

Roof Painting By Hartzell, Inc./ Summit Holdings- Claims Center v. Andres Hernandez, Colors Construction, Inc., and Guarantee Insurance Company

Case No. 1D14-0112 (February 16, 2015): An MKRS Law Case Win

Issue: Whether the JCC properly determined that dual employment existed between a contractor and subcontractor?

Facts: Roof Painting by Hartzell (Hartzell) and its Carrier appealed the Order by the JCC finding that Hartzell and its subcontractor, Colors Construction, Inc. (Colors) were dual employers at the time of the Claimant's on the job accident. The Carrier for Colors cross-appealed the JCC's Order striking Color's defenses for discovery violations and the Order disallowing their proposed amendment to the Pretrial to raise a borrowed servant doctrine.

A property management company hired Hartzell, a contractor, to provide pressure cleaning and staining services. Hartzell then subcontracted with Colors to provide the labor for the contracted services. The Claimant did not do any work or tasks other than the pressure cleaning and staining as called for in the subcontract.

Analysis and Conclusion: The Court found no error with the JCC's striking Guarantee/Color's defenses and affirmed the issues raised on the cross appeal. .

The Court, however, determined that the JCC's finding of dual employment was not supported by the law nor the evidence and they reversed that portion of the Order on appeal. First, the Court noted that none of the parties argued or asserted a dual employment theory in the proceedings before the JCC. The JCC instead first raised the dual employment possibility at the conclusion of an evidentiary hearing.

The Court noted it had previously set forth the standard of dual employment in Interstate Industrial Park v. Afterdeck Rest., 478 So. 2d 852, 854 (Fla. 1st DCA 1985). As such, dual employment occurs when a single employee is under contract of hire with two employers. Secondly, this employee is under the separate control of each employer and also performs services for the most part for each employer separately. The third prong of the test is that the service for each employer is largely unrelated to that of the other one.

When the definition of dual employment was considered, the Court found that the evidence did not support a finding a dual employment under the three prong test. The Court reversed the Final Merits Order finding dual employment and splitting liability for workers' compensation benefits between Hartzell and Colors and their respective Carrier. It was remanded for consideration of the applicability of section 440.10(1(b)).

Take Away: To qualify for dual employment, all three prongs of the following test must be met:

1. a single employee is under contract of hire with two employers;
2. this employee is under the separate control of each employer and also performs services for the most part for each employer separately; and
3. services performed by each employer are largely unrelated to that of the other one.

American Airlines and Sedgwick Claims Management Services, Inc. v. David Hennessey

Case No. 1D14-3604 (February 23, 2015)

Issue: Whether the JCC properly excluded a deposition from being admitted into evidence due to late disclosure of a witness without a showing of actual prejudice?

Whether a JCC can issue a blanket award of attendant care benefits without consideration of the actual evidence presented with regard to the actual services performed?

Facts: The Employer/Carrier appealed and the Claimant cross appealed the award of attendant care services for a finite period of time to the Claimant's wife.

The Claimant had sustained a compensable right leg injury that resulted in the development of an infection in the thigh. The E/C had provided wound care by authorizing a home health nurse to attend to the Claimant on a daily basis. The Claimant sought payment of nonprofessional attendant care services performed by his wife. The E/C defended the claim on the basis that there was no valid prescription for the requested attendant care benefits and that attendant care for household duties are considered gratuitous and not compensable.

At the trial, the E/C attempted to offer into evidence the deposition of the home health nurse who provided wound care and also assessed the Claimant's ability to perform personal activities of daily living, for which the nonprofessional attendant care services were being sought. The Claimant objected to the deposition on the grounds that the nurse was not identified on the

Pretrial Stipulation. The Claimant alleged that although in attendance at her deposition, he was prejudiced to the admission of the deposition because he was not aware it was going to be introduced into evidence. In the Order awarding attendant care benefits, the JCC sustained the Claimant's objection to the admission of the nurse's deposition, instead accepting it as a proffer.

