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CASE NOTES
CASE LAW SUMMARY
August 2009

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

Pla v. Point Blank/MDC Products and Sentry Claims Services (PCA Decision Fla. 1st DCA 8/10/09) At trial, Gregory White successfully prevailed on a denied claim for authorization of a specific doctor, where the claimant alleged failure of the carrier to comply with the one time change statute. The claimant appealed, and William Rogner and Gregory White handled the written appeal. Michael Waranch argued the case at the Appellate level. Although this PCA case does not contain a written opinion, the Opinion affirms the Order of JCC Hogan. Click here to read case

Attorney Fees/Time Limitations Re: pursuing fees/Powers of JCC
Zaldivar v. Shaboun, Le Café, Inc./Claims Center, (Fla. 1st DCA 8/29/2009) The claimant's former counsel appealed the JCC's denial of his motion for approval of an attorney fee. In settling the case, the parties agreed to the former attorney's claimed fee of $14,000. However, the documents presented to the JCC on October 23, 2007 did not list what benefits the former attorney secured. The JCC sent the parties a memorandum on November 2, 2007 indicating there was no basis for fees, and that the attorney should send such documentation or set the matter for hearing. The former attorney did not respond to the memorandum, and an order was entered on December 4th directing the former attorney to set the matter for hearing and provide supporting documentation. At a hearing on December 17, 2007, the attorney still did not provide documentation, yet the JCC did not deny the motion for fees. He issued another memorandum on December 28th, explaining he still could not approve the fee, and held the matter in abeyance. Nothing happened until February 28, 2008,

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when the JCC recited the above facts and denied the fee.

The 1st DCA denied the claimant's first argument that the JCC erred in not setting a specific time limit, finding that it would have been clear to "any attorney" the requested information was to be supplied immediately. The DCA rejected his second inherently conflicting argument that the JCC did not have the power to set a time limit for providing the documentation in support of awarding fees. The DCA rejected the claimant's interpretation of Villanzano, which reversed a JCC's attempted 30 day limit on pursuing fees. The DCA noted in that case there was no issue pending before the JCC, whereas in this case the former attorney's motion gave the JCC power under 44.33(1) to effectively discharge the duties of his office. The dissent criticized the majority's tacit approval of undefined time parameters, arguing the JCC should have indicated a date certain by which the former attorney should have complied. Click here to read case

EMAs/Petition for Writ of Certorari
Taylor v. TGI Friday's/Broadspire, (Fla.1st DCA 8/29/09) The DCA rejected the claimant's Petition for Writ of Certiorari, which challenged the JCC's appointment of an EMA. The appointment of an EMA is a non-final Order. The DCA noted that the claimant failed to prove that the JCC's order would result in irreparable harm, which could not be remedied on appeal. The DCA also rejected the claimant's argument that the JCC had not posed the proper questions to the EMA, noting that the statute allows the parties to depose the EMA physician. Click here to read case

Evidence/JCC as Trier of Fact
White v. Bass Pro Outdoor World, Inc./Travelers Ins., (Fla.1st DCA 8/26/2009) The claimant appealed the JCC's denial of compensability of a knee condition. The authorized doctor opined the MCC of the knee condition was the work accident. The carrier's IME initially agreed with that opinion. However, after receiving evidence of pre-existing knee problems, the IME opined he could not testify within a reasonable degree of certainty that the work accident was the MCC of the knee condition. The JCC rejected the opinion of the treating doctor. The claimant argued that the authorized doctor's opinion was "uncontroverted" and the JCC's rejection of that testimony was unreasonable. The DCA noted that record evidence supported the JCC's rejection of the authorized doctor's testimony. The DCA further commented that the JCC is not required to provide a reason for rejecting the opinion of the authorized treating doctor, only that the opinion was unpersuasive. Click here to read case

EMAs/Presumption of Correctness and FCEs/Admissibility and Authentication
Amos vs. Gartner Inc./Sentry Ins. (Fla. 1st DCA 8/21/09) The JCC denied the claimant's claim for PTD. The 1st DCA reversed and remanded on two separate issues. First, the JCC appointed an EMA in the case to address MMI and permanent work status, among other issues. The parties introduced the EMA's report, and what were purportedly the EMA's handwritten responses on the JCC's EMA appointment letter. The EMA was not deposed, and the report and responses on the letter contained different opinions re: MMI, and most importantly work status ("limited sedentary vs. limited light duty"). The JCC rejected the EMA opinion per the recent Fitzgerald case. The DCA found such reliance misplaced, noting that in this case, the JCC rejected the EMA opinion without making a finding as to the clear and

convincing evidence the statute requires to reject the EMA opinion. The JCC also rejected the EMA opinion re: major contributing cause and diagnosis, which were not inconsistent or contradicted by other testimony. The DCA also reversed the JCC's admission into evidence and reliance on an FCE that was not properly authenticated and was hearsay. The DCA rejected the JCC's view that a lower evidentiary standard applied in WC proceedings, and noted his consideration of the improperly admitted FCE went to the heart of the denial of PTD benefits. Click here to read case

