

SUPREME COURT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA

BRENDA BUTLER,

Petitioner,

vs.

BAY CENTER and CHUBB
INSURANCE COMPANY,

Respondent.

CASE NO.: SC07-437

Lwr Tribunal.: 1D06-1235

PETITIONER'S INITIAL BRIEF ON JURISDICTION

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This is an Initial Brief on Jurisdiction seeking to invoke discretionary jurisdiction to review a decision of the First District Court of Appeal, Tallassee, Florida, opinion rendered February 5, 2007.

TABLE OF CONTENTS

	Page
TABLE OF CITATIONS	ii
PRELIMINARY STATEMENT . . . . .	.iii
STATEMENT OF THE CASE AND STATEMENT OF THE FACTS	1
POINT ON APPEAL . . . . .	.4
SUMMARY OF ARGUMENT . . . . .	.4
ARGUMENT	
POINT I:	6
WHETHER OR NOT THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN THE CASE AT BAR EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THIS HONORABLE COURT IN <u>SULLIVAN V. MAYO</u> , 121 So.2d 424(Fla.1960) AND THE DECISION OF THE SECOND DCA IN <u>HAUSLER V. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY</u> , 374 So.2d 1037(Fla. 2 ND DCA 1979).	
CONCLUSION . . . . .	.10
CERTIFICATE OF SERVICE . . . . .	.11
CERTIFICATE OF TYPE FACE COMPLIANCE . . . . .	.12

TABLE OF CITATIONS

	Page
<u>Cal Covens Construction v. Lott,</u> 473 So.2d 249(Fla.1st DCA 1985).	8
<u>Curry v. State,</u> 682 So.2d 1091(Fla.1996). . . . .	.6
<u>Department of Health and Rehabilitative Services v. National Adoption Counseling Service Inc.,</u> 498 So.2d 888(Fla. 1986). . . . .	.6
<u>First Union National Bank v. Turney,</u> 832 So.2d 768(Fla.1 st DCA 2002). . . . .	.6
<u>Gonzales v. Publix,</u> 654 So.2d 634(Fla.1st DCA 1995).	8
<u>Hardee v. State,</u> 534 So.2d 706(Fla.1988).	6
<u>Hausler V. State Farm Mutual Automobile Insurance Company,</u> 374 So.2d 1037(Fla.2 nd DCA 1979).	5,8,9
<u>Russell v. P. I. E. Nationwide,</u> 668 So.2d 696(Fla.1st DCA 1995).	8
<u>Southern Bakeries v. Cooper,</u> 659 So.2d 339(Fla.1st DCA 1995).	8
<u>Sullivan v. Mayo,</u> 121 So.2d 424(Fla.1960).	4,5,8,9
<u>Teimer v. Pixie Playmates,</u> 532 So.2d 37,40(Fla.1st DCA 1988).	4,7,8
 <u>FLORIDA STATUTES</u>	
440.13(1985).	3,10
440.13(2005). . . . .	.3,9
440.13(2)(c)(1994) . . . . .	.7
440.13(3)(1985) . . . . .	.3,5
440.13(3)(1986)	5,6,7,8,10
440.13(3)(1993) . . . . .	.7

PRELIMINARY STATEMENT

The Petitioner, BRENDA G. BUTLER, shall be referred to herein as the "Claimant" or by her separate name.

The Respondents, BAY CENTER and CHUBB INSURANCE COMPANY, shall be referred to herein as the "Employer/Carrier" (E/C) or by their separate names.

References to the record on appeal shall be abbreviated by the letter "V" (Volume), followed by the applicable volume and page number.

The Judge of Compensation Claims shall be referred to as the JCC.

References to the appendix attached to Petitioner's Initial Brief on Jurisdiction will be referred to by the letters "AP" and followed by the applicable appendix page number. The appendix contains the opinion issued by the First District Court of Appeal on December 29, 2006, and the Order of the First District Court of Appeal dated February 5, 2007 denying Claimant/Petitioner's Motion for Rehearing En Banc.

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

The Claimant, BRENDA BUTLER, was employed with the employer herein as a bindry supervisor (V1-119). On September 3, 1986 the Claimant was involved in a compensable accident when she injured her back while lifting paper (V1-19,59,119,143).

Following Claimant's compensable 9/3/86 accident, Claimant came under the care of Dr. Antonio Castellvi, orthopedist, Tampa, Florida (V1-19,60,121). Dr. Castellvi has been the only authorized doctor Claimant has had since her compensable 9/3/86 accident (V1-19,60).

