

**Online Reference: FLWSUPP 1612TELU**

**Insurance -- Personal injury protection -- Independent medical examination -- Failure to attend -- Error to find that insured's lack of notice of IME is valid reason for failure to attend IME where insured was represented by counsel, and counsel received valid notice of IME -- Discovery -- Depositions -- Expert witness fee -- Error to require insurer to pay expert witness fees to depose treating physicians**

UNITED AUTOMOBILE INSURANCE COMPANY, a Florida corporation, Appellant, vs. COMPREHENSIVE HEALTH CENTER, INC., a/a/o ERLA TELUSNOR, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 08-248 AP & 08-358 AP (CONSOLIDATED). L. T. Case No. 07-20457 CC 05(2). October 21, 2009. An appeal from a decision of the County Court, Civil Division, Miami-Dade County. Counsel: Thomas L. Hunker, United Automobile Insurance Company, Office of the General Counsel, for Appellant. Marlene S. Reiss, P.A., for Appellee. (Before JOHNSON, LANGER, and CYNAMON, JJ.)

(CYNAMON, J.) Provider Comprehensive Health Center, Inc. (“provider” or “Comprehensive”) sued insurer United Automobile Insurance Company (“insurer” or “United Auto”) for personal injury protection (PIP) benefits. Insurer answered that the bills were not reasonable, related, and necessary. Insurer later moved for summary judgment, arguing that the benefits were not due because the Claimant, Erla Telusnor, unreasonably refused to attend a properly scheduled independent medical examination (an IME). Provider filed a cross-motion for summary judgment, contending that the claimant did not “unreasonably refuse” to attend the IME. At the hearing in the trial court on the cross motions for summary judgment, the trial judge agreed with the claimant's argument that because she said her attorney never told her about the IME, it was a reasonable excuse for her to not have attended it. The trial court granted plaintiff's motion for summary judgment on this point.

A second issue on appeal in this case is that when the insurer went to take the depositions of the claimant's two treating physicians, the provider moved for a protective order, asking the trial court to require payment of expert witness fees before the insurer could depose them. The insurer objected, arguing that as treating physicians, the doctors were ordinary fact witnesses because they acquired their knowledge in the course of treating the patient. The trial court granted plaintiff's motion and required the insurer to pay expert witness fees of \$350/hour to depose the physicians.

The trial court entered final judgment and then subsequently granted plaintiff's motion for attorney's fees and costs. This consolidated appeal followed.

The issues now before this Court are whether or not the trial court erred by (1) granting plaintiff's motion for summary judgment and thereby holding that the claimant had a reasonable excuse for not attending the IME; and, (2) by requiring the insurer to pay expert witness fees to depose the two treating physicians. We conclude that the trial court erred as to both issues.

As to the first issue, failure to attend the IME, the trial court erred by granting the provider's motion for summary judgment as to whether or not it was reasonable for the claimant to not have attended the IME. IMEs are provided for by section 627.736(7), Fla. Stat. (2005), which states:

- (a) Whenever the mental or physical condition of an injured person covered by personal injury protection is material to any claim that has been or may be made for past or future personal injury protection benefits, such person *shall*, upon the request of an insurer, submit to mental or physical examination by a physician or physicians.
- (b) . . . If a person *unreasonably refuses* to submit to an examination, the personal injury protection carrier is no longer liable for subsequent personal injury protection benefits. (emphasis added)

An IME requirement is a condition precedent to suit, and when an insured fails to comply without a reasonable excuse, the insurer is entitled to summary judgment. *U.S. Security Ins. Co. v. Silva*, 693 So.2d 593 (Fla. 3d DCA 1997) (holding that an insurer is not liable for bills submitted subsequent to the insured's unreasonable failure to attend an IME); *De Ferrari v. GEICO*, 613 So.2d 101, 103 (Fla. 3d DCA 1993) (holding that insurer's motion for summary judgment was properly granted where the insured failed to meet a condition precedent to coverage).

