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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

VMS, Inc. v. Alfonso, **(Fla 3d DCA 9/24/2014)**
Workers' Compensation Immunity/Securing Coverage

The 3d DCA reversed the trial court's partial denial of summary judgment which denied subcontractor VMS WC immunity. The case arose out of a contract VMS had with the State DOT to maintain highways. VMS obtained required WC coverage and subcontracted with ABC, who also had coverage. ABC in turn sub contracted with an individual named Contreras, who provided labor, but did not have WC coverage. Alfonso was burned while working for Contreras. It was disputed that VMS knew of the accident, but neither VMS nor ABC notified their WC carriers. Alfonso sued both in tort, with ABC subsequently settling. The circuit judge found that VMS was estopped from asserting WC immunity, as they never notified their carrier. The DCA reversed, holding that a sub contractor is only required to secure coverage for its employees and any statutory employees, and is not required to actually agree to provide benefits or notify their insurer. The court distinguished their prior holding in Ocean Reef Club, which concerned only direct employees. They also receded from prior dicta in the 2010 Catafolmos case suggesting that a contractor was required to ensure provision of insurance benefits to enjoy immunity. **Click here to view Opinion**

Rivas v. Oasis Outsourcing/Sedgwick, **(Fla. 1st DCA 9/23/2014)**
Attorney Fees/ Medical Only Claims

The parties ultimately settled a WC case for $10,000 plus a $1500 medical only attorney fee. The JCC approved the $1750 statutory guideline fee on the washout, but rejected the side fee, noting that medical benefits sought in a December PFB were resolved at a December mediation, and thus no side fee was earned. The JCC indicated the parties were free to seek modification of the order per the Q rules. The parties re-submitted the motion for side fees, alleging the side fee was the result of benefits that were the subject of September and November PFBs. The JCC denied this motion, noting that no good cause or exceptional circumstances existed to vacate his prior order. As the Order in question made no mention of the earlier PFBs or the basis asserted by the parties, the DCA reversed the JCC order and remanded for consideration of the earlier PFBs. **Click here to view Opinion**

City of Jacksonville Fire and Rescue/Jacksonville Risk Mgmt. v. Battle, **(Fla. 1st DCA 9/19/14)**
Firefighter Presumption/Disability

The DCA affirmed the JCC's award of compensability of claimant's hypertension, coronary artery disease (CAD) and authorization of a doctor. The E/C argued that the claimant did not satisfy the disability burden, but the DCA agreed with the JCC that the claimant's diagnostic catheterization resulted in being taken out of work for several days. The E/C also argued whether the claimant's time out of work after the catheterization constituted disability. They argued that under the Bivens case, the claimant failed to show that his condition affected the ability to perform his job duties. The DCA agreed with the JCC that the case was more analogous to the Rocha case, where the claimant proved disability because his work restrictions were "legitimately imposed as medically necessary 'because of the injury,'" and "created actual incapacity by interfering with his ability 'to earn in the same or any other employment the wages which the employee was receiving at the time of the injury.'" Citing the language of the statute, the DCA noted because the "impairment of health" created by the catheterization in Claimant's case was both caused or brought about by a listed disease (two, in fact) and resulted in work restrictions, it – as well as the listed disease – "shall be presumed to have been accidental and to have been suffered in the line of duty." **Click here to view Opinion**

Flores-Orellana v. Circle K/Constitution State Ins., (Fla. 1st DCA 9/16/2014) ***(rehearing denied)***
Writ of Mandamus/Requirement that JCC set hearing

