DISTRICT COURT OF APPEAL
FIRST APPELLATE DISTRICT
TALLAHASSEE, FLORIDA

PHYLLIS A. CRISPIN,

Appellant,

vs.

ORLANDO REHABILITATION GROUP D/B/A CLERMONT NURSING AND REHAB CENTER and GALLAGHER BASSETT SERVICES, INC.,

Appellees.
_____/

CASE NO.: 1D19-863

OJCC NO.: 12-009053MES

D/A: 4/18/2011

REPLY BRIEF OF APPELLANT

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This is an Appeal from a Final Order from the State of Florida, Division of Administrative Hearings, Office of the Judges of Compensation Claims, Orlando District Office, dated February 20, 2019.

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PRELIMINARY STATEMENT

The Appellant, PHYLLIS A. CRISPIN, shall be referred to herein as the "Claimant".

The Appellees, ORLANDO REHABILITATION GROUP D/B/A CLERMONT NURSING AND REHABILITATION CENTER and GALLAGHER BASSETT SERVICES, INC., shall be referred to herein as the "Employer/Carrier" (E/C) or by their separate names.

References to the Record on Appeal shall be referred to by the letter "R" followed by the applicable page number.

The transcript of the Final Hearing held on February 12, 2019, which is the second volume consisting of 29 pages, shall be referred to by the letters "RT" (record/transcript) followed by the applicable page number.

The Judge of Compensation Claims shall be referred to by the letters "JCC".

The Initial Brief of Appellant will be referred to by the letters "IB" followed by the applicable page number.

The Answer Brief of Appellees will be referred to by the letters "AB" followed by the applicable page number.

ARGUMENT

POINT I

THE JCC ERRED IN CONCLUDING THE 5 YEAR LIMITATION ON PTD BENEFITS IN F.S.440.15(1)(b)(2011) FOR A CLAIMANT WHOSE ACCIDENT OCCURS AFTER THE EMPLOYEE REACHES AGE 70 IS LIMITED TO 5 CALENDAR YEARS AFTER ACCEPTANCE OF PTD, AS OPPOSED TO A 5 YEAR BANK OF BENEFITS.

Claimant agrees with the E/C that this appeal is controlled by the plain language of F.S.440.15(1)(b)(2011) which provides, inter alia, as follows:

> "If the accident occurred on or after the employee reaches age 70, benefits shall be payable during the continuance of permanent total disability, not to exceed 5 years following the determination of permanent total disability." (AB-3)

Claimant acknowledges, as stated by the E/C (AB-4) that pursuant to rule making authority, the Department adopted rule 69L-3.01945 which provides in part:

> "If the accident occurred on or after the employee reaches age 70, benefits shall be payable during the continuance of permanent total disability, not to exceed 5 years from the date of permanent total disability."

The E/C argues the plain language of both the statute and the applicable rule control here (AB-4). Claimant disagrees, because the statute and the rule are different. The Statute states "not to exceed 5 years following the **determination** of permanent total disability", whereas the rule states "not to exceed 5 years from the **date** of permanent total disability" (emphasis mine).

The rule would line up with those statutes that limit a claimant's entitlement to benefits to a certain period of time following a specific event, to wit "from the date of PTD" which would be a calendar based rule, as argued in the Initial Brief (IB-19-23). The statute, however, as argued in the Initial Brief (IB-16-19) would line up with those cases that are calculated as a bank of benefits.

It is axiomatic that an administrative rule cannot enlarge, modify or contravene the provisions of a statute, Phillips v. Leon County Public Works, 44 F.L.W. D1747 (Fla. 1st DCA 2019). As a result, when an administrative rule conflicts with the enabling statute, the statute will control, Phillips v. Leon County Public Works, supra. Therefore, this case should be decided on the language in the statute, not the rule.

Claimant submits the plain language of the statute entitles Claimant up to 5 years of permanent total disability benefits, calculated on a cumulative basis (bank of benefits), as opposed to limiting Claimant to entitlement to just 5 calendar years of PTD beginning on the date Claimant becomes PTD.

The E/C argue Claimant herein was PTD before her 2014 surgery, PTD immediately following her 2014 surgery, and she remains PTD now (AB-5).

Claimant respectfully submits Claimant was not PTD immediately following her 2014 surgery, but rather reverted back to a TTD status from October 22, 2014 through January 4, 2015.

