A Look at the Interplay Between Unemployment Law and Workers' Compensation law in Florida

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For many in the workers' compensation section, the interplay between workers compensation law and unemployment as dealt with in the day to day 440 practice is an under explored area indeed. Often times, there are many opportunities for both the defense and claimant sides which are often overlooked, or at the very least, underutilized. This article endeavors to more closely examine the relationship between these two related areas of the law, while providing analysis of practical applications of this relationship.

Misconduct

The so called "misconduct defense" is grounded in F.S. 440.15(4)(e), which states "If the employee is terminated from post-injury employment based on the employee's misconduct, temporary partial disability benefits are not payable as provided for in this section." Thus, at the outset of our analysis, it is important to note that termination for misconduct is not at all a defense to payment of TTD benefits. As a practice note, a separation must be made between the concepts of misconduct and termination for cause, as termination for cause does not rise to the level of supporting a bar on TPD benefits.

"Misconduct" is defined in F.S. 440.02(18) for worker's compensation purposes:

> "Misconduct" includes, but is not limited to, the following, which shall not be construed in pari materia with each other:
>
> (a) Conduct evincing such willful or wanton disregard of an employer's interests as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of the employee; or
>
> (b) Carelessness or negligence of such a degree or recurrence as to manifest culpability, wrongful intent, or evil design, or to show an intentional and substantial disregard of an employer's interests or of the employee's duties and obligations to the employer.

F.S 443.036(29)(a-b) of the Unemployment Compensation Law defines "misconduct" virtually identically to the way the Legislature has defined "misconduct" for workers' compensation purposes:

> "Misconduct" includes, but is not limited to, the following, which may not be construed in pari materia with each other:
>
> (a) Conduct demonstrating willful or wanton disregard of an employer's interests and found to be a deliberate violation or disregard of the standards of behavior which the employer has a right to expect of his or her employee; or
>
> (b) Carelessness or negligence to a degree or recurrence that manifests culpability, wrongful intent, or evil design or shows an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his or her employer.

Surprisingly, there has not been a well developed analysis of misconduct under F.S. 440, and the current leading case on the issue of termination for misconduct originates in the realm of a case which largely noted the analogous language between the unemployment definition of misconduct and the workers' compensation definition, to arrive at some guidelines, as unemployment has somewhat more developed case law on the topic of misconduct. Perhaps a reason for this is that the Florida Supreme Court has "held that where the Legislature uses the exact same words or phrases in two different statutes, we may assume it intended the same meaning to apply." *See Goldstein v. Acme Concrete Corp.,* 103 So.2d 202 (Fla.1958)." *State v. Hearns*, 961 So.2d 211, 219 (Fla. 2007)

In that regard, *Thorkelson v. NY Pizza & Pasta Inc.,* 956 So.2d 542 (Fla. 1st DCA 2007) states "While a violation of an employer's policy may constitute misconduct, for purposes of statute providing that employee is disqualified from receiving unemployment compensation benefits if termination was caused by misconduct, repeated violations of explicit policies, after several warnings, are usually required." Further, "Whether an unemployment compensation claimant commits misconduct connected with work, as would disqualify claimant from receiving benefits is a question of law, but the findings of fact on which the legal question is based must be accepted if supported by competent, substantial evidence." *Id.*

Based upon this verbiage, misconduct is a very fact sensitive inquiry, and the conduct must usually be quite egregious for the defense to be applicable. In that regard, contrary to shying away from this defense on

the Employer/Carrier side, or having a false sense of confidence on the Claimant side, the facts are of paramount importance. Situations involving life and death mistakes, such as claims involving grievous, isolated mistakes by a CNA which jeopardize a patient for example would likely stand even in an isolated scenario. Contrast this with an isolated incident involving clocking out late or arguing with a co-worker and the pertinent, not to be overlooked, element shared by both the 440 and 443 standards comes to the forefront… "*Carelessness or negligence to a degree* or recurrence that manifests culpability."

A very recent JCC ruling evidences the type of facts which can support a misconduct defense, even with only a single act of misconduct. In *Farris vs. Sweetbay / Kash N' Carry*, the claimant worked for the employer as a loss prevention coordinator, observing customers and store associates to prevent theft. Part of her job required her to apprehend shoplifters. The employer provided a Loss Prevention Handbook to claimant. This was a manual which outlined its policies as to how claimant was to stop those she observed shoplifting. According to the claimant supervisor, the loss prevention policy was designed to prevent theft of store products in such a manner as to avoid endangering customers or store employees. Despite this policy/handbook, the claimant endeavored to chase a suspected shoplifter through the store, sustaining injuries as a result. The claimant argued that this did not rise to the level of misconduct, as it was not "repeated" as contemplated by *Thorkelson*. However, the Employer/Carrier focused on the facts of this case as being a specific instance of egregious conduct which stood on its own by virtue of the claimant endangering the customers and employees of the store via her actions. In addition, the claimant had previously been advised as to avoiding over-aggressive conduct, but despite this, went on a wild chase through the store. The JCC reviewed these facts, and determined that "*Thorkelson* did hold that multiple instances of conduct showing disregard of the employer's interests were *usually* required but that is not always the case… *Thorkelson* in my view, stood for the proposition that the employer may prove intent by showing multiple instances of the conduct which violated policy but *did not stand for the proposition that there must always be multiple violations.*" 2012 WL 2060796 (FL.Off.Judge Comp.Cl.).

