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CASE NOTES
CASE LAW SUMMARY
February 2009

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

Statute of Limitations/Burden of Proof

Palmer v. McKesson Corp./Gallagher Bassett Services, Inc., (Fla.1st DCA 2/27/09) The 1st DCA affirmed JCC Harris' Order denying further benefits based on a valid Statute of Limitations defense. The claimant was in injured on 8/17/01, had a discectomy in November of '01, and received a TNS unit in February of '02. Her last authorized care came in June of '02. The claimant filed PFBs in on July 5, '05, to which the carrier responded that the SOL had run. The claimant introduced testimony of a medical supply employee that the claimant obtained TNS supplies in October of '04, and evidence of a prescription card from a prescription company which the claimant received in '06, and subsequently filled some unauthorized prescriptions. The E/C offered testimony that they were never notified nor did they pay for the TNS supplies in '04, and that the prescription card was erroneously sent to claimant without their knowledge or consent. The claimant appealed, arguing the JCC improperly shifted the burden of proof to the claimant re: the SOL. The DCA held that the SOL affirmative defense in F.S. § 440.19(1) requires only that the E/C establish (1) the date of accident and (2) the date of the first petition for benefits. Thereafter, the burden shifts to the claimant under subsection (2) to establish that an exception applies to the general statute. This case appears to greatly simplify the E/C's role in an SOL defense, requiring the claimant to present evidence sufficient to overcome the defense. Click here to read case

Firefighter Presumption/Burdens of Proof

Punsky v. Clay County Sherriff's Office/Scibal Ins., (Fla. 1st DCA 2/27/09)

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(rehearing En Banc) The First DCA, sitting En Banc, affirmed the JCC's Order denying benefits. The court wrote to "harmonize case law" on the issue of the statutory presumption, particularly as it relates to rebutting the presumption that the employment caused the claimant's heart disease. The DCA traced the history of presumption cases, which discussed whether the presumption could be rebutted by clear and convincing evidence. In this case, the court noted that the claimant relied solely on the statutory presumption, without presenting further corroborating or supporting medical evidence. The court ruled that the claimant's presumption does not vanish when contrary evidence re: causation is presented, but that the presumption can be overcome by evidence "of sufficient weight to satisfy the trier of fact that the tuberculosis, heart disease or hypertension had a non – industrial cause". The further noted that the E/C's ability to rebut the presumption is not limited to a single, non industrial cause, but may be satisfied by a combination of non – industrial factors. The case establishes that evidence of risk factors can be the basis of a presumption defense. Click here to read case

Medical Benefits/One Time Change – Evidence/Authentication & Circumstantial Evidence

Sunbelt Healthcare/AHS v. Galva, (Fla.1st DCA 2/27/09) The First DCA reversed a ruling by JCC Sculco that a claimant was entitled to an additional 1x change. The claimant was injured and originally covered under a managed care arrangement. When the claimant requested a 1x change in orthopedist, the carrier provided a list, from which the claimant apparently chose Dr. Macksoud. The carrier sent a letter to the claimant asking whether the claimant was choosing Macksoud as their 1x change or IME. Three days later, the carrier's attorney received his letter faxed back, with a handwritten note saying "Macksoud is alt. ortho". The signature was illegible. The claimant treated with him for three years and ultimately had surgery. Thereafter, in 2006, the carrier ceased providing benefits under managed care. Later, the claimant filed a PFB requesting another 1x change, which the E/C denied on the basis the claimant had already exercised their change. At the merit hearing, for the first time, the claimant argued that the choice of Macksoud was invalid because he was professionally affiliated with the prior orthopedist. Numerous letters from the E/C were introduced into evidence confirming the choice as a 1x change, but the JCC did not admit the claimant attorney's faxed response re. "alt. ortho", because there was "no direct evidence showing the claimant attorney had written the note". The DCA found the JCC abused his discretion by not admitting the letter which was clearly in response to the E/C letter, and by not considering the ample additional evidence that pointed to the fact that the claimant attorney wrote the letter. The court also found that the claimant does not get an additional 1x change, just because the 1x change occurred under a managed care arrangement that was later abandoned. Click here to read case

Medical Benefits/One Time Change

Tri-City Electric/Amerisure v. Werner, (Fla. 1st DCA 2/27/09) The 1st DCA held that the language of F.S. § 440.13(2)(f) is clear and unambiguous, and a claimant's right to a one time change in physician is limited to one change per accident, regardless of the number of body parts or conditions involved. Here the claimant had compensable orthopedic and hernia conditions. After receiving a onetime change in general surgeons, the claimant later sought a onetime change in orthopedist. The JCC granted this, noting the limitation is untenable because the nature of the claimant's injuries requires different specialties. The DCA reversed, reiterating their position enunciated earlier in the 2008 Perez v. Rooms to Go case. Click here to read case