On October 22, 2014, following additional right shoulder surgery under the direction of Dr. Nowicki (R-62,63), Claimant's MMI date of May 25, 2012 was rescinded and Claimant reverted to a TTD status (R-71,140). Both the Florida Supreme Court, Smitty's Coffee Shop v. Florida Industrial Commission, 86 So.2d 268(Fla.1956), and this Honorable Court, Orange County School Board v. Melman, 721 So.2d 1183(Fla.1st DCA 1998), Lopez v. Nabisco Brands, Inc., 516 So.2d 993(Fla.1st DCA 1987), Delgado v. LaQuinta Motor Inns, 457 So.2d 572(Fla.1st DCA 1984), and Atkins v. Green Hut Construction Company, 447 So.2d 268(Fla.1st DCA 1983), have held that surgery or other remedial or curative procedures performed after the date a claimant reaches MMI may entitle a claimant to temporary total disability benefits. Claimant herein remained in a TTD status from October 22, 2014 through January 4, 2015 at which time Dr. Nowicki again placed Claimant at MMI following Claimant's 10/22/14 right shoulder surgery (R-140).

Furthermore, in Smitty's Coffee Shop v. Florida Industrial Commission, Supra, the Florida Supreme Court observed the Florida Workers' Compensation Act defines the various classes of disability as being: (1) permanent total; (2) temporary total;

(3) temporary partial; and (4) permanent partial. It does not prescribe they must occur in any specific order. Thus, in Smitty's Coffee Shop v. Florida Industrial Commission, Supra, the Florida Supreme Court specifically held an employee may be awarded compensation for temporary total disability after an award of permanent partial disability has been made for the same injury.

Claimant herein would submit that under circumstances such as those existing in the case at bar, a claimant can be awarded temporary total disability benefits following a period of permanent total disability benefits if claimant's MMI status has been revoked due to surgery and claimant is temporarily put back in a TTD status.

The E/C, in arguing F.S.440.15(1)(b)(2011) is a "calendar based" statute seeks to compare it to F.S.440.15(2)(a)(2011) which is a statute that provides for a "bank" of benefits.

F.S.440.15(2)(a)(2011), which is the TTD statute, provides inter alia:

> "Subject to subsection (7) in case of disability total in character but temporary in quality, 66 2/3% of the average weekly wages shall be paid to the employee **during the continuance thereof, not to exceed 104 weeks except as provided in this subsection, s.440.12(1), and s.440.14(3)**.." (Emphasis mine)

This Honorable Court has held the aforesaid language in the TTD statute entitles Claimant to a "bank of benefits", as

opposed to a "calendar based" entitlement to benefits, Auman v. Leverocks Seafood House, 997 So.2d 476(Fla.1st DCA 2008), Cooper v. Buddy Freddy's Restaurant, 889 So.2d 125(Fla.1st DCA 2004), Wright v. City of Rockledge, 813 So.2d 283(Fla.1st DCA 2002).

The E/C argues the TTD statute is silent regarding the date such benefits begin, the date such benefits end and specifically provides for a set number of "weeks" (AB-8). Therefore, the E/C argue the statute provides for a bank of such benefits that can be paid out at various times depending on claimant's entitlement to them (AB-8).

Contrary to the E/C's argument, the TTD statute clearly provides the TTD benefits begin "in case of disability total in character but temporary in quality". Similarly, the PTD statute clearly provides the PTD benefits begin "In case of total disability adjudged to be permanent", F.S. 440.15(1)(a)(2011).

The language in F.S.440.15(1)(b)(2011), which is the statute at issue herein, is nearly identical to that in the TTD statute. F.S.440.15(1)(b)(2011) provides:

> **"Benefits shall be payable during the continuance of permanent total disability, not to exceed 5 years following the determination of permanent total disability."** (Emphasis mine)

If the nearly identical language of the TTD statute has been determined to provide a "bank" of benefits, so too should the nearly identical language in the PTD statute be construed to

provide for a "bank" of benefits. As Claimant argued in Claimant's Initial Brief (IB16-19), when a statute, such as the statute in the case at bar, provides a claimant is entitled to a certain amount of benefits following the date in which claimant first becomes entitled to those benefits, those benefits are calculated as a bank of benefits to be used cumulatively while the claimant is in the status in question. Claimant is entitled to receive those benefits, as long as she is otherwise qualified to do so, until she has exhausted her entitlement to those benefits (IB-15).

To the contrary, those statutes that limit a claimant's entitlement to benefits to a certain period of time following a specific event, such as claimant attaining MMI, or the date of the accident, regardless of whether claimant is entitled to those benefits at the time the triggering date occurs, limit entitlement to those benefits to the end date of the period, even if claimant has not exhausted the total amount of those benefits she would otherwise be entitled to (IB-15,16).

