

HURLEY, ROGNER, MILLER,
COX, WARANCH & WESTCOTT, P.A.

REX A. HURLEY, ESQ., WILLIAM H. ROGNER, ESQ., SCOTT B. MILLER, ESQ., DERRICK E. COX, ESQ.,
MICHAEL S. WARANCH, ESQ., PAUL L. WESTCOTT, ESQ., GREGORY D. WHITE, ESQ.,
W. ROGERS, TURNER, JR., ESQ., PAUL L. LUGER, ESQ., ROBERT J. OSBURN JR. ESQ., GREGORY S. RAUB, ESQ.,
MATTHEW W. BENNETT, ESQ., ANTHONY M. AMELIO, ESQ., ESQ., JONATHAN L. COOLEY, ESQ., BRYAN A. LOWE, ESQ.,
ROBERT S. GLUCKMAN, ESQ., TERI A. BUSSEY, ESQ., ANDREW R. BORAH, ESQ., ALLISON M. TWOMBLY, ESQ., SANDRA D.
WILKERSON, ESQ.
1560 Orange Avenue, Suite 500, Winter Park, FL 32789 * Phone (407) 571-7400 * FAX (407) 571-7401
603 North Indian River Drive, Suite 102, Ft. Pierce, FL 34950-3057 * Phone (561) 489-2400 * FAX (561) 489-8875
www.hurleyrogner.com

CASE NOTES

TO RECEIVE CASE NOTES VIA EMAIL,
PLEASE SEND REQUEST TO hurleyrogner@hrmcw.com

CASE LAW SUMMARIES: August 2005

Statute of Limitations

McBride v. Pratt & Whitney & Ace USA 30FLW D 1880 (Fla. 1st DCA August 4, 2005). The claimant was injured in a compensable accident on October 26, 1994. The claimant filed a petition in March 2001 seeking authorization of an orthopaedic surgeon. He filed another petition in March 2002 seeking reimbursement of medical bills. The claimant last received authorized medical care in December 2001 and the carrier paid the last bill related to authorized care/treatment on May 29, 2002. The claimant voluntarily dismissed the two petitions on February 7, 2003. The claimant filed another petition on July 3, 2003 seeking authorization of a physician for evaluation and treatment. The E/C controverted the petition asserting that it was barred by the statute of limitations. The JCC agreed with the E/C and held that the petition was barred because it was not filed within one year of the furnishing of remedial treatment, care/attendance, or within one year of the payment of indemnity.

The 1st DCA pointed out that the claimant last received indemnity benefits in 1999, last received authorized medical care and treatment in December 2001, and the carrier last paid a bill related to authorized care/treatment on May 29, 2002. The 1st DCA noted the line of authority in civil cases that hold when an action is dismissed, the statute of limitations is not tolled during the period that the dismissed action was pending, the statute runs as if the dismissed action had never been filed. Following, the court held that absent a clear statement from the legislature to the contrary, the one year statute of limitations specified in section 440.19(2) is not tolled during the period that an earlier filed petition was pending before it was voluntarily dismissed.

Exemption from Workers' Compensation

Collins v. Escambia Roof Masters 30FLW D1960 (Fla. 1st DCA August 19, 2005). The 1st DCA held that the claimant may not receive

workers' compensation benefits from the E/C when a claimant files a valid notice of election to be exempt from the provisions of workers' compensation statute.

Immunity

Protegrity Services, Inc. v. Vaccaro 30FLW D1989 (Fla. 4th DCA August 24, 2005). The claimant was injured in 1993 and subsequently received workers' compensation benefits, including medical treatment from Dr. Lichtblau. The carrier provided the claimant with massage therapy which was prescribed by Dr. Lichtblau. In August 2002, the E/C conducted a utilization review of Vaccaro's care and decided that the doctor's treatment and massage therapy were not necessary.

The claimant filed a complaint in circuit court on May 20, 2003. The complaint alleged (1) that the defendants "falsely threatened Dr. Lichtblau" with the utilization review, which would expose him to significant fines and possible decertification; (2) this was done intentionally to interfere with the plaintiff's relationship with her doctor and deprive her of medical care; (3) that she suffered injuries apart from the initial accident, severe emotional disorders and other damages because of the carrier's conduct; and (4) that the carrier was substantially certain that its conduct would cause her serious injury. The carrier filed a motion to dismiss on December 15, 2003 claiming that the circuit court did not have subject matter jurisdiction.

The 1st DCA, relying heavily on Aguilera v. Inservices, Inc. found that the trial court properly denied the carrier's motion to dismiss. The court found that the complaint alleged harm subsequent to and distinct from the original workplace injury. The court found that the claimant's allegations that the carrier was substantially certain that its conduct would cause her serious injury went beyond a mere claim delay or simple dispute involving benefits. The court also quoted Aguilera and stated that carriers are not allowed to cloak themselves with a blanket of immunity in circumstances where the carrier has allegedly committed an intentional tort upon an employee.

Discovery/Pretrial Procedure

Medical Logistics, Inc. v. Marchines 30FLW D2026 (Fla. 1st DCA August 29, 2005). The 1st DCA found that the JCC improperly applied a per se rule to the admission of surveillance evidence. The JCC issued a pretrial order directing that all discovery be noticed and submitted to the opposing party at least thirty days before the final hearing. With twenty-one days left before the final hearing, the claimant's counsel received copies of surveillance tapes from the E/C. The E/C attempted to introduce the tapes into evidence at the final hearing. The claimant's attorney objected to their admission on the ground that it was untimely and unjustly prejudicial. The JCC ruled the tapes would not be submitted into evidence based on his uniform policy that the E/C's failure to provide notice of surveillance at least thirty days prior to the final hearing would always result in a finding of procedural prejudice to a claimant.

In reversing this decision, the 1st DCA looked to the case of Binger v. King Pest Control which laid out three factors to be considered by a judge in making the determination of actual procedural prejudice. The three factors are (1) the objecting party's ability to cure the prejudice or,

similarly, his independent knowledge of the existence of the evidence ; (2) the calling party's possible intentional, or bad faith, noncompliance with the pretrial order; and (3) the possible disruption of the orderly and efficient trial of the case. The court stated that the per se rule applied by the judge in the present case was antithetical to the case-specific analysis prescribed in Binger. Following, the court found that the JCC's exclusion of the surveillance tape was an abuse of his discretion and would not be sustained.

In a dissenting opinion, Justice Benton stated that the majority's opinion was an unwarranted diminution of the judge's authority. Justice Benton went on to state that the court's ruling allowed parties to violate pretrial orders of judges of compensation claims. He stated that this essentially forced the complying party to prove that the opponent's intentional non-compliance was not harmless.

CASE NOTES

Case Notes is published by Hurley, Rogner, Miller, Cox, Waranch & Westcott, P.A. to update our clients on significant appellate court decisions and developments which warrant your review. The topics contained in this newsletter are abridged from appellate court decisions and are not to be construed as legal advice or opinions on specific facts. If you have any questions or need further information pertaining to any of the topics in the newsletter, then please give one of our attorneys a call at (407) 571-7400.