Going and Coming Rule/Traveling Employees
Bruce Houck as P.R. for the Estate of Ellen Houck v. Tarragon Mgmt./AIG, (Fla.1st DCA 2/24/09) The DCA affirmed a finding by JCC Pecko that the claim for death benefits was not compensable. The claimant worked for a property management company in Jacksonville. A prior trainee of hers in Ft. Lauderdale requested further training from the claimant in Ft. Lauderdale, to which the employer agreed. The training was to last a week, starting on Monday. The claimant would stay in an employer provided condo. The claimant obtained permission from the employer to fly down the preceding Friday, to visit with a friend. The friend however, could not meet the claimant, so the trainee met the claimant instead that evening. The evidence showed that the two had dinner, discussed work to some degree, then after dinner went window shopping and were going to go dancing. Around 2 a.m. the claimant was attempting to cross the street when she was struck by a car and killed. The court analyzed prior traveling employee cases, which they noted often deal with employees faced with down time during layovers. The Court found the claimant was not a traveling employee as she was not required to be in Ft. Lauderdale until Monday, and her reasons for being there early were purely personal. The court also found the claimant was not in the course and scope of employment when killed, as any discussion regarding work at dinner had ceased by the time the accident occurred. Click here to read case

Timely Notice
Orange County Public Services/Alternative Staffing Concepts v. Ottley, (Fla.1st DCA 2/24/09) The DCA affirmed a ruling of JCC Sculco finding the claimant gave proper notice of her injury per F.S. § 440.185(1)(2007). Although the facts are not included in the order, the JCC's ruling was based on the amended language of the statute reading "an employee… shall advise the employer of the injury within 30 days of *or the initial manifestation* of the injury" (emphasis supplied). The court rejected the E/C's argument that the amendment abolished the "reasonable person" articulated in Escarra v. Winn Dixie, 131 So.2d 483 (Fla. 1961). There, the Supreme Court held the time period for notice does not commence until the claimant, as a reasonable person "recognize(s) the nature, seriousness and probably compensable character of the injury". Click here to read case

Diagnostic Testing/Prevailing Party Costs/Attorney Fees
Chance v. Polk County School Board/Comp Options, (Fla.1st DCA 2/24/09) The DCA reversed and remanded JCC Hofstad's order denying a shoulder MRI based on a lack of MCC, an award of costs to the E/C and a denial of attorney fees for the claimant. The claimant saw an initial physician, who obtained an MRI of the neck and a right shoulder x-ray after two workplace accidents. These tests were inconclusive. The claimant was referred to an orthopedist, who ordered an MRI of the shoulder. Both physicians testified they could not causally relate the MCC of the neck and shoulder complaints to the accidents. The JCC denied the shoulder MRI. The DCA noted that claimant's need not prove MCC to obtain diagnostic testing to determine the cause of the claimant's compensable vs. non-compensable conditions. Click here to read case

Permanent Total Disability Benefits
Advanced Masonry/PMA Group v. Molina, (Fla.1st DCA 2/19/09) Claimant was injured in 2001. Various surgeries worsened rather than improved his condition, and

the claimant sought PTD benefits. The carrier agreed the claimant has sustained a catastrophic injury, but defended the claim arguing that the claimant retained a substantial earning capacity, the claimant voluntarily limited his income and the claimant refused suitable employment. At trial, JCC considered the EMA physician's opinions that the claimant was capable of sedentary work and evidence of available work from ReEmployability, who was hired by the E/C. He awarded PTD, and rejected the E/C defenses, first finding that there was only one job offer that was not signed off on by a doctor. He rejected the voluntary limitation defense, noting that although the claimant refused English classes provided by the E/C, that failure was excused by the E/C's lack of evidence showing that had any impact on the claimant's ability to obtain work. He rejected the last defense, noting that although the claimant said he would not work for less than 18.50 per hour, the E/C did not present evidence that he refused work. After an analysis of the requirements for obtaining PTD under this date of accident, the DCA reversed and remanded, finding none of the JCC's findings were supported by competent substantial evidence.
Click here to read case

Defense Attorney Fees
Allstatt v. Florida Dept. of Agriculture/Fla. Dept. of Insurance, (Fla. 1st DCA 2/19/09) The asked JCC Beck to find that defense fees are subject to JCC approval under 440.105(3)(C), by filing a "Motion to Approve Defense Attorney Fees". When she declined, the claimant appealed her decision. The DCA noted neither this section, or anything in Chapter 440 would require the JCC to so rule. Further, they found it unnecessary to decide whether the legislature intended this section of the statute to apply to defense attorney fees.
Click here to read case

Mullins v. 7-11, Inc./Sedgwick, Fla1st DCA (2/12/09) In the underlying claim, the JCC found the claim for repair to the claimant's ruptured breast implant was compensable, but apportioned out 75% of the cost. This was based on the IMEs testimony that 75% of the need for replacement of the implant was due to degeneration of the implant. The DCA examined F.S. § 440.02(19), which deals with prosthetic devices. The court held that MCC does not apply to replacement of damaged prosthetics in an otherwise compensable incident under that section. The court reasoned that the devices was clearly prosthetic, rejecting carrier arguments that the cosmetic nature of the prosthetic removed it from the statute. As to apportionment, the court reasoned that apportionment under F.S. § 440.15(5)(a) and (b) applied only to pre-existing diseases and diagnoses, and not to "conditions". Finding the prosthetic was not a disease or diagnosis, they reasoned it was not subject to apportionment, and reversed that portion of the order.

