FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D18-5243

LFI FT. PIERCE and ESIS WC CLAIMS,

Appellants/Cross-Appellees,

v.

DEWAYNE HOLMES, BLUE GOOSE GROWERS LLC/FFVA MUTUAL INSURANCE COMPANY,

Appellees/Cross-Appellants.

On appeal from an order of the Office of the Judges of Compensation Claims.
Gregory J. Johnsen, Judge.

Date of Accident: April 16, 2015.

May 6, 2022

PER CURIAM.

In this workers' compensation case, employer Labor Finders, Inc., and its insurance carrier ESIS (referred to together as LFI) seek review of an order of the Judge of Compensation Claims (JCC) ruling Claimant's incomplete tetraplegia compensable. The injured employee, Dewayne Holmes (Claimant), cross-appeals the JCC's dismissal of a second employer, Blue Goose Growers LLC

(and its carrier, FFVA Mutual), from the proceedings. We find merit in the direct appeal.

Claimant's injury was sustained in a single-car motor vehicle accident in April 2015, which happened while he was riding home from work with a co-worker, Cory Johnson. Approximately forty-five minutes away from the job site, Johnson fainted while driving because of dehydration, which Claimant alleged was caused by Johnson's employment with Blue Goose. Both Claimant and Johnson worked for Blue Goose as leased employees from employee leasing company LFI.

After the accident, Claimant sued Blue Goose and LFI as co-defendants in tort. LFI did not appear; Blue Goose asserted workers' compensation immunity under section 440.11, Florida Statutes (specifically on grounds that the "special hazard" exception to the "going and coming" rule found in section 440.092(2), Florida Statutes, creates compensability under the Workers' Compensation Law). Blue Goose obtained a summary judgment in the circuit court, and Claimant subsequently stipulated to dismiss Blue Goose from the tort action with prejudice. Claimant then voluntarily dismissed the tort suit against LFI as well.

Next, Claimant initiated a workers' compensation proceeding before the JCC, filing a petition for benefits (PFB) naming both Blue Goose and LFI as employers. It is undisputed that LFI was Claimant's general employer and Blue Goose was Claimant's special employer under section 440.11(2), Florida Statutes (2014). LFI argued that the claim was barred by the going and coming rule and that no exception to the rule applies.

The JCC ruled that LFI was estopped from asserting the going and coming rule because Blue Goose had argued the contrary in circuit court, LFI had benefited from Blue Goose's argument by being dismissed from the circuit court case, and the two employers shared a special relationship. Alternatively, the JCC concluded that the going and coming rule does not apply because Johnson's dehydration was a special hazard. And as a third alternative, the JCC found that the injury arose directly out of employment in that the dehydration experienced by Claimant's co-worker was a "ticking time bomb" like that described in *Strother v. Morrison*

Cafeteria, 383 So. 2d 623 (Fla. 1980). Based on all three rationales, the JCC ruled the injuries compensable.

LFI challenges all three of the rationales. All its arguments were preserved or tried by consent, and all have merit.

Neither estoppel nor the special hazard doctrine apply because Claimant did not establish their elements. *See City of Dania Beach v. Zipoli*, 204 So. 3d 52, 54 (Fla. 1st DCA 2016) (listing elements of equitable estoppel); *Zeeuw v. BFI Waste Sys. of N. Am., Inc.*, 997 So. 2d 1218 (Fla. 2d DCA 2008) (finding no judicial estoppel where mutuality of parties was lacking); *see also Evans v. Holland & Knight*, 194 So. 3d 551, 552 (Fla. 1st DCA 2016) (setting forth special hazard analysis as requiring both "hazard at particular off-premises location" and "close association of the access route with the work premises" (emphasis added)). More specifically, estoppel does not pertain because the two Employers have adverse interests. If the claim sounded in tort, perhaps both Employers could have been liable, but if the claim instead fits under Florida's Workers' Compensation Law, Blue Goose enjoys tort immunity (created by section 440.11(2)'s extending tort immunity to special employers) even while not being obligated to provide worker's compensation benefits (because LFI carried its own workers' compensation insurance, *see* § 440.11(2), Fla. Stat. (2014) ("The employer shall be liable for and shall secure the payment of compensation to all such borrowed employees as required in s. 440.10, except when such payment has been secured by the help supply services company.")). Accordingly, it did not help LFI when Blue Goose argued in circuit court that the case should be heard as workers' compensation, nor did it help LFI when Blue Goose assured Claimant that the "special hazard" theory would defeat the affirmative defense of the going-and-coming rule. And the fact of being before a JCC did not estop LFI from asserting the going-and-coming rule because the rule is not an argument that the injury did not arise out of or occur in the course and scope of the employment, but is a legislatively created and logistically necessitated exception to general principles of compensability; because travel to and from work is necessarily work-related, the rule exists *solely* to avoid the logistical impracticability of coverage for such injuries. *Doctor's Bus. Serv., Inc. v. Clark*, 498 So. 2d 659 (Fla. 1st DCA 1986) (*en banc*).