The DCA originally issued an opinion on 8/5/14 granting claimant's Petition for Mandamus. The DCA subsequently denied the motions for rehearing, substituting the 8/5/2014 opinion with this opinion, which is identical in all respects except to reflect the denials of motions for rehearing. Claimant was adjudicated PTD in 2011. Thereafter, she settled a separate wage and hour claim against the employer. Based upon language in that agreement that the claimant purportedly settled "all claims" against the employer, the E/C ceased paying the claimant PTD. She then filed a PFB seeking reinstatement of her PTD. The JCC denied the E/C's Motion for Summary Final Order. On the date of the Final Hearing in August of 2013, the JCC cancelled the Final Hearing, dismissed the PFB for PTD, and told the parties to schedule a hearing on a Petition to Modify. A month later, a Federal Judge set aside the claimant's wage and hour settlement, and month thereafter, the E/C reinstated the claimant's PTD benefits. In April of 2014, the claimant then asked the JCC to set a hearing on the Petition to Modify, which the JCC denied, indicating that too much time had passed since the order became final. The DCA granted the claimant's Petition for Mandamus, which requires that the Petitioner show (1) a clear legal right; (2) an indisputable legal duty on the part of the respondent; and (3) no other adequate remedy exists. The court found the claimant had a right to have the hearing on the Petition to modify, the JCC had a duty to set the hearing, and no other remedy existed. The opinion notes that "both claimant and the E/C have the right to claims and pending legal rights adjudicated." **Click here to view Order**

R.L. Haines Construction, L.L.C. v. Santamaria et al, (Fla. 5th DCA 9/15/2014)
Workers' Compensation Immunity/Virtual Certainty Standard

The 5th DCA reversed a jury verdict of $2.4 million dollars awarded to the estate of an injured worker. The trial judge found the plaintiffs had sufficient evidence to overcome the immunity asserted by the General Contractor. The case arose out of the death of a foreman for Metal Bilt, a subcontractor on a construction site. Metal Bilt was to install 38 foot tall, 2,000 pound steel support posts, but only 72 hours after the epoxy had dried on the bases for the posts. After 44 hours, the GC Haines instructed that the posts be installed. The columns were erected, and while tightening a wire on one of the posts, the worker was killed by a falling post. The DCA entered into an extensive discussion of the virtual certainty standard required to remove WC immunity. They noted the question is not whether an accident is preventable, and that testimony regarding cumulative inevitability that an accident will happen is insufficient. Based upon prior cases analyzing the standard, they held the plaintiffs were required to establish that due to the shortened cure time of the epoxy, the accident was virtually certain to occur. Evidence, such as the three other similarly erected posts not falling, as well as no evidence of prior similar incidents, removed the requisite virtual certainty. The dissent noted the virtual certainty standard is almost impossible to prove. **Click here to view Opinion**

Guerra v. C.A. Lindman/Argonaut Ins., **(Fla. 1st DCA 9/10/2014)**
Expert Medical Advisors/Requisite Conflict to appoint EMA

The DCA, upon rehearing, withdrew their 7/21/14 opinion and issued this opinion. The DCA reversed the JCC's order, finding he erroneously appointed an EMA and denied benefits. The claimant had a compensable C5-6 injury and saw Dr. Schecter, who did not feel surgery was warranted. The claimant's one time change physician, Dr. Greenberg, opined the claimant needed a discectomy. The E/C moved for an EMA in response to a PFB, and Dr. Pagan was appointed. He issued a report saying the claimant did not currently need surgery, but if the condition worsened he might. The claimant withdrew his PFB and began treating with Dr. Montesano after Dr. Greenberg declined further treatment. Dr. Montesano opined the claimant needed an urgent cervical fusion and the claimant filed a new PFB. The E/C deposed Drs. Schecter and Pagan, who both testified their opinions had not changed, while candidly admitting they had not seen the claimant since 5/11. The claimant offered the testimony of Dr. Montesano. Although neither party requested such, the JCC appointed Dr. Theofilis as an EMA, and relied on his opinion to deny indemnity and medical benefits. The DCA held the JCC erred in finding a conflict to appoint Dr. Theofilis, where neither Dr. Schechter nor Pagan were ever (1) asked whether they disagreed with the opinions of Dr. Montesano, or (2) presented with the opinion of Dr. Montesano. The lack of any contrary medical opinion to the specific unrefuted recommendations of Dr. Montesano required reversal and an award of indemnity, medical benefits and attorney fees and costs. **Click here to view Opinion**

