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CASE NOTES

CASE LAW SUMMARY
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If you have any questions regarding Case Law Summaries, please contact W. Rogers Turner, Jr. : rturner@hrmcw.com

HEART ATTACK/INTERNAL DEFECT

Coca Cola Bottling Co. v. Perdue, 32 Fla. L. Weekly D910 (Fla. 1st DCA April 9, 2007)

The claimant worked as a delivery driver for Coca-Cola. The claimant suffered a heart attack while delivering cases of Coca-Cola. The claimant alleged that his heart attack was work related. The JCC concluded that the claimant's heart attack was compensable under the *Victor Wine* test since the claimant suffered a heart attack that was caused by an unusual work related exertion. Under the *Victor Wine* test, if there is evidence of a preexisting condition, heart attacks are compensable only if the employee was at the time of the heart attack subject to unusual physical strain not routine to the type of work the employee was accustomed to performing. In this case, it was

undisputed that the claimant had preexisting heart disease. The First DCA ruled that the JCC applied the *Victor Wine* test incorrectly and reversed and remanded.

To determine whether an employee was subject to unusual strain or overexertion, the First DCA stated that you must examine the work done by the employee as an entirety rather than as an isolated event. In order to do this, an evaluation of the range of days the employee experiences is necessary.

In the case at issue, the claimant was performing his normal duties of delivering cases of Coca-Cola at the time of his heart attack. Therefore, the First DCA stated that the JCC must have evidence of the number of cases of Coca-Cola the claimant is accustomed to delivering on his most active day and least active day. This will give the JCC a range of the number of cases of Coca Cola the claimant is accustomed to delivering. If the claimant's delivery requirements on the day of his heart attack fall within the range between the least active and most active days, the employee is not subject to unusual strain or overexertion. Since there was no evidence as to what the claimant's typical deliveries were, the First DCA reversed and remanded for the JCC to conduct an evidentiary hearing to ascertain whether on the day of the claimant's heart attack, he was required to perform beyond the range of what he was accustomed to performing on one of his most active days.

HEALTH INSURANCE BILLS

Nova Southeastern University v. Majnerich, 32 Fla. L. Weekly D913 (Fla. 1st DCA April 9, 2007)

The JCC ordered the employer/carrier to reimburse the claimant's health insurance carrier for payments made for the claimant's work related injuries. The First DCA agreed with the employer/carrier that the JCC acted without authority in requiring the employer/carrier to reimburse the claimant's health insurance carrier since the health insurance carrier was not a party before the JCC. The First DCA still ordered the employer/carrier to pay the claimant for the payments made by the claimant's health insurance carrier.

DISABILITY UNDER THE FIREFIGHTER PRESUMPTION

City of Port Orange v. Sedacca, 32 Fla. L. Weekly D917 (Fla. 1st DCA April 10, 2007).

The claimant, a firefighter, passed his pre-employment physical examination without evidence of heart disease. During his employment as a firefighter he was diagnosed with hypertension and reached MMI on April 2, 2004. The claimant suffered a permanent physical impairment rating anywhere between 1% and 10%. The sole issue before the First DCA was whether the claimant's permanent impairment for hypertension alone constituted a disability to qualify the claimant for workers' compensation benefits as an occupational disease pursuant to Fla. Sta. 440.151. To be entitled to workers' compensation benefits for an occupational disease pursuant to Fla. Stat. 440.151 the claimant must sustain disablement or death. The First DCA held that since the claimant's hypertension did not result in any wage loss, he did not suffer disablement, thus his hypertension was not covered under workers' compensation.

NOTICE OF APPEAL

Troche v. B J's Wholesale Club, Inc., 32 Fla. L. Weekly D990 (Fla. 1st DCA April 16, 2007).

