State: Fla.
1st DCA Revives Constitutional Challenge to Statutory Max Comp Rate: Top [2017-06-20]

Florida's 1st District Court of Appeal this week ruled that an injured worker was wrongfully deprived of an opportunity to create a record for establishing a constitutional challenge to the state's statutory cap on weekly disability benefits.

Under Florida law, a worker is generally entitled to receive benefits paid at 66 2/3% of his average weekly wage, but his benefits cannot exceed 100% of the statewide average weekly wage.

The maximum compensation rate for Florida in 2017 is $886.

When Julio Jiminez was allegedly injured in 2014, the maximum compensation rate was $827. That's far less than the $2,217.92 per week he was making at his job with UPS, and the $1,478.69 in benefits he would receive, were it not for Florida Statutes Section 440.12(2).

Jiminez filed a petition for benefits, arguing that he was entitled to payments of $1,478.69 per week.

He insisted that Section 440.12(2) is unconstitutional because it causes higher-paid workers to receive benefits based on a lower percentage of their actual average earnings than the 66 2/3% benchmark applicable to those with less lucrative jobs.

Jiminez also contended that the statute unjustly enriches insurance carriers, since they collect premiums based on the actual wages an employer is paying workers, but don't have to pay benefits based on those wages if the worker is making more than 133 1/3% the statewide average weekly wage.

Judge of Compensation Claims Edward Almeyda dismissed Jiminez's petition for lack of jurisdiction, as Florida's JCCs do not have authority to decide constitutional issues.

The 1st DCA overturned Almeyda's ruling on Monday.

Although Almeyda couldn't rule on Jiminez's arguments, the 1st DCA said the judge should have allowed Jiminez to make his case and lay the necessary procedural groundwork to take his claims up on an appeal to a court with jurisdiction to address his arguments.

The 1st DCA also already has a case on tap that is asking it to address the constitutionality of Section 440.12(2). Bosch v. Miami Herald is set for oral argument on Aug. 2.

The Bosch case involves the same basic arguments as Jiminez's case, and both workers are being represented by the same attorney, Miami practitioner Mark Zientz.

Last year, Zientz took a constitutional challenge to the adequacy of the remedies provided by the Florida comp system all the way to the Florida Supreme Court, only to have the court revoke its writ of review after hearing oral argument.

Zientz then petitioned the U.S. Supreme Court for review, but the U.S. Supreme Court declined to hear the matter.

Zientz was also amicus counsel in Westphal v. City of St. Petersburg and in Castellanos v. Next Door Co., the two 2016 cases that involved successful constitutional challenges to Florida's statutory caps on temporary total disability benefits and attorney fees.

He wasn't available to comment on the 1st DCA's revival of the Jiminez case on Monday. UPS and its comp carrier, Liberty Mutual, both declined to comment about the case while it remains in litigation.

The issue at the heart of the case — the validity of having a statutory maximum workers' compensation rate — is not unique to Florida. According to the Social Security Administration, there is a max comp rate in every state, U.S. territory and the District of Columbia.

The rate varies from state to state. In Louisiana, it is $876 per week. Pennsylvania pays a bit more, maxing out at $995 per week. Injured workers in Illinois can get up to $1,076.38, and California claimants can receive up to $1,164.51.

Each state has its own way of coming up with the max rate as well. In New York, it's 66 2/3% of the statewide average weekly wage. It's 85% of the statewide average weekly wage in Arkansas.

Maryland sets the max at 100% of the statewide average weekly wage, the same as Florida.

In Nevada, the max comp rate is 150% of the statewide average weekly wage, and in Iowa, it is 200%.

David Langham, the deputy chief judge of the Florida Office of Judges of Workers Compensation Claims, said that the "break point" for injured workers under Section 440.12(2) is an annual income of $69,108 in 2017. Anyone making more than that will get less than 66 2/3% because the claimant can receive no more than the $886 maximum comp rate for this year.

Langham said he has heard complaints that the cap is not fair. Comp benefits also don't make up for the loss of fringe benefits, such as employer-subsidized meals or child care, Langham noted.

On the other hand, Langham said, if a worker can make as much, or more, from collecting comp benefits, then there's no incentive to return to work. He observed that it's also easier for insurance carriers to calculate risk when there is a max comp rate.

"All these things compete for attention of those who make the laws," Langham said, and these factors presumably underlie the Legislature's decision to enact Section 440.12(2).

But Michael Gruber, president of the national Workers' Injury Law and Advocacy Group, said such laws are "prejudicial against higher wage-earners," and "the more you earn, the more punitive it becomes."

He noted that the 1972 National Commission on State Workers' Compensation Laws recommended that the max comp rate be at least 200% of the statewide average weekly wage, and if all the states would follow that recommendation, it would help "reduce the burden on a worker who was fortunate enough to make a decent salary" before getting hurt.

As things stand, Gruber opined, the max comp rates in most states are “just another way the system doesn’t provide reasonable and adequate benefits for a person who gets hurt on the job,” and unless something changes, he predicted, “these kinds of constructional challenges are going to become more and more prevalent.”

George Kagan, a Florida defense attorney with Miller, Kagan, Rodriguez & Silver, said Monday that he saw the Jiminez case as a “warning shot,” indicating there is an discontent brewing over the max comp rate.

Fellow defense attorney Rogers Turner of Hurley, Rogner, Miller, Cox & Waranch agreed, but at present, he said it wasn’t anything to be excited about.

The general rule that if someone wants to present a constitutional argument, he needs to be allowed to present it to a JCC. Turner said the 1st DCA’s decision on Monday was simply an acknowledgment of that.

Turner said the claimants' bar has been advancing multiple arguments about the constitutionality of various provisions of the Florida comp law as of late, and being able to present the argument isn’t the same thing as prevailing, but claimants are entitled to make their claim.

To read the 1st DCA decision, click here.