

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

BREVARD COUNTY SCHOOL
BOARD and SEDGWICK
CLAIMS SERVICES

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

Appellants,

v.

CASE NO. 1D13-4503

MARIA ACOSTA,

Appellee.

_____ /

Opinion filed June 9, 2014.

An appeal from an order of the Judge of Compensation Claims.
Donna S. Remsnyder, Judge.

Date of Accident: February 7, 2012.

William H. Rogner of Hurley, Rogner, Miller, Cox, Waranch & Westcott, P.A.,
Winter Park, for Appellants.

Susan W. Fox of Fox & Loquasto, P.A., Orlando, Richard W. Ervin, III, of Fox &
Loquasto, P.A., Tallahassee, and Dennis D. Smejkal of the Law Office of Dennis
Dean Smejkal, P.A., Orlando, for Appellee.

PER CURIAM.

In this workers' compensation appeal, the Employer/Carrier (E/C)
challenges a determination by the Judge of Compensation Claims (JCC) that
surgical repair of Claimant's left shoulder condition is compensable based on the

hindrance-to-recovery doctrine. Because we agree that the JCC misapplied the doctrine, we reverse.

The E/C in this case accepted compensability of Claimant's February 7, 2012, right shoulder injury, but denied responsibility for a proposed surgery to repair Claimant's left shoulder condition, which was not caused by Claimant's workplace activities. In the only medical testimony presented here, Dr. White confirmed that Claimant requires surgery for each shoulder and that the two shoulder conditions are not connected. Dr. White also opined that the result from the (non-compensable) left shoulder repair will be better if the left shoulder surgery is performed first although the ultimate result from the (compensable) right shoulder repair will be unaffected by the order of the surgeries.

Under the hindrance-to-recovery doctrine, it is the purpose of the treatment that determines compensability. Glades Cnty. Sugar Growers v. Gonzales, 388 So. 2d 33, 336 (Fla. 1st DCA 1980) citing Barris v. Toppers of Florida, Inc., 382 So. 2d 441, 442 (Fla. 1st DCA 1980). The E/C is not responsible for medical treatment required independently by the non-compensable left shoulder injury if the removal of a hindrance is only incidental to the recovery of the compensable right shoulder injury. Id. In the final compensation order, the JCC concluded that Claimant's left shoulder repair is a medically necessary procedure that must be provided by the E/C as "a hindrance to the compensable surgery required on her right shoulder."

The JCC's conclusion, however, is based on Dr. White's opinion that surgical repair of the left shoulder is medically necessary to avoid further injury to the (non-compensable) left shoulder during the later anticipated surgery and recovery period for the right shoulder injury. The relevant inquiry is not whether the left shoulder surgery is medically necessary, but rather why it is medically necessary—i.e., what is the purpose of the left shoulder surgery? Unless the purpose is to remove a hindrance to treating the compensable right shoulder injury, the doctrine does not apply. In this case, the JCC made no specific findings to explain how the left shoulder condition hinders Claimant's recovery from her compensable right shoulder injury. It follows that the findings do not establish that the purpose of the left shoulder surgery is to remove a hindrance to treating the compensable right shoulder. In fact, based upon the findings, the JCC appears to have applied the inverse of the doctrine.

Because the findings do not demonstrate that the purpose of proposed treatment of the left shoulder is to treat Claimant's compensable right shoulder injury, the JCC erred when she found the left shoulder surgery to be compensable. Accordingly, we REVERSE the final compensation order awarding Claimant surgical repair of the left shoulder.

WETHERELL and MARSTILLER, JJ., CONCUR; SWANSON, J., DISSENTING.

SWANSON, J., dissenting.

I respectfully dissent. Claimant, now age fifty-two, was working as a school custodian at the time of her February, 2012, workplace injury to the right shoulder. She underwent surgery to repair the right rotator cuff, but continues to have right shoulder pain. In October of 2012, while working in a limited capacity, she experienced symptoms of pain and discomfort in the left shoulder. Tests revealed a left rotator cuff tear; however, the left shoulder condition was initially determined to be non-compensable. Claimant is unable to work and has no health insurance through employment.

According to Chapter 440 of Florida Statutes, it is the intent of the Legislature that Workers' Compensation Law "be interpreted so as to assure the quick and efficient delivery of disability and medical benefits to an injured worker and to facilitate the worker's return to gainful reemployment at a reasonable cost to the employer." § 440.015, Fla. Stat. (2012). Here, in the medical opinion of Dr. White—the only physician to testify in this case—performing surgery on the right shoulder first may result in further injury to the left shoulder. Dr. White refused to subject Claimant to this risk and recommended that surgery first be performed on the left shoulder. Dr. White further confirmed that surgical repair of the left shoulder would aid Claimant's later recovery from the anticipated surgery to the compensable right shoulder in that she will have a better shoulder on the left side

during the recovery period. Of critical import, Dr. White opined it was medically necessary for Claimant to undergo the left shoulder surgery first; this was un rebutted. Based on the stated intent of the Legislature, the record, the law as further discussed, common sense and fundamental fairness, we should affirm the JCC in this case.

In support of that proposition, I note in the final order the JCC found Claimant's left shoulder repair to be a compensable condition as a hindrance to the compensable surgery on the right shoulder "[b]ased on the totality of the evidence." This finding is supported by Dr. White's opinion that having a good left shoulder will aid in Claimant's recovery following the right shoulder surgery, and is a part of the "totality of the evidence." It constitutes competent substantial evidence (CSE) supporting the JCC's determination and is consistent with section 440.13(2), Florida Statutes (2012). That provision requires an employer/carrier to "furnish to the employee such medically necessary remedial treatment, care, and attendance for such period as the nature of the injury or the process of recovery may require, which is in accordance with established practice parameters and protocols of treatment." § 440.015, Fla. Stat. (2012).

Here the E/C challenges the JCC's findings of fact. Accordingly, the correct standard of review is whether CSE supports the JCC ruling. Jefferson v. Wayne Dalton Corp/Hartford, 793 So.2d 1081, 1083 (Fla. 1st DCA 2001). To the extent

an order depends upon an evidentiary foundation, the “standard of review in worker’s compensation cases is whether competent substantial evidence *supports* the decision below, *not* whether it is possible to recite contradictory record evidence which supported the arguments rejected below.” Wintz v. Goodwill, 898 So.2d 1089, 1093 (Fla. 1st DCA 2005) (quoting Mercy Hospital v. Holmes, 679 So.2d 860, 860 (Fla. 1st DCA 1996) (emphasis in original). In this case, I am of the view the majority has, by their opinion, diminished this standard in a manner inconsistent with controlling authority.

I am of the strong opinion that the record evidence requires this court to affirm the order on appeal.