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CASE NOTES
CASE LAW SUMMARY
August 2013

If you have any questions regarding Case Law Summaries, please contact W. Rogers Turner, Jr. (rturner@hrmcw.com) or Matthew Troy (mtroy@hrmcw.com)

Audio Visual Innovations, Inc. v. Spiessbach **(Fla.2d DCA 8/16/2013)**
440.205 Retaliatory Discharge Claims/Arbitration Agreements

The circuit court denied the Employer's motion to compel arbitration of claimant's 440.205 Retaliation Claim, finding it would defeat the remedial purposes of that section. The 2d DCA reversed, finding that arbitration did not defeat such purposes. Further, they found that the requisite elements to support arbitration existed, which are: (1) the existence of a valid agreement to arbitrate; (2) whether an arbitrable issue exists; and (3) whether that right has been waived. The critical issue concerned the second element, and whether or not the arbitration's exclusion for claims for "workers' compensation benefits" applied. The Second DCA analyzed the 1983 Florida Supreme Court case of Smith v. Piezo Tech, and found that a claim arising under F.S. s 440.205 is not a claim for "compensation or benefits" contemplated under Chapter 440, and as such the circuit judge should have compelled the case to arbitration per the agreement. **Click here to view Order**

Collins v. Mosaic Fertilizer LLC/Gallagher Bassett (Fla.1st DCA 8/22/2013)
Expert Medical Advisor/Clear and Convincing Evidence to Reject Opinion

The JCC denied benefits finding that clear and convincing evidence existed to reject the EMA opinions. The EMA opined that the claimant's need for surgical intervention for hematomas occurring a year after his compensable fall, were caused by the fall. The JCC noted that the clear and convincing evidence to reject this opinion was based upon 1) An MRI four months post accident showed no hematoma; 2) the EMA and IME agreed that if the hematoma were caused by the accident it would have appeared on the MRI; and 3) the EMA found no case in the literature evidencing a similar delay. The DCA reversed the JCC's rejection of the EMA and denial of benefits. They noted that while the facts backed up the JCC's finding regarding his reasoning in 1-3 above, the fact that the MRI should have shown a hematoma was insufficient to reject the EMA. The EMA's opinion regarding causation was based on multiple factors, including the fact that literature allowed that later onset hematomas were possible, his examination of the claimant and the lack of any history of hematoma pre accident. **Click here to view Order**

Savard v. Rio Vista Mgmt. d/b/a McDonald's/USIS (Fla.1st DCA 8/22/2013)
Grounds for Vacation of Orders

Claimant sought PTD from 12/13/11. The JCC awarded the benefits in part, but from 7/30/12 forward. The E/C then moved to vacate the Order, alleging a violation of Due Process in awarding benefits after 7/30/12. The JCC offered no explanation in granting the motion, vacated the order and then issued a new order denying all benefits, finding no evidence of medical disability as of 12/13 /11. The DCA found this was error, and ordered the JCC to vacate the second order, and issue a new order consistent with the findings in the first Order. **Click here to view Order**

Goding v. City of Boca Raton/Corvel (Fla.1st DCA 8/22/13)
PTD Supplemental Benefits/Eligibility for ongoing benefits under '92 law

Claimant appealed the JCC's denial of supplemental PTD benefits. The E/C cross appealed the JCC's determination that PTD supps were payable through claimant's 66th birthday. Claimant (DOB 9/12/45) had a compensable heart attack in 1992. The E/C voluntarily began paying the claimant PTD and PTD supps in January of 1994. Claimant began receiving SS retirement at age 62. He applied for and was denied SS disability benefits 12 times. The E/C stopped paying the claimant supplemental benefits when the claimant turned 66. (The 2003 amendment changed the "and" to "or"). The controlling 1992 version of F.S. s 440.15(1) indicates that supplemental benefits cease if the claimant ***is eligible for*** both Social Security Retirement benefits ***and*** Social Security Disability benefits. Citing to Hillsborough County v. Ward, the court noted claimant never became eligible for both types of benefits, and thus his PTD supplemental benefits will continue. **Click here to view Order**

Tyler-Fleming v. Sunshine International/Broadspire (Fla.1st DCA 8/22/2013)
Equitable Estoppel/Defenses to multiple claims

The DCA affirmed the JCC's denial of compensability, agreeing that equitable estoppel did not apply. Claimant injured her knee in a compensable accident in May of 2000, received treatment and was placed at MMI in March of 2002 with a 2% PIR and no work restrictions. In September of 2005, claimant had another compensable accident, and alleged injuries to her left knee and other body parts. The E/C defended, citing medical testimony that the accident was not the MCC of any injury to the left knee. The claimant obtained an IME who opined the MCC was the new accident. An EMA opined the MCC of any injury and need for treatment to the left knee was the 2000 accident. The JCC denied her claim in March of 2010 accepting the EMA opinion. In October of 2010, the claimant filed a new PFB asserting benefits were due as a result of her 2000 left knee injury, basing her position on the prior EMA report. She asserted that the E/C should be estopped from denying that the 2000 accident was not the MCC.

