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CASE NOTES

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CASE LAW SUMMARIES: December 2004

RULES OF WORKERS' COMPENSATION PROCEDURE

AMENDMENTS TO THE FLORIDA RULES OF WORKERS' COMPENSATION PROCEDURE 29 FLW S738 (Fla. Supreme Court December 2, 2004)

The Florida Bar's Workers' Compensation Rules Committee filed its regular-cycle report asking the Florida Supreme Court to consider amendments to the Florida Rules of Workers' Compensation Procedure. The Florida Supreme Court concluded that they did not have jurisdiction under the Florida Constitution to adopt rules of practice and procedure for an executive branch agency, and therefore declined to adopt the proposed amendments. The Florida Supreme Court further noted they never had jurisdiction to adopt these rules in the past, and therefore repealed the Florida Rules of Workers' Compensation Procedure. The repeal is to operate prospectively and does not affect any workers' compensation proceedings that are final.

SECOND OPINIONS

Lombardi v. Southern Wine & Spirits and Fireman's Fund, 29 FLW D2677 (1st DCA November 30, 2004)

The claimant sustained a compensable accident. The claimant asked for a second medical opinion. The E/C denied the request asserting that second opinions were authorized only under the managed care section of the statute (440.134), and they did not participate in a managed care arrangement. The E/C further argued that section 440.13, which controls medical benefits outside a managed care arrangement, authorizes only the provision of an IME. The JCC agreed and dismissed the claimant's Petition. The claimant appealed.

The First DCA concluded that 440.13 does not limit the claimant

to only an IME. The First DCA found that under section 440.13(2)(a), claimants are entitled to "medically necessary remedial treatment, care and attendance". The First DCA found that the request for a second opinion presented a question of fact which the JCC must resolve after an evidentiary hearing. The JCC's dismissal was reversed and remanded for further proceedings.

IMPAIRMENT BENEFITS

Cooper v. Traveler's Insurance Company, 29 FLW D2677 (1st DCA November 30, 2004)

The JCC denied the claimant's Petition for impairment benefits because the claimant had not yet reached MMI for her psychiatric condition and had received only 36 weeks of temporary disability benefits. The claimant appealed.

The First DCA affirmed and found, pursuant to Fla. Stat. 440.15(3)(a)3, that a claim for impairment or permanent disability benefits made before a claimant has reached MMI or received 98 weeks of temporary benefits is premature.

STIPULATIONS

Flowers v. Commercial Risk Management, Inc., 29 FLW D2786 (1st DCA December 10, 2004)

The JCC denied approval of the parties' written, signed stipulation regarding a greater than guideline attorney's fee and taxable cost without affording the parties appropriate notice and a reasonable opportunity to be heard. The First DCA ruled that because the parties were not afforded the appropriate notice and an opportunity to present evidence and argument regarding the abrogation of the stipulation in accordance with Florida Rule of Workers' Compensation 4.142(e), the Order was reversed and remanded for further proceedings concerning the stipulation.

AWW

Flowers v. Commercial Risk Management, Inc., 29 FLW D2787 (1st DCA December 10, 2004)

The JCC used the claimant's AWW at the time of the injury to compute compensation rather than the date when the claimant was determined to be PTD. The First DCA affirmed.

INTENTIONAL TORT EXCEPTION

Traveler's Indemnity Company v. PCR Incorporated 29 FLW S774 (Fla. Supreme Court December 9, 2004)

This case arose out of a 1991 explosion at PCR's chemical plant that killed one employee and seriously injured another. PCR was insured by Traveler's Indemnity Company under a "workers' compensation and employers' liability policy." This was a dual-coverage policy. The employer's liability policy excluded coverage for bodily injury intentionally caused or aggravated by PCR.

The question before the Court was whether an employer's liability insurance policy that provides coverage for liability arising from a work-related accident but excludes from coverage liability arising from injuries intentionally caused by the employer, provides coverage for a tort claim brought under the objectively substantially certain prong of the intentional tort exception to the workers' compensation law. The Florida Supreme Court answered this question in the affirmative.

The Florida Supreme Court rejected Traveler's argument that the law should impute intent to injure where the insured's conduct was substantially certain to result in an injury. It appears there would have had to have been a showing that the insured acted with the specific intent to cause injury. The Court concluded its opinion by noting that whether a claim brought under the newly enacted virtual certainty standard would fall outside such a policy was a different question that they were not answering.

FCCI Insurance Company v. Horne, 29 FLW D2769 (5th DCA December 10, 2004).

The issue in this case is identical to the issue above in Travelers v. PCR. FCCI Insurance Company provided both workers' compensation and employers' liability insurance to the employer which specifically excluded coverage for bodily injury intentionally caused or aggravated by the employer.

Like the case in Travelers v. PCR, it was shown that the accident was only substantially certain to result from the employer's conduct. Because there was no showing the employer intended to cause harm to his employees, the incidents were not excluded from the employer's liability insurance coverage.

WORKERS' COMPENSATION IMMUNITY

Reeves v. Fleetwood Homes Florida, 29 FLW S783 (Fla. Supreme Court December 16, 2004).

The Florida Supreme Court found the DCA did not have jurisdiction to review a non-final Order of a circuit court denying a Motion for Summary Judgment on the issue of workers' compensation immunity where issues pertaining to the defendant's level of negligence remained. The Florida Supreme Court reiterated the well-established rule that non-final orders denying summary judgment on claims of workers' compensation immunity are not appealable unless the trial court specifically states that, as a matter of law, such defenses are not available to a party.

