FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D19-1141

ZENITH INSURANCE COMPANY
and ONE HOSPITALITY, LLC,

Appellants,

v.

JENNY BARRIZONTE CRUZ,

Appellee.

On appeal from an order of the Judge of Compensation Claims.
Rita L. Young, Judge.

Date of Accident: August 3, 2018.

February 12, 2020

PER CURIAM.

This is a workers' compensation appeal in which the Employer/Carrier (E/C) challenge the Judge of Compensation Claims' (JCC's) award of attorney's fees payable to Claimant pursuant to section 440.34(3)(b), Florida Statutes. Deciding this case requires us to examine the interplay between this statute and the Rules of Procedure for Workers' Compensation Adjudications (codified at chapter 60Q-6 of the Florida Administrative Code). For

the reasons explained below, we affirm the JCC's order awarding entitlement to E/C-paid attorney's fees.

Procedural Background

Claimant filed a petition for benefits via the Office of Judges of Compensation Claims' (OJCC's) electronic filing portal (e-JCC) after five o'clock p.m. on August 22, 2018. The E/C acknowledged receipt after six that night, and the parties agreed that the petition was filed the next day, on August 23rd, and that the thirtieth day after that was September 22, 2018 (a Saturday).[1] The E/C filed a response on August 29th denying the entire claim. On Monday, September 24th, the E/C filed another response in which they rescinded their denial, agreed to provide all requested benefits, and denied fee entitlement. The E/C also issued a check for indemnity benefits that same day.

Claimant then filed a verified petition for attorney's fees pursuant to section 440.34(3)(b), Florida Statutes, asserting entitlement to attorney's fees because she filed a petition, the E/C filed a response to the petition denying the claim, and then accepted the claim and provided all requested benefits.[2] The E/C

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[1] Rule 60Q-6.108(1)(e) provides that documents filed via the e-JCC and received by the OJCC after 5 p.m. are deemed filed the next day, rule 6.108(2)(e) says a petition served via e-JCC (i.e., sent by the OJCC on behalf of the serving party) is deemed received when served, and rule 6.108(3) says that service by email after 5 p.m. is deemed to have been made on the next business day.

[2] Section 440.34(3), Florida Statutes, provides, in relevant part:

> If any party should prevail in any proceedings before a judge of compensation claims or court, there shall be taxed against the nonprevailing party the reasonable costs of such proceedings, not to include attorney's fees. A claimant is responsible for the payment of her or his own attorney's fees, except that a claimant is entitled to recover an attorney's fee in an amount equal to the amount provided for in subsection (1) or subsection (7) from a carrier or employer:

responded by arguing that, according to this statute, successfully prosecuting a petition after denial is alone insufficient for fee entitlement because, regardless of when benefits are requested, fee entitlement does not attach until thirty days after an e/c receives the petition and, here, the E/C provided the requested benefits within this time limit.

In support of their assertion that they timely provided the benefits, the E/C relied on rule 60Q-6.109, which provides that if any act required or allowed to be done falls on a holiday or weekend day, performance of the act is required to be done on the next regular working day. The E/C argued that here, based on the agreed filing (and receipt) date of August 23rd, the thirtieth day thereafter was September 22, a Saturday and, thus, the rescission they filed on the following Monday (the 24th) was timely — thereby preventing fee attachment.

In her initial order, the JCC ruled in Claimant's favor on the ground that the procedural rule (60Q-6.109) cannot supersede the statute (440.34(3)(b)). The E/C sought rehearing, arguing that the rule does not actually conflict with the statute, but rather "explains what 30 days means . . . for purposes of computation of time." The E/C also argued that there was no clear statutory mandate that the Legislature "wanted benefits provided strictly

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> (b) In any case in which the employer or carrier files a response to petition denying benefits with the Office of the Judges of Compensation Claims and the injured person has employed an attorney in the successful prosecution of the petition;
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> Regardless of the date benefits were initially requested, attorney's fees shall not attach under this subsection until 30 days after the date the carrier or employer, if self-insured, receives the petition.

within 30 days to avoid Employer/Carrier paid attorney's fee even when the 30th day falls on a weekend or holiday."

