



Case Law Update

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WINTER PARK
1560 ORANGE AVENUE, SUITE 500
WINTER PARK, FL 32789
TEL: (407) 571-7400
FAX: (407) 571-7401
www.hrmcw.com

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

Portu v. City of Coral Gables/Johns Eastern,
Attorney Fee Entitlement/Benefits Obtained

(Fla. 1st DCA 4/18/2018)

The DCA reversed the JCC's denial of attorney fees. The DCA noted fees were due where the claimant sought benefits in a PFB, more than 30 days elapsed and the benefits were provided. The brief opinion states this is so, even where, as in this case, the JCC may ultimately award income impairment benefits based upon a lower PIR than originally sought in the PFB. The DCA affirmed the JCC's denial of taxable costs as that issue was not preserved on appeal. [Click here to view Opinion](#)

The above DCA opinion seems to be a "Duh?" opinion, as it is short on facts. The underlying Order describes exactly what happened. The claimant was a firefighter. The claimant's IME assigned a 35% rating based upon a class 3 impairment for hypertension. The claimant filed a PFB seeking IBs per that PIR. The E/C's response indicated there was no evidence that the claimant was at MMI, or that he had class 3 impairment for Hypertension. The authorized treater indicated the claimant had a 0% in deposition. A month later, the claimant's IME doctor testified that he was wrong, and the impairment rating was really 4%. The E/C then provided IBs based on 4% within 14 days of the IME doctor's depo. The JCC denied a fee saying E/C paid IBs within 14 days of becoming aware of rating as per statute and they paid less than what the claimant asked for. The DCA obviously disagreed. [Click here to view Order](#)

Inmon v. Convergence Employee III, Inc., et al.,
Death Benefits/Intoxication/Competent Substantial Evidence

(Fla. 1st DCA 4/18/2018)

The DCA reversed the JCC's denial of death benefits and funeral expenses. The deceased claimant worked for a construction company. After work, the supervisor dropped several workers at a bar. While standing outside on US 1, apparently trying to hail a ride, the deceased employee was struck by a truck and killed. The E/C denied the claim per the intoxication defense in F.S. s. 440.09(3), but they

did not have the presumption found under F.S. s. 440.09(7)(b). The E/C stipulated the employee was in travel status and in the course and scope. To sustain their burden to show the accident and death were primarily occasioned by intoxication, the E/C presented surveillance video which appeared to show the claimant intoxicated and weaving around. They also offered blood test results showing the claimant was over the legal limit for intoxication, as well as testimony of the claimant's widow. She testified she was speaking to him on the phone at the time, that he dropped his phone twice, and seemed intoxicated but functioning. Finally, they offered testimony of the investigating FHP officer and a surveillance representative. The DCA noted the E/C did not, however, present testimony of the truck driver or of a motorist behind the vehicle that hit the driver. The JCC denied benefits, finding that (1) video showed claimant in the road before the accident and stumbling, (2) damage to the driver side door allowed a reasonable inference that employee was in the road, and (3) the position of the body near the truck supported the defense. The DCA reversed, noting that while competent substantial evidence (CSE) supported the finding that the claimant was intoxicated, there was no CSE to support that the accident/injury was occasioned primarily by the employee's intoxication. In reversing, the DCA found all three findings were of "questionable probative value" because (1) the video did not show the actual collision, (2) the inference re. the damage to the truck, while possibly reasonable if based on expert testimony, did not discount that truck may have veered off the road, and (3) the position of the claimant's body, as testified to by the FHP officer, was *after* it had been moved (resulting in a conclusion based on inference and not direct evidence). Because all of the JCC's conclusions were an "impermissible stacking of inferences to establish an essential finding of fact", they reversed the denial and awarded death benefits and funeral expenses. [Click here to view Opinion](#)

Greenfield v. Tallahassee Police Department/ City of Tallahassee Risk Management,
(Fla. 1st DCA 4/20/2018)

IME No Show Fee/ Taxable Costs

The DCA reversed the JCC's assessment of a no-show fee for the claimant's failure to attend the E/C IME, as well as the assessment of \$1,000 records review of the IME as a taxable cost. On 10/14/15, the E/C notified claimant's counsel of an IME that was to take place on 10/19/15. The claimant was not notified directly. Claimant's counsel indicated that as the IME could not be a witness at the upcoming trial, they would not attend, and to cancel to avoid paying a no-show fee. The JCC then entered on Order on the E/C's motion to assess the no-show fee, asking the E/C to find out what the fee would have been with cancellation on 10/16/15. The E/C filed a notice that it would have been \$1750, but the JCC did not amend the original order. After prevailing on a medical claim, the E/C sought the no-show fee and records review. They reversed the Order that the claimant pay 50% of the no-show fee, as it was not timely noticed within seven days of the appointment. They also reversed the award of \$1,000 records review, as it was not part of the no-show fee. It was also not awardable as either an IME exam fee or deposition preparation fee, because neither event took place. Finally, the E/C did not establish their purported IME's testimony could be submitted into evidence, and thus it was not a cost "necessary to maintain the claim". [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.

| Treasure Coast | North Florida | Miami-Dade | Broward | Southwest Florida |
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| 772-489-2400 | 850-222-1200 | 305-423-7182 | 954-794-6933 | 239-939-2002 |