

Case Law Update for TPD/TTD

by Heather Byrer Carbone

We are getting all too familiar with cancellations of some of our favorite conferences and seminars this year. With the unfortunate cancellation of the Workers' Compensation Claims Professionals Forum in April, we missed the opportunity to present a case law update on recent cases regarding temporary total disability (TTD) and temporary partial disability (TPD). As such, I've put together the following update of recent 2020 DCA decisions regarding claims for temporary indemnity benefits.

Krysiak v. City of Kissimmee, Toho Water Authority, Preferred Government Claims Solutions

First DCA #18-5241 (2/13/2020)

Judges: Wolf, Jay, and Kelsey

This claim involved a date of accident from October 12, 2016, where the claimant appealed the judge of compensation claims' (JCC's) order finding the claimant could not choose his own one-time change physician and he was not entitled to TPD benefits due to misconduct. The DCA affirmed the JCC's order on the one-time change, as even though the employer/carrier did not timely respond to the one-time change request, the claimant acquiesced to the employer's/carrier's choice of physician. The claimant attended the appointment and thus gave up his right to select his own choice of doctor.

The DCA reversed the JCC's decision on misconduct. The employer argued the claimant had violated the employer's policy on substance abuse, as the human resources (HR) director noted the claimant was "under the influence" of alcohol while at work. The HR director testified the claimant's test came back positive for presence of alcohol or drugs twice, but the test was not submitted as evidence at the final hearing. The JCC ruled that under the totality of the circumstances, the claimant was terminated for misconduct. The DCA found that without authenticated evidence of the positive test, the HR director's testimony was inadmissible hearsay, and given the absence of competent substantial evidence in support of the finding of misconduct, the JCC's order was reversed. Judge Kelsey entered a dissenting opinion on the issue of misconduct.

Medina v. Miami Dade County and Risk Management of Dade County

First DCA #19-1410 (7/15/2020)

Judges: M. K. Thomas, Bilbrey, and Ray

This case involved a date of accident from August 8,

2017. The claimant appealed a denial of TPD benefits and the reinstatement of personal leave benefits. He sustained a compensable work injury and underwent knee surgery on January 8, 2019. He was placed on TPD following his surgery through the date of the final hearing. The claimant received two TPD checks and then indemnity was subsequently discontinued for several pay periods. The adjuster testified the claimant received full pay from the employer's payroll and this amount was deducted from the claimant's personal sick or leave time, but his leave time would eventually be reinstated since the payments were made for a compensable workers' compensation claim. The JCC found the claimant had been paid correctly for the time periods at issue and the claimant was entitled to have his leave time reinstated to the sick bank in accordance with the employer's policies. The claimant appealed the order and argued the JCC did not have jurisdiction to order reinstatement of personal leave benefits.

The DCA reviewed the issue de novo, as it involved undisputed facts of law. The DCA found the employer failed to pay compensation or furnish benefits pursuant to Florida Statutes section 440.09, as the record simply established the claimant paid himself through personal sick leave. The DCA found there was no evidence the employer reinstated or "bought back" the sick leave from the claimant. The employer also argued the wages were paid in lieu of benefits, but the DCA held this act must clearly be understood between the employee and the employer pursuant to *City of St. Augustine v. Allen*, 404 So. 2d 1240 (Fla. 1st DCA 1998). The employer has to understand wages are being paid in lieu of Chapter 440 benefits, not as sick pay, which is what the current employer was doing. Finally, the DCA opined the JCC did not have jurisdiction to order reinstatement of personal leave. The DCA held "subject matter jurisdiction of a JCC extends to personal leave matters only when: (1) statutory disability compensation benefits are awarded to a claimant; (2) the claimant has received employer-provided benefits for the same period of time covered by the disability compensation award; and (3) the employer-provided benefits qualify for an offset under section 440.20(14)." Because the underlying order

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TPD/TTD Case Law, continued

from the JCC denied the TPD benefits, the JCC lacked jurisdiction regarding same. As such, the DCA reversed the JCC's order and remanded for entry of an order awarding TPD benefits for the dates at issue.

Guerlande v. Delray Beach Fairfield Inn/Traveler Insurance

First DCA #19-2104 (8/20/20)

Judges: Rowe, Makear, and Tanenbaum

In this claim involving a date of accident from September 11, 2018, the claimant appealed the JCC's order denying 12 days of TPD benefits, which occurred approximately six weeks after her work accident. The claimant received treatment at an urgent care clinic immediately following the injury and was given work restrictions. Several weeks later, she returned and was offered an injection but declined. She was not given any work restrictions during this time period. Subsequently, the claimant returned to the urgent care 12 days later and elected to undergo the injection, and was again placed on work restrictions. She began receiving TPD benefits following that visit. The JCC opined that the claimant did not satisfy her burden of showing that work restrictions existed during the 12-day period. Both a treating physician and a reviewing physician found the lack of

work restrictions during this brief period reasonable and appropriate. The claimant argued "uncontroverted facts" supported the award of TPD benefits, but the DCA disagreed, as there was no evidence of disability presented during this time period, and the JCC's decision was upheld by competent substantial evidence and affirmed.

Summary

Given that it comes up on nearly every litigated claim, we can be assured of a plethora of new case law each year on TTD and TPD benefits. The overriding theme of the three recent cases from 2020 is for attorneys on both sides to ensure that admissible competent substantial evidence supporting their positions is before the JCC. Be careful not to have the crux of your case rely on hearsay evidence or fail to provide a witness that has firsthand knowledge supporting your claim or defense. Regardless of whether your hearings are via Zoom or in person and socially distanced, ensure you have the proper fact witnesses and authenticated documentary evidence lined up before final hearing.



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