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Preferred News

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Court Establishes Bright Line Rule Regarding 120-Day Letter

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In May 2015, the First District Court of Appeal established a bright-line rule for application of the 120-day rule. Prior to this recent ruling the general thought was that even if a carrier did not initially controvert a claim or send a 120-day letter, as long as the carrier denied the compensability of the claim within 120 days of the first provision of benefits, the denial was timely.[1] However, the court has made clear that an employer/carrier who does not send a 120-day letter upon the initial provision of compensation or benefits cannot later use the 120-day rule to deny compensability of the claim.

The Case - *Babahmetovic v. Scan Design Florida, Inc.*, --- So.3d ----, 2015 WL 1958999 (Fla. 1st DCA 2015)

"[A]n employer/carrier who pays yet does not provide written notice '[u]pon commencement of payment' cannot avail itself of the 120-day rule to deny compensability, because it has elected to 'pay' rather than 'pay and investigate.'" *Babahmetovic v. Scan Design Florida, Inc.*, 2015 WL 1958999 (Fla. 1st DCA 2015).

In *Babahmetovic*, the claimant lifted a heavy box at work on October 9, 2013 which resulted in low back pain. The E/C authorized an urgent care facility to treat the claimant. The provider diagnosed radiculitis and indicated the injury was work-related. The provider also referred the claimant to a specialist who, on November 15, 2013, diagnosed a resolving lumbar sprain and degenerative disc disease, which pre-existed the date of accident. He also sent a letter to the E/C stating that the cause of the lumbar condition was 60% preexisting and 40% the work injury.

On November 27, 2013 the E/C filed a Notice of Denial stating that the entire claim was denied and that the reason for the denial was that the industrial accident was not the major contributing cause of the need for treatment. *Both parties agreed that this form was intended to be a denial of compensability, or in other words, a statement that there had never been a compensable injury.*

The E/C took the position that it was permitted to deny compensability in its entirety at this point—even after authorizing treatment—because it did so within 120 days after the initial provision of benefits or payment of compensation, as permitted in section 440.20(4), Florida Statutes (2013).

Even though the E/C had filed a Notice of Denial, the claimant requested a one-time change in authorized treating physician, which the E/C denied on the basis that they had denied compensability of the entire claim.

At trial the issues presented to the JCC were whether the work accident was the major contributing cause of the injury (i.e., whether the accident was compensable) and whether the claimant was entitled to a one-time change where there was never a compensable injury.

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Fourth District Court of Appeal Recognizes the Protection of Incident and Safety Reports Under the Work Product Doctrine

By J. David Marsey, Associate - Rumberger, Kirk & Caldwell

In February 2015, the Fourth District Court of Appeal held that the Broward County Circuit Court deviated from the essential requirements of the law when it ordered the production of a company's quarterly safety reports during a slip-and-fall lawsuit.[1] In reversing the trial court's order to produce these reports containing evidence of prior falls, the court reinforced the adage that plaintiffs may not make a case from a defendant's investigation intended to improve safety and manage risk.

In this case, the plaintiff attempted to obtain incident reports and quarterly safety reports containing details about prior falls. The defendant objected to the production of the documents arguing that the requested documents were protected from disclosure by the work product doctrine because they contained photographs, discussions surrounding the incidents and mental impressions regarding the incidents. The trial court agreed that the incident reports were not discoverable, but ordered the production of the safety reports that contained much of the same information.

In reaching its decision that the safety reports were also protected from disclosure, the appellate court recognized that information gathered in anticipation of litigation, including internal investigations, are protected from disclosure absent a showing by the plaintiff that she was unable to obtain substantially equivalent evidence through other means. Importantly, the court recognized that a lawsuit or claim need not be filed to invoke the work product protections. Even reports that are routinely prepared may qualify as work product because experience has shown all retail stores that people who fall in their stores try to be compensated for their injuries and that frivolous claims are sometimes made. If defendants knew their investigative reports were discoverable, it would defeat the reasons for preparing them and would discourage a proactive critical self analysis designed to improve customer safety. A company's decision to fully investigate incidents and to memorialize the findings to protect itself against meritless claims should not, in and of itself, permit the plaintiff to utilize the fruits of their labors.

This case is important because the court recognized that we live in a litigious society and that many abuse the ease in which a lawsuit may be filed. By holding plaintiff's to their burden, the court ratified a defendant's right to fully investigate adverse incidents and to document its findings while minimizing the fear that their efforts to self-regulate will be used against them.

Public and private entities should continue to thoroughly investigate adverse incidents and document their findings as part of a comprehensive risk management program.

[1] Mallard Mall Services, Inc. v. Bolda, 155 So. 3d 1272 (Fla. 4th DCA 2015).

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