The JCC accepted the Claimant's wife's testimony as to the specific amount of time she spent assisting the Claimant with attendant care activities, which totaled 7.5 hours per week. Yet, the JCC awarded attendant care benefits in the amount of 56 hours per week.

Analysis and Conclusion: The Court reiterated its prior holding from *Cedar Hammock Fire Dep't v. Bonami*, 672 So. 2d 892, 893 (Fla. 1st DCA 1995), where it noted that late disclosure of evidence (or witnesses), which does not result in actual prejudice does not normally warrant the exclusion of evidence. It then noted that the JCC did not make any findings as to why she sustained the Claimant's objection in the Final Order.

The Court noted that the Claimant's alleged prejudice- of not being aware that a deposition was going to be offered into evidence- "did not rise to the level of surprise or unfair disadvantage." Because the excluded evidence could have had an impact on the award of benefits, the Court reversed and remanded for consideration of the home health nurse's testimony.

The Court also went on to determine that if on remand the JCC were to determine that the Claimant's wife remained entitled to attendant care benefits, they agreed with the E/C that the competent substantial evidence (CSE) did not support the award that had been made by the JCC of 56 hours per week. The Court reiterated its prior holdings that a blanket award of attendant care without regard to the actual services performed would be error. The JCC had accepted the wife's testimony with regard to the specific amount of time she spent performing attendant care services (7.5 hours per week). To determine entitlement to anything beyond what was established through the evidence would be considered to be a blanket award.

Take Away: To be successful in excluding evidence at a hearing, including witnesses that are disclosed late in the litigation process, one must be able to actually establish prejudice that would rise to the "level of surprise or unfair disadvantage."

To establish entitlement to attendant care benefits, the Claimant has the burden of proving the time spent providing necessary services and this must be established by CSE. A JCC is not allowed to issue a blanket award of attendant care benefits without having evidence to support the actual performance of those services that were awarded.

Miami-Dade County v. Thomasena Mitchell
Case No. 1D14-1466 (February 16, 2015)

Issue: Whether the JCC erred in ignoring or overlooking medical testimony that a congenital condition was a non-occupational cause of a Claimant's heart condition that was sufficient to overcome the presumption?

Whether a JCC has overlooked or ignored evidence, which if considered by the JCC could change the outcome of the case?

Facts: The Employer/Carrier appealed the JCC's determination that that they failed to sufficiently rebut the heart and lung presumption under section 112.18(1)(a).

The parties had stipulated to the following requirements for application of the Heart and lung presumption under section 112.18(1)(a):

1. The Claimant was a member of a protected class under the statute.
2. The Claimant underwent a pre-employment physical that failed to reveal any evidence of heart disease.
3. The Claimant was diagnosed with heart disease- supraventricular tachycardia (SVT);
and
4. The Claimant was disabled on account of the SVT.

The parties had further agreed that, given the application of the presumption, it was the E/C's burden to offer medical evidence to rebut the presumption by demonstrating that a non-occupational cause for the SVT.

Claimant's IME physician testified that the slow pathway accessory was "presumably" present from birth. Dr. Pianko, the authorized physician, opined that the Claimant may have been born with the slow pathway accessory or it could have developed later after birth. During redirect, he opined within a reasonable degree of medical certainty that the Claimant was most likely born with this condition.

The JCC found that the SVT was caused by a slow pathway accessory in combination with a triggering event. However, the JCC determined that the slow pathway accessory was not a congenital condition.

Analysis and Conclusion: An E/C may offer evidence of a congenital condition to overcome the occupational presumption set forth in section 112.18(1)(a). The Court found that the JCC had determined that there was no competent substantial evidence (CSE) establishing when the slow pathway accessory developed. However, the Court determined that in so doing, the JCC ignored the testimony of Dr. Pianko on redirect where he testified that the Claimant was most likely born

with this condition. Since the JCC's Order failed to address whether he had rejected this physician's testimony on redirect or to reconcile it with the portion he had accepted, it was determined that the JCC had failed to address this testimony in reaching his opinions.

