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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) with questions or comments on any of the listed cases.

District Court of Appeal Cases

City of Jacksonville v. Ratliff, (Fla. 1st DCA 4/13/2017)
F.S. s. 112.18 Presumption/E/C's Burden of Proof with "triggering event"

In a lengthy opinion, the First DCA affirmed the JCC's award of compensability for a firefighter's presumption claim, but wrote to clarify the E/Cs two-tiered burden of proof where the claim involves a "triggering event". Claimant was a 24 year veteran of the Fire Dept. when he experienced chest pain and discomfort at a meeting that was characterized as "stressful", but not a heated argument. The E/C initially accepted his diagnosed heart attack and Coronary Artery Disease (CAD) under the 120 day rule, but later issued a denial. The heart attack was caused by a rupture of plaque build-up. The claimant filed a "presumption only" claim, citing no occupational cause for the conditions alleged to be compensable. Both parties obtained IMEs, who each said that claimant had multiple pre-existing factors including diabetes, high cholesterol, history of smoking and family history of early onset CAD. The E/C's IME opined these factors were non-work related, causative factors for the CAD. The claimant's IME essentially agreed, stating the stressful meeting could have contributed. Both agreed there is no known test to determine what triggered rupture of the underlying blockage. The DCA provided an extensive history and analysis of the law related to burdens of proof in the rebuttal arena. In analyzing whether the E/C carried their burden to proof to rebut the presumption only claim with competent evidence, the DCA found the JCC's "catch all analysis" under (1) MCC, (2) Competent Evidence and (3) Clear and convincing evidence was error. Noting that the E/C sustained their burden to show the factors causing CAD were non-industrial, they clarified that the "triggering event" requires the E/C to rebut under the second tier. They likened the concept of a triggering event in a presumption claim to an aggravation of an underlying compensable condition in a non-presumption WC case, and held the E/C must prove by competent evidence that "the" or "all" possible factors causing the triggering event must be shown to be non-work related. As both experts testified that stress from the meeting in which the claimant had his heart attack "could have been" a cause, the E/C failed in this regard. **Click here to view Opinion**

State of Florida Department of Corrections v. Junod, **(Fla. 1st DCA 4/13/17)**
F.S. 112.18 Presumption Claim/Daubert Standard

The DCA reversed the JCC's finding of compensability of a correctional officer's presumption claim, finding the EMA's opinion flawed. The Claimant had been employed as a correctional officer for only a little over three months when he suffered a heart attack while sleeping at home in 2010. He left that job in 12/11, but was rehired in 12/12. In 2014 he filed a PFB for compensability of the 2010 heart attack. The claimant had the following pre-existing risk factors: heavy smoker for 20 years prior to his employment, family history of heart disease, obesity, dyslipidemia, increased abdominal girth, and elevated glucose levels. The E/C's IME examined the claimant and found his heart attack was due to non-work related factors. The claimant's IME performed only a records review and expressed no opinion on causation. Nevertheless, the JCC appointed Dr. Pianko as an EMA. The JCC accepted the EMA's opinion and found the heart attack compensable under the presumption statute. The First DCA reversed, finding that the E/C successfully rebutted the presumption and established the pre-existing risk factors as a non-occupational cause of his 2010 heart attack. The First DCA rejected the EMA's opinion under Daubert on the grounds that (1) it was based upon an inaccurate factual basis (he assumed the claimant worked for "several years" under the "real and anticipatory stress" of a correctional officer's job) and (2) it relied on improper bolstering by scientific articles and studies. The main Kales study was performed on firefighters and police officers, but not correctional officers. The EMA's reliance on that article as well as other unspecified publications and discussions was improper, and rendered the EMA opinion incompetent and not a valid evidentiary basis for the JCC's finding in favor of the Claimant. **Click here to view Opinion**

McFarlane v. Miami-Dade Transit Auth./Miami-Dade Risk Management, **(Fla. 1st DCA 2017)**
One-Time Change/Timely Asserting of Defenses on Pre-Trial Stipulation

