § 97-25.6 (2013);

5. Section 97-25.6(d)(4) of the General Statutes charges the Industrial Commission as follows given Plaintiff's objection in this case and her request for a protective order:

> Upon making a timely objection, the employee may request a protective order to prevent the written communication, in which case the employer shall refrain from communicating with the health care provider until the Commission has ruled upon the

> employee's request. In deciding whether to allow the submission of additional information to the health care provider, in part or in whole, **the Commission shall determine whether the proposed written communication and additional information are pertinent to and necessary for the fair and swift administration and resolution of the workers' compensation claim** and whether there is an alternative method to discover the information. If the Industrial Commission determines that any party has acted unreasonably by initiating or objecting to the submission of additional information to the health care provider, the Commission may assess costs associated with any proceeding, including reasonable attorneys' fees and deposition costs, against the offending party.

§ 97-25.6(d)(4) (emphasis added). The Industrial Commission should grant Plaintiff's request for a protective order because the questions proposed by Defendants are not "pertinent to and necessary for the fair and swift administration and resolution of [this] workers' compensation claim." § 97-25.6(d)(4);

6. The standard for the defendants' requirement to provide medical treatment and for determining what this medical treatment consists of is set forth in Section 97-2(19) of the General Statutes, 97-25 of the General Statutes and Little v. Penn Ventilator Co., 317 N.C. 206, 345 S.E.2d 204 (1986).

7. Section 97-25 of the General Statutes directs that "[m]edical compensation shall be provided by the employer." Section 97-2(19) of the General Statutes in turn defines the term medical compensation:

> The term "medical compensation" means medical, surgical, hospital, nursing, and rehabilitative services, including, but not limited to, attendant care services prescribed by a health care provider authorized by the employer or subsequently by the Commission, vocational rehabilitation, and **medicines**, sick travel, and other treatment, including medical and surgical supplies, **as may reasonably be required to effect a cure or give relief and for such additional time as, in the judgment of the Commission, will tend to lessen the period of disability**; and any original artificial members as may reasonably be necessary at the end of the healing period and the replacement of such artificial members when reasonably necessitated by ordinary use or medical circumstances.

§ 97-2(19) (emphasis added). In Little, the Supreme Court of North Carolina reiterated this definition and held that Section 97-25 of the General Statutes requires defendants to pay for medical treatment "as long as they [the treatments] are reasonably required to (1) effect a cure or (2) give relief" from the compensable injury. Id. at 210, 345 S.E.2d at 209; see also § 97-2(19);

8. Therefore the only relevant inquiry on the medications Dr. Gemelli is recommending for Plaintiff in this case is whether they are reasonably required "to effect a cure or give relief" from Plaintiff's pain from her compensable injury; and

9. The questions that Plaintiff has proposed in lieu of Defendants' questions are in keeping with this standard, but the questions that Defendants have proposed are not because they ask if the medications are "solely" related to the compensable injury. This is not the correct standard, and as a result, the answers to these questions are not "pertinent to and necessary for the fair and swift administration and resolution of the workers' compensation claim." § 97-25.6(d)(4). In addition, Defendants questions are misleading because they imply that Plaintiff continues to have sciatica. Finally, the questions are confusing as written because they imply that Dr. Leonard has not been prescribing Lyrica and Tramadol for Plaintiff's compensable injury, which is not the case. The reason that Dr. Leonard initiated these medications is not relevant to whether or not these medications are now reasonably required to give Plaintiff relief from her compensable injuries, especially where the condition for which the medications were initially prescribed has since resolved.

WHEREFORE, Plaintiff respectfully requests that the Industrial Commission note her objection to Defendants' request to submit these questions to Dr. Gemelli. Plaintiff also respectfully requests that the Industrial Commission issue a protective order for these questions pursuant to Section 97-25.6(d)(4) of the General Statutes. Plaintiff is fine with Defendants sending Plaintiff's primary care records, Defendants' proposed questions 1 and 7 should Defendants wish to ask them, and the substitute questions that Plaintiff has suggested in place of questions 2, 3, 4, 5 and 6.

