

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

BARBARA BOURGEOIS,

Claimant,

vs.

Case No. 24-3838MA

BAPTIST HEALTH CARE, INC., F/K/A
BAPTIST HOSPITAL, INC., BAPTIST
MEDICAL GROUP, LLC, AND EDDIE
N. POWELL, M.D.,

Defendants.

ORDER ON PENDING MOTIONS

This case is scheduled for arbitration on November 18 through 21, 2025. At this time, the following Motions have been filed and responses have been received: Respondent's Motion for Clarification Related to Appearance by Allan Berger (Motion for Clarification), filed October 16, 2025; Respondent's Motion to Restrict Damages Evidence in Compliance with Florida Statute 768.0427(2) (Motion to Restrict Damages), filed October 21, 2025; Respondent's Motion to Strike Claimant's Expert Dr. Robin Simon-Mark, D.O. (Motion to Strike), filed October 22, 2025; Respondent's Motion to Vacate Order Granting Consent Motion to Excuse Eddie N. Powell, M.D., from Personal Appearance at Arbitration Hearing (Motion to Vacate), filed October 23, 2025; and Amended Motion to Excuse Eddie N. Powell, M.D. from Personal Appearance at Arbitration Hearing (Amended Motion to Excuse), filed October 23, 2025. Responses have been timely filed for each motion listed.

The Appearance by Allan Berger

On October 16, 2025, a document was filed on the docket in this case with the docket remark listed as "Motion to Act as Qualified Representative – Notice of Appearance (Allan Berger)." There was no actual motion to act as a qualified representative. There is simply a Notice of Appearance, which lists Mr. Berger's Louisiana Bar number.

The absence of a Motion to Act as a Qualified Representative is understandable, given that the status as a qualified representative is unique to cases arising under the Administrative Procedure Act (APA) and is authorized by section 120.569(2)(e),

Florida Statutes. *See also* Fla. Admin. Code R. 28-106.106 and 28-106.107, which describe the process for attaining qualified representative status and the standards applicable to qualified representatives. The Uniform Rules of Procedure, generally applicable to APA cases, have no application to medical malpractice arbitrations, because there is no "agency action" at issue. Fla. Admin. Code R. 28-106.101 (defining the scope of the Uniform Rules). While section 766.207(2), Florida Statutes, provides that the evidentiary standards in sections 120.569(2)(g) and 120.57(1)(c) apply to medical malpractice arbitrations, it does not incorporate the other provisions in chapter 120.

In Respondent's Motion for Clarification, it seeks "clarification as to the appropriate process for an out-of-state attorney to appear on behalf of a party in a DOAH proceeding and whether Mr. Berger has complied." The Motion for Clarification does not seek to have Mr. Berger removed from representation: it appears to simply make sure that Mr. Berger is properly appearing in this proceeding.

Claimant's counsel takes issue with the need for clarification, but states that if there is something that needs to be done in addition to the actions Mr. Berger has already taken, those steps will be taken. Mr. Berger has filed the required verified statement pursuant to Rules Regulating the Florida Bar 1-3.11 and has paid the requisite fee. Claimant's counsel has taken the position, however, that these actions were actually unnecessary for proceedings at DOAH, and relies on a response to Frequently Asked Questions regarding unlicensed practice and limited appearances in Florida. It appears some clarification is indeed required.

The question and answer forming the basis for Claimant's position appear to be from The Florida Bar's website, under the link "Unlicensed Practice – Limited Appearance in Florida." The specific question and answer are as follows:

Do I have to send the Bar a Pro Hac Vice motion or Verified Statement if I am appearing before an administrative agency or the Division of Administrative Hearings (DOAH)?

No, you do not need to send the Bar any filing or fee for an appearance in an administrative proceeding. However, you should check the rules of the state agency or DOAH to determine the requirements for appearing and whether you need to file something with the agency or DOAH.

It is notable that the question does not specify appearance before DOAH for an arbitration, but rather for an administrative proceeding. Medical malpractice arbitrations do not fit that particular mold. In any event, Claimant's counsel represented in his response that "Mr. Berger's office then contacted DOAH and

spoke with this Court's Judicial Assistant inquiring about what, if anything, needs to be filed with DOAH for Mr. Berger to be authorized to appear in this DOAH proceeding. Mr. Berger's office was told by this Court's JA simply to file a Notice of Appearance, and so he filed his Notice of Appearance as instructed."¹ The undersigned believes that counsel acted in good faith, but the answer to the question asked is answered in The Florida Bar's rule regarding arbitrations. Rule 1-3.11 provides in part:

Appearance by Non-Florida Lawyer in an Arbitration Proceeding in Florida.

(a) Non-Florida Lawyer Appearing in an Arbitration Proceeding in Florida. A lawyer currently eligible to practice law in another United States jurisdiction or a non-United States jurisdiction may appear in an arbitration proceeding in this jurisdiction if the appearance is:

(1) for a client who resides in or has an office in the lawyer's home state; or

(2) where the appearance arises out of or is reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice; and

(3) the appearance is not one that requires pro hac vice admission.

