

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

THG RENTALS & SALES OF  
CLEARWATER, INC./SUMMIT  
HOLDINGS – CLAIMS  
CENTER,

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

CASE NO. 1D15-970

Appellants,

v.

JAMES C. ARNOLD,

Appellee.

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Opinion filed March 17, 2016.

An appeal from an order of the Judge of Compensation Claims.  
Stephen L. Rosen, Judge.

Date of Accident: August 6, 2013.

H. George Kagan of Miller, Kagan, Rodriguez & Silver, P.L., West Palm Beach, for  
Appellants.

Bradley Guy Smith of Smith, Feddler & Smith, P.A., Lakeland, and Wendy S.  
Loquasto of Fox & Loquasto, P.A., Tallahassee, for Appellee.

PER CURIAM.

In this workers' compensation case, the Employer/Carrier (E/C) appeals and  
Claimant cross-appeals an order of the Judge of Compensation Claims (JCC)

rejecting the E/C's misrepresentation defense and awarding benefits to Claimant. We reverse and remand because the JCC too narrowly analyzed the E/C's misrepresentation defense and because the E/C did not plead its misrepresentation defense in sufficient detail as required by Florida Administrative Code Rule 60Q-6.113(2)(h).

### Facts

Claimant suffered compensable injuries to both his back and right knee. During the proceedings below, Claimant filed five petitions for benefits (PFBs) seeking medical and indemnity benefits with respect to both injuries. By the time of Claimant's third PFB, the E/C began denying entitlement to benefits "based on misrepresentation," which it subsequently described in the joint pretrial stipulation as: "Misrepresentation,' in violation of §§ 440.09 and .105, F.S. (physical abilities and post-accident earnings)."

By the time of the final hearing, Claimant sought medical and indemnity benefits only for his compensable right knee injury. In a trial memorandum filed two days before the hearing, Claimant asserted, for the first time, that the E/C's misrepresentation defense lacked the specificity required by rule 60Q-6.113(2)(h). At the hearing, however, the JCC found that the E/C's defense was pled with sufficient specificity because it "put the Claimant on notice as to what that defense means." The E/C proceeded to present video surveillance, evidence of earnings, and

the testimony of doctors who treated Claimant's back injury to demonstrate that Claimant had not been truthful with his doctors. But the JCC ultimately rejected the misrepresentation defense because the alleged misrepresentation did not relate to Claimant's right knee, but only to his back injury. And, according to the JCC, "the issues regarding the claimant's back are not before me." The JCC awarded Claimant's request for temporary partial disability (TPD) benefits.

#### Standard for Establishing Misrepresentation

We find two things wrong with what occurred below, one benefitting each party in this case. First, the JCC too narrowly analyzed the E/C's defense by considering only whether the alleged misrepresentation related to Claimant's knee. The JCC apparently believed that to prove misrepresentation, the E/C had to link the allegedly false statements directly to the particular injury and benefits being sought, to Claimant's knee in this instance. But such a requirement is not found in the law.

Section 440.105, Florida Statutes, makes it illegal for any person to "knowingly make, or cause to be made, any false, fraudulent, or misleading oral or written statement for the purpose of obtaining or denying any benefit or payment under this chapter" (emphasis added). And section 440.09(4)(a), Florida Statutes, bars benefits for an employee found to have "knowingly or intentionally engaged in any of the acts described in s. 440.105 . . . for the purpose of securing workers' compensation benefits" (emphasis added). Accordingly, this court has recognized

that “it is not necessary that a false, fraudulent, or misleading statement be material to the claim; it only must be made for the purpose of obtaining benefits.” Village of N. Palm Beach v. McKale, 911 So. 2d 1282, 1283 (Fla. 1st DCA 2005). Fraud “does not limit a claimant’s forfeiture to those benefits that may have been obtained by virtue of the claimant’s unlawful conduct.” Wright v. Unifs. for Indus., 772 So. 2d 560 (Fla. 1st DCA 2000) (quoting Rustic Lodge v. Escobar, 720 So. 2d 1014, 1015 (Fla. 1st DCA 1999)). Thus, if the Claimant made *any* misrepresentation for the purpose of obtaining benefits, then he is barred from entitlement to benefits, even if the misrepresentation is unrelated to his knee injury or benefits based on that injury.

#### Specificity of the E/C’s Misrepresentation Defense

The second error below relates to the requirement for pleading a misrepresentation defense under rule 60Q-6.113(2)(h), which provides:

Any defense raised pursuant to Sections 440.09(4)(a) and 440.105, F.S., and any affirmative defense, must be raised with specificity, detailing the conduct giving rise to the defense, with leave to amend within 10 days. Failure to plead with specificity shall result in the striking of the defense. Any objections/responses to the affirmative defenses must be pled with specificity.

(Emphasis added.) Here, in its responses to Claimant’s PFBs, the E/C asserted that it was denying the entire claim based on “misrepresentation,” with nothing more. Then, in its pretrial stipulation, the E/C only identified two broad categories of alleged misrepresentations—“physical abilities” and “post-accident earnings”—without detailing the misrepresentative conduct. “Only *oral* or *written statements*

can serve as the predicate for disqualification from benefits.” Dieujuste v. J. Dodd Plumbing, Inc., 3 So. 3d 1275, 1276 (Fla. 1st DCA 2009). And, here, the E/C failed to identify any statement upon which it was basing its misrepresentation defense. Thus, the E/C did not plead its defense in sufficient detail to satisfy the rule.

But, in this instance, we cannot simply strike the E/C’s defense under rule 60Q-6.113(2)(h) without affording the rule-prescribed 10-day period for amending its defense. Although the rule does not impose a timeframe for a claimant to object to a defense, it does give an E/C ten days from a claimant’s specificity objection to amend. Because Claimant failed to object or seek a ruling regarding the deficient defense until two days before the final hearing, the E/C had no time to amend its defense to conform with the rule’s specificity requirements.

And so, taking account of both parties’ rights, we remand with instructions to the JCC to give the E/C ten days to amend its pleading, and thereafter to give the Claimant an opportunity to object/respond to the affirmative defense with specificity, as required by the rule. If the E/C satisfies the rule’s specificity requirement, then the JCC should determine whether Claimant made “any” statements afoul of subsection 440.09(4)(a), Florida Statutes, irrespective of whether the statements relate to the specific injuries for which Claimant is seeking benefits.

### Lack of Job Search

Finally, we find no merit in the E/C's argument that the Claimant in this case needed to present evidence of an unsuccessful good-faith job search in order to establish entitlement to temporary partial disability benefits. See Thayer v. Chico's FAS, Inc., 98 So. 3d 766, 768 (Fla. 1st DCA 2012); Wyeth/Pharma Field Sales v. Toscano, 40 So. 3d 795, 802 (Fla. 1st DCA 2010).

### Conclusion

For the reasons explained above, we AFFIRM, in part, and REVERSE and REMAND for further proceedings in accordance with this opinion.

ROBERTS, CJ., OSTERHAUS, and KELSEY, JJ., concur