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False Statements/TTD/TPD

Lucas v. ADT Security/Sedgwick CMS, 36 Fla. L. Weekly D1580 (Fla. 1st DCA July 22, 2011)

The claimant appealed an order of the JCC that denied benefits on the ground she made false or misleading statements in the pursuit of benefits. The order also denied TTD and TPD benefits.

The JCC found the claimant made false or misleading statements for the purpose of obtaining workers compensation benefits. The JCC based this decision on the totality of the claimant's statements, behaviors, and conduct. These factors included reporting pain grossly out of proportion to physical findings, reporting non-organic physical signs in the face of normal diagnostic tests, posturing and cog wheeling, and repeatedly attempting to be placed on TTD status.

The appellate court reversed the JCC's finding, holding that not all of the factors cited by the JCC were "statements" for the purpose of sections 440.09 and 440.105, and the factors properly considered statements were not provably false. The court stated posturing and cog wheeling are not statements, but behaviors that

cannot serve as a predicate for a finding of fraud. Additionally, the E/C did not submit any objective evidence to disprove the claimant's subjective complaints of pain, nor did it prove that the claimant actually wanted to work despite her request for TTD status. The court also found the record did not support the JCC's finding that the claimant "reported" non-organic physical signs, as the physician's report indicated he "found" non-organic physical signs.

The JCC also denied the claimant TTD benefits for the period in question, April 3, 2007 through June 27, 2007. The JCC based his decision on his acceptance of the testimony of one doctor, who placed the claimant at MMI on March 7, 2007, over another doctor, who gave the claimant no-work slips for the period in question. The appellate court reversed, finding that although a JCC remains entitled to ultimately accept the medical opinion of one doctor over another, the "no work slips" were still in effect and the claimant had no notice that she was able to work during the period in question.

However, the court affirmed the denial of TPD benefits from the date of accident and continuing, as the claimant never produced any evidence of work restrictions other than the no work slips.

Expert Medical Advisor

Trevino v. Dep't. of Revenue/Div. of Risk Mgmt., 36 Fla. L. Weekly D1581 (Fla. 1st DCA July 22, 2011).

The claimant appealed the JCC's denial of cervical spine diagnostic testing and a lumbar spine evaluation, arguing the JCC applied an incorrect legal standard when he rejected the opinion of the EMA.

The claimant sought cervical spine diagnostic testing per the recommendation of an EMA. The JCC denied the requested benefit, finding the EMA did not recommend diagnostic testing, but instead recommended a surgical evaluation at which time the diagnostic testing would be considered. The claimant argued the JCC rejected the opinion of the EMA without providing clear and convincing evidence to support the denial. The appellate court found the JCC did not reject the EMA's opinion; rather he interpreted it differently than did the claimant. The court found the JCC's interpretation was supported by competent substantial evidence and affirmed the denial.

The claimant also argued the JCC erred in denying the EMA's recommendation for lumbar treatment, without providing clear and convincing evidence in support of his denial. The JCC found the EMA did not make a recommendation for lumbar treatment. However, the EMA's written report contained a recommendation for a lumbar spine evaluation at an anesthesia pain clinic.

The court stated the claimant had the burden of proving entitlement to benefits, and a decision in favor of a party without the burden does not require support by competent substantial evidence on appeal. Thus, the JCC was not required to make detailed findings as to his denial. However, the JCC's discretion is not unfettered. Citing to Ullman v. City of Tampa Parks Dep't., 625 So.2d 868 (Fla. 1st DCA 1993), the court explained it must guard against an abuse of discretion by scrutinizing a JCC's findings, in light of the competent, substantial evidence rule. The court found the JCC abused his discretion in denying the claim as there was no evidence to support his findings.

The appellate court affirmed the denial of cervical spine diagnostic testing, and reversed the denial of the lumbar spine treatment.

Prevailing Party Costs

Brascom v. Hillsborough Cnty. Sheriff's Office/Commercial Risk Mgmt., 36 Fla. L. Weekly D1582 (Fla. 1st DCA July 22, 2011)

The appellate court affirmed an award of prevailing party costs to the Employer/Carrier ("E/C") for a pre-deposition conference between counsel for the E/C and the E/C's independent medical examiner ("IME").

