

# Young Lawyers Section



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## CARMACK AND THE EROSION OF WORKERS' COMPENSATION BENEFITS

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In Florida, businesses are required to self-insure or to carry workers' compensation insurance. Injured employees should benefit greatly from this no-fault system, but the disparity in lobbying power between injured workers and the insurance carriers provides for unfairness in the law. Although disparity in bargaining power is an unavoidable element of workers' compensation, extreme tort reform has reduced the ability of attorneys to fight for injured workers. While employers have arguably enjoyed reduced premiums as a result, employees have suffered from the consequences of the pro-employer trend in workers' compensation legislation. Not only has it become unfeasible for some to obtain representation but claimant's benefits been continuously eroded at the same time. One of the most recent examples of this trend is illustrated by the appeals court decisions in the *Parodi* and *Carmack* cases. In August 2009, the *Parodi v. Fla. Contracting Co.* decision gave employees a small yet significant victory. *Parodi v. Florida Contracting Co.*, 16 So.3d 958 (Fla. 1st DCA 2009). However, the celebration for employees was short lived. In September 2009, the decision in *Carmack v. State of Fla.* "affirmed" that the pro-employer trend was stronger than ever. *Carmack v. State*, 31 So.3d 798 (Fla. 1st DCA 2009).

The *Parodi* decision appeared to be a triumph for employees before *Carmack* was decided. In *Parodi*, the employer and carrier refused to authorize treatment when an employee's medical past indicated fraud. *Parodi v. Fla. Contracting Co.*, 16 So.3d 958, 960 (Fla. 1st DCA 2009). Workers' compensation law provides to employers and carriers the right to control the selection of treating physicians. §440.13 FLA. STAT. (2003). However, because the carrier refused to provide coverage, the claimant was forced to obtain unauthorized treatment on his own. *Parodi v. Fla. Contracting Co.*, 16 So.3d 958, 960 (Fla. 1st DCA 2009). The Judge of Compensation Claims (JCC) held that the carrier wrongfully denied coverage. *Id.* The JCC ordered the carrier to pay for past medical expenses, but he excluded the medical opinions of the claimant's doctors because they were not authorized at the time of treatment. *Id.* On appeal, the First District Court of Appeal of Florida reversed the decision of the JCC. *Id.* at 962. In reaching its conclusion, the court noted that when an employer abandons its obligation to provide appropriate care, it surrenders to the injured employee the right to select a physician and obtain treatment, provided the care is

compensable and medically necessary. *Id.* at 961-962. Ultimately, the court held that medical opinions during periods of wrongful denial are admissible if the claimant establishes: (a) a specific request for the contested treatment was made; (b) a reasonable time was allowed for a response; and (c) the treatment was compensable, reasonable, and medically necessary. *Id.*

The victory for employees would soon be trumped. In *Carmack v. State of Fla.*, the claimant requested treatment for injuries to his leg and back and for emotional difficulties. *Carmack v. State*, 31 So.3d 798, 799 (Fla. 1st DCA 2009). The employer/carrier deemed compensable only the leg and back injuries and authorized health care providers for those injuries. *Id.* The claimant requested a referral for a psychiatrist from the carrier, but received no authorization and was forced to seek psychiatric treatment on his own. *Id.*

The JCC held that the claimant was wrongfully denied compensation for his mental injuries. *Id.* However, the JCC held that the carrier had the right to select a new psychiatrist for continued treatment. *Id.* The JCC relied on *Butler v. Bay Ctr.* to reach its decision. *Carmack v. State*, 31 So.3d 798, 800 (Fla. 1st DCA 2009); see *Butler v. Bay Ctr.*, 947 So.2d 570 (Fla. 1st DCA 2006). Applying *Butler*, the JCC held that when a denial is proven wrongful, the carrier is required to pay the amount expended by the claimant for care that would have been compensable and medically necessary, but the carrier is not required to authorize that physician for the claimant. *Id.* The right to select the medical provider for continuing care and treatment remains with the carrier. *Id.* The First District Court of Appeal of Florida affirmed the JCC's decision, and a rehearing was denied in March 2010.

### The Problem with the Carmack Decision

An injured worker was forced to seek psychiatric care on his own when his employer wrongfully denied compensation. As a result of the carrier's wrongful denial, the claimant built a doctor-patient relationship with a psychiatrist whom he will no longer see. Claimant will now have to establish a new relationship with a health care provider of the carrier's choice.

Let's look at another foreseeable scenario that the *Carmack* decision creates. In this scenario, a claimant is denied compensation for an injury, and the claimant sees a doctor on his own. The claimant undergoes significant testing to prepare for surgery and has built a strong doctor-patient relationship. Now, two days before surgery, the JCC finds that the denial was wrongful and the carrier exercises its right to choose a different health care provider. The claimant wasted time and resources with the previous doctor and may now have to wait months before getting surgery with the new doctor. The dissenting Judge in *Carmack* feared this exact situation. *Carmack v. State*, 31 So.3d 798, 800-803 (Fla. 1st DCA 2009). The dissenting judge was rightly concerned with the problems associated with allowing a carrier to disrupt an existing doctor-patient relationship deemed medically necessary, when the injured employee wishes to continue treatment with the same physician. *Id.* at 801. Doctor-patient relationships take significant time and resources to develop, and it seems harsh to punish the injured employee by forcing him or her to start from scratch with a different doctor. Perhaps, if *Carmack* is not overturned, carriers could provide injured employees who are denied coverage with a list of approved physicians, in the event their denial is proven wrongful.

### The Future of Florida Workers' Compensation

The legislative and judicial systems appear to be strongly supporting lower premiums at the cost of employees' rights and oftentimes their health. The above discussed issue is only a snapshot of how offensive workers' compensation

law has become. Not only are claimant's rights being eroded, but it has become more difficult for them to find representation. It is due time the pendulum swing the other way for workers' compensation and we see that it is brought back to what it was intended to be.