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# CASE NOTES
# CASE LAW SUMMARY
# February 2013

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

As anyone with an email inbox is aware, on 2/28/13 the First DCA issued a major decision regarding the statutory cap on Temporary Total Disability Benefits found in F.S. s 440.15(2)(a)(2009). The First DCA addressed the "gap period" discussed in prior cases, and following a lengthy analysis, determined that the 104 week cap on available weeks of TTD is unconstitutional, replacing it with the 260 weeks of available TTD which existed in the WC law enacted in 1991.

**Westphal v. City of St. Petersburg/City of St. Petersburg Risk Mgmt./State of FL, ******* **(Fla.1st DCA 2/28/13)**
**Temporary Total Benefits/Statutory Cap of 104 Weeks/ Constitutionality of Statute**

*******VACATED BY EN BANC DECISION SEPTEMBER 23, 2013. Click here to view Opinion.*****

**Facts:**
Claimant, a paramedic/firefighter, was injured in 2009. Having exhausted the 104 weeks of available temporary benefits, the claimant continued to undergo medical procedures, and remained on a TT status. He then sought PTD benefits, which the JCC denied, relying on the 2011 Matrix v. Hadley decision. The JCC found that because the claimant had not reached MMI (a requirement for entitlement to PTD benefits), it was too speculative to determine whether he would remain totally disabled after reaching MMI.

The opinion makes passing reference to the 1998 City of Pensacola Firefighters v.



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Oswald case, which they note was an attempt to ameliorate the gap period (*by allowing medical testimony as to what anticipated restrictions might be upon reaching MMI*), but does not describe why such evidence was too speculative in this case.

The DCA then analyzed whether the 104 week TT limit resulted in a denial of the claimant's right to access to courts and the right to administration of justice, in violation of the Florida Constitution. In so doing, they considered the statute in place at the time of the adoption of the Florida Constitution in 1968. Their discussion then turns to the claimant's required avenue for benefits under WC law, versus suing his employer in tort. The court holds that the "gap period" fails to comport with any notion of "natural justice" and is "repugnant to fundamental fairness". The Opinion spends multiple paragraphs discussing the history and benefits available under Chapter 440. They compare the temporary benefits available in Florida to "sister states" (AL, LA, MS, NC, SC and TN) finding Florida's woefully inadequate. Finding the cap "not merely unfair, but fundamentally and manifestly unjust", (in addition to finding no public necessity for the limitation), the DCA rules the 104 week limit is unconstitutional.

The next portion of the Opinion deals with severability, (the notion that if one portion of the statute is stricken as unconstitutional, then all sections of that statute are also subject to being stricken). Interestingly, after spending several pages decrying the failures and shortcomings of Chapter 440, the Court determined that the offending subsection may be severed and rendered unconstitutional, as it can be separated from the remainder of the Act, leaving a "complete system of recovery". Finally, the Court analyzes whether the available weeks of TTD under the 1968 or 1991 version should replace the severed 104 week cap. Citing the doctrine of "judicial revival", they determined the 260 week limitation available in the Act preceding the 1994 amendments to Chapter 440 is appropriate. The new 260 week cap applies prospectively and does not apply to rulings, adjudications or proceedings rendered final prior to the date of the opinion. **Click here to view Order**

**Future Potential Impact**

The three Judge panel has harsh words for the 2003/2009 amendments and the 1993 amendments – taken in whole, they decry the unfair nature ("*doctor chosen by the employer", "City had the right to select doctors", "City had the right to meet and confer with their selected doctors" etc*. ) current statute. The question will be which additional portions of the statute the DCA feels might also fail to leave the claimant without a reasonable remedy. (i.e. IBs, caps on psych IBs, caps on PTD up to age 75, no carrier paid IMES, and of course attorney fees.

With regard to attorney fees, three separate constitutional challenges to WC attorney fee limitations are set for First DCA oral argument March 12th and 13th. It is assured the identical access to courts and right to administration of justice arguments will be offered up in those cases as well.

For employers and carriers, the 260 week limit, if it is limited to TTD benefits only, will not necessarily be overwhelming. The majority of cases involve claimants attaining MMI within 104 weeks. In fact, it might actually delay some PTD cases and limit or mitigate exposure on those. If the Opinion holds, it would likely ultimately be found to apply to TPD as well, and will have more significant impact.

