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Coverage

Bend v. Shamrock Services, 36 Fla. L. Weekly D430a, (Fla. 1st DCA February 28, 2011).

The claimant was involved in a motor vehicle accident while en route to an employer-contracted painting job in a truck owned by his employer. After the claim was reported to the carrier by the employer, the carrier cancelled the workers' compensation policy and denied the claim on the basis that 1) the claimant was an independent contractor rather than an employee and 2) the employer made misrepresentations in the insurance application process and/or failed to regularly submit documentation and reports to the carrier as required by law.

At the merits hearing, the carrier presented evidence to demonstrate that when the employer applied for workers' compensation coverage, it asserted that it was a lawn maintenance service. However, at least as of the time of the subject accident, the employer was also performing painting and several other services. The carrier asserted that it was never made aware that the employer was performing these additional services and that they would not have issued a policy if the true nature of the business had been disclosed at the time of application.

The JCC found that the claimant was an independent contractor or subcontractor for painting activities and that the painting work was a type of service within the "construction industry." This, pursuant to section 440.02(15)(c), Fla. Stat., eliminated any legal significance to the distinction between an employee and an independent contractor and, therefore, this portion of the carrier's denial was not pursued on appeal.

With regard to the denial based on employer misrepresentations during the insurance application process, the JCC found that due to the multiple material misrepresentations relating to the nature of the business and business activities, the policy was void *ab initio* (from the beginning) under section 627.409(1)(a), Fla. Stat., thereby precluding the claimant from recovering benefits under the policy. The JCC alternatively concluded that the claimant was employed "through a separate statewide business entity being run by the employer that provided commercial painting services," which was separate from the lawn maintenance entity insured by the carrier.

The appellate court concluded that the JCC did not have jurisdiction to retroactively void or cancel the insurance policy under section 627.409(1)(a), Fla. Stat. While the JCC has authority to determine if a workers' compensation policy is in effect, has been properly cancelled pursuant to section 440.42(3), Fla. Stat., or whether it covers a particular individual, he cannot effect a remedy not provided for in chapter 440. The court noted that pursuant to section 440.42(3), Fla. Stat., the only factual circumstance that allows for a "retroactive" cancellation of a policy is where there is duplicative or dual coverage, and both policies carry the same "effective date." Those facts were not present in this case.

The appellate court rejected the carrier's argument that it had no remedy under chapter 440, thus obligating the JCC to seek a remedy outside of Chapter 440. The court analyzed several remedies available to the carrier under chapter 440. First, section 440.381(1), Fla. Stat., allows the carrier to request additional information from the employer during the application process to further assess the nature of its business. In this case, the carrier did not take advantage of this and, instead, issued the policy based on unsubstantiated responses made by the employer on an automated on-line application system.

The appellate court also noted that there are additional remedies available after the policy has been issued. Section 440.381(6)(a), Fla. Stat., allows for a penalty paid by the employer to the carrier in the amount of 10 times the difference in the premium paid versus the amount the employer should have paid, plus attorney's fees, for misrepresentations such as those alleged to have been made by the employer in this case. This penalty would be enforced by the circuit court. The court noted that this remedy was applicable to misrepresentations made during the application process and thereafter.

As an additional remedy, section 440.381(4), Fla. Stat., requires the employer to submit quarterly employee earnings reports and monthly application updates to the employer. Section 440.105(3)(a), Fla. Stat., provides that it is a crime for the employer to fail to submit the updated application. That section also requires the carrier to report any omissions to the Department of Insurance Fraud. During the three plus years the carrier insured the employer, the employer had never updated his application or submitted quarterly earnings reports and the carrier did not enforce this.

The carrier also failed to take advantage of a fourth remedy by failing to require that the employer provide sufficient information to allow it to conduct a thorough audit as required by section 440.381(3) and (8), Fla. Stat., even though its first audit attempt made the carrier aware that, contrary to the representations made on its application, the employer was perhaps using subcontractors.

Finally, the appellate court advised that section 440.381(7), Fla. Stat., expressly provides that a carrier may obtain full indemnification from the employer, along with

attorney's fees, actionable in circuit court, for benefits due to an employee who is not reported by the employer in the mandatory quarterly earnings reports. Failure of the employer to indemnify the carrier within 21 days after demand for same is grounds for the insurer to immediately cancel coverage. This would mean that the carrier remains liable to the employee, but may then seek indemnification from the employer.

The appellate court also rejected the JCC's alternative finding that the claimant was working for the employer under a separate entity than the lawn maintenance service for which the carrier was providing coverage. The appellate court found that the undisputed evidence established that the employer was paying the claimant under the same federal employer identification number appearing on the application for insurance and that the employer's banking and tax records indicated a single legal entity providing a variety of maintenance services to the public.

Based on the above, the court reversed and remanded for a determination of which workers' compensation benefits, if any, the claimant is entitled.

Managed Care Arrangement

Diversified Maintenance Systems, Inc. v. Fuerte, 36 Fla. L. Weekly D435b (Fla. 1st DCA February 28, 2011).

The claimant requested an alternative primary care provider under the managed care arrangement. When the employer/carrier agreed to authorize one of only three PCP's whose names it provided to the claimant, the claimant filed a petition for benefits seeking to choose a PCP from the full provider network. The JCC found in favor of the claimant. The appellate court, citing Mack v. Westminister Suncoast Manor, 929 So.2d 610 (Fla. 1st DCA 2006), reversed, holding that the terms of the managed care arrangement govern resolution of the petition and that the employer/carrier's offer of a selection from three providers was as prescribed by the applicable managed care arrangement.