PUBLIC EMPLOYMENT

Public Employment: Labor Relations

Alderman v. City of Jacksonville, Fire and Rescue Division,
902 So. 2d 885 (Fla. 1st Dist. App. 2005)

In an employee-filed grievance, pursuant to a collective bargaining agreement, the timeliness of an arbitration request and the controlling nature of a prior grievance are issues properly evaluated by the arbitrator, not by the local government or the trial court.

FACTS AND PROCEDURAL HISTORY

Kenneth Alderman filed a grievance against the City of Jacksonville, claiming that the City neglected to administer the promotional exam for a Fire Captain position within six months of the position becoming vacant, as required by the collective bargaining agreement between the City and the firefighters' union. Although the hearing officer found that the City violated the agreement, he denied Alderman's request for seniority credit. Alderman did not pursue a review of this denial.

Subsequently, Alderman applied to take the promotional exam for a District Chief position. He was not permitted to take the exam because he had not served for one year as Fire Captain. Alderman filed another grievance, claiming that the City's initial violation of the agreement had directly resulted in the denial of his District Chief application.

The City denied his grievance without submitting it to arbitration, determining that the grievance was untimely and that the issue had already been addressed in the first grievance proceeding. Alderman filed an action to compel arbitration. The trial court granted the City's motion for summary judgment, holding that Alderman had waived his right to arbitration because his filing had not been timely, and that timeliness was a "condition precedent" to arbitration. *Alderman*, 902 So. 2d at 887. Alderman appealed.

ANALYSIS

The First District Court of Appeal explained that the trial court erroneously merged the concepts of timeliness and waiver, conducting a waiver analysis when the facts of the case suggested delay, not waiver. Timeliness issues are properly decided by an arbitrator rather than a trial court, even if a timely request is a condition precedent to arbitration. *Piercy v. Sch. Bd. of Wash. County*, 576 So. 2d 806, 808 (Fla. 1st Dist. App. 1991); *Exec. Life Ins. Co. v. John Hammer & Assoc., Inc.*, 569 So. 2d 855, 857 (Fla. 2d Dist. App. 1990).

The First District also indicated that because the determination of whether a resolution of a prior grievance is controlling over a subsequent grievance is a procedural matter, that issue is also more appropriately submitted to an arbitrator. The court reversed summary judgment and remanded the case for referral to arbitration.

SIGNIFICANCE

Alderman makes clear that the timeliness of an arbitration request, even if a condition precedent to arbitration, is properly decided by the arbitrator, not by the local government or trial court.

RESEARCH REFERENCES

- M. J. Greene, *Waiver of, or Estoppel to Assert, Substantive Right or Right to Arbitrate as Question for Court or Arbitrator*, 26 A.L.R.3d 604 (1969 & Supp. 2005).
- E. L. Kellett, *Delay in Asserting Contractual Right to Arbitration as Precluding Enforcement Thereof*, 25 A.L.R.3d 1171 (1969 & Supp. 2005).

Christopher A. Cazin

Public Employment: Labor Relations

Miami-Dade County v. Government Supervisors Association of Florida, OPEIU AFL-CIO,
907 So. 2d 591 (Fla. 3d Dist. App. 2005)

Neither the Public Employee Relations Commission (PERC), nor a hearing officer presiding over a PERC claim has the authority to rule on a claim that was not presented or argued by the parties. Additionally, when the interpretation of a provision of a collective bargaining agreement is in question, and the issue is strictly a question of law and not a matter that requires agency expertise, a court will not give deference to PERC's interpretation of that provision.

FACTS AND PROCEDURAL HISTORY

Airport protocol employees, subject to a collective bargaining agreement with the Miami-Dade County, filed charges with the PERC, alleging that the County committed an unfair labor practice by changing the work shift schedule from a ten-hour-per-day, four-day-per-week work week to an eight-hour-per-day, five-day-per-week schedule. The employees alleged that the change was made in retaliation for a union member's complaint regarding an earlier scheduling decision by the County. The charge did not include a claim that the work schedule was a mandatory subject of collective bargaining, or that the County refused to bargain collectively concerning the work schedule modification. The PERC hearing officer, relying on Section 447.501(1)(c) of the Florida Statutes, determined that although the County did not engage in retaliation, it had not bargained with the union over the schedule change, and therefore the County committed an unfair labor practice.

