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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

Major Contributing Cause/Occupational vs. Non-Occupational Causes

Bysczynksi v. UPS/Liberty Mutual (Fla.1st DCA 12/28/2010)
The DCA reversed the JCC's Order denying a cervical fusion, remanding for entry of an order awarding the surgery. The DCA noted that all of the evidence showed that the MCC of the claimant's need for the surgery was work related. The claimant had a compensable injury in 2005, with resulting discectomy and fusion at C5-6. After his MMI date in October of 2005 (with a full duty release and return to work with the employer), the claimant required no medical treatment until Feb. of 2007. At that time the claimant injured his neck and right shoulder in two separate incidents. The same surgeon treated the claimant again. Claimant had a partial shoulder replacement with another doctor, and was referred back to the neck surgeon after persistent complaints. The surgeon recommended a fusion at C6-7 and removal of the plate at C5-6, which the carrier denied. The carrier obtained an IME who opined the current need the recommended neck procedures was degenerative. The EMA opined in his report that the MCC was degenerative, but at trial testified the injuries caused by the 2007 accident combined with the 2005 "problems" to cause the need for the surgery in question, and he could not say that Claimant would have required the surgery in question, absent the occurrence of the 2007 accident and resulting injuries. The DCA characterized the claimant's degenerative changes as "age appropriate", finding no evidence of a need for

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treatment for degenerative changes independent of the two accidents. The DCA repeated that the MCC analysis should not apply where a previous condition is due to an occupationally related cause. **Click here to view Order**

Prevailing Party Costs/Enforcement

Lakeland Regional Medical Center/Commercial Risk v. Weech, (Fla.1st DCA 12/21/2010)
The DCA affirmed the JCC's refusal to certify facts related to the claimant's failure to pay prevailing party costs to the circuit court. The E/C sought this certification in an attempt to enforce its cost award in circuit court. The DCA agreed with the JCC that although the contempt statute discusses contempt for a party that *"disobeys a lawful order or process"* under 440, failure to pay prevailing party costs is not contempt under this section. The DCA noted that this section exists to ensure orderly process before the JCC, but not to act as an enforcement mechanism for JCC orders. They also rejected the E/C's argument that such a certification was necessary so the E/C could take its cost award to circuit court. The DCA noted that recent cases indicate that an E/C may enforce or seek to collect cost awards "*as any other debt (would be) in the appropriate court*", without further comment. **Click here to view Order**

Statute of Limitations/Prosthetic Devices/Employer Knowledge

Coburn v. Polk County Brd. Of Cmmsrs./Commercial Risk, (Fla.1st DCA 12/21/2010)
The DCA reversed the JCC's finding that the claim was barred under the one year SOL. The claimant continued to wear hearing aids prescribed under a 1999 claim. When he attempted to make an appointment with the authorized treating doctor, the carrier denied further benefits, as over a year had passed since the date of last medical treatment. The DCA analyzed the decision, noting that the hearing aids were clearly prosthetic devices. They also noted that the issue turned on whether the employer had implied or actual knowledge of the claimant's continued use of the hearing aids. The Court's recent decision in Gore v. Lee County (issued after the JCC's Order) articulated that claims may be tolled via such employer knowledge. They noted that the JCC's order did not contain an ultimate finding of fact as to this issue, and remanded for the JCC to determine whether actual or implied knowledge existed on the part of the E/C. **Click here to view Order**

Permanent Total Disability/Requisite Evidence

East v. CVS Pharmacy/GAB Robbins, (Fla.1st DCA 12/14/2010)
The DCA affirmed a denial of PTD, finding the claimant failed to show her disability would continue after reaching overall MMI. The claimant received 104 weeks of temporary indemnity benefits, and then filed for PTD. As of the December 2009 hearing, the orthopedic surgeon restricted the claimant to sedentary work, requiring her to sit with her leg elevated and ice her knee frequently. But the surgeon would not impose permanent physical and work restrictions or find MMI until the claimant completed physical therapy, and the psychiatrist would not put the claimant at MMI for depression, anxiety and insomnia secondary to chronic pain until she reached orthopedic MMI. Only the pain management specialist deemed her at MMI for chronic knee and leg pain. But he would not assign work restrictions until the orthopedic surgeon placed the claimant at

MMI and she underwent a functional capacities examination. The DCA noted that a finding of PTD pre-MMI requires evidence of total disability that will exist after overall MMI. Although the treating orthopedist had assigned total disability restrictions, he would not testify that those restrictions would exist after the claimant completed physical therapy, or what post MMI restrictions would be. **Click here to view Order**

