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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.

Florida Supreme Court Cases

Castellanos v. Next Door Company, ____ So. 3d ____ (Fla. 4/29/2016)
Attorney Fees/Constitutionality

Castellanos – What happened yesterday?

The Florida Supreme Court invalidated the mandatory attorney fee schedule (guideline) found in F.S. s. 440.34(2009), finding that it unconstitutionally creates an irrebuttable presumption that precludes any consideration of whether the fee award is reasonable. Although the claimant alleged the fee limitations offended numerous constitutional grounds, the ruling is based on a due process analysis.

What were the facts in Castellanos?

The Court considered the facts of the claimant's case, which the E/C initially accepted but subsequently denied for misrepresentation. The claimant prevailed at trial after the JCC denied the defense, and the claimant's attorney subsequently sought approval of a fee based on 107.2 hours at $350 per hour. The JCC heard testimony from other claimant attorneys regarding the reasonableness (or lack thereof) of the fee, but under the law could not award anything other than guideline fee of $164.54, or $1.53 per hour based upon the asserted hours.

How did the Supreme Court decide that the prior law was unconstitutional?

The Supreme Court's 38 page majority opinion notes that reasonable prevailing party attorney fees were available from 1941 to 2009. The Court found the claimant had standing to litigate this issue, rejecting the argument that this concerned only attorney rights. The Court discussed the increasing complexity of the Workers' Compensation system ("the thicket") as well as the 2009 law's prohibition on claimants' ability to challenge the reasonableness of their attorneys' fee awards, discouraging representation. The opinion finds the law's limitation on this ability to challenge reasonableness created a facial due process issue. The core of the opinion deals with the fee schedule's creation of an irrebuttable presumption, and finds that the 2009 law failed to pass a three part test for constitutionality of conclusive statutory presumptions. The analysis of the three part test is lengthy, but surrounds examination of the legislature's identification of a problem, whether there is a reasonable basis that the law would fix the problem, and whether the expense and difficulty of individual determinations justify

the imprecision of a conclusive presumption. The Supreme Court last examined this issue in the WC case of Recchi v. Hall in 1997, finding that the law prohibiting an injured worker under a drug free workplace from rebutting the presumption of intoxication was an impermissible irrebuttable presumption.

What is "facially unconstitutional" versus "as applied?"

The Court ruled the current version of F.S. s. 440.34 is facially unconstitutional. That means that this ruling applies for all claimants in all cases. "As applied" pertains to "this litigant in this case only." The finding of facial unconstitutionality makes this applicable across the board.

So what does this mean for WC attorney fees?

This holding operates to revive the version of s. 440.34 analyzed by the Supreme Court under Murray. JCC's must now, in any pending case where fee entitlement is alleged, allow the claimant to present evidence that the fee schedule will result in an unreasonable fee. The Court specifically emphasized that "the fee schedule remains the starting point, and that the revival of the predecessor statute does not mean the claimant attorneys will receive a windfall." Claimant attorneys will only be able to qualify for a fee deviating from the fee schedule where they show the guideline is unreasonable under the Lee Engineering factors.

What does this mean for the "stakeholders" in WC cases?

Claimant attorneys will revive attorney fee claims where jurisdiction was reserved on their entitlement to fees and costs, filing Verified Petitions if they can't be resolved informally. Claimant attorneys will begin filing Petitions at a higher rate, as their incentive to litigate smaller issues is obviously increased. With this increase, adjusters will face the prospect of becoming more involved in claim litigation via depositions and hearings. NCCI will likely review the law quickly and issue an opinion as to how this affects rates. E/C attorneys will be involved in defending additional mediations, discovery and hearings as claimant attorneys seek to prove entitlement to benefits that under the guideline standard were not attractive to litigate. JCC's and mediators will be busier with additional mediations and hearings.

What about the claimant paid fee case from last week...didn't that address a lot of the constitutional issues that Castellanos argued?

