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

LEMIN COLINDRES-BANEGAS,	)	
	)	
Employee/Claimant	)	
	)	
vs.	)	OJCC Case No. 14-014952-TWS
	)	
DCHC, INC.	)	
MARKEL SERVICES, INC.	)	Accident date: 12/24/2013
	)	
Employer/Carrier#1	)	
	)	
	)	
WINTER PARK CONSTRUCTION AMERISURE	)	
	)	
	)	**Judge: Thomas W. Sculco**
Employer/Carrier#2	)	

FINAL COMPENSATION ORDER

THIS CAUSE came before the undersigned Judge of Compensation Claims (JCC) at Orlando, Orange County, Florida on April 27, 2015, for a final merits hearing upon the E/C/SA #1's Motion for Indemnification/Contribution and Notice of Controversy between Employer/Carrier/Servicing Agents e-filed with the OJCC. The parties' Uniform Pretrial Stipulation was e-filed April 17, 2015. E/C/SA #1 is represented by Brian Bolton, Esquire. E/C/SA #2 is represented by William Rogner, Esquire.

This order addresses the E/C/SA #1's Motion for Indemnification/Contribution and Notice of Controversy Between Employers/Carriers and Servicing Agents filed with the OJCC on February 4, 2015.

DOCUMENTARY EVIDENCE:

#1 E/SA #1's:	Trial Memorandum/attachments
#2 E/SA #1's:	Motion for Indemnification/Contribution
#3 E/SA #2's:	Response to Motion for Indemnification Contribution/Notice of Controversy
#4 E/SA #2:	Trial Memorandum
#5 Joint:	Pretrial Stipulation April 17, 2015
#6 E/SA #2's:	Composite
#7 Joint:	Deposition/attachments of Evan Beeh February 13, 2015
#8 Joint:	Deposition of Dawn Hurley January 30, 2015
#9 Joint:	Deposition of Lemin Colindres-Banegas November 5, 2014

#10 Joint: Deposition of Lemin Colindres-Banegas
October 6, 2014

#11 Joint: Deposition/attachments of Arnoldo Cortez
March 4, 2015

#12 Joint: Deposition/attachments of Edward Coleman
March 23, 2015

#13 Joint: Deposition/attachments of Simon Desangles
April 14, 2015

#14 Joint: Deposition/attachments of Jessica O'Connell
April 13, 2015

#15 Joint: Deposition of David Castillo
January 30, 2015

#16 Joint: Composite

After hearing all of the testimony and evidence presented, and after having resolved any and all conflicts therein, the undersigned Judge of Compensation Claims makes the following findings of fact and conclusions of law: The issue for determination is whether E/C #1 is entitled to reimbursement/ contribution from E/C #2 for a settlement amount of $25,000.00 paid by E/C #1 to claimant, and for medical bills paid by E/C #1 to various providers in the amount of $44,641.42, for a total of $69,641.42.

BACKGROUND

On 12/24/13, Lemin Colindres-Banegas ("Claimant") suffered serious injuries to his head, face, and jaw while working on a construction project in Orlando, FL. He was transported to Orlando Regional Medical Center for treatment, including reconstructive surgery. (E/C #1 trial memorandum, at 3). Claimant eventually filed PFB's against DCHC, Inc. and Markel Services, Inc. (E/C #1) and Winter Park Construction and Amerisure (E/C #2), requesting acceptance of compensability of the injury, disability benefits, payment of past medical bills, authorization of medical care, and penalties, interest, costs, and attorney's fees.

E/C #1 issued a notice of denial of claimant's claims in September of 2014 on the basis of no employer/employee relationship. (Deposition Jessica O'Connell, at 22). That denial was never rescinded. E/C #1 paid no benefits to claimant prior to entering into a settlement agreement on 12/15/14. (Deposition Jessica O'Connell, at 24). While E/C #1 did negotiate and reach agreements with various medical providers to pay for medical treatment incurred by claimant, the order approving attorney's fees and child support for E/C #1's settlement with claimant specifically provides that payment of the medical bills by E/C #1 is part of the settlement agreement.

There is language in some of E/C #1's settlement paperwork that refers to claimant as the "employee". However, Markel adjuster Jessica O'Connell testified that she never gave her attorney authority to stipulate that claimant was an employee of DCHC, Inc..

