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FLORIDA'S EXPERT MEDICAL ADVISER (EMA) STATUTE IS CONSTITUTIONAL

Teresita DeJesus Abreu v. Riverland Elementary School and Broward County School Board, So.3d
(Fla. 1st DCA June 18, 2019)

In 2015, the Claimant injured her shoulder while at work. The Employer/Carrier accepted compensability of the accident and authorized treatment. The treating doctor performed an arthroscopic shoulder surgery to address a partial rotator cuff tear. Soon thereafter, the Claimant requested an alternate orthopedic physician. That doctor placed the Claimant at maximum medical improvement (MMI) and assigned a zero percent (0%) permanent impairment rating.

The Claimant discontinued treatment with that doctor and sought care with an unauthorized orthopedic physician. That unauthorized doctor recommended additional surgery and the Employer/Carrier authorized an orthopedist who evaluated the Claimant and placed her at MMI on August 6, 2016. That doctor did not recommend further surgery because it was not medically necessary.

In response, the Claimant obtained an independent medical examination (IME), who recommended additional surgical repair as medically necessary. Because of the conflict in medical opinions, the judge appointed an EMA pursuant to Section 440.13(9) Fla. Stat. That doctor concluded the Claimant did not suffer from a full-thickness rotator cuff tear, and no further surgery was medically necessary.

At the merits hearing, the Judge of Compensation Claims (JCC) denied the request for surgery based on the opinions of the EMA. On appeal, the Claimant challenged the constitutionality of Section 440.13(9)(c), the "EMA Statute" as being unconstitutional both facially and as applied.

In a lengthy opinion, the First District Court of Appeal addressed each of the Claimant's challenges and ruled that the statute did not violate Florida's "separation of powers" doctrine. In addition, the statute did not violate the Claimant's procedural due process rights because the EMA's presumption was not irrebuttable and the heightened burden of persuasion did not completely deny the right to present evidence and an opportunity to be heard.

Finally, the Court rejected the argument that the statute was unconstitutional as a violation of equal protection rights under Florida law and the 14th amendment to the U.S. Constitution. The Court said that the statute applied equally to claimants and employer/carriers, and did not run afoul of the equal protection guarantees.

The EMA Statute has been subject to multiple challenges along the lines of the claims asserted in this case. To date, none of those challenges have been successful, although this is the first time that the Court has written a lengthy opinion explaining why the statute is constitutional. While it is too soon to know for sure, there is a possibility the attorneys for the Claimant in this case will attempt to get the issue of the EMA Statute before the Florida Supreme Court. If that becomes the case, we will keep you apprised of that situation.

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