**Bottom Line**

There are several important issues to keep in mind regarding this opinion and the immediate responsibilities of claims entities:

> It is expected there will be a Motion for Rehearing and Rehearing En Banc. A motion for rehearing tolls the rendition of the Order and until the Order is rendered, a mandate cannot issue.
>
> The ruling, if it becomes final, does not apply to closed cases or proceedings that have become final as of the date of the opinion. The ruling will apply to all open, current cases.
>
> Under the Appellate Rules, the Supreme Court has non-discretionary, mandatory appeal jurisdiction as the DCA declared a statute unconstitutional. To seek Supreme Court review a party must file a Notice of Appeal in the 1st DCA within 30 days of rendition of the DCA's ruling. Thus, the City has 30 days from Feb 28 with no motion for rehearing, or 30 days from the ruling on their motion for rehearing, whichever is later.
>
> In many cases, the impact should be minimal. More serious cases will require additional exposure analysis regarding this extension of TT benefits. Although the DCA interspersed subsection 440.15(2)(a) with the term "temporary benefits", the decision did not specifically mention the identical cap on temporary partial benefits under subsection 440.15(4), whether that section is also unconstitutional and subject to the new 260 week cap, or whether wage loss benefits, which existed at the time of the 1991 statute, might come back into play.

HRMCWW will monitor and report any Motions for Rehearing and Rehearing en Banc, and whether or not the case proceeds for review in the Florida Supreme Court. Please feel free to contact any of the firm's attorneys to discuss the Opinion and its ramifications in greater detail.

**Beavers v. Carpenter Contractors /Alternative Service Concepts,**
**(Fla.1st DCA 2/26/13)**
**De-authorization of Physicians/Failure to make appropriate progress in recuperation**

In accordance with the recent Avery decision, the First DCA reversed the JCC's approval of de-authorization of a doctor. The First DCA ruled that once the claimant has reached overall MMI then the transfer method of de-authorization under section 440.13(2)(d)(2010) is not available. The E/C is stuck with the authorized doctor. **Click here to view Order**

**Hinzman v. Winter Haven Facility Operations LLC d/b/a Consulate Health Care Of Winter Haven And Gallagher Bassett Services, Inc (Fla.1st DCA 2/18/13)**
**One Time Change/Calendar vs. Business Days**

The DCA reversed the JCC's finding that the E/C timely complied with the "5 day rule". The JCC found that the carrier's obligation to authorize a one-time change doctor was governed by business versus calendar or consecutive days. The DCA held that because the Legislature specified "business days" elsewhere in section 440.13, canons of statutory interpretation (particularly the presumption of consistent usage) dictate that the Legislature's use of the unmodified term "days" referred to consecutive or calendar days. They discounted the Legislature's use of the terms "calendar days" and "consecutive days" in other sections of chapter 440, characterizing the wording of those statutes as unrelated to one-time changes. As described in our earlier alert on the subject, carriers need to respond to these requests immediately, and be vigilant for Friday afternoon email or fax requests. **Click here to view Order**

**Hillsborough Count Sch. Brd/Broadspire v. Kubik, (Fla.1st DCA 2/20/13)**
**Prevailing Party Costs**

The DCA affirmed the JCC's award of a one-time change doctor without comment. They reversed the JCC's denial of prevailing party costs to the E/C. The JCC awarded claimant TPD, penalties and interest and certain medical benefits, but denied TTD, compensability of neck complaints and other medical benefits. Despite the E/C's request for prevailing party costs in the response to PFB and the Pre-Trial Stipulation, the JCC found the claimant was the prevailing party and awarded his costs, while finding the E/C not to be the prevailing party and denying them such costs. The DCA noted this finding conflicted with the 2011 Aguilar v. Kohl's case, which explained that the JCC is not limited to finding only one party, or neither prevailed. Per Aguilar, the JCC's order cannot inconsistently deny some benefits yet find the E/C did not prevail, or prematurely determine which is the prevailing party without making it clear all claims (including those resolved pre-hearing) have been considered. The dissent disagreed, noting that the request for prevailing party costs was not sufficiently articulated to the court. The dissent felt the E/C should have brought Aguilar to the court's attention, and asserted that the general request for costs is insufficient. **Click here to view Order**

