

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGES OF COMPENSATION CLAIMS
SARASOTA DISTRICT OFFICE**

Abel De La Cruz,)	
Employee/Claimant,)	OJCC Case No. 12-021903DBB, 12-
)	021908DBB, 12-028998DBB
vs.)	
)	Accident date: 8/4/2009, 4/23/2010,
Pacific Tomato Growers/United States Fire)	9/1/2011
Insurance Company,)	
Employer/ Carrier/ Servicing Agent.)	Judge: Diane B. Beck

ORDER ON EMPLOYER/CARRIER'S MOTION FOR SUMMARY FINAL ORDER

THIS CAUSE came before the undersigned Judge of Compensation Claims (JCC) at Sarasota, Manatee County, Florida upon the Employer/Carrier's Motion for Summary Final Order filed April 5, 2013. Claimant is represented by Alex Lancaster, Esquire and employer/carrier (E/C) is represented by Jonathan L. Cooley, Esquire.

OVERVIEW

E/C seeks a summary final order in regard to the petitions for benefits filed September 24, 2012 and December 20, 2012 seeking payment of temporary total disability (TTD) and permanent total disability (PTD) benefits on the grounds that claimant was receiving unemployment compensation benefits at the time his petitions were filed and therefore is not entitled to TTD or PTD benefits per section 440.15(10)(a), Fla. Stat. (2009). Claimant filed an Objection to E/C's Motion for Summary Final Order on the grounds that the claims for TTD date back to 2009, prior to the receipt of unemployment benefits, and that there is no evidence that claimant continues to receive unemployment benefits. For the reasons set forth below, I am granting the Motion in part, and denying in part.

EVIDENCE

I considered the following in reaching this decision: petitions for benefits filed September 24,

2012 and December 20, 2012; Uniform Statewide Pretrial Stipulation filed January 8, 2013; E/C's Motion for Summary Final Order filed April 5, 2013 with claimant's two depositions attached in support of the Motion; claimant's Objection to E/C's Motion for Summary Final Order filed April 11, 2013; and I took judicial notice of the appropriate pleadings in the computer file.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. I have jurisdiction over the subject matter and parties, and venue is proper in Sarasota, Manatee County, Florida.

2. Rule 60Q-6.120, F.A.C. (2012) governs summary final orders, and provides in pertinent part as follows: (1) The judge may enter a summary final order when such an order would be dispositive of the issues raised by the subject petition; (2) Any party may file a motion for summary final order when there is no genuine issue of material fact and the granting of the motion would be dispositive of the issues raised by the subject petition. A summary final order shall be rendered if the judge determines from the pleadings and depositions, together with affidavits, if any, that no genuine issue as to any material fact exists and that the moving party is entitled as a matter of law to the entry of a final order.

3. In summary judgment proceedings, all reasonable inferences must be drawn in favor of the party opposing summary judgment; summary judgment should not be granted unless the facts are so crystallized that nothing remains but questions of law; and if the evidence is conflicting, will permit different reasonable inferences, or tends to prove the issues, it should be submitted to the trier of fact. *See, Thomas v. Eckerd Drugs*, 987 So.2d 1262 (Fla. 1st DCA 2008) (*citations omitted*).

4. Claimant suffered compensable injuries to his back, left leg, and left ankle while working for employer on August 4, 2009, April 23, 2010, and September 1, 2011. E/C has provided medical benefits. Per claimant's testimony, he was given restrictions by his authorized doctor and was provided light duty supervisory work by employer after each of his accidents and continued working until the plant closed on June 15, 2012. Thereafter he applied for and began receiving unemployment compensation

benefits beginning in July 2012.

5. Claimant pleads in the alternative, but alleges that if he reached maximum medical improvement (MMI), it occurred on August 19, 2012. Claimant filed petitions for benefits on September 24, 2012 and December 20, 2012 seeking payment of TTD or temporary partial disability (TPD) benefits from August 4, 2009 to August 19, 2012 (or MMI); PTD benefits from August 19, 2012; medical care and attention by an orthopedic; and penalties, interest, costs, and attorney's fees. E/C denied the benefits on various grounds, including that TTD and PTD are not ripe, due, or owing because claimant is receiving unemployment compensation benefits.

