

IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO THE
FLORIDA RULES OF WORKERS'
COMPENSATION PROCEDURE

CASE NO.: SC04-110

COMMENTS OF FLORIDA WORKERS' ADVOCATES, INC.

Florida Workers' Advocates, Inc., an organization whose sole purpose is to advocate the interests of injured workers in Florida, file these comments concerning the Amendments to the Florida Rules of Workers' Compensation Procedures.

Jurisdiction

The threshold issue before the court is its jurisdiction to adopt rules of workers' compensation procedure. As to this issue, this court has been presented with diametrically opposed arguments. Each argument is based on a conflicting statute.

The Florida Workers' Compensation Rules Committee argues that Section 440.29(3), Florida Statutes (2003) governs and provides that "practice and procedure before the Judges of Compensation Claims shall be governed by rules adopted by the Supreme Court." The Division of Administrative Hearings (DOAH) and Office of the Judges of Compensation Claims (OJCC) asks the court to declare all of the Florida Rules of Workers' Compensation Procedure to be null and void, having been abrogated by operation of Section 440.45(4) which states:

“The Office of the Judges of Compensation Claims shall promulgate rules to affect the purposes of this section. Such rules shall include procedural rules applicable to Workers’ Compensation claim resolution. The Workers’ Compensation Rules of Procedure approved by the Supreme Court shall apply until the rules promulgated by the Office of the Judges of Compensation Claims pursuant to this section become effective.”

In attempting to discern legislative intent, this Court first looks to the actual language used in the statute. Joshua v. City of Gainesville, 768 So. 2d 432, 435 (Fla. 2000). If the statutory language is unclear, the Court applies rules of statutory construction and explores legislative history to determine legislative intent. Id.; Weber v. Dobbins, 616 So. 2d 956, 958 (Fla. 1993). “To discern legislative intent, courts must consider the statute as a whole, including the evil to be corrected, the language, title, and history of its enactment, and the state of law already in existence on the statute.” State v. Anderson, 764 So. 2d 848, 849 (Fla. 3d DCA 2000) (citing McKibben v. Mallory, 293 So. 2d 48, 52 (Fla. 1974)).

Resort to standard rules of statutory construction does not resolve the conflict between these statutes. The foremost such rule is that when two statutes are in conflict, the specific statute controls over the general statute. See State v. J.M., 824 So. 2d 105, 112 (Fla. 2002). Both statutory provisions have near equal specificity, however, an advantage on specificity goes to Section 440.29(3), which applies to all

of Chapter 440, while Section 440.45(4) by its terms applies only to “this section,” i.e., only to section 440.45, which governs internal operation of the offices of the JCCs.

Another basic tenet of statutory construction is that, “When two statutes are in conflict, the later promulgated statute should prevail as the last expression of legislative intent.” McKendry v. State, 641 So. 2d 45, 46 (Fla. 1994). However, this rule does not provide a clear answer here. Section 440.45(4) was adopted in 1993, but not given its current interpretation until 2002. In the intervening years, the legislature considered and adopted many amendments to Chapter 440, and not only left Section 440.29(3) intact, but seemingly was content with the OJCC’s continued operation under court-adopted rules.

Section 440.45(4) was initially construed by the OJCC as authorizing only minor changes and procedures such as those set out in the “Uniform Practices and Procedures” (UPPs) (DOAH/OJCC comment at 8). This fact gives rise to another rule of construction: that the construction given to the law by the agency charged with interpreting and implementing it should be given great weight unless the interpretation is clearly erroneous. See Pan Am. World Airways, Inc. v. Fla. Pub. Serv. Comm'n, 427 So. 2d 716 (Fla. 1983). If the agency's interpretation is one of several permissible interpretations, it must be upheld despite the existence of reasonable alternatives. Doyle v. Department of Business Regulation, 794 So. 2d 686, 690 (Fla. 1st DCA

2001). Here, OJCC did not consider 440.45(4) as a mandate to replace the Rules of Worker's Compensation Procedure adopted by this Court for nearly 10 years. While that interpretation has now changed, the initial interpretation and the OJCC's actions in accordance with it remains a valid consideration in the statutory construction.

The legislature is deemed to be aware of the construction assigned by the courts and administrative agencies and is deemed to approve of such construction when the statutes are reenacted without change. See Ford v. Wainwright, 451 So. 2d 471, 475 (Fla. 1984); Newman v. State, 738 So. 2d 981, 983 (Fla. 2d DCA 1999). This rule thus gives an advantage to Section 440.29(3). More importantly, the OJCC's report to the legislature for 2003 described the ongoing controversy over rulemaking authority and requested statutory clarification, stating, "Evidently, it would still be beneficial to clarify the scope of the rulemaking authority by placing it in Section 440.29 or 440.25 that pertain to procedure, rather than 440.45 that pertains to internal organization of OJCC." See Report at Appendix, p. 21.