Respectfully submitted this 6th day of September, 2013.

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NORTH CAROLINA INDUSTRIAL COMMISSION

I.C. NO. [redacted] Employee-Plaintiff, V. [redacted] Employer, Self-Insured, [redacted], Defendant.

DEFENDANTS' RESPONSE TO PLAINITFF'S OBJECTION AND MOTION FOR A PROTECTIVE ORDER

NOW COME DEFENDANTS, [redacted] by and through counsel, pursuant to N.C. Gen. Stat. § 97-25.6(d), and show unto the Commission the following:

1. This claim arises from a compensable neck injury on June 18, 2007. Pursuant to this injury, Plaintiff underwent two surgeries to her cervical spine, and was released at MMI by her authorized treating neurosurgeon, Dr. Brown, on May 26, 2011. A second opinion evaluation by Dr. Curling confirmed that she was at MMI.

2. On April 25, 2013, the parties entered into a Consent Order in which they agreed that Dr. Peter Gemelli would assume Plaintiff's pain management for this claim. One of the issues was whether Defendants should have to pay for Plaintiff's Lyrica, Tramadol, or Percocet prescriptions, which were prescribed by Plaintiff's unauthorized primary care physician, Dr. Andre Leonard, for unrelated conditions. However, the parties agreed that should Dr. Gemelli decide to prescribe any of either Lyrica, Tramadol, or Percocet, Defendants retained the right to defend or dispute responsibility for payment for these medications. (Exhibit A, ¶¶ 20, 24, 25)

3. On June 3, 2013, Plaintiff presented to Dr. Gemelli for her initial evaluation for pain management. Dr. Gemelli assessed her with chronic pain, and instructed Plaintiff to continue Tramadol and Lyrica, and start Norflex and Celebrex. Dr. Gemelli prescribed Tramadol, Norflex, and Celebrex, but did not prescribe Lyrica. (Exhibit B)

4. On June 12, 2013, Plaintiff presented to Dr. Gregory Schimizzi for an initial rheumatology evaluation. This was not an appointment authorized by Defendants' and was discovered by Defendants in the course of a records request per N.C. Gen. Stat. § 97-25.6. Dr. Schimizzi noted that Plaintiff had pain in both knees and elbows, as well as low back pain. Dr. Schimizzi opined that Plaintiff's symptoms and family history were consistent with a reactive spondyloarthropathy, and that early rheumatoid arthritis and incomplete ankylosing spondylitis were also possibilities. He instructed her to increase her dose of Celebrex, and continue her other current medications and return in 2-3 weeks. (Exhibit C)

5. Plaintiff returned to Dr. Gemelli on June 26, 2013. She reported that she stopped taking the increased dose of Celebrex due to the side effects, but that she was 50% better. Dr. Gemelli recommended she continue her medications, and again prescribed Tramadol, Celebrex, and Norflex. (Exhibit D)

6. On August 21, 2013, Plaintiff followed up with Dr. Gemelli. She reported that she was doing well on her current medications, and that she was started on Plaquenil by her rheumatologist, but it had not helped. Dr. Gemelli recommended she continue with her current medications and continue to follow up with her rheumatologist. He noted, "I do believe some of

her pain could be related to her rheumatological problem." Again, Dr. Gemelli prescribed Tramadol, Celebrex, and Norflex. (Exhibit E)

7. Given the express language in the Consent Order that Defendants are permitted to explore and/or defend or dispute their responsibility for payment for Tramadol, Lyrica, and Percocet, should Dr. Gemelli decide to prescribe them, Defendants have exercised their right to seek clarification from Dr. Gemelli per N.C. Gen. Stat. § 97-25.6. Plaintiff's unrelated pain, for which she is treating with a rheumatologist, the rheumatologist's indication that she should take her "current medications" for those complaints (including those being prescribed by Dr. Gemelli), and Dr. Gemelli's opinion that her pain was related to her rheumatological problem further confirm this need for clarification.

