Summer 1995

Apportionment and Contribution of Workers' Compensation Benefits

Mathew D. Staver
Liberty University, mstaver@liberty.edu

Apportionment and Contribution of Workers' Compensation Benefits

by Mathew D. Staver, Esq.

The apportionment of benefits between a claimant and a carrier and contribution of benefits between multiple carriers has been a confusing area of law which has generated conflicting appellate court opinions. Florida Statutes §440.15(5)(a) states as follows regarding apportionment between an employee and a carrier:

> The fact that an employee has suffered previous disability, impairment, anomaly, or disease, or received compensation therefor, shall not preclude the employee from benefits for a subsequent aggravation or acceleration of a pre-existing condition nor preclude benefits for death resulting therefrom, except that no benefits shall be payable if the employee, at the time of entering into the employment of the employer by whom the benefits would otherwise be payable, falsely represents himself as not having previously been disabled or compensated because of such previous disability, impairment, anomaly, or disease. Compensation for temporary disability, medical benefits, and wage loss benefits shall not be subject to apportionment.

Florida Statutes § 440.42(3) regarding contribution of responsibility between carriers states as follows:

> Where there is any controversy as to which of two or more carriers is liable for the discharge of the obligations and duties of one or more employers with respect to a claim for compensation, remedial treatment, or other benefits under this chapter, the Judge of Compensation Claims shall have jurisdiction to adjudicate such controversy; and if one of the carriers voluntarily or in compliance with the compensation order makes payments and discharges such liability and it is finally determined that another carrier is liable for all or part of such obligations and duties with respect to such claim, the carrier which has made payments either voluntarily or in compliance with the compensation order shall be entitled to reimbursement from the carrier finally determined liable and the Judge of Compensation Claims shall have jurisdiction to order such reimbursement; however, if the carrier finally determined liable can demonstrate that it has been prejudiced by lack of knowledge or notice of its potential liability, such reimbursement shall be only with respect to payments made after it had knowledge or notice of its potential liability.

Though Section 440.15(5)(a) governs issues between a claimant and an E/C, it may also be raised in cases involving controversies between multiple carriers.[1] This article will seek to explore the differences between Florida Statutes §440. 15(5)(a) in Section 440.42(3). After discussing the differences, this article will then focus on the multiple applications of Section 440.42(3), the section dealing with contribution of responsibility between carriers.[2]

A. Claimant vs. Carrier

Cases involving pre-existing conditions fall into the following three categories: (1) an injury which results directly and solely from the industrial accident and which would have occurred even in the absence of the pre-existing condition; (2) an injury resulting from the industrial accident accelerating or aggravating a pre-existing condition; and (3) a condition which results from the normal progress of a pre-existing condition and which would have existed had the industrial accident never occurred. Disability falling within the first two categories is compensable but disability falling within the third category is not compensable.[3]

Section 440.15(a) prohibits a carrier from apportioning benefits if at the time of the industrial accident the claimant had (1) a *permanent* pre-existing condition, (2) which is aggravated or accelerated by the industrial accident. If both criteria are met, then the carrier cannot apportion temporary disability, medical benefits, or wage loss benefits. If the claimant's pre-existing condition is not permanent in nature, or if that condition has not been aggravated or accelerated by the industrial accident, then Section 440.15(a) does not prohibit a carrier from apportioning out the pre-existing condition.

B. Prior vs. Subsequent Carrier

Section 440.42(3) allows the Judge of Compensation Claims to require one carrier to reimburse another carrier based on shared liability for the claimant's condition. Though commonly referred to as apportionment between carriers, it is more accurately described as contribution or reimbursement between carriers.

1. Claimant Not at MMI Prior to Subsequent Accident

If the claimant has not reached maximum medical improvement ("MMI") from the prior carrier's accident at the time of the subsequent injury, then the prior carrier may seek reimbursement or contribution of liability against the subsequent carrier. Since in this case the claimant suffers a subsequent accident, the claimant cannot raise Section 440.15(a) against the prior carrier.

