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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) with questions or comments on any of the listed cases.

District Court of Appeal Cases

Govea v. Starboard Cruise Service, Inc./Travelers Ins. Co, 212 So. 3d 466 (Fla. 1st DCA 2/7/17)

Prevailing Party Costs/Constitutional Issues

Claimant appealed the JCC's award of prevailing party costs to the E/C, alleging substantive and procedural error,(which they affirmed without comment) as well as constitutional concerns. In relation to the constitutional claims, the claimant argued the award against him created an access to courts issue. To have standing to make such a challenge, the claimant must show a real and immediate injury, rather than one that is conjectural or hypothetical. The DCA noted the claimant in the 2011 Punsky case argued most claimants on the losing side of litigation would be unable to pay, but presented no evidence of an actual injury. Although the claimant argued the cost award created a "chilling effect", this potential adverse effect alone did not create the requisite standing to allow the claimant to prevail.

Click her to view Order

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Hillsborough County/Broadspire v. Kubik, **(Fla. 1st DCA 2/10/2017)**
Admissibility of EMA opinion/Basis for TTD award

The DCA reversed one issue on appeal, and another on cross appeal. The E/C argued the JCC should not have excluded the EMA's opinion regarding causation of the need for treatment of Claimant's neck. The DCA agreed that the JCC should instead have admitted the opinion into evidence without giving it the presumption of correctness prescribed in F.S. s. 440.13(9) and the recent Lowe's Home Ctrs., Inc. v. Beekman opinion. (holding EMA's opinion beyond scope of inquiry was admissible but not presumptively correct). They noted the error was not harmless because the JCC's perception that a preexisting condition's worsening could not create a break in the causal chain was formed without the benefit of Certistaff, Inc. v. Owen, 181 So. 3d 1218 (Fla. 1st DCA 2015).

The Claimant cross-appealed the portion of the Order denying TTD benefits based upon the EMA's opinion, despite evidence that Claimant's authorized treating provider placed him on a TTD status and never informed him he could return to work. The DCA held the JCC should have relied on case law holding that an injured worker can rely on an authorized treating provider's instruction to refrain from working, "even assuming retrospective testimony that claimant could have worked during this period." Charles v. Suwannee Swifty, 622 So. 2d 114, 115 (Fla. 1st DCA 1993). On remand the JCC is to consider the causation evidence, giving appropriate weight to the EMA opinion, and to determine the period for which the claimant is entitled to TTD. **Click here to view Opinion**

Brighthouse/ESIS v. Yohn-Weinstein, **(Fla. 1st DCA 2/10/2107)**
Appellate Procedure/Motion to Stay Proceedings

The DCA affirmed the JCC's Order denying E/C's motion to stay proceedings. A concurring opinion wrote to clarify that the E/C sought review of the JCC's order denying its motion to stay proceedings, with a prior final merits order of the JCC still pending before the DCA. In the interim, another final hearing is scheduled for March 9, 2017 on subsequently filed PFBs which are not the subject of the pending appeal. The E/C's attempt to seek review under Fl. R. App. P. 9.130 was improper, as that section applies to review of Final Orders or Non-Final Orders, but not review of orders denying a stay of the entire underlying proceedings. A request that a JCC stay proceedings until resolution of issues raised by a previous order pending appeal is procedurally appropriate under rule 60Q-6.115, F.R.P.W.C.Adj., and rules 9.180(c)(1) and 9.190(e)(3)&(4), Fl.R.App. P. Appellate review of the resulting JCC's order is governed by rule 9.100(c)&(e), Fl R.App. P. **Click here to view Opinion**

RetailFirst Insurance Company/Servpro of S. E. Tampa v. Davis, (Fla. 1st DCA 1/23/17)
One time change/Claimant's ability to choose following untimely response

The First DCA ruled that a claimant's right to choose a 1x change in physician following an untimely response by the E/C does not result in the claimant's ability to choose a doctor in any specialty. Rather, the language of F.S. s. 440.13(2)(f) indicating that the prior doctor "in the same specialty" shall be de-authorized provides sufficient evidence of the legislature's intent to require the 1x change to be in the same specialty as the prior doctor. In the underlying case, the JCC allowed the 1x change to be in a different specialty based upon her reading of the last sentence of that subsection, which states that where an E/C does not timely respond, an "….employee may select the physician and such physician shall be considered authorized if the treatment being provided is compensable and medically necessary." The DCA found that while this sentence may suggest the only requirement is that the treatment be compensable and medically necessary, this ignores the "in the same specialty" language preceding that sentence. The court held that such an interpretation could result in authorization of specialists "wholly unsuitable for the "course of treatment"", also noting that the statute provides separate subsections to allow authorization of separate subspecialties. This case resolves what the DCA noted was a "split" among JCC in interpreting this subsection. **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.