WESTPHAL V. CITY OF ST. PETERSBURG AND OTHER CONSTITUTIONAL CHALLENGES TO CHAPTER 440

By Jill Spears
(407)839-0120
Jill.spears@rissman.com

The First DCA recently held that the 104 week cap on TTD benefits is unconstitutional and revived the 1991 amendments which allow for up to 260 weeks of TTD benefits. See Westphal v. City of St. Petersburg, Case number 1D12-3563 (Fla. 1st DCA February 28, 2013).

I. SUMMARY OF WESTPHAL V. CITY OF ST. PETERSBURG:

In Westphal, the claimant suffered severe injuries. He sustained nerve damage in his legs and required multiple surgeries, the last of which involved a five level lumbar fusion. While on TTD status and recovering from surgery, he exhausted his entitlement to 104 weeks of temporary benefits. He was unable to seek employment without disobeying medical advice. His claim for PTD benefits was denied as he had not yet reached maximum medical improvement. Although he was eventually accepted as PTD, there was a nine month "gap period" during which time he did not receive any indemnity benefits.

The court agreed that the resulting "statutory gap" in benefits: 1) failed to comport with any notion of legal justice as it violated the claimant's constitutional right of access to courts and his right to administration of justice without denial or delay, and 2) failed to comport with any notion of natural justice as it was "repugnant to fundamental fairness, because it relegates a severely injured work in a legal twilight zone of economic and familial ruin." The court therefore concluded that claimant was "denied access to courts and the constitutionally guaranteed right to the administration of justice without denial or delay, in violation of the Florida Constitution."

The Legislature can only abolish a cause of action or statutory right to redress for injury that existed at the time of the 1968 amendments if it provides a reasonable alternative to the right that is being removed or substituted. Kluger v. White, 281 So. 2d 1, 4 (Fla. 1973). This alternative must be a "just and adequate" substitute for those rights that were available when the Declaration

of Rights of the Constitution of the State of Florida was adopted in 1968.

Under the current law, an injured worker is only entitled to 104 weeks of temporary benefits, resulting in a 71% reduction from what a claimant would have received in 1968. Employers/carriers have the "unfettered right" to select the treating physicians. An injured worker who is TTD and still recovering from his injuries upon the expiration of the 104 weeks is prohibited from PTD benefits, even if he/she must refrain from working for an indefinite period of time on the advice of those doctors selected by the employer/carrier.

In evaluating the legal and natural justice (or lack thereof) resulting from the amendments, the Court also compared the 104 week limit to other jurisdictions and noted that more than 40 states allow for a minimum of 312 weeks of temporary benefits, some of which provide for unlimited duration. The "sister states" that are more likely to face similar economic conditions (Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee) provide for no less than 400 weeks of benefits. The court concluded that the 104 week limit under Florida law "is not adequate and does not comport with principles of natural justice."

Citing eight other appellate decisions dealing with the statutory gap in benefits that occurs when a claimant has exhausted of 104 weeks of temporary benefits but has not yet reached MMI, the court found that the 104 week limit is indicative of "systematic deprivation of justice." The end result, which leaves the claimant without compensation for disability, contravenes the stated purpose of chapter 440, which is to provide injured workers with prompt medical and indemnity benefits.

Unlike the 1990 amendments to chapter 440, which were found be constitutional because the law "continued to provide injured workers with full medical care and wage loss payments for total or partial disability," the court in Westphal held that the current system only provides injured workers "with limited medical care, no disability benefits beyond the 104 week period, and no wage-loss payments, full or otherwise." Finding that the 104 week limit did not provide an adequate substitute to the benefits provided in 1968, the court concluded that the 104

week limit on TTD benefits violates the constitutional guarantee that justice will be administered without denial or delay.

In so holding, the court stated, "[A] system of redress for injury that requires the injured worker to legally forego any and all common law right of recovery for full damages for an injury, and surrender himself or herself to a system which, whether by design or permissive incremental alteration, subjects the worker to the known conditions of personal ruination to collect his or her remedy, is not merely unfair, but is fundamentally and manifestly unjust." The court rejected the argument that a decrease in workers' compensation premiums demonstrated a public necessity, noting that it did not "justify a fundamentally unjust system of redress for injury."

