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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

Baycare Home Care Medical Supply/Commercial Risk Mgmt. v. Santiago,
(Fla. 1st DCA 6/27/2017)
Expert Medical Advisors/Ability of JCC to Reject EMA opinion

The claimant alleged a work place neck injury which produced differing medical opinions regarding the MCC of a cervical strain vs. an underlying degenerative disease/condition. Ultimately, the EMA appointed by the JCC issued a report concluding the claimant's work caused the strain, but that he was fully recovered and was at MMI with a 0% impairment rating. The parties deposed the EMA, where his conclusions became less clear, and he offered contradictory testimony on causation and MMI. The claimant unsuccessfully sought to obtain an alternate EMA, but the JCC denied that motion finding the EMA's testimony was "competent" and "responsive". At hearing, however, the JCC awarded TPD benefits, finding that the claimant's pre-existing degenerative disease was not "legally a pre-existing condition". She concluded that since that condition was "asymptomatic and without treatment or disability before the accident…the issue of MCC should not be considered". The DCA reviewed the EMA statute and prior cases, noting that rejection of the EMA's almost conclusive opinion requires clear and convincing evidence. The DCA remanded to allow the JCC to either accept the EMA's conclusions or to articulate the findings necessary to reject it. **Click here to view Opinion**

Lowman v. Racetrac Petroleum/Broadspire, **(Fla. 1st DCA 6/27/2017)**
Disqualification of JCC

The DCA granted claimant's Writ of Prohibition following the denial of his Motion to Disqualify the JCC. Under the applicable standard, a motion to disqualify based on prejudice or bias is legally sufficient if "the facts alleged would place a reasonably prudent person in fear of not receiving a fair and impartial trial." The claimant alleged that he was in such fear based on a prior denial of a motion to continue in an unrelated case, where the JCC found the claimant attorney's representations were not credible. Despite having granted a similar Motion to Disqualify in another case filed at the same time, the JCC denied claimant's Motion as legally insufficient. The DCA found the case law cited by the JCC in his Order denying the Motion dealt with an attorney seeking a general disqualification in multiple cases, and were inapplicable. The allegations in the Motion must be accepted as true, and the claimant's fear of not receiving a fair and impartial trial due to the JCC's statements regarding the claimant's attorney were legally sufficient to support the Motion. The DCA quashed the Order denying the Motion and ordered the Deputy Chief Judge to re-assign the case. **Click here to view Opinion**

Phares v. School Board of Lee County/Johns Eastern, **(Fla. 1st DCA 6/21/2017)**
One Time Change Jonathan Cooley/Bill Rogner

Although the DCA did not write an opinion, they affirmed the JCC's Order that the adjuster acted absolutely correctly in responding to the one-time change request. The underlying Order below contains all of the facts, surrounding the familiar situation of authorizing doctors, forwarding records, and then waiting on the doctor to accept the E/C's authorization. In the underlying Order, the JCC read the statute and case law to apply a reasonableness standard in obtaining an appointment, so long as the EC timely responds with the name of a specific physician within five days, even if the appointment ends up with a different physician from the one originally named because the initial doctor selected declines the assignment. **Click here to view Opinion**

Levy County Transit/Gallagher Bassett v. Kokenzie, **(Fla. 1st DCA 6/14/2017)**
Temporary Partial/Requisite Medical Evidence

The JCC denied the E/C's misrepresentation defense, which the DCA affirmed. However, the DCA reversed the JCC's award of temporary indemnity. After a March 2015 neck injury, the claimant obtained treatment with Dr. Trimble, who opined the MCC of the claimant's neck complaints was pre-existing degeneration of the cervical spine. Thereafter, the claimant treated with Dr. Lowell, who recommended cervical surgery. The claimant filed a PFB for the surgery, which the E/C denied based upon the opinions of Dr. Trimble and their IME. The DCA noted it is the claimant's burden to prove (by medical evidence only) that the industrial accident is more than 50% responsible when compared to all other causes. The DCA found that the JCC's Order stated that Dr. Lowell testified that "assuming claimant's neck has been asymptomatic since the early 2000s" the IA would be the MCC. However, Dr. Lowell never actually testified that the IA was the MCC of the need for surgery. Despite being asked hypotheticals by claimant's counsel assuming a history of no recent prior complaints, the evidence did not support those hypotheticals, and did not provide sufficient testimony for the clamant to sustain her burden of proof for MCC. **Click here to view Opinion**

Jimenez v. UPS/Liberty Mutual, **(Fla. 1st DCA 6/19/17)**
Constitutional Challenges to Max CR/Ability to make a Record

The JCC granted the E/C's Motion to Dismiss claimant's PFB, noting he was without jurisdiction to rule on claimant's constitutional challenge to the statute's cap on the weekly compensation rate found in F.S. s. 440.12(2) (2014). The claimant argued this was error, as dismissing the PFB failed to allow the claimant a chance to build a record for his constitutional challenge. The DCA agreed this resulted in irreparable harm/departed from the essential requirements of the law, and granted the Petition of Certiorari. (Citing to HRMCW 2013 Russ v Brooksville Health case). The claimant will be allowed an opportunity to build a record for the appellate court to consider on the constitutional question. **Click here to view Opinion**

Velez v. CoAdvantage/CCMSI, **(Fla. 1st DCA 6/19/2017)**
One Time Change/Statutory Interpretation

