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CASE NOTES

CASE LAW SUMMARY
NOVEMBER 2007

If you have any questions regarding Case Law Summaries, please contact W. Rogers Turner, Jr. : rturner@hrmcw.com

REIMBURSEMENT DISPUTES BETWEEN HOSPITAL AND CARRIER:

Fairpay Solutions v. State of Florida, Agency for Health Care Administration, 969 So. 2d 455 (Fla. 1st DCA, November 15, 2007)

This case involved two consolidated appeals by the carriers of the Agency for Health Care Administration's (AHCA) decision denying them administrative hearings and ordering them to reimburse hospitals the full amount for services provided. The DCA held that AHCA's interpretation of section 440.13 (7), Florida Statutes (2005) did not violate the carriers' rights under the Administrative Procedure Act. The statute states that a health care provider, carrier, or employer wanting to dispute a carrier's payment of a bill must file a petition with AHCA and serve a copy on all affected parties by certified mail within 30 days after receipt of notice of the carrier's decision. The carrier

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then has 10 days of receipt of the petition to submit documentation substantiating its disallowance or adjustment of the bill to AHCA. Failure to timely submit the requested documentation within 10 days constitutes a waiver of all objections to the petition.

In both cases the hospitals filed a petition for reimbursement and the carriers failed to file a response, which AHCA ruled waived all objections to the petitions. The carriers then filed a petition for an administrative hearing arguing entitlement to a formal hearing under chapter 120, Florida Statutes, the Administrative Procedure Act despite their failure to respond.

In the first case AHCA referred the carrier's petition to DOAH. The administrative law judge agreed with AHCA's interpretation that the carrier waived all objections to the hospital's petition and relinquished jurisdiction back to AHCA since there could be no material issue of fact and therefore no justifiable hearing. AHCA again ordered the carrier to reimburse the hospital.

In the second case AHCA cited the first case and dismissed the carrier's petition for administrative hearing and ordered the same.

The DCA affirmed finding the plain language of the statute made the failure to timely respond an absolute bar to raise any defense under section 440.13(7)(b) and contest AHCA's findings at a later chapter 120 hearing.

SPOLIATION OF EVIDENCE CLAIMS:

Jimenez v. Community Asphalt Corp., 968 So.2d 668 (Fla. 1st DCA, November 14, 2007)

The First DCA held that where an employee's spoliation of evidence claims were premature, the appropriate remedy was remand to trial court for issuance of order of abatement until the claims had properly matured not dismissal with prejudice.

The claimant was injured in 2001 when the Rinker truck he was driving overturned. The claimant filed two separate suits against his employer, Rinker, for a 2000 accident where Rinker was not a party and the 2001 accident where Rinker was a first-party defendant. He sued Rinker under the intentional misconduct exception to worker's compensation immunity claiming among other things that Rinker failed to preserve evidence critical to both suits in violation of section 440.39(7), Florida Statutes (2006). The the trial court citing *Royal & Sunalliance v. Lauderdale Marine Center,* 877 So.2d 843 (Fla. 4th DCA 2004) dismissed the spoliation counts with prejudice on the ground that the claimant failed to allege the essential elements of a

spoliation claim, which included (1) existence of a potential civil action, (2) a legal or contractual duty to preserve evidence which is relevant to the potential civil action, (3) destruction of that evidence, (4) significant impairment in the ability to prove the lawsuit, (5) a causal relationship between the evidence destruction and the ability to prove the lawsuit, and (6) damages. The trial court found the claimant never requested Rinker preserve any evidence until one to four years subsequent to the potential civil action and thus failed to establish a legal duty to preserve evidence. Additionally, the trial court found that a spoilation claim will not lie where the alleged spoliator and defendant are one and the same. The DCA agreed pointing to *Martino v. Wal-Mart Stores, Inc.*, 908 So.2d 342 (Fla.2005) where the Florida Supreme Court held that an independent cause of action for spoliation could not be maintained against a first-party defendant until the underlying negligence action is decided. The Court relying on other common law spoliation cases also noted that the elements of common law spoliation must be met before proceeding with a spoliation claim pursuant to section 440.39(7).

Gayer v. Fine Line Const. & Elec., Inc. 970 So.2d 424 (Fla. 1st DCA, November 28, 2007)

The claimant appealed a summary judgment entered in favor of a special employer, Fine Line, (who had hired an employee leasing agency, Labor Finders), on the claimant's spoliation of evidence claim. The DCA held in a matter of first impression, that a special employer using a laborer from an employee leasing agency has a duty under section 440.39(7), Florida Statutes, to preserve evidence for the injured laborer's claim against a third-party tortfeasor.