An example on the unemployment law side of the fence evidencing a single instance of conduct supporting misrepresentation was found in facts where the claimant showed up for a 7:00 am work shift drunk and incapable of driving the employer's truck. The claimant told the office manager that he was very depressed and had drunk extensively the night before and late into the morning. Given that claimant himself admitted that he was drunk, and because the claimant's job was as a truck driver, his actions amounted to conduct demonstrating willful or wanton disregard of employer's interests." *Hubbard v. State, Unemployment Appeals Com'n*, 53 So.3d 1261 (Fla. 4th DCA 2011)

Thus it appears the appropriate standard, and the simplest way of distilling these seemingly disparate, fact sensitive holdings was arrived at by the JCC in Farris who noted "the standard for determining whether a one-time occurrence was misconduct as opposed to merely a firing offense was the characterization of the conduct. If the conduct were egregious or outrageous (such as on-the-job intoxication or insubordination in the presence of others), then a one-time occurrence could demonstrate misconduct. If the conduct were only bothersome or troubling but not necessarily inimical to the employer's interests (such as excessive absenteeism), then multiple instances might be required."

Unemployment Offsets and Indemnity Benefits

Pursuant to F.S. §440.15(10), there are numerous considerations regarding benefits for injured workers receiving unemployment and/or indemnity benefits. First and foremost, F.S. §440.15(10)(a) mandates that "No compensation benefits shall be payable for temporary total disability or permanent total disability under this chapter for any week in which the injured employee has received, or is receiving, unemployment compensation benefits."

Further, F.S. §440.15(10)(b) requires that "If an employee is entitled to temporary partial benefits pursuant to subsection (4) and unemployment compensation benefits, such unemployment compensation benefits shall be primary and the temporary partial benefits shall be supplemental only, the sum of the two benefits not to exceed the amount of temporary partial benefits which would otherwise be payable." This relatively straightforward premise was recently discussed in the case of *Ballard v. Edd Helms Group*, 79 So.3d 88, 89 (Fla. 1st DCA 2011), *reh'g denied* (Feb. 9, 2012). In *Ballard*, the claimant sought penalties and interest on TPD benefits the carrier paid for the period of June 12, 2009 through August 14, 2009. The carrier in *Ballard* was paying the claimant TPD benefits during this time period, while the claimant was also receiving unemployment benefits. However, what makes this case noteworthy is that the claimant was in fact on a TTD work status during the subject time period per his authorized treating provider, and therefore, pursuant to §440.15(10)(a), the carrier was not required to pay the claimant **anything**, rendering the claimant request for penalties and interest for

the period a nullity. As a footnote, the carrier realized this problem… far too late, asserting an overpayment was made only during closing arguments, resulting in waiver of the claim for recoupment of the overpayment.

From *Ballard*, a number of lessons can be gleaned. First, it is vital to confirm with the authorized provider(s) early on, and on an ongoing basis, the exact class of benefits to which a claimant may be entitled, whether TTD, TPD or PTD. If an injured worker is receiving unemployment benefits while on a PTD or TTD status, then there is no basis to ever pay indemnity benefits to an injured worker for this time period, based upon the plain language of F.S. §440.15(10)(a). However, a reading of the controlling section of F.S. §443 results in a seeming paradox. F.S. §443.111(b) requires that "each claimant must… *attest to the fact that she or he is able and available for work*" in order to receive unemployment benefits. However, if an injured worker attests to being able and available to work while on a TTD or PTD work status, then clearly, either the injured worker is incorrect in this assertion or the authorized medical provider is incorrect in their assessment of the injured worker's condition. From a claimant's perspective, this may make receipt of unemployment benefits undesirable in order to receive such benefits one must assert they are able to work, but by doing so, the assertion in the 440 arena that one is unable to work by virtue of the opinion of authorized doctor X is correspondingly weakened. Depending upon the manner by which a claimant navigates through this maze, misrepresentation may also arise as a defense in such a scenario.

If the Claimant is on a TPD work status, then it is essential to identify whether or not the Claimant is receiving unemployment benefits, and then to immediately identify the applicable periods of time and amounts of such benefits so that a recoupment and offset plan may be coordinated and implemented as soon as possible, to avoid possible waiver of same.

Caution When Settling

Depending upon the circumstances of the case, the policies of the carrier, and a host of other considerations, it is commonplace for settlement of a worker's compensation case to involve some component of a voluntary resignation and a general release of any and all possible tertiary claims. While this is acceptable and usually well advised for employers to seek, it is essential to avoid specific references to any type of waiver of unemployment benefits as a specific component of such a document. Pursuant to F.S. 443.041, "Any agreement by an individual to waive, release, or commute her or his rights to benefits or any other rights under this chapter is void… An employer, or an officer or agent of an employer, who violates this subsection commits a misdemeanor of the second degree."

However, this does not mean that Employer/Carrier's are precluded from having a claimant resign as part of settlement. Such a resignation may not be conclusive in an unemployment hearing, but it does serve as a very strong defense. Indeed, the Frist District has previously held that a settlement agreement which included a voluntary resignation was not affected by statute declaring void any agreement to waive unemployment benefits. Accordingly, the agreement, which stated that claimant was voluntarily resigning, precluded award of benefits and the claimant's disqualification from benefits was considered a "collateral consequence," and not the primary purpose, of agreement. *Florida Dept. of Revenue v. Florida Unemployment Appeals Com'n*, 872 So. 2d 376 (Fla. 1st DCA 2004)

Conclusion

Handling a worker's compensation claim often involves some aspect of unemployment law and, therefore, being aware of the unemployment law implications of actions taken in a worker's compensation context can be the difference between success and failure in a claim for both sides. Whether addressing offsets, wording of settlement documents, misconduct, or any of the other areas where these two fields overlap, there is almost always an opportunity to successfully incorporate unemployment law ideas and legal concepts for a favorable outcome.

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