ANALYSIS

The Third District Court of Appeal agreed with the hearing officer's determination that retaliation had not occurred; however, the court reversed the hearing officer's decision that the County improperly changed the shift hours because it failed to engage in collective bargaining with the union.

To rule on an issue that has not been litigated before the court violates due process. *Clemente v. B. & B. Chemical Co.*, 480 So. 2d 257, 258 (Fla. 3d Dist. App. 1985). The Third District found that because the failure to collectively bargain over the proposed shift change was not an issue argued before the PERC, neither the PERC nor the hearing officer had proper jurisdiction to rule on the claim.

Furthermore, a reviewing court need not defer to an agency's interpretation of law if that interpretation falls outside the permissible boundaries of potential constructions. *Colbert v. Dept. of Health*, 890 So. 2d 1165, 1166 (Fla. 1st Dist. App. 2004). A reviewing court also will not defer to an agency's interpretation of law if no special agency expertise is required to apply the law and the agency's interpretation conflicts with the plain meaning of a statute. *Fla. Hosp. v. Agency for Health Care Admin.*, 823 So. 2d 844, 848 (Fla. 1st Dist. App. 2002).

The Third District gave no deference to PERC's ruling on the issue of whether collective bargaining was required in advance of changes in work shifts because a plain reading of the collective bargaining agreement revealed that the County had the sole authority to set work hours and schedules based on the airport's needs. While the union argued that a waiver provision in the collective bargaining agreement could be construed as imposing an obligation on the County to bargain over work schedules, the court noted that such an interpretation would require a "tortured reading" of the provision, and it refused to interpret the provision. *Govt. Supervisors*, 907 So. 2d at 594. The court affirmed the trial court's determination on the retaliation issue, but reversed on the hearing officer's finding that the County had engaged in an unfair labor practice.

SIGNIFICANCE

This case clarifies the degree of deference reviewing courts may apply to administrative final orders. Practitioners should be aware that courts will not defer absolutely to an agency ruling when the matter is one of law, requiring no specialized expertise. Additionally, this case demonstrates that courts will not sustain rulings by administrative agencies when those rulings address a subject matter that was not properly claimed or argued before the administrative tribunal.

RESEARCH REFERENCE

- 34 Fla. Jur. 2d *Labor and Labor Relations* § 190 (2002 & Supp. 2006).

Jay Daigneault

Public Employment: Tort Claims

Maggio v. Florida Department of Labor & Employment Security,
899 So. 2d 1074 (Fla. 2005)

Presuit notification required by Section 768.28(6) of the Florida Statutes when bringing a tort action against the State or one of its agents is not applicable to suits arising under the Florida Civil Rights Act of 1992. The Florida Civil Rights Act includes its own sovereign immunity clause and its own presuit notification requirements.

FACTS AND PROCEDURAL HISTORY

Janet Maggio, who was legally blind, was an employee of the Florida Department of Labor and Employment Security (DLES) for twelve years. Maggio filed suit against the DLES, claiming unlawful discrimination as a result of her handicap. The suit was filed pursuant to the Florida Civil Rights Act of 1992, Section 760.01 of the Florida Statutes.

The DLES moved to dismiss, alleging a failure to comply with the presuit notice requirements of Section 768.28(6) of the Florida Statutes. The trial court granted the motion, holding that because Maggio's suit was a tort claim, Maggio was required to comply with presuit notification requirements. The Second District Court of Appeal affirmed the trial court's ruling, but acknowledged that there was no controlling precedent deciding whether a claim under the Florida Civil Rights Act was subject to the presuit notification requirement of Section 768.28(6). Therefore, the Second District certified the question to the Florida Supreme Court.

