NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY TERM, A.D. 2001

INSERVICES, INC. f/k/a MANAGED CARE USA SERVICES, INC., a North Carolina corporation, and MIPPY HEATH, individually,	**	
Appellants,	**	
vs.	**	CASE NO. 3D01-867
RODRIGO AGUILERA and PATRICIA AGUILERA, his wife,	**	LOWER TRIBUNAL NO. 00-15118
Appellees.	**	

Opinion filed October 31, 2001.

A Non-Final Appeal from the Circuit Court for Dade County, Barbara S. Levenson, Judge.

Rumberger, Kirk & Caldwell and Joshua D. Lerner and David J. Pyper, for appellants.

Friedman & Friedman; Lauri Waldman Ross, for appellees.

Before GERSTEN and SHEVIN, JJ., and NESBITT, Senior Judge.

SHEVIN, Judge.

Inservices, Inc., and Mippy Heath, appeal an order denying a motion to dismiss the Aguileras's amended complaint.[1] We reverse

[1] We have jurisdiction. Fla. R. App. P. 9.130(a)(3)(C)(v).

the denial as to the bad faith, breach of contract and declaratory judgment counts. However, we affirm the denial as to the intentional infliction of emotional distress count.

The facts in this case are fully set out in the Aguileras's amended complaint:

FACTS COMMON TO ALL COUNTS

> 8. On April 21, 1999, plaintiff Aguilera was injured at a Publix warehouse on NE 183rd Street when an electric fork lift operated by a Publix employee struck him and pushed him against a pallet. Plaintiff suffered immediate injuries to his back and right leg and was transported to Palmetto Hospital Emergency room. Palmetto medical records reflected, that at the time, that plaintiff simply had blood in his urine. An emergency room physician diagnosed an infection and gave the Plaintiff a prescription for necessary medication.
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> 9. Immediately following his injuries, Plaintiff received medical care supervised and controlled by Managed Care USA Services, Inc., n/k/a Inservices, Inc. defendant here, and its employees and agents. On instructions of the Defendant, Plaintiff was referred to a workers compensation clinic and, on May 12, 1999, was discharged to return to work with restrictions.
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> 10. Subsequently Plaintiff began to complain of kidney and/or bladder pain. On May 24, 1999, plaintiff's workers compensation attorney filed an initial "request for assistance," requesting inter alia Inservices' authorization for a board certified urologist to examine and treat the Plaintiff. From that point forward, the defendants did everything in their power to block medical treatment that it had actual notice Plaintiff needed, and by doing so recklessly endangered plaintiff's life, and engaged in a pattern of action substantially certain to bring about his death.
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> 11. Inservices first denied Plaintiff any authorization for urologist treatment, ostensibly because it was not "work related."

12. On June 17, 1999, Inservices was notified that Plaintiff's urological care was now an "emergency" because the Plaintiff's urine had begun to smell like feces.

13. On June 21, 1999, Plaintiff was advised that his workers compensation benefits were being terminated as of July 9, 1999, notwithstanding the report of two doctors, including Defendant's own doctor that he should not return to work.

14. On June 25, 1999, Inservices blocked Plaintiff's receipt of the prescription medication prescribed to him by the hospital emergency physician, for his urinary tract infection.

15. On June 30, 1999, the defendant denied Plaintiff's emergency request for the care of a urologist, this time on the ostensible basis that it was not "medically necessary." At this time defendant had within its possession medical care information showing directly the opposite.

16. On July 7, 1999, Inservices was advised by Plaintiff's treating physician that his need for a urological consult was now "urgent," and that his condition was "deteriorating."

17. On July 9, 1999, Defendant's own doctor, Alan Dansky, gave Plaintiff prescriptions for various urinary tests to take place, and the appointments were scheduled by Defendant's own nurse.

18. On July 29, 1999, Defendant's adjuster unilaterally canceled some of this medical testing. Testing which was performed (a retrograde urethrogram) reflected that Plaintiff had a fistula or a hole in his bladder.

19. On August 6, 1999, Defendant Mippy Heath introduced herself as defendant's new "case manager." She was specifically advised not to deal with Plaintiff directly and agreed not to perform on site case management services directly, or to interfere with plaintiff's care.

20. On August 19, 1999, Plaintiff's counsel alerted Defendant's adjuster that he needed a general surgeon to perform emergency surgery on the fistula.