In arguing the JCC abused her discretion by awarding this cost, the claimant relied on Centex-Rooney Construction Co. v. Martin County, 725 So.2d 1255 (Fla. 4th DCA 1999). In Centex-Rooney, the court clearly stated conferences between counsel and an expert prior to trial are not taxable.

However, the court in the instant case wrote specifically to point out that Centex-Rooney was decided prior to a 2005 amendment to the Uniform Guidelines for Taxation of Costs, which eliminated the prohibition against these conferences. The JCC had discretion to award prevailing party fees for a pretrial conference between counsel and the IME.

Waiver of Defenses

City of Panama/PGCS v. Bagshaw, 36 Fla. L. Weekly D1582 (Fla. 1st DCA July 22, 2011)

The Employer/Carrier ("E/C") appealed an order of the JCC awarding the claimant medical benefits and attorney's fees.

The claimant requested a left knee arthroscopy and Supartz injections. The E/C sought to challenge the requested treatment based on the lack of causal connection between the requested treatment and compensable injury. The JCC found the E/C had waived its right to challenge the claim because it did not authorize or

deny the claimant's request for benefits within ten days, as required by section 440.13(3)(i). The E/C did not dispute the JCC's finding that its response was untimely.

However, in finding the JCC incorrectly construed section 440.13(3)(i), the appellate court relied on Elmer v. Southland Corp., 5 So.3d 754 (Fla. 1st DCA 2009). In Elmer, the court was asked to decide whether or not the E/C was precluded from challenging the medical necessity of the requested treatment because it did not timely respond. The court stated that section 440.13(3)(i) does not require a final determination on authorization within a 10 day period, it only requires a response. The Elmer court then stated "an E/C who fails to comply with the statutory requirements forfeits the right to contest whether the referral is reasonably and medically necessary."

Citing to City of Pembroke Pines v. Ortagus, 50 So.3d 31 (Fla. 1st DCA 2010), the court in the instant case went on to say that even if the E/C loses the right to challenge medical necessity under section 440.13(3)(i), the E/C may still argue the compensable injury is not the reason treatment is needed.

The appellate court held the JCC erred in concluding the E/C waived its right to challenge the causal connection between the compensable injury and specific treatment, and reversed.

Indemnity/JCC Determinations

West v. University of Miami/Gallagher Basset Services, 36 Fla. L. Weekly D1583 (Fla. 1st DCA July 22, 2011).

Claimant and E/C challenged an order that awarded some benefits, and not others. The appellate court affirmed all findings, except for the following:

1. The JCC erred in awarding TPD benefits past the date of maximum medical improvement. The JCC also erred in awarding attorney's fees associated with this award.
2. The JCC erred in denying penalties for late TPD payments. An award of penalties on late payments is mandatory, not discretionary.
3. The JCC erred in listing a ripeness challenge as a defense to the Claimant's claims, as the E/C never raised this defense before the JCC.
4. The JCC erred in declining to rule on the claimant's claim for a plastic surgeon.

Department of Financial Services - Penalties

Citrus Cnty. School Board v. Dep't. of Financial Services, 36 Fla. L. Weekly D1584 (Fla. 1st DCA July 22, 2011)

The Citrus County School Board ("School Board") sought review of an order of the Department of Financial Services ("DFS"), which imposed a \$13,250 penalty for late indemnity payments.

An audit of the School Board's workers compensation claims for a 5 year period revealed 169 temporary indemnity payments were made after they became due. Of the 169 payments, only 4 were made more than 7 days after their due date. Construing the term "late payment" in section 440.20(8)(b) to mean payment made after the due date, DFS calculated the penalty based on 169 late payments. At an informal hearing, the school board argued that "late payment" should mean those payments made more than 7 days after they became due.

The sole issue on appeal was the correct interpretation of "late payment." The issue of statutory interpretation is reviewed de novo.

The appellate court found the language of section 440.20(8) to be clear and unambiguous. The statute requires benefits to be "timely paid." Penalties are imposed for "late payments." Read together, a payment that is not paid timely is a late payment subject to a penalty.

The School Board argued that section 440.20(8)(b) should be read in pari materia with section 440.20(6)(a), which provides for E/C paid penalties for compensation payments made 7 days after they become due. However the court rejected this argument, finding the statutes serve different purposes. Section 440.20(8)(b) serves a regulatory compliance purpose, while 440.20(6)(a) provides an injured employee additional compensation.

The appellate court affirmed the order of DFS.