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Case Law Update

August 18, 2017

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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

Mathis v. Broward County School Board, **(Fla. 1st DCA 8/14/2017)**
120 day rule/Notice/Emergency Services

The claimant did not appeal the JCC's ruling that her foot injury was not compensable. The Appeal concerned the JCC's finding the E/C was not responsible for a $116,000.00 hospital bill incurred prior to the E/C issuing a notice of denial under the 120 day rule. On 3/5/15, the clamant alleged she stepped on a nail or tack the previous evening (the style of the opinion lists the DOA as 3/2/15) and her foot was swollen and painful. After speaking with an NCM, the E/C authorized the claimant to see Dr. Kerr under the 120 day rule. Dr. Kerr evaluated the claimant on 3/5, and noted her abscess was a staph infection which could not have developed the night before. By 3/9/15, the infection was worse, the doctor again told the claimant she didn't feel it was related, but filled out a DWC-25 requesting an ER consult for IV treatment. The claimant went to the ER on 3/9/15, where a podiatrist operated on her foot and did not release her until 3/17/15. The adjuster received the referral to the ER on 3/10, within 10 days of denying the claim on 3/17, but did not authorize the hospital or podiatrist, nor did either provider notify the adjuster or request authorization. The DCA reversed the JCC's finding that the adjuster's alleged decision to deny the claim on 3/5 was sufficient, finding the 120 day rule requires a carrier pay "all benefits" until the denial is communicated to the claimant. However, the DCA remanded for the JCC to make determinations about the carrier's defenses under F.S. s. 440.13(3)(c) (prior authorization) or subsection (i) (ten day period to approve services over $1,000.00) and the "emergency care exception" to that subsection. **Click here to view Opinion**

Sinclair v. Manorcare Health Dunedin, **(Fla. 1st DCA 8/7/17)**

TTD benefits/proof of disability over 21 days

The DCA reversed the JCC's order awarding ten days of TTD benefits. The claimant withdrew her appeal, but the DCA considered the E/C's cross appeal. Claimant had a compensable injury on 1/28/14 and did not see an authorized doctor until 2/4/14 when she was taken out of work. She did not return for a scheduled appointment ten days later, and did not see an authorized doctor for almost a year. As such, the doctor refused to say she was on restrictions after 2/14. He was not asked and did not opine as to any disability prior to 2/4. The E/C paid TTD from 2/12 through 2/18, but the claimant's PFB sought TTD from the DOA "and continuing". The DCA affirmed the JCC's ruling that her disability lasted from 2/4 to 2/14, but reversed as to his finding that the TTD award should include the first seven days of disability. In that regard, they noted that F.S. s. 440.12(1) states that "[c]ompensation is not allowed for the first 7 days of *disability*, except for [medical] benefits" unless "the injury results in more than 21 days of disability." (emphasis added). Noting the effective date is disability and not the date of accident, they found no concession or proof that claimant was unable to work due to the accident from 1/28 to 2/4. In applying subsection 440.12(1), the JCC is to take into account his credit to the E/C for TTD paid from 2/12 through 2/18. If that credit stands, the E/C will owe no TTD or PICA. **Click here to view Opinion**

Lagine v. Key West Reach Owner, LLC, 2017 U.S. Dist. LEXIS 122898, (S.D. Fl, 8/4/2017)
W/C Immunity/Negligence/ Intentional Infliction of Emotional Distress

The District Court granted the Employer Defendant's Motion to Dismiss multiple counts of the Complaint. The plaintiff worked at a hotel gift shop. She sued the employer over two purported assaults by a hotel guest; alleging the guest initially assaulted her, then said he would return, which he did, and assaulted her a second time. The Plaintiff's Complaint stated she informed management of the first incident, was told to return to the gift shop, and that the hotel did not notify police or ensure her safety prior to the second incident. The Court dismissed claims for Negligent Hiring, Negligent Supervision and Negligent Training, agreeing with the Employer that the "virtually certain" standard did not apply as an exception to W/C immunity under F.S. 440.11(1)(b). Under that subsection, the Plaintiff must allege that an employer's actions show (1) "[t]he employer engaged in conduct that the employer knew, based on prior similar accidents or on explicit warnings specifically identifying a known danger, was virtually certain to result in injury or death to the employee;" and (2) "the employee was not aware of the risk because the danger was not apparent;" and (3) "the employer deliberately concealed or misrepresented the danger so as to prevent the employee from exercising informed judgment about whether to perform the work." All three elements must be proved by clear and convincing evidence to overcome statutory immunity of the employer. (citations omitted). The Court found the reported "human actions" were less predictable than those in Turner v. PCR, where an employer's knowledge of high risk of injury or death from prior uncontrolled explosions satisfied the standard. They also found she knew of the danger, and the Employer did not conceal or misrepresent the danger. Plaintiff's count for intentional infliction of emotional distress was also dismissed. Florida law provides that four elements must be pleaded and supported by factual allegations to support a

claim for intentional infliction of emotional distress: which are (1) The hotel's (here) conduct was intentional or reckless (i.e. they knew or should have known that emotional distress would likely result; (2) the conduct was outrageous, that is, as to go beyond all bounds of decency, and to be regarded as odious and utterly intolerable in a civilized community; (3) the conduct caused emotion[al] distress; and (4) the emotional distress was severe. The Court found the Complaint failed to allege sufficient facts under the second element, which in Florida is a high bar, especially in the employment context. **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.

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