> Defendant's new nurse consultant/case manager Mippy Heath refused to authorize the emergency surgery, and insisted on a second opinion.
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> 21. On August 25, 1999, notwithstanding her agreement with Plaintiff's counsel, Mippy Heath showed up for the Plaintiff's urology appointment with Dr. Campeatore, the defendant's IME urologist. Ms. Heath then advised the Plaintiff to lie to his workers compensation lawyer, and tell his lawyer that she was not at the doctor's office.
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> 22. Defendant insisted on the administration of tests that were painful to Plaintiff and contraindicated by his then-present medical condition. Defendant then used Plaintiff's refusal to submit to these painful tests as a further excuse to refuse Plaintiff's now critical, surgical treatment.
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> 23. By November 4, 1999, defendant's own case manager and nurse practitioner agreed that plaintiff needed immediate hospitalization for surgery. Defendant's adjuster overruled its nurse because it ostensibly wanted a second opinion from a general surgeon. However, Defendant did not authorize plaintiff's consult with a "general surgeon," but instead sent him to a gastroenterologist. At this point in time, Plaintiff had been urinating feces and blood for over six months.

Based on these allegations, the Aguileras sued the workers compensation carrier/administrator, Inservices, Inc., and Mippy Heath, the case manager [collectively "defendants"]. The complaint asserted causes of action for common law bad faith, breach of contract, declaratory judgment and intentional infliction of emotional distress. Defendants filed a motion to dismiss the complaint asserting workers' compensation immunity. The trial court denied the motion finding that the acts alleged fell outside the scope of the immunity. We agree, in part.

A motion to dismiss tests whether the plaintiff

> has stated a cause of action. Because a ruling on a motion to dismiss for failure to state a cause of action is an issue of law, it is reviewable on appeal by the de novo standard of review. When determining the merits of a motion to dismiss, the trial court's consideration is limited to the four corners of the complaint, the allegations of which must be accepted as true and considered in the light most favorable to the nonmoving party.

Bell v. Indian River Memorial Hospital, 778 So. 2d 1030 (Fla. 4th DCA 2001)(citations omitted). The allegations in the amended complaint, as set out above, sufficiently demonstrate that the Aguileras have stated a cognizable action for intentional infliction of emotional distress that survives dismissal on workers' compensation immunity grounds.

Florida's workers' compensation scheme was designed "to assure the quick and efficient delivery of disability and medical benefits to an injured worker and to facilitate the worker's return to gainful reemployment at a reasonable cost to the employer." § 440.015, Fla. Stat. (1999). In exchange for affording employees these benefits, an employer is shielded by statutory immunity from suit. § 440.11, Fla. Stat. (1999). Nevertheless, that immunity does not shield an employer from lawsuits alleging intentional torts. Turner v. PCR, Inc., 754 So. 2d 683, 684 (Fla. 2000); Eller v. Shova, 630 So. 2d 537, 539 (Fla. 1993).

The defendants accurately represent the well-accepted proposition that absent an act independent of handling a claim, no tort action can be brought against a workers' compensation

insurance carrier. Old Republic Ins. Co. v. Whitworth, 442 So. 2d 1078 (Fla. 3d DCA 1983); Montes de Oca v. Orkin Exterminating Co., 692 So. 2d 257 (Fla. 3d DCA), review denied, 699 So. 2d 1374 (Fla. 1997). However, a review of the facts pled in the amended complaint, which must be accepted as true, demonstrate that this case goes beyond mere claims-mishandling allegations and asserts independent acts that rise to the level of an actionable intentional tort.

In Turner v. PCR, Inc., 754 So. 2d 683, 684 (Fla. 2000), the Florida Supreme Court "reaffirm[ed] the existence of an intentional tort exception to an employer's immunity, and h[e]ld that the conduct of the employer must be evaluated under an objective standard." Aguileras' facts, evaluated under the Turner standard, demonstrate that Aguilera has stated a cause of action for intentional infliction of emotional distress, that divests the carrier of workers' compensation immunity.

The facts alleged in the amended complaint do not describe a carrier who "makes the intentional decision to terminate benefits or takes some other intended action to adjust a claim[.]" Rather, Aguilera's amended complaint asserts intentional tortious behavior by Inservices and by the case manager - who went so far as to show up at Aguilera's urologist appointment and suggest that he lie to his attorney and say she was never there. The allegations here go beyond mere assertions of willful delays in payment, see Old Republic, or assertions that injuries were

exacerbated because of payment or service delays. Sheraton Key Largo v. Roca, 710 So. 2d 1016 (Fla. 3d DCA), review denied, 728 So. 2d 204 (Fla. 1998); Sullivan v. Liberty Mut. Ins. Co., 367 So. 2d 658 (Fla. 4th DCA), cert. denied, 378 So. 2d 350 (Fla. 1979). Instead, these allegations of intentional torts by the defendants constitute conduct not shielded by the workers' compensation immunity. See Turner; Cunningham v. Anchor Hocking Corp., 558 So. 2d 93 (Fla. 1st DCA), review denied, 574 So. 2d 139 (Fla. 1990).