8. The North Carolina Court of Appeals has made it clear that "our Worker's Compensation Act was never intended to be a general accident and health insurance policy . . . ." *Errante v. Cumberland Cnty Solid Waste Mgmt.*, 106 N.C. App. 114, 121, 415 S.E.2d 583, 587 (1992). Thus, defendants must provide only a plaintiff's medical expenses that are incurred as a result of her compensable injuries. *Id.* at 121, 415 S.E.2d at 587-88. Further, an employer's liability for medical expenses expressly relies on which portion of the expenses relate solely to her compensable injury. *Id.* at 121, 415 S.E.2d at 588. Thus, contrary to Plaintiff's statement that the *only* relevant inquiry is whether the medicines are reasonably necessary to effect a cure or provide relief to Plaintiff, Defendants contend they have a valid legal basis for asking whether the prescriptions are solely related to the compensable condition.

9. Defendants' proposed questions and medical records are attached as Exhibit F. Of the proposed medical records and questions Defendants wish to send to Dr. Gemelli, Plaintiff has objected to questions 2, 3, 4, 5, and 6. Defendants contend that each of these questions is pertinent to and necessary for the fair and swift administration of this claim, pursuant to section 97-25.6(d)(4) of the Workers' Compensation Act. Defendants' reasons for asking each question Plaintiff has objected to are as follows:

> **2. After reviewing the enclosed medical records from Dr. Leonard, including the record dated August 21, 2012, in which Ms. [redacted] was prescribed Tramadol after complaining of low back pain, and the May 24, 2013 note in which she was complaining of joint, elbow, and knee pain, please identify the body parts and conditions being treated by Tramadol.**
>
> The purpose of this question was to make Dr. Gemelli aware of Plaintiff's other complaints for what Defendants contend are unrelated to her compensable condition, and to obtain information regarding which body parts and complaints of pain were being treated by Tramadol. Defendants made no statements regarding the causation or compensability of these conditions; they simply wished to draw Dr. Gemelli's attention to Plaintiff's other complaints of pain, which Plaintiff's primary care provider had previously treated with Tramadol, and to make sure that he saw the medical records wherein Plaintiff was originally prescribed Tramadol.
>
> **3. Is the Tramadol you are prescribing solely in relation to Ms. [redacted]'s work-related neck-related pain?**
> **Yes_____ No _____**

This question was asked because Plaintiff has previously been prescribed Tramadol by her primary care physician for unrelated conditions. While Dr. Gemelli did begin prescribing Tramadol, Defendants have legitimate reason to believe that it was being prescribed for Plaintiff's joint and other unrelated pain. Defendants are only required to pay for the medical expenses that relate solely to Plaintiff's compensable cervical condition. *Errante*, 106 N.C. App. at 121, 415 S.E.2d at 587. If Dr. Gemelli were to answer this question in the negative, further inquiry would be made into the portion relating solely to Plaintiff's neck pain, as is Defendants right under *Errante*. *Id.*

4. Do you believe additional Tramadol, on top of what Dr. Leonard has been prescribing, is necessary to effect a cure, provide relief, or lessen the period of disability for Ms. [redacted]'s work-related neck injury? Please explain.

The records from Plaintiff's primary care provider, Dr. Leonard, appear to indicate that Plaintiff was being prescribed Tramadol by Dr. Leonard as recently as May 28, 2013. (Exhibit F) Dr. Gemelli then prescribed Tramadol only 6 days later. This question was meant to clarify whether Dr. Gemelli was intentionally prescribing Tramadol *in addition to* what was already being prescribed by Dr. Leonard. By asking the question of whether additional Tramadol was necessary to effect a cure, provide relief, or lessen the period of disability, Defendants were using the proper legal standard for whether the Tramadol was a necessary medical expense, as Plaintiff has pointed out in her Motion.

