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

HILLSBOROUGH COUNTY SCHOOL BOARD / BROADSPIRE,

Appellants,

v.

JOHN E. KUBIK,

Appellee.

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

CASE NO. 1D12-2165

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Opinion filed February 20, 2013.

An appeal from an order of the Judge of Compensation Claims.
Ellen H. Lorenzen, Judge.

Date of Accident: April 12, 2011.

Paulette Z. Brown of Barr, Murman & Tonelli, P.A., Tampa, for Appellants.

Craig O. Stewart of Morgan & Morgan, P.A., Tampa, and Wendy S. Loquasto of Fox & Loquasto, P.A., Tallahassee, for Appellee.

PER CURIAM.

In this workers' compensation case, the Employer/Servicing Agent (E/SA) appeals an order of the Judge of Compensation Claims (JCC) to the extent it awards Claimant a one-time change of physician, under section 440.13(2)(f),

Florida Statutes (2010), and denies the E/SA prevailing-party costs, under section 440.34(3). We affirm the award of a one-time change, without further comment. We reverse the denial of prevailing-party costs to the E/SA, and remand for further proceedings on that issue.

The JCC awarded Claimant some benefits (a period of temporary partial disability benefits, interest and penalties on that award, continued pain management care, and reimbursement of some bills), yet denied other claims for benefits (temporary total disability benefits, compensability of neck complaints, and authorization of some medical benefits). Then, despite the E/SA's multiple requests (in both the responses to the petitions for benefits and the pre-trial stipulation) for an award of costs for the claims on which it prevailed, the JCC found "[C]laimant was the prevailing party" and "E/SA was not the prevailing party," and, accordingly, granted Claimant's motion to tax costs and denied the E/SA's motion to tax costs.

This ruling conflicts with the recent opinion in <u>Aguilar v. Kohl's Department Stores, Inc.</u>, 68 So. 3d 356 (Fla. 1st DCA 2011). In <u>Aguilar</u>, this court explained that "the JCC is not limited to finding that only one party (or neither party) prevailed," and held the order on review was both inconsistent, in that the JCC had awarded the claimant a benefit yet found "neither party was a prevailing party," and premature, in that "[t]o determine which party prevailed, more specific

evidence is needed than was available here." Id. at 357-58. Similarly, here, the JCC either produced an inconsistent order by denying some of the disputed benefits yet finding the E/SA had not prevailed, or prematurely determined which party (or parties) prevailed without making clear she had considered (as mentioned in Aguilar) "all claims presented, including those resolved . . . pretrial." Id. at 358. The error is not harmless, because cost awards to prevailing parties are mandatory and cannot be denied as a matter of discretion. See Punsky v. Clay County Bd. of County Comm'rs, 60 So. 3d 1088, 1093 (Fla. 1st DCA 2011).

The appropriate remedy here is the remedy provided in Aguilar; accordingly, we remand this case for further proceedings to allow the parties to present evidence "of the specific costs incurred and both their reasonableness and their relevance to all claims presented, including those resolved . . . pretrial." Aguilar, 68 So. 3d at 358 (referring to the procedures in Florida Administrative Code Rule 60Q-6.124). We further suggest that the interests of judicial efficiency would be better served in future cases if the JCC simply reserved ruling as to which party prevailed, and thus reserved ruling on both entitlement to and amount of prevailing-party costs until a full consideration of the relevant facts (as set forth in Aguilar) can be facilitated by the procedures in Florida Administrative Code Rule 60Q-6.124.

AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings in accordance with this opinion.

CLARK and WETHERELL, JJ., CONCUR; MAKAR, J., CONCURRING IN PART, DISSENTING IN PART.

MAKAR, J. concurring in part, dissenting in part.

I concur in affirmance of the JCC's order granting a one-time change of physician under section 440.13(2)(f), Florida Statutes. I cannot agree, however, that we should remand on the costs issue. It is a basic precept of error preservation that trial courts must be put on notice of alleged errors in their rulings so that they have an opportunity to correct them. Philip J. Padovano, Florida Appellate Practice § 8.1 (2013 ed.) ("A legal argument must be raised initially in the lower tribunal by the presentation of a specific motion or objection at the appropriate stage of the proceeding."); Jack R. Reiter, Principles & Pitfalls of Preservation of Error, 78 Fla. B.J. 32, 32 (Nov. 2004) ("Requiring litigants to preserve error before the lower tribunal maintains the integrity of the judicial process by ensuring that the lower tribunal has the opportunity to correct errors."). That did not occur here. The E/SA did not object to the JCC's ruling on costs when it was made nor did it present to the JCC the legal argument it now makes for the first time on appeal.

That argument is based on Aguilar v. Kohl's Department Stores, Inc., 68 So. 3d 356, 358 (Fla. 1st DCA 2011), in which this Court explained that a JCC "is not limited to finding that only one party (or neither party) prevailed." Aguilar was issued on August 23, 2011, which was seven months prior to the final hearing held on March 28, 2012 in this case. Adequate time existed to apprise the trial court of Aguilar; even if Aguilar had not issued, it was still incumbent upon the E/SA to

assert an objection timely (as was done via a motion for rehearing in Aguilar[1]). See Holland v. Cheney Bros., Inc., 22 So. 3d 648, 649 (Fla. 1st DCA 2009) ("Traditional rules of preservation of issues apply to workers' compensation appeals.").

The E/SA at no time, however, raised any objection below to the JCC's denial of costs on the basis of Aguilar or its holding. Making a general request for costs for claims on which it prevailed was insufficient to inform the JCC of the legal issue resolved in Aguilar. See Aills v. Boemi, 29 So. 3d 1105, 1109 (Fla. 2010) ("[T]he concern articulated in the objection must be sufficiently specific to inform the court of the perceived error."). The E/SA's failure to raise below, and ultimately preserve, the issue should bar us from considering it on appeal. See id. Accordingly, I would affirm the order in its entirety.

[1] I would grant the Claimant's motion to take judicial notice of this fact.