Strother does not apply here, either. The rule evident in *Strother* is that an injury might be compensable where the employer set its cause in motion within the course and scope of the employment of the injured employee:

> We hold that to be compensable, an injury must arise out of employment in the sense of causation and be in the course of employment in the sense of continuity of time, space, and circumstances. This latter factor may be proved by showing that the causative factors occurred during the time and space limits of employment.

383 So. 2d at 628 (emphasis added). But here, the alleged cause of the accident that led to Claimant's injuries—Johnson's dehydration—arguably occurred in the course and scope of Johnson's employment, not Claimant's. And the effect on Claimant as a result of the employer's alleged action (not providing Johnson with adequate water on the job site) was unforeseeable. Although Johnson's dehydration caused the accident, it did not cause Claimant's involvement in the accident; Claimant's decision to ride with Johnson occurred beyond the time and space limits of employment, and neither Johnson's dehydration nor anything else about the conditions of employment put Claimant in Johnson's car. *See generally Sedgwick CMS v. Valcourt-Williams*, 271 So. 3d 1133, 1138 (Fla. 1st DCA 2019) ("If industry does not contribute to the risk of the accident resulting in injury, the workers' compensation law does not require industry to contribute to the cost of the injury." (quoting *Sentry Ins. Co. v. Hamlin*, 69 So. 3d 1065, 1071 (Fla. 1st DCA 2011))). In sum, the accident that caused Claimant's injuries did not arise out of the course and scope of Claimant's employment. To apply *Strother* here would be to extend it too far.

Turning to the cross-appeal, we affirm Blue Goose's dismissal from the workers' compensation proceedings because any coverage would be imputed to LFI as Claimant's general employer under section 440.11(2). But to be clear, there is no coverage here because there is no compensability; the going and coming rule precludes it, and no exception applies.

REVERSED and REMANDED for proceedings consistent with this opinion.

ROBERTS and MAKAR, JJ., concur; ROWE, C.J., concurs with an opinion joined by MAKAR, J.

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

ROWE, C.J., concurring.

I fully concur in the majority opinion but write separately to explain the effect of Claimant's tactical decisions in the two related actions. Claimant has received somewhat conflicting rulings as to the proper forum for him to seek compensation for his injuries. On the one hand, in this appeal of the JCC's order, we hold that Claimant's injuries are not compensable under chapter 440, Florida Statutes because the accident that caused his injuries did not arise out of work Claimant performed in the course and the scope of employment. On the other hand, in the circuit court action, the trial court concluded—in its ruling on Blue Goose's summary judgment motion—that chapter 440 provides the exclusive remedy for injuries Claimant may have sustained.

But despite our ruling that Claimant is not entitled to workers' compensation benefits, Claimant may be unable to now advance his negligence claims against LFI in circuit court. Claimant did not appeal the trial court's ruling that Blue Goose was entitled to worker's compensation immunity. *See* Fla. R. App. P. 9.130(a)(3). As to LFI, because it did not move for summary judgment in the circuit court, the court never considered whether LFI was entitled immunity under the exclusive remedy provisions of chapter 440. And as to the trial court's ruling on the merits of the negligence claims, Claimant never challenged the trial court's summary judgment ruling.

Instead, Claimant voluntarily entered into a joint stipulation with Blue Goose agreeing to dismiss his action against it with prejudice. *See* Fla. R. Civ. P. 1.420(a). Claimant then filed a notice voluntarily dismissing his claims against LFI. And because the

trial court entered final judgments dismissing the civil actions against Blue Goose and LFI, Claimant may now be unable to seek to advance his negligence claims against either employer. *See Kelly v. Colston*, 977 So. 2d 692, 694 (Fla. 1st DCA 2008) ("The effect of a voluntary dismissal prior to submission is immediate, final, and irreversible. It terminates the litigation and instantaneously divests the court of its jurisdiction to enter further orders."); *see also Randle-E. Ambulance Serv., Inc. v. Vasta*, 360 So. 2d 68, 69 (Fla. 1978) ("The benefit of the dismissal privilege must carry with it commensurate responsibility . . . for counsel, as an officer of the courts, to ascertain the need for and the consequence of a voluntary dismissal before removing a client's cause from the adjudicatory process which counsel has set in motion."). For better or worse, the decision to voluntarily dismiss the civil court action against LFI to seek benefits under chapter 440, "like so many others which attend counsel's judgmental decisions" may leave Claimant with no forum to test his claims. *Id*.

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