

FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D20-3307

ESTATE OF RONALD MCKENZIE
through the personal
representative Terry McIntosch,

Appellant,

v.

HI RISE CRANE, INC. and
BRIDGEFIELD EMPLOYERS
INSURANCE CO.,

Appellees.

On appeal from an order of the Office of the Judges of
Compensation Claims.
Iliana Forte, Judge.

Date of Accident: January 26, 2018.

August 19, 2021

BILBREY, J.

Appellant, Terry McIntosch, is the personal representative for the estate of her deceased brother, Ronald McKenzie (decedent). She appeals order of the Judge of Compensation Claims (JCC) dismissing a petition for benefits (PFB) she filed on the estate's behalf. McIntosch argues that the JCC erred by finding her appointment as personal representative after filing the PFB did

not relate back to the filing. McIntosch also argues that the JCC erred by concluding dismissal was required because she did not include with the PFB a copy of the acknowledgement signed by McIntosch under section 440.105(7), Florida Statutes (2018).¹ For the reasons explained below, we agree with McIntosch and reverse for further proceedings.

Facts

Before he died in August 2018, decedent filed PFBs through his attorney, Edward P. Busch, identifying a January 26, 2018, date of accident. Busch dismissed those PFBs shortly after decedent's death. The claim remained dormant until January 24, 2020, when Busch filed a PFB on behalf of McIntosch, in her capacity as personal representative of decedent's estate. The PFB identified McIntosch, filing as personal representative, as the claimant, and decedent as the employee. Attached to this PFB was a copy of a combined certificate of good faith and "fraud acknowledgement" signed by decedent in February 2018 and attached to the earlier PFBs filed by Busch before decedent died. McIntosch petitioned the circuit court for appointment as personal representative shortly after she filed the PFB, and she received her appointment in July 2020. The Employer/Carrier (E/C) moved to dismiss the pending PFB alleging that, because McIntosch was not the personal representative when she filed the PFB, it was a nullity, and asserting that the PFB was statutorily non-compliant because McIntosch was not the one who signed the attached acknowledgement.

McIntosch then moved to amend the PFB contending her appointment as personal representative should relate back to the January 2018 filing date, which was just before the statute of limitations ran. *See* § 440.19(1), Fla. Stat. (2018), (establishing a two-year limitation period in which to file a PFB). McIntosch accompanied the motion with an amended PFB, attached to which was an acknowledgement signed by her. The matter went to a final hearing that led to the order appealed here.

¹ This document is sometimes called the "fraud attestation" or "fraud acknowledgement."

In her order, the JCC rejected McIntosch's relation back argument, finding the doctrine did not apply. The JCC explained that the case McIntosch relied on² concerned a civil complaint filed in circuit court. The JCC found that there is a distinction between such civil complaints and a PFB because section 440.105(7) mandates anyone making a workers' compensation claim provide a signed attestation that they are not providing any false or misleading information, while there is no such requirement in civil cases. The JCC found also that the acknowledgement attached to the original PFB here was signed by decedent before he died and therefore McIntosch "did not legally acknowledge by her signature making a workers' compensation claim."

The JCC also found that Busch was without legal authority to file the PFB because his representation of decedent ended with decedent's death, and that, if McIntosch "as potential or to be designated personal representative of the estate was making the claim . . . [she] was required to sign the" statutorily required acknowledgement. The JCC also rejected Busch's explanation that he did not have McIntosch sign the form when he filed the PFB because of time constraints, finding instead that he did not have her sign it at that time because doing so would have subjected "her to insurance fraud." As a result, the JCC found the PFB was "null and void as Claimant was deceased when the Petition was filed and, thus, Busch was without legal authority to represent him." The JCC denied the motion to amend and dismissed the PFB. McIntosch then appealed.

Analysis

Because the relevant facts are undisputed, our review is de novo. See *Airey v. Wal-Mart/Sedgwick*, 24 So. 3d 1264, 1265 (Fla. 1st DCA 2009). The JCC committed several errors here.

The first concerns the effect of failing to include with the PFB a fraud acknowledgement signed by McIntosch. The JCC concluded that, because the acknowledgement contained decedent's signature, it was decedent, not McIntosch, who was

² *Estate of Eisen v. Phillip Morris USA, Inc.*, 126 So. 3d 323 (Fla. 3d DCA 2013).

making the claim. As such, the JCC held that the claim was a legal impossibility since decedent was deceased when the PFB at issue was filed. But the acknowledgement found in section 440.105(7) says nothing about acknowledging making a claim. Instead, it says anyone who *is* making a claim must sign a certificate acknowledging the ramifications of filing “a statement of claim containing any false or misleading information.” Thus, the acknowledgement itself does not identify the claimant; rather, it identifies the person making the acknowledgement. Claimants are identified in PFBs and here, the January 2020 PFB named McIntosch, in her capacity as personal representative, as the claimant.

