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Case Law Update

Weeks of July 19, 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

Publix/Publix Risk Mgmt. v. Carter, **(Fla. 1st DCA 7/29/2019)**
TPD/Causal Connection

The DCA reversed the JCC's award of temporary partial disability benefits. Shortly before her industrial accident, the claimant voluntarily transferred from her deli management position to a deli position, to be closer to home. This resulted in the claimant earning $2.55 less per hour, and reduced her overtime opportunities. The claimant then injured her back, but was returned to work on light duty, making the same lowered wages, and working the same pre-injury hours. As her AWW was based upon wages earned primarily in the deli manager position, the claimant subsequently filed a PFB for TPD benefits, arguing she was entitled to be paid the difference, which the JCC awarded. The DCA reversed. They analyzed their prior decision in Vencor v. Ahles, which held a nurse terminated for theft but not yet at MMI and with restrictions, was not entitled to TPD as her misconduct and not her injury, caused the wage loss. Similarly, here the DCA found the claimant's voluntarily acceptance of a lower paying position prior to the accident caused her wage loss. **Click here to view Opinion**

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Clarke v. Fl. Dept. of Financial Svcs./Div. of Risk Management, (Fla. 1st DCA 7/23/19)
TPD Benefits/Sufficient Findings to Support Denial

The DCA affirmed the JCC's denial of PTD benefits, but reversed and remanded for additional findings as to entitlement to TPD. The claimant sustained compensable physical and psychiatric injuries in 2003. After a fusion, he achieved physical and psychiatric MMI as of 2/13/18. He last worked for a subsequent employer on 6/30/14. After leaving to attend to personal matters, the opinion states his job was not available upon his return, and he has not worked since that date. The JCC denied further TPD and attorney fees and costs based upon voluntary limitation of income. The DCA reviewed Toscano, and found the JCC made no findings as to whether the claimant's job was available after his return. The E/C argued at trial and on appeal that a break in the causal chain occurred, but the DCA found the record lacking in evidence to support that argument. On remand, if the Claimant is found to have refused "employment suitable to" his capacity, s. 440.15(6), Florida Statutes (2003), applies. However, if Claimant is found to have left his employment at his last employer "without just cause" then TPD benefits "shall be payable based on the deemed earnings" of Claimant just as if "he had remained employed." § 440.15(7), Fla. Stat. (2003). **Click here to view Opinion**

MJM Electric, Inc./Sedgewick CMS v. Spender, (Fla. 1st DCA 7/29/2019)
TPD/Continued offers of employment

The First DCA reversed and remanded the JCC's order rejecting the E/C's voluntary reduction of income defense. The authorized treating physician notified the E/C of the claimant's work restrictions for his shoulder, who subsequently called the claimant and left messages to relay a light duty job offer. The claimant never responded, nor did he return to the employer in a light duty capacity. Subsequently the employer terminated him for job abandonment. At trial, the claimant testified he was unaware of the Employer's light duty offer because he "does not answer the phone or listen to voicemails from phone numbers he does not recognize". In light of the testimony, the JCC found that the E/C offered suitable light duty work within his restrictions that the Claimant refused when he "chose not to listen to his voicemails and did not contact the employer about returning to work". However, the JCC awarded TPD benefits from the date of termination and continuing because the E/C did not meet their burden in showing that suitable available employment existed after the termination. On appeal, the E/C focused on the Moore case, which held the Employer is not required to continually re-offer a job to avail itself to the refusal of suitable employment defense. The first DCA noted that termination of employment will result in a rescission of an offer of suitable employment but a claimant may nevertheless be found to continue to refuse suitable available employment. Based on the JCC's order, the First DCA found the JCC was not clear as to why she believed the claimant was owed TPD benefits post-termination. Thus, the order was remanded to determine whether the suitable employment remained available post-termination, whether the claimant continued to refuse such suitable employment, and whether such refusal was justified. **Click here to view 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 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 Opinion**

Heredia v. Beach and Associates/Gross, **(Fla. 2d DCA 7/24/2019)**
Workers Compensation Immunity/Horizontal Immunity

Lennar Homes was developing a tract of property it owned. The Plaintiff, Hereida, worked for QGS, a road clearing company. Hereida alleged that Gross, an employee of JBA, a surveying company, ran into him on site and injured him. Hereida sued JBA and Gross in circuit court, and both asserted the negligence claims were barred under Workers' Compensation. JBA and Mr. Gross argued that QGS and JBA were both subcontractors of Lennar for the development. Further, JBA and Mr. Gross maintained that QGS, JBA, and Lennar had workers compensation insurance coverage for this project—QGS' policy provided coverage for its employees; JBA's policy covered JBA's employees; and Lennar's policy extended coverage that "would have provided coverage to the Plaintiff." As such, the defendants argued, there was horizontal privity between the subcontractors, JBA and QGS, so that JBA and Mr. Gross were immune from civil liability for QGS' employee's injuries. The Plaintiff pointed out that section 440.10(b) only creates horizontal privity when "a contractor sublets any part or parts of his or her contract work to a subcontractor or subcontractors." Because Lennar was developing the project for itself as the owner, and not under a contract they had with any third party, Lennar could not be considered a "contractor" that was "subletting" work under this section. Accordingly, he argued, neither JBA nor Mr. Gross were immune from civil liability as a matter of law. The Judge granted SJ for defendants. The DCA examined prior immunity cases, and found there was no evidence that Lennar was performing any work of any kind on behalf of a third party. As such, final summary judgment in favor of JBA and Gross was entered in error. **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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