HURLEY ROGNER
MILLER, COX, WARANCH & WESTCOTT, P.A.

Case Law Update

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WINTER PARK
1560 ORANGE AVENUE, SUITE 500
WINTER PARK, FL 32789
TEL: (407) 571-7400
FAX: (407) 571-7401
www.hrmcw.com

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.

District Court of Appeal Cases

Sears Outlet/Sedgwick v. Brown, **(Fla. 1st DCA 12/9/2014)**
Hindrance Theory/Wrongful Denial Self Help Provision

The DCA reversed the JCC's Order that the E/C provide treatment (diagnostics and ultimately surgery) related to a renal mass/cancer as a hindrance to treatment of a compensable lumbar spine condition. After the carrier provided lumbar surgery, the claimant had a recurrence. The E/C authorized a surgeon for further workup, who noticed a possibly cancerous renal mass on an MRI. The E/C authorized an urologist to clear claimant for back surgery. The urologist referred the claimant to a hospital for further testing and partial or complete removal of the kidney. It was undisputed the claimant did not request authorization from the carrier for the kidney procedures, but instead had the procedures done on an unauthorized, non emergency basis. Only after the kidney was removed did the claimant request that the E/C pay for the treatment. The JCC found that the claimant's failure to request authorization under the self help provision of F.S. s 440.13(2)(c) was excused, and found the medical testimony showed the kidney mass needed to be removed before the claimant could have back surgery or take anti-inflammatories, and thus was a hindrance to recovery and compensable. The DCA noted the JCC applied (2)(c) based only on his finding that the E/C wrongly denied care. That subsection provides that there "must be a specific request for the initial treatment or care, and the E/C must be given a reasonable time in which to provide the treatment or care". The authorized urologist recommended follow up for the kidney mass in his report, but indicated it was unlikely the condition was related to WC. The court found this could not reasonably be construed as a specific request for treatment from the E/C. **Click here to view Opinion**

O'Connor v. N. Okaloosa Medical Center/Gallagher Bassett, (Fla. 1st DCA 12/12/14)
Indemnity Benefits/Res Judicata

The DCA reversed the JCC's denial of TTD benefits, finding he improperly applied the doctrine of *res judicata*. The claimant injured her hand in 2004, ultimately resulting in a diagnosis of RSD. The carrier accepted the injury and provided authorized medical care. In January of 2011, the claimant was placed at MMI, and the carrier suspended TTD benefits. The claimant filed a petition for PTD in September of 2011. The E/C contested PTD but agreed the claimant was at overall MMI. The JCC entered an order in March of 2012 denying the PTD claim without prejudice, finding the claim was not ripe as the claimant was not at overall MMI, based on his interpretation of medical testimony regarding possible future improvement in the claimant's condition, and the potential impact of another neck injury with a second carrier. Neither party appealed that ruling. The claimant then filed a subsequent PFB seeking TTD benefits from January 14th of 2011 through February 14th of 2012, the date of the above Merit hearing. The JCC denied that claim, finding the claimant could have sought TTD alternatively but chose not to. The DCA analyzed the concept of res judicata, which requires a final order on the merits of a prior action. Finding that the JCC's prior order expressly denied the PTD without prejudice, the DCA held that ruling could not act to bar the subsequently filed claim for TTD benefits. **Click here to view Opinion**

Osceola County School Board/FL School Board Insurance Claims Trust v. Pabellon-Nieves, (Fla. 1st DCA 12/3/14)
Major Contributing Cause/Preexisting Conditions

