

Trial Law TIPS

Roy D. Wasson's
TIP #20

ROY D. WASSON is board certified in Appellate Practice with extensive courtroom experience in more than 750 appeals and thousands of trial court cases, civil, criminal, family and commercial. AV-rated.

Acceptance of Workers' Compensation Benefits by Tort Claimant—an Election of Remedies?

You have been retained to represent a construction worker injured in a job site accident, or his widow in a wrongful death lawsuit against the general contractor and others on the site. You assisted your client in filling-out a required accident report which you knew would be submitted to the Workers' Compensation carrier, but you and your client have not made any formal claim for Workers' Compensation benefits. A significant sum of money appears in an envelope from the comp carrier one day without any form of release or other documentation. Can your client put the money in the bank? Will cashing the check constitute an election of remedies precluding the tort claim? Good questions.

Introduction

As a general statement of law, but one subject to recognized exceptions, “one who claims and receives workers’ compensation benefits will be found to have elected such compensation as an exclusive remedy where there is evidence of a conscious choice of remedies.” *Mandico v. Taos Constr., Inc.*, 605 So. 2d 850, 853 (Fla. 1992). “Likewise, such an individual is estopped from bringing civil suit against an employer where the elements necessary for an estoppel are present.” *Id.* It is clear that where an injured worker has “filed a workers’ compensation claim against [his alleged employer and w]hile represented by counsel, he formally settled that claim in his workers’ compensation proceeding and executed a general release [his] claim for bodily injury against [the employer] is barred by the doctrine of election of remedies.” *Townsend v. Conshor, Inc.*, 832 So. 2d 166, 167 (Fla. 2d DCA 2002). But that is not what happened in our example case; the money appeared automatically without you or your client filing any claim for the benefits. Absent a conscious pursuit of a comp. claim to an adjudication on the merits, your client may be able to cash the check without jeopardizing her tort claim.

Need for Resolution of Comp. Claim on the Merits

One of the most favorable decisions on this topic is the Third DCA’s case of *Hernandez v. United Contractors Corp.*, 766 So. 2d 1249 (Fla. 3d DCA 2000). That was a case involving the death of a construction laborer in which there was an affirmative Workers’ Compensation claim made by the decedent’s common-law wife and mother of his children, who also had filed a civil action against multiple defendants including the contractor which provided Workers’ Compensation benefits. At mediation of the comp. claim, the personal representative reached a settlement and accepted a lump sum payment of \$10,000 of Workers’ Compensation benefits, with the parties executing a release of the comp. claim and settlement stipulations. The trial court in the personal injury action thereafter entered final summary judgment in favor of the putative employer, accepting its argument that the personal representative

and the decedent's children had elected their exclusive remedies by accepting the check from the comp carrier.

On appeal, the Third DCA reversed the summary judgment on several grounds. First, the court cited the First District's decision in *Lowry v. Logan*, 650 So. 2d 653, 657 (Fla 1st DCA 1995), in which that court stated "that to constitute an election of remedies the workers' compensation remedy must be pursued to a determination or conclusion *on the merits*, . . . that mere acceptance by a claimant of some compensation benefits is not enough to constitute an election [of remedies, and t]here must be *evidence of a conscious intent* by the claimant to elect the compensation remedy and to waive his other rights." (Emphasis added).

The Third District in *Hernanadez* then noted the importance of the fact that the case had settled at mediation following the comp carrier's assertion of a defense on the merits (whether the accident arose out of and in the course and scope of decedent's employment), thereby negating the element of the election of remedies defense that there must be a "resolution on the merits of the claim." 766 So. 2d at 1252. Apparently, there was no order of the JCC approving the settlement or entering a judgment thereon. The court held: "Because the workers' compensation remedy was not pursued to a determination or conclusion on the merits, there could be no election of remedies." *Id.* at 1253.

