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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

Stahl v. Hialeah Hospital/Sedgwick, **(Fla. 1st DCA 3/25/2015)**
Co-pays and Impairment Benefits/MMI/Constitutionality

Claimant requested a written opinion, so the DCA withdrew their 2/3/15 PCA and issued this decision. Claimant argued the $10 post MMI co-pay and elimination of Permanent Partial Disability Benefits in the 2003 amendment make the Workers' Compensation Law an inadequate exclusive replacement remedy for a tort action. The DCA disagreed, noting that both of these changes pass the rational basis test. The copay provision furthers the legitimate stated purpose of ensuring reasonable medical costs after the injured worker has reached a maximum state of medical improvement, and PPD benefits were replaced with impairment income benefits. **Click here to view Opinion**

The two cases issued last week by the First DCA appear to provide conflicting standards to prove entitlement to ongoing benefits in an initially compensable claim. Echevarria upheld a JCC's denial of a medical evaluation post MMI, noting the claimant provided no medical evidence of ongoing MCC. Two days later, Perez reversed a JCC's denial of TTD based upon the Order's finding of no objective relevant medical findings. The Perez decision notes that after the claim is accepted as compensable, and there is no evidence of a new injury or break in the causal chain, claimant is "absolved of the requirement to prove causal relationship between the injury and the requested benefit". Whether or not there is a Motion for Rehearing asking the DCA to clarify these opinions, adjusters would be wise to use every effort to quickly obtain a medical

determination of the exact injury caused by the workplace accident, avoiding acceptance of "the low back" or "the right knee". Where warranted, diagnostics should be obtained to specifically identify the structure of the body injured ("right sided bulge at L-5" or "right sided meniscal tear") and any other degenerative or non-acute findings should be specifically carved out of the compensable injury description.

Echevarria v. Luxor Investments LLC, AIF Ins. Co. (Fla. 1st DCA 3/18/15)
Post MMI Medical Care/Requirement of Medical Necessity

Claimant sought an evaluation with his authorized neurologist for compensable injuries arising out of his 2007 date of accident. The DCA affirmed the JCC's denial of the evaluation, which found the E/C proved the original accident was not the MCC of the need for the evaluation, and that "no further neurological treatment is medically necessary…". They wrote separately to refute claimant's arguments that a claimant assigned a permanent impairment rating is entitled to ongoing palliative treatment *as a matter of law*, in the absence of medical testimony establishing the need for such treatment. The DCA found nothing in Chapter 440 or case law creates such a right. They distinguished the 2005 Homler v. Family Auto Mart decision, which stated "The law is clear that once a claimant establishes a PI, he or she is entitled to ongoing palliative care for that condition", noting in that case the claimant had medical testimony supporting the continuing need for such related treatment. They acknowledged that some permanent injuries, although not requiring ongoing active treatment, may require periodic doctor visits "to ensure that the compensable injury is not worsening or in need of further evaluations or treatment", but where, as here, there is no medical evidence of ongoing MCC, such treatment is not awardable. **Click here to view Opinion**

Perez v. Southeastern Freight Lines, Inc./Gallagher Bassett Svcs, Inc. (Fla. 1st DCA 3/20/15)
Compensability/MCC/Burdens of Proof

Claimant appealed the JCC's denial of TTD benefits, accepting the E/C's argument that the claimant failed to present evidence of "objective relevant medical findings" as required by F.S. 440.09(1). The DCA reversed, accepting the claimant's argument that 440.09 governs compensability, and as the E/C stipulated to the compensability of the injury, the JCC applied the wrong legal standard. The DCA noted that after the claimant carries his burden to establish initial compensability, the E/C may not challenge the causal connection between the work accident and injury, but only the causal connection between the injury and the connected benefit. Further the E/C must demonstrate a "…break in the causation chain... such as the occurrence of a new accident or that the requested treatment was due to a condition unrelated to the compensable injury". The court noted that although the preceding language from the 2010 Jackson case considered a pre 1994 accident, the reasoning applies to later cases if the "break" is understood as occurring when the work related cause drops below 50% of the total need for the benefit at issue. In the instant case, the E/C did not assert any such break, or an MCC defense. Claimant, after a stipulation on compensability, is absolved of the need to reestablish objective relevant medical findings, and if there is no evidence of a break in causation, claimant meets the burden to prove causal relationship between the injury and the benefit. The opinion notes the claimant still must prove medical necessity, but found here that medical testimony taking the claimant off of work "due to ongoing symptoms or injuries from the …accident" carried the claimant's burden. **Click here to view Opinion**

The portion of the underlying Order regarding TTD is short. It indicates that the documents relied on to support TTD really had no information at all about injury. The Judge's Order correctly identifies F.S. 440.09(1) as not only establishing the standard for "compensability" but for "any resulting manifestations", which also requires the objective relevant medical findings. The DCA opinion repeats the same language regarding resulting manifestations, but then concentrates only on initial compensability. **Click here to view Order**

Gonzalez v. AMC/CCMSI **(Fla. 1st DCA 3/12/2015)**
EMAS

Claimant filed a petition for writ of certiorari challenging an order of the JCC appointing an EMA. The physical examination by the EMA, were it to take place, would constitute harm not remediable on appeal because claimant objected to being physically examined. The DCA noted though, that a disagreement in medical opinions existed which was sufficient for the JCC to order the objected-to examination. Thus, the JCC did not depart from the essential requirements of law. They noted any harm that might result from the EMA's being asked to opine on facts or issues of law that are not properly within the EMA's purview could be fully remedied on appeal. Therefore, they denied the requested relief. **Click here for Opinion**