The legislature would also be deemed aware of this court's adoption of workers' compensation rules of procedure under the authority of Article V, Section 2(a), Florida Constitution. See Amendments to Florida Rules of Workers' Compensation Procedure, 603 So. 2d 425 (Fla. 1992); In Re: Amendments to the Florida Rules of Workers' Compensation Procedure, 664 So. 2d 945 (Fla. 1995); In

Re: Amendments to the Florida Rules of Workers' Compensation Procedure, 674 So. 2d 631 (Fla. 1996); Amendments to the Florida Rules of Workers' Compensation Procedures, 795 So. 2d 863 (Fla. 2000); Amendments to the Florida Rules of Workers' Compensation Procedure, 829 So. 2d 791 (Fla. 2002). Further, the legislature has consistently treated JCCs as judicial tribunals. Section 440.442 states that JCCs "shall observe and abide by the Code of Judicial Conduct as adopted by the Florida Supreme Court." Section 440.442, Florida Statutes (2003).

If JCCs are courts under Article V, Section 2, of the Florida Constitution, then the court-adopted rules of workers' compensation procedure may be repealed only by general law enacted by a 2/3 vote of the membership of each house of the legislature. Article V, Section 2(a), Florida Constitution.

While conceding that Section 440.45(4) does give some hint of legislative intent to authorize the OJCC to adopt rules of procedure, such hints are not sufficient to overcome the contrary indications. The contrary indications, including the reenactment of Section 440.29(3), the limiting language within Section 440.45, the OJCC's own interpretation of Section 440.45(4) for ten years as allowing adoption of UPPs, and the failure to amend other provisions treating the JCCs as judicial officers or courts, create too much doubt to justify abrogating the rules of procedure under which the workers' compensation has operated for so many years.

Moreover, the legislature has been unclear in dealing with other aspects of the anticipated rulemaking under Section 440.45. Section 440.021 exempts JCCs from the APA (Chapter 120) and states that no Judge of Compensation Claims shall be considered an agency or a part thereof, however, the OJCC was assigned to DOAH in the 2002 Amendments, and DOAH was made “its agency head for all purposes, including, but not limited to, rulemaking . . . and establishing agency policies and procedures.” This provision adds weight to the argument that 440.45(4) was intended to establish agency policies and procedures, not necessarily to replace the Rules of Workers’ Compensation Procedure. In addition, this provision apparently created so much doubt as to whether rulemaking authority was delegated to the DOAH head or to the Deputy Chief OJCC that the two departments determined to sign all rulemaking documents jointly “to obviate any question about which official was responsible for the general rulemaking under Section 440.45(4) (DOAH/OJCC Comments at 9). Besides the difficulty in determining which agency head was actually responsible for the rulemaking, which creates doubt as to whether the proper official did the actual rulemaking, both officials determined that Chapter 120 should be followed even though the Chapter 120 rulemaking process does not apply by virtue of Section 440.021. While the DOAH/OJCC comments indicate they believe Chapter 120 applies, Section 440.021 notwithstanding, they do not address other provisions of Chapter 440

which clearly indicate that Chapter 120 does not apply except when expressly so provided. For example, Section 440.591 allows the Department, the Financial Services Commission, the Agency for Healthcare Administration, and the Department of Education to adopt rules pursuant to Chapter 120 to implement the provisions of Chapter 440 conferring duties upon them. This provision invokes yet another rule of statutory construction, that the inclusion of certain specifically named agencies implies the exclusion of others. Gay v. Singletary, 700 So. 2d 1220, 1221 (Fla.,1997) (holding that under doctrine of *inclusio unius est exclusio alterius*, when a law expressly describes the particular situation in which something should apply, an inference must be drawn that what is not included by specific reference was intended to be omitted or excluded). See also Industrial Fire & Cas. Ins. Co. v. Kwechin, 447 So. 2d 1337, 1339 (Fla. 1983). Both DOAH and the OJCC are excluded from this grant of authority to proceed with rulemaking under Chapter 120.

In summary, given the many years of rulemaking authority and the unclear and contradictory statutory provisions, together with uncertainties of actual statutory intent, this court should find that it continues to have jurisdiction to adopt Rules of Workers' Compensation Procedures, and that the present rules have not been abrogated.

Substance of Proposed Rules

The proposed rules are entirely appropriate and should be adopted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of this Request to Participate in Oral Argument has been furnished to Jeffrey I. Jacobs, Esquire, 5975 Sunset Drive, Suite 801, South Miami, FL 33143; to John F. Harkness, Jr., Esquire, 651 East Jefferson Street, Tallahassee, FL 32399-2300; to Mary Ann Stiles, Esquire, Post Office Box 460, Tampa, FL 33601-0460; Frederic M. Schott, Esquire, 746 North Magnolia Avenue, Orlando, Florida 32803-3860; and to Robert S. Cohen, Esquire, Director and Chief Administrative Law Judge, S. Scott Stephens, Esquire, Deputy Chief Judge, Division of Administrative Hearings, The DeSoto Building, 1230 Apalachee Parkway, Tallahassee, FL 32399-3060, by U.S. mail on this _____ day of August, 2004.

Attorney