5. Your medical record dated June 3, 2013, indicates that Ms. [redacted] should continue taking Lyrica, although you did not prescribe Lyrica and have not prescribed Lyrica. After reviewing the medical records, especially the December 7, 2011 record from Dr. Leonard in which he prescribes Lyrica for Ms. [redacted]'s sciatica, please clarify what complaints and conditions Lyrica is being prescribed to treat.

As indicated by this question and outlined above, Dr. Gemelli recommended that Plaintiff continue taking Lyrica, although he never prescribed it. To the extent that Lyrica is one of the drugs that is specifically contested in the parties' Consent Order, Defendants thought it necessary to clarify why Dr. Gemelli opined that Plaintiff should take it, and whether it would treat her compensable condition.

6. Is Lyrica being prescribed solely in relation to Ms. [redacted]'s neck-related pain?
Yes_____ No_____

Just as with question No. 3, this question was asked because Plaintiff has been prescribed Lyrica by her primary care physician for unrelated conditions. While Dr. Gemelli did not begin prescribing Lyrica, Defendants have legitimate reason to believe that it was being prescribed for Plaintiff's joint and other unrelated pain. To the extent that Dr. Gemelli mentioned Lyrica, Defendants thought it necessary to inquire into whether it was also treating Plaintiff's compensable condition. Defendants are only required to pay for the medical expenses that relate solely to Plaintiff's compensable cervical condition. *Errante*, 106 N.C. App. at 121, 415 S.E.2d at 587. If Dr. Gemelli were to answer this question in the

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negative, further inquiry would be made into the portion relating solely to Plaintiff's neck pain, as is Defendants right under *Errante*. *Id.*

10. Not only do Defendants contend that their proposed additional information and questions to Dr. Gemelli were valid and fair, but Defendants also object to Plaintiff's proposed re-written versions of Defendants' questions as follows:

2. Please identify the condition(s)/body part(s) for which you have recommended that Ms. [redacted] take Tramadol.
Condition(s) _____
Body part(s) _____

Defendants contend that this question is improperly worded to skew the answer in favor of Plaintiff. To the extent that Dr. Gemelli is only providing pain management for Plaintiff's compensable injury-related pain, he would only be recommending she take Tramadol for those work-related conditions. The real relevant question is Dr. Gemelli's opinion considering all of the medical records, not just his own treatment.

3. Please identify the condition(s)/body part(s) for which you have recommended that Ms. [redacted] take Lyrica.
Condition(s) _____
Body part(s) _____

Defendants contend that this question is improperly worded to skew the answer in favor of Plaintiff. To the extent that Dr. Gemelli is only providing pain management for Plaintiff's compensable injury-related pain, he would only be recommending she take Lyrica for those work-related conditions. The real relevant question is Dr. Gemelli's opinion considering all of the medical records, and not just his own treatment.

4. You will note from the attached records that Ms. [redacted]'s primary care doctor, Dr. Andre Leonard, previously prescribed Tramadol and Lyrica for unrelated medical conditions. Ms. [redacted]'s sciatica has since resolved. Her joint pain is now being treated with Humira. Ms. [redacted] has indicated that she has continued taking Tramadol and Lyrica primarily because they relieve her neck and shoulder pain, although the Tramadol does ease her joint pain to an extent.

(A) What is your opinion on whether or not Ms. [redacted] should take Lyrica and Tramadol to lessen her compensable neck and shoulder pain?
Yes_____ **No**_____
Explain:

(B) If so, do you plan to take over the prescribing of these medications?
Yes_____ **No**_____
Explain:

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Defendants object to these questions because it is based on Plaintiff's Counsel's representations about Plaintiff's medical conditions, and contains medical causation opinions, which neither Plaintiff, nor Plaintiff's Counsel are competent to give. Defendants contend that any representations about Plaintiff's condition and the relief she experiences from medicines should be made directly from Plaintiff to Dr. Gemelli, or should come from the medical records. Defendants also object to these questions on the grounds that they misrepresent the medical records.