Florida Fifth District Court of Appeal
Andrews v. Direct Mail Express, (Fla. 5th DCA 2/6/09) The DCA reversed the circuit court's granting of a directed verdict for the Defendant. After the evidence was presented at trial for the Plaintiff's 440.025 retaliatory discharge claim, the Defense moved for the directed verdict, alleging the claimant had not proven her termination was due to her filing a workers' compensation claim. The Appellate Court noted the evidence presented indicated the claimant had been disciplined for issues which she alleged were related to her filing a claim, and such was sufficient to withstand the motion for directed verdict. The case was remanded for a new trial, finding the issue of the cause of claimant's termination should have been submitted to the jury. Click here to read case

Florida First District Court of Appeal

Fla. Transport 1982, Inc./Assoc. Industries v. Quintana, (Fla. 1st DCA 2/9/09) The court reversed, as (1) the award of PTD was premature; (2) the claimant was not entitled to two additional psychiatrists and (3) there was no basis to award PICA. The claimant sustained a physical injury, was paid 104 weeks, and then requested a psychiatrist. The carrier provided one name, and the claimant did not attend the appointment. Both parties obtained psychiatric IMEs, and the JCC awarded "temporary PTD" pursuant to Emanuel v. Piercey Plumbing, 765 So.2d 761 (Fla. 1st DCA 2000). The court then ordered the carrier to provide a list of names to the claimant to choose an authorized psychiatrist. The court held the JCC erred in awarding such PTD benefits, as he failed to make any findings as to whether the claimant was PTD from his physical injuries alone, and because the award of PTD based upon the claimant's psychiatric condition was not supported by competent, substantial evidence. In reversing the award of additional psychiatrists for the claimant to choose from, the DCA noted, pursuant to Butler v. Bay Center/Chubb, 947 So.2d 570 (Fla. 1st DCA 2006) that the change to the prior version of the statute granting claimants a list of three doctors to choose from was procedural, and thus applied to all dates of accident.

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Molina V. AlphaStaff/Unisource Administrators, (Fla. 1st DCA 2/9/09) The DCA held the court erred in admitting extra record material in support of his order finding the PFB at issue was not "medical only". The fee award was reversed, limiting the fee to $1500.

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Note – DOAH indicates this fee was in relation to a side fee concurrent with a washout Pre-Murray.

Prater v. IMC Phosphates/Ins. Co. of PA, (Fla. 1st DCA 2/5/09) The DCA reversed the JCC's order, finding the Social Security offset should have been calculated pursuant to the holding of Florida Power v. Van Loan, 764 So.2d 708 (Fla. 1st DCA 2000). There, the court approved the method to calculate the weekly payment, by first subtracting the social security disability offset from the maximum compensation rate for the year of the claimant's accident, and then adding the supplemental benefits for the current year.

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Fourth District Court of Appeal

Rule Nisi

City of Hollywood/Florida Municipal Insurance Trust v. Benoit, (Fla.4th DCA 1/21/09)

The claimant incurred a severe head injury in 1996, and a stipulation was entered into in 1997 that the carrier would provide attendant care, paying the claimant's mother 12 days of unskilled care, seven days a week. The claimant sustained a subsequent accident, and was transferred to an inpatient rehab facility, where he receives 24 hours of attendant care (provided by the same carrier). Several weeks later, the carrier ceased paying the mother attendant care and the mother then filed a Petition for Benefits seeking the attendant care payments under the terms of the '97 stipulation. The JCC found he was without jurisdiction to rule on the PFB, finding the proper vehicle was a Rule Nisi. The mother filed a Petition for Rule Nisi, which

the circuit court granted. Noting that the result seemed absurd, both the circuit judge and the appellate court noted the finite jurisdiction of the circuit court, which limits the analysis only to whether an outstanding order has been complied with, regardless of the evidence. The court noted that the carrier should have (1) drafted an original joint stipulation and should have included more definitive limiting language and (2) that no petition to modify had been filed by the carrier. **Click here to read case**

Note: The carrier in this case did file a Petition to Modify. While the Appeal was pending, JCC Pecko granted their petition, noting however that she was without jurisdiction to rule on the period where the Rule Nisi was pending in Circuit Court. Click here to read case