The Supreme Court considered the recent 1st DCA Miles case on claimant paid fees in a footnote, but said they were not being asked to rule on the constitutionality of the criminal penalties under F.S. s.440.105(3)(c). Miles is not yet final and that ruling could still be appealed to the Supreme Court. Although the Appellate Rules provide for mandatory review of a DCA opinion that finds a statute unconstitutional, that mandatory review only occurs if a party appeals the decision.

If Miles isn't appealed will claimant attorneys be able to seek enhanced hourly fees and fees from their clients?

It would appear so.

What are the chances this gets "fixed" by the legislature in a special session or gets a second look on a Motion for Rehearing?

Given the lengthy analysis, it is unlikely the Court would grant a Motion for Rehearing. As far as the legislature, after the Murray decision in 2008, the legislature met again and tweaked (removed the word "reasonable" from) F.S. 440.34 to address the issue noted by the Murray Court. The difference in this opinion is that the Court has essentially stated that the Legislature CANNOT eliminate reasonable fees, since such fees are part of the grand bargain:

"It is undeniable that without the right to an attorney with a reasonable fee, the workers' compensation law can no longer "assure the quick and efficient delivery of disability and medical benefits to an injured worker," as is the stated legislative intent in section 440.015, Florida Statutes (2009), nor can it provide workers with 'full medical care and wage-loss payments for total or partial disability regardless of fault and without the delay and uncertainty of tort litigation.' Martinez v. Scanlan, 582 So. 2d 1167, 1172 (Fla. 1991)."

The Court is saying that the Florida and Federal constitutions guarantee the right of injured workers to obtain reasonable fees. The legislature can try and address this however they want, but this opinion seems to be written to make that difficult, to say the least.

Was the decision unanimous?

Two dissenting opinions disagreed strongly with the majority's conclusion regarding the irrebuttable presumption, noted prior cases suggested high deference should be afforded to legislative judgment, and that reasonable attorney fees are not guaranteed under the Constitution.

What about cases that appealed the same issue?

The Court also issued opinions on a number of companion cases that considered the same issue. Those cases are listed on the Supreme Court website, but essentially say that the holding in Castellanos applies equally to those cases.

Can I read the opinion?

The link to the entire 55 page opinion is below. Let us know is there any additional questions, or contact Nancy Curry to schedule a seminar to discuss strategies going forward.

http://www.floridasupremecourt.org/decisions/2016/sc13-2082.pdf

HRMCW Cases

JCC Lewis (Ft. Lauderdale)(Sandra Wilkerson) – Denied appointment of EMA. The claimant filed a notice of conflict. The JCC accepted the E/C's arguments that the notice was not timely and that after reviewing the opinions there was no conflict. **Click here to view Order**

District Court of Appeal Cases

****The First DCA ruled that the claimant may agree to pay his or her attorney an attorney fee in excess of the statutory guideline fee, and the law making it a crime for attorneys to accept such fees is unconstitutional. This does not directly result in greater attorney fee exposure for E/Cs****

Miles v. City of Edgewater Police Dept./PGCS/State of Florida,___ So. 3d ___ (Fla. 1st DCA 4/20/2016)
Attorney Fees/Criminal Prohibitions/Constitutionality

Bill Rogner for Appellees City of Edgewater/PGCS

Claimant, a police officer, sought benefits based upon claims of work related exposure. After the E/C denied compensability, she initially obtained counsel who filed PFBs. She withdrew those PFBs and her attorney withdrew. She then obtained new counsel, albeit with retainer agreements that would have the Police Union pay the attorney a $1500 fee and the claimant paying hourly fees over 15 hours. After subsequent PFBs, the claimant attorney asked the JCC to approve the fee agreements, which the JCC could not and did not do as they sought impermissible, non-contingent hourly fees. The claimant attorney then withdrew (citing a conflict of interest and an undue hardship on her ability to practice law) and the claim proceeded to a merit hearing. There the claimant asked again to have the prior fee agreements approved and offered affidavits from other attorneys who said they could not take her case due to the high burden of proof and complexity. The JCC again denied this request, and ultimately denied her claims as they lacked requisite evidence.