The E/C also relies on F.S.440.093(3)(2011) as support for their position (AB-6). F.S.440.093(3)(2011), which is a "calendar based" statute, Kneer v. Lincare, 267 So.3d 1077(Fla.1st DCA 2019), Utopia Homecare v. Alverez, 230 So.3d 72(Fla.1st DCA 2017), School Board of Lee County v. Huben, 165 So.3d 865(Fla.1st DCA 2015) provides, inter alia, as follows:

"(3) Subject to the payment of permanent benefits under s.440.15, in no event shall temporary benefits for a compensable mental or nervous injury be paid for **more than six months after the date of maximum medical improvement** for the injured employee's physical injury or injuries, which shall be included in the period of 104 weeks. . ." (Emphasis mine).

This is a statute that limits a claimant's entitlement to benefits to a certain period of time following a specific event, which, in the case of F.S.440.093(3)(2011), is claimant attaining MMI.

The E/C also relies on F.S.440.15(2)(b)(2011), another calendar based statute to support their position (AB-6,7). F.S.440.15(2)(b)(2011), which is a statute dealing with catastrophic benefits, provides inter alia:

"Notwithstanding the provisions of paragraph (a) an employee who has sustained the loss of an arm, leg, hand, or foot, has been rendered a paraplegic, paraparetic, quadriplegic, or quadraparetic, or have lost sight of both eyes shall be paid temporary total disability of 80% of her or his average weekly wage. The increased temporary total disability compensation provided for in this paragraph **must not extend beyond six months from the date of the accident** . . ." (Emphasis mine)

Again, this statute limits a claimant's entitlement to catastrophic benefits to a certain period of time, specifically six months, following a specific event, and in the case of F.S.440.15(2)(b)(2011) the specific event is the date of accident.

To the contrary, F.S.440.15(1)(b)(2011) does not limit a claimant's entitlement to benefits to a certain period of time

following a specific event. Instead, it entitles the claimant to a specific amount of benefits, specifically up to five years of PTD benefits.

The E/C, relying on School Board of Lee County v. Huben, Supra, argue that when addressing these issues this court often looks to whether a particular statute utilizes the word "weeks" instead of "months" or "years" (AB-7). The E/C argue the use of "weeks" is suggestive of a bank of benefits. In contrast, a statute using "months" or "years" suggest a calendar based construction (AB-7).

In School Board of Lee County v. Huben, Supra, this court was addressing the issue of whether the psychiatric temporary total disability benefits under F.S.440.093(3)(2003) should be calculated as a calendar based limitation and not calculated cumulatively. This Honorable Court in finding F.S.440.093(3) was a calendar based statute, noted the JCC drew a contrast between the operative language in F.S.440.093(3) and the operative language in F.S.440.15(2) which limits catastrophic TTD benefits and which the JCC concluded was a "clear consecutive month calendar period limitation."

This Honorable Court in School Board of Lee County v. Huben, Supra, concluded that the above two statutes were more alike than dissimilar and that it appeared significant they both used the word "months" in contradistinction to the use of the

word "weeks" in other statutes such as F.S.440.15(1)(a), the TTD statute quoted above, which provides for a bank of benefits.

Claimant submits whether the statute uses weeks, months or years has no bearing on whether the statute provides for a "bank" of benefits or is a "calendar based" determination of benefits. For example, F.S.440.15(3)(c)(2002) (the statute was in effect from 1/1/1994 through 9/30/2003), provided a claimant's eligibility for temporary benefits, impairment benefits, and supplemental benefits "terminates on the expiration of 401 weeks after the date of injury."

This Honorable Court in Holl v. United Parcel Service, 140 So.3d 1062(Fla.1st DCA 2014) made it clear a claimant was not entitled to temporary benefits 401 weeks after his injury, even if he had not exhausted his eligibility for 104 weeks (at that time) of temporary disability benefits. Thus, claimant's eligibility for temporary benefits, impairment income benefits and supplemental benefits is clearly calendar based, and not a bank of benefits under the provisions of F.S.440.13(c)(2002), even though it used the term "weeks".

As previously argued, the distinguishing factor is whether the statute provides a claimant is entitled to a certain amount of benefits following the date in which claimant first becomes entitled to those benefits, (those statutes would be a bank of benefits), as opposed to a statute that limits a claimant's

entitlement to benefits to a certain period of time following a specific event, such as attaining MMI, or the date of accident (which would be a calendar based calculation). The statute at issue herein provides claimant is entitled to a certain amount of benefits following the date in which claimant first becomes entitled to those benefits and thus entitles claimant to a bank of benefits.

