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Costs

Valera v. Florida Keys Aqueduct Authority, 38 Fla. L. Weekly D515a (Fla. 1st DCA March 6, 2013)

The Judge of Compensation Claims found that both the claimant and the employer/carrier were prevailing parties and offset the cost amounts of the two parties. This resulted in a cost award to the employer/carrier only. The appellate court, noting that matters of enforcement of compensation orders are appropriately resolved in circuit court, remanded the case back to the JCC with instructions to award costs to both parties without offsetting the amounts.

Workers' Compensation Immunity

Villalta v. Cornn International, Inc., 38 Fla. L. Weekly D515b (Fla. 1st DCA March 6, 2013)

The claimant was employed by L&W Drywall Services, a subcontractor on a construction project, when he fell from

scaffolding and sustained fatal injuries. His estate filed civil suits again several defendants, including Tropic Aire, an HVAC subcontractor on the same project. Tropic Aire asserted immunity from suit pursuant to section 440.10(1), Florida Statutes, which states that a subcontractor providing services on the same project as another subcontractor is given immunity from suit by an employee of the other subcontractor so long as certain requirements are met. One of those requirements is that the subcontractor's "own gross negligence was not the major contributing cause of the injury." The trial court awarded summary judgment to Tropic Aire, finding that the evidence did not meet the standard for gross negligence.

The appellate court reversed, finding that the complaints, depositions and other supporting evidence presented a prima facie case of gross negligence sufficient to create a jury question and preclude summary judgment. The claimant had been working from scaffolding in a room where Tropic Aire had made recessed cut outs in the floor that were left uncovered in violation of safety standards. The evidence demonstrated that Tropic Aire was responsible for covering the cut outs, that the contractor had contacted Tropic Aire about the cut outs, Tropic Aire employees never provided any instructions about the cut outs to the drywall workers, and that a scaffold wheel had been placed in one of the cut outs causing the scaffold to topple over. Tropic Aire's project manager acknowledged that the cut outs created a risk of serious injury or death if not properly covered.

The appellate court noted that the standard for gross negligence encompasses a composite of circumstances which create a clear and present danger of serious harm, of which the defendant was aware or charged with knowledge of such danger and acted with conscious disregard of that danger. Where there is uncertainty about whether the circumstances constitute simple or gross negligence, the question should usually be resolved by the jury. The appellate court held that summary judgment was improper because Tropic Aire failed to show there was no genuine issue of material fact as to whether it acted with gross negligence.

Workers' Compensation Immunity

Villalta v. Cornn International, Inc. 38 Fla. L. Weekly D516a (Fla. 1st DCA March 6, 2013)

This appeal resulted from the same lawsuit as the above case. In this appeal, the claimant's estate challenged a summary judgment awarded to Cornn International. Cornn International was subcontracted dry wall work on the construction project by the general contractor. Cornn International further subcontracted the drywall work to L&W Drywall Services (the sub subcontractor), who employed the deceased claimant. This created a vertical relationship between Cornn International and L&W Drywall, making Cornn International the claimant's statutory employer pursuant to section 440.10(1). As a result, Cornn International had immunity from suit pursuant to section 440.11(1), Florida Statutes, so long as the claimant could not prove an intentional tort. The evidence did not support an intentional tort.

The claimant's estate relied on a theory of gross negligence, under section 440.10(1)(e)2, which provides section 440.11 immunity for a subcontractor sued by the employee of another subcontractor, unless the first subcontractor's own gross negligence was the major contributing cause of the injury. The appellate court explained that this was improper because it ignored the distinction between vertical and horizontal subcontracting relationships.

A vertical relationship is created when a contractor sublets part of the work to a subcontractor, who then further sublets work to another subcontractor. That was the situation here. In this situation immunity is governed by section 440.11(1), which includes the intentional tort exception. In contrast, a horizontal relationship is created when subcontractors are engaged in the same construction project, but under different subcontracts outside of a vertical chain of contractor to sub-contractor to sub-subcontractor. With a horizontal relationship, there would be immunity unless gross negligence is shown. As a result, the appellate court concluded that the claimant's estate had failed to prove an intentional tort and that the gross negligence theory was not applicable. Summary judgment was affirmed. .

Permanent Impairment

Sheaffer v. Publix Super Markets, Inc., 38 Fla. L. Weekly D595a (Fla. 1st DCA March 8, 2013)

The claimant's authorized psychiatrist placed her at MMI and assigned a zero percent impairment rating. He opined that she would need to follow up every two to three months for medication and supportive therapy to maintain the improvement she had achieved. The claimant filed a petition for benefits claiming payment of an impairment rating for her psychiatric condition, which the employer/carrier denied on the basis that the authorized doctor assigned a 0% impairment rating.

The Claimant's psychiatric IME diagnosed recurrent major depressive disorder and assigned her a 6% permanent impairment rating. The employer/carrier's IME agreed with the diagnosis, but assigned a 0% impairment rating. All three psychiatrists agreed that if the claimant stopped taking her psychiatric medications, her condition would deteriorate. The JCC accepted the opinions of the authorized provider and the employer/carrier's IME over those of the claimant's IME and did not award impairment benefits.

The Florida Impairment Guides indicate that "attention must be given to the effect of medication on the individual's signs, symptoms, and ability to function." Since the unrebutted testimony was that the claimant would decompensate if she stopped taking her medications, the impairment guides indicate that she should have received a 1% impairment rating, the maximum permitted for psychiatric conditions in workers' compensation cases. Section 440.15(3)(b) and (c) provide that all impairment income benefits shall be based on an impairment rating using the impairment schedule. Therefore, while the JCC has discretion to accept the opinions of one physician over another, the reliance on the physician's opinion must be warranted by the substance of the medical testimony and not only the doctor's conclusion. Since the opinions of the authorized provider on which the JCC relied were not grounded in a correct application of the law and because no reasonable view supports the award of a 0% impairment rating, the case was remanded to the JCC to award a 1% impairment rating.