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CASE NOTES
CASE LAW SUMMARY
2013

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

***** In Touch with Today's Workers' Comp Professionals ****
EXCELLENCE AWARDS

In Touch Magazine's 2nd Annual Excellence Awards Gala takes place in Pembroke Pines on Friday, May 10. HRMCW attorney Gina Jacobs returns as emcee of this event, which recognizes top claims adjusters, health care providers and related professionals in Florida's Workers' Compensation industry. Keynote speaker Bill Rogner will present "FROM *WUELLING* TO *WESTPHAL*: A LIFE SPENT AVOIDING THE PRACTICE OF 'REAL' LAW."

Friday, May 10, 2013 from 7-10 p.m., Floridian Ballroom
17850 NW 2nd Street in Pembroke Pines, FL 33029

Admission is free for claims adjusters and other insurance professionals. To RSVP, contact melissadiaz@myomservices.com. For sponsorship information and vendor tickets, please call Melissa Lopez or Mari Diaz at 866-640-4060.

Morales v. Zenith Insurance Co., (11th Cir. 4/15/13)
Exclusive Remedy/Employer Liability Exclusions/Effect of WC settlements

In a 30 page opinion, The 11th Cir. Court of Appeal certified three questions to the Florida Supreme Court arising out of a WC death claim. In 1997 the claimant was killed in a workplace accident. The claimant's estate began receiving death benefits under Zenith's comp policy. In 1999, the Estate sued the Employer in tort, alleging simple

negligence, but not an intentional act or gross negligence. Zenith initially agreed to defend the employer under a reservation of rights, but after filing an answer including WC immunity, that attorney ultimately withdrew as the employer would not cooperate in the defense of the case. Ultimately the trial court struck the employer's defenses, held a one day trial without the employer present, and the jury returned a verdict against the employer of $9.525 million dollars. The Estate did not inform the trial court that prior to trial, they settled the remaining death benefits with Zenith for a lump sum payment of $20,000. Within that settlement, they also signed an agreement stating that the settlement constituted *"an election of remedies with respect to the employer and carrier as to the coverage provided to employer".*

The Estate then sued Zenith in state court alleging they breached their insurance policy when they did not pay the tort judgment. Zenith removed the case to federal court. Ultimately the Federal District Court granted summary judgment for Zenith, ruling primarily that the WC exclusion in part II barred Zenith's coverage of the $9.525 million dollar judgment. The Opinion considers the cases considered by the District Court, including Indian Harbor Ins. v. Williams, FIGA v. Revoredo and Wright v. Hartford Underwriters. These cases construe exclusive remedy in the context of both Commercial General Liability policies and Employer Liability Policies. The 11th Circuit also discussed the law covering standing of a third party to sue under a liability policy. Finding that ultimately these questions turn on interpretations of Florida Law, the court certified three questions to be addressed by the Florida Supreme Court:

1. **Does the Estate have standing to bring its breach of contract claim against Zenith under the employer liability policy?**
2. **If so, does the provision in the employer liability policy which excludes from coverage "any obligation imposed by workers' compensation….law" operate to exclude coverage of the Estate's claims against Zenith for the Tort Judgment"**
3. **If the Estate's claim is not barred by the workers' compensation exclusion, does the release in the Workers' Compensation settlement agreement otherwise prohibit the Estate's collection of the tort judgment?**

The court notes the Fl. Supreme Court is not restricted only to addressing these questions as phrased above. **Click here to view Order**

Miller Electric Company/Commercial Risk Management v. Oursler,
(Fla.1st DCA 4/2/13)
Misrepresentation/Admissible Medical Evidence

The DCA reversed the JCC's striking of the E/C's misrepresentation defense and the JCC's admission of medical testimony otherwise inadmissible under the statute. Claimant treated for his 2000 injury with an initial doctor through 2003, and then Dr. DeMeo for pain management through 2010. That year, the E/C denied further treatment, based upon Dr. DeMeo's opinion following review of surveillance that the IA was not the MCC of further treatment. The claimant filed a PFB for continued treatment with either authorized doctor. Prior to trial, claimant obtained unauthorized treatment (without requesting the E/C to provide it) with Dr. Mouhanna. Based upon alleged misstatements to the EMA, the E/C asserted a misrepresentation defense. At the Merit Hearing, despite finding Mouhanna was not an IME, and reserving on whether his treatment was emergent, the JCC ordered an EMA. The JCC struck the E/C fraud defense as untimely,

found the Mouhanna treatment was emergent, and that the EMA determined the IA was the MCC for the need for further treatment.