Moreno v. Palm Beach County School Board/F.A. Richard, **(Fla. 1st DCA 9/11/2014)**
Two Dismissal Rule/Res Judicata

The DCA reversed the JCC's dismissal of a PFB for PTD with prejudice. On 9/14/10, the claimant filed a PFB for PTD from 3/1/08 and continuing. He withdrew that PFB on 1/6/11 without prejudice. The claimant refiled for PTD in a PFB dated 7/28/11, seeking benefits from 6/29/11 and continuing. He dismissed that PFB on 7/28/11 without prejudice. Both of those claims sought PTD on account of a compensable lumbar condition.

On 11/12/13, the claimant filed a PFB for PTD seeking benefits from 4/2/13 forward, this time as a result of the lumbar and psychiatric conditions. The E/C then filed a Motion for Summary Final Order under the two dismissal rule, citing the recent American Woodmark v. Sipe case, which although short on detail, supported that position. The claimant opposed the Motion, arguing that the third petition was based on the psych injury, and thus would not rely on similar evidence to trigger res judicata. The DCA noted the Motion for Summary Final Order required them to analyze the facts in the light most favorable to the moving party. Under principles of res judicata, the court noted that the PFBs sought benefits for different dates of disability, and the third PFB required analysis of the psychiatric condition, which naturally would require different evidence. This distinction, at the Summary Final Order stage, resulted in a reversal of the JCC's dismissal of the third PFB. **Click here to view Opinion**

Plaintiff Estate Entitled to recover $184,514.24 in MSPA Private Cause of Action

It is important to resolve conditional payments in MSA cases quickly and accurately. The MSPA contains a provision for private parties to bring actions alleging a responsible party failed to reimburse Medicare, and provides for damages which "shall be in an amount double the amount otherwise provided." See **42 U.S.C. § 1395y(b)(3)(A)** . Recently a Kentucky Federal District Court awarded a plaintiff's Estate a significant award against a workers' compensation carrier under the statute. The deceased claimant was a Medicare beneficiary who died following a workers' compensation injury in 2007. In 2009 the Kentucky Workers' Compensation Board found his accident and death compensable and ordered the carrier to pay his medical expenses, which they did not do.

As a result, the claimant's Estate filed suit on September 13, 2012. The carrier received a Conditional Payment Letter from Medicare dated September 18, 2012 indicating they paid $181,326.38 in conditional payments for the claimant. That letter instructed the carrier not to pay pending a final determination. On October 25, 2012, Medicare issued Indemnity a "Final Demand Letter" asking the carrier to pay $184,514.24. The Final Demand Letter stated that interest would be assessed on that amount if it was not fully resolved within 60 days of the date of the letter. On December 11, 2012, the carrier issued a check to Medicare for $184,514.24. A January 11, 2013 letter from Medicare acknowledged receipt of the check and stated that the amount due had been reduced to zero. The Federal Court awarded summary judgment to the Estate in the amount of $184,514.24. The bottom line is that if you are settling a case, conditional payments should be resolved quickly to eliminate the possibility of incurring additional damages. In this case the double damages were awarded even though the carrier paid the final conditional payment amount. The case may be appealed, but serves as good advice for dealing promptly with conditional payments.

****Attorney General's office files Notice of Appeal in Padgett/Cortes****

Last month a declaratory ruling from a Dade County Judge deemed Florida's WC immunity statute to be unconstitutional. The Judge denied the Attorney General's Motion for Rehearing of that ruling on August 22nd, and the Attorney General appealed the initial Order on August 26, 2014. This appeal will be heard by the Third DCA, unless the DCA on its own motion or suggestion of a party requests that the matter proceed directly to review by the Fla. Supreme Court as a "matter of great public importance or hav(ing) a great effect on the proper administration of justice throughout the state". The appellate process will determine whether or not Florida's WC immunity statute passes constitutional muster.

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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