

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

NORETTA ELDER,

Appellant,

v.

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

WEST BOCA MEDICAL
CENTER and SPECIALTY RISK
SERV.,

CASE NO. 1D04-0764

Appellees.

Opinion filed June 23, 2005.

An appeal from an order of the Judge of Compensation Claims.
Shelley M. Punancy, Judge.

Marc E. Golden, Esquire, West Palm Beach and Bill McCabe, Esquire of Shepherd,
McCabe & Cooley, Longwood, for Appellant.

Kelly Fayer, Esquire and Esther E. Galicia, Esquire of George, Hartz, Lundeen,
Fulmer, Johnstone, King & Stevens, P.A., West Palm Beach, for Appellees.

PER CURIAM.

Noretta Elder (appellant) appeals a final order entered by the judge of
compensation claims denying her petition for permanent total disability (PTD)
benefits, penalties, interest, costs and fees. We affirm without discussion, except to

address appellant’s argument that under Home Depot v. Turner, 820 So. 2d 1075 (Fla. 1st DCA 2002), an employer/carrier (E/C) seeking to establish proof of a substantial earning capacity in defense to a claim for PTD benefits must specifically plead this as an affirmative defense, or forever waive it.

We do not read Home Depot to create such a pleading requirement; Home Depot addresses only the burden of proof in permanent total disability claims. See § 440.15(1)(b), Fla. Stat. (2001) (“Only a catastrophic injury as defined in s. 440.02 shall, in the absence of conclusive proof of a substantial earning capacity, constitute permanent total disability. . . . In no other case may permanent total disability be awarded.”); Home Depot, 820 So. 2d at 1075-76 (holding the E/C bears the burden, not the claimant, “to demonstrate, by the conclusive proof required statutorily, that claimant maintained a substantial earning capacity despite her impairment”).

AFFIRMED.

BARFIELD, BROWNING and HAWKES, JJ. CONCUR.