The DCA affirmed the JCC's award of continuing medical treatment for the claimant's work related neck injury, but wrote to clarify the bench and bar's apparent "misunderstanding" of Bysczynksi and the application of F.S. s. 440.09(1)(b)(2009). That section states in pertinent part *that if a work injury combines with a preexisting disease or condition to cause or prolong disability or need for treatment, the employer must provide benefits only to the extent that the work injury is and remains more than 50 percent responsible for the injury as compared to all other causes combined and thereafter remains the MCC.* The opinion notes Bysczynski turned on whether competent substantial evidence, rather than a correct application of the law existed to support the JCC's decision in that case. That decision was reversed as the evidence did not show the prior condition was the MCC of the need for treatment (and the EMA expressly said it was not). This opinion notes the language in Bysczynksi that the degenerative condition "bespeaks the claimant's age" has never meant that age related illness or conditions can never be the MCC for disability or need for treatment. Rather, the analysis should properly be whether the preexisting condition or disease is the MCC of the disability or need for treatment. The opinion notes the JCC here properly distinguished the facts of Bysczynski (the prior condition did not independently require treatment either before or after the two WC accidents), and then analyzed whether Nieves' prior neck condition was merely age appropriate, or it was a prior condition requiring treatment that could be considered a legal cause of her injury and need for treatment. The JCC then conducted an MCC analysis and ruled that the IA was the MCC of the need for treatment. **Click here to view Opinion**

Giaimo v. Florida Autosport/Summit Claims/Fla Retail Federation (Fla. 1st DCA 11/26/14)
Opinion Testimony/Daubert/Apportionment

The DCA affirmed the JCC's finding that the claimant's pre-existing injuries were aggravated by the work place accident, but reversed the portion of the Order awarding apportionment. Claimant sustained neck and back injuries in a compensable 2010 accident, resulting in a fusion surgery at C5-6. A "few months" before that accident, the claimant received an 8% PIR from a non-work MVA which resulted in low back and neck injuries. At trial the E/C conceded the claimant was PTD, but asserted apportionment based upon the testimony of Dr. Wingo that the 2010 accident was 51% responsible. The Order noted the E/C "judiciously elected" to argue for that %, versus the 85/15% asserted by Dr. Lee (the authorized treating neurosurgeon). The Order ultimately accepted Dr. Lee's opinion based upon the doctor's experience, treatment of the claimant and review of the claimant's past medical records. When asked in deposition how he arrived at the percentages, Dr. Lee testified "when I was asked and thought about it that is the answer I came up with". The DCA ruled Lee's opinion inadmissible under F.S. 90.702, which was amended in 2013 to conform to Daubert. The amendment sought to prohibit "pure opinion testimony" and require that admissible opinions be (1) based on sufficient facts or data; (2) be the product of reliable principles and methods; and (3) be the product of the witness applying the principles and methods reliably to the facts of the case. Although the DCA agreed Dr. Lee's opinions were sufficient for the first element, they found they were insufficient under the second and third, as they lacked any evidence of reliable principles and methods or their application. They noted the JCC's justification for admissibility of his opinions was precisely the "pure opinion" testimony the amendment seeks to prohibit. **Click here to view Opinion**

Coincidentally, the same week, JCC Hill issued a very well researched Order denying a claimant's Motion to exclude medical testimony under Daubert:

JCC Hill (Gainesville) – Denied claimant's Daubert motion to exclude E/C IME in a presumption claim. In contrast with the First DCA's 11/26/14 Giaimo opinion, Judge Hill's Order provides a very detailed analysis of the purpose of Daubert, as well as the distinction between expert medical evidence and other types of evidence. Additionally, the Order notes that the principles and methodologies assailed by the claimant were the same ones used by Dr. Mathias in support of his opinions. **Click here to view Order**

Marvin v. University Hospital/Broadspire (Fla. 1st DCA 12/3/2014)
Summary Final Order/Two Dismissal Rule

The JCC granted the E/C's Summary Final Order seeking to bar PTD claims under the two dismissal rule. The DCA reversed, stating they found no record evidence of voluntary dismissals. **Click here to view Opinion**

Judge Lazarra's Order reveals the claimant had two dates of accident that were consolidated. Although consolidated, claimant filed PFBs for PTD benefits for both dates of accident. When the E/C moved to dismiss for failure to include the good faith notice provision, the E/C allowed the claimant to amend the PFBs. The claimant did not, but rather filed identical PFBs several months later. The JCC then held a status conference on the earlier PFBs and the claimant attorney indicated it was his intent to dismiss them. The JCC entered on order indicating that based on claimant's representations on the record, the Final Hearing generated from the earlier PFBs would be cancelled. The JCC considered the "dismissal" of those two PFBs as a denial on the merits to any PTD claims.

