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**Prevailing party costs**

Punsky v. Clay County Board of County Commissioners, 2011 WL 1167205 (Fla. 1<sup>st</sup> DCA March 31, 2011)

The claimant appealed the JCC's order awarding prevailing party costs to the employer/carrier (E/C), arguing that if the E/C was entitled to costs the award may not exceed \$250 in cases where the E/C prevails on the issue of compensability. Alternatively, if prevailing-party costs are awarded to the E/C the amount of costs should be limited costs because chapter 440 precludes recovery of costs incurred for depositions, experts and independent medical examinations.

On appeal the claimant argued that section 440.19(6), Florida Statutes, allows either an award of zero costs or at most \$250 in costs against the claimant in a case where compensability is denied because there is no fund of money from which to deduct the \$250. The First DCA discussed that section 440.19(6) applies only when a claimant first proceeds against an employer at law or in admiralty and such relief is denied on the basis of workers' compensation immunity. In this case the E/C were not seeking to recover costs incurred in defense of an action brought as an alternative to the workers' compensation claim, either at law or in admiralty. Section 440.19(6) did not apply.

The claimant further argued on appeal that section 440.24(4) supports the position that costs may not be awarded against a claimant in a case where compensability is denied. The issue in this case was the claimant's responsibility for and the E/C's entitlement to an award of costs pursuant to

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section 440.34(3). The First DCA discussed that section 440.24(4) addresses enforcement and sanctions. The E/C has other mechanisms available for the enforcement of an order awarding costs. For example, the E/C may seek enforcement of a cost award in circuit court. The Court held that Section 440.24(4) had no bearing on this case.

The claimant also made the argument that the right to access courts is denied if costs are awarded to an E/C for successfully defending against compensability of a claim. To establish standing, the claimant must demonstrate an injury that is both real and immediate, not conjecture or hypothetical. The claimant made the argument that very few injured workers could afford to pay the costs when the claim fails and an award of costs to the E/C for successfully defending against compensability of a claim denies claimants access to courts. However, the record contained no evidence to support there was an actual injury. While it was proper for the claimant to raise the constitutional issue for the first time on appeal, there was no support in the record for the argument that the award of costs was an injury that was both real and immediate and not conjectural or hypothetical.

Finally, as to the claimant's argument that prevailing-party costs should be limited, the Court discussed that the legislature's significant amendment in 2003 intended the amendment of section 440.34(3) to include the taxation of all reasonable costs, with the exclusion of attorney's fees, equally to both the claimant and E/C. The claimant argued that sections 440.13(5) and 440.30 controlled in this case and override section 440.34(3). Section 440.13(5)(a) addresses only independent medical examinations and sets out the circumstances under which a claimant may obtain reimbursement should the opinion of the claimant's independent medical examiner be relied on in determining the claimant's course of treatment. Section 440.34 directs the JCC to award reasonable costs to the prevailing party. The Court noted that when read in conjunction with section 440.34(3), section 440.13(5) may broaden the circumstances under which a claimant may obtain reimbursement for the costs of an independent medical examination, but does not impact an E/C's entitlement to reimbursement of reasonable costs when the E/C is the prevailing party.

The claimant made the argument that the language of section 440.30 expressly limited the award of costs for depositions to claimants only. Section 440.30 uses permissive language, may be taxed, and relates only to depositions. Section 440.34(3) is mandatory, shall be taxed, and includes all reasonable costs, not just deposition costs. The First DCA held the legislature opted to make the award of costs mandatory and to expand it to allow the prevailing party, not just the claimant, to recover reasonable costs.

The award of costs was affirmed.

KAR/jab