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**CASE NOTES**

**CASE LAW SUMMARY  
FEBRUARY 2008**

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

**PERMANENT TOTAL DISABILITY**

Walmart Stores, Inc. v. Thompson, 2008WL 312644 (Fla. 1<sup>st</sup> DCA February 6, 2008), 33 Fla. L. Weekly D417

This is the first appellate case interpreting the 2003 amendments to the PTD statute. That section requires that the claimant establish that he/she is not able to engage in at least sedentary employment within a 50 mile radius of the claimant’s home due to his/her physical limitations.

This claimant had only a 5% impairment rating. The claimant’s vocational expert was Gerri Pennachio, who testified that the claimant was ruled out on all jobs within a 50 mile radius. There was little evidence regarding restrictions. The JCC ultimately accepted that testimony and awarded PTD, although somewhat begrudgingly. The opinion quoted the JCC’s Order that it was almost incomprehensible that this claimant would be PTD, considering her return to work post accident, her subsequent departure from the employer for reasons apparently not related to the injury and scant evidence of a search for subsequent employment. The DCA found no error of law and upheld the PTD award because there was evidence of impairment and un rebutted vocational evidence of unemployability.

The E/C did not present vocational testimony. Although this opinion does not

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analyze the statute in great detail, it seems to reject the plain language of the statute that the inability to work must be due to physical limitations alone. The opinion certainly suggests that vocational evidence, assumed by some to be of limited value after the 2003 amendments, is an essential element of proof in the analysis of post 2003 PTD claims.

## **VENUE**

Rodas v. Commercial Forming Corp., WL 351053 (Fla. 1<sup>st</sup> DCA February 11, 2008), 33 Fla. L. Weekly D461

Changes of venue require JCC approval. The parties stipulated to change venue from Miami to Fort Lauderdale after the case settled and only attorney fees were outstanding. The JCC denied the stipulation.

The DCA held that, per the 60Q rules of procedure, a JCC may grant a transfer of venue from an improper venue to a proper venue. There was no allegation that venue was improper in Miami, so the JCC did not err in refusing to change the venue to Fort Lauderdale.

## **EXPERT MEDICAL ADVISOR**

Fitzgerald v. Osceola County School Board, 2008 WL 420027, 33 Fla. L. Weekly D529

This case addresses the appropriate remedy when a JCC misinterprets testimony of an Expert Medical Advisor - the remedy is remand.

The claimant was a school teacher with pre-existing sinusitis, rhinitis and mold allergies. She was alleged exposure to persistent mold in her classroom. The E/C initially accepted compensability on the basis that the claimant was having a temporary aggravation of her pre-existing condition. The E/C later denied benefits on the basis that the industrial exposure was no longer the major contributing cause of the claimant's need for treatment for her ongoing respiratory problems.

The claimant's IME diagnosed the claimant with asthma caused by ongoing mold exposure at work. The E/C's IME disagreed with the diagnosis of asthma. He recommended further testing to determine the cause of condition. The JCC appointed an EMA, who found that most of the claimant's symptoms were allergy related. The EMA indicated that the diagnosis of asthma was questionable, though it was reasonable to think of that diagnosis, but it is still somewhat questionable. During deposition, the EMA testified that he could not say that the industrial exposure was more than 50% the cause of the need for treatment. But the EMA also testified that he could not say what the MCC of the claimant's condition, it could be industrial exposure and it could be her pre-existing condition. The JCC interpreted the EMA's testimony to say that he was of the opinion that the MCC of the need for treatment was not the industrial exposure. The JCC denied claim for ongoing treatment and payment of outstanding bills.

The claimant argued that the JCC misinterpreted the EMA's testimony and requested reversal of the judgment as a matter of law. The DCA agreed that the JCC had misinterpreted the EMA's testimony because the EMA doctor did not offer a definitive opinion on the two critical issues (1) whether the claimant had asthma; and (2) whether the industrial exposure to mold was the major contributing cause of the claimant's need for treatment.

The appropriate remedy is remand, not outright reversal and automatic victory for the claimant. The instructions with the remand were for the JCC to conduct more analysis using the EMA's opinions to resolve the issue.

## **MEDICAL CARE**

Hampton v. Fantastic Sam's, 2008 WL 482329, 33 Fla. L. Weekly D597

The Court held that an authorized treating physician does not have the authority to transfer care to another physician upon retirement. The Court further held that the claimant could not be reimbursed for treatment with the second psychiatrist.