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# Case Law Update

Weeks of August 26, 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*

**Godwin v. Hillsborough County School Board/Broadspire, (Fla. 1st DCA 8/29/2019)**
**Expert Medical Advisors/Ex Parte Communication**

The DCA affirmed the JCC's denial of compensability without comment. However, they wrote to address the claimant's allegation that the JCC's ex parte contact with the EMA was error. After the JCC noted the EMA's report requested the claimant submit to further testing, the JCC conferred with the EMA, conducted a status conference and ordered the claimant to return for testing. The claimant did not object to this at the time, only on appeal, arguing they had no recourse at the time. The DCA disagreed, suggesting that the claimant could have sought recusal for the ex parte communication. Likewise, the DCA noted the JCC could have indicated his intent to confer with the EMA to the parties prior to the conference. **Click here to view Opinion**

**Napier v. City of Riviera Beach/Gallagher Bassett, (Fla. 1st DCA 8/29/2019)**
**Final Orders/Findings on Issues not the subject of hearing**

The DCA affirmed the JCC's finding that the requested surgery was not compensable. They also affirmed his finding that the pars defect was compensable. However, they reversed as to the JCC's finding of MMI, as that issue was not before the JCC. Ten days prior to the merit hearing, the claimant filed a PFB seeking indemnity. That issue was reserved upon, as it had not been mediated. The only issue before the JCC was compensability of back surgery. They noted this did not require a determination of MMI as to whether or not it was awardable. Therefore, the DCA ordered that the JCCs findings as to MMI be stricken from the Order. **Click here to view Opinion**

**Schiano v. City of Hollywood Police Dept./Employer's Mutual, Inc., (Fla. 1st DCA 8/21/19)**
**Statute of Limitations/Estoppel**

**Bill Rogner – Appeal, Andy Borah – Trial**

The DCA affirmed the JCC's finding that the claim was barred by the Statute of Limitations (SOL) and that estoppel did not apply. On 8/30/2017, the claimant attorney faxed a letter to the E/C requesting a replacement neurologist, and a one-time change in orthopedist. The next day, the claimant filed a PFB seeking the same benefits. On 9/1/17, the E/C attorney emailed the claimant attorney, stating that Dr. Brown would be authorized as the 1x change, and providing the name of the new adjuster. On 9/6/17, the E/C filed a response to the PFB, indicating no benefits would be provided as the SOL had run. At the Merit Hearing, the claimant argued the E/C's 9/1 email was an initial response to PFB, and as it failed to assert SOL, waived the SOL defense. Alternatively, they argued the promise to provide the benefits in the email revived the SOL. The JCC accepted the E/C arguments that the email responded only to the fax, and the 9/6 response to the PFB appropriately invoked the SOL. The JCC found the statute was not revived, as the statement that care would be provided was not provision of a benefit or an acceptance of responsibility, as in agreeing to pay a bill for services rendered. The DCA examined SOL case law (finding the parties agreed the time had run) and the claimant's avoidance theories that the E/C failed to assert the SOL in their initial response, and estoppel. Noting that estoppel requires a misrepresentation of a material fact, reliance on that misrepresentation, and a change in position to the detriment of the party, the DCA stated it could affirm based on CSE alone, as the claimant never alleged reliance upon the 9/1 email. To the contrary, the claimant filed the PFB *prior* to receipt of the email. The DCA also rejected claimant's argument that the E/C's assertion of the SOL ran contrary to the legislative intent of the pre-suit resolution process, the claimant only raised that argument on appeal, and thus did not properly preserve it for review. **Click here to read opinion**

**SBCR, Inc/BITCO Ins. Co. v. Doss, (Fla. 1st DCA 8/1/2019)**

**PTD Supps/Entitlement after Age 62**

The DCA reversed the JCC's award of PTD supps (2008 DOA) after claimant turned 62. The DCA found no competent substantial evidence to support the finding that the compensable injury prevented the claimant from working sufficient quarters to be eligible for SSD. The E/C voluntarily accepted the claimant as PTD in 2009, paying PTD and supplemental benefits. When the claimant turned 62, they stopped paying the supplemental benefits pursuant to F.S. s. 440.15(1)(f), which allows this "… *unless the employee is not eligible for social security benefits under 42 U.S.C. s. 402 or s. 423 because the employee's compensable injury has prevented the employee from working sufficient quarters to be eligible for such benefits."*

Under the Federal Statutes cited in 440.15(1)(f), insured status for social security disability requires, among other things, that an individual have at least forty quarters of coverage by age 62, and that not less than 20 quarters of this coverage fall within the ten-year (40-quarter) period immediately before the date in which the other requirements are satisfied. Claimant appeared to have the credits for SSR eligibility, but the JCC based his finding on a lack of quarters for SSD eligibility solely on claimant's unsubstantiated testimony that he was told he didn't have enough quarters, and that he would have

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continued working with the employer but for his accident. The DCA noted there was no evidence of how many quarters he was short, the date of his disability for SSA purposes or other relevant dates, or the dates of the relevant ten year period. The DCA found it notable that his nine year work history with the employer was usually only half-year work, and that prior to that he worked jobs without SSA coverage. The determination of whether he worked sufficient quarters or whether the injury prevented such work was purely speculative. **Click here to view Order**

# *Federal District Court*

**Sbrocco v. Hartford Ins. Co./Dr. Stephen Schengber, (M.D. Fla. 8/14/2019)**
**Workers' Compensation/Allegations of RICO Violations**

The District Court granted Defendants' Motion to Dismiss. The *pro se* Plaintiff received workers' compensation benefits following his 2014 hand injury, including a JCC ordered evaluation for psychological issues. In January of 2019 , Plaintiff dismissed his pending case and filed a complaint in Federal Court, alleging Federal RICO claims, and other various state law claims including negligent and intentional infliction of emotional distress on the part of Hartford and Dr. Schengber.

In bringing a RICO claim, the Plaintiff must allege among other things, an injury to "business or property". Plaintiff alleged his WC claim had been mishandled and wrongfully denied. The District Court noted that while the 11th Circuit had not addressed this scenario, Jackson v. Sedgwick, 731 F.3d 556 (6th Cir. 2013) did address a similar RICO claim in Federal Court of a party alleging RICO violations for their receipt of less than they felt entitled to under WC. The District Court noted Jackson dealt with alleged losses that were "simply a shortcoming in the compensation they believed they were entitled to receive for a personal injury[,] [t]hey are not different from the losses the plaintiffs would experience if they had to bring a civil action to redress their personal injuries and did not obtain the compensation from that action they expected to receive." The Court agreed with that reasoning, further noting that in the Eleventh Circuit, personal injury and related physical symptoms do not suffice to state an injury under RICO. As the Federal Claim was dismissed, no jurisdiction remained to entertain the remaining state claims. **Click here to view Opinion**