Supreme Court of Florida

Morales v. Zenith Insurance Company **(Fla. 12/4/14)**

WC Exclusive Remedy/Binding Nature of Workers' Compensation Releases

Bill Rogner – on behalf of Amicus Curiae Florida Association of Insurance Agents

This opinion eliminates a $9.525 million dollar default judgment against firm client Zenith Insurance, and is an important ruling for insurers and employers regarding the exclusive remedy provision of Chapter 440 and the binding nature of WC settlement agreements. After the employee was killed by a falling palm tree, his widow entered into a settlement of the WC benefits, which contained a release as to any liability on the part of Zenith. This release was signed by the widow at the same time she pursued an ongoing negligence claim against the employer, Lawns. After obtaining a default judgment of $9.525 million against the defunct employer, the Estate sought payment from Zenith. When they refused to pay, the estate sued Zenith in state court alleging they had breached the terms of the employer liability policy. Zenith removed the case to Federal Court, and the District Judge granted summary judgment in favor of Zenith. The Estate appealed the case to the U.S. Court of Appeals for the 11th Circuit, who sent the case back to the Florida Supreme Court to clarify three questions of Florida law:

1. *Does the Estate have standing to bring a breach of contract action against Zenith under the Employer Liability Policy?*
2. *Does the insurance policy language excluding coverage for "any obligation imposed by WC law" exclude coverage for the Estate's claim against Zenith for the tort judgment?*
3. *If the claim is not barred by the WC exclusion, does the WC release prohibit the Estate's collection of the Tort judgment?*

The Supreme Court held that the Estate had legal standing to bring suit against the Employer Liability policy, by virtue of having obtained the default judgment. However, the opinion notes that mere standing does not mean a party may ultimately prevail in their claim. The Court then ruled that the Estate was barred by the exclusion language of the policy. Zenith's policy covered WC obligations of the employer under Part 1, and Employer Liability under part 2. Employer Liability coverage contemplates covering injuries of employees, but excludes coverage for "any obligation imposed by the WC law". The court characterized part 2 coverage as a "gap filler", and found the Estate had no right to sue Lawns in tort, where there was no allegation of an intentional act which was substantially certain to result in injury or death. They rejected the Estate's argument that the exclusion did not apply because the judgment arose in tort rather than comp. They distinguished cases relied upon by the Estate, in that those cases invoked employer liability coverage via alleged negligence of co-employees, rather the negligence of the employer directly. Finally, the court found the Release executed by the widow further barred recovery. The language of the release waived any further benefits under the WC law, and constituted an election of remedies against the employer and carrier. The Court rejected the Estate's argument that the widow had signed the release only in the capacity of a parent or guardian of the four minor children, and not as an individual or personal representative of the Estate. They further rejected the argument that the release should not apply to the Estate because the probate court did not approve the release and the children weren't represented by a guardian. These arguments are addressed by F.S. 440.11(1) which covers anyone potentially entitled to benefits, and includes wives, parents and children. As the release met all the requirements of Chapter 440 and the widow was represented by counsel, the release barred further liability on the part of the employer or Zenith. There were no dissenting opinions. **Click here to view Decision**

*P**lease 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.***

Treasure Coast	North Florida	Miami-Dade	Broward	Southwest Florida	Georgia
772-489-2400	850-222-1200	305-423-7182	954-580-1500	239-939-2002	404-214-4565