Tu-Lane Investments, Inc. v. Orr, 29 FLW D2855 (1st DCA December 20, 2004)

The claimant was employed by an employee leasing company which leased to the defendant, Tu-Lane Investments, Inc. The claimant filed a personal injury action against the defendant and the defendant moved for summary judgement on the grounds they were entitled to workers' compensation immunity. The motion was denied and this appeal took place.

The First DCA found that if the employee leasing company secured workers' compensation coverage in compliance with section 440.38, Fla. Stat.2002, the claimant was the employee of the employee leasing company and the defendant would have workers' compensation immunity pursuant to section 440.11(2) Fla.Stat.2002. If the employee leasing company did not secure the necessary workers' compensation coverage, however, then the claimant would not be considered the employee of the employee leasing company but rather the borrowed employee of the defendant and because the defendant in this case did not secure workers's compensation coverage for the claimant, the defendant would not be entitled to workers' compensation immunity. The case was reversed and remanded.

Byers v. David Ritz & Paul Barcinas, 29 FLW D 2825 (1st DCA December 15, 2004)

Byers was a public safety officer who was killed in an accident involving a backhoe which was taken without the permission of its owner and was being used in clearing debris the day after hurricane Andrew. David Ritz and Paul Barcinas were the claimant's superiors and were aware the backhoe was being used without permission of its owner.

Byers estate filed a wrongful death action against Ritz & Barcinas. The estate alleged that because Ritz & Barcinas had committed a crime (participating in the theft of the backhoe) that caused their son's death, they were not entitled to workers' compensation immunity based on the the "criminal acts" exception.

The First DCA found that although the theft of the backhoe triggered a series of events that ultimately resulted in Byers death, the theft was not the "proximate cause" of death because it was causally superceded, as a matter of law, by unintentional actions of the backhoe operator. Therefore the criminal acts exception was inapplicable and the entire action was bared by workers' compensation immunity.

Columbia County Board of Commissioners v. Holt, 29 FLW D2784 (1st DCA December 10, 2004).

The claimant suffered fatal injuries when his vehicle was struck by a dump truck driven by a co-employee. The trial court entered a partial summary judgment on dual grounds finding the E/C could not assert workers' compensation immunity because the claimant and the co-employee were engaged in unrelated works and at the time of the accident, the claimant was engaged in a purely private mission and was not within the scope of his employment.

The First DCA reversed and found the E/C was entitled to assert

workers' compensation immunity because both the claimant and the co-employee worked for the County's Public Works Department, reported to work at the same job location and held jobs related to the upkeep of the streets and highways of Columbia County. The First DCA also held there were disputed issues of fact that remained whether the claimant was engaged in a purely private mission and remanded for further proceedings consistent with this opinion.

TRIBAL IMMUNITY

The Miccosukee Tribe of Indians v. Claudia Elena Napoleoni, 29 FLW D2793 (1st DCA December 15, 2004).

The claimant was injured while working at the Miccosukee Resort & Gaming Convention Center which is wholly owned by the tribe. Prior to this accident, the tribe passed a resolution establishing its own workers' benefits system and explicitly rejected the State of Florida Workers' Compensation Law.

The claimant filed a PFB with the Florida Division of Administrative Hearings. The tribe moved to dismiss the claim arguing that it had tribal immunity under the Indian Reorganization Act of 1934. The First DCA found the JCC had no jurisdiction because Indian tribes are independent sovereign governments that are not subject to the civil jurisdiction of the courts of this State.

ATTORNEY'S FEES

Alma Davis v. Bon Secours-Maria Manor and Johns Eastern, 29 FLW D2793 (1st DCA December 15, 2004).

The claimant appealed the JCC's award of a statutory guideline attorney's fee of $576.79, contending the fee was manifestly unfair as it constituted an award of only $4.48 per hour. The claimant's attorney testified that 128.6 hours were reasonably expended in this matter in securing $2,883.97 in benefits for the claimant. This testimony was not contradicted.

The First DCA held the JCC abused her discretion in weighing the statutory factors of section 440.34(1), Fla. Stat. 1999. The First DCA explained that section 440.34(1) sets forth a sliding scale for an award of fees based upon the amount of benefits recovered. The Court went on to explain that when the fee produced by the statutory formula is "manifestly unfair, a departure should be ordered." The First DCA found that an hourly rate of $4.48 was manifestly unfair and reversed and remanded for further proceedings consistent with their opinion.

MODIFICATION OF ORDERS

Department of HRS/State of Florida v. Bessie Giles, 29 FLW D2852 (1st DCA December 20, 2004).

The JCC entered a Final Order dated April 12, 1994 denying PTD benefits as well as TTD/TPD benefits. In March 1999, the claimant again sought these same benefits and also sought medical treatment for her back complaints. The basis of the claim was that the claimant's original compensable knee injury had caused an altered gait that resulted in a low back injury. A second hearing was held on October 3, 2001. The JCC found the claimant's low back condition compensable and awarded PTD benefits/supplemental benefits from February 19, 1999.

The First DCA found the claimant's disability claim was barred because she failed to file a Petition for Modification as required by section 440.28, Fla. Stat. 1987, within two years after the entry of the April 12, 1994 Order. The First DCA therefore reversed the portion of the JCC's Order awarding disability benefits but affirmed the part of the order awarding medical treatment for the claimant's low back condition.

SOCIAL SECURITY DISABILITY OFFSETS

Miami-Dade County v. Lovett, 29 FLWD 2682 (First DCA, November 30, 2004)

The First DCA reiterated in this case that the claimant's social security disability benefits may be offset but only to the extent it does not reduce the total amount of benefits to less than 100% of the claimant's monthly AWW or 80% of his or her monthly ACE, whichever is greater.

CASE NOTES

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