

CASE LAW BULLETIN

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First DCA Sheds Glimmer of Light for Claimants on Fee and Cost Issues . . . or Does It?

In Eshlibi v. Consolidated Box Manufacturing, the First DCA, in a two-sentence opinion containing no facts, states: "A JCC lacks statutory authority to deny the attorney's fees based upon costs charged to the claimant." Some claimant attorneys believe the First DCA has at least implicitly indicated that the JCCs should not be scrutinizing costs submitted by claimant's counsel as most now do. Although asked a specific question about this case at the comp convention, the First DCA declined to add one iota of clarification to this ambiguous opinion.

Claimant May Have His Cake and Eat it Too . . . As Long As the Release is Properly Worded . . .

In Vasquez v. Sorrells Grove Care, Inc., the claimant filed a workers' compensation claim against Packing Company. The Company, and its carrier, controverted the claim by stating the claimant was not an employee. The claimant thereafter filed a tort claim against Company and other parties. Naturally, in circuit court, the Company alleged the claimant was an employee and thus asserted workers' compensation immunity. The claimant then settled with the W/C carrier for Company. Because the claimant never obtained a final determination as to his status as an employee, and because the Release in the W/C matter specifically retained his right to pursue his tort claims against the various parties, it was held he had *not* elected his remedies.

Note: How the carrier negotiated an independent settlement with the claimant without the participation of its insured is not explained. This case is a must-read on the issue of election of remedies.

No Penalties Due on Late Payment of Washout for Represented Claimant

In Lucas v. Englewood Community Hospital, the claimant sought a 20% penalty because the E/C failed to make payment of the washout monies within 14 days after the JCC mailed the Order approving the attorney's fees. In denying the request for penalty, the Court focused on the current language of 440.20(11)(c) which provides "Any Order entered . . . approving attorney's fees . . . is not to be considered an award" Therefore, the penalty language of 440.20(7) is not applicable when a claimant is represented by counsel in the settlement process. Noting that a claimant's counsel is free to negotiate the imposition of penalties for failure to make a timely payment, the statute itself would not support such an award.

Note: The result is exactly the opposite for an unrepresented claimant. In other words, under these very same facts involving an unrepresented claimant, a 20% penalty would have been awarded. While this distinction was challenged by claimant's counsel on constitutional grounds, that argument was rejected.

Claim for Intentional Infliction of Emotional Distress Allowed to Stand Against Carrier and Adjuster

In Liberty Mutual Insurance Company v. Steadman, the Second DCA allowed the claimant/plaintiff to proceed against the carrier and adjuster in circuit court based upon a nine-month delay in authorizing lung transplant surgery the JCC had previously ordered to take place. The Court not only looked at the four elements necessary to state a cause of action for intentional infliction of emotional distress, but also stated the defendants' knowledge as to the precarious physical and emotional state of the plaintiff is a key factor in its decision. Here, the plaintiff alleged the adjuster and carrier knew she had a very limited life expectancy and the defendants, therefore, intentionally delayed the surgery thereby hastening her demise. These allegations, if true, would satisfy the requirement that the conduct of the defendants was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency."

Note: Please remember, this decision only allows the tort claim to proceed to a jury. It does not constitute a final adjudication in the plaintiff's favor.

Opinions remain subject to revision or withdrawal at the time of publication. These cases have not been added to the Southern Reporter at the time of publication. We are pleased to provide a copy of the above cases upon request.

COMPTEST

The first three persons** to correctly identify the MOVIE or T.V. SHOW containing the following quote will receive lunch on us! Please forward your e-mail responses to David Rigell at rigell@rigell.cc.

MOVIE/TV SHOW QUOTE:

The following is an excerpt from a recorded statement being taken of a claimant:

Claimant (to adjuster): We are very much alike, you and I, I and you . . . us.

Adjuster: Oh. Except for a sense of honor and decency and a moral center. And personal hygiene.

Claimant: Trifles!

Editor's Note: All the more reason to take these statements by phone!

The answer to the last Comptest was The Office. Congratulations to the winners, Rob Smith from Summit; Jane Tallent from Broadspire; and Rob Woten from Sedgwick/Wal-Mart; and thanks to all who participated.

**The Establishment has outlawed consecutive wins...sorry!

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This Bulletin is merely intended to provide awareness of recent case law in the world of workers' compensation. Please do not rely on this document for legal