The E/C authorized Dr. Munson with Jewett Ortho as the claimant's initial treating orthopedist. Upon his retirement, the E/C authorized Dr. Weber with Orlando Orthopedic. The E/C then timely responded to the claimant's PFB containing a request for a one-time change, authorizing Dr. Meinhardt with Jewett Ortho. Claimant then filed a second PFB asking Dr. Murrah be appointed as the one-time change, arguing that Dr. Meinhardt was an improper choice as he was affiliated with the same practice group as Munson. The JCC granted the E/C's Motion for Summary Final Order, rejecting the claimant's argument that the language in F.S. s. 440.13(2)f) prohibits the E/C from authorizing a doctor that has been previously affiliated with "any" prior physician, hospital or medical group. That subsection states that after the E/C receives the claimant's request for a one-time change of physician in the course of treatment, *"... the E/C has five days to authorize an alternative physician who shall not be professionally affiliated with the previous physician"* (emphasis added). As the DCA stated: "resolution of this case boils down to which physician is "the previous physician" for purposes of F.S. s. 440.13(2)(f). They held that Dr. Weber was that doctor, that prior case law approves a "one-for one exchange of doctors" and as such, Dr. Meinhardt was an appropriate one-time change choice by the E/C. Finding they were without authority to re-write the plain language of the statute, they affirmed the JCC's decision. **Click here to view Opinion**

Arena Football League/Arena Football One, LLC v. Bishop, (Fla. 1st DCA 6/6/2017)
Employer/Employee Relationship – Contractual Interpretation

Claimant played a season of Arena League Football for the Orlando Predators and then left. He later participated in a two day tryout, in which he sustained injuries on the second day. The JCC found the claimant was "under contract" at the time of his alleged injury', and the League appealed. The issue was whether the Standard Player Contract the claimant signed made him an employee entitled to benefits. The contract had two other lines for signatures; one for the "Team Rep"(Mandatory and signed by the coach) and one for "League Signature", which was never signed. The DCA analyzed the contract and the parties' competing arguments under contract law, noting that contracts require mutual assent. They rejected the claimant's argument that the lack of a league rep's signature could be excused as the contract did not specifically say it was required. They also rejected claimant's arguments that provisions in the contract for "disapproval" or approval of the contract by the league suggested an agreement, as without all signatures no contract was ever formed. Finally, the DCA recognized that although conduct of the parties can evidence assent, they found the leagues' only assent was to allow the claimant to tryout. They declined to find that allowing a player to participate in a tryout showed the assent to "hire" the claimant as a football player for the rest of the season. Absent an employer/employee relationship, the DCA reversed and remanded the Order for entry of new Order denying the claims. **Click here to view Opinion**

Delgado v. City Concrete/FCCI, (Fla. 1st DCA 6/6/17)
Attorney Fees/Due Process

The parties settled the case pre-Castellanos, reserving on an E/C paid fee. Post Castellanos, the parties sought approval of a $20,000 E/C paid fee for past benefits obtained. The JCC subsequently held a hearing at his own request to discuss the stipulated fee and a "couple of matters". After a brief discussion, the JCC ordered Claimant's counsel to submit his time records, following which he entered an Order saying he could not, in good conscience, approve the fee, reduced the fee to the stat fee of $4,293.80, and ordered the remainder to be paid directly to the claimant. The claimant appealed on numerous grounds, but the DCA focused on the due process issue. Noting that the parties are required to submit fees for approval by the JCC, and the JCC has the authority and obligation to review fees, due process requires notice so parties may fairly present their case. In contrast to prior case law affirming a JCC's reversal of a proposed fee, in this case the DCA found the JCC's brief hearing and subsequent seven page order which "assumed certain unestablished facts and strongly suggested the attorneys engaged in collusion to commit fraud under F.S. 440.105(4)" did not comport with such requirements. The DCA disagreed with the JCC's findings that an evidentiary hearing took place, as the parties were not asked to submit evidence or witnesses and were not asked about fraud or collusion. The JCC denied subsequent motions for rehearing seeking to dispute the assumed facts and to provide further evidence, which were denied. As such the case was reversed and remanded. The DCA noted the case should not be construed as limiting the power of JCCs to approve or disapprove fees under F.S. 440.34(1). **Click here to view Opinion**

Lewis v. Dollar Rent A Car/ESIS, **(Fla. 1st DCA 6/8/2017)**
FCE/Authority of JCC to Compel

Claimant previously settled her indemnity claims related to the 1989 Industrial Accident. In March of 2016, the E/C filed a Motion to Compel Claimant's Attendance at an FCE. They alleged but did not attach any medical documentation. In May of 2016, the claimant filed a PFB seeking authorization of prescriptions. The day before the parties attended a hearing on the E/C's motion to compel, the E/C e-filed medical records of the authorized doctor that stated the FCE was "medically necessary". The JCC denied claimant's objections, finding the authorized treater's records were admissible, and that there was no showing the claimant did not already have the records. The JCC ordered the claimant to attend the FCE. Claimant filed a Petition for Certiorari review, asking the DCA to find that the order is "(1) a departure from the essential requirements of the law, (2) resulting in material injury for the remainder of the case (3) that cannot be corrected on postjudgment appeal." The last two elements are generally considered together as "irreparable harm." The DCA entered into a lengthy analysis of prior case law analyzing a JCC's authority to order claimants to attend IMEs, EMAs, FMEs and FCEs. They noted that an FCE does not appear in Chapter 440, and discussed prior case law which suggested that an FCE may be compelled where there is "medical necessity". Ultimately, they found that those prior cases do not authorize compelling the claimant, even where medical necessity is shown, and distinguished the JCC's authority where there is no pending PFB which is dependent upon the FCE. They granted the claimant's Motion and quashed the Order compelling her attendance at the FCE. **Click here to view Opinion**