The Florida Supreme Court "has recognized an intentional tort exception to the worker's compensation statutory scheme. . . . [W]orker's compensation law does not protect an employer from liability for an intentional tort against an employee." Turner, 754 So. 2d at 686-87. The allegations in this amended complaint satisfy the "bases for an employee to prove an intentional tort action against an employer." Id. The amended complaint clearly alleges that defendants "intentionally engaged in conduct that was substantially certain to result in injury or death." Id. This is sufficient to survive a workers' compensation immunity dismissal motion.

It is of no moment that the action in this case is against the carrier and case manager, and not against the employer. It follows logically that if a carrier is shielded by the same immunity as an employer, Old Republic Ins. Co.; Sullivan, the carrier is also amenable to suits for intentional torts, under

the exception as the employer would be. Sullivan. There is no logic to making a distinction between the carrier and the employer for purposes of an intentional tort claim, when no such distinction is made for any other purpose. Indeed, as recognized in Sullivan, 367 So. 2d at 661, "it appears the immunity granted under the statute was not intended to cover instances where a carrier intentionally harms the employee." It is beyond peradventure to assert that a carrier can commit intentional torts with impunity when the employer cannot do the same.

In this case, as in Connelly v. Arrow Air, Inc., 568 So. 2d 448, 451 (Fla. 3d DCA), review denied, 581 So. 2d 1307 (Fla. 1990), the behavior exhibited by the defendants meets the test set in Turner, for an employee to prove an intentional tort under the exception: conduct that will "-to a substantial certainty-" cause serious injury to, or the death of the employee. Turner; Cunningham. This court has observed that "the cases that have actually applied the Turner doctrine, especially Turner itself, have characteristically involved a degree of deliberate or willful indifference to [the] employee . . . ." Pacheco v. Florida Power & Light Co., 784 So. 2d 1159, 1163 (Fla. 3d DCA 2001). The defendants here exhibited the same deliberate and willful indifference to Aguilera. Hence, the immunity cannot extend to shield defendants from the intentional infliction of emotional distress claim.

Any alternative holding would require us to adopt

defendants' argument that once an employee files a claim, the employee has already been injured and the carrier is free to proceed and behave in any manner it desires. We cannot fathom that this was the intent of the legislature in creating the workers' compensation scheme. We decline to so hold here.

We do reverse, however, the denial of the dismissal motion as to the bad faith, breach of contract and declaratory judgment counts. These allegations do not rise to the level of actionable torts sufficient to overcome the immunity. See Old Republic.

This disposition makes it unnecessary to reach the defendants' remaining point on appeal.

Affirmed in part; reversed in part.

Nesbitt, Senior Judge, concurs.

GERSTEN, J. (concurring in part and dissenting in part).

I respectfully dissent to that part of the majority opinion which affirms the denial of the motion to dismiss on the intentional infliction of emotional distress count. Established precedent provides that alleged malfeasance in a carrier's handling of a claim pursuant to a workers' compensation insurance contract is exclusively covered by the workers' compensation statutes. I would reverse.

The facts bear repeating to more clearly focus on the point at issue. Appellant, Inservices, Inc., f/k/a Managed Care USA Services, Inc. ("Inservices") provided workers' compensation benefits to the employer of appellee Rodrigo Aguilera ("Aguilera"). Aguilera was injured in a work-related accident when he was struck by an electric fork lift in April of 1999. Inservices referred Aguilera to a workers' compensation clinic where he was treated and eventually discharged to return to work with restrictions.

A few weeks later, Aguilera began to complain of kidney and bladder pain. After examination by two doctors who both recommended that Aguilera not return to work, Aguilera's workers' compensation attorney requested examination and treatment by a board certified urologist. Inservices denied the request claiming the injury was not work-related.

In June of 1999, Aguilera notified Inservices that he was

passing feces through his urine and was in need of immediate urological care. Three days later, Aguilera was advised that his workers' compensation benefits were being terminated. Inservices denied the emergency request for medical care claiming it was not medically necessary.