Res Judicata/Ripeness and Evidence/Medical Opinion Testimony

Parodi v. Florida Contracting Co., Inc./Summit Holdings, (Fla.1st DCA 8/21/09) After providing initial authorized treatment, the carrier suspended medical and indemnity benefits, asserting major contributing cause and fraud defenses. The claimant then obtained treatment on his own with two physicians. The claimant claimed payment of bills for each physician, and sought to introduce their testimony. The first doctor was the claimant's IME, to whom the claimant later returned for injections. The second treated the claimant. The JCC found that care rendered by both physicians was reasonable, medically necessary and causally related to the IA, and awarded reimbursement of the bills. However, the JCC did not consider the testimony of the second doctor, as he was not an EMA, IME, or authorized treating doctor under the statute. The JCC did not consider the second deposition of the claimant's IME, finding that injections were provided between his two depositions, and such treatment exceeded the statutory definition of an IME. The DCA reversed, holding that in situations under F.S.440.13(2)(C), the JCC has the statutory authority to authorize such doctors during the period of wrongful denial. Claimants still bear the burden to prove that they made a request for care, that the request was denied, and that the treatment obtained was "compensable, reasonable and medically necessary". The court notes that if the JCC finds the E/C's denial warranted, the care is not compensable and the opinions are not admissible. The case was remanded for the JCC to consider the PTD with the previously excluded medical opinions.
The Res Judicata issue merely repeats the recent holding in Paschen that "when a claim is ripe, absent some action on claimant's part to bring this to the attention of the JCC, res judicata will bar a subsequent claim". In this case, there were PFBs that had been filed prior to the merit hearing but not mediated. The claimant attorney brought this to the JCC's attention, and the JCC reserved jurisdiction. The DCA noted those claims were not barred by res judicata, as the claimant attorney fulfilled his duty to bring those claims to the court's attention. Click here to read case

Misrepresentation/False Social Security Numbers

Arreoloa v. Administrative Concepts/Southern Eagle Ins., (Fla. 1st DCA 8/14/2009) The JCC below denied benefits pursuant to the F.S. §440.105. The DCA affirmed as to both questions decided by the JCC. The JCC first found that the claimant made or caused to be made false, fraudulent or misleading statements. The JCC found that a false social security number was provided at multiple stages post accident, and that decision was supported by competent, substantial evidence, which included testimony by individuals receiving the false information from the claimant. The DCA also affirmed the JCC's ruling on whether or not the false information was provided for the purpose of obtaining benefits. The DCA noted that this is a finding of intent, and rejected the claimant's argument that he provided the number for identification only, and not to obtain benefits. The decision notes the Judge could have accepted that argument, and the claimant might have prevailed. However, the claimant's state

of mind is within the fact finding powers of the JCC. The DCA also rejected the claimant's argument that carrier denied benefits only because the claimant was an undocumented worker. Click here to read case

Permanent Total Disability Benefits/Vocational Factors

Garcia v. Fence Masters, Inc./AIG, (Fla.1st DCA 8/6/09) The claimant appealed the JCC's denial of PTD benefits. The evidence showed, and the parties were apparently in agreement, that the claimant's physical restrictions were sedentary. The claimant argued that those restrictions, when coupled with his particular vocational limitations, prevented him from engaging in at least sedentary employment within a 50 mile radius of his home. The First DCA reversed the JCC's denial, noting that the JCC's order did not contain any findings as to vocational factors or impairment she considered in denying benefits. The Court also did not outline which employment the claimant would be able to obtain, nor did the Order explicitly reject the claimant's vocational expert. The Order merely found the E/C expert's testimony "more persuasive". Click here to read case

This decision repeats the instructions from prior cases that defense of a PTD claim requires concrete evidence of actual employment the claimant would be capable of performing, given his or her particular physical and vocational limitations. The decision also strongly encourage JCCs to enter orders containing only ultimate findings of fact, and not to issue overly lengthy Orders, as the DCA will review the Record on Appeal re: all relevant evidence.

Course and Scope of Employment/Intoxication Defense

Samuel Thomas v. Edd Burcheat/Labor Finders/ACE USA, (Fla. 1st DCA 8/6/09) The claimant appealed a denial of compensability. The JCC found the claimant was not in the course and scope of employment when the injury occurred, and that the employee was intoxicated. The claimant alleged that he slipped and fell after being terminated, but before leaving the worksite. The First DCA held the JCC erred in determining the claimant was not in the course and scope, as prior case law indicates that discharge is an element of the employment relationship, and employees are afforded a reasonable time to exit the premises after termination. However, the DCA held this error was harmless. Although the claimant correctly argued the employer was not afforded the intoxication presumption under the statute, competent substantial evidence still supported the finding that the injury was primarily occasioned by intoxication, even absent the statutory presumption. Click here to read case