IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

CHERIE SOLSAA, on behalf of DAVID SOLSAA, decedent,

Appellant,

v.

WERNER ENTERPRISES, INC.,

Appellee.
_____/

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

CASE NO.: 1D04-2909

Opinion filed October 11, 2005.

An appeal from an order of the Judge of Compensation Claims
Thomas G. Portuallo.

T. Rhett Smith and Teresa E. Liles, Pensacola, for Appellant.

Susan Sapoznikoff Foltz, Tallahassee, for Appellee.

VAN NORTWICK, J.

In this workers' compensation appeal, Cherie Solsaa seeks reversal of an order of the Judge of Compensation Claims (JCC) which denied her claim for death benefits following the death of her husband, a truck driver and delivery man employed by

Werner Enterprises, Inc., appellee. Because the employer began paying death benefits and did not deny compensability within 120 days of the initial provision of benefits, under section 440.20(4), Florida Statutes (2002), the employer has waived the right to deny compensability. Accordingly, we reverse.

On August 21, 2003, while unloading a truck, David Solsaa suffered a heart attack and subsequently died in Bunnell, Florida. The self-insured employer, headquartered in Nebraska, commenced payment of death benefits on October 21, 2002 and paid such benefits through August 4, 2003. The employer ceased benefits based upon a medical doctor's report which found that Solsaa's heart attack was not caused by his employment. The employee's widow, Cherie Solsaa, petitioned for resumption of death benefits arguing that the employer was estopped to deny such benefits pursuant to section 440.20(4), Florida Statutes (2002). The claim proceeded to a hearing before the JCC who denied the petition. The JCC found that the death benefits paid by the employer were paid under Nebraska law, not Florida law. As a result, the JCC concluded that the "pay and investigate" provisions of section 440.20(4) had not been invoked and that the employer was therefore not estopped from denying compensability.

Section 440.20(4), provides:

> If the carrier is uncertain of its obligation to provide

> benefits or compensation, it may initiate payment without prejudice and without admitting liability. The carrier shall immediately and in good faith commence investigation of the employee's entitlement to benefits under this chapter and shall admit or deny compensability within 120 days after the initial provision of compensation or benefits. . . . Upon commencement of payment, . . . the carrier shall provide written notice to the employee that it has elected to pay all or part of the claim pending further investigation, and that it will advise the employee of claim acceptance or denial within 120 days. A carrier that fails to deny compensability within 120 days after the initial provision of benefits or payment of compensation . . . waives the right to deny compensability, unless the carrier can establish material facts relevant to the issue of compensability that it could not have discovered through reasonable investigation within the 120-day period.

The statute is clear and unambiguous. The purpose of the 120-day limit is to ensure that an employer/carrier complies with the mandate of section 440.20(4) to "immediately and in good faith commence investigation of the employee's entitlement to benefits." Bussey v. Wal-Mart Store #725, 867 So. 2d 542, 545 (Fla. 1st DCA 2004). The statute works to fulfill the legislative goal of speedy resolution of claims and protects a claimant from prolonged periods of uncertainty regarding the employer/carrier's position on the claim's compensability. Id.

Here, the employer mistakenly believed Nebraska law applied and began paying benefits and investigating pursuant to that state's workers' compensation statute. The employer argues that section 440.20(4) does not apply since the benefits were not paid

under Florida law. We cannot agree. It is without dispute that David Solsaa's heart attack and death occurred in Florida. Given those facts, as a matter of law this claim is governed by Florida law and Florida has jurisdiction over the workers' compensation claim. See Philyaw v. Arthur H. Fulton, Inc., 569 So. 2d 787, 793 (Fla. 1st DCA 1990)(holding that, when an employee is injured in an accident in Florida while in the course of his employment with an out-of-state employer, the fact of the occurrence of the injury in Florida gives rise to coverage and jurisdiction under the Florida Workers' Compensation Act). The employer's erroneous assumption or conclusion as to the applicable law does not create either a factual issue concerning the applicable law or a defense or exception to the 120-day "pay and investigate" requirement in section 440.20(4). Because the employer did not deny compensability of the heart attack within 120 days of the initial provision of benefits, the employer waived the right to deny compensability. See Public Storage v. Galano, 894 So. 2d 287 (Fla. 1st DCA 2005); Hutchinson v. Lykes Smithfield Packing, 870 So. 2d 144 (Fla. 1st DCA 2004).

The case before us is distinguishable from Cole v. Fairfield Communities, 2005 WL 1680584 (Fla. 1st DCA July 20, 2005) and Bussey v. Wal-Mart, 867 So. 2d 542 (Fla. 1st DCA 2004). In both Cole and Bussey, the JCC determined, and competent substantial evidence showed, that the employer in each case was not uncertain of its

obligation to provide benefits, never invoked the pay-and-investigate provisions of section 440.20(4), and intended to deny compensability. Cole, 2005 WL 1680584 *1-2, Bussey, 867 So. 2d at 545.[1] In both cases, we concluded that, because the employer did not invoke the pay-and-investigate procedure and never intended to take any action other than deny compensability, the failure to respond to the petition operated as a denial and the 120-day provisions of section 440.20(4) did not apply. Id.