Claimant testified that her back condition has gotten worse through the years (V1-20). Claimant testified that in the last few years Dr. Castellvi has made recommendations for surgery as a possibility (V1-20). Claimant, however, has indicated that she does not want surgery at this time (V1-20).

On 4/27/05 Dr. Castellvi referred Claimant to a physical medicine and rehabilitation physician, Dr. De Latorre (V1-20,121).

Claimant testified that she does want to see a pain management doctor (V1-20). Claimant testified that she needs pain management because her back hurts on a constant basis and her leg hurts (V1-20).

Following Dr. Castellvi's referral to a pain management physician on 4/27/05, Claimant did not receive any offers from

the E/C for a pain management physician (V1-20,21). As such, on 7/22/05 Claimant filed a Petition for Benefits (PFB) requesting authorization with Dr. Rudolfo Gari, pain management physician (V1-119,120).

Following receipt of the 7/22/05 PFB, the E/C authorized pain management with Dr. George Chaumont (V1-26).

Claimant did not want to see Dr. Chaumont, but instead wanted to see either Dr. Gari or have the carrier provide Claimant with some different alternatives (V1-22).

Mr. Ravitz, the adjustor, testified that the carrier has not offered anybody other than Dr. Chaumont because the carrier has every right to choose the initial doctor (V1-31).

On 2/22/06 a hearing on the aforementioned PFB was held before the Honorable Judge of Compensation Claims Ellen H. Lorenzen (V1-2).

Thereafter, on 2/22/06 the Honorable JCC Ellen H. Lorenzen entered her Final Compensation Order (V1-143-148). In that order the JCC found that the applicable statutory requirement was that of the 1986 law which provided that the employer had a "duty" to select another physician to treat if the employee objected to "the medical attendance furnished." (V1-146).

The JCC found Dr. Chaumont never "attended" Claimant because he never provided any medical care (V1-146). The JCC

therefore found that the E/C had no duty to select another physician (V1-146).

The First DCA, on 12/29/06, affirmed, in a 2 to 1 decision, the JCC's order finding that the E/C had no duty to authorize another pain management physician because Claimant had not received treatment from the physician timely authorized by the E/C (AP-6). However, in doing so, the First District Court of Appeal found that F.S.440.13(2005) is procedural, not substantive, and accordingly the 2005 version of F.S.440.13 controls in this case (AP-2,3).

The Honorable Judge Kahn, in his dissenting opinion, concluded that the statute in effect at the time of the injury controls the present case (AP-7). Judge Kahn also noted that the parties, as well as the JCC below, assumed that the 1985 version of Section 440.13 would control in this case (AP-7). Judge Kahn noted that this assumption carried through in the Merits Order under review as well as in the parties' briefs (AP-7). The Honorable Judge Kahn, in his dissenting opinion, agreed with Claimant's assertion that under the 1985 statute, Claimant had the absolute right to veto the E/C's initial selection of a physician and compel the Employer/Carrier to authorize another selection (AP-7,8). The Honorable Judge Kahn, found that F.S.440.13(3)(1985) was the controlling statute (AP-7,8). The

Honorable Judge Kahn noted that, in construing the 1985 statute, the First District Court of Appeal has opined:

"It is clear that the statute gives the initial right of selection of a treating physician to the employer and carrier. It, however, reserves to Claimant the right to reject such selection, require another authorization, or to seek authorization by the deputy for a physician of Claimant's choice." (AP-8), Teimer v. Pixie Playmates, 532 So.2d 37,40(Fla.1st DCA 1988).

As such, Judge Kahn indicated he would reverse the JCC's 2/22/06 Order because, although the JCC applied the 1985 statute, she construed the statute erroneously (AP-11).

Thereafter, Petitioner filed a Motion for Rehearing and a Motion for Rehearing en banc both of which were denied by the First DCA on 2/5/07(AP-12, 13).

POINT ON APPEAL

POINT I

WHETHER OR NOT THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN THE CASE AT BAR EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THIS HONORABLE COURT IN SULLIVAN V. MAYO, 121 So.2d 424(Fla.1960) AND THE DECISION OF THE SECOND DCA IN HAUSLER V. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, 374 So.2d 1037(Fla. 2ND DCA 1979).

