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

CASE NOTES

CASE LAW SUMMARY
December 2006

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

MEDICAL BENEFITS/INDEMNITY BENEFITS

Williams v. BCI Industries, 31 FLW D3014, December 1st, 2006, Judge Condry

The claimant appealed an Order denying his request for medical benefits and TPD benefits. The JCC appointed a neurologist, Dr. Ronald Oppenheim, to perform an IME as authorized by section 440.29(1). The claimant then filed a continuance of the hearing for the JCC to consider additional medical evidence. The 1st District Court of Appeal found that the JCC properly appointed an IME to assist him in deciding whether the claimant was afflicted with a neurological condition. Additionally, the court held that the JCC did not abuse his discretion in denying the claimant's motion to reopen the evidence.

The JCC denied the claimant's petition for TPD benefits between August 1, 2003 and October 9, 2003 on the ground that the claimant voluntarily limited

Winter Park Office
1560 Orange Avenue
Suite 500
Winter Park, FL 32789
T (407) 571-7400
F (407) 571-7401

Ft. Pierce Office
603 N Indian River Dr
Suite 102
Ft. Pierce, FL 34950
T (772) 489-2400
F (772) 489-8875

Tallahassee Office
257 Pinewood Drive
Tallahassee, FL 32303
T (850) 386-2500
F (850) 222-5553

Ft. Lauderdale Office
1451 W Cypress Creek Rd
Suite 300
Ft. Lauderdale, FL 34950
T (954) 958-0323
F (954) 958-0322

his income. The JCC also found that the claimant's treating physician, Dr. Jungreis had released the claimant to work on August 1, 2003, with restrictions, and during that time, the claimant limited his job search to only one contact. The 1st DCA found that nothing in the record indicated that Dr. Jungreis instructed the claimant to return to work. The claimant testified that he was not aware that Dr. Jungreis had ever released him to work. In reversing the JCC's order, the court noted that evidence that the claimant is able to return to work is not sufficient to deny temporary total disability benefits in the absence of evidence the claimant was informed or should have known that he or she was released to return to work. It is recommended that carriers inform claimants of medical opinions releasing the claimant back to work to avoid this argument.

ATTORNEY'S FEES

Murray v. Mariners Health, 31 FLW D3016, December 1, 2006, Judge Turnbull

The 1st District Court of Appeal certified the following question to the Supreme Court: Do the amended provisions of Section 440.34(1), Florida Statutes (2003), clearly and unambiguously establish the percentage fee formula provided therein as the sole standard for determining the reasonableness of an attorney's fee to be awarded a claimant?

SUBCONTRACTORS/EXCLUSIVE REMEDY

Biggins v. Fantasma Productions, Inc. of Florida, 31 FLW D3044, December 6, 2006, Judge Carney

The plaintiff filed a four-count complaint alleging negligence against four defendants arising from an incident in which Biggins received serious injuries after falling from a "Genie" lift while working at a concert. Fantasma filed a motion for summary judgment on the grounds that it enjoyed immunity as a general contractor under the Workers' Compensation Act. The trial court granted Fantasma's motion. Chosen Sound was the only defendant involved in the appeal.

Biggins was hired by Backstage Productions to do lighting and electrical set-ups. Biggins testified that he was working as an electrician for Backstage at the concert when an employee for Chosen Sound directed him to find a lift and hang cable. Biggins went up the lift by himself. After realizing he could not rig cables from the location he was positioned, he started to bring down the lift. As he was bringing it down, he fell 14 to 20 feet, sustaining serious injuries.

Chosen Sound filed a motion for summary judgment claiming Chosen Sound had immunity from suit under the Workers' Compensation Act. The trial court granted Chosen Sound's motion. The Fourth DCA, however, found that the trial court erred in granting Chosen Sound's motion for summary judgment.

Biggins argued Chosen Sound was not entitled to workers' compensation immunity because Chosen Sound was a subcontractor standing in a horizontal position to Biggins's employer, Backstage, which was another subcontractor under the same general contractor. Chosen Sound conceded that it was not

Biggins's statutory employer pursuant to section 440.10(1)(b), however, Chosen Sound claimed to be entitled to immunity because Biggins was Chosen Sound's borrowed servant under section 440.11. Biggins contended that Chosen Sound was not immune from liability under the borrowed servant doctrine.

In order to overcome the presumption that the employee is not a borrowed servant, but instead remains an employee of the general contractor, a party must establish: (1) there was a contract of hire, either express or implied, between the special employer and the employee; (2) the work being done at the time of the injury was essentially that of the special employer; and (3) the power to control the details of the work resided with the special employer.

The Fourth DCA engaged in an analysis of these three factors and found that there was no evidence of an express of implied contract for hire between Chosen Sound and Biggins, or that Biggins consented to employment with Chosen Sound. Next, the court found that Chosen Sound established that Biggins was performing work that was essentially the responsibility of Chosen Sound. Last, the court found that Chosen Sound did not establish that it had the power to control the details of Biggins work. Therefore, the court reversed the trial court's finding.

RULE NISI

Mabire v. St. Paul Guardian Insurance Company, 31 FLW D3102, December 12, 2006, Judge Shackelford

The claimant filed a Petition for Rule Nisi, seeking to enforce a Compensation Order of the JCC compelling the insurance carrier to construct a heated exercise pool to his residence. The 1st District Court of Appeal held that the JCC's Order was a final Order that could be enforced by a Rule Nisi Petition. The Court noted that a Compensation Order in a Workers' Compensation proceeding is final when it settles all claims ripe for adjudication.