In the case on appeal, however, it is uncontested that the employer intended to pay benefits and did pay benefits for over nine months while it investigated the claim. Thus, unlike Cole and Bussey, this is not a case where the employer intended to deny compensability all along and did not provide a notice of the denial to claimant. Believing that Nebraska law applied, the employer here paid the claimant benefits while it investigated the claim, but failed to admit or deny compensability within the 120-day period provided by section 440.20(4). The employer seeks relief from the clear provisions of the statute based upon its mistaken assumption as to the applicable law. To grant such relief would require us to ignore the express language of the statute and would be contrary to the legislative goal of facilitating speedy resolution

[1]In addition, in Cole, the employer had inadvertently paid one of the claimant's chiropractor's bills even though the chiropractor was not authorized to treat the claimant. Cole, 2005 WL 1680584, *2. This single payment made in mistake did not mandate a result different than Bussey. Id.

of claims.

Accordingly, the order of the JCC is reversed, and the cause is remanded for determination of the benefit owing the claimant under Florida law.

REVERSED and REMANDED for further proceedings.

KAHN, C.J., CONCURS WITH WRITTEN OPINION AND HAWKES, J., DISSENTS WITH WRITTEN OPINION.

KAHN, C.J., concurring.

I have signed on to Judge Van Nortwick's opinion, and I write separately in an attempt to dispel any notion that this case in any way involves an analysis under the familiar rule of competent substantial evidence. The determinant in this case, as Judge Van Nortwick points out, is that benefits due were controlled solely by Florida law, and Florida alone has jurisdiction over this workers' compensation claim. This is a legal conclusion, and appellee's unilateral mistake of law no more serves as a defense than does its apparent ignorance of Florida Workers' Compensation law.

Failure of an employer/carrier to investigate fully and deny a claim within 120 days after initially providing benefits renders that claim compensable pursuant to section 440.20(4), Florida Statutes. See, e.g., Franklin v. Northwest Airlines, 778 So. 2d 418 (Fla. 1st DCA 2001); Bynum Trans., Inc. v. Snyder, 765 So. 2d 752 (Fla. 1st DCA 2000). This is not a "gotcha" or "technical" claim. This is the law established by the Florida Legislature and extant in this state now for well over eleven years. The law was obviously intended by our Legislature to facilitate the administrative management of workers' compensation claims by employers and carriers and, thereby, to avoid litigation. For better or worse, section 440.192(8) and section 440.20(4), both contemplate that in some cases, benefits will be payable under circumstances where the merits of the situation might suggest otherwise. This is a policy decision made by the Legislature that we have no alternative but to honor.

HAWKES, J., DISSENTING,

I am compelled to dissent. Claimant's argument for benefits depends on a hope and a dream that a bizarre "I gotcha" claim can work. She argues that the E/C's mistaken payment of Nebraska benefits can somehow trigger a provision of Florida law that would forever bar any adjudication of a Florida claim based on its merits. Her argument concludes that, as a consequence, the E/C and the system must now be burdened paying her Florida compensation to which she was never entitled.[2] Apparently, dreams can sometimes come true.

Two uncontested points should have shattered the dream. The first is a finding of fact. The JCC found Claimant never received any compensation pursuant to chapter 440, Florida's workers' compensation statute. The second is a question of law. Under Florida law, unless benefits or compensation is paid pursuant to chapter 440, the pay and investigate provisions of section 440.20(4), Florida Statutes, can never be triggered.

This issue before us is a simple question of fact: Did the carrier ever pay

[2] The concurring opinion indicates benefits due were controlled by Florida law. However, on the merits, Claimant was not due benefits under either Florida or Nebraska law.

compensation[3] under section 440.20(2) or section 440.192(8), Florida Statutes (2002), so as to trigger the pay and investigate provisions of section 440.20(4), Florida Statutes (2002)? Florida law is clear. If it did, compensation is due. If it did not, compensation is not due. Paying compensation pursuant to one of these sections *as required*, is the *only way* the pay and investigate provisions of section 440.20(4), Florida Statutes, can be triggered. Payment under any other circumstance or for any other reason, even a mistake, cannot trigger section 440.20(4), Florida Statutes. *See Cole v. Fairfield Cmtys. & RSKO*, 2005 WL 1680584 (Fla. 1st DCA July 21, 2005) (holding E/C's mistake in making a chiropractor payment under chapter 440, does not trigger the waiver provisions section 440.20(4), Florida Statutes).[4]

As the majority notes, the statute is clear and unambiguous. Section 440.20(4), Florida Statutes, in relevant part, provides: "A carrier that fails to deny compensability within 120 days after the initial provision of benefits or payment of compensation *as*

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[3] *See* § 440.02(7), Fla. Stat. (2002) (defining compensation as "the money allowance payable to an employee or to his or her dependents *as provided for in this chapter*.") (emphasis added).