The Court noted that where it is demonstrated that a JCC has overlooked or ignored evidence, which may impact or alter the outcome of the case, then reversal and remand is necessary for consideration of the evidence.

Take Away: Not only does this case have an impact on presumption claims, but it also directly impacts the grounds for appeals for Final Orders from JCCs where they do not specifically address significant portions of relevant deposition testimony or live testimony in their Orders and the basis for their rejection or acceptance of the same. Thus, Final Orders should be carefully reviewed in light of this case to ascertain whether there is an argument that a JCC has overlooked or ignored evidence, which if considered by the JCC could have changed the outcome of the case.

Gwendolyn Echo v. MGA Insurance Company, Inc.

Case No. 1D14-1444 (February 16, 2015)

Issue: Whether an insurance company was entitled to rescind an insurance policy based on the insured's material misrepresentations and whether payments made after the denial could rescind their ability to deny the existence of the policy?

Facts: The Insured, Gwendolyn Echo (Echo), appealed a final summary judgment in favor of MGA Insurance Co. (MGA), in which the court determined that MGA was entitled to rescind an insurance policy based on her material misrepresentations.

Echo purchased a vehicle in the name of Mildred White. At no point was Echo a registered owner of the vehicle and only Ms. White's name appeared on documents related to that vehicle. Echo purchased the subject insurance policy from MGA covering the vehicle and hers is the only name appearing on any of the insurance documents. When Echo signed the insurance application, she listed herself as the only driver or resident in her household.

Approximately one year after the purchase of the vehicle, Echo was involved in a MVA while driving that vehicle. She received medical care and submitted a claim with MGA. MGA responded by indicating that contrary to her assertion on the insurance application, it had learned she was not the owner of the vehicle. MGA asserted this constituted a material misrepresentation and that it would not have issued the policy if it had known the truth. Therefore, coverage was denied and a check refunding her premiums.

Nearly one year after Echo filed her complaint and MGA had answered denying coverage, MGA had paid over \$10,000 to her medical care providers. Echo argued that MGA waived its entitlement that the contract was void due to their payments.

After a hearing, the court found that Echo completed the insurance application and indicated that she was the vehicle's registered owner, even though she knew at the time of the application that this was not the case. The court determined that the policy was issued based on this representation and that it would not have been issued if MGA had known Echo was not the registered owner of the vehicle. Finally, the court found that MGA's payment of PIP benefits to medical providers were inadmissible as Echo lacked standing to raise the same.

Analysis and Conclusion: The Court agreed that Echo made a material misrepresentation in the insurance application warranting rescission of the insurance policy. However, the Court held that the trial court failed to properly consider Echo's arguments on waiver and confession of judgment by MGA's payment of PIP payments.

Although MGA asserted that the contract could not be "resurrected" even if it took actions inconsistent with its rescission (i.e., in this case by paying \$10,000 plus to medical care providers in PIP benefits), the Court disagreed. The Court indicated that the case law was very clear that "when an insurer has knowledge of the existence of facts justifying a forfeiture of the policy, any equivocal act which recognizes the continued existence of the policy or which is wholly inconsistent with a forfeiture, will constitute a waiver thereof." *Johnson v. Life Ins. Co. of Ga*, 52 So. 2d 813, 815 (Fla. 1951). Therefore, the case was remanded to the trial court to resolve the waiver issue on the merits or to submit it to a jury.

A confession of judgment is where an insurer pays proceeds after a suit has been filed, but before judgment has been rendered. It entitles the insured to attorney's fees. The Court found in this claim that there remained the issue of whether MGA made PIP payments after the filing of the suit by Echo as a result of the pending lawsuit or whether there was another reason for MGA's decision to make the payments. The Court noted that this was a question for the trial court to resolve.

Take Away: Actions taken by a party that are inconsistent with their position in a claim can be used to assert waiver of their position. Hence, it is extremely important that if a denial is issued that benefits are not paid.