



Case Law Update

December 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

Levy County Transit/ Gallagher Bassett Services vs Kokenzie, (Fla.1st DCA 12/21/2017)
Misrepresentation and Attorney Fees/Appellate Jurisdiction

In a prior appeal of this case, the DCA affirmed the JCC's rejection of the fraud defense, but reversed an award of TPD, finding the JCC erred in applying MCC. On remand, the JCC rejected the fraud defense, denied TPD, but awarded fees for successfully defeating the fraud defense (reserving jurisdiction to determine amount). The E/C again appealed, arguing that as there were no past benefits awarded, and that no future benefits could be awarded as the claimant failed to prove the injury was work related, no fees could be due. While acknowledging that ultimately may prove correct, the DCA cited to numerous cases noting that a determination as to entitlement to fees is not appealable where jurisdiction is reserved to determine the amount. Accordingly the DCA dismissed the appeal for lack of jurisdiction. [Click here to view Opinion](#)

Teco Energy Co. v. Williams, (Fla. 1st DCA 12/19/2017)
MCC and Pre-Existing Conditions/120 Rule – Waiver and Estoppel

The DCA reversed the JCC's ruling that the E/C was barred as a matter of law from asserting pre-existing osteoarthritis was the MCC for a claimed left total knee replacement. The DCA also reversed the JCC's sua sponte application of waiver of the 120 day rule, where it was not specifically pled by the claimant. In 2011, Dr. Morse operated on the claimant's right knee for a non-WC injury. He also examined the claimant's left knee, and noted symptoms suggestive of arthritis or a tear, but there was no need for treatment. In 2013 the claimant had a compensable left knee injury. The E/C authorized Dr. Morse, who diagnosed an acute tear with arthritis. He ultimately repaired the tear and placed the

claimant at MMI. The claimant returned a year later, and the doctor diagnosed arthritis, recommended viscosupplementation injections and a loading brace, but noted the symptoms were not work related. The carrier provided the injection, but ultimately denied a left total knee replacement based on MCC. Ultimately, an EMA opined the MCC of the need for the TKA was the pre-existing osteoarthritis. However the JCC found the pre-existing condition could qualify as such under case law, and further held that the E/C waived its right to deny the treatment under the 120 day rule. The DCA reversed, holding that the prior arthritic condition need not have required medical treatment or caused disability or impairment prior to the IA. Rather there must be medical testimony that the pre-existing condition is the MCC of the current requested treatment. They further held the osteoarthritis is a pre-existing condition under F.S. 440.09(1)(b). In regard to the 120 waiver defense, the DCA rejected the claimant’s position that the defense was raised “in substance” in the Pre-Trial, finding that “as an affirmative defense, the “120-Day Rule” pursuant to section 440.20(4), must be timely and specifically pled by a claimant and the JCC may not assert the defense on her own. [Click here to view Opinion](#)

Ascension Benefits/City of Orlando v. Robinson, ___ So.3d ___ (Fla. 1st DCA 12/27/2017)

Expert Medical Advisors/Presumption of Correctness

The DCA reversed the JCC’s award of surgery. The claimant developed compensable upper extremity conditions. Following a finding of requisite disagreement in medical opinions, the JCC appointed Dr. Rayhack as the EMA to determine whether surgery was reasonable, medically necessary and causally related. The JCC found the EMA testified the surgeries would be reasonable, but did not address medical necessity, which the claimant is also required to prove. The EMA specifically stated he did not believe the procedures were medically necessary and would not recommend them. The DCA held the JCC erred in failing to address medical necessity, afford the EMA’s opinion the statutory presumption of correctness, or articulate clear and convincing evidence to the contrary which would allow him to reject the medical necessity opinions. [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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