The prior carrier may seek reimbursement or contribution from the subsequent carrier even before the claimant reaches MMI from the subsequent accident. Thus, the prior carrier can request reimbursement for temporary and medical benefits. Apportionment for permanent benefits must await the claimant's reaching MMI from the subsequent injury.[4]

2. Claimant Reached MMI Prior to Subsequent Accident

If at the time of the subsequent accident the claimant had already reached MMI from the prior injury, the prior carrier may still seek reimbursement from the subsequent carrier. Just like the situation where the claimant had not yet reached MMI at the time of the subsequent accident, the prior carrier may seek reimbursement for any temporary and medical benefits which the prior carrier is responsible for paying. The prior carrier must await the claimant reaching MMI from the subsequent accident prior to seeking reimbursement from the subsequent

carrier of permanent benefits. Again, a claimant cannot raise Section 440.15(a) against a prior carrier from seeking reimbursement against a subsequent carrier.

C. Subsequent vs. Prior Carrier

Whenever a subsequent carrier seeks reimbursement against a prior carrier, two other statutory provisions come into play. In some circumstances a claimant may raise Section 440.15(a) to prohibit certain apportionment of benefits, and in other cases, Section 440.49 dealing with the Special Disability Trust Fund lays out policy reasons for prohibiting certain forms of contribution.

1. Claimant Not at MMI Prior to Subsequent Accident

If at the time of the claimant's subsequent accident the claimant had not yet reached MMI from the prior accident, then Section 440.15(a) does not bar a subsequent carrier from obtaining reimbursement from a prior carrier. Section 440.42(3) allows a subsequent earner to seek reimbursement against a prior carrier and this reimbursement or contribution is not barred by Section 440.15(a) which prohibits apportionment of temporary and medical benefits. As noted above, in order for Section 440.15(a) to prohibit apportionment of benefits between a claimant and a carrier, the claimant must have a permanent condition (which requires a finding of MMI) at the time of the accident and the condition must have been aggravated or accelerated by the industrial accident. Here the claimant has not reached MMI and therefore the subsequent carrier may not only apportion benefits against the claimant but require the prior carrier to reimburse the subsequent carrier for temporary and medical benefits. Once the claimant reaches MMI from the subsequent accident, the subsequent carrier can also require the prior carrier to reimburse permanent benefits. Again, the subsequent carrier does not need to wait until the claimant reaches MMI from the subsequent accident prior to seeking reimbursement for temporary and medical benefits.[5]

2. Claimant Reached MMI Prior to Subsequent Accident

If at the time of the subsequent accident the claimant has already reached MMI from the prior accident, and if the subsequent accident aggravates or accelerates this pre-existing condition, then Section 440.15(a) may act as a bar to the subsequent carrier's apportionment of benefits against the claimant.[6]

a. Merger of Injuries

If the claimant has a pre-existing permanent condition at the time of the subsequent accident which is temporarily aggravated or accelerated by the subsequent accident, then the subsequent carrier may be responsible for the temporary and medical benefits during the period of temporary acceleration or aggravation.

If the subsequent accident results in a permanent aggravation or acceleration of the claimant's previous permanent condition, then the subsequent carrier may be responsible for all of the permanent and medical benefits. The recourse of the subsequent carrier is to seek reimbursement, not from the prior carrier, but from the Special Disability Trust Fund. See Florida Statute § 440.49.[7]

b. No Merger of Injuries

If at the time of the subsequent accident the claimant has reached MMI from the prior accident, but the subsequent accident has not merged with the prior condition to result in an acceleration or aggravation of that pre-existing condition, then Section 440.15(a) cannot be used to prohibit the subsequent carrier from apportioning benefits. Section 440.42(3) would allow a subsequent carrier to seek contribution or reimbursement from the prior carrier. Since there was no merger, the subsequent carrier cannot seek reimbursement from the Special Disability Trust Fund. This situation therefore represents the third factor noted above in *Evans*, namely that portion of the claimant's condition which is due to the normal progress of the pre-existing condition which would have existed even in the absence of the subsequent accident is not compensable. Therefore, as it relates to the subsequent carrier, that portion of the condition is not the responsibility of the subsequent carrier. This portion of the condition is either related to the prior accident, or is not related to work at all. At any rate, the subsequent carrier need not bear any responsibility for that por-

tion of the condition which does not merge with the subsequent accident and which would have existed in the absence of the subsequent accident.[8]

D. Determining Apportionment and Contribution Ratio

1. Apportionment Ratio

For a carrier to apportion out of an accident its responsibility to a claimant, the carrier must identify that part of the claimant's illness which has not been aggravated nor accelerated by the industrial accident. For example, if a claimant sustains a back injury related to work, the carrier need not pay for the claimant's pre-existing vision impairment so long as this condition is not accelerated or aggravated by the industrial accident. There may be an occasion where the carrier may have to temporarily pay for the condition if it is temporarily aggravated by the industrial accident or requires treatment in order to treat the underlying industrial accident.[9]

2. Contribution Ratio

When requiring contribution or reimbursement between carriers of temporary and medical benefits, a judge must determine the ratio of each accident in terms of its impact on the claimant's temporary disability or need for medical benefits.