The lawyer must comply with the applicable portions of this rule and of rule 4-5.5.

* * *

(e) The non-Florida lawyer must file a verified statement with The Florida Bar and serve a copy of the verified statement on opposing counsel, if

¹ The response does not identify the undersigned's assistant by name. She was shown the response and does not recall the conversation. Moreover, this particular JA, who has worked at DOAH for over 18 years, stated that she would never give that answer with respect to an out-of-state attorney. It is assumed, for the purpose of this Order, that whomever counsel spoke with may not have understood that this was an arbitration as opposed to a chapter 120 proceeding. If such a Notice of Appearance was filed in a regular administrative proceeding, the filer would have been sent the rules related to qualified representatives.

known, before practicing under this rule in all arbitrations except international arbitrations. ...

The comment immediately following the rule states, unequivocally, that this rule applies to *all* arbitrations conducted in Florida, with the exception international arbitrations, stating, "[f]or the most part, the rule applied to *any* type of arbitration proceeding and *any* matter being arbitrated." (emphasis added). Given the language of the rule itself and the language of the rule's comment, the rule applies to medical malpractice arbitrations authorized by section 766.207.

With these clarifications in mind, it is noted that the form filed with The Florida Bar has a certificate of service that lists opposing counsel in this case. While it is unclear why counsel did not receive it, it appears that Mr. Berger has done all that is required of him. Respondent's Motion for Clarification is granted and Mr. Berger will be added to the Parties listing in this case so that he will receive any orders from DOAH. Mr. Berger should also be copied with any pleadings served by the parties.

Respondent's Motion to Strike Claimant's Expert Dr. Robin Simon-Mark, D.O.

Respondents' Motion to Strike is based on two issues: Respondents assert that they have been hampered in scheduling the doctor's deposition because of Claimant's failure to provide dates that the doctor is available. According to Respondents, they have been requesting dates since early April, and did not receive possible dates until after requesting dates at least ten times. After the deposition was scheduled for October 6, 2025, Respondents report being told on October 1, 2025, that the deposition would have to be rescheduled because of Dr. Simon-Mark's insistence on examining Claimant before having her deposition taken. The deposition was rescheduled for October 29, 2025.

Respondents assert that Dr. Simon-Mark should be stricken as a witness because of the unwarranted delays in scheduling her deposition, and because Claimant's counsel refused to allow counsel for Respondent to be present for the examination prior to the deposition. Respondent claims prejudice because the inability to be present impairs their ability to prepare.

Claimant responds that the deposition was ultimately scheduled for October 29, 2025, which is prior to the discovery cutoff; that there is no requirement to allow counsel for Respondents or their retained expert to attend the medical examination conducted by Claimant's witness; and that there is no prejudice to Respondents because they are able to depose the witness.

Claimant makes no explanation for failing to provide dates for this witness until requested ten times. An inference can certainly be made that Claimant was being

uncooperative by not making the witness available earlier, the Claimant's failure to provide any basis for the delay reinforces that inference. However, it does not appear that Respondents filed a motion to compel at a time when a remedy could be fashioned to have the deposition occur earlier in the discovery process. Striking the witness is not appropriate when the problem could have been remedied by filing a motion to compel well before now.

With respect to whether Respondents' representative should have been allowed to attend the examination, neither party provided any caselaw to support their position, and the undersigned's independent research has not uncovered a case addressing this precise issue where the witness conducting the examination is aligned with the party being examined.² Accordingly, the Motion to Strike is denied.

Whether Dr. Powell is Required to Appear

On October 22, 2025, Respondents filed what was labeled as a Consent Motion to Excuse Eddie N. Powell, M.D., from Personally Appearing at Arbitration Hearing. The "Consent Motion" stated that liability was not in dispute, given that Respondents have admitted negligence; that Dr. Powell does not possess any information relevant to the issue of damages; and his testimony is not needed for any evidentiary purpose at the hearing. The Consent Motion further asserted that someone with full settlement authority on his behalf would be present at the arbitration hearing, and that Dr. Powell no longer lives in the Pensacola area, so requiring him to travel to the area would impose unnecessary expense. The Consent Motion was granted by an Order issued the same day.

The following day, Respondents filed a Motion to Vacate Order Granting Consent Motion to Excuse Eddie N. Powell, M.D., from Personal Appearance at Arbitration Hearing, stating that Respondents' representation that Claimants did not object was in error, and further stating their intention to file an amended motion asking for the same relief, which they did the same day, October 23, 2025.

Claimant's counsel responded to the Motion to Vacate. While he agreed with the remedy sought by Respondents (vacation of the prior order), he requested that the parties be ordered to have all further "meet and confer meetings" be by telephone, with a confirmation in writing by email. The undersigned will not grant this request. All counsel in this proceeding are officers of the court, and are bound by their Oath of Admission, by which they pledged "fairness, integrity, *civility*, not only in court, but also in all written and oral communications." Filing mountains of feuding emails in support of various arguments, and casting aspersions regarding the conduct of opposing counsel, does nothing to move this case to resolution. It is expected that both sides will meet and correspond in good faith, minus the vitriol.