When the Legislature approves new statutory language and simultaneously repeals its predecessor, the subsequent striking of the new language as unconstitutional revives the predecessor unless it, too, would be unconstitutional. The court therefore revived the 1991 amendments allowing for up to 260 weeks. This holding is to be applied prospectively only, and does not apply to "rulings, adjudications, or proceedings that have become final" prior to the date of the February 28, 2013 opinion.

It is important to note that the court limited its holding to TTD benefits. It is likely that the Employer/Carrier in Westphal will seek further review of the First DCA's holding. However, nothing has been filed to date.

II. WHAT TO EXPECT POST-WESTPHAL:

The claimants' bar has long since argued that the 2003 amendments have so eroded the benefits afforded under chapter 440 that the law no longer provides reasonable alternative to tort remedy, and as a result, injured workers are being been denied access to courts.

Specifically, chapter 440 now requires the claimant to fund his/her IME, requires the claimant to pay for the EMA if he/she is the party requesting same, provides that prevailing party costs may be taxed against the claimant, places an age limit on PTD benefits, reduces supplemental PTD benefits from 5% to 3%, allows for

apportionment of all benefits, limits psychiatric impairment ratings to 1%, limits temporary benefits payable for a psychiatric condition following physical MMI to six months, eliminates wage loss benefits, and limits attorneys fees.

We can expect to see challenges to other aspects of chapter 440 under the premise that injured workers are no longer being provided "with full medical care and wage loss payments for total or partial disability" and that the current system does not avoid the "delay and uncertainty of tort litigation."

III. CONSTITUTIONAL ARGUMENTS THAT ARE ALREADY IN THE WORKS:

In a recent case, Frederick v. Monroe County School Bd, 99 So. 3d 983 (Fla. 1st DCA 2012), the claimant argued that the current law allowing the employer to recover prevailing party costs is unconstitutional. The claimant asserted that by burdening her with over $16,000 in costs, the law imposed an unconstitutional restriction on her right of access to the courts.

While the court declined to find the statute unconstitutional, it agreed that the law raised “important questions of public policy.” Specifically, the court noted that it is not unreasonable to argue that requiring claimants to pay a prevailing employer’s costs imposes a chilling effect on employees with meritorious claims who seek workers' compensation benefits in good faith. The court further noted, “This is especially significant where a prevailing party's opportunity to recoup its attorney's fees is limited by statute. Such employees may thereby forego seeking benefits based on meritorious claims in order to avoid subjecting themselves to an award of costs.”

Nevertheless, the court concluded that it was constrained to affirm the award of prevailing party costs to the employer as it is the Legislature’s role to decide whether the imposition of certain costs is appropriate. In closing, however, the court recommended that the Legislature consider whether an employee who files a petition for benefits in good faith should be subject to the imposition of costs, again noting that this question raised “complex and difficult policy questions.”

The claimant in Frederick has sought discretionary review by the Florida Supreme Court, and jurisdictional briefs have been filed. It is unknown at this point whether the Florida Supreme Court will accept jurisdiction.

In the meantime, the claimants' bar is strategically handling their cases to ensure that the end result is so unjust as to shock the conscience of the court. In Eugene Jacobson v. Southeast Personnel Leasing, the Employer/Carrier prevailed at a final hearing and sought prevailing party costs. Shortly thereafter, the claimant's attorney, Brian Sutter, withdrew from the case, leaving the claimant without representation. The claimant attempted to retain attorney Michael Winer to represent him on the cost issue pursuant to a retainer agreement which provided an hourly fee of $175.00. A motion was filed seeking approval of the hourly retainer agreement and payment of $575.00 in fees for services already provided.

At the hearing on the motion, the claimant testified that he was not familiar with the cost provisions, evidence rules, legal pleadings, or how to file pleadings; that he had no legal training and had never acted as his own attorney; and that he entered into the Retainer Agreement freely and voluntarily and wanted the attorney to represent him in the matter.