In response, the JCC again ruled in Claimant's favor, but altered her reasoning by pointing out that the OJCC had developed and implemented the "e-JCC program that allows service almost instantaneously" and, thus, complying with the statute's thirty-day deadline was not impossible as it was in *Daly Aluminum Products, Inc. v. Stockslager*, 244 So. 2d 528 (Fla. 1970) (a case the E/C relied on). The JCC also cited *Hinzman v. Winter Haven Facility Operations, LLC*, 109 So. 3d 256 (Fla. 1st DCA 2013), which, the JCC found, held that the response time provided in the statute at issue there was not altered by rule 60Q-6.109. Applying the *Hinzman* analysis to this case, the JCC found that the thirty days referenced in section 440.34(3)(b) meant consecutive or calendar days and that the rule, being procedural or administrative, could not enlarge, modify, or contravene the statute's provisions. The JCC added that, applying the rule so as to extend the thirty-day time period set forth in the statute would operate to move the "yardstick" laid down by the Legislature.

Apparently expanding on her reasoning that procedural rules cannot supersede a substantive statute, the JCC also effectively rejected the parties' agreement that the E/C received the petition on August 23, 2018, and instead took judicial notice of the OJCC's docket, and found that the E/C acknowledged receiving the petition on August 22nd, making the thirtieth day September 21, 2018—a Friday—rendering any attempt to accept the claim after that day untimely to avoid the statute's fee attachment provision.[3] The JCC denied the rehearing motion and this appeal followed.

Analysis

Because this case involves the application of undisputed facts to the law, review is de novo. *See Houck v. Tarragon Mgmt., Inc.*,

[3] The E/C argue that the JCC violated their due process rights by rejecting the parties' stipulation and taking judicial notice of an extra-record source without prior notice. Based on our reasons for affirming the fee award, we need not address the due process issue.

4 So. 3d 73, 75 (Fla. 1st DCA 2009); *Gilbreth v. Genesis Eldercare,* 821 So.2d 1226, 1228 (Fla. 1st DCA 2002).

We first address the question of when the E/C received Claimant's petition.[4] In section 440.45(4), Florida Statutes, the Legislature mandated that the OJCC promulgate "procedural rules applicable to workers' compensation claim resolution, including rules requiring electronic filing." There is no dispute that, according to the applicable rules, all petitions and responses to them must be electronically filed via the e-JCC system (rule 60Q-6.108(1)(b)) and that the petition here was deemed filed on August 23, 2018 (rule 60Q-6.108(1)(e)), and both served and received that same day (rule 60Q-6.108(2)(e) and (3)). These rules do not run afoul of section 440.34(3)(b) because they comply with the legislative mandate in section 440.45 to enact rules with respect to electronic filing. The only impact these rules have on section 440.34(3)(b) is to establish the date an e/c receives a petition for benefits, without which the statute is not implicated in the first place. This date, in turn, starts the thirty-day countdown that must expire before entitlement to attorney's fees attaches.

The parties concede, and we agree, that section 440.34(3)(b) creates a substantive right to an e/c-paid attorney's fee if three prerequisites are satisfied: 1) claimant files a petition for benefits; 2) the e/c deny the petition, and 3) the claimant retains an attorney who successfully prosecutes the petition. *See*, *e.g.*, *Neville v. JC Penney Corp.*, 130 So. 3d 235, 235 (Fla. 1st DCA 2013). Prior to 2002, satisfying these prerequisites was alone sufficient for fee attachment to occur. That year, however, the Legislature amended the statute by adding a provision according to which, even if these prerequisites are satisfied, attorney's fees will not attach "until 30 days after the date the carrier or employer, if self-insured, receives the petition."

[4] Section 440.34(3)(b) makes the date of receipt, not the date of filing, the operative date for determining when the thirty-day period commences.

As this court explained in *Sansone v. Crum*, 201 So. 3d 1289, 1291 (Fla. 1st DCA 2016):

> Attorney's fees under section 440.34(3)(b) require the "successful prosecution of the petition," but fees cannot attach until thirty days after the employer receives the petition . . . Therefore, an award under section 440.34(3)(b) requires some part of the 'successful prosecution' to occur after thirty days. In other words, if the petition fully succeeds before the thirty days run, fees do not attach. (citations omitted).

Thus, even if an e/c denies a petition, so long as it performs the necessary act for accepting the claim or providing the requested benefits (as applicable) within thirty days of receiving the petition, fees do not attach. The crux of this case, therefore, is whether rule 60Q-6.109 can extend the thirty-day deadline when the thirtieth day from the date an e/c receives a petition falls on a weekend or holiday.

The JCC, in both orders, ruled that the 60Q rules, being procedural, do not supersede the substantive statute and, thus, the rule(s) concerning computation of time do not extend the thirty-day period for avoiding fee attachment. In so doing, the JCC relied on *Demedrano v. Labor Finders of the Treasure Coast*, 8 So. 3d 498 (Fla. 1st DCA 2009), and *Hinzman*, 109 So. 3d at 256.

