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Case Law Update

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This Update contains summaries of all relevant Appellate decisions for the preceding week, with comments on how a particular decision affects you. In addition, we review daily the Merit Orders posted on the DOAH website. This Update contains summaries and links to relevant JCC decisions for the past week.

Please feel free to contact Rogers Turner (rturner@hrmcw.com) or Matthew Troy (mtroy@hrmcw.com) with questions or comments on any of the listed cases.

*First District Court of Appeal Cases***

McIntosh v. CVS Pharmacy/GAB Robbins Gallagher Bassett
Compensability/Psychiatric Conditions

(Fla.1st DCA 4/22/2014)

The DCA reversed and remanded the JCC's denial of compensability of the claimant's Post Traumatic Stress Disorder (PTSD), finding the Order on appeal confused the standard for determining whether a mental or nervous injury arose out of an employment-related accident with whether a mental or nervous injury occurred as a manifestation of a compensable physical injury.

The original 10/16/2010 accident occurred when a robber entered the pharmacy where the then six months pregnant claimant worked. The robber ordered the claimant to the floor, but she ran, falling and landing on her stomach in the process. The Order found the claimant received initial treatment for a minor knee injury, and a year and nine months later received a diagnosis and authorized treatment for PTSD from two psychiatrists, both of whom related the PTSD to the incident, but not the physical injury. The DCA noted the 2003 changes to psychiatric compensability in F.S.440.093 were discussed at length in McKenzie v. Mental Health Concepts, and found the facts here analogous to the language contemplating a psychiatric injury arising at the same time as a compensable physical injury requiring medical treatment. The DCA stated that McKenzie characterizes the statute as allowing for compensability of separate physical and psychiatric injuries, both arising out of the initial accident. The

DCA ruled the JCC erred in denying the PTSD on the basis it was not “the natural or unavoidable result [of Claimant’s] minor physical injuries treated at the emergency room...”

The DCA also reversed the JCC’s determination that the E/C was not estopped from denying the compensability of the PTSD under the 120 day rule. The claimant first sought treatment for PTSD in the summer of 2012 and the first authorized psychiatric visit took place on July 11th. The DCA noted that Bynum Transport required the carrier to deny the compensability of the PTSD within 120 days of providing the authorized treatment beginning on July 11th, 2012. The Order was unclear as to why the JCC rejected claimant’s estoppel argument. [Click here to view Opinion](#)

Energy Air/Amerisure v. LaLonde
Exposure/Medical Benefits

(Fla. 1st DCA 4/24/2014)

The E/C appealed the JCC’s finding of compensability of heat exhaustion, where the Order did not find that the claimant “was exposed to dangers materially in excess to which the community is exposed.” The DCA affirmed, noting that that the 1994 Amendments to F.S. §§440.09(2) (MCC) and 440.02(36)(occupational causation) supersede any prior “court created causation standards”. The court also affirmed payment of bills for diagnostic services reasonably necessary to determine the cause of claimant’s injuries. [Click here to view Opinion](#)

Lord v. Santa Rosa Correctional Inst./Div. of Risk Mgmt.
Attorney Fees/time spent securing benefit

(Fla. 1st DCA 4/24/2014)

In 2012, claimant sought a new PCP related to his 1999 accident. The E/C agreed at mediation to provide a new doctor, and stipulated to the claimant attorney’s entitlement to a fee. The E/C had difficulty locating a doctor, and the claimant attorney filed a motion to compel the mediation agreement resulting in “several orders”. The E/C ultimately selected a doctor on 12/7/12. In ruling on the claimant’s fee petition, the JCC found that fees were due from the PFB through mediation, but denied fees thereafter (except for minimal items) as the E/C did not act in bad faith or unreasonably delay locating a new doctor. The DCA however, seized on the JCC’s language characterizing the claimant attorney’s “entitlement” to a fee up to the mediation, but no “entitlement” for fees thereafter. The court ruled this was error, as entitlement had already been established. The court disapproved of the JCC’s reliance on Jennings v. National Linen, a case where an E/C continued to provide medical treatment during a doctor’s anticipated retirement, and thus no entitlement existed. The held that especially where the JCC noted the benefit was obtained in part due to the post mediation orders, on remand the JCC shall determine what time was necessary to secure the benefit post mediation. [Click here to view Opinion](#)

Sarasota County School Board/OptaComp v. Roberson
PTD/Consideration of Psychiatric Restrictions

(Fla.1st DCA 4/16/2014)

The DCA affirmed the JCC's award of permanent total disability. The DCA wrote specifically to reject the E/C's contention that the plain language of F.S.§440.15(1)(b)(2009) requires the claimant to prove entitlement to PTD based solely on physical limitations from the workplace injury. The claimant sustained a wrist injury after an altercation with a student. Thereafter her orthopedist recommended a psychiatric evaluation which the E/C authorized. After obtaining an IME, the E/C asserted the industrial accident was not the MCC of the psychiatric condition. The JCC's order rejected that position. The DCA affirmed the JCC's analysis that cases interpreting the pre-1994 PTD standard allowed consideration of psychiatric limitations. Additionally they noted that the legislature's six month limitation on temporary benefits based on psychiatric restrictions in F.S.§440.093(3)(2003) does not extend to PTD benefits. Finally, the court noted that Ferrell Gas v. Childers approves of an analysis of both physical limitations and "vocational factors" in determining PTD, and certainly contemplates consideration of psychiatric limitations. [Click here to view Opinion](#)

