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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

Meyers v. Pasco County School Board/Johns Eastern, (Fla. 1st DCA 6/4/2017)
One Time Change/Need to be in same specialty

The JCC reversed the DCA's decision that the E/C appropriately authorized a neurosurgeon following claimant's request for a statutory one time change from an orthopedic surgeon. The DCA essentially reasoned that "same" does not mean "similar" and while orthopedic and neuro surgeons undoubtedly treat the "same" lumbar conditions, their specialties are not the same, and thus the neurosurgeon did not comply with F.S. s. 440.13(2)(f)'s language. **Click here to view Opinion**

Sarasota School Board/Johns Eastern v. Brockman, (Fla. 1st DCA 6/4/2018)
Temporary Partial/Evidence re. Break in Causal Chain

The E/C appealed the JCC's award of temporary partial disability and PICA. The claimant was a school custodian who was an almost 30 year employee, six months from vesting and retirement. She had a past history of on the job accidents and disciplinary episodes. The claimant sustained her IA in May of 2016, but was returned to work, with the School Board accommodating her restrictions and the claimant earning her full salary. Five months later, she vested and retired. She had not worked or attained MMI as of the Merit Hearing. In response to her claim for TPD post retirement, the E/C denied the benefits, asserting the retirement broke the causal chain between the IA and any temporary wage loss. Although the JCC wrote that the "loss of earnings was caused by the industrial injury and the MCC was not voluntary limitation of income or voluntary retirement," the JCC did not accept one witness over another, or find that the loss of earnings was not caused by the involuntary retirement (termination) independent of the injury. Thus, the DCA remand for the JCC to make a finding, based on the record "as it stands", as to whether Claimant left her employment "for unjustifiable reasons". **Click here to view Opinion**

Brinson v. Hospital Housekeeping Svcs/Broadspire, (Fla. 1st DCA 6/22/2018)
Denial of Benefits for Failing Drug Test/Sufficiency of Evidence Necessary to Rebut Presumption

The JCC denied claimant benefits for failing two drug tests. The claimant appealed, but the DCA found she failed to rebut the presumption attributing her shoulder injury following a fall primarily to the influence of drugs. The drug tests (immunoassay and confirmatory gas chromatography mass spectrometry) were administered on her urine immediately following her accident. Upon hire, the claimant signed a stipulation acknowledging she was subject to drug testing, and that she was aware of the employer's Drug Free workplace and consented to providing samples. F.S. s. 440.09(7)(b) provides that a positive drug test presumes the injury was occasioned primarily by the influence of drugs, but also allows the claimant to rebut that presumption with evidence that the drug did not contribute to the injury. The claimant attempted to rebut the presumption with two medical opinions attacking (1) the limits of drug testing itself and (2) Chapter 440's reliance on drug test results. The DCA found their testimony lacking as to ultimate opinions about her possible impairment and the impact of the test results on her behavior/capabilities at the time. They noted that, under prior case law, she may have been successful had she offered testimony of an external cause for her injury, or that the findings were evidence of "inactive residue of some fairly recent usage". A lengthy dissent addressed limits on drug testing, as well as drug testing research, but the majority noted that the bottom line was that the claimant's experts did not present the required clear and convincing evidence to rebut the presumption that the influence of the drug did not contribute to the injury. The opinion also disagreed the drug test results should have been excluded, as the claimant consented to the tests. **Click here to view Opinion**

Chiavano/Villaverde v. Greater Miami Caterers, Inc., (Fla. 1st DCA 6/22/2018)
Petition for Writ of Prohibition/Mootness

The DCA dismissed as moot the claimant and her attorney's Petitions to Disqualify a JCC in three separate cases. The DCA found the claimant's position "difficult to understand". The claimant and her attorney agreed that the prior JCC they sought to disqualify was no longer on the case, which the court noted should end the inquiry. In their response to the DCA's Order to show cause, the claimant and her attorney responded that the DCA needed to remand the matter to a new JCC to revisit all rulings of the prior JCC. The DCA explained that a Writ of Prohibition is preventative, not corrective, and it is not a substitute for an appeal. As the request was beyond the scope of a Petition for Writ of Prohibition, they dismissed the Petition. **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.