11. Defendants contend that their proposed written questions to Dr. Gemelli are fair and unbiased, well-founded in the law, and necessary to the fair and swift administration of this workers' compensation claim. This is precisely the type of situation contemplated by the legislature in enacting N.C. Gen. Stat. § 97-25.6(d), where the timeliness and costs of litigation can be saved by submitting additional information and a corresponding questionnaire to the authorized treating physician. Defendants questions in no way attempt to characterize Plaintiff's current symptoms; rather, they present the medical records in an informative manner, and point Dr. Gemelli's attention to Plaintiff's prior and concurrent medical history, allowing him to draw his own inferences and conclusions. Further, Defendants contend that it is indeed necessary to note specific records to ensure that all the relevant information is actually considered by Dr. Gemelli prior to him answering the questions. Defendants contend that § 97-25.6(d) does not allow Plaintiff's counsel to re-write Defendants questions, without a reasonable basis for objection.

12. Finally, Defendants contend that the medical records from Plaintiff's rheumatologist, Dr. Schimizzi, should also be sent to Dr. Gemelli for his consideration along with the questions proposed by Defendants and the medical records from Dr. Leonard. Defendants were not in possession of the records from Dr. Schimizzi when the proposed questionnaire was sent to Plaintiff's Counsel, and given their importance in this issue, especially when considering Dr. Gemelli's opinion that some of Plaintiff's pain could be attributed to her rheumatological problems, Defendants contend that the records are relevant and will be informative for Dr. Gemelli. (Exhibit C)

13. Accordingly, Defendants request that the Commission find that they be allowed to submit all of their original proposed questions, as well as the prior medical records from Dr. Leonard, and the records from Dr. Schimizzi, to Dr. Gemelli for his review pursuant to N.C. Gen. Stat. § 97-25.6(d).

WHEREFORE, the **Defendants** [redacted] respectfully move the Commission to enter an Order allowing Defendants to submit their original questions as proposed to Dr. Gemelli, as well as the medical records from Plaintiff's primary care physician and her rheumatologist.

NORTH CAROLINA INDUSTRIAL COMMISSION

I.C. NO. [redacted], Employee-Plaintiff, v. [redacted] Employer, SELF-INSURED, [redacted] Servicing Agent), Defendant.

ORDER by Meredith Henderson, Executive Secretary.

FILED: SEPTEMBER 26, 2013

This matter is before the undersigned on Plaintiff's Objection and Motion for a Protective Order pursuant to Section 97-25.6(d)(4) of the General Statutes. Defendants responded.

APPEARANCES

Plaintiff : POISSON, POISSON & BOWER, PLLC
Attorneys, Wilmington, North Carolina;
E. Stewart Poisson, Counsel of Record.

Defendants : [redacted]
Attorneys, Wilmington, North Carolina
[redacted], Counsel of Record.

* * * * * * * * * * *

Based on the submissions of the parties and for good cause shown by Plaintiff, IT IS HEREBY ORDERED that Plaintiff's Objection to Defendants' request to send Defendants' proposed questions 2, 3, 4, 5 and 6 to Dr. Gemelli is noted, and Plaintiff's Motion for a Protective Order is GRANTED. Defendants SHALL therefore refrain from sending these questions to Dr. Gemelli. Defendants are allowed to submit Plaintiff's primary care medical records and Defendants' proposed Questions 1 and 7.

Defendants may submit revised proposed questions to plaintiff on the issue of whether the medications are recommended or being prescribed for plaintiff's work-related neck pain, without the use of the term "solely." No Order is needed as to whether defendants may choose submit Questions 2, 3, 4 and 5 as proposed by Plaintiff.

No costs are assessed at this time.

Meredith Henderson

MEREDITH HENDERSON
EXECUTIVE SECRETARY

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