Several weeks later, Aguilera's treating physician again advised Inservices that the need for urological care was urgent and that his condition had deteriorated. The results of a retrograde urethogram revealed Aguilera had a hole in his bladder. A new case manager was assigned to Aguilera's case, defendant/appellee Mippy Heath ("Heath"), however, Heath rejected Aguilera's request that a general surgeon perform immediate emergency surgery on his fistula. She insisted on a second opinion and the administration of tests which, according to Aguilera, were painful and contraindicated by his medical condition. Heath thereafter sent Aguilera to a gastroenterologist.

After seeing six doctors in addition to his initial treating physician, and after urinating feces and blood for over 10 months, Aguilera's surgery was authorized on March 22, 2000. Aguilera filed suit against the defendants, seeking damages for common law bad faith and breach of contract against Inservices, for intentional infliction of emotional distress against Inservices and Heath, and seeking a declaration that the workers' compensation exclusivity rule is unconstitutional to the extent it eliminates claims for subsequent malfeasance of a carrier.

The defendants moved to dismiss on various grounds including the defense of workers' compensation immunity under the Workers' Compensation Act (the "Act"). The trial court denied the motion. While I agree that the allegations in Aguilera's complaint unquestionably set forth egregious circumstances, in my view established precedent coupled with the plain language of the Workers' Compensation Act requires reversal.

This Court previously established that the test to determine if workers' compensation bars a tort action, is whether the injury for which a plaintiff seeks recovery is covered by the Workers' Compensation Act. See Old Republic Insurance Co. v. Whitworth, 442 So. 2d 1078 (Fla. 3d DCA 1983). Simply stated, if the injury is covered by the Act, a separate tort action in circuit court is barred.

Thus, in Old Republic Insurance Co. v. Whitworth, 442 So. 2d at 1078, we dismissed the plaintiff's tort claim because workers' compensation provided a remedy for the allegations of delayed payment and bad faith. In so doing, we specified that: "[A] compensation claimant cannot avoid the exclusivity of the Act and transform a delay in payments into an actionable tort cognizable in the Circuit Court simply by calling that delay outrageous, fraudulent, deceitful or an intentional infliction of emotional distress." Old Republic Insurance Co. v. Whitworth, 442 So. 2d at 1079. See also Sheraton Key Largo v. Roca, 710 So. 2d 1016 (Fla. 3d DCA 1998)(workers' compensation immunizes a carrier from

a tort action based on alternative allegations of outrageous, fraudulent and deceitful conduct or for intentional infliction of emotional distress committed while handling a claim); Montes De Oca v. Orkin Exterminating Co., 692 So. 2d 257 (Fla. 3d DCA 1997)(allegations of delay, outrageous misconduct, and intentional infliction of emotional distress in handling claim, fall within exclusive jurisdiction of workers' compensation judge).

We further noted the history and objectives of the workers' compensation laws, and expressed our concerns that "if delay in providing services could become the subject of an independent suit, the legislatively designed exclusivity of the act would be destroyed." Old Republic Insurance Co. v. Whitworth, 442 So. 2d at 1079 (citing Sullivan v. Liberty Mut. Ins. Co., 367 So. 2d 658 (Fla. 4th DCA 1979), cert. denied, 378 So. 2d 350 (Fla. 1979)). The legislative intent expressed in the workers' compensation law is that a claimant's exclusive remedy for misconduct in the rendition of medical care lies solely with the commission, and not through independent third party court actions.[2]

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[2]As noted in Sullivan v. Liberty Mut. Ins. Co., 367 So. 2d at 660 (quoting Noe v. Travelers Insurance Co., 342 P. 2d 976 (Cal. 1959), if a carrier is liable for all intentional torts which occur after a workplace injury, the present workers' compensation system would be effectively eliminated:

> "if delay in medical service attributable to a carrier could give rise to independent third party court actions, the system of workmen's compensation could be subjected to a process of partial disintegration. In the practical operation of the plan, minor delays in getting medical service, such as for a few days or even a few hours, caused by a carrier, could become the bases of independent

This is not to say that a compensation carrier is immune from all intentional torts. The workers' compensation scheme does not immunize a compensation carrier from wrongdoing which occurs independently of its claims handling. Sibley v. Adjustco, Inc., 596 So. 2d 1048 (Fla. 1992) (adjuster who fraudulently edited the statement of a claimant which results in the denial of benefits constitutes an intentional act independent of the handling of a workers' compensation claim); cf. Associated Indus. of Fla. Property & Cas. Trust v. Smith, 633 So. 2d 543 (Fla. 5th DCA 1994) (it is not an independent tort for a workers' compensation carrier to withdraw benefits, as a wrongful termination can be remedied under the statute). Thus once a trial court determines a plaintiff does have a remedy under the Workers' Compensation Act, the only remaining issue to be considered prior to dismissal is whether the plaintiff's allegations involve wrongdoing independent of the workers compensation claim.

