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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.

District Court of Appeal Cases

Shannon v. Cheney Bros. Inc./Travelers **(Fla. 1st DCA 1/30/2015)**
Appellate Review/Orders Denying Advances

Claimant sustained workplace injuries in 2010. Thereafter, claimant sustained injuries in a non work related car accident, and the authorized doctor eventually indicated the workplace injury was no longer the MCC of any further disability or need for treatment. Claimant filed two PFBs, and also sought a $2,000 advance. The JCC denied the motion for advance in a "Final Evidentiary Order" on 12/18/13. The claimant did not appeal this decision within 30 days. The JCC then subsequently denied the two PFBs in a Final Evidentiary Order dated 4/30/14. Within 30 days of that Order, claimant filed a Notice of Appeal as to both Orders. The DCA affirmed the JCC's denial of the PFBs without comment. They wrote fairly extensively though, on the issue of whether the Order denying the advance was a final order (requiring a notice of appeal within 30 days) or a non-final order, which could be appealed following "the end of judicial labor". Interestingly, the E/C agreed with the claimant's position, but the DCA rejected this stipulation regarding their jurisdiction to consider the denial of the advance. The opinion notes that workers' compensation litigation is by nature piecemeal, that they routinely have considered orders dealing with advances as Final Orders and that orders *awarding* advances have previously been considered as Final Orders. The DCA rejected the claimant's supporting case law, noting it did not deal with workers' compensation litigation. The opinion notes with approval that advances are a *"stopgap, which can be (and, by its nature, should be) made before entitlement to other benefits (or even compensability) is determined".* **Click here to view Opinion**

Jacobs v. Clarkwestern Bldg. Systems/Travelers **(Fla. 1st DCA 1/30/2015)**
MCC/Opinion of EMA

Claimant sustained a low back injury, and thereafter the claimant underwent several MRIs showing findings at L4-5. Eventually, the authorized doctor ceased treating the claimant and the E/C denied ongoing care, asserting the work accident was no longer the MCC. That issue proceeded to an EMA, who noted that the updated MRI now showed findings at L5-S1, and not L4-5. However, the EMA nevertheless stated the work accident remained the MCC, assigned a 6% rating (even though the bulge was now at a different level) and deferred to pain management doctors about the need for pain management. The pain management doctors opined she did need the treatment. The DCA found the JCC applied the correct law, but incorrectly interpreted the EMA's testimony. They noted the EMA expressly stated the injury (upon which they found the rating was based, regardless of the apparent discrepancy in levels of the spine) was the MCC. The DCA reversed and remanded the case for the JCC to review whether clear and convincing evidence exists to reject the EMA's opinion. **Click here to view Opinion**

Appel v. Bard **(Fla. 4th DCA 1/21/15)**
5th Amendment Privilege/Discovery

Plaintiffs obtained an order requiring Defendant to answer deposition questions and interrogatories asking whether he had filed federal income tax returns 2005-2010. Defendant filed a Petition for Certiorari, seeking to quash the order compelling him to answer. The DCA granted Defendant/Petitioner's Petition. Where a party requests information and the opposing party asserts a 5th Amendment Privilege, the court "must exercise its discretion and determine whether it is reasonably possible that answers to either interrogatories or deposition questions could evoke a response "*forming a link in the chain of evidence which might lead to criminal prosecution*." The privilege is inapplicable only "if the testimony sought cannot possibly be used as a basis for, or in aid of, a criminal prosecution against the witness." The DCA found that compelling Appel to answer yes-or-no in response to whether he filed tax returns would force him to admit or deny the very thing the government would be trying to prove in a federal tax prosecution—an essential element of the crime, presumably "aiding" the prosecution by lowering the government's burden. The DCA disagreed with the plaintiff/respondent's argument that because the IRS is already aware of his filing status he should be compelled to answer. **Click here to view Opinion**

Facebook Photos Not Private/Are Discoverable

Nucci/Leon v. Target Stores, et al **(Fla. 4th DCA 1/7/15)**
Discovery of Electronic Data/Privacy Considerations

The Fourth DCA denied the Plaintiff's Petition for Certiorari, which argued the circuit court abused its discretion in ordering her to provide photographs primarily stored on her Facebook account. Plaintiff alleged she sustained injuries in a 2010 slip and fall at Target. Prior to her 9/4/13 deposition, Target's lawyer viewed her Facebook account, which contained 1,284 photographs. Two days later, the account had only 1,249 photos. Thereafter, Target moved to compel inspection of her FB profile, and that she not delete further items. At an initial hearing on the motion, the court denied Target's motion as vague, overly broad and unduly burdensome. However, Target subsequently sent more specific

discovery requests, to which the Plaintiff also objected. The Order on appeal compelled production of (1) screenshots from FB and any other social media site and (2) cell phone photos and call logs relating only to the Plaintiff.