The importance of avoiding an adjudication on the merits on any workers' compensation claim is made clear by the Fourth DCA's holding affirming a summary judgment against the plaintiff *Michael v. Centex-Rooney Constr. Co.*, 645 So. 2d 133 (Fla. 4th DCA 1994). That was a case in which the plaintiff had worked as a cabinet installer for a subcontractor of the general contractor. After being injured on the job, he filed a workers' compensation claim with the subcontractor, which was initially rejected on the basis that he was an independent contractor. Eventually, he received a lump sum workers' compensation settlement with the subcontractor which was approved by the judge of compensation claims. "Michael specifically acknowledged Joint Petition that the lump sum settlement constituted 'full and final Discharge' of Regal

and its workers' compensation carrier's responsibility for workers' compensation benefits [and t]he Judge of Compensation Claims entered an order . . . approving the Joint Petition for lump sum settlement." *Id.* at 135.

The Fourth District in the *Michael* case relied upon authorities including the Third District's decision in *Ferguson v. Elna Elec, Inc.* 421 So. 2d 805, 806 (Fla. 3d DCA 1982). *Ferguson* is a short opinion which does not indicate that the comp. claim was denied on the merits. In *Ferguson*, the court stated: "We affirm the summary judgment solely for the reason that appellant having demanded and been paid workers' compensation benefits, was estopped to deny that he was injured while in the course and scope of his employment." The Fourth District in *Michael* held that "appellant's active pursuit and acceptance of the workers' compensation benefits makes it irrelevant whether appellant was actually an employee and entitled to benefits" and constituted an election of remedies. *Id.* at 136.

Need for Receipt of Benefits by Individual Survivors

The Third District in *Hernandez, supra*, after finding for the plaintiff on the first ground, goes on to "note that even if Hernandez's argument had failed as to herself, it is clear that the minor children did not elect the workers' compensation remedy as there is no evidence that the minor children received or were to receive any of the death benefits paid by the workers' compensation carrier" to their mother as the surviving spouse. The court rejected the argument that the mention of the children in the petition for Workers' Compensation benefits would be sufficient to defeat their claim, as follows:

Although the Petition for Benefits filed in the workers' compensation claim included the children's names, the record reflects they are not mentioned in any other document filed therein. The stipulation mentioned above was brought only in Hernandez's name as the surviving spouse and did not include the minor children. Nothing in the Joint Petition and

Stipulation indicates that the children were to receive any of the proceeds of the settlement, but rather it indicates that all of the settlement proceeds were to be paid to Hernandez. . . . Similarly, Hernandez's affidavit filed in support of the Joint Petition states that the Joint Petition and Stipulation indicates that the settlement of this claim was being paid to Hernandez as the surviving spouse. The children are not mentioned in this affidavit. Finally, the Order for Release from Liability entered by the Judge of Compensation Claims contains only Hernandez's name as the surviving spouse and does not mention the two minor children. In light of this record, we find that the children's participation in the tort action is not barred by the doctrine of election of remedies because although their names were included in the Petition, they were not included in any other document and they did not receive any workers' compensation Benefits.

766 So. 2d at 1253. Thus, perhaps the check your client received could be earmarked for fewer than all of the claimants, allowing the remaining survivors' claims to proceed.

Need for Court Approval Where Minor Survivors Involved

Further, if the foregoing grounds were not enough, the Third District in Hernandez went on to hold that the settlement with the comp carrier could not constitute an election of remedies of the children's claims because "the settlement was not approved by the probate court . . . [,] no guardian ad litem was appointed to review the proposed settlement," and the small amount of the settlement as compared to the value of the tort case would have rendered it against the best interests of the children to have accepted that settlement, so it was not a settlement of the children's claims under Workers' Compensation and could not amount to an election of remedies as to them.