Here, the claimant received notice of the IME through her attorney [the IME notice was sent certified mail to her attorney and by regular mail to her]. The provider admitted at the lower court hearing that notice to the attorney constitutes notice to the client. See Fla. R. Civ. P. 1.080(b) (When service is required or permitted to be made upon a party represented by an attorney, service shall be made upon the attorney unless service upon the party is ordered by the court). Claimant said the reason she did not attend the IME is that her attorney never told her about it. However, notice was also sent to her by regular mail. Proof that a letter or documents were mailed is sufficient to raise a prima facie presumption of the receipt by the addressee of the letter or documents so mailed, when there is proof that the mail was sent to the correct address. *Brown v. Giffen Industries, Inc.*, 281 So. 2d 897 (Fla. 1973). She says her failure to attend the IME does not amount to an "unreasonable refusal" under the statute, and should not relieve the insurer from paying PIP benefits. However, it is not a valid excuse for nonattendance, when the claimant is represented by counsel, and counsel received valid notice. *American Skyhawk Ins. v. Chacon*, 8 Fla. L. Weekly Supp. 593b (Fla. 11th Cir. Ct. App. July 24, 2001). As such, summary judgment for the provider on this issue was improper.

The trial court also erred as to the second issue, by requiring the insurer to pay expert witness fees to depose the two treating physicians. The provider contends that the treating physicians are unquestionably experts under Fla. R. Civ. P. 1.390, and entitled to a fee for their depositions. However, the insurer is correct in arguing that the trial court erred when it ordered that the insurer pay the treating physicians a fee of \$350/hour for their deposition time. Florida Rules of Civil Procedure 1.280(4) and 1.390(c) authorize expert witnesses fees for those witnesses who acquire or develop knowledge "in anticipation of litigation or for trial." But, treating physicians do not obtain their information for the purpose of litigation, but rather in the course of making their patients well. As such, they are treated as ordinary fact witnesses and are not entitled to charge expert witness fees. See *Engel v. Rigot*, 434 So. 2d 954, 957 (Fla. 3d DCA 1983) (holding that a dentist's subpoenas were erroneously quashed for not being accompanied by expert witness fees); *Ryder Truck Rental, Inc. v. Perez*, 715 So. 2d 289, 290 (Fla. 3d DCA 1998) (injured motorist's treating physicians should not have been classified as expert witnesses in her negligence action, but as ordinary fact witnesses); *Frantz v. Golebiewski*, 407 So. 2d 283, 285 (Fla. 3d DCA 1981) (a treating doctor, while unquestionably an expert, does not acquire her expert knowledge for the purpose of litigation but rather simply in the course of attempting to make his patient well); and, *Fittipaldi USA, Inc. v. Castroneves*, 905 So. 2d 182, 186 (Fla. 3d DCA 2005) (treating physicians are not subject to discovery rules governing expert witnesses because they did not acquire their expert knowledge for the purpose of litigation, but rather simply in the course of attempting to make their patients well. Under such circumstances, the witness is typically testifying as the treating physician concerning his or her own medical performance on a particular occasion and is not opining about the medical performance of another). The trial court should not have awarded expert witness fees for deposing the treating physicians.

Therefore, we reverse the trial court because it erred in: (1) granting summary judgment to the provider when the claimant unreasonably refused to attend the IME; and, (2) granting expert witness fees to the treating physicians for their depositions. Accordingly, we reverse and remand this cause to the trial court for further proceedings consistent with this opinion. Additionally, we also reverse the fee judgment awarded by the trial court since Appellee's entitlement to fees and costs is premised upon sec. 627.428(1), Fla. Stat., which requires the entry of a judgment in favor of the insured or the insured's assignees. *Hart v. Bankers Fire and Casualty Co.*, 320-So. 2d 485 (Fla. 4th DCA 1975). Reversal of the underlying judgment requires reversal of the fee award. *Marty v. Bainter*, 727 So. 2d 1124 (Fla. 1st DCA 1999). (JOHNSON and LANGER, JJ., concur.)