Plaintiff argued that the Order (as to the social network sites only) constituted an invasion of privacy, that the requests were a fishing expedition and that her activation of privacy settings amounted to an invocation of federal law. Target argued that the photos would be relevant to compare her condition pre and post accident, the photos were not private or privileged and that the order was sufficiently narrow and specific to the instant lawsuit.

The DCA denied Plaintiff's Petition, finding that the photos sought were potentially "powerfully relevant" to the issue of damages in a personal injury suit. They held that this relevancy trumps any privacy right, especially as the court concurred with case law holding that photos posted on social networking sites are neither privileged nor protected, regardless of privacy settings. They distinguished photos on such sites from medical records or attorney/client communications which can be privileged, especially where any "friend" on the site may copy or disseminate the photos. Additionally, they noted that FB users acknowledge that their personal information will be shared with others. Finally, they rejected Plaintiff's claim that the Federal "Stored Communications Act" has any application, as it applies only to providers of communications services, and not individual users. **Click here to view Opinion**

City of Miami Beach/Johns Eastern v. Marten **(Fla. 1st DCA 12/30/14)**
Payment of IBs/Knowledge of MMI by Carrier

In a short opinion, The DCA reversed the JCC's award of penalties and interest (DOA '97). Under F.S. 440.15(1)(3)1 (1996), IBs are payable within 20 days of the carrier having knowledge of the claimant's permanent impairment rating. The DCA found the evidence was undisputed that the E/C paid within that period of learning of the PIRs assigned by the claimant's IME doctor. Previous authorized doctors had determined the claimant had no permanent impairment rating. **Click here to view Opinion**

The DCA opinion provides almost no facts of the underlying case, but the Order indicates that in this presumption claim, doctors placed the claimant at MMI in 1997, but provided no condition or rating. The evidence also showed the carrier sent DWC-25s and DWC-9s to the doctors on a regular basis, but did not receive responses. Once the claimant's IME assigned a rating for hypertension and another for palpitations/arrhythmias in 2013, the carrier paid IBs within 20 days of learning of the IME's opinion. The JCC cited to the 2010 Gauthier case, which holds the carrier has an obligation to investigate such issues. The DCA case does not cite to Gauthier, seemingly finding the carrier's attempts to obtain a rating to be sufficient.

City of Ft. Pierce/Fla. Mut. Ins. Trust v. Spence, **(Fla. 1st DCA 12/30/14)**
MCC/Pre-Existing Conditions

The E/C appealed and the claimant cross- appealed the JCC's decision ordering (1) the E/C to provide facet injections, but (2) denying an ortho and C5-6 discectomy and fusion. Following a compensable car accident, the claimant's pain management doctor recommended cervical branch blocks, although he opined 70% of the cause was due to degenerative disc disease. This opinion was based in part on a family doctor's finding that those were usual findings for a 44 year old patient. Relying on Bysczzynski, the JCC awarded the injections. The DCA reversed, noting the JCC did not have the benefit of their recent (12/3/14) Pabellon-Nieves decision, which holds that it does not matter if a claimant has pre-existing age appropriate findings, but rather whether those findings are the MCC for the recommended treatment. Although the DCA found the JCC erred in excluding the testimony of an authorized doctor whose (unrefuted) opinion recommended the surgery, they found this to be harmless error given that his reliance upon the pain management's doctor's testimony that the main pain generator was facet joints and not the disks provided the "reasonable evidentiary basis to do so". **Click here to view Opinion**

Jackson v. Columbia Pictures/Fireman's Fund, **(Fla. 1st DCA 12/16/14)**
Certiorari/Compelling Claimant to attend IME/Compelling Medical Care

Claimant filed two separate Petitions for Writ of Certiorari, challenging the JCC's order compelling him to attend an authorized doctor appointment and compelling him to attend the E/C IME. Claimant was injured in a 20 foot fall in 1986, and a 1992 DCA opinion approved an award of attendant care for the claimant in the nature of "remote surveillance" or "oversight". Thereafter, the claimant was incarcerated from 4/93-9/05 and 5/08 – 7/12. An Order in July of 2008 awarded attendant care benefits "actually rendered". In 2010, claimant filed a PFB seeking payment of attendant care provided by the State of Florida for all periods claimant was in prison at $20/hr. In 2014, upon the E/C's motion, the JCC ordered the claimant to attend an authorized medical appointment, and ordered his attendance at an IME. With regard to the order compelling attendance at an authorized medical appointment, the DCA found the claimant satisfied the requirements for certiorari of irreparable harm, which are "(1) a departure from the essential requirements of the law, (2) resulting in material injury for the remainder of the case (3) that cannot be corrected on post judgment appeal"). They found the "invasive nature" of the examination could not be undone on appeal, that no portion of the statute authorizes a carrier to compel attendance, and that an updated authorized eval would not impact the claimant's claim for past attendant care. With regard to the order compelling the IME, the DCA limited this IME to the extent will deal solely with the specific issue before the JCC and no other issues. **Click here to view Opinion** **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.