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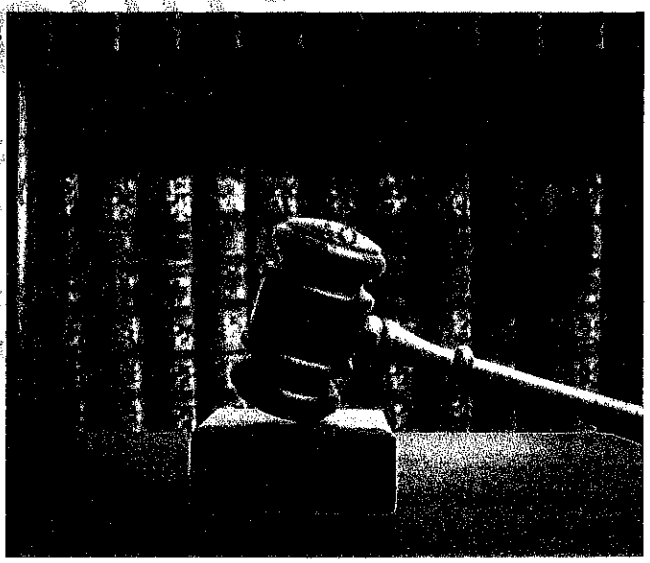
State: Fla.
1st DCA Says Westphal Invalidated 104-week Cap on Temporary Partial Disability Benefits: Top [2016-11-10]

Florida's 1st District Court of Appeal on Wednesday ruled that the state's statutory 104-week cap on temporary partial disability benefits cannot cut off the benefit payments for a worker who has not yet attained maximum medical improvement.



In a case called Westphal v. St. Petersburg decided earlier this year, the Florida Supreme Court declared the state's statutory benefit cap unconstitutional, as applied to a worker who remained totally disabled at the 104-week mark.

The Supreme Court said the cap impermissibly cuts off compensation to claimants if they remain unable to work but are not eligible for permanent disability benefits because they have not yet reached maximum medical improvement.

Because the comp system "deprives an injured worker of disability benefits under these circumstances for an indefinite amount of time" but the system is the sole means through which a worker can seek redress for an industrial injury, the Supreme Court ruled that the comp remedy being afforded to workers in Bradley Westphal's position was not fair and adequate substitute for a tort claim.

The question for the 1st DCA in Jones v. Food Lion was whether the rule from Westphal applies only to those workers who remain disabled after 104 weeks, or just those who are totally disabled for working.

The 1st DCA reasoned that the Supreme Court's justification for striking down Florida Statutes Section 440.15(2)(a) applied with equal force to Section 440.15(4)(e), since both statutes function to cut off benefits to workers after 104 weeks, until they reach MMI.

Since the Supreme Court's decision in Westphal used the doctrine of "statutory revival" to reinstate the last constitutional version of Section 440.15(2)(a), the 1st DCA said it would take the same approach for Section 440.15(4)(e).

As the prior version of both statutes had provided a 260-week cap on benefits, the 1st DCA said Vincent Jones was entitled to the continuation of his temporary partial disability benefits until he reaches MMI or hits 260 weeks.

Jones, the manager of a Food Lion grocery store in Jacksonville, injured his neck and shoulder while at work in October 2011.

He received medical treatment, provided by Food Lion, and his doctor cleared him to return to work, subject to restrictions.

By the time he hit the 104-week mark, Jones was still subject to medical restrictions on his work activities, and he had not yet secured any employment.

In March 2014, Jones filed a petition for benefits seeking permanent total disability benefits even though he had not yet attained MMI.

This was the solution crafted by the 1st DCA in its September 2013 en banc decision in the Westphal matter.

The 1st DCA's ruling had been that a claimant who remains totally disabled at the 104-week point had to be be treated as though he had reached MMI so he could apply for PTD benefits and thereby avoid a lapse in his receipt of indemnity compensation.

Judge of Compensation Claims Ralph J. Humphries denied Jones' petition in July 2015 before the Supreme Court reversed the 1st DCA's decision in Westphal.

Humphries reasoned that the rule from Westphal was inapplicable to Jones since Bradley Westphal was totally disabled and had no potential source of income under the worker's compensation law, but Jones was "physically capable of employment" and had the prospect of income by securing employment within his restrictions.

The JCC also noted that Food Lion said it would voluntarily continue to pay TPD benefits to Jones until he reached MMI, so there would be no actual period of time in which Jones would remain disabled but uncompensated.

Since Jones was not at MMI, and the rule from the 1st DCA's decision in Westphal didn't allow him to be treated as though he were, Humphries concluded that Jones' petition for PTD benefits was premature and accordingly, the JCC dismissed it.