Neither the majority opinion nor Aguilera contest the fact

> suits, and these could be many and manifold indeed. The uniform and exclusive application of the law would become honeycombed with independent and conflicting rulings of the courts. The objective of the Legislature and the whole pattern of workmen's compensation could thereby be partially nullified."

This reasoning is further supported not only by Florida case law, but by cases from numerous other jurisdictions which have addressed allegations of flagrant interference by a carrier in rendition of medical care, and which have all concluded that the worker's sole remedy lay in compensation proceedings under the Act. See Old Republic Insurance Co. v. Whitworth, 442 So. 2d at 1078, and cases cited therein.

that Aguilera does have remedies under the Act. The Act contains several provisions which directly address Aguilera's allegations that the defendants lied to him concerning available benefits, refused to schedule appointments with physicians, wrongfully attempted to deprive or ignored his request for medical treatment and insisted upon tests to evaluate his medical condition which were contradicted by his medical condition.[3] Rather the thrust of the majority opinion seems to adopt Aguilera's primary contention that the exclusivity provisions of the workers' compensation statutes do not bar the intentional tort claim allegedly because the carrier's malfeasance constitutes an independent act. I respectfully disagree.

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[3]If a carrier "lies" regarding available benefits, such statements constitute a criminal offense and subject the carrier to penalties under Section 440.105, Florida Statutes (2000). The Department of Insurance is authorized to revoke or suspend the authority of a workers' compensation carrier for violation of Section 440.105. See §440.106(3), Fla. Stat. (2000). Damages for bad faith are also authorized by the Act. See Florida Erection Serv., Inc. v. McDonald, 395 So. 2d 203 (Fla. 1st DCA 1981).

A claimant has a number of remedies if a workers' compensation carrier wrongfully attempts to, or deprives or ignores, a request for medical treatment. Section 440.20, Florida Statutes (2000), sets a deadline for the timely payment of compensation claims and establishes penalties for late payments. Pursuant to Section 440.34(3), Florida Statutes (2000), a claimant can recover attorneys' fees from the carrier in a claim for medical benefits. Further, Section 440.192, Florida Statutes (2000), provides a procedure for resolving any benefit disputes between a carrier and a claimant and sets strict deadlines for dispute resolution.

A carrier is entitled to request an independent medical examination concerning compensibility or medical benefits. See § 440.13, Fla. Stat. (2000). However, if a claimant believes the exam would be inconsistent with his medical condition, he can seek relief from a judge of compensation claims who has the power to deny a carrier's request. See Watkins Eng'g & Constructors v. Wise, 698 So. 2d 294 (Fla. 1st DCA 1997); Fla. R. Work. Comp. P. 4.065. Aguilera thus does have remedies under the Act.

In order for an independent tort to exist, there must be facts that are distinct from a breach of contract. See Invo Florida, Inc. v. Somerset Venturer, Inc., 751 So. 2d 1263 (Fla. 3d DCA 2000); HTP, Ltd. v. Lineas Costarricenses S.A., 685 So. 2d 1238 (Fla. 1996). Here, all of Aguilera's allegations deal with the manner in which his claim was handled by the defendants pursuant to the workers' compensation insurance contract. Since all of the allegations relate to the defendants alleged breach of contractual obligations under the workers' compensation policy, no independent acts have been alleged and thus there is no independent tort. See Sullivan v. Liberty Mut. Ins. Co., 367 So. 2d at 658. Aguilera's injuries arising from any delays in medical treatment were incidental to his original injury and compensable by his employer's compensation carrier. See Old Republic Insurance Co. v. Whitworth, 442 So. 2d at 1079.

Simply, Aguilera does have remedies under the Act, and the allegations of malfeasance in the carrier's handling of the claim are insufficient to come within any exception to the statutory immunity provided by Section 440.11, Florida Statutes (2000). See Sheraton Key Largo v. Roca, 710 So. 2d at 1016; Old Republic Insurance Co. v. Whitworth, 442 So. 2d at 1078; Sullivan v. Liberty Mutual Insurance Co., 367 So. 2d at 658. Accordingly, applying

this Court's precedent in cases involving insurance carriers,[4] I would find the trial court erred in holding the cause of action was not barred by the Act, and would reverse and remand with instructions to enter a final order dismissing the complaint.

[4]Since the position advanced by the majority contradicts prior decisions of this Court and express legislative policy, I believe any decision to affirm should only be made by this Court en banc.