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# CASE NOTES

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## CASE LAW SUMMARIES: FEBRUARY, 2005

Public Storage v. Galano, 30 Fla. L. Weekly D318 (Fla. 1st DCA, Feb. 1, 2005) Employer/carrier appealed the JCC''s decision that claim was compensable. The court ruled that employer/carrier waived their right to deny compensability because they failed to deny the claim within 120 days since the initial provision of benefits. The court reiterated that if the employer/carrier seeks relief from the 120 day rule, employer/carrier has the burden to demonstrate material facts relevant to the issue of compensability that could not have been discovered with reasonable investigation within that 120 day period. In addition, employer/carrier failed to assert that they were entitled to relief from the 120-day rule prior to the appeal.

Eaton Corp. v. Votour, 30 Fla. L. Weekly D369 (Fla. 1st DCA, Feb. 7, 2005) Employer/carrier appealed an order awarding partial disability benefits, arguing that the JCC erred in excluding surveillance videos as impeachment evidence. Claimant had suffered a compensable rotator cuff injury to her right shoulder, and testified extensively to the limited use of her right arm. The employer/carrier proffered two surveillance videos that showed claimant using her right arm inconsistently with her testimony. The JCC refused to admit the tapes concluding that the tapes did not constitute impeachment. The District Court found that the JCC abused her discretion, reversed the decision and remanded the case with instructions for the tapes to be entered into evidence. The court noted that case law recognizes that surveillance videotapes can be used for impeachment, the method of impeachment is not limited to actual testimony of other witnesses.

Divosta Building Corp. v. Rienzi, 30 Fla. L. Weekly D409-10, (Fla. 1st DCA, Feb. 11, 2005) This is another in a line of recent cases where the court held that it is within the jurisdiction of the JCC to determine whether an enforceable settlement agreement was reached.

Salva v. American Airlines, 30 Fla. L. Weekly D410 (Fla. 1st DCA, Feb. 11, 2005) The District Court reversed the order requiring claimant to reimburse the employer/carrier for payment of private mediation conference.

Peckham v. Speegle Construction, Inc., 30 Fla. L. Weekly D476 (Fla. 1st DCA, Feb. 17, 2005) Claimant appealed the decision of the JCC that he was not entitled to temporary total disability, arguing that the JCC erred in relying on documentation of a physician''s assistant. The court upheld the finding of the JCC that the physician''s assistant opinion could be relied upon because the physician''s assistant was the last person at the clinic to provide treatment to the claimant, his opinion did not contradict the doctor''s testimony, and the claimant relied on the physician''s assistant''s findings for the compensability of the claim, seeking only to use the doctor''s testimony for his work status. Based on the physician''s assistant''s opinion that the claimant could have returned to work over the doctor''s conjecture of work status when the doctor had not examined the patient, the court upheld the decision to not award temporary total disability. The dissent of the case argued that a physician''s assistant is not within the statutory classification of an authorized treating provider and therefore his testimony should not have been given as much weight as the testimony of the doctor, who was an authorized treating provider.

Mosquera v. Home Shopping Network, En Españñol, LLC, 30 Fla. L. Weekly D484 (Fla. 1st DCA, Jan.19, 2005) Claimant argued that the JCC erred in failing to appoint an EMA to resolve the conflict between claimant''s treating physician and the IME. Employer/carrier conceded that the case should be remanded for the appointment of an EMA. The court reversed and remanded the case for an EMA appointment.

Delotta v. J&J Automotive, Inc., 30 Fla. L. Weekly D465 (Fla. 4th DCA, Feb. 16, 2005) Claimant was injured in accident on June 25, 1998 while driving a Florida Light and Power (FPL) vehicle that was inspected by Mr. Kramer, an employee of J&J Automotive Corp. (J&J). Claimant appeals an order of summary judgment in favor of J&J who asserted that Kramer was a ""borrowed servant"" of FPL and thus both he and his employer were subject to workers'' compensation immunity. The District Court reversed the order of summary judgment stating that there was material issue of fact on the issue of Kramer being a borrowed servant. The court remanded the case, stating that to determine whether the employee is a borrowed servant, the lower court must consider: (1) whether an express or implied contract existed between the employee and the alleged special employer, (2) whether the work performed at the time of the injury was essentially that of the alleged special employer; and (3) whether the alleged special employer had the power to control the details of the work being done.

Protegrity Services, Inc. v. Brehm , 30 Fla. L. Weekly D432-34 (Fla. 5th DCA, Feb. 11, 2005) Claimant was injured in a work-related accident and underwent treatment. The third-party administrator (TPA) for the

workers'' compensation carrier, changed the treating physicians during treatment. The claimant alleged that the second doctor performed the procedure at the wrong location. Claimant then filed suit alleging medical malpractice and inappropriate handling of her workers'' compensation claim. The TPA filed a motion to dismiss based on workers'' compensation immunity which was denied. The TPA appealed the denial of that motion. The court found that a workers'' compensation carrier enjoys the same immunity from tort liability that an employer does under the law. The test to determine whether workers'' compensation bars tort action is whether the injury for which plaintiff seeks recovery is covered by the Workers'' Compensation Act. The court concluded that the claimant''s allegations against the third-party administrator involved the handling of her workers'' compensation claim and did not allege wrongdoing that was independent of the handling of the claim. Therefore all the claimant''s claims fell under workers'' compensation immunity. Case was reversed and remanded.

**CASE NOTES**

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