Southeast Milk/Zurich North America v. Fisher
Temporary Partial/Consideration of Misconduct

(Fla. 1st DCA 4/14/2014)

The DCA reversed and remanded an order awarding TPD. The claimant received restrictions from an authorized doctor, and the employer offered work within those restrictions. After coming to work for several days, the claimant stopped coming to work, and the employer fired him for no call/no show. The E/C asserted that they did not owe TPD after termination, based upon claimant's misconduct. The DCA indicated the JCC erred in failing to rule on this defense, and in finding in his order that TPD would be due even if the claimant were terminated for misconduct under F.S.§440.02(18). [Click here to view Opinion](#)

Hamm et al v. PMI/ Comprehensive Ins. Svcs.,
Jurisdiction of JCC

(Fla. 1st DCA 4/7/2014)

The E/C accepted the death claim as compensable and filed an emergency motion to determine beneficiary. The JCC subsequently entered an order finding the minor child appellant was not a beneficiary. The DCA reversed, noting that absent a pending PFB the JCC lacked jurisdiction to consider the E/C's motion.

Alachua County School Board v. FL. Dept. of Financial Svcs./
Div. of Workers' Compensation
Administrative Penalties/Jurisdiction of DOAH vs. JCC

(Fla. 1st DCA 3/27/14)

Following a multi-year audit, DFS assessed an overall penalty against the School Board of \$15,300 for 177 late payments. The School Board paid the penalty, but reserved the right to contest two \$100 dollar payments for late TTD. The legal question was whether or not the statute allows DFS to impose penalties without a referral to the JCC. The court concluded that the two applicable statutes can be read together to make available both a DFS audit report-focused review process as contemplated in §440.525 (3) (under the APA) and a §440.021 review process before the JCC. The JCC review contemplates resolving narrower disputes involving only the amount of the penalty or interest assessment, given the ultimate results of the audit report or the APA-based review of same. In this case, because the matter did not involve an objection to the means by which the penalty amount was calculated or the appropriateness of the penalty based upon violations found in the APA-based review, referral to the JCC was not required. If the \$200 penalty assessment would have been disputed, arguably miscalculated, etc., then referral to the JCC would have been called for pursuant to §440.021.

[Click here to view Opinion](#)

Cabrera v. Outdoor Empire Inc./FFCI Insurance Co.
Enforceability of Settlements

(Fla.1st DCA 3/27/14)

The DCA affirmed three separate orders finding the claimant had settled his two WC cases. A prior appeal found the then unrepresented claimant had not settled his case. Thereafter, with representation of counsel, the claimant attended a six hour mediation with an interpreter. Claimant signed agreements for both dates of accident, as well as “any and all” accidents, agreeing to receive a total of \$165,000, from which his attorney would receive \$10,000. Shortly thereafter, he claimed he was tricked into the settlement, alleging he did not agree to settle both dates of accident. The JCC held evidentiary hearings, taking testimony from all present. Before the JCC, the claimant affirmed under oath that his signature appeared on the documents. On appeal, the claimant alleged the signatures were not his. The DCA dispensed with that argument, as well as the claimant’s alleged violations of his constitutional rights. The court noted the claimant has already received the settlement proceeds, and denied his requested relief to set aside the agreements. [Click here to view Opinion](#)

Attorney Fees/Required Findings of Fact by JCC

This was the second time the DCA considered attorney fee issues in this case (Dates of Accidents May 7, 2008 and May 20, 2009). The First DCA previously found the claimant entitled to fees for one of two PFBs. On remand, claimant sought fees based upon 50.8 hours for securing a dental benefit, and 66.3 hours proving entitlement to that fee, for a total of 116 hours. The E/C asserted the amount of time spent on both issues was 31.4 and ten hours respectively. The JCC determined that 37.55 hours were reasonably spent on the dental issue, and 22.6 hours on the entitlement issue, but provided no basis for accepting or rejecting the total claimed hours. The JCC denied claimant's motion for rehearing. The DCA reviewed multiple cases outlining the JCC's responsibility to make specific findings as to what evidence is accepted and rejected in relation to claims for attorney fees. Although the JCC made general findings and reviewed various factors, the DCA determined the JCC's order was not sufficiently specific to allow meaningful appellate review and remanded the case for additional findings. [Click here to view Opinion](#)

Please note that the DCA Opinions and Merit Orders contained in this newsletter are non-final until 30 days after their rendition. Until that time, they are subject to amendment, vacation, or other action which may remove or alter some or all of the decision. Please contact any HRMCWW attorney if you have a question as to the finality and applicability of an Opinion or Order. We endeavor to include any amendments or alterations to Opinions or Orders that may occur at a later date.

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