SUMMARY OF ARGUMENT

I

Petitioner respectfully submits that the opinion rendered by the First DCA in the case at bar expressly and directly conflicts with the decision of this Honorable Court in Sullivan v. Mayo, 121 So.2d 424(Fla.1960). Specifically, in Sullivan v.

Mayo, Supra, this Honorable Court has held that the substantive rights of a workers compensation Claimant is governed by the provision of the Workers' Compensation Law in force at the time of the injury for which compensation is sought.

Similarly, in Hausler V. State Farm Mutual Automobile Insurance Company, 374 So.2d 1037(Fla.2nd DCA 1979), the Second DCA held that when parties enter into a contract of insurance, its terms are set in accordance with the law in effect at that time.

Claimant submits that the Claimant's right to veto the E/C's initial selection of a physician and compel the E/C to authorize another selection as permitted by F.S.440.13(3)(1986) (same statute as F.S.440.13(3)(1985)) is a substantive right, and not a procedural right. Therefore, Claimant respectfully submits that the First DCA, in finding that the statute in effect at the time of the request, as opposed to the statute in effect at the time of the Claimant's compensable injury, was the applicable statute, expressly and directly conflicts with the above referenced decisions.

ARGUMENT

POINT I

WHETHER OR NOT THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL IN THE CASE AT BAR EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THIS HONORABLE COURT IN SULLIVAN V. MAYO, 121 So.2d 424(Fla.1960) AND THE DECISION OF THE SECOND DCA IN HAUSLER V. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, 374 So.2d 1037(Fla. 2ND DCA 1979).

Article V, Section 3(b)(3), Fla. Const. and Fla.R.App.P. 9.030(a)(2)(A)(iv) provides that the jurisdiction of this Honorable Court may be invoked to review any decision of a District Court of Appeal that:

". . .Expressly or directly conflicts with a decision of another District Court of Appeal or of the Supreme Court on the same question of law."

Jurisdiction of this Honorable Court on a Notice to Invoke Discretionary Jurisdiction based upon a conflict depends on whether the conflict between decisions below is express and direct and not whether the conflict is inherent or implied, Department of Health and Rehabilitative Services v. National Adoption Counseling Service Inc., 498 So.2d 888(Fla. 1986). For purposes of determining the conflict jurisdiction, this Honorable Court is limited to the facts which appear on the face of the opinion, Hardee v. State, 534 So.2d 706(Fla.1988). Review based on conflict is unavailable where the opinion below establishes no point of law contrary to a decision of this Honorable Court or another District Court of Appeal, Curry v.

State, 682 So.2d 1091(Fla.1996), First Union National Bank v. Turney, 832 So.2d 768(Fla.1st DCA 2002).

F.S.440.13(3)(1986), which is the statute in effect on the date of the Claimant's 9/3/86 accident (and contains identical language to the 1985 version) provides, inter alia:

"If an injured employee objects to the medical attendance furnished by the employer pursuant to subsection (2), it shall be the duty of the employer to select another physician to treat the injured employee unless a Deputy Commissioner determines that a change in medical attendance is not for the best interest of the injured employee. . ."

F.S.440.13(3)(1986) further provides:

". . . It is unlawful for any employer or representative of any insurance company or insurer to coerce or attempt to coerce a sick or injured employee in the selection of a physician. . . and any employer or representative of any insurance company or insurer who violates this provision is guilty of a misdemeanor of the second degree. . ."

The portion of F.S.440.13(3)(1986) which provides that "It is unlawful for any employer or representative of any insurance company or insurer to coerce or attempt to coerce a sick or injured employee in the selection of a physician. . ." remained in effect until the extensive statutory amendments to the Workers' Compensation Law that took effect on 1/1/94, compare F.S.440.13(3)(1993) with F.S.440.13(2)(c)(1994).

F.S.440.13(3)(1986) has been interpreted to mean that, although the statute gives the initial right of selection of a treating physician to the employer and carrier, it reserves to Claimant the right to reject such selection, require another

authorization or seek authorization by the Deputy for a physician of Claimant's choice, Teimer v. Pixie Playmates, 532 So.2d 37(Fla.1st DCA 1988). F.S.440.13(3)(1986) has been interpreted to give to the Claimant an absolute right to veto the E/C's initial selection of a physician and compel the E/C to authorize another selection, Teimer v. Pixie Playmates, Supra at 40, Cal Covens Construction v. Lott, 473 So.2d 249(Fla.1st DCA 1985) at 254. Otherwise the guarantee against coercion contained in F.S.440.13(3)(1986) is made a mere sham, Teimer v. Pixie Playmates, Supra, Cal Covens Construction v. Lott, Supra.