**Cabrera v. Outdoor Empire, FCCI Ins,** **(Fla.1st DCA 2/18/13)**
**Enforceability of Settlements/Unrepresented Claimants**

Claimant, who was unrepresented at all relevant points at issue, had 2007 (denied) and 2010 (benefits provided) dates of accident. Claimant filed a PFB, and at a subsequent mediation, the parties agreed to settle all claims for $100,000. After claimant refused to sign the settlement documents, the E/C filed a Motion to Enforce, which the JCC granted. The DCA examined case law both before and after the 2001 law change regarding the procedure for approval of settlements for represented and unrepresented claimants. They held that the law requires that a final settlement with an unrepresented claimant occurs only when the JCC signs an order approving the agreement of the parties, and that the JCC could not find the mediation agreement binding given the claimant's refusal to go through with the settlement. The DCA rejected the E/C's argument that the mediation process somehow supplanted this requirement, finding it crafted "from whole cloth". **Click here to view Order**

**Arnau v. Winn Dixie Stores/Sedgwick CMS,** **(Fla. 1st DCA 2/5/13)**
**Evidence required to reject EMA opinion**

The DCA reversed and remanded the JCC's denial of medical and indemnity benefits, finding the JCC lacked the required clear and convincing evidence to reject the EMA's opinion. In the underlying order, the JCC rejected the EMAs testimony regarding the need for a thoracic surgery evaluation and temporary benefits, noting the claimant's unreliable testimony undermined the factual predicate upon which the EMA's opinion relied. The court noted that the parties did not depose the EMA, and therefore no evidence existed to show the extent upon which the EMA could have considered the claimant's testimony. Additionally, the DCA found the EMA's report indicated he reviewed medical reports and the deposition of the doctor upon whose opinion the JCC relied. The DCA noted that the claimant provided the same history to both the EMA and the authorized doctor, whose testimony the JCC accepted. **Click here to view Order**

**Critical Intervention Svcs. V. Florida Reemployment Assistance/Winston Edwards**
**(Fla. 1st DCA 2/5/13)**
**Elements of Misconduct**

The claimant was denied Reemployment Assistance. The DCA found that although the Employer initially proved misconduct, the hearing officer erred by not considering or discussing the ensuing burden of the employee to show that he either didn't know or couldn't have reasonably known of the rule violated. **Click here to view Order**

**Buttrick v. By the Sea Resorts/Summit Claims Mgmt./Claims Ctr.,**
**(Fla. 1st DCA 2/5/13)**
**PTD/Medical Evidence to Support MMI**

The claimant appealed for the second time the JCC's denial of PTD. In the first appeal, the DCA specifically instructed the JCC to rule as to whether the claimant achieved MMI. In the Order following remand, the JCC found the claimant at "statutory MMI" based upon the stipulation of the parties. The DCA held the JCC erred, as her finding of the date of overall MMI was not based on expert medical testimony. The DCA remanded for the JCC to find based on such testimony the date of MMI and whether the restrictions of that date qualify the claimant for PTD, or, if the claimant is not at overall MMI, what her restrictions are expected to be and whether she will be PTD upon attaining that status. **Click here to view Order**

**Black v. Tomoka State Park/Division of Risk Mgmt/State of Florida,**
**(Fla. 1st DCA 2/5/13)**
**Statute of Limitations/Tolling based on reservation of fees and costs**

The DCA reversed the denial of benefits based upon the Statute of Limitations. The DCA noted that the case was almost completely identical to Longley, which holds that dismissal of a PFB that reserves on the claims for attendant attorney fees and costs operates to toll the Statute until such time as those claims are resolved, dismissed voluntarily or dismissed for lack of prosecution. In any case where such claims remain open, the employer/carrier should immediately inquire as to whether counsel has a good faith basis that fees and costs are due, and if not to withdraw those as well. If no response is forthcoming, the E/C should inform counsel that a motion will be filed under the Q Rules asking the JCC to require the claimant to file a Verified Petition to obtain a ruling on the issue. **Click here to view Order**