In *Demedrano*, the court, dealing with the issue of whether paralegal time was counted as a "cost" or as "attorney time," rejected the "argument that the question of costs is controlled by a retainer agreement envisioned by the rules regulating the Florida Bar," holding that "[r]ules 'cannot alter, amend or eliminate' a substantive right. *See Heymann v. Free*, 913 So.2d 11, 12 (Fla. 1st DCA 2005)." *Demedrano*, 8 So. 3d at 500.

In *Hinzman*, the court reversed the JCC's order finding that the five-day period found in section 440.13(2)(f) meant "business days," not "calendar days," "because the plain meaning of the statute reveals the Legislature's intent to limit to five consecutive days, or calendar days, the time period within which a 'carrier shall authorize an alternative physician . . .' in response to an

injured employee's written request for a change of physician." 109 So. 3d at 257.

> Seen another way, because the Legislature specified "business days" elsewhere in section 440.13, canons of statutory interpretation (particularly the presumption of consistent usage) dictate that the Legislature's use of the unmodified term "days" here refers to consecutive or calendar days. Although the Legislature used the terms "calendar days" and "consecutive days" in other sections of chapter 440, the wording of those statutes, unrelated to the topic of this statute (permitting injured employees to request "one change of physician during the course of treatment for any one accident" regardless of medical necessity for such), does not affect the analysis of the statute in question here.

Id.

Likewise, section 440.34(3)(b) does not specify "business days"—thus the same canons relied on in *Hinzman* dictate that the term "days" as used in the statute be read to mean calendar days. This conclusion was made more compelling by the fact that the timeframe involved is thirty days, not just five, and because e/c's have complete control over whether they will agree to accept a claim and provide requested benefits. They can also avoid fee exposure by utilizing the process set forth in section 440.20(4), Florida Statutes, which gives them 120 days to provisionally accept the claim while they investigate it without prejudicing their right to deny the claim.

The E/C argue that *Hinzman* should not dictate the outcome here because, unlike a one-time-change request, which does not require a petition for benefits (or litigation), but only a written request, section 440.34(3)(b) does require litigation, so the rule should apply. They argue that this litigation requirement implicates section 440.45 because it requires the OJCC to enact procedural rules pertaining to workers' compensation "claims resolution." As we explained above, the relevant procedural rules concerning filing and receipt of petitions for benefits are clearly applicable because petitions are a necessary prerequisite to fee

entitlement, and they must be filed electronically as contemplated by section 440.45. We also explained that those rules do not infringe on the statutory right that section 440.34(3)(b) bestows because its only impact on that right is to start the countdown for when the right attaches. Applying rule 60Q-6.109 as the E/C would have us do, however, would result in impinging on a claimant's right to carrier-paid fees by expanding the time for an e/c who previously denied the claim to change its mind – a result prohibited for the reasons explained in *Demedrano* and *Hinzman*.

Furthermore, although a petition is a prerequisite for fee entitlement, it is the e/c's receipt of that petition that not only starts the clock on the thirty-day countdown, but also provides the e/c with notice of the deadline and the need to act accordingly if they wish to avoid fee liability. And no formal response need be filed to resolve the dispute over a claimant's entitlement to the benefit(s) at issue and avoid fee liability. For example, in this case, the E/C had notice that the thirty days would expire on a Saturday and decided to rely on rule 60Q-6.109's applicability and wait until the following Monday to file a formal rescission of their earlier denial and mail a check. But, again, they were not obligated to *file* anything to avoid fee liability. Rather, they could have sent an email directly to Claimant's counsel agreeing to accept responsibility for the requested medical benefits, and put the indemnity check in the mail that Friday (or perhaps even that Saturday). Doing these things, neither of which were impossible to do before thirty days expired, would have avoided fee liability. *See*, *e.g.*, *Sansone; Amerimark, Inc. v. Hutchinson*, 882 So. 2d, 1114, 1115 (Fla. 1st DCA 2004).

Conclusion

The substantive right the statute bestows is one of fee entitlement (the exception to the rule), not fee avoidance (which *is* the rule), and unless the Legislature specifies that the time period that must expire before a right attaches is to be calculated using "business" rather than "calendar" days, or is otherwise subject to a procedural rule that extends that period, the rule cannot operate to do so. For these reasons, we affirm the JCC's award of fee entitlement.

WOLF and MAKAR, JJ., concur; B.L. THOMAS, J., concurs in result only.

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

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