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Case Law Update

Week of April 29, 2019

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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.

DCA Cases

Varricchio v. St. Lucie Cty. Clerk of Courts/Ascension Ins., (Fla. 1st DCA 4/29/2019)
Indemnity Benefits/Retroactive MMI/Ex Parte Doctor Conferences

The DCA affirmed the JCC's denial of TPD, but wrote to address retroactive assignment of MMI and the constitutionality of E/C doctor conferences. The claimant reached MMI for her 2013 back injury from a neurosurgeon, and continued to treat with a pain management doctor. That doctor performed a rhizotomy in June of 2015, reportedly telling the claimant to follow up in two weeks. After a year delay, the claimant returned, stating she had 100% pain relief. The doctor's DWC-25 stated she was at MMI, but without an effective date. She returned later, feeling worse, had a second rhizotomy, but again the doctor indicated on follow-up she was at MMI but without assigning an effective date or PIR. Finally, on November 30th, 2016, the pain management doctor filled out a DWC-25 assigning a 5% PIR and full duty status, effective on that date. Prior visits had all indicated she was light duty. The E/C initiated IBs, and the claimant filed a PFB seeking TP from September 26, 2013 forward. The JCC ultimately accepted the pain management doctor's testimony (which was the only admissible medical evidence) that her MMI date was June 30th, 2015 and denied TPD. The DCA affirmed the JCC's ruling, rejecting the claimant's arguments that (1) the MMI date should have been rejected because the doctor did not see the claimant on that date, and (2) that MMI as of that date should have been rejected because the claimant continued to receive care with an expectation of further recovery. The court also rejected the claimant's attempt to broadly expand Gauthier (failure of the E/C to obtain MMI and a PIR extended SOL), but rejected the idea that estoppel existed, although they agreed estoppel could be a viable bar to retroactive assignment of work restrictions or MMI under certain facts. Finally, the DCA rejected claimant's argument that the E/C's 440.13(4)(c) conference with the

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pain management doctor in April 2017 re. MMI violated the claimant's constitutional right to privacy. Claimant argued that the 2000 Kimes decision (specifically approving of ex parte conferences with doctors in WC cases) had been overruled by the Florida Supreme Court's 2017 Weaver v. Myers decision (holding amendments to med mal law allowing release of medical records and doctor conferences violated litigant's right to privacy), and that Weaver suggested that the E/C could only conference with authorized doctors. The DCA found that Weaver specifically distinguished Kimes, and disagreed that Weaver's characterization of the 2003 amendments somehow provided a basis to limit the E/C's right to speak to all doctors about a claimant's injuries. Finally, they found the claimant did not have a requisite "real and immediate injury" to warrant a successful constitutional challenge. Click here to view Opinion

Prada USA/Travelers v. Young, **(Fla. 1st DCA 5/2/2019)**
Res Judicata/120-Day Rule

Claimant's injury occurred in 2003. He received authorized treatment for his back and neck from 2003 to 2014, and in late 2014 filed a PFB seeking lumbar treatment per his treating neurologist. However, prior to trial several authorized providers, including the neurologist, opined the original injury was no longer the MCC of the need for treatment, and further that such treatment was not medically necessary. The claimant dismissed this claim and proceeded to hearing on claims related to the knee. In the fall of 2015, less than three months after the PFB withdrawal, the claimant began seeing another doctor for lumbar complaints, received a recommendation for treatment by a specialist. Almost a full year later, in March of 2017 filed a PFB to return to that doctor, and in September of 2017, filed another PFB for evaluation and treatment of the lumbar spine. At hearing, the JCC rejected the E/C's res judicata defense, finding that the prior PFBs claims for Lidoderm patches and PT were narrow, while the newer request sought a more broad lumbar evaluation and treatment. The JCC also agreed with the claimant that under the 120 day rule the E/C waived the right to deny compensability of a lumbar spine condition they had accepted and for which they had provided treatment for over a decade. Although the DCA noted that res judicata can be a difficult concept in WC cases with changing physical conditions and multi-factorial considerations, they declined to address that issue because the JCC properly found waiver under the 120 day Rule. The opinion notes the E/C can raise an MCC defense "where the evidence supports it" but the E/C did not argue that issue on appeal. Click here to view Opinion

On 4/12/2019, **Bill Rogner** argued on behalf of Appellees in Zamora v. 1X Design, before the First DCA at the Florida Bar Board Certification Forum at Champions Gate. The First DCA issued a PCA, affirming the JCC's decision in favor of our clients on 4/17/19. Bill also received a PCA affirming the JCC's decision in favor of our client in Hektner v. Brevard County School Board on 4/15/19.