E/C #2 denied compensability of claimant's case, never rescinded that denial, and ultimately settled with claimant on a controverted basis for $2,000.00. E/C #1 now seeks reimbursement/contribution from E/C #2 for a settlement amount of $25,000.00 paid by E/C #1 to claimant, and for medical bills paid by E/C #1 to various providers in the amount of $44,641.42, for a total of $69,641.42.

E/C #1's ENTITLEMENT TO REIMBURSEMENT/CONTRIBUTION FROM E/C #2

Initially, I note that this case presents an interesting and difficult issue of first impression with regards to the application of Section 440.42(4) where neither contending employer/carrier had accepted compensability of claimant's injuries before entering into settlement agreements with the claimant. Before addressing the merits of the dispute, however, I would like to commend both counsel, Bill Rogner, Esq. and Brian Bolton, Esq., for the thoroughness, cooperation, and professionalism they exhibited in the presentation of their cases

at the final hearing. We often focus on the unfortunate lapses in professionalism exhibited by some attorneys on rare occasions. I believe it is equally important, however, to recognize those attorneys whose conduct meets the high standards and expectations of professionalism recognized to be of critical importance by our Supreme Court.

Section 440.42(4), Fla. Stat. (2013) provides jurisdiction to the Judge of Compensation Claims to adjudicate controversies "as to which of two or more carriers is liable for the discharge of the obligations and duties of one or more employers with respect to a claim for compensation, remedial treatment, or other benefits under this chapter… and if one of the carriers voluntarily or in compliance with a compensation order makes payments in discharge of such liability… the carrier which has made [such] payments shall be entitled to reimbursement from the carrier finally determined liable."

However, this statute relates only to a situation where "such matters as the claim's compensability and the awards to be made [therefor] have been voluntarily accepted by one of the carriers or have been already determined under other provisions of the Workmen's Compensation Act." *City of Lakeland v. Catinella*, 129 So. 2d 133, 136 (Fla. 1961). As stated in *Cruise Quality Painting v. Page*, 564 So. 2d 1190, 1197 (Fla. 1st DCA 1990): "[S]ection 440.42(3) can be applied only when each of the

contending employer/carrier's liability for the benefits in question has been determined under other provisions of chapter 440."

Here, neither E/C #1 nor E/C #2 voluntarily accepted compensability of claimant's injury or voluntarily accepted responsibility for the benefits requested in claimant's PFB's. E/C #2 denied compensability of claimant's case, never rescinded that denial, and ultimately settled with claimant on a controverted basis for $2,000.00. Similarly, E/C #1 issued a notice of denial of claimant's claims in September of 2014 on the basis of no employer/employee relationship. (Deposition Jessica O'Connell, at 22). That denial was never rescinded. E/C #1 paid no benefits to claimant prior to entering into a settlement agreement on 12/15/14. (Deposition Jessica O'Connell, at 24). While E/C #1 did negotiate and reach agreements various medical providers to pay for medical treatment incurred by claimant, the order approving attorney's fees and child support for E/C #1's settlement with claimant specifically provides that payment of the medical bills by E/C #1 is part of the settlement agreement.

While there is language in some of E/C #1's settlement paperwork that refers to claimant as the "employee", Markel adjuster Jessica O'Connell testified that she never gave her attorney authority to stipulate that claimant was an employee of DCHC, Inc.. To the extent that this language suggests that E/C

#1 accepted claimant's claim as compensable, I find the overwhelming weight of the evidence, and the clear intent of the parties, establishes that E/C #1 never accepted the compensability of claimant's claim and never provided benefits before settling claimant's case on a controverted basis.

Consequently, as neither E/C accepted the compensability of claimant's injuries, I lack jurisdiction under Section 440.42(4), Fla. Stat. (2013) to award E/C #1 reimbursement or contribution from E/C #2. *See Catinella, supra; Page, supra. Standard Fire Insurance Co. v. U-Haul Company of Eastern Florida*, 551 So. 2d 580 (Fla. 1st DCA 1989), relied on by E/C #1, is distinguishable because both E/C's in that case voluntarily accepted compensability of claimant's injuries and paid claimant workers' compensation benefits before Standard Fire reached a washout settlement with claimant. *Standard Fire* does not address the situation here, where compensability was neither ordered nor accepted by either E/C prior to the settlement. Rather, this case is governed by the rule expressed in *Catinella* and *Page* that Section 440.42(4) only applies where compensability and entitlement to benefits has been determined by the JCC or voluntarily accepted by either E/C.