The DCA ruled the E/C's failure to comply with the applicable Q Rule governing Pre-Trial Stipulations resulted in a waiver of their "acquiescence defense". Following her 2009 accident, the claimant received authorized care from Dr. Hodor (wrist) and Dr. Baylis (shoulder). In 2011, claimant requested a one-time change from Dr. Baylis, and the E/C timely authorized Dr. Feanny. The claimant subsequently obtained treatment for her wrist and shoulder from Dr. Feanny, but in 2015 filed a PFB seeking treatment with Dr. Hodor. Several months prior to the PFB, the adjuster testified that the one-time change was from Baylis and that Hodor remained authorized. However, following receipt of the PFB, the E/C sent a de-authorization letter to Hodor. On the Pre-Trial Stipulation, the E/C asserted that "*Claimant had previously requested a one-time (change)from Dr. Hodor, who is no longer authorized, and that the authorized physician is Dr. Feanny, who has been treating Claimant since the one-time change.*" The DCA noted that Rule 6.113(2)(a) requires *"all available defenses not raised in the pretrial stipulation are waived unless thereafter amended by the judge for good cause shown"* and that *"[a]bsent an agreement of the parties, in no event shall an amendment or supplement be used to raise a new claim or defense that could, or should have been raised when the initial pretrial stipulation was filed, unless permitted by the judge for good cause shown*." The DCA noted the word "acquiescence" did not appear in the Pre-Trial, but appeared for the first time in the E/C's trial memo.

The DCA found no good cause for the E/C to have failed to include this defense. They rejected the E/C's position that they were not required to list the defense as it was not affirmative. Noting the defense "self-evident(ly)" seemed to be affirmative defense to which the Q rule would apply, they reversed and remanded for the JCC to enter an Order awarding the requested treatment with Dr. Hodor. **Click here to view Opinion**

Ferrer v. Truly Nolen of Am., Inc., **(Fla. 1st DCA March 20, 2017)**
Attorney Fees/Proof of Hourly Fees

The DCA affirmed the JCC's Order which denied claimant's attorney's request for hourly fees, and instead awarded a guideline fee on benefits. The Verified Petition mentioned more than one attorney but did not specify which attorney was attesting to what work. The time entries only contained the initials of a senior partner while a significant part of the work was performed by other attorneys in the office. Because the Verified Petition and time sheets were confusing and misleading, calculating an hourly fee was impossible and no competent substantial evidence existed to substantiate an hourly fee. **Click here to view Opinion**

Eckert v. Pinellas Cnty. Sheriff's Office, **(Fla. 1st DCA 3/31/17)**
Income Impairment Benefits/% of rate paid based on when income is "earned"

The DCA reversed the JCC's finding that the carrier properly paid IBs. The claimant reached MMI on 7/20/2010, with a 39% PIR, entitling him to 169 weeks of permanent impairment benefits (IIBs). F. S. s. 440.13(3) states that: *"Impairment income benefits are paid biweekly at the rate of 75 percent of the employee's average weekly temporary total disability benefit not to exceed the maximum weekly benefit under s. 440.12; provided, however, that such benefits shall be reduced by 50 percent for each week in which the employee has earned income equal to or in excess of the employee's average weekly wage"* (Emphasis in original). The E/C, pursuant to that language, calculated the payment of IIBs and for each week the claimant earned 100% or more of his AWW, and reduced the IIB payment by 50%. The claimant argued the E/C improperly reduced his payments for the weeks in which he was paid accrued leave (sick and/or vacation leave) which took his income over the 100% threshold. He asserted that accrued pay was accrued and "earned" at an earlier time, and not "earned" during the week of payment of IIBs. The 1st DCA agreed with the claimant's argument and reversed the Order and held that the plain language of 440.13(3)(c) only allows for the 50% reduction in any week the claimant *earned* equal to or in excess of the AWW. As the accrued leave payment was not *earned* during that week, it is not includable. **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.