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CASE NOTES

CASE LAW SUMMARY February 2007

If you have any questions regarding Case Law Summaries, please contact W. Rogers Turner, Jr. :
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ORDERS:

U.S. Foundry and Manufacturing, Inc. v. Carner, 2007 WL 556916 (1st DCA 2007) - Judge Jatherine Pecko

The DCA reversed an Order which failed to make explicit findings regarding whether the Claimant's hearing loss was the major contributing cause of the Claimant's disability. Additionally, the DCA instructed the JCC to clarify that appropriate penalties were to be included in the award of temporary indemnity benefits.

Although not referenced in the DCA opinion, the claim involved a claimant who sustained two dates of accident in 2002, the one litigated involving a compensable

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bilateral hearing loss. The parties litigated the issue of temporary indemnity, permanent total disability and penalties and interest.

The JCC awarded past due temporary indemnity benefits, but failed to address whether penalties should be paid on those benefits. Additionally, the JCC awarded interest on unpaid or untimely paid compensation benefits, including untimely paid impairment income benefits. Finally, the JCC awarded permanent total disability benefits. However, the JCC failed to make explicit findings that the compensable hearing loss constituted the major contributing cause of the claimant's disability, requiring reversal.

RES JUDICATA

Pigg v. Balderson, 2007 WL 516257 (1st DCA 2007) - Judge Ivy C. Harris

The DCA affirmed an Order denying the Claimant's permanent total disability claim, as the petition was barred by *res judicata*.

The Claimant injured his right shoulder on August 24, 1998. The Claimant, through an attorney, filed a petition seeking PTD benefits. On December 21, 2001, the JCC entered an order denying PTD. In December of 2003, Claimant, through a second attorney, filed a new petition for PTD which was dismissed.

On May 21, 2005, Claimant filed a pro-se petition seeking PTD benefits. The Claimant raised the same facts as were introduced in 2001. The Claimant attempted to introduce documents he felt should have been introduced in 2001. The JCC did not allow admission of the evidence and ruled the 2005 petition was barred by *res judicata*.

The DCA affirmed the Order of the JCC that *res judicata* barred the claim. Additionally, the DCA indicated that had they treated the PFB as a petition for modification under s. 440.28, Florida Statutes, based on the ground of a change in condition or because of a mistake in a determination of fact, the petition was untimely as it was not filed within two years from the mailing of the previous Order denying benefits.

CONTRIBUTION BETWEEN CARRIERS

Pearson v. Paradise Ford, 32 Fla. L. Weekly D373 (1st DCA 2007) - Judge Paul T. Terlizese

The DCA reversed an Order of the Judge Paul T. Terlizese which held the major contributing cause standard precluded a carrier with only 20% responsibility from being liable for contribution to the carrier responsible for the remaining 80%. Additionally, the DCA reversed the JCC's denial of temporary indemnity benefits as the Claimant had not been advised to return to work.

The Claimant sustained two accidents, one in 1999 and the other in 2004. Both accidents involved injuries to the back. The JCC found 80% of the Claimant's disability and need for treatment related to the 1999 accident with the remaining 20% related to the 2004 accident. The JCC further held that the carrier for the 2004 accident could not be held responsible for any contribution as they were not greater than fifty percent responsible for the need for treatment or disability, as required under the post 10/1/03

major contributing cause provisions.

The DCA reversed the Order of the JCC, holding that the major contributing cause standard does not apply to apportionment between carriers. The DCA held that major contributing cause only applies where claimant's need for treatment or benefits is caused by the impact of an employment accident combining with a preexisting injury or condition that is unrelated to an employment accident.

Finally, the DCA reversed a denial of temporary total disability benefits as the Claimant was not made aware of being returned to work status prior to the merits hearing. "We have consistently held in workers' compensation cases 'that even in the absence of medical evidence' of a claimant's disability, a claimant is nonetheless entitled to benefits if he has not been advised to return to work."

ATTORNEY'S FEES

La Pettite Academy v. Duprey, 32 Fla. L. Weekly D375 (1st DCA 2007) - Judge Paul P. Thurman

The DCA reversed an award of attorney fee in excess of the schedule established in s. 440.34, Florida Statutes.

The Claimant prevailed at merits hearing on several issues. At the attorney fee hearing, the Claimant sought a fee based upon hours expended in prosecution of the claims. The JCC undertook an analysis of the factors contained in the statute prior to the October 1, 2003 changes. Additionally, the JCC analyzed the "lodestar" approach to determining fees and found the hourly rate established by the statutory fee to be unfair. The JCC awarded an hourly fee based upon 82 hours at \$250.00 per hour.

In reversing the award of fees by the JCC, the DCA reiterated that in workers compensation cases, a fee award must be based on the value of the benefits actually obtained on behalf of the Claimant, as has been discussed in multiple prior opinions. The DCA additionally rejected argument that s. 440.34, Florida Statutes violates either the Florida or U.S. Constitution..