TEMPORARY TOTAL DISABILITY BENEFITS

Lalonde v. Checker's Drive-In Restaurants, Inc., 31FLW D3103, December 12, 2006, Judge Powell

The JCC awarded the claimant TTD benefits from April 9, 2002 through November 4, 2002 although the claimant admitted that he was working a reduced number of hours during this period. The JCC awarded TTD benefits after finding that the claimant's treating physician mistakenly placed him on a no work status. The 1st DCA, however, found that since the claimant was working, he did not have a disability that was total in character. There was no competent, substantial record evidence establishing the claimant believed he could not work, therefore, the JCC erred in awarding TTD benefits.

Additionally, the JCC found that the claimant reached maximum medical improvement on July 1, 2002. Therefore, it was error to determine that the claimant was entitled to TTD benefits following attainment of maximum medical improvement.

ATTORNEY'S FEES

Rodriguez v. Granduate Plastics, Inc., 31 FLW D3167, December 18, 2006, Judge Castiello

In this case, the parties in the workers' compensation proceeding mediated a lump sum settlement agreement. The settlement required the employer/carrier to pay the claimant a sum of $9,000.00 from which the claimant would then pay his attorney a fee of $1,600.00. In addition, the employer/carrier agreed to pay to the claimant's attorney an additional $4,000.00 in attorney's fees.

When the claimant failed to execute the settlement documents, the employer/carrier filed a Motion to Enforce. After a hearing, the JCC entered an Order finding that the parties had entered into a valid and enforceable settlement agreement. The claimant appealed, contending that the JCC should have also Ordered the employer/carrier to pay the claimant's attorney the $4,000.00 as part of the settlement agreement. The 1st DCA however, found that under Section 440.20(11)(c), the settlement agreement requires approval by the JCC only as to the attorney's fees paid to the claimant's attorney by the claimant. The 1st DCA found that the JCC did not err in failing to include language in the Order approving payment of the $4,000.00 additional fees.

RES JUDICATA/MAJOR CONTRIBUTING CAUSE

Tokio Marine Management v. Pizon, 32 FLW D88, December 22, 2006, Judge Condry

The employer/carrier, represented in the underlying case by Scott Miller, of HRMCWW, appealed an award of Permanent Total Disability benefits to the claimant who hurt his wrist at work on February 3, 1999. William Rogner handled the appeal and argued that the JCC erred in three respects, 1. Accepting the testimony of an attorney; 2. Ruling that *res judicata* precluded the E/C from presenting evidence as to major contributing cause and 3. Declining to permit a defense of apportionment. The 1st DCA reversed and remanded the JCC's ruling as to the second and third issues. The court found that the claimant is entitled to benefits only as long as the industrial injury remains the contributing cause of the disability, even where the initial accident has been deemed compensable.

MEDICAL BENEFITS/ONE TIME CHANGE

Butler v. Bay Center, 32 FLW D123, December 29, 2006, Judge Lorenzen

The 1st DCA affirmed the JCC's finding that the employer/carrier had no duty to authorize another pain management physician where the claimant had not received treatment from the physician timely authorized by the employer/carrier. If the claimant never attended the initial appointment with an authorized physician, the claimant can not "change" that physician because she was never treated by the physician.

The claimant filed a PFB seeking treatment from a specified pain

management physician. The E/C timely authorized a different pain management physician and scheduled an appointment for the claimant. The claimant refused to attend. After a hearing, the JCC denied the claimant's PFB, finding that the E/C had no duty to authorize another pain management physician since the claimant had not received treatment from the physician timely authorized by the E/C.

In affirming, the court noted that under 440.13, the E/C has the initial right and duty to authorize the physician who will treat the injured claimant. In the claimant's July 22, 2005 PFB, she requested treatment with a specific pain management physician. The E/C authorized an appointment with a pain management different from the one the claimant specified. The JCC found that the E/C timely authorized the claimant's request for evaluation.

Since the E/C timely offered medical care in response to the claimant's request, the court found the JCC could not award the specific physician sought by the claimant. The claimant never received treatment from the authorized physician. The court found that before requesting another authorized physician, a claimant must at least begin treatment with the physician the claimant seeks to change.

The court went on to point out that even if the claimant had received treatment, the claimant would only be entitled to her choice of physicians if the E/C failed to provide another physician within 5 days of receiving the request for another physician.

APPELLATE ATTORNEY'S FEES

Hale v. Shear Express, Inc., 32 FLW D127, December 29, 2006, Judge Jenkins

The 1st DCA reversed the JCC's finding reducing the amount of appellate attorney's fees. The Court noted that there was no competent, substantial evidence presented to dispute the reasonableness of the fee. It was error for the JCC to base her findings on subjective beliefs and personal experience. Unsworn responses and arguments of counsel are not evidence upon which the JCC may rely on determining the amount of a reasonable fee.

STATUTE OF LIMITATIONS

Hanson v. Florida Hospital, 32 FLW D147, December 29, 2006, Judge Sculco

The claimant appealed a workers' compensation Order which determined his Petition for Benefits was barred by the statute of limitations. The claimant asserted he was not given sufficient information as to his rights in connection with this limitations period although the employer/carrier provided the claimant with an approved informational brochure. The 1st DCA found the informational brochure clearly and expressly advised the claimant of his rights. Therefore, the Order was affirmed.