Labor Finders sent the claimant to Fine Line. Fine Line provided the claimant with a tall folding ladder and an electric drill and directed him to remove metal framing from a ceiling. The claimant fell from the ladder and sustained severe injuries. The ladder, subsequently, could not be located.

The claimant sued Fine Line for negligence. Fine Line prevailed on the affirmative defense of worker's compensation immunity from tort liability because the claimant was Fine Line's borrowed employee under section 440.11(2), Florida Statutes. The claimant amended his complaint alleging a spoliation claim against Fine Line and Labor Finders for the lost ladder. The trial court granted Fine Line's motion for summary judgement finding it had no duty to preserve the ladder under section 440.39(7), Florida Statutes, because Fine Line was not the claimant's employer. The DCA rejected Fine Line's argument of no employment relationship and no duty to preserve. The DCA looked at the doctrine of lent employment and the majority rule as referenced in *Folds v. J.A. Jones Constr.* Co., 875 So.2d 700, 703 (Fla. 1st DCA 2004) which states "*that if the general employer simply arranges for labor without heavy equipment, the transferred worker then becomes the employee of the special employer*, " which applied particularly to furnishing labor services. The Court also noted that a special employment relationship exists where "*1) the special employer has assumed control of the employee, 2) the employee has consented to that control, and 3) the work being done is for the benefit of the special employer*," and the payment of wages was the

least important factor. *Hoar Constr. v. Varney*, 586 So.2d 463, 464 (Fla. 1st DCA 1991). Here the DCA found that Fine Line, a special employer of the claimant, a borrowed employee, was a statutory employer under section 440.11(2), Florida Statutes and fit the definition of "employer" as that term is used in section 440.39(7). Thus, the duty to preserve necessarily applied to special or statutory employers such as Fine Line, who controlled access to the accident site.

ATTORNEY'S FEES:

McCallum v. Palm Beach County School Dist. 969 So.2d 562 (Fla. 1st DCA, November 30, 2007)

The claimant appealed the JCC's denial of a motion for attorney's fees based on judge's belief she lacked jurisdiction to hear the motion. On November 19, 2003, the claimant and employer/carrier reached a lump sum settlement agreement releasing the employer/carrier from any further claims. The employer/carrier also agreed to set up and fund a Medicare Set Aside Trust to indemnify the Claimant and her attorney from any medical liens asserted by Medicare. On December 1, 2003, the claimant filed a Petition for Benefits seeking payment by the employer/carrier of her share of certain bills that had been covered by Medicare prior to settlement. On December 11, 2003, the judge approved the attorney's-fee stipulation, finalizing the parties' settlement agreement. The employer/carrier disputed the claimant's entitlement to the Medicare claims. The employer/carrier eventually agreed to hold the claimant harmless against the Medicare claims after the issue was unsuccessfully mediated. The claimant moved for attorney's fees for the time expended for mediation and securing the hold harmless agreement. On January 23, 2007, the judge concluded she did not have jurisdiction to "adjudicate disputes arising from the Release Agreement" executed back in December 2003 and denied the motion. The DCA reversed and found the judge of compensation claims erred as a matter of law and nothing in the settlement agreement precluded the judge from making a determination as to whether its terms required the employer/carrier to pay Medicare and whether the employer/carrier failed to abide by the agreement. The DCA relied on *Cartaya v. Coastline Distrib*., 937 So.2d 700 (Fla. 1st DCA 2006) (noting that determination of the terms of a settlement agreement is a question of law).

WORKER'S COMPENSATION COVERAGE:

Twin City Roofing Construction Specialists v. State of Florida, Dept. of Financial Services, (Fla. 1st DCA, November 30, 2007)

The First DCA reversed a portion of the ALJ's order that assessed a penalty on a roofing contractor for failure to secure worker's compensation coverage for one individual found to be a volunteer. The DCA held that the roofing contractor's response to a request for admissions during the administrative proceeding that a certain individual was "employed" was not an admission that the individual was an

"employee" for whom worker's compensation coverage had to be provided. The DCA noted that section 440.02(15), Florida Statutes defines who qualifies as an "employee" for purposes on requiring an employer to provide worker's compensation coverage and that a person is presumed to be a volunteer if no monetary remuneration is received. The DCA acknowledged that mattes admitted during the discovery period could furnish the basis for a finding of fact but in the instant case where the ALJ's conclusion was in conflict with unrebutted testimony it was not supported by competent, substantial evidence. The DCA affirmed the Department's other penalty assessments noting the legislature's broad granting of powers to the Department to investigate employers and assess penalties for noncompliance.