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Working for You

Wyeth v. Toscano Court Clarifies Legal Standard Applicable to the Payment of TPD Benefits

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In *Wyeth v. Toscano*, 40 So.3d 795 (1st DCA 2010), the Employer / Servicing Agent appealed the JCC's order awarding TPD benefits. The E/SA argued the award was error because claimant failed to establish a "causal connection" between her compensable injuries and her subsequent loss of wages.

Claimant was employed as a sales representative. She slipped and fell (9/24/07) while performing work in the course and scope of her employment, resulting in compensable injuries. She was eventually released to part-time sedentary employment. The Employer, although having accepted compensability of claimant's accident, did not offer or secure modified work appropriate to her restrictions. While claimant was still recovering, and still precluded from performing her pre-injury job, her employment was terminated in a permanent lay-off involving over a 1,000 other employees. The E/SA then denied TPD on the basis that claimant's loss of earnings was not causally related to her workplace injuries but, rather, was caused by the corporate downsizing; and contested the petition for TPD

on the ground that she was capable of working and was voluntarily limiting her income. The E/SA did not introduce evidence of claimant having refused suitable employment offered; of termination for misconduct; or of claimant having left employment for unjustifiable reasons. E/SA argued claimant could not satisfy her burden of proving a causal relationship between her injuries and the subsequent loss of income because she failed to engage in a job search. The JCC disagreed and concluded that by proving the incapacity to perform her pre-injury job, which resulted in a direct reduction of earnings sufficient to qualify her for TPD, claimant met her burden.

According to the First DCA, once a claimant meets her initial burden of establishing a prima facie showing of a causal connection between the compensable injury and the subsequent loss of income, **the burden shifts to the E/SA** to prove that during the period in which wage loss benefits are claimed, the claimant refused work or voluntarily limited her income. "Claimant was displaced from this employment (and other similar jobs) and its corresponding

wages as a result of her inability to perform the functions of the job before, during, and after the mass lay-off. Claimant's termination did nothing to change the causes of her wage loss; nor did it create an appreciable wage-earning capacity."

A Job Search Is Not Necessary to Establish Entitlement to TPD

Effective January 1, 1994, the TPD statute no longer requires a job search for entitlement to TPD benefits. The Court explained that an inadequate job search does not establish a **lack** of causation between an injury and a loss of wages, especially where such causation is affirmatively established through medical evidence demonstrating the claimant's inability to perform her pre-injury job duties. "Because of the legislative repeal of a job-search requirement, imposing such a requirement on **every** claim for TPD is inappropriate; rather, performing a job search provides an alternate evidentiary means by which an employee may be able to establish disability following a period of successful work."

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Newsletter Challenge

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Accident Dates On or After October 1, 2003—

1) True or False? The administrative rules require the carrier to mail an informational letter to the employee and the employer within 5 business days after the carrier's knowledge of the employee's release to restricted work.

2) True or False? With amendments effective 10/01/03, the legislature made it clear that TPD bene-

fits are payable only if the claimant has not reached overall MMI.

3) True or False? Coupled with medical restrictions, a good faith job search is frequently more than adequate proof of eligibility for TPD benefits.

4) True or False? Indemnity benefits are automatically foreclosed when an injured employee loses a job for reasons unrelated to the industrial accident.

5) True or False? If the employee is terminated from postinjury employment based on the employee's misconduct, TPD benefits are not payable.

Send your answers to:
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Two entries will be drawn from all correct submissions. Winners receive a \$25 gift card.

Attorney Fees Issues

February & March Newsletter Challenge Comments

(1) Awarding attorney fees is proper, even if the finding of compensability does not result in an award of benefits. The First DCA upheld the JCC's ruling in Florida Hospital v. Taylor, 784 So.2d 601 (2001). The only issue was claimant's entitlement to ongoing physical therapy. Because the claim had been denied, she did not obtain professional medical care, but treated herself with home remedies. By the time of the hearing, she was well and no longer needed care, so no actual benefits were awarded. Despite the lack of an award of benefits, the JCC awarded an attorney's fee.

(2)&(3) Section 440.34(3)

lists the four circumstances under which a claimant is entitled to recover an attorney's fee from the E/C. § 440.34(b): "In any case in which the employer or carrier files a response to petition denying benefits with the OJCC and the injured person has employed an attorney in the successful prosecution of the petition;" § 440.34(c): "In a proceeding in which a carrier or employer denies that an accident occurred for which compensation benefits are payable, and the claimant prevails on the issue of compensability."

(4) JCC's are not required to approve fees other than those fees payable to injured workers' attorneys under Section 440.34. Based on some peculiar

language in the Workers' Compensation Act, it first appeared that **defense** attorneys must get court approval of their fees. In Administrative Order I, issued March 16, 1994, the Chief Judge held that section 440.105(3)(b) only requires judicial approval of fees payable to injured workers' attorneys.

(5) A JCC must base the fee award **only** on the benefits the lawyer secured. In other words, the JCC must apply the statutory factors to only those benefits the carrier did not pay timely. Even if an injured worker formerly and properly claimed a benefit, the judge may not include those benefits if the carrier paid them voluntarily and timely.

Congratulations to
LeAnne Hotchkiss
and
Jennifer Buecker!
They answered the
March Newsletter
Challenge questions
correctly, and each
won a \$25 gift card.



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