Judge Beck denied the Motion for Approval of Hourly Retainer Agreement and for Payment of $525 to Claimant's Counsel for Services Rendered, and Mr. Winer promptly withdrew from the case. The claimant, left with no means to pay for an attorney, was unrepresented at the hearing on the Motion to Tax Costs. He was ultimately ordered to pay taxable costs in the amount of $17,145.76.

The claimant in Jacobson has appealed this decision, asserting that the statute is unconstitutional. Oral Arguments are scheduled to take place on March 13, 2013.

This is just one of the many cases in which the constitutionality of chapter 440 has been or will be called into question. In fact, on the same day as the Oral Arguments in Jacobson, the court will hear arguments in Elms vs. Castle Constructors. In Elms, the claimant's industrial accident left him a quadriplegic. He granted his ex-wife power of attorney to act with regard to his

affairs, and she in turn attempted to retain Jeffrey Appel for a flat fee of $100.00.

At the hearing seeking approval of the retainer agreement, the ex-wife testified that there were ongoing issues for which she needed legal advice including home modifications, attendant care, transportation, and social security offsets. She further testified that she needed guidance as she was not a lawyer and needed counsel to navigate the legal system. She requested approval of the flat fee so that the claimant would not have to pay a percentage of the benefits obtained. She testified that any reduction in the claimant's benefits would have a serious impact on his financial status and that he probably "couldn't make it" with a reduction. Counsel for the employer/carrier acknowledged that he was being paid either an hourly fee or a flat fee for his representation.

Judge Sojourner found that due to the constraints of section 440.34(1), she had no choice but to deny the motion to approve retainer agreement even thought it "does leave the claimant and his representative without the advice of counsel in a complicated matter."

On March 12, 2013, just one day prior to Oral Arguments in Jacobson and Elms, Oral Arguments will be held on Serrano v. Del Air. In that case, attorney Roland Tan was successful in retaining benefits resulting in a guideline fee of $581.89. Citing constitutional grounds, he argued that the case was appropriate for the award of a reasonable attorney's fee calculated on an hourly basis using the Lee Engineering factors. Citing Kauffman, Judge Pitts held that he was "unable to rule upon that issue. That issue must be presented to and resolved by the First District Court Of Appeal."

Judge Pitts found the attorney reasonably expended 35 hours securing the benefits. He further found that if an hourly rate was awarded, $250.00 would be appropriate. Thus under the Lee Engineering factors, the fee would have been $8,750.00. The guideline attorney's fee that was awarded of $581.89 yielded an hourly rate of only $16.62.

Other provisions that are currently being challenged as on appeal as unconstitutional include section 440.13(9)(f) which requires the claimant to pay for the EMA if he/she is the requesting party (Yolanda Banuchi vs.

Department of Corrections/Indian River Correctional Institute,(OJCC #09-024352), and section 440.34(2) which allows the employer/carrier (and not the claimant) to make an "offer to settle," potentially limiting attorney's fees even further. (Heinz Klein v. Easy Restaurant Group, LLC (OJCC #12-00761DAL). In Banuchi, the final brief was filed on March 6, 2013, and the request for Oral Arguments remains pending. In Klein, the Record on Appeal was just transmitted on February 28, 2013, thus no briefs have been filed to date.

The First DCA only hears Oral Arguments in a limited number of cases. Many claimants' attorneys feel the court's holding in Westphal, coupled with their agreement to hold Oral Arguments in Jacobson, Elms, and Serrano, suggest that the floodgates have opened on constitutional challenges to many of the benefits afforded by chapter 440.

However, the court recently declined to find that the 1% cap on psychiatric permanent impairments set forth in section 440.11(3)(c), Florida Statutes is unconstitutional. See Larry Goodwin v. Mosaic Phosphates Co., (OJCC 05-037320). The court likewise declined to find that section 440.13(14)(c) which requires the claimant pay a $10.00 copay upon reaching MMI, is unconstitutional. See Miguel Andres v. Central County Water Control District, (OJCC #10-001228SHP). Oral Arguments were heard in Goodwin on October 17, 2012 and Andres on November 14, 2012.

It is therefore difficult to predict how the First DCA will rule on the constitutional challenges to chapter 440 going forward. Of note, the court decided both Goodwin and Andres just 5 days after hearing Oral Arguments, so we could have our answer fairly quickly.