The claimant failed to file a Notice of Appeal within 30 days of the date the JCC mailed the final order to the parties. The claimant made the argument that the Notice of Appeal was timely filed because it was filed within 30 days of the date the claimant's attorney received the final order. The First DCA held that the claimant's argument was in direct conflict with Fla. R. App. P. 9.180(b)(3), which specifically states that the Notice of Appeal must be filed within 30 days of the date the JCC mails the final order to the parties. Further, the First DCA pointed out that the claimant's argument would be unworkable because there would be no way to confirm when a party received an order and as such, the Court could not accurately calculate the time for filing a Notice of Appeal.

ATTORNEY'S FEES

Francisco v. Espinosa, 32 Fla. L. Weekly 1004 (Fla. 3d DCA April 18, 2007).

The claimant discharged his attorney and retained another attorney. The former attorney filed a charging lien in the workers' compensation action. Four months later, the claimant's new attorney settled the workers' compensation case. As part of the settlement, the employer/carrier agreed to indemnify the claimant regarding the former attorney's claim for attorney's fees. The former attorney filed a Complaint against the claimant in Circuit Court for breach of contract seeking payment of attorney's fees. The former attorney withdrew the charging lien filed in the workers' compensation action. The claimant contended that the JCC had exclusive jurisdiction to award attorney's fees and moved for the former attorney's Complaint to be dismissed. The Circuit Court agreed with the claimant's position and dismissed the former attorney's Complaint. The former attorney appealed and the Third DCA agreed that the JCC has exclusive jurisdiction to determine the fees to which the former attorney is entitled to in this situation.

FLA. STAT. §440.09(4) MISREPRESENTATION DEFENSE

Alvarez v. Unicco, 32 Fla. L. Weekly D1031 (Fla. 1st DCA April 19, 2007)

The JCC found that the claimant violated the Fla. Stat. 440.09(4) misrepresentation provision. The claimant did not contest the JCC's finding that she violated Fla. Sta. 440.09(4), but argued that she was entitled to workers' compensation benefits until the date the JCC found that she violated Fla. Stat. 440.09(4). The First DCA rejected the claimant's argument indicating that the claimant had no authority supporting her position that the JCC erred by not awarding benefits for the period prior to the entry of the Order finding that she violated Fla. Stat.440.09(4).

The First DCA specifically stated that the *Wetherington* case does not require an award by the JCC for a period preceding the determination of a violation of Fla. Stat. 440.09(4). This is important because after the *Wetherington* case claimant's attorneys argued that a carrier cannot unilaterally suspend benefits due to a violation of Fla. Stat. 440.09(4) without a finding by the JCC that the claimant violated Fla. Stat. 440.09(4). This case appears to indicate that the language in the *Wetherington* case that states that

the Workers' Compensation Act contains no authority for the suspension of benefits based on the employer/carrier's unilateral determination that a claimant has violated Fla. Stat.440.09(4) is merely dicta and has no precedential value.

THE 120 DAY RULE

St. Lucie County School Board v. Fuller, 32 Fla. L. Weekly D1127 (Fla. 1st DCA April 30, 2007)

The claimant injured her right knee on the job and the employer/carrier accepted such accident as compensable. After receiving treatment, a preexisting arthritic degenerative condition was diagnosed. The claimant's doctors recommended that the claimant undergo a total knee replacement, for which the claimant sought authorization from the employer/carrier. The employer/carrier denied the request for a total knee replacement since the industrial accident was not the major contributing cause for the need for the surgery. The claimant argued that the employer/carrier was estopped from denying authorization of the surgery by application of the 120 day rule in Fla. Stat. 440.20(4). The JCC agreed and awarded authorization of the surgery.

The JCC decided the case before *Checker's Restaurant v. Wiethoff*, 925 So.2d 348 (Fla. 1st DCA 2006) was decided. The *Checker's* case explained that the waiver of the right to deny compensability under the 120 Day Rule does not preclude the employer/carrier from contending that the claimant's industrial injuries are not the major contributing cause of the claimant's need for further treatment or surgery. As such, the First DCA reversed the JCC's decision in line with the holding in the *Checker's* case.