Jones appealed, arguing that the Supreme Court's decision in Westphal ought to apply equally to those who are temporarily partially disabled and those who are totally disabled at the 104-week mark.

The 1st DCA on Wednesday agreed.

As the passage of 104 weeks cuts off the ability of a worker receiving temporary partial disability benefits from the ability to receive any further compensation just the same as it had for workers receiving temporary total disability benefits, the 1st DCA reasoned that both types of workers should be treated the same way.

The 1st DCA said it believed the Supreme Court had implied such a result by discussing "temporary disability benefits" in Westphal, as opposed to specifying whether the benefits were for a total or partial disability.

Since the Supreme Court revived the 260-week cap for TTD benefits in Westphal, the 1st DCA said it would do the same for TPD benefits, and this meant Jones was still entitled to TPD benefits at the time of the

hearing before the JCC.

Accordingly, the 1st DCA said, the JCC's conclusion that Jones' petition was "premature" was correct — but not for the reasons given by the JCC.

Geoff Bichler, a claimants' attorney with Bichler, Oliver, Longo & Fox who represented the Police Benevolent Association as an amicus in support of Bradley Westphal, said he didn't find Wednesday's ruling to be surprising at all.

He said the 1st DCA was "extending the reach of the Westphal case," but it "makes sense" to do so, since the Supreme Court hadn't differentiated between TPD and TTD claimants.

"To me, it's the right decision, given the law and analysis in Westphal," Bichler said.

Rayford Taylor, a defense attorney who had filed an amicus brief in the Westphal case on behalf of the Associated Industries of Florida, acknowledged that the language used by the Supreme Court in the Westphal decision "seemed to indicate the rule could apply equally to a temporary partial case."

He conceded that there would be some logic to that, since a TPD worker who remains jobless is "not in any different a position than a person who is TTD."

As the Jones case was "basically Westphal but with a temporary partial claimant rather than a temporary total," Taylor said he would have expected it to have the same result as Westphal, and he had anticipated that the rule in Westphal would be applied to workers with temporary partial disabilities anyway.

Taylor said he thought the practical effect of Wednesday's decision may mean more workers will be getting temporary benefits for longer periods of time, since there are many more people who will reach 104 weeks with a partial disability than with a total disability.

He said his concern now is what will happen when a worker hits 260 weeks. While it is rare for a worker to be temporarily disabled for that long, Taylor said there is Florida precedent involving a worker who hit 350 weeks, so it can happen.

Taylor said the other thing he's wondering about is the impact of the decision on insurance rates. When Westphal was decided, the National Council on Compensation Insurance estimated that it would add at least $65 million to annual workers' compensation costs in Florida.

That calculation was based only on the invalidation of the TTD cap — NNCI didn't factor in the invalidation of the TPD cap as well.

Dean W. Dimke, the marketing communications director for NCCI, said that the rate-maker was aware of the Jones decision and that it was reviewing the case as of Wednesday afternoon.

George Kagan, a defense attorney with Miller, Kagan, Rodriguez & Silver, said the decision in Jones "wasn't inevitable," since a plausible argument could be made that there are "less compelling exigencies attending most TPD cases than in TTD cases."

He explained that TTD "presumes an utter inability to produce any income whereas TPD permits some income to be flowing," and that could have been a valid reason for the 104-cap to survive for TPD, had the

1st DCA found the argument persuasive.

However, Kagan said he had a feeling this argument would not be well-received by the Supreme Court, since he was aware of some instances where the court declined jurisdiction of a few cases raising this issue already.

"This to me represented a sub silento ruling that Westphal did apply to the sister statute on TPD," Kagan said.

He said the the 1st DCA decision "confirms that" for him.

Kagan said the decision also raises a question as to whether any other statutory caps in Florida might be subject to challenge.

Two years ago, Kagan successfully defended Section 440.093, which places a six-month limit on indemnity benefits for mental and emotional injuries, from a challenge in a case called Davis v. Nascar Holdings.

Given the decisions in Westphal and Jones, Kagan said Wednesday that he suspected employers and carriers "wouldn't want to be investing too heavily in a defense based on the psyche statute now."

W. Rogers Turner, a defense attorney with Hurley, Rogner, Miller, Cox and Waranch, said he thought another question the courts will have to decide is whether a worker who receives 260 weeks of TTD benefits can receive 260 weeks of TPD benefits.

Longwood attorney Bill McCabe represented Jones before the 1st DCA. Janelle G. Koren of Sponsler, Bishop, Koren & Hammer represented Food Lion. Neither could be reached Wednesday for comment.

To read the court's decision, click here.