Susan MILLER, Petitioner,

v.

JUPITER MEDICAL CENTER and Commercial Risk Management, Respondents.

No. 1D06–0450.

District Court of Appeal of Florida, First District.

May 8, 2006.

Background: Workers compensation claimant filed petition for writ of certiorari seeking review of an order of the Judge of Compensation Claims (JCC) compelling claimant to undergo an independent medical examination (IME) with a different physician than physician who performed a prior IME.

Holdings: The District Court of Appeal held that:

(1) employer/carrier (E/C) was entitled to select a new physician to conduct IME, and

(2) JCC could permit E/C to select physician who practiced outside claimant's county of residence.

Petition denied.

1. Workers' Compensation ⇨1313

Employer/carrier (E/C) was entitled to select a new physician to conduct an independent medical examination (IME) of workers' compensation claimant to ascertain whether claimant's shoulder condition could have been aggravated by a non-industrial cause, and was not required to select same physician who performed an earlier IME; compensability of shoulder condition was a new dispute between claimant and E/C arising after the earlier IME was performed. West's F.S.A. § 440.13(5).

2. Workers' Compensation ⇨1311

Judge of Compensation Claims (JCC) could permit employer/carrier (E/C) to select physician who practiced outside workers' compensation claimant's county of residence to perform independent medical examination (IME); statute governing IMEs contained no limitation regarding geographical location. West's F.S.A. § 440.13(5).

Richard A. Kupfer of Richard A. Kupfer, P.A., West Palm Beach, and Gilbert R. Panzer, Jr., Boynton Beach, for Petitioner.

Danni Lynn Germano of Rigell, Ring & Ardman, P.A., North Fort Myers, and Jonathan D. Wald, Palm Beach Gardens, for Respondents.

PER CURIAM.

Claimant, Susan Miller, petitions this court for writ of certiorari to review an order of the judge of compensation claims (JCC) compelling Miller to undergo an independent medical examination (IME). Miller claims the JCC departed from the essential requirements of law resulting in a miscarriage of justice by permitting the employer, Jupiter Medical Center, and carrier, Commercial Risk Management (E/C), to select a physician who practices outside claimant's county of residence, rather than the same IME physician selected by the E/C who performed the IME on Miller in February 2004. We deny the petition.

The physician was asked to conduct the IME for the purpose of determining whether (1) Miller had reached maximum medical improvement after undergoing three surgeries for neck and right-shoulder injuries suffered at work on March 29, 2001, and (2) her capacity for work. The

physician diagnosed post fusion cervical spine syndrome; full-thickness right rotator cuff tear; and residual myelopathy and weakness, right upper extremity. He stated that two other treating physicians had already found claimant to be at maximum medical improvement, and he would defer to them as to the date and the permanent impairment rating. He concluded that Miller could work light-duty six and one-half hours per day.

In January 2005, one of Miller's physicians recommended arthroscopic surgery to address right-shoulder problems. Believing that Miller had been involved in a new accident in 2004, following the 2004 IME, the E/C filed a motion to compel her to undergo a new IME to ascertain whether the shoulder condition could have been aggravated by a non-industrial cause. The E/C asked the JCC to permit an IME outside Palm Beach County, alleging that Miller coordinates the provision of continuing medical education classes and has close professional relationships with many physicians in that area. The JCC granted the motion.

[1] The above facts support the JCC's conclusion that the surgery issue was a new dispute entitling the E/C to an IME with the physician of its choice. *See, e.g., Wal–Mart Stores, Inc. v. Liggon,* 668 So.2d 259 (Fla. 1st DCA 1996) (observing that the E/C's request for a second IME more than a year after the first IME was reasonable because of the lapse of time); *Cortina v. Dep't of HRS,* 901 So.2d 273 (Fla. 1st DCA 2005) (observing that a dispute warranting an IME is clearly created when the employer disputes the claimant's right to benefits); *Kohout v. Benefit Adm'rs,* 781 So.2d 1164, 1165 (Fla. 1st DCA 2001) (observing that a party is entitled to an IME "to resolve the threshold question of causation"). *See also Karell v. Miami Airport Hilton/Miami Hilton Corp.,* 668 So.2d 227 (Fla. 1st DCA 1996) (observing that the E/C has the right to schedule an IME prior to the filing of a petition for benefits, because the only requirement for scheduling an IME is a dispute regarding overutilization, medical benefits, compensability, or disability).

Miller claims the E/C failed to prove need for an *alternate* IME examiner, required by section 440.13(5)(b), Florida Statutes (2001), *viz.,* the examiner is not qualified to render an opinion about the condition, no longer practices in the relevant specialty, is unavailable, or the parties agree to an alternate examiner. On the contrary, this provision simply means that once a party has selected an IME physician to address a dispute under section 440.13(5)(a), the party is generally bound by that physician's opinion as it applies to the particular dispute, even if it does not support the party's position. The statute does not require a party to repeatedly use the same IME physician for every dispute that arises within the scope of the physician's specialty during the course of a claimant's injury and treatment. Because Miller made a *new* request for surgery following her 2004 IME and the E/C disputes whether the need for surgery was related to the industrial injury or a later, non-work-related cause, and there has been no IME addressing what the E/C asserts is a shoulder condition that is attributable to an event post-dating the IME, the E/C is entitled to select a new—not an alternate—IME physician.

[2] In addition, there is no limitation in section 440.13(5) regarding the geographical location of an IME. This court has repeatedly stated that there is simply a "reasonableness" requirement in the IME provisions that is subject to a JCC's exercise of discretion. *See Farm Stores, Inc. v. Fletcher,* 621 So.2d 706 (Fla. 1st DCA 1993).

The petition for writ of certiorari is DENIED.

KAHN, C.J., ERVIN and VAN NORTWICK, JJ., concur.

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Glenn SMITH, Appellant,

v.

FLORIDA DEPARTMENT OF CORRECTIONS, Capt. L.L. Hatcher, Sgt. Jeffrey Pippin, Co., Christopher M. Lister, Co., Jan D. Heffel, and Marcell Johnson, Appellees.

No. 1D04–5179.

District Court of Appeal of Florida, First District.

May 8, 2006.

An appeal from the Circuit Court for Gulf County, Judy M. Pittman, Judge.

Glenn Smith, pro se, Appellant.

Charlie Crist, Attorney General, and Pamela Lutton–Shields, Assistant Attorney General, Tallahassee, for Appellees.

PER CURIAM.

REVERSED. The Department of Corrections concedes that the trial court erred in dismissing appellant's complaint for failure to exhaust his administrative remedies. We, therefore, reverse the order of dismissal and remand for further proceedings.

ALLEN, WOLF, and WEBSTER, JJ., Concur.

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Matthew James DAILY, Petitioner,

v.

STATE of Florida, Respondent.

No. 1D05–5819.

District Court of Appeal of Florida, First District.

May 8, 2006.

Petition Seeking Belated Appeal—Original Jurisdiction.

Robin Miller of the Law Office of Robin Miller, P.A., Fort Walton Beach, for Petitioner.

Charlie Crist, Attorney General, and Tracy Lee Cooper, Assistant Attorney General, Tallahassee, for Respondent.

PER CURIAM.

The petition is granted and Matthew James Daily is hereby afforded a belated appeal from the order of the Circuit Court for Okaloosa County, which denied in part and granted in part postconviction relief after an evidentiary hearing in case numbers 01–1755 and 02–2033. Because Daily was resentenced, the appeal shall be treated as a plenary appeal from judgment and sentence. *King v. State,* 795 So.2d 1086 (Fla. 1st DCA 2001).

The court notes that an untimely notice of appeal was filed for review of denial of