ANALYSIS

The DLES argued that both the Florida Civil Rights Act of 1992 and Section 768.28(6) should be read together, and both sets

of requirements should be imposed upon the claim. The Florida Supreme Court rejected that argument, holding that the Civil Rights Act is a "stand alone" statute. *See Stoletz v. State*, 875 So. 2d 572, 575 (Fla. 2004) (citing *McKendry v. State*, 641 So. 2d 45, 46 (Fla. 1994), a specific statute regulating a specific area will control over a more general statute regulating the same subject).

The Supreme Court looked to the language of the Civil Rights Act to support this finding and to determine whether the Legislature intended for claims brought under the Act to be subjected to the presuit requirements of Section 768.28(6). The Court found that the Act had its own provision for presuit requirements independent of Section 768.28(6), and that the Civil Rights Act expressly stated it should be "liberally construed to further the general purposes." Fla. Stat. § 760.01(3) (2003). Next, the Court found that the Act expressly referred to Section 768.28(5) (limiting recovery against the State) and reasoned that this indicated that the Legislature was aware of Section 768.28 and purposefully did not intend for Section 768.28(6) to be applied to these discrimination claims. Last, the Court held that sovereign immunity for civil rights claims is waived under the Civil Rights Act, and therefore, does not require the waiver provided for in Section 768.28(6).

The Florida Supreme Court distinguished this holding from the two cases which the Second District relied on for its ruling. The Second District referenced *Bearelly v. State Department of Corrections*, 1 D02-2139 (Fla. Cir. Ct. 8th Dist. May 29, 2002) (holding that Section 768.28(6) applies to claims under the Civil Rights Act); and *Scott v. Otis Elevator Co.*, 572 So. 2d 902 (Fla. 1990). The Court concluded that *Scott* involved a claim arising under a different statute (Florida Statutes Section 440.205, part of the Workers' Compensation Law) and did not involve the question concerning whether claims arising under Section 440.205 were subject to the presuit notice requirement of Section 768.28. Though the Court recognized that the First and Third District Courts of Appeal had ruled that Section 768.28 is applicable to Section 440.205 claims (*see Osten v. City of Homestead*, 757 So. 2d 1243, 1244 (Fla. 3d Dist. App. 2000); *Kelley v. Jackson County Tax Collector*, 745 So. 2d 1040, 1040–1041 (Fla. 1st Dist. App. 1999)), the Court declined to determine whether these rulings were correct.

The Court reiterated that the purpose of Section 768.28 was to waive sovereign immunity for breach of a common law duty of care, explaining that those were torts for which the State would be liable as if it were a private person. The Court then declined to decide whether Section 768.28 applied only to common law torts.

SIGNIFICANCE

Maggio expressly establishes controlling precedent regarding applicability of presuit requirements found in Section 768.28(6) to discrimination claims filed pursuant to the Florida Civil Rights Act of 1992 (Florida Statutes Section 760.10), holding that Section 768.28(6) is not applicable. The case clarifies that the Florida Civil Rights Act is a "stand alone" statute with its own presuit requirements and its own waiver of sovereign immunity.

RESEARCH REFERENCE

- 28 Fla. Jur. 2d *Government Tort Liability* § 61 (Westlaw database updated Jan. 2006).

Roxanne Fixsen

Public Employment: Workers' Compensation

Hillsborough County School Board v. Ward,
913 So. 2d 39 (Fla. 1st Dist. App. 2005)

A workers' compensation claimant will remain eligible for permanent total disability benefits after the age of sixty-two, unless the employer/carrier establishes that the claimant is eligible for both social security retirement benefits and social security disability benefits.

FACTS AND PROCEDURAL HISTORY

After Sandra Ward, the claimant, suffered a compensable injury in 1993, the Hillsborough County School Board began to pay her both permanent total disability benefits and permanent total disability supplemental benefits. When Ward reached the age of sixty-two, the School Board terminated the supplemental benefits, believing it was entitled to do so because Ward had reached permanent disability status prior to turning sixty-two and had

begun receiving social security benefits at that time. The Judge of Compensation Claims (JCC) determined that Section 440.15(1)(e)(1) of the Florida Statutes required the School Board to demonstrate that Ward was eligible for both social security retirement benefits and social security disability benefits to properly terminate her supplemental benefits. Because the School Board failed to establish that Ward was eligible for the disability benefits, the JCC ordered that the supplemental benefits be reinstated. The School Board appealed.