This result is consistent with the language of the statute that grants jurisdiction to the JCC to determine "**which**" of two or more carriers is liable for the discharge of liability to the

claimant. Until compensability and entitlement to benefits have been determined or voluntarily accepted, there is no way to know whether either E/C #1 or E/C #2 were in any way responsible for claimant's injuries. Section 440.42(4) provides a limited grant of jurisdiction to the JCC to determine which carrier is responsible for a claimant's undisputedly compensable injury. It is not an open-ended invitation to the JCC to make a hypothetical determination of the compensability of a claimant's alleged injury in the first instance, in a proceeding to which the claimant is not even a party. E/C #1's construction of the statute would require the JCC to render a prohibited advisory opinion, as there is no present case or controversy relating to the compensability of claimant's alleged 12/24/13 injury. *See Hamm v. PMI Employee Leasing*, Case No. 1D13-4895 (Fla. 1st DCA 2014)(holding that JCC has no authority to adjudicate E/C's motion to determine proper beneficiary for death benefits in the absence of a PFB).

Moreover, the difference between compensable and controverted injuries is not merely a technical or "form over substance" distinction. On the contrary, acceptance or determination of compensability has a significant impact on the rights and obligations of the parties under Chapter 440. For example, until compensability has been established, a claimant must prove his injuries, their occupational cause, and any

manifestations of disability, by objective relevant medical findings. *See* Section 440.09(1), Fla. Stat. (2013). Once compensability has been accepted or determined, however, a claimant is no longer required to prove entitlement to benefits by that stringent test. *See Morrow v. Sam's* Club, 17 So. 3d 763 (Fla. 1st DCA 2009).

Similarly, an unrepresented claimant with a compensable injury may only settle his workers' compensation case if the JCC finds the settlement is in his or her best interests, and that MMI has been reached. In contrast, there are no such protections for a claimant settling a controverted case. *See* Sections 440.20(11)(a) and (b), Fla. Stat. (2013). Also, a claimant with a compensable injury is entitled to one change of physician as a matter of right, while a claimant in a denied case has no such right. *See* Section 440.13(2)(f), Fla. Stat. (2013).

Moreover, in a compensable claim medical providers face no risk of non-payment from the employer or carrier, and know they will be reimbursed at the applicable fee schedule. *See Orange County v. Willis*, 996 So. 2d 870 (Fla. 1st DCA 2008). However, until compensability has been accepted or determined by the JCC, medical providers face a significant risk of non-payment from often indigent claimants. Thus, an E/C's denial of compensability in a case where the claimant has incurred significant medical bills (like the present case) could provide

an incentive to the medical provider to compromise the amount of those bills, an incentive they would not have if compensability had been accepted.

Finally, as argued by E/C #2, this construction of the statute is consistent with the policy that underlies Section 440.42(4): "The intent and purpose of [section 440.42(4)] is to secure prompt payment of all amounts due to, or on behalf of, the claimant without regard to the primary and secondary responsibility of several employers/carriers and their rights to reimbursement." *Belford Trucking Co. v. Pinson*, 360 So. 2d 1140 (Fla. 1st DCA 1978). That policy is not served by the denial of compensability and refusal to promptly pay benefits to an injured worker, as occurred in this case. Rather, as in *Standard Fire*, *supra*, that policy is served by the prompt voluntary acceptance of compensability and payment of requested benefits, with contribution pursuant to Section 440.42(4) determined between contending E/C's at a later time.

Consequently, because it denied compensability of claimant's injuries and controverted his entitlement to benefits under the workers' compensation act, E/C #1 is not entitled to contribution or reimbursement from E/C #2 pursuant to Section 440.42(4) for amounts it paid pursuant to its settlement agreement with claimant. As such, it is not necessary to address E/C #2's alternative arguments as to why it does not owe reimbursement to

E/C #1.

WHEREFORE it is hereby **ORDERED** and **ADJUDGED** that E/C #1's claim for contribution/reimbursement from E/C #2, pursuant to Section 440.42(4), Florida Statutes, is DENIED and DISMISSED WITH PREJUDICE.

DONE and ORDERED in Orlando, Orange County, Florida.

This 14th day of May, 2015

Thomas W. Sculco

Thomas W. Sculco
Judge of Compensation Claims
Division of Administrative Hearings
Office of the Judges of Compensation Claims
Orlando District Office
www.jcc.state.fl.us

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that the Order was entered by the Judge of Compensation Claims and was electronically served on the parties through their respective attorneys.

Marla Miller 5/14/2015

Marla Miller
District Clerk
Orlando District Office