The E/C seeks to distinguish the case of Winn Dixie v. Resnikoff, 669 So.2d 1297(Fla.1st DCA 1995), a case relied upon by Claimant in Claimant's Initial Brief wherein this court interpreted the 78 week limitation on wage loss eligibility under F.S.440.15(3)(b)4.d(III)(1991) as a cumulative period, not an uninterrupted consecutive calendar period, on the grounds that the very nature of wage loss benefits was that they were paid out as needed (AB-8). While true, this Honorable Court in Winn Dixie v. Resnikoff, Supra, concluded the 78 week limitation was a cumulative period, not an uninterrupted consecutive period, because this court found the statute at issue was not confined to an uninterrupted period immediately after MMI (the occurrence of a specific event).

The E/C seeks to distinguish Smitty's Coffee Shop v. Florida Industrial Commission, Supra, and the other similar cases cited by Claimant that hold that a claimant who undergoes a post-MMI surgery may be entitled to additional temporary

benefits following that surgery on the grounds that none of the aforesaid cases addressed an injured worker who was already receiving PTD benefits at the time of that post-MMI surgery (AB-9). While true, Claimant submits it does not matter what status a claimant is in when a claimant reverts to a temporary TTD status following post-MMI surgery. As previously indicated, the Florida Supreme Court in Smitty's Coffee Shop v. Florida Industrial Commission, Supra, held there is no particular order in which a claimant can receive the various indemnity benefits.

The E/C next argue Claimant, in the case at bar, was over the age of 62 and therefore not entitled to PTD supplemental benefits (AB-10). The E/C argue the majority of those receiving PTD benefits are also receiving PTD supplemental benefits (AB-10). The E/C argue that under the Claimant's construction, a Claimant receiving PTD and PTD supplemental benefits after surgery would lose her entitlement to PTD supplemental benefits during the period of post-surgical recovery (AB-10).

The question of PTD supplements has no bearing on the issue in the case at bar, since as acknowledged by the E/C, Claimant is not receiving supplemental benefits.

Finally, the E/C argues that the record is devoid of any evidence Claimant's 2014 surgery restored any functionality or increased Claimant's capacity to work (AB-10).

It is unrefuted that following Claimant's October 22, 2014 right shoulder surgery, Dr. Nowicki rescinded Claimant's MMI date of May 25, 2012 and reverted Claimant to a TTD status (R-71,140). Claimant remained in the TTD status until January 4, 2015 at which time Dr. Nowicki again placed Claimant at MMI (R-140). The JCC specifically found:

> "Subsequently, on October 22, 2014 Dr. Nowicki performed her right shoulder surgery. He rescinded MMI from the date of surgery until January 4, 2015." (R-140)

Claimant would note that if the E/C calendar based construction is adopted, then if an injured worker, who has an accident after age 70, is paid PTD benefits for a year and goes back to work for 4 years and then is again PTD, he/she would get no further PTD or other indemnity benefits. Claimant submits this could not have been the intent of the legislature in passing this statute, guaranteeing at least 5 years of PTD, which historically was otherwise payable over the worker's lifetime.

As such, Claimant respectfully submits the JCC erred in concluded the 5 year time period set forth in F.S.440.15(1)(b)(2011) is a calendar based time period as opposed to a cumulative based time period (bank of benefits).

POINT II

THE JCC ERRED IN DENYING CLAIMANT'S REQUEST FOR RECLASSIFICATION OF PTD TO TTD/TPD FOR THE PERIOD OF OCTOBER 22, 2014 TO JANUARY 4, 2015 AND THEREFORE ERRED IN DENYING CLAIMANT'S REQUEST FOR CONTINUED PAYMENT OF PTD BENEFITS FROM THE DATE OF SUSPENSION ON MAY 26, 2017 TO AUGUST 6, 2017, PLUS PENALTIES, INTEREST, COSTS AND ATTORNEY'S FEES.

Claimant adopts and re-alleges the arguments set forth in Claimant's Initial Brief (IB-28,29).

CONCLUSION

Claimant adopts and re-alleges the conclusions set forth in the Initial Brief of Appellant (IB-30).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by email on this 26 day of July, 2019 to: William H. Rogner at wrogner@HRMCW.com, William G. Berzak at WilliamBerzak@Aol.com, Scott B. Miller at SMiller@HRMCW.com.

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CERTIFICATE OF TYPE FACE COMPLIANCE

I hereby certify that this Reply Brief for Appellant was computer generated using Courier New twelve font on Microsoft Word, and hereby complies with the font standards as required by Fla.R.App.P 9.210 for computer-generated briefs.

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