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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

American Airlines/Sedgwick v. Hennessey, **(Fla. 1st DCA 2/23/2015)**
Attendant Care/Submission of Evidence

The E/C appealed an award of attendant care for a finite period, payable to the Claimant's wife. Claimant cross-appealed seeking an increase in the time awarded. Claimant's compensable torn meniscus surgery resulted in an infection requiring several hospital stays and a lengthy course of antibiotics. The E/C provided a home health nurse on a daily basis until the wound healed. The claimant had the authorized doctor provide a hand-written, undated note stating the claimant's wife was providing non-professional attendant care 24 hours per day from the date of accident (9/29/13) and was to continue to do so until the claimant healed. In a subsequent medical report, the doctor clarified that the non-professional attendant care was needed from 9/29/13 through March 11, 2014 at 12 hours daily.

At trial, the E/C sought to admit the home health nurse's deposition, although they had not included the nurse as a potential witness on the pretrial. The JCC sustained the claimant's objection and refused to admit the deposition. The 1st DCA discussed past case law allowing the admission of late disclosed evidence which does not result in actual prejudice. The opinion notes that the claimant merely expressed "surprise", and the JCC made no findings as to why she sustained the objection. The 1st DCA noted that because the excluded evidence "could have had an impact on the awarded benefits, the award is reversed and remanded for consideration of the nurse's testimony."

Finally, the 1st DCA agreed with the E/C's argument that a "blanket award" of past attendant care (i.e. 8 hours per day & 4 hours per day, 7 days per week) was not appropriate. Rather than the 56 hours per week awarded by the JCC, the actual attendant care provided should be awarded (i.e. 7.5 hours per week). The DCA also precluded the Claimant from presenting additional evidence on remand. **Click here to view Opinion**

Todd Perry's former attorneys, James A. Walker, Esq. and James A. Walker, P.A. v. Todd Perry, Signal Services Industries Inc. and Bridgefield Employers Ins. Co.,

(Fla. 1st DCA 2/26/2015)

Attorney Fees and Costs/JCC jurisdiction

The claimant's prior attorney, who represented the claimant for multiple WC claims and federal wage and hour claims, appealed an order of the JCC which sought to determine what amount of the $40,000 that attorney held in trust should be awarded to him. The former attorney argued the JCC did not have jurisdiction to rule on the cost issues related to the Workers' Compensation case, which the DCA rejected. They also held the JCC correctly determined she did not have jurisdiction to rule on costs associated with attendant wage and hour claims under federal law. The DCA did hold that the JCC reversibly erred in ruling on an issue of costs relative to the pending appeal of an E/C paid attorney fee and cost issue, as the issue of claimant paid appellate costs was not yet ripe. **Click here to view Opinion**

Gonzalez v. McDonald's/Amerisure, **(Fla. 1st DCA 2/18/15)**
Attorney Fees (Bill Rogner)

In a brief, written PCA opinion, the 1st DCA again rejected a claimant's arguments that they were entitled to an hourly fee on a post 9/1/09 date of accident case. **Click here to view Opinion**

Roof Painting by Hartzell, Inc./Summit Claims Holdings/Claims Center v. Hernandez/Colors Const./Guarantee Ins., **(Fla. 1st DCA 2/16/15)**
Dual Employer Doctrine

The DCA reversed and remanded the JCC's finding that the claimant was a dual employee of a contractor and subcontractor, and that each was liable for benefits to the claimant equally. A property management company hired Hartzell to perform pressure cleaning and staining work. Hartzell sub-contracted with Colors Const. who would provide the labor for the job. The claimant only pressure washed and stained as part of his job for Colors. Although neither party argued for its application, the JCC determined that each entity was a dual employer. The DCA rejected this analysis, noting such a finding requires (1) a single employee under contract with two employers, (2) who is under separate control of each employer and (3) who performs services for each separately for largely unrelated functions. The court noted that F.S. 440.10(1)(b) appeared more applicable as the express terms of the subcontract seemed to provide coverage for all employees, including the claimant. A footnote indicated that the employer/employee relationship issue was determined prior to the merit hearing in a separate Evidentiary Order by a different JCC. The DCA affirmed the cross appeal issues of Colors challenging the JCC's striking of their defenses and disallowing their proposed amendment to include a "borrowed servant" defense without comment. **Click here to view Opinion**

Miami Dade County v. Mitchell, **(Fla. 1st DCA 2/5/2015)**

Law Enforcement Presumption/Congenital Conditions

The JCC found the E/C failed to rebut the law enforcement presumption under F.S. s. 112.18(1)(a). The parties stipulated that the claimant met all elements, which then places the burden on the E/C to show, in this case, that the claimant's supraventricular tachycardia (SVT) was due to a non occupational cause. Two doctors testified and the JCC found the evidence did not support the E/C argument that the claimant's slow pathway accessory (SPA) was congenital. The DCA reversed, noting that while initially the medical evidence indicated the doctor accepted by the JCC did not know when the SPA occurred, on re-direct, the doctor testified the claimant was most likely born with the condition. As the Order did not reject or reconcile this testimony, the decision was reversed and remanded for a re-examination of the medical evidence. **Click here to view Opinion**

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