Election of Remedies Where Multiple Causes of Action Involved

Some cases involve a situation in which a plaintiff will have multiple civil claims, some of which may also be compensable in workers' compensation, and some of which are not within the ambit of the comp. claim. In such a case, the receipt and acceptance of workers' compensation benefits may constitute an election of remedies as to those parts of the claim which are compensable under either tort theories or under workers' compensation but not of the other portions of the civil claims.

In *Moniz v. Reitano Enterprises, Inc.*, 709 So. 2d 150 (Fla. 4th DCA 1988), the plaintiff had filed suit against her employer alleging a count for assault and battery and a second count of false imprisonment, both arising out of biting incident, and a third count for intentional infliction of emotional distress. In dismissing the plaintiff's claims, the trial court held that the plaintiff was limited to her workers' compensation settlement.

On appeal, the Fourth District reversed in part, holding that counts for assault and battery and false imprisonment were barred by the plaintiff's settlement of a workers' compensation claims because those claims involved a physical injury which caused economic loss compensable by workers' compensation. However, because the claim for intentional infliction of emotional distress alleged a broader course of conduct which could be separated from the biting incident, the court held that those claims were distinct and not barred by the plaintiff's acceptance of workers' compensation benefits.

Dismissal Inappropriate Remedy—Election is Affirmative Defense

While some courts have permitted the workers' compensation defense to be adjudicated on a motion to dismiss the tort complaint, other courts have recognized the fact that dismissal is an improper remedy because the defense usually would not appear on the face of your complaint. For example, in *Vause v. Bay Medical Center*, 687 So. 2d 258 (Fla. 1st DCA 1996), the court reversed the trial court's dismissal of the plaintiff's complaint on the basis of election of workers' compensation as the exclusive remedy, holding as follows:

The dismissal was improper to the extent that it was based upon plaintiff's having elected a workers' compensation remedy. Election of remedies is an affirmative defense that is not properly raised by means of a motion to dismiss where the affirmative defense does not appear on the face of the prior pleading The plaintiff's complaint does not clearly show the applicability of the defense. Indeed, nowhere in the complaint is it asserted or suggested that the plaintiff pursued a workers' compensation remedy to a determination on the merits or to final settlement as to give rise to an election of remedies defense. . . . Consequently, the defense could not have been the basis for dismissal of the complaint against any of the defendants.

Id. at 261 (footnotes deleted).

Mere Acceptance of Benefits No Election of Remedies

In the example of a typical case used at the beginning of this article, it was posited that there was no affirmative claim for workers' compensation benefits, but simply a check which was tendered by the comp carrier following receipt of notice of the accident. That was the situation in *Wishart v. Laidlaw Tree Service, Inc.*, 573 So. 2d 183 (Fla. 2d DCA 1991), in which the plaintiff employee was injured while on his lunch break when the brakes failed on a truck owned by his employer. During the employee's hospitalization, "he began to receive payments of workers' compensation benefits and continued to receive such payments [for several months, but a]t no time did the employee make any claim for workers' compensation benefits." *Id.* at 183.

The plaintiff sued the employer alleging that he was entitled to a tort recovery because the injuries did not occur within the course and scope of his employment. A summary judgment was entered in favor of the defendant, which was reversed on appeal. The court held that "neither election of remedies, waiver, or estoppel applies simply because the employee accepts payment of workers' compensation benefits after he is injured." 573 So. 2d at 184. The lack of an affirmative claim rendered the election of

remedies defense inadequate and necessitated reversal of the summary judgment, permitting the plaintiff to proceed with his tort claim as well.

Conclusion

There are, of course, several other cases involving this important issue which reach conclusions for and against employees who attempt to sue their employer after receiving workers' compensation benefits. While this article is not intended to be a substitute for comprehensive research on the topic, it should give you a head start concerning the major issues in the area. In the example given above, where a nice check appears without having filed a formal workers' compensation claim, and without the necessity for a stipulation which will lead to a formal disposition on the merits of the claim, **TAKE THEIR MONEY!**

Keep Tryin!

Roy