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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

Hancock v. Suwannee County School Board/Fla. Sch. Brd. Ins., (Fla. 1st DCA 10/31/2014)
JCC Jurisdiction/IME no shows/Reasonableness of IME charges

The DCA reversed and remanded the JCC's decision that he did not have jurisdiction to determine the reasonableness of the E/C IME's $1500 charge for a videographer's presence at the IME appointment. The basic facts were not disputed. The E/C properly noticed their IME. The morning of the examination, the claimant attorney told the doctor that a videographer would be present. The doctor indicated the IME would not go forward without an additional $1500 fee. That issue remained unresolved on the morning of the IME, and when the claimant appeared with a videographer she was turned away. The E/C sought ½ of the $600 "no show" fee from the claimant, which the JCC ultimately ordered per F.S. s 440.13(5)(d). However, the JCC stated he had no jurisdiction to determine the reasonableness of the $1500 fee. The DCA noted that issue was intertwined with the reason for the no show, and the JCC does have jurisdiction on that issue as it directly affects whether claimant's failure to appear was with good cause and whether the claimant might be responsible for doctor charges for a videographer in the future. The DCA had insufficient record evidence to determine whether or not the charge was reasonable, and remanded for additional findings to determine the reasonableness and propriety of the videographer fee. Thereafter, the JCC is to determine whether to assess ½ the no show fee and which party should pay any future videographer fee. **Click here to view Opinion**

Baker v. Airguide LLC., (Fla. 3d DCA 10/29/14)
Workers' Compensation Immunity/Borrowed Servants/Help Supply Services Companies

The DCA affirmed the trial court's finding that workers' compensation immunity barred the plaintiff's negligence claim. The plaintiff was an employee of Pacesetter, a PEO(*although referred to by the DCA as an "employment agency*") and injured her finger while on assignment with Airguide, a manufacturer of air conditioning ducts. She notified Pacesetter, who provided WC benefits. (*Although not noted in the opinion, the DOAH docket reflects she settled that case for $5500*.) Not satisfied with that recovery, she then sued Airguide, who asserted workers' compensation immunity. Four months after her deposition, and two days before the summary judgment hearing, she filed an affidavit and errata sheet significantly altering her prior description of Airguide and Pacesetter's respective levels of control exerted over her work, a key issue under the borrowed servant analysis. The DCA affirmed the judge's refusal to admit the affidavit and errata sheet, disapproving of her blatant attempt to change testimony to try and create genuine issues of material fact. The decision discusses the analysis under the borrowed servant doctrine (the existence of an express or implied contract between the special employer and the claimant which details the relative control over the employee by the general and specific employers), but then notes no need to discuss that, as immunity existed by virtue of Pacesetter's clear status as a help services supply company under F.S. s. 440.11(2)(2011). **Click here to view Opinion**

Silvernail v. City of Tampa/Commercial Risk (Fla. 1st DCA 10/27/14)
Appellate Procedure/Sufficiency/Timeliness of Motion for Rehearing

The DCA affirmed the JCC's denial of compensability for the claimant's bradycardia condition and payment of bills related to that condition. They noted that the issue of estoppel was not presented in any meaningful way in the proceedings before the JCC. Additionally, the claimant's Motion for "Reconsideration" (properly treated as a motion for rehearing by the JCC) was filed 11 days late (such motions must be filed within 10 days of the rendering of the JCC's order), and failed to meaningfully address the issue on appeal. The Motion argued the E/C should be estopped from paying certain allegedly related bills by virtue of their payment of past bills, but the Appeal argued the E/C should be estopped from denying compensability based upon the 120 day rule. **Click here to view Opinion**

Taylor v. CVS/Gallagher Bassett, (Fla. 1st DCA 10/27/2014)
Preservation/Powers of JCC/Settlements

The DCA affirmed the JCC's Order finding the parties entered into a valid settlement agreement, finding that a resignation/release was a condition of the settlement. The opinion notes the claimant did not preserve the issue of competency of the underlying evidence for appellate review. The DCA struck the portion of the Order, however, compelling the claimant to sign additional documents, and conditioning the E/C's receipt of these additional documents as a condition precedent to the claimant's ability to access the settlement funds. This portion of the Order exceeds the enumerated powers granted to the JCC. **Click here to view Opinion**

Panzer, P.A. v. Palm Beach County School District/FARA **(Fla. 1st DCA 10/13/2014)**
Attorney Fees/Effect of Failure to File Motion to Dismiss

In this pre 7/1/09 hourly fee case, the claimant's prior attorney sought entitlement to a fee for obtaining a second opinion with a shoulder surgeon. The DCA reversed the JCC's denial of that request, which was based upon a finding that the subject PFB failed to meet the specificity requirements of F.S.s 440.192(2). The claimant's prior attorney filed a PFB seeking authorization for an evaluation with a second opinion shoulder specialist. It was undisputed that at the time the request was made in a PFB, the claimant had an authorized shoulder specialist who had not made such a request, nor had any other physician. The E/C did not, within the requisite 30 days, seek to dismiss the PFB for lack of specificity as it failed to attach a medical report recommending the evaluation, nor did they respond to the PFB. A year and half later, they authorized the second opinion. The DCA ruled the JCC did not adequately consider that the E/C's failure to either move to dismiss the PFB or respond acted as a waiver under F.S. s. 440.192(5) that the requested benefit was neither sufficiently specifically pled or "ripe, due and owing". As such waiver applied, the JCC erred in denying the attorney fee. **Click here to view Opinion**

Bonner v. Miami/Dade Public Schools/Gallagher Bassett **(Fla. 1st DCA 10/7/2014)**
Advances/Evidentiary Requirements

The DCA reversed the JCC's denial of a $2,000 advance, finding his ruling exceeded the claimant's burden to show entitlement to an advance. At the hearing on the $2,000 advance, the claimant testified without contradiction that she had been out of work for 18 months on sick leave, and returned with a reduction in wages. She further testified that an advance would "get her up to date" as well as put food in her refrigerator, gas in her car and help her pay bills. The JCC found that her bills appeared to be for luxury expenses and that there was an insufficient nexus (per ESIS v. Kuhn) to the accident to award the advance. The JCC noted the main reason the claimant needed an advance appeared to be her inability to manage her finances. The DCA noted that although an advance does require a nexus to the accident, whether the claimant was spending money on luxury items is not a consideration of F.S.§ 440.20(12). They further found that the uncontroverted evidence showed that the financial difficulties requiring the advance were due to the reduction in wages following the industrial accident. Noting that claimants are not required to achieve "pauper status" to qualify for an advance, they reversed and remanded for an award of the requested advance. The dissent would have affirmed the JCC's decision based upon a simple failure of proof on the part of the claimant, noting that the JCC found the claimant's income and expenses roughly equated, and in the absence of indebtedness, an advance should be denied. **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.