Once the claimant reaches MMI and is assigned a permanent impairment to the prior accident and an additional permanent impairment to the subsequent accident, a judge may not use the ratio of impairments as the ratio of disability.[10] In other words, if the claimant has a 10% permanent impairment, 5% attributable to the prior accident and 5% to the subsequent accident a judge may not on this basis *alone* apportion 50% of the condition to the prior carrier and 50% to the subsequent carrier. A judge must apportion based on *disability* and not *impairment*.

E. Death Benefits

The discussion above regarding apportionment and contribution does not apply to death benefits. The reason is that it is virtually impossible to determine what portion of a condition actually caused the claimant's death. In most situations, the subsequent accident will in all probability be totally liable for the claimant's death.[11]

Summary

Section 440.15(a) prevents the carrier from apportioning benefits if the claimant, at the time of the accident, had a permanent pre-existing condition which is aggravated or accelerated by the industrial accident. Section 440.42(3) allows contribution of benefits between carriers for responsibility to the same claimant for different accidents. Contribution of these benefits may be adjudicated before or after the claimant reaches MMI. Contribution between carriers generally takes the form of the prior carrier seeking contribution from the subsequent carrier. However, when a claimant sustains an injury by a prior carrier and incurs a second injury by a subsequent carrier prior to reaching MMI from the first accident, the subsequent carrier may seek contribution against the prior carrier or apportionment against the claimant. Contribution or apportionment is permissible because the claimant had not reached MMI, and therefore did not have a permanent condition at the time of the subsequent accident. Finally, in cases where a claimant has reached MMI prior to the accident under coverage by the subsequent carrier, contribution is not permissible when the two accidents have merged. The recourse is for the subsequent carrier to be reimbursed from the Special Disability Trust Fund.

However, if there is no merger between the accidents, then a subsequent carrier is not responsible for the claimant's condition not related to the industrial accident.

Endnotes:

[1] *Cf. Rowe & Mitchell v. Rogers*, 378 So. 2d 1281, 1281-82 (Fla. 1st DCA 1979) *with Cruise Quality Painting v. Paige*, 554 So. 2d 1190, 1196 (Fla. 1st DCA 1990).

[2] Apportionment between carriers also applies to repetitive trauma. *Roz Fischer's Beauty Unlimited v. Mathis*, 19 F.L.W. D2229 (Fla. 1st DCA 1994).

[3] *Evans v. Florida Industrial Commission*, 196 So. 2d 748, 752 (Fla. 1967).

[4] *Paige*, 564 So. 2d at 1195; *Flagship National Bank of Broward County v. Hinkle*, 479 So. 2d 828 (Fla. 1st DCA 1985).

[5] *Rowe & Mitchell*, 378 So. 2d at 1281.

[6] *Paige*, 564 So. 2d at 1197.

[7] *Entenmann's Bakery v. Nunez*, 592 So. 2d 1158, 1160 n2, 1161 (Fla. 1st DCA 1992); *Paige*, 564 So. 2d at 1194 n2, 1196.

[8] *Evans*, 196 So. 2d at 752; *see also Nunez*, 592 So. 2d at 1162 n3; *Atlas Van Lines v. Jackson*, 642 So. 2d 603 (Fla. 1st DCA 1994).

[9] *Copeland Steel Erectors v. McCollom*, 587 So. 2d 658 (Fla. 1st DCA 1991).

[10] *Standard Fire Insurance Co. v. U-Haul Company of Eastern Florida*, 551 So. 2d 580 (Fla. 1st DCA 1989); *Upson v. Orange County School Board*, 19 F.L.W. D2096 (Fla. 1st DCA 1994).

[11] *Evans*, 196 So. 2d at 753.

***Matthew D. Staver** is a 1980 graduate of Southern College. He obtained an M.A. from Andrews University in 1992 and his J.D. Degree from the University of Kentucky in 1987. He is board certified in Appellate Law, as well as Workers' Compensation and practices with Staver and Associates of Orlando and Tallahassee.*