ANALYSIS

When a claimant suffers a disabling injury prior to age sixty-five, an employer/carrier must prove the claimant's entitlement to social security disability benefits before permanent total disability supplemental benefits may be terminated. *Burger King Corp. v. Moreno*, 689 So. 2d 288, 289 (Fla. 1st Dist. App. 1997). In order for an employer "to stop paying [permanent total disability] supplemental benefits to a claimant who turns 62, it must first be established that a claimant is eligible for both social security retirement and social security disability benefits." *Ward*, 913 So. 2d at 42. Therefore, if the claimant is not eligible for both benefits, permanent total disability benefits may not be terminated if the injury is suffered prior to receiving social security benefits at age sixty-two.

On appeal, the School Board argued that Ward's entitlement to the supplemental benefits immediately ceased when she reached the age of sixty-two and that even if the benefits did not automatically stop, Ward's eligibility for social security disability benefits precluded her from collecting the supplemental benefits. The First District Court of Appeal affirmed the JCC's order reinstating the benefits because the School Board failed to establish Ward's eligibility for social security disability benefits as required by law, and because the School Board did not prove that Ward in fact suffered from a disability. The court concluded that the claimant's eligibility for social security benefits did not automatically qualify her for social security disability benefits and explained that to be "eligible" for social security disability benefits, as used in Florida Statutes Section 440.15(1)(e)(1), the individual must be insured for disability benefits, be younger than age sixty-five, and be legally disabled. Because the School Board did not

prove that Ward was indeed disabled, Ward's eligibility for the social security disability benefits was not established; therefore, the School Board could not cease payment on the permanent total disability supplemental benefits. The court held that a claimant past the age of sixty-two remains entitled to permanent total disability supplemental benefits until the claimant is proven to eligible for both social security retirement benefits and social security disability benefits.

SIGNIFICANCE

This case clarifies the meaning of the term "eligible" under Section 440.15(1)(e)(1) of the Florida Statutes, and provides guidance as to what an employer/carrier must establish to demonstrate that social security benefits should supplant workers' compensation benefits. Practitioners should not rely strictly on a claimant's age to demonstrate eligibility.

RESEARCH REFERENCE

- 58 Fla. Jur. 2d *Workers' Compensation* § 171 (2005).

Jay Daigneault

Public Employment: Workers' Compensation

Seminole County Sheriff's Office v. Johnson,
901 So. 2d 342 (Fla. 1st Dist. App. 2005)

When the Legislature enacts an amendment that creates a presumption that a deputy's hypertension was accidental and suffered in the line of duty for worker's compensation purposes, the amendment is a procedural enactment and the law applies retroactively. However, the judge of compensation claims must consider whether the presumption was successfully rebutted.

FACTS AND PROCEDURAL HISTORY

Johnson, a deputy sheriff, suffered a stroke as a result of hypertension and sought workers' compensation benefits. The Judge of Compensation Claims awarded Johnson workers' compensation benefits based on an amended Florida statute under which John-

son's hypertension was presumed to be accidental and suffered in the line of duty.

On appeal, the First District Court of Appeal held that although Johnson was protected under the amended statute, the judge did not address whether Johnson's employer, the Seminole County Sheriff's Office, successfully rebutted the presumption and, if it did, whether Johnson's hypertension was related to his occupation.

ANALYSIS

The Sheriff's Office argued that deputy sheriffs were not entitled to the statutory presumption in Section 112.18, Florida Statutes, and because Johnson's disability occurred before the 2002 amendment to the statute that expanded the class of protected workers, his injuries were not covered. The First District agreed that Johnson would not have been covered by the presumption included in the previous statute, but because the 2002 amendment was a procedural enactment related to the burden of proof, as opposed to a substantive change, the amendment applied retroactively. Therefore, Johnson was included in the class of employees covered by the statutory presumption.