The DCA reversed the JCC's striking of the fraud defense, noting there is no time limit for the E/C to assert this defense, subject to due process concerns, which the JCC did not address. The appeal of the disqualification of an initial EMA was affirmed without comment. As to the admissibility/EMA issue, the DCA noted reversible error "at the trunk of the EMA tree". They note that although certain medical care may be shown to be authorized "by operation of law" Parodi requires presenting evidence for this date of accident that the care at issue "is compensable and medically necessary," that there was "a specific request for the treatment," and that "the employer or carrier [was] given a reasonable time period within which to provide the treatment or care." The opinion notes that although the second and third elements may be proven by "facts only" evidence, a claimant is required to obtain an additional medical opinion admissible under F.S.§440.13(5)(e) (Authorized treater, IME or EMA) to prove the compensable and medically necessary element. A claimant cannot "bootstrap" the opinion from the initial source (here Dr. Mouhanna). On remand, the claimant will still be allowed to obtain admissible evidence, not as the DCA notes, as a "second chance", but because of his reliance on the JCC's rulings made in error. **Click here to view Order**

Bennienfield v. City of Lakeland/Claims Center (Fla.1st DCA 4/8/13)
PTD benefits/Overall MMI

The DCA reversed the JCC's finding that the PTD claim was premature. Claimant injured his back in April of 2008, and had surgery. His authorized doctor placed him at MMI on 1/7/09. Claimant then sought PTD benefits, but shortly before the trial suffered additional injuries when his cane collapsed. With regard to the subsequent injury, the authorized doctor testified the new injury and need for an MRI had "not yet" changed his opinion re: overall MMI but felt it was "too soon to know". He further testified that the claimant "might require additional surgery". The carrier denied PTD benefits, alleging the claimant was not at overall MMI. The JCC agreed, ruling that he could not determine PTD until the claimant had a new MRI. The DCA noted that although it is the claimant's burden to prove they are at MMI and that their disability and restrictions are permanent, a claimant can be PTD even if he may be a candidate for further remedial treatment. The DCA examined case law addressing post MMI consideration of remedial treatment, noting that Emanuel v. Piercey Plumbing stands for the proposition that if medical testimony supports finding that claimant has reached MMI in *"real time"*, PTD benefits can be awarded thereafter, even if claimant later became candidate for remedial surgery to restore claimant's ability to work (emphasis added). They then note that Worker's Compensation benefits are to be paid in *"real time"*. They remanded the case for the JCC to reconsider the merits of the claimant's PTD case. **Click here to view Order**

Escambia County School District/Board v. Vickery-Orso (Fla.1st DCA 4/3/2013)
Proper Calculation of Compensation Rate

The DCA determined the appropriate calculation of the "66 and 2/3ds" compensation rate for PTD benefits. The E/C calculated the compensation rate by multiplying .666 of the AWW, while the JCC calculated the rate by multiplying by .667. The DCA noted that both multipliers result in a larger number than the fractional 66 2/3% amount required by the statute. Walking everyone through fractions, they noted that the statute requires multiplying the AWW ($794.21) by 66 2/3ds which results in a compensation rate rounded up of $529.47. The E/C's method resulted in a rate of $529.48, while the JCC's multiplier resulted in a rate of $529.50. Noting this small amount could become significant over time, and because the case was a pre 7/1/09 case where hourly fees were available, they reversed the JCC's ruling on attendant fees and costs. A concurring/dissenting opinion agreed that there was no authority to affirm the ruling awarding the upward adjustment and PICA, but would have awarded fees, arguing the E/C did not raise the issue below, and that the Lee Engineering factors would necessarily result in a small fee, based on the "amount in controversy" and "time and labor required" factors. Although not mentioned, the 66 2/3ds method may also be derived by dividing the AWW by 1.5. **Click here to view Order**