[4] The majority opinion conflicts with *Cole*, 2005 WL 1680584. Florida law provides that the pay and investigate provisions must be intentionally invoked by the E/C. *See* § 440.20(4), Fla. Stat. (providing "the carrier shall provide written notice to the employee that it has elected to pay the claim pending further investigation. . ."; *see also Bussey v. Walmart Store # 725*, 867 So. 2d 542 (Fla. 2004) (holding a failure to take action in response to a petition for benefits does not trigger the pay and investigate provisions).

required under subsection (2) or s. 440.192(8) waives the right to deny compensability, . . ." *Id*. (Emphasis added). However, for waiver to apply, compensation must have been paid *as required* pursuant to chapter 440.[5] *See* § 440.02(7), Fla. Stat. (2002). That did not happen here.

Here, the JCC found the payments were *not* made pursuant to chapter 440, but were instead made pursuant to Nebraska law. The majority concedes the payments were made pursuant to Nebraska law. (*See* Majority op. pg. 3). The JCC's findings are supported by competent, substantial evidence.[6] Since the finding is supported by competent, substantial evidence, this court is not free to substitute its judgment for the JCC.[7] *See La. Pac. Corp. v. Harcus*, 774 So. 2d 751 (Fla. 1st DCA 2000). No

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[5] Judge Kahn correctly asserts the waiver provisions of section 440.20(4), have been extant in Florida for over eleven years. Consequently, it is difficult to conceive how he now overlooks the express statutory requirement that payment must be made pursuant to section 440.20(2) or section 440.192(8), for waiver to apply. These two sections have always provided the only means to trigger the waiver provisions, and we are not at liberty to add alternative means to impose waiver.

[6] In addition to testimony that no compensation was paid pursuant to Florida law, the record shows the amount of death benefits paid conformed with that payable under Nebraska, not Florida law, and that the carrier did not provide notice to Claimant, the employer or the department, as required by chapter 440, that they were paying compensation. *See* § 440.20(3), Fla. Stat. (2002).

[7]This court is not asked to resolve the legal question of which state's workers' compensation law, Florida's or Nebraska's, applies. If this question was relevant, I would agree with the majority that if Claimant was entitled to benefits, Florida law would govern. However, the question before this court is whether

compensation paid pursuant to Florida law means no waiver can apply.

Despite agreeing with the JCC that payments were made pursuant to Nebraska law, the majority boldly ignores this fact and constructs a convoluted alternative route to section 440.20(4). The majority reasons: (1) Any right that Claimant might have to receive workers' compensation depended on Florida law; (2) The E/C mistakenly determined Nebraska law governed Claimant's entitlement to workers' compensation; (3) Because Florida law would govern a valid workers' compensation claim, any mistake made by the E/C must be assumed to be a mistake made under Florida law; (4) Therefore, the E/C's mistake in determining Nebraska law would govern a workers' compensation claim is judicially transformed into the E/C mistakenly paying compensation pursuant to Florida law; (5) Once the Nebraska benefits are judicially transformed into compensation paid pursuant to Florida law, then the pay and investigate provisions are triggered; (6) Since the E/C paid Nebraska benefits for more than 120 days, the E/C is now forever denied a merits determination on the subsequent Florida claim.

Despite the majority's herculean efforts, we are not free to rewrite chapter 440.

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compensation *was ever paid* pursuant to *Florida* law. Contrary to the concurring opinion, this is clearly a factual question to be answered by the JCC, which this court has "no alternative but to honor" if supported by competent, substantial evidence.

The majority's conclusion ignores the clear statutory language which provides a very limited means to trigger the pay and investigate provisions of section 440.20(4), Florida Statutes. This conclusion also ignores the fact that Florida's workers' compensation law is devoid of equitable powers. *See Globe Sec. v. Pringle*, 559 So. 2d 720, 722 (Fla. 1st DCA 1990) (noting workers' compensation is a creature of statute and must be governed by what the statute provides, "not by what we may feel the law should be").

It is our obligation to apply the plain language of the statute. Here, Claimant was not prejudiced by the fact that she received Nebraska checks for several months before being informed she would no longer receive those checks. If Claimant, or anyone similarly situated, is entitled to Florida compensation, a petition for benefits would be granted. However, under the majority's logic, any payment, whether gratuitous, mistaken, made pursuant to the law of another state, or for any other reason, may, if this court so chooses, start the 120 day countdown to waiver of an E/Cs ability to ever adjudicate the merits of a Florida workers' compensation claim.

For these reasons, I cannot join the majority in their judicial rewrite of chapter 440, and their avoidance of the well-established principle that, for factual questions, a JCC's findings must be affirmed if supported by competent, substantial evidence. I would affirm the JCC's factual determination and deny Claimant's petition for

benefits.