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Chapter 1- Accidents Arising Out of and in the Course and Scope of Employment

Randy Lee Jenks v. Bynum Transport, Inc. and Zenith Insurance Company, 37 Fla. L. Weekly D2859

The claimant, a licensed truck driver, was contacted by the employer's recruiter. After providing his name and social security number, the claimant was invited by the employer to attend 2 days of orientation at their facility. The claimant's orientation was set 2 to 3 weeks out so that he could provide his resignation notice to his current employer.

Thereafter, the claimant traveled from his home in Mims to Auburndale to attend orientation on 6/22/11 and 6/23/11. During orientation, the employer provided the claimant lodging, lunch,

transportation, and $50 per day "upon successful completion of orientation".

On the first day of orientation, the claimant successfully completed a physical exam, drug test and a checklist entitled "Prospective Bynum Drivers" which stated that, "This is not an offer of employment and should not be viewed as such." The claimant was instructed to date the checklist for the following day, 6/23/11, which would be his "official date of hire".

On 6/23/11, the second day of orientation, the claimant received a picture identification badge. At the end of the day, the recruits were expected to immediately depart from the employer's location for their first trip. That afternoon, the claimant followed the recruiter in his truck to a restaurant for lunch. On the way to lunch, the claimant was involved in a motor vehicle accident.

Later that same day, the claimant completed his driving test, received keys to his assigned truck and then left to complete his first trip for the company. The claimant then filed a Petition for Benefits on 7/22/11 seeking compensability of his injuries. The E/C denied the claim, stating that the Claimant was not an employee at the time of the accident.

At trial, the claimant testified that he believed he was hired before he left his home in Auburndale to begin orientation as his background check was already done, the employer invited him to orientation, and covered the cost of his lodging and meals. He also testified he would not have quit his job on a "maybe".

Gary Brinkley, the safety director for the employer testified that drivers cannot become employees until orientation is completed. He also stated that the employer uses the orientation period to complete unfinished background checks, physical exams, drug testing and a driving test. Prospective drivers also receive a photo ID badge when they have been officially hired. The claimant received his badge between 4:30

p.m. and 5:00 p.m. on 6/23/11, approximately 4 hours after his car accident. However, the employer acknowledged that work comp benefits had been provided in the past to other prospective recruits that had been injured during orientation.

The JCC held that the claimant was not an employee at the time of the accident and that benefits were not due because: 1) claimant was aware he had to pass a drug test, the results of which would not be back until the end of orientation; 2) he was told not to date the checklist until the second day of orientation, as he would not be hired until then; 3)claimant testified that he knew he was free to leave orientation at any time, noting that several recruits did leave; 4) claimant testified he knew he would be hired as he could pass the drug and driving tests, but the employer did not know he could pass those and advised the claimant that he would not be hired until he successfully completely the orientation process; 5) that the $50 paid to claimant by employer during orientation was only to be made after successful completion of the orientation process; and 6) the money paid for the orientation was a flat rate and differed from the wage ultimately offered to and accepted by the claimant.

Because the claimant's physical, drug test and driver's test "had not been completed or results received by the Employer", the JCC ruled that there had been not been an unequivocal offer of employment and denied benefits.

The claimant appealed this issue of "first impression" to the 1st DCA. The general rule is that there is no entitlement to workers' compensation benefits before hiring. A contract, either express or implied, must exist. Claimant argued that the Court should follow the Supreme Court of Tennessee who found that a claimant, injured on her third day of orientation, was an "employee" where the claimant was required to attend the orientation prior to starting the position, the claimant was to be paid for attending the orientation, and orientation was not part of the application process.

The 1st DCA ultimately followed Tennessee and found that claimant was an "employee" because: 1) orientation was required prior to beginning first job; 2) travel pay and lodging was provided by employer during orientation; 3) employer exerted "control" over claimant by transporting him during orientation process; and 4) Employer had previously paid work comp benefits to others injured during orientation. Reversed and Remanded.

A very lengthy dissent was written by Justice Thomas who opined that the majority incorrectly interpreted the legal elements necessary to prove the existence of an "implied in fact contract" and noted that the JCC had already resolved facts which might have established an implied-in-fact contract against the claimant.

Chapter 1- Accidents Arising Out of and in the Course and Scope of Employment

Frank Urbina v. Kindred Hospital-North Florida/Sedgwick CMS, 37 Fla. L. Weekly D2865

Claimant was asked by employer to pick up medical equipment using his personal van. On the way back, the claimant "blacked out" at some point, struck an electrical pole and was injured. He filed a claim for workers' compensation benefits but same was denied by the Carrier who asserted that the claimant was not in the course and scope of employment, that he suffered from an idiopathic condition, and that his employment was not the major contributing cause of the accident. No evidence of any pre-existing conditions was presented by the E/C.

The JCC denied compensability under an increased hazard analysis, finding that claimant had an idiopathic injury but that driving on public roads did not pose an increased hazard/danger not encountered by ordinary people.

The 1st DCA reversed. Pursuant to Caputo, if no medical evidence of a pre-existing condition is presented, then the claimant is not required to present additional evidence going to

the issue of whether the accident was the major contributing cause of the injuries. Claimant satisfies this just by showing he was performing work at the employer's direction when the accident occurred causing injuries.

The JCC also erred in ruling that claimant's injuries did not arise out of his employment by virtue of claimant's operation of a dangerous instrumentality. The Court previously held that even a MVA caused by an identifiable pre-existing condition occurring while employee is driving in the course and scope of employment is compensable. See Deturk v. Charlotte County, 642 So.2d 779 (Fla. 1st DCA 1994).

Further, under the "traveling employee" analysis, since the claimant is required to use a car to travel and carry out employment related duties, an accident occurring during the course and scope of employment is compensable.

Since claimant's injuries resulted from a collision which occurred while he was actively engaged in work activities and because no other identifiable risk or medical condition brought about the accident or his injuries, claimant's injury arose out work performed within course and scope of employment. Reversed and Remanded.