6. E/C argues that section 440.15(10)(a), Fla. Stat. (2009) provides that no compensation benefits shall be payable for TTD or PTD for any week in which the injured employee has received, or is receiving, unemployment compensation benefits. According to E/C, claimant was receiving unemployment compensation benefits at the time he filed his petitions for TTD and PTD benefits and therefore he is not entitled to those benefits as a matter of law. E/C notes that section 440.192(3), Fla. Stat. provides in pertinent part that a petition for benefits is limited to those claims in default and ripe, due and owing on the date the petition is filed.

7. Claimant filed an unsworn Objection to E/C's Motion for Summary Final Order on April 11 2013 without supporting affidavit(s) or deposition(s). In his two depositions claimant testified he received unemployment compensation benefits beginning in July 2012 and was continuing to receive them, but his counsel argues that the claims for TTD date back to 2009, prior to the receipt of unemployment compensation benefits, and that there is no evidence that claimant continues to receive unemployment compensation past his most recent January 2013 deposition.

8. A movant for summary judgment has the initial burden of demonstrating the nonexistence of any genuine issue of material fact, but once he tenders competent evidence to support his motion, the opposing party must come forward with counterevidence sufficient to reveal a genuine issue.

It is not enough for the opposing party merely to assert that an issue does exist. *See, Landers v. Milton*, 370 So.2d 368 (Fla. 1979). Counsel's unsworn assertions are insufficient to overcome summary judgment when the opposing party fails to demonstrate by affidavit or otherwise the existence of a genuine issue of material fact. *See, The Florida Bar v. Mogil*, 763 So.2d 303 (Fla. 2000) (*citations omitted*).

9. I find claimant's counsel's unsworn assertion is insufficient to create a genuine issue of material fact regarding those periods for which claimant received unemployment compensation benefits. As noted by E/C the petitions were filed when claimant was receiving unemployment compensation benefits, and thus I agree PTD benefits were not ripe, due and owing when the petitions were filed. However, benefits may mature and become due following the filing of a claim. *See, Daytona Beach Geriatric Center v. Linehan*, 673 So.2d 548 (Fla. 1st DCA 1996), and as pointed out by claimant, no evidence was submitted regarding claimant's receipt of unemployment compensation benefits after his last deposition, which was three months ago. And the TTD claims are for periods beginning years prior to claimant's receipt of unemployment compensation benefits, so those past claims are ripe. Accordingly, the issue of claimant's receipt of unemployment compensation benefits during the applicable periods is dispositive of only those same periods for which TTD and PTD were requested in the petitions filed September 24, 2012 and December 20, 2012.

10. Based upon the foregoing, no genuine issues of material fact have been demonstrated for the periods during which claimant received unemployment compensation benefits, and the granting of this Motion would be dispositive of the TTD and PTD issues raised by the pending petitions for the same periods. Accordingly, E/C is entitled as a matter of law to the entry of a final order on those periods.

11. Therefore, the Motion for Summary Final Order is granted in part and the claims for TTD and PTD for the periods when claimant received unemployment compensation benefits are dismissed. The petitions for benefits should not be dismissed in toto as other claims remain. I find that the Motion

does not violate Rule 60Q-6.125(2), F.A.C. (2012) as to the claims not dismissed; therefore no sanctions should be imposed against E/C for filing the Motion.

WHEREFORE, based upon the foregoing, it is **ORDERED AND ADJUDGED**:

A. E/C's Motion for Summary Final Order is granted in part and the claims for TTD and PTD are dismissed for those periods the claimant received unemployment compensation benefits.

B. The petitions for benefits are not dismissed in toto because the other periods of requested indemnity remain as well as the other claims for medical care, penalties, interest, costs, and attorney's fees.

C. No sanctions pursuant to Rule 60Q-6.125(5), F.A.C. (2012) are imposed.

DONE AND E-MAILED this 15th day of April, 2013, in Sarasota, Manatee County, Florida.



Diane B. Beck
Judge of Compensation Claims
Division of Administrative Hearings
Office of the Judges of Compensation Claims
Sarasota District Office
6497 Parkland Drive, Suite M
Sarasota, Florida 34243-4097
(941)753-0900
www.jcc.state.fl.us

Alex Lancaster, Esquire
apl@lancasterlawyers.com; KarenT@lancasterlawyers.com

Jonathan L. Cooley, Esquire
jcooley@hrmcw.com; mdriscoll@hrmcw.com

Frank D. DeCiutiis, Esquire
Frank.Deciutiis@LibertyMutual.com; Michelle.Cuervo@LibertyMutual.com