Furthermore, we held in *Padilla v. Collins Contracting*, 22 So. 3d 124 (Fla. 1st DCA 2009), that section 440.105(7) does not provide for dismissal when a person making a claim fails to provide the statutory acknowledgement with a PFB. Rather, section 440.105(7) requires only a suspension of benefits until the claimant signs the acknowledgement. *Padilla*, 22 So. 3d at 125. We explained that it is section 440.192(2)(a)–(i), Florida Statutes, that sets forth the requirements for a PFB, and it does not require a signed acknowledgement. *Padilla*, 22 So. 3d at 125.

We also pointed out in *Padilla* that “Florida Administrative Code Rule 60Q-6.107(1), entitled ‘Amendment and Dismissal of Petitions for Benefits,’ indicates petitions will be dismissed only for failure to comply with section 440.192(2)–(4), Florida Statutes.” *Id.* at 126. We see no reason why the same rationale does not apply when a claimant, as happened here, attaches to a PFB an incorrect or defective acknowledgement rather than not attaching one at all. Thus, the form bearing decedent’s signature no more made him the claimant than if Busch had inadvertently attached an acknowledgement signed by a client in an unrelated claim. So to the extent that the JCC dismissed the PFB because it did not include an acknowledgement signed by McIntosch, the JCC erred.

Additionally, by erroneously concluding that decedent, rather than McIntosch, was the claimant, the JCC likewise erred by concluding that Busch lacked the authority to file the PFB. These two errors combined to lead the JCC to incorrectly reject the relation back doctrine’s applicability here.

In rejecting the relation back doctrine, the JCC relied on *Rogers v. Concrete Sciences, Inc.*, 394 So. 2d 212 (Fla. 1st DCA 1981). In *Rogers*, the E/C made a settlement offer, and the claimant died a few days later without having accepted it. Shortly after the claimant died, his attorney accepted the offer and, when the E/C declined to follow through with the settlement, moved to enforce it. We held that the claimant's death terminated the attorney-client relationship and extinguished the attorney's authority to accept the E/C's offer. *Id.* at 213. Thus, in *Rogers* we affirmed the JCC's denial of the motion to enforce. *Id.* But here, Busch filed the January 2020 PFB on behalf of McIntosch as personal representative of decedent's estate, not on behalf of decedent, and so Busch did not act beyond his authority.³

Finally, although McIntosch was not yet personal representative at the time of filing, section 733.601, Florida Statutes (2020), provides that a personal representative's powers "relate back in time to give acts by the person appointed, occurring before appointment and beneficial to the estate, the same effect as those occurring after appointment." *See also Cunningham v. Florida Dep't of Child. & Fams.*, 782 So. 2d 913, 916 (Fla. 1st DCA 2001) (holding "when letters of administration are granted, they relate back to the intestate's or testator's death") (citing *Griffin v. Workman*, 73 So. 2d 844 (Fla. 1954)). In *Cunningham*, we further held that, if a personal representative is improperly appointed and a substitute is later named, the second appointment relates back to the original complaint and the substituted personal representative may go forward with the action. *Id.* "It follows, from the fact that the plaintiff can amend to reflect his capacity as personal representative, that claims which are properly recoverable by the personal representative . . . will also relate back." *Id.* (quoting *Talan v. Murphy*, 443 So. 2d 207, 209 (Fla. 3d DCA 1983)).

³ Section 733.601, Florida Statutes (2020), provides in part, "A personal representative may ratify and accept acts on behalf of the estate done by others when the acts would have been proper for a personal representative."

Here, McIntosch was prematurely identified as personal representative in the PFB because she had not yet attained that status. Logically, therefore, applying section 733.601 and the rationale in *Cunningham* requires that McIntosch's appointment in July 2020 related back to January 2020 when the PFB was filed.

For these reasons, the JCC erred by dismissing the PFB filed in January 2020 and by denying McIntosch's motion to amend it. As a result, we REVERSE and REMAND for further proceedings consistent with this opinion.

ROBERTS and MAKAR, JJ., concur.

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

Edward P. Busch and Jay M. Levy, Miami, for Appellant.

H. George Kagan, Delray Beach, and Gil Godfrey, Miami, for Appellees.