Unemployment Benefits/Definition of Misconduct and Absenteeism

Gonzalez v. Unemployment Appeals Commission/Quick Clean, (Fla.1st DCA 12/14/2010)
The DCA affirmed a denial of UC benefits. At issue was the interpretation of the statutory definition of "misconduct", which is identical to the definition used in Chapter 440. The DCA noted that absenteeism can result in misconduct, when it is "excessive unauthorized absenteeism", citing prior case law indicating that "*…(t)he term 'unauthorized' implicitly connotes an element of willfulness because it means that the absences were unexcused and without the permission of the employer.*" The DCA approved the referee's interpretation of the statute re: misconduct. They rejected the appellant's arguments that her absences were not willful as they were the result of attending medical appointments for a workplace injury. The DCA noted that although the evidence showed some absences for such appointments, numerous unauthorized absences for other reasons existed in the record. **Click here to view Order**

Attorney Fees/Medical Only Claims

Clay County Sherriff/Scibal Associates v. Kraemer, (Fla.1st DCA 12/14/2010)
The DCA reversed the JCC's award of attorney fees and costs. The claimant sought authorization of neuromuscular massage. Among other defenses, the E/C alleged the JCC did not have jurisdiction over the issue. The JCC denied the massage as not being medically necessary, but awarded the claimant attorney a fee for "establishing jurisdiction." The DCA found the award of fees under the "medical only" section of the statute erroneous. **Click here to view Order**

Prevailing Party Costs/Res Judicata

Hernandez v. Manatee Co. Govn't/Comm. Risk Mgmt., (Fla.1st DCA 12/8/2010)
The claimant appealed the award of costs to the E/C as a result of a merits hearing for a 2008 PFB. The claimant argued that many of the costs claimed had previously been denied to the E/C as a result of a 2007 PFB. The JCC considered whether each cost item was "relevant to any issue", regardless of the date it was obtained. The DCA found that the depositions were used to support the defense of claims in both PFBs and that the motion to tax costs did not become ripe until the order was issued on the 2008 PFB. The E/C used prior deposition testimony (instead of incurring further costs to re-depose physicians) to promote judicial economy. The DCA noted this result was consistent with the Fla. Supreme Court's public policy statement on the Uniform Guideline of Taxation of Costs, to *"reduc(e) the overall costs of litigation and keep such costs as low as justice will permit."* Therefore the costs were not barred by *res judicata*.

Powers of JCCs

Ekechi v. First America/Gallagher Bassett Svs, (Fla.1st DCA 12/8/2010)
Struck the phrase "*Interest will accrue on any unpaid sum at the rate allowed by statute. For all of which let execution issue*." from a JCC's order, holding that JCCs issue compensation orders, rather than judgments. Affirmed as to all other issues.

Binding Nature of Stipulations/Medical Necessity

Marin v. Aaron's Rent to Own/Broadspire, (Fla.1st DCA 12/3/2010)
The DCA affirmed the JCC's denial of PTD without comment. However, the DCA modified an Order re: authorization of a physiatrist in Colombia, finding it at odds with the terms of the Pretrial Stipulation. Claimant was injured in 1998, and moved back to Colombia in 2004. After filing a PFB for authorization of a physiatrist, the E/C represented in a 2008 Pretrial Stipulation that they would authorize a physiatrist in Colombia. The opinion notes this stipulation was "without conditions or contingencies". 18 months later, the E/C sought to amend the PT Stip to include the defense of medical necessity. The JCC then entered an order indicating the E/C was to provide the physiatrist, "upon referral" from the claimant's Colombian treating orthopedist. The DCA reversed and remanded, noting the JCC's order impermissibly modified and rewrote the agreement the claimant sought to enforce. The DCA noted that the agreement in the PT Stip to provide the physiatrist was unambiguous and clear, and the JCC was not permitted to attach additional conditions or barricades to the authorization. A concurring opinion noted the opinion was in conflict with the recent Salinas v. C.A.T. Concrete decision, (*holding a JCC "…is not required to follow a stipulation that is refuted by competent, substantial evidence*"). The decision does not characterize the "medical necessity" issue as a continuing requirement for care. The lesson here should be that when representing that a healthcare provider is authorized, include the words "so long as the treatment is reasonable, medically necessary and causally related", lest their authorization become eternal. **Click here to view Order**