The DCA noted that for equitable estoppel to apply, the party sought to be estopped must have [1] "successfully maintained a position in one proceeding while taking an inconsistent position in a later proceeding, and [2] the other party was misled and changed its position in such a way that it would be unjust to allow the [party] to take the inconsistent position." A party has successfully maintained a claim or position if, in the prior proceeding, the court "adopt[ed] the claim or position either as a preliminary matter or as part of a final disposition." Furthermore, the positions taken or claims made must be "inherently inconsistent." The DCA found the positions taken in 2006 and 2010 were not inconsistent, but merely defenses as to each accident. They noted claimant's reliance on the EMA's prior finding that the knee condition was "causally related" to the 2000 accident was misplaced, as this was an opinion of the EMA rather than a claim asserted by the E/C. **Click here to view Order** **Click here to view Order**

Owen v. City of Key West/Employers Mutual Inc (Fla.1st DCA 8/22/2013)
Claimant paid Attorney Fees

The DCA held the JCC erred in finding he lacked authority to approve a retainer agreement. The agreement provided that the claimant would pay the claimant attorney an hourly fee to represent him at the hearing on the E/C's motion to tax costs. The court cited to the June 2013 Jacobson case, which held Chapter 440's prohibition on claimant paid fees in relation to a cost proceeding violates the claimant's First Amendment rights. The opinion instructs that the JCC has the authority to determine whether the proposed fee is reasonable. **Click here to view Order**

Covell v. Cracker Barrell Old Country Store, Inc./CCMSI (Fla.1st DCA 8/15/2013)
Discovery/Jurisdiction of JCC to Order Production
Bill Rogner and Paul Luger

Claimant sought to compel production of items which were previously the subject of a Request to Produce. The JCC denied the Motion, finding he did not have jurisdiction to compel such production without a pending PFB. The DCA reversed, stating that such pre PFB jurisdiction exists. The court specifically noted that their decision was limited only to the jurisdictional issue, and not whether the items requested are ultimately discoverable. **Click here to view Order**

ARACELY M. DIAZ-LLERENA, AS LIMITED GUARDIAN OF THE PERSON AND PROPERTY OF OCTAVIO P. LLERENA, v. SPILLIS, CANDELA & PARTNERS, INC. and ONEBEACON INSURANCE GROUP
(Fla. 1st DCA 8/9/2013)
Settlements/Determination of Finality

The parties entered into a settlement agreement. The claimant then alleged that the E/C had not complied with certain provisions of the agreement, and apparently filed Petitions for Benefits seeking those items. The JCC then dismissed the PFBs with prejudice, finding that the parties entered into a valid agreement. The DCA reversed, finding the JCC should have reviewed the terms of the agreement, and held an evidentiary hearing to determine whether Claimant has waived or released the claims now at issue, and whether the E/C complied with the terms of the agreement. **Click here to view Order**

Bustamante v. Amber Construction/American Interstate Ins. Co.
(Fla. 1st DCA 8/1/2013)
Medical Benefits/One Time Change

The DCA reversed the JCC's finding that the carrier timely complied with the onetime change request. The sequence of events was as follows:

Sept. 24 – Claimant attorney emailed request for one time change.
Sept. 26 – Adjuster responded, advising she would send notes to the Ortho Inst. to see if they will treat claimant
Sept. 28 – Adjuster sent records to Ortho Inst., asking that "one of the physicians assume treatment and schedule appt". (*The claimant was not copied on this communication*)
Oct. 5 – Claimant notified OC that Dr. Kaplan is authorized physician, and an appointment was scheduled for 10/16. Claimant attorney responded that he hadn't received a response and referred claimant to another physician.

The DCA citing Harrell, noted it is not enough for the adjuster to agree and indicate that an appointment will be set. Rather, they need to identify the physician who is authorized. They also cited to the HMHost v. Frederic case, which found a carrier fully complied with the onetime change statute, even though they timely informed the claimant of the identity of the onetime change doctor, but did not inform the doctor within that time frame. The DCA found it significant that Frederic's identification of the doctor allows the claimant to follow up if they don't hear anything.

None of the onetime change cases address the reality of identifying doctors who likely may never agree to see the claimant. However, it appears this line of cases strongly suggests that a valid timely response to a request for a one time change should include authorizing a specific doctor, and that authorization should be sent to both the claimant attorney and the doctor. From that point on, repeated timely contact should be made to confirm acceptance of the authorization and scheduling of the appointment. Upon receiving word that the doctor will not accept authorization, an immediate alternate doctor should be authorized, again informing all parties. **Click here to view Order**

Figueroa v. Delant Construction **(Fla.4th DCA 7/24/13)**
Employer Immunity/Intentional Tort Exception

The 4th DCA affirmed the trial judge's award of summary judgment for the statutory employer. The DCA agreed with the trial judge that the plaintiff had not provided any evidence that there were (1) no prior similar accidents or (2) a specific warning explicitly identifying a known danger, which would thereby establish that the defendant engaged in conduct it knew was "virtually certain to result in injury or death" to plaintiff.

Further, the unrefuted evidence demonstrated that the danger or risk was apparent to Plaintiff, and that there was no concealment or misrepresentation by the defendant. The intentional tort exception is applicable only where the plaintiff proves by clear and convincing evidence that:

1. The employer engaged in conduct that the employer knew, based on similar accidents or on explicit warnings specifically identifying a known danger, was virtually certain to result in injury or death to the employee; *and*
2. The employee was not aware of the risk because the danger was not apparent; *and*
3. The employer deliberately concealed or misrepresented the danger so as to prevent the employee from exercising informed judgment about whether to perform the work.

The court noted that the "virtual certainty" standard for immunity is amenable to determination at the summary judgment stage. **Click here to view Order**

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