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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) or Matthew Troy (mtroy@hrmcw.com) with questions or comments on any of the listed cases.

District Court of Appeal Cases

*****Maximum Workers' Compensation Rate, Effective January 1, 2016 is $863.00*****

Jennings v. Habana Health Care Center/Gallagher Bassett **(Fla. 1st DCA 12/28/15)**
Prevailing Party Costs/Applicable Statutes

The claimant appealed the JCC's denial of prevailing party costs, arguing the JCC based her denial upon the incorrect subsections of the statute. Claimant requested authorization of an orthopedic evaluation in a PFB which the adjuster received on 9/11/14. The next day, the adjuster informed the claimant attorney an appointment had been set for 9/15/14. The JCC denied prevailing party costs under F.S.§440.192(8) and s. 440.34(3) finding that as the E/C responded within 14 days under the first subsection, and within 30 days (eliminating attorney fee entitlement) under the second subsection, no fees or costs were due from the E/C. The DCA, however, noted that neither of those subsections pertain to costs. Prevailing party costs under F.S.§440.34(3) are available to the party that prevails "in any proceedings", which here were initiated with a PFB. The agreement to provide the benefit after the PFB designated the claimant as the prevailing party for the purpose of costs (presumably certified mail costs). The opinion notes the E/C did not challenge the "good faith" efforts to resolve the dispute prior to the filing of a PFB. However, Palm Beach County School Dist. v. Blake-Watson held "The JCC erred in dismissing the July PFB because section 440.192 does not independently give the JCC authority to "go behind" a counsel's representations of good faith effort to resolve the dispute in a PFB". **Click here to view Opinion**

Certistaff, Inc./Summit Holdings, **(Fla. 1st DCA 12/11/15)**
MCC/Pre-existing Conditions/EMAs

The DCA reversed the JCC's ruling that the MCC of the claimant's need for shoulder replacement surgery was his 2013 industrial accident. The E/C denied ongoing care based upon evidence of pre-existing osteoarthritis and rotator cuff arthropathy. The claimant testified he had a right rotator cuff repair in 1999 or 2000 with two prior left rotator cuff repairs as well. He testified thereafter he would take over the counter meds for pain, but that he was able to work albeit with adjustments to his schedule. Based upon disagreements regarding MCC, Dr. Greene was appointed as the EMA, and ultimately testified the MCC of the need for surgery was the pre-existing condition. He testified there was a "high probability" the claimant would have needed the surgery without any intervening accident based upon his underlying degenerative arthritis. The DCA noted the JCC's error was in focusing solely on whether the claimant had been undergoing ongoing medical care prior to the industrial accident, to the exclusion of his testimony regarding ongoing pain. They found the evidence supported the EMA's opinion, and no clear and convincing evidence existed to reject the presumptively correct opinion that the pre-existing shoulder condition was the MCC for the requested procedure. **Click here to view Opinion**

*****Florida Supreme Court declines to accept jurisdiction on Padgett*****

On 12/22/15, the Florida Supreme Court declined to accept jurisdiction on the "Padgett" decision, noting that no further requests would be considered. Decisions are still pending on the Westphal, Castellanos and Stahl cases from the Supreme Court.

The Third DCA had summarily reversed a circuit judge's much discussed order last year finding F.S. s.440.11 unconstitutional. That opinion noted the lack of the threshold issues of ripeness and mootness precluded them from addressing the underlying alleged constitutional arguments of FWA, WILG and Padgett, and the impermissible "piggy backing" of new plaintiffs onto a predecessor case could not create standing where the first plaintiff dismissed his claim.

*****JCC's striking authorized treating doctors' opinions for accepting payment above fee schedule*****

In June, we reported on a recent Merit Order from JCC Kerr , that struck all the opinions of an "authorized" doctor. Judge Medina-Shore issued a similar Order on 11/13/15. Both of these decisions accepted the claimant attorneys' arguments that where the E/C pays in excess of the fee schedule, and does not do so in compliance with F.S.§440.13(13)(b), the doctor is not properly authorized and therefore the opinions don't come in under F.S.§440.13(5)(e).

Whether carriers or TPAs/SAs agree to pay doctors via their own agreements or something generated internally, HRMCW recommends incorporating the following language or amending current agreements to avoid having an authorized doctor's opinions stricken. Please contact our office if you would like to discuss this issue further.

Based on the amount of time and effort as well as the quality of reports generated by Dr. _____, you agree to depart from the workers' compensation fee schedule for a one time initial fee of $_____. You will accept 100% of the Workers' Compensation fee schedule for all subsequent authorized office visits. You specifically agree to the bolded language below:

As per F.S.§440.13(13)(b), this office agrees to timely scheduling of appointments for the injured worker. This office will participate in return to work programs with the injured workers' employer. This office will expedite the reporting of treatments provided to injured workers (which will typically be done on the same day

of the visit or within one or two business days after the visit. This office agrees to participate in continuing education, utilization review, quality assurance, pre-certification, and case management systems that are designed to provide needed treatment for injured workers.

Should the patient not show, cancel or reschedule less than 3 business days from the scheduled appointment, you further agree to a $200.00 no show/cancellation fee.

Humana Medical Plan v. Reale **(Fla. 3d DCA 12/2/15)**
Federal Jurisdiction/MSPA actions

Humana runs a Medicare Advantage plan that issues Medicare payments on behalf of Medicare recipients. The plaintiff settled her personal injury case for $135,000 without taking into account the $19,155.41 Humana paid for her injuries under Medicare. While Humana pursued a Federal MSPA (Medicare Secondary Payer Act) claim against the claimant in Federal Court, the plaintiff filed a separate declaratory action in state court under Florida subrogation and collateral source law. In a lengthy opinion, the Third DCA held the trial court erred in determining that a personal injury plaintiff could remove Humana's attempt to collect payments under Medicare to state court, finding the state court lacked jurisdiction, and Florida law was inapplicable and pre-empted by Federal law in regard to MSPA actions. **Click here to view Opinion**

Gobel v. American Airlines/Sedgwick **(Fla. 1st DCA 11/24/15)**
Costs payable by E/C

The E/C agreed to provide certain medical benefits and stipulated to attorney fees and costs payable by the E/C. The Motion for approval of fees and costs listed payment of $200 in costs without explanation. The JCC indicated he would not approve these costs as the lack of description suggested it may be an attempt to obtain additional fees. The claimant attorney argued under 60Q-6.123(5) she was not required to list the costs as they were under $250. The DCA noted that Rule 6.123(5) applies only to washouts under F.S. 440.20(11) and was inapplicable here. Rule 60Q-6.124(2) applies to payment of non-washout attorney fees and costs, and allows the parties to submit fees and costs for approval without documentation, as the E/C rather than the claimant is paying those fees and costs. No specific rules apply in that situation, rather general rules of contract and settlement. The E/C wisely took no position in this appeal. **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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