Church's Chicken/The Hartford v. Anderson (Fla.1st DCA 4/4/2013)
Burden of Proof/Emergency Medical Treatment/Temporary Benefits

The DCA affirmed one of three issues without comment, but reversed the JCC's determination of compensability of ER bills, and denial of three days of TPD. The DCA repeated it is the claimant's burden, for conditions not readily observable to show the injury is the MCC of the need for treatment, and that such treatment was medically necessary. Finding no competent, substantial evidence to award the ER bills, the DCA reversed on that issue. With regard to the TPD issue, the JCC denied that period noting the JCC's based his denial on the reasoning that the claimant "did not show why she didn't work on those days". The Court found this was the incorrect standard under Toscano and Levy. Those cases state that the claimant satisfies her initial burden of proof by showing whether her capabilities allow her to return to and adequately perform her prior job with the employer, and whether the workplace injury caused a change in employment status resulting in a reduction of her wages below 80% of her pre-injury average weekly wage. As was the case here, in the absence of the E/C providing an intervening cause for the lack of earnings, the JCC must award temporary benefits. **Click here to view Order**

Lopez v. A.Duda & Sons/Chartis **(Fla.1st DCA 4/4/2013)**
PTD/Evidence of Employability

The DCA reversed the JCC's denial of permanent total disability benefits. Claimant worked for the employer for 27 years. Following a back injury, he was placed at MMI with light to medium duty restrictions. The E/C obtained a reemployment assessment that determined that he should return to work for the employer as a security guard. The assessment also contained language stating that "he really would not be placeable anywhere else". The court considered the employer representative's testimony that the possibility of a placement of a security guard position was discussed with the claimant, but found no evidence that such a job was ever offered to the claimant. Citing prior case law, the court indicated that the showing of an ability to engage in employment pertains to the employee, and not to some hypothetical employee. They specifically identified the E/C vocational expert's unrefuted testimony that the only job the claimant was capable of was the employer's security guard position. As the employer never offered this position to the claimant, the court rejected reasoning that the claimant "could have" or "should have" attempted this job. The court found the JCC erred in finding the claimant did not establish that he has permanent work-related physical restrictions that preclude him from engaging in at least sedentary employment. They do not mention that his restrictions exceeded the sedentary threshold, but rather relied on the vocational testimony that this was only one security job he was capable of performing. **Click here to view Order**

Elms v. Castle Construction/Bridgefield/Claims Center **(Fla.1stDCA 4/4/2013)**
Claimant paid Attorney Fees/Irreparable Harm

The DCA denied claimant's Petition for Certiorari review of the JCC's denial of approval of a retainer fee agreement between the claimant and his attorney. Claimant was rendered a quadriplegic following an accident in 2011. The court noted that he continues to receive medical and PTD benefits, all of which he has obtained without having to file a PFB. In May of 2012, the JCC declined to approve a retainer agreement allowing the claimant to pay his attorney a $100 onetime fee for ongoing advice related to his claim. The JCC noted that such a fee could not be approved where a benefit had not been obtained. The DCA noted that Certiorari review applies to only very rare cases, and specifically noted that for the DCA to even have jurisdiction for such review, the moving party is required to show "irreparable harm". Claimant argued he would suffer irreparable harm, as the "JCC's order… leaves him without legal representation to navigate the complex workers' compensation system". In this case, the record failed to support claimant's allegation of such harm. The opinion specifically notes that the claimant has continuously enjoyed legal representation, and his attorney had previously been paid an $11,000 fee by the E/C for obtaining home modifications. While recognizing the importance of an injured worker's right to obtain counsel, the court determined they lacked jurisdiction to review the JCC's order or the claimant's constitutional challenges. **Click here to view Order**