In a 23 page opinion, the DCA ruled that the prohibitions found in F.S. s. 440.105 (3)(c)(2011) against claimant attorneys receiving anything other than a JCC approved contingency or guideline fee for benefits obtained violated the claimant's First Amendment guarantees to Free Speech, Freedom of Association and right to petition for redress. The legislature's ability to restrict these rights is analyzed under strict scrutiny, and the DCA found that the law was (a) not necessary to promote a compelling governmental interest (b) was not narrowly tailored to advance that interest and (c) did not accomplish its goal through the use of least intrusive means. They also found the law violates an individual's freedom to contract. The appropriate remedy in this situation is to allow injured workers to enter into fee contracts approve by JCCs notwithstanding F.S. s 440/105(3)(c). The JCCs denial of her request for approval of the fee contract as well as the underlying claim was reversed and remanded.

With regard to the impact of the decision and the prospect for additional E/C exposure, the opinion notes: "If Claimant prevailed, the E/C still could not be required to pay more in fees that the Legislature allows under section 440.34, Florida Statutes, regardless of Claimant obtaining legal counsel not authorized under chapter 400, as Claimant would pay the excess fee." **Click here to view Opinion**

Scott v. Sears Holding/Sedgwick,___ So.3d ___ (Fla. 1st DCA 4/14/2016)

The DCC rejected both of claimant's arguments arising out of a denial of increased attendant care. They found "ample" evidence to support the JCC's determination of reasonable hours, and found claimant's constitutional challenge to the rate of attendant care "meritless". The claimant argued the Florida Constitution mandated a minimum wage higher than the federal minimum wage. The DCA noted this provision applies only to "employees", which prior case law specifically holds does not encompass providers of attendant care. As such, paying attendants the federal minimum wage does not violate the Florida Constitution. **Click here to view Opinion**

JCC Merit Orders

Compensability

JCC Medina-Shore (Miami) – Awarded $1,800 (9 @ $200) attorney fee sanction for prevailing against the E/C's motion for summary final order on an SOL issue. The JCC found that the E/C was aware of the factual disputes but refused to withdraw the motion for summary final order after receiving the claimant's 21 day sanction letter.

https://www.fljcc.org/Finals/10000260_357_04272016_02203462_i.pdf

JCC Spangler (Miami) – Awarded compensability. Bifurcated hearing. The JCC struck the E/C's misrepresentation defense as not being specifically stated per the rules. Additionally, as the E/C asserted that the defense was based solely upon video surveillance, there were no statements to be considered. The claimant was working from home when her computer froze, which required her and her husband to go into the office. The claimant alleged the office elevator malfunctioned causing her to fall when she exited. Video surveillance showed the fall and her husband exiting the elevator and taking cell phone pictures. The JCC found no evidence in the video to support the E/C's claim that the claimant staged the accident.

https://www.fljcc.org/Finals/15019287_229_04272016_04025648_i.pdf

Medical Benefits

JCC Hill (Gainesville) – Awarded claimant's choice of 1x change. On December 18, Claimant requested his 1x change and E/C timely responded. On December 29, 2015, the E/C changed the doctor. While the E/C argued the first doctor had refused to treat the claimant and the E/C had timely offered a replacement, the JCC found no evidence that the 1st doctor had refused the claimant and that there was no "good faith" provision in the statue. **Click here to view Order**

JCC Sojourner (Lakeland) – Awarded replacement doctor. 1989 d/a. The claimant had treated with a doctor in TN since 1996. She now lived in AL 239 miles from the prior doctor and requested a replacement physician closer to her new home. The JCC rejected the E/C's arguments that since the claimant was only required to treat once per year and the E/C were providing treatment there was no need for a new doctor. **Click here to view Order**

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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