FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D18-3503

PREMIER COMMUNITY
HEALTHCARE GROUP, AMTRUST
NORTH AMERICA OF FLORIDA
and ASSOCIATED INDUSTRIES
INSURANCE COMPANY,

Appellants,

v.

ANA RIVERA,

Appellee.

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

Date of Accident: June 9, 2017.

November 13, 2019

PER CURIAM.

AFFIRMED.

RAY, C.J., and WOLF, J., concur; B.L. THOMAS, J., dissents with opinion.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

B.L. THOMAS, J., dissenting.

In this workers' compensation case, Claimant had the burden of proving her workplace injury is the major contributing cause of the need for requested medical care; this was the sole issue for determination by the Judge of Compensation Claims (JCC). On appeal, the Employer/Carrier challenge the JCC's determination in Claimant's favor based on the evidence. Because I agree the record lacks competent substantial evidence in support of the MCC determination, I would reverse the order below.

Claimant, a dental assistant, was injured while trying to stop a patient from falling. The E/C initially accepted compensability of Claimant's injuries to the low back and neck (cervical spine), but later denied claims for cervical injections and physical therapy when Claimant's medical history revealed that she had a prior motor vehicle accident and previous neck symptoms. Dr. Schulak, an orthopedic surgeon authorized to treat the workplace injuries, testified that Claimant never mentioned *any* neck or cervical complaints to him. Dr. Davis, another orthopedic surgeon and the E/C's independent medical examiner, testified Claimant has objective findings of preexisting degenerative disc disease. Ultimately, both doctors opined that the workplace injury is not the major contributing cause of Claimant's current need for medical treatment of the cervical spine.

Claimant relied on the medical records maintained by Dr. Tolli, another authorized treating physician. In the appealed order, the JCC found that the compilation of Dr. Tolli's records sufficiently established that Claimant suffered injury to her neck in the workplace accident. In particular, the JCC emphasized both Dr. Tolli's notation that the requested treatment for the cervical spine was on hold awaiting authorization from the workers' compensation carrier and the fact that Dr. Tolli did not relate the need for medical care to any other cause. Although the JCC

acknowledged the contrary opinions from Drs. Schulak and Davis, he concluded Dr. Tolli's opinions should be given greater weight "based on the claimant's credible testimony and Dr. Tolli's continuous treatment and examination of the claimant."

Under the statute, the accidental compensable injury must be the MCC of any resulting injuries. § 440.09(1), Fla. Stat. (2016). "Major contributing cause" is defined in the statute as "the cause which is more than 50 percent responsible for the injury as compared to all other causes combined for which treatment or benefits are sought." MCC "must be demonstrated by medical evidence only." Section 440.09(1)(b) further provides that when a work-related injury combines with a preexisting disease or condition to cause or prolong disability of the need for treatment, benefits are due "only to the extent that the injury arising out of and in the course of employment is and remains more than 50 percent responsible for the injury as compared to all other causes combined and thereafter remains the [MCC] of the disability or need for *treatment*." (emphasis added). In the instant case, however, the JCC did not make any findings concerning any preexisting condition and found instead that the workplace accident alone is the MCC of the need for the recommended cervical treatment.

In several narrative reports, Dr. Tolli describes Claimant as having cervical and lumbar injuries resulting from a work-related accident in June 2017, but he never directly addresses the *cause* of the need for treatment. This is true despite his references to a "pertinent past medical history" of prior neck symptoms and the evidence of degenerative cervical changes as shown on MRI. In short, although the medical narrative reports relate Claimant's neck symptoms to a work injury, there is no language suggesting that work-related injury is the MCC of the need for the requested medical benefits.

Significantly, Dr. Tolli's records include the DWC-25 medical treatment/status reporting forms which are required to be completed for every office visit under the statute and the administrative rules. See § 440.13(4)(a), Fla. Stat. (2016); Fla. Admin. Code R. 69L-7.720 & 7.730(1)(b). This form contains a specific section with questions concerning the cause of the treatment and the MCC of the need for treatment. This portion of

the form was conspicuously left blank on every DWC-25 completed by Dr. Tolli or his staff.

It is true, as Claimant points out, that the use of specific "magic words" is not required to prove MCC. *See, e.g., Fed. Exp. Corp. v. Boynton*, 38 So. 3d 167, 169 (Fla. 1st DCA 2010) (finding MCC threshold had not been met but agreeing with claimant that magic words "MCC" are not necessary). But proof of MCC nevertheless requires evidence that the accidental compensable injury is 50 percent or more of the total cause. In this case, medical records indicating only that cervical injuries resulted from the accidental compensable injury in June 2017 are simply not substantive enough to convey the meaning of MCC.

In his Answer Brief, Claimant argues, in the alternative, that the order here should be affirmed under "tipsy coachman" because the E/C are precluded from challenging causation under the 120-day rule of section 440.20(4), Florida Statutes (2016), or are otherwise estopped from denying the compensability of the benefits sought. Because neither the 120-day rule nor estoppel were timely raised or properly pled, these issues have not been preserved for appellate review and cannot provide a basis for affirmance in a workers' compensation case. *See, e.g., Teco Energy, Inc. v. Williams*, 234 So. 3d 816, 823 (Fla. 1st DCA 2017) (holding waiver under 120-day rule and estoppel are affirmative avoidances which must be pleaded timely and carefully or forever waived). In addition, this court has held that a determination of an industrial accident's compensability does not preclude an E/C from challenging a claimant's entitlement to benefits, and that the claimant has the burden of proving that the industrial injury remains the MCC of the need for medical treatment. *See Checkers Restaurant v. Wiethoff*, 925 So. 2d 348, 350 (Fla. 1st DCA 2006).

In sum, the record here contains no CSE in support of the JCC's ultimate MCC determination. The order below, in my view, should be reversed.

Rayford H. Taylor of Hall Booth Smith, P.C., Atlanta, for Appellants.

Michael J. Winer of Law Office of Michael J. Winer, P.A., Tampa, for Appellee.