MKRS LAW

JULY 2015

Case Law Update

Hershel Brady vs. Cypress Communications / Amerisure
DCA#15-0025 decided July 29, 2015

Facts
Claimant was involved in a compensable accident in December of 2013. As a result of which he filed multiple petitions, one of which requested authorization of Dr. Ellowitz and payment of his medical bills.

Issue
Claimant appealed the Judge of Compensation Claims' denial of a $1,500.00 medical only fee under Fl. Stat. §440.34(3)(a) and (7) after having found same to be part of a scheme between the Employer/Carrier and the Claimant's attorney to maximize fees at Claimant's expense. The Employer/Carrier denied same. Later, a washout was entered into this claim wherein the Employer/Carrier agreed to pay the bills of Dr. Ellowitz and would pay Claimant's attorney a $1,500.00 "medical only" fee under Fl. Stat. §440.34(3)(a) and (7) for securing same. As part of the washout, the parties entered two stipulations for the Judge of Compensation Claims approval – one approving attorney's fees and costs and child support associated with the washout and one for the medical only fee. While he approved the former, he denied the later finding that the Employer/Carrier had never agreed to pay the bills prior to the washout and noting there was nothing in the stipulation entered by the parties upon which the Judge of Compensation Claims could find the Carrier was now convinced of their responsibility for Dr. Ellowitz's bill other than that the claim was being settled in its entirety. Given the structure of the settlement, the Judge of Compensation Claims found same was to the Claimant's detriment, benefiting only his attorney. Upon a joint motion to vacate, the Judge of Compensation Claims continued to deny the stipulation for the medical only fee but entered an order approving the Employer/Carrier agreement to pay the bills of Dr. Ellowitz.

Outcome & Analysis
The 1st DCA found that given that the Judge of Compensation Claims entered an order on the parties agreement to pay for the bills of Dr. Ellowitz, it was in turn unsupported by the facts of the case for the Judge of Compensation Claims to then deny the medical only fee. Reversed.

Takeaway
When agreeing to separate fees to be paid to Claimant's counsel at or about the time of settlement, same should be supported by the facts of the case and should not merely be done in an effort to assist Opposing Counsel's in securing higher fees. While this may not be the case, steps should be taken to avoid the appearance of impropriety. In this case, the Court realized that the facts did not support the Judge's insinuation of collusion given that the parties had entered a separate stipulation relative to the bills that were the basis of the medical only fee. Therefore, perhaps a better approach to resolving past fee claims as part of washouts is to

also submit stipulations regarding the actual medical benefit that was provided versus merely a stipulation on the fee agreement so as to provide clarity to the Judge / for the record.

Ricardo Sanchez vs. American Airlines and Sedgwick CMS

DCA# 14-4907 decided July 14, 2015

Facts

Claimant filed a petition for benefits dated November 8, 2011 requesting compensability of an injury to Claimant's right arm and the Carrier accepted same under the 120 day pay and investigate provision of Fl. Stat. §440.20(4) on November 15, 2011. On February 24, 2012 Judge of Compensation Claims Harnage dismissed said petition, following a notice of resolution, reserving as to fees and costs. Following same, in September of 2013, an order was entered approving a Joint Stipulation of attorney's fees and costs. There was no record activity until April of 2014 when Claimant filed a new petition for benefits which was responded to by the Carrier advising that the statute of limitations had run given last provision of benefits was on March 1, 2013 and that no further benefits would be provided. The parties attended final hearing on this matter at which time it was determined

Issue

Whether the payment of attorney's fees and costs to Claimant's counsel is sufficient to extent the statute of limitations under Fl. Stat. §440.19 (2) when no other medical or disability benefits are being paid to Claimant and there are no petitions outstanding.

Outcome & Analysis

Claimant's argument rested on the position that payment of attorney's fees and costs pursuant to a previously filed petition for benefits tolls the statute of limitations. The 1st DCA disagreed re-affirming long standing case law (citing *Houston-Miller vs. U.S. Fire Insurance* 668 So.2d 653 (Fla. 1st DCA 1996) that payment of attorney's fees and costs is not provision of a benefit to Claimant upon which the statute of limitations can be tolled under Fl. Stat. §440.19(2). The 1st DCA rejected Claimant's argument and upheld the Judge of Compensation Claims finding that the Claimant's most recently filed petition for benefits was in fact barred by Fl. Stat. §440.19. Affirmed.

Takeaway

It is best practice to make all attempts to resolve any pending issues of attorney's fees and costs once Opposing Counsel dismisses a petition but leaves the issue of attorney's fees and costs open. If this would result in payment of attorney's fees and costs, so be it. At least it would allow the statute of limitations to run on the claim. Some practical approaches including moving for a verified petition or a motion to dismiss for lack of prosecution when Opposing Counsel has left the claim pending for more than a year.

Victor Gonzalez vs. Quinco Electrical and Zenith Insurance

DCA# 14-5395 decided July 15, 2015

Facts

Claimant's counsel appeared on the record via a petition for benefits (as per Fla. Admin. Rule 60Q-6.104(1). He also filed a notice of appearance three weeks later. On the second page of same, counsel inserted a request for a one-time change under Fl. Stat. §440.13(2)(f).

Claimant's counsel admitted during final hearing that the request had been made via notice of appearance as he "took advantage of" his belief that adjusters do not always read in full every document they receive. The Carrier noticed same *after* expiration of the five day period upon realizing the same tactic had been used by the attorney in another claim. Employer/Carrier then authorized an alternate, but Claimant argued same was untimely. The Judge of Compensation Claims found the Claimant's request via notice of appearance did not trigger the Employer/Carrier obligation to provide an alternate physician and found that the Employer/Carrier's selection was valid.

Issue

Whether the Carrier's response to Claimant's request for a one-time change was timely under Fl. Stat. §440.13(2)(f). The 1st DCA also addressed whether Claimant's request for a one-time change provided effective notice to the Carrier given the method in which same was requested.

Outcome & Analysis

The 1st DCA found the Judge of Compensation Claims ruling was consistent with the legislative intent of Fl. Stat. §440.015. Claimant's actions were directly opposite same as his actions were found to do little more than delay[…]the delivery of benefits…" The Court expressly held that "the request should be readily apparent, unobscured, and unambiguous, to advance the purpose of placing the Employer/Carrier on notice that such a request is being made in a document. The 1st DCA also addressed the ethical obligations that bind attorneys from avoiding such gotcha!" tactics. Based on the circumstances of this case, it was determined the Judge of Compensation Claims had correctly found that Claimant's request for a one-time change did not provide effective notice and therefore, Employer/Carrier's response was timely. Affirmed.

Takeaway

Although a best practice is to read everything in detail, there is now express language that a one-time change request must adhere to in order to constitute effective notice. When we receive a one-time request, the first inquiry should be whether same is clear and unambiguous. If it is not, and the Carrier has not responded to same within five calendar days, the Carrier may still retain the right to select the physician should the circumstances be deemed similar to those of this case. Caution: the court has however ruled that including a one-time change request within a PFB is fair game -- and despite the extended time within which to answer a PFB generally, there remains the tight five day turnaround for the one time change request made within a PFB.