Claimant respectfully submits that giving a Claimant an absolute right to veto the E/C's initial selection of physician and demand that the E/C provide the Claimant with authorization of another selection is a substantive right, not a procedural right. Indeed, the First DCA has generally reviewed a Claimant's entitlement to medical services as a substantive right not a procedural right, Russell v. P. I. E. Nationwide, 668 So.2d 696(Fla.1st DCA 1995), Southern Bakeries v. Cooper, 659 So.2d 339(Fla.1st DCA 1995), Gonzales v. Publix, 654 So.2d 634(Fla.1st DCA 1995), dissenting opinion of Honorable Judge Kahn (AP-9).

This Honorable Court in Sullivan v. Mayo, held:

"It is well established in Florida that the substantive rights of the respective parties under the Workman's Compensation Law are fixed as of the time of the injury to the employee. This is so because the acceptance of the provisions of the Workman's Compensation Law by the

employer, the employee, and the insurance carrier constitutes a contract between the parties which embraces the provisions of the law as of the time of the injury. Consequently, a subsequent enactment could not impair the substantive rights of the parties established by this contractual relationship." Sullivan v. Mayo, Supra at 428.

The Second DCA in Hausler V. State Farm Mutual Automobile Insurance Company, 374 So.2d 1037(Fla.2nd DCA 1979) stated that:

"When Hausler and State Farm negotiated for and entered into the subject contract of insurance, its terms were set in accordance with the law in effect at that time. . . ." Hausler V. State Farm Mutual Automobile Insurance Company, Supra at 1038).

The Second DCA further stated in Hausler V. State Farm, Supra that:

"Article I, Section 10, of the Florida Constitution prohibits the Legislature from passing any law which impairs the obligation of a contract. In other words, where the statute in question was not in effect at the time of contracting, it cannot be retroactively applied to alter the obligations of that contract. This is true even though the act which triggers the obligation occurs after the statute is enacted." Hausler V. State Farm Mutual Automobile Insurance Company, Supra at 1038.

In the case at bar, the First DCA, in affirming the JCC's order below, specifically found that:

"Section 440.13, Florida Statutes (2005), establishes an E/C's duty to ensure an injured Claimant receives medical treatment, and it prescribes the **procedure for authorizing medical providers**. . . Accordingly, the 2005 version of Section 440.13 controls in this case." (AP-2,3).

Claimant respectfully submits the above referenced finding by the First DCA directly and expressly conflicts with this Honorable Court's decision in Sullivan v. Mayo, Supra, and the

second DCA's opinion in Hausler V. State Farm Mutual Automobile Insurance Company, Supra.

The Claimant's right to veto the E/C's initial selection of a physician and demand the appointment of another physician is a substantive right, not a procedural right. As such, as stated by the Honorable Judge Kahn in his dissenting opinion, the statute in effect at the time of the injury, specifically F.S.440.13(3)(1986) controls this case, not the 2005 version.

As further noted by the Honorable Judge Kahn in his dissenting opinion:

"Interestingly, the parties as well as the Judge of Compensation Claims (JCC) below, assume that the 1985 version of Section 440.13 would control this case. This assumption carries through in the merits order here under review, as well in the parties' briefs. Claimant's argument on appeal is that the JCC misconstrued the requirements of the 1985 statute. I agree with Claimant's assertion." (AP-7).

CONCLUSION

Since the First DCA's 12/29/06 opinion expressly and directly conflicts with the above referenced case of this Honorable Court and the above referenced case of the Second DCA, Petitioner respectfully requests that this Honorable Court grant Petitioner's Notice to Invoke Discretionary Jurisdiction and accept jurisdiction of this appeal.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by regular U.S. Mail on this _____ day of March, 2007 to: Joey D. Oquist, 1135 Dr. MLK Street North, St. Petersburg, Florida 33701-1515, Jack Weiss, Post Office Box 210, St. Petersburg, Florida 33731.

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CERTIFICATE OF TYPE FACE COMPLIANCE

I HEREBY CERTIFY that this Initial Brief on Jurisdiction for Petitioner was computer generated using Courier New twelve font on Microsoft Word, and hereby complies with the font standards as required by Fla.R.App.P 9.210 for computer-generated briefs.

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