However, the First District found that the Judge of Compensation Claims erred by not addressing whether the Sheriff's Office successfully rebutted the presumption that the hypertension was accidental and suffered in the line of duty. Further, if the presumption was successfully rebutted, the Judge of Compensation Claims should have addressed whether the disability was related to Johnson's occupation.

As a result, the court held that Johnson was covered by the amended statute, but before he could collect workers' compensation benefits, the judge was required to address whether the presumption was successfully rebutted, and if so, whether Johnson's disability stemmed from his occupation as a sheriff's deputy.

SIGNIFICANCE

Seminole County Sheriff's Office addresses when an amended statute may be applied retroactively and identifies the standard that should to be used when applying the statute. The case clarifies that when an amendment is merely procedural rather than substantive, it applies retroactively. However, even though the

amendment applies retroactively, if it includes a rebuttable presumption, the judge of compensation claims must still consider whether the presumption has been rebutted.

RESEARCH REFERENCE

- 57 Fla. Jur. 2d *Worker's Compensation* §§ 12–13 (2003).

Zachary A. Harrington

Public Employment: Workers' Compensation

Tyson v. Palm Beach County School Board,
913 So. 2d 105 (Fla. 1st Dist. App. 2005)

If a non-work related injury increases the need for care of a compensable work-related injury, the employer will be responsible for the increased care if the treatment would not have been needed but for the work-related injury.

FACTS AND PROCEDURAL HISTORY

Robbin Tyson received workers' compensation for seventeen hours per week of attendant care for illnesses that arose from work-related back injuries. The illnesses included hypertension, diabetes, and coronary and orthopedic conditions. After being in an automobile accident, Tyson filed for increased compensation to cover twenty-four-hour-a-day attendant care. The Judge of Compensation Claims (JCC) determined that Tyson required increased assistance to pick up medications and groceries, to travel to doctor appointments, and to test her blood glucose levels. The JCC found that this additional assistance was necessary to continue to treat the original compensable injury and the associated illnesses. Accordingly, the JCC ordered an increase in compensation to cover thirty-eight hours of attendant care per week. Both parties appealed.

ANALYSIS

Employers are required to furnish care for a work-related injury to the extent "the nature of the injury or the process of recovery requires." *Tyson*, 913 So. 2d at 106. Compensation is appropriate when the need for care results from a combination of work-

related and non-work-related injuries. *See Jordan v. Fla. Indus. Commn.*, 183 So. 2d 529, 530 (Fla. 1966). However, an employer's responsibility to provide care for non-work-related injuries exists only to the extent that the requirement for additional care was necessitated by the compensable injury. Any injury resulting solely from the second incident is not the responsibility of the employer.

Under the "hindrance to recovery" theory, the employer is responsible for care of the new injuries only as necessary to treat the original compensable injury. *Tyson*, 913 So. 2d at 107. Although Tyson claimed additional compensation following her automobile accident, the First District Court of Appeal determined that the School Board was responsible only for the increased attendant care as related to her original, compensable injury. A JCC would be required to determine to what extent new injuries were related to, or independent of, compensable injuries. The School Board would be responsible for the cost of attendant care for any new injury that was a hindrance to Tyson's recovery from her compensable injuries.

The First District approved the JCC's list of activities for which Tyson needed increased care, concluding that those activities were related to her original compensable injury. The court went on to note that the record indicated that Tyson also needed assistance administering her medications for hypertension, diabetes, and coronary and orthopedic conditions. Her inability to administer those medications herself was a hindrance to her recovery from those compensable conditions and was the responsibility of the School Board, despite the fact that such inability resulted from a non-compensable injury. Therefore, the court remanded the order for the JCC to award additional compensation for the assistance with the administration of Tyson's medications.

SIGNIFICANCE

An employer paying workers' compensation to an employee may be responsible for compensation for new non-work-related injuries, if the new injuries are a hindrance to the employee's recovery from her compensable injuries.

RESEARCH REFERENCE

- 9 Fla. Prac., *Workers' Compensation* §§ 9:6; 16:12 (2004–2005 ed.).

Sandy Phillips