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FLORIDA LAW WEEKLY

Week of February 19, 2010

Workers' compensation immunity

Coastal Masonry, Inc. v Bayardo Guitierrez, 35 Fla. L. WeeklyD342
(Fla. 3rd DCA February 10, 2010).

Claimant filed a petition seeking benefits for injuries sustained while lifting concrete blocks for the employer. The employer/carrier denied the claim in its entirety for failure to provide timely notice of the injury, the condition was not the result of an injury by accident arising out of and in the course and scope of employment, no accident or occupational disease, claimant's condition is personal in nature and not the result of an injury the insured.

Claimant dismissed his petition and filed a negligence action against the insured asserting that the insured denied the workers' compensation claim on the basis that the accident and injuries did not arise out of his employment and were not covered by workers' compensation. The insured responded admitting this allegation and further denied that the claimant was an employee, however, the insured denied that they waived workers' compensation immunity as an affirmative defense. The insured filed a motion for summary judgment based on workers' compensation exclusivity. The trial court denied the motion as a matter of law.

The 3rd DCA acknowledged that workers' compensation is the exclusive remedy for an injured employee unless the employer fails to obtain workers' compensation insurance or commits an intentional tort which results in injury or death. The court also noted that an employer may be equitably estopped from raising the exclusivity defense if the employer denies the employee's claim by asserting the injury did not occur in the course and scope of employment.

The court went on stating that it is not merely the denial of benefits that may permit an employee to seek damages in a venue other than a workers' compensation proceeding rather the irreconcilable positions asserted. The court cited *Byerley*, which held that expressly asserting that an injury did not occur in the course and scope of employment estops the employer from defending a subsequent tort action on the ground that the claim arose in the course and scope of employment.

The court held that the insured has taken inconsistent positions. The insured denied workers' compensation benefits stating that the claimant's condition was not the result of an injury by accident arising out of and in the course and scope of employment. Then turned around and used workers' compensation exclusivity as an affirmative defense in to the negligence claim on the basis that the accident arose in the course and scope of employment.

The 3rd DCA affirmed the trial court's decision because the insured asserted irreconcilable positions as to whether the claimant's injury occurred in the course and scope of employment.

The court also noted prior decisions holding that the employer is not estopped from asserting exclusivity defense when it denied further workers' compensation benefits and that the employer is not esptopped when it denied the claim for benefits based on the employee's failure to file the claim timely.