De La Rosa v. Cheney Brothers/Clarendon National Ins. Co., (Fla. 1st DCA 4/9/2019)
120 Day Rule/Waiver

The entire opinion states: In this workers' compensation case, the Claimant appeals an order of the Judge of Compensation Claims ("JCC") denying his claim for continued palliative care for a November 2002 injury. He claims the JCC reversibly erred in finding the E/C satisfied its burden of proving a break in the causal chain and by failing to find waiver by the E/C under section 440.20(4), Florida Statutes. We disagree and affirm. See Teco Energy, Inc. v. Williams, 234 So. 3d 816 (Fla. 1st DCA 2017).

Sedgwick CMS/The Hartford/Sedgwick CMS v. Valcourt-Williams, (Fla. 1st DCA 4/5/2019)
Compensability/"Arising out of" element/Personal Comfort Doctrine

The First DCA, sitting en banc, reversed former JCC Condry's Final Order requiring the E/C to provide medical and indemnity benefits for the claimant's right knee injury. The JCC previously entered a Summary Final Order, which found compensable a work-at home WC adjuster's fall over her dog while getting coffee. The seven page majority opinion is followed by two lengthy dissents and an appendix of the original Summary Final Order (total pages 44). The basic facts were not in dispute: the claimant worked out of her home office in Arizona. She had been working three hours when she went downstairs to get coffee, tripped over one of her two dogs, and injured her knees, hips and shoulders. The E/C denied the claim, asserting the injuries did not arise out of employment as is required by F.S. s. 440.09(1)(2016). The parties stipulated (1) that the claimant was in the course of scope of employment, (2) that the accident occurred during work hours, (3) that she was where she was reasonably expected to be and (4) that the claimant's act of getting coffee was a permissible comfort break. The majority opinion rejected the JCC's analysis of the work environment being imported into her home; rather, they stated the analysis is whether the claimant's work "necessarily expose[d] the claimant to conditions which substantially contributed to the risk of injury..". Finding the dog would have been there with or without work, they held the risk did not arise out of employment. The majority reviewed the statute and case law relating to the elements of course and scope and arising out of in analyzing compensability in the arena of home office falls, stating that it is insufficient to say the fall is compensable merely because it occurred while working. Such analysis does not adequately account for the arising out of element. They acknowledged that some earlier cases ignored or overlooked the arising out of element, but stated those cases cannot be squared with the language of the statute. They then rejected older cases such as the 1986 Wilmot v. Pan Am case, which found a flight attendant's (on layover) cigarette burn injuries compensable, as it lacked the arising out of element. The majority states this holding does not mean (as the dissents imply) that you can never have a compensable home - based claim be compensable, giving the example of an employee claiming carpal tunnel from her at home work related activities.

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The first dissent by Judge Bilbrey pulls no punches, repeating the old adage that bad facts make bad law, and stating the majority opinion reverses decades of precedent. Prior to this opinion, the dissent states an injury caused by a neutral risk and not caused by the claimant's pre-existing or idiopathic condition would have "undoubtedly" been compensable. However, the majority opinion, in finding the claimant's dog to be a personal risk, narrows "arising out of" to mean that injuries can only (emphasis in original) be compensable if they are directly caused by working, rather than incident to employment. In the personal comfort context, compensability is analyzed under the three part test in Hamlin: (1) the activity has been a traditional or routine part of the work place experience (incidental to work), (2) the employee's participation in this type of activity benefits the employer by refreshing the employee, and (3) the injury results from either a work created risk, or a neutral risk. Judge Bilbrey found she passed all three tests, and that it is essential that the clamant was no more engaged with the dog than she would have been had she tripped over a back pack or brief case that would have been present in an office based environment. His opinion asserts the majority exceeded that which the E/C sought to have reviewed, combined "course and scope" and "arising out of" analysis, and notes this same analysis was rejected in the 1996 Vigliotti v. K-Mart case. The dissent states that without expressly overturning precedent regarding personal comfort (due to the Fl. Supreme Court ruling in McCook), they discredit the doctrine. Finally, it is predicted that the opinion will inject uncertainty into the 3 billion dollar Florida WC industry and potentially increase tort liability for employers and co-employees. Judge Makar's dissent examines the particular facts of the case in greater detail, including the written arrangement Sedgwick provides to their in-home office employees. Under the three part test above, this dissent identifies the key factor as whether or not Sedgwick expressly prohibited dogs in such an environment. Analyzing the three part personal comfort test and the exceptions (pre-existing/idiopathic cause or employer's control of risk/foreseeability), the only real issue is identified to be that of foreseeability and employer control. The work at home agreement said (among other things) that the home office (but not the home) should be free of obstructions, the home office must be safe and comfortable, and that they may require photos of the office. Despite Sedgwick's argument that the employee exercised "sole control" over the telecommuting agreement, the dissent notes that Sedgwick retained full control, and could have prohibited pets and provided guidelines for kitchens and bathrooms, but did not. In short, the dissent asserts the risk here was not only foreseeable, but able to be controlled by the employer. The Judge concludes with a quote from the 1947 Florida Supreme Court decision in Cardillo vs. Liberty Mutual - "the statutory phrase "arising out of and in the course and scope of employment"….is deceptively simple and litigiously prolific."

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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