² It may be that the parties researched the issue and also found nothing directly on point. It would have been helpful to state what research had been done.

With respect to whether Dr. Powell is required to appear, at the time the original motion was filed, Dr. Powell was not on anyone's witness list. After the Consent Motion was filed, Claimant added him to their witness list. In her response to the Amended Motion, Claimant describes Dr. Powell's two surgeries that give rise to this arbitration, and states:

Numerous specialist physicians have tried to fix claimant's damaged arm, totaling nine subsequent surgeries/procedures, with varying degrees of success. ... Claimant's counsel maintains that Dr. Powell should be made to attend the arbitration and to answer under cross examination necessary questions concerning how his counsel's attempt to place the cause on other sources is totally misleading and without merit.

Claimant does not explain how any questions directed to Dr. Powell regarding his counsel's actions relating to cause would answer any of the legitimate questions raised in this arbitration. Nor is there any explanation as to how his testimony could add anything related to any subsequent procedures that Claimant has endured. It seems more likely that, given counsel's reference to Dr. Powell's alleged "notorious background," and the attachment of a settlement order from the Wisconsin Board of Medicine, counsel is simply trying to undermine Dr. Powell's reputation.³ Given that no jury is present in this proceeding, and liability is stipulated, Dr. Powell's reputation is not relevant. Further, there is no explanation as to how Dr. Powell would be cross-examined by Claimants if he is called as their witness, or how any conversations with his counsel would not be inadmissible pursuant to attorney-client privilege.

Nonetheless, at the time that the Amended Motion was filed, the arbitration hearing was scheduled to take place in Pensacola. Since that time, it has been changed to a Zoom hearing. The primary reason advanced for excusing Dr. Powell's appearance at hearing was the time and expense related to travel. Given that travel is no longer a concern, as Dr. Powell can appear remotely, the Motion to Excuse Dr. Powell from Personally Appearing at Arbitration is denied.

Motion to Restrict Damages

Finally, Respondents filed a Motion to Restrict Damages, based on the provisions of section 768.0427(2), Florida Statutes. Respondents request that

³ As someone who spent a lengthy part of her career litigating either in front of or on behalf of Florida's Board of Medicine, a final order issuing a reprimand and requiring a limited number of continuing medical education hours is hardly a basis to refer to someone as having a "notorious background." A reprimand, while public, is one the most lenient penalties available to licensing boards.

Petitioners be limited to the rate described in section 768.0427(2)(c)2., i.e., 120 percent of the current Medicare reimbursement rate for covered services, or 170 percent of the Medicaid rate where no Medicare rate applies. Respondents also assert that Claimants bear the burden of producing evidence of these rates.

Claimant responds by stating that: 1) section 768.0427 does not apply to medical malpractice arbitrations, because DOAH is not an Article V court; 2) that Respondents have misconstrued section 468.0427; 3) that section 468.0427 does not limit evidence of unpaid past and future medical expenses; and 4) section 768.0427 does not create a burden of production.

There is no question that DOAH is not an Article V court. It is an administrative agency with authority that is limited by statute. However, the undersigned disagrees with Claimant's claim that section 768.0427 does not apply to medical malpractice arbitrations. Section 766.207(7) states that "[a]rbitration pursuant to this section shall preclude recourse to any other remedy by the claimant against any participating defendant, and shall be undertaken with the understanding that damages shall be awarded *as provided by general law*, including the Wrongful Death Act, ..." As section 768.0427 is part of general law, and speaks directly to the type of evidence that is admissible to prove medical expenses (which is at the heart of most medical malpractice arbitrations), it would most likely be an abuse of discretion for a panel NOT to consider it.

That being said, section 768.0427 does not limit the evidence that can be presented regarding unpaid and future medical expenses. By its terms, the statute provides that certain evidence related to medical expenses "shall include, *but is not limited to*," the evidence that Respondents seek as a restriction. Moreover, nothing in the statute places a burden on Claimants to produce the Medicare or Medicaid reimbursement rates.

Claimants provided an exhaustive list of decisions by trial judges throughout the state that have addressed the issues raised in this motion. The undersigned adopts the reasoning expressed in *Cheryl A. Beyenka v. Jean Pyle*, Case No. 2023-CA-009204 (Fla. 4th Jud. Cir. Ct. Apr. 21, 2025)(Order Denying Defendant's Motions Regarding Section 768.0427(2), Florida Statutes). Accordingly, Defendants' Motion to Restrict Damages is denied.

DONE AND ORDERED this 31st day of October, 2025, in Tallahassee, Leon County, Florida.

Case No. 24-5338MA


LISA SHEARER NELSON
Chief Arbitrator
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