Cortes-Martinez v. Palmetto Vegetable Co. LLC/Claims Center **(Fla. 1st DCA 3/10/2015)**
Attorney Fees/Calculation of Statutory Formula

The parties agreed at mediation to settle the case for $28,500, from which the claimant attorney would be paid a (20/15/10) statutory fee of $3,600 pursuant to F.S.§440.34(1)(2009). The parties further agreed the E/C would pay the claimant attorney an additional fee based on the claimant attorney having secured $4,940.54 in past indemnity, paid as a result of prior litigation. The parties submitted the attorney fee agreements to the JCC for approval. The JCC approved the statutory fee on the washout amount of $28,500, but would not approve the fee based on 20% of the prior benefits obtained. The JCC reasoned that there can only be one $5,000 in benefits to which the 20% attaches, only one $5,000 amount to which the 15% attaches, and once $10,000 is reached, any remaining attorney fees would be limited to 10%. The DCA examined the plain language of F.S. s. 440.34(1), and rejected the JCC's analysis. The court reasoned that that section's reference to "the" claim suggests there would be more than one claim subject to the full formula. They also looked to sub section (2) of that section, which eliminates "benefits secured" from future medical benefits to be proved on any date more than five years after the claim is filed. The court reasoned that under the JCC's conclusion that "the" claim can only be the *first* claim filed, then contested medical benefits secured more than five years after the first claim would not result in payment of any attorney fee. They reversed and remanded for entry of an order consistent with their opinion. **Click here to view Opinion**

Mitchell v. Osceola County School Board/Johns Eastern/Liberty Mutual (Fla. 1st DCA 3/10/2015)
Statutory Employer/Evidence of Contractual Obligation

Claimant was a student at Hagerty High School (HHS) participating as an intern in a veterinary clinic housed at the high school. After being bitten by a dog, claimant filed PFBs against the clinic and Osceola County School Board (OCSB). The claimant dismissed PFBs against the uninsured clinic, and the parties bifurcated the issue of employer/employee relationship as to OCSB. The claimant alleged, among other theories, that she was a statutory employee of OCSB under F.S. s. 440.10(1)(b).

The JCC dismissed all PFBs, finding the claimant was not a statutory employee of OCSB as no contractual duty had been sublet to the clinic. The DCA reversed and remanded the case for the JCC to conduct additional legal analysis regarding the "business partnership" between the clinic and OCSB. The DCA noted that the students received clinical hours by assisting with services the clinic provided at a reduced cost to the residents of the county. They found it significant that OCSB prepared a pamphlet describing the involvement of the students, along with services and prices, which was distributed in the front office of the high school. Neither the high school nor OCSB received any funds generated by the clinic. The DCA noted that a finding of statutory employment does not require a written contract, and that even an advertisement may qualify to create evidence of such. They cited the 1994 Antinarelli case (*hotel found to be statutory employer of worker injured in onsite, but separately owned restaurant, where part of hotels marketing materials created voucher program for guests who ate meals in restaurant*) as authority for possible establishment of a statutory employer relationship, given the provision of low cost vet care by OCSB. On remand, the JCC is to consider in addition to the impact of the business partnership, the advertisement published by the county for the provision of vet services, which they found more significant than OCSB's primary obligation to provide educational services. **Click here to view Opinion**

AMS Staff Leasing v. Taylor/Diamond K Resources LLC., (Fla. 4th DCA 3/4/15)
Arbitration Clauses/Enforceability

The DCA reversed the circuit court's decision not to enforce an arbitration clause. Taylor signed a contract to perform work for Diamond K as a leased employee of AMS. He alleged Diamond K had him fill out the AMS paperwork in haste, without really reading it, and with the admonition he would be fired if he did not complete the forms. The AMS forms contained an arbitration clause, indicating that any and all claims "arising under employment…" would be subject to arbitration in Dallas, Texas where AMS is headquartered. Taylor subsequently injured himself while working and AMS/Diamond K later terminated him. He then sued both entities for wrongful termination. AMS entered a limited appearance, contending that Taylor was required to arbitrate his claims per the agreement rather than litigate. Taylor countered his case should not be subject to arbitration because: (1) AMS waived enforcement of the agreement by not seeking arbitration in the workers' compensation case; (2) the arbitration agreement violated public policy because it failed to exempt workers' compensation matters and because it required a Florida hourly-wage worker to travel to Texas to arbitrate a claim of wrongful termination, and (3) the arbitration agreement was unconscionable and was procured under duress. The circuit judge denied AMS' Motion, agreeing with Taylor as to his first and second arguments. The DCA reversed, noting the agreement does not violate public policy, that the agreement does not violate the remedial purpose of the statute, and that the F.S. 440.205 claim is separate and distinct from claims for WC medical and indemnity benefits. Additionally the DCA held AMS did not act in such a way to waive arbitration, Further, as the agreement is governed by the (Federal) FAA, and not Florida's arbitration code, the fact that the agreement provides for arbitration in another state was not grounds to invalidate it. Finally, the DCA noted the judge's order did not provide evidence of either duress or unconscionability, which can serve as defenses to enforcement of an arbitration clause. **Click here to view the Opinion**

Bonafide Masonry/Retail First Ins. Co./Claims Center v. Saxton, (Fla. 1st DCA 3/5/15)
Appellate Jurisdiction/Non Final Orders

The DCA dismissed appeals of two non final orders. The DCA dismissed the appeal of the first Order, issued 9/3/2014, for failure to timely file a notice of appeal. The DCA's dismissal of the appeal of the second non-final order of 9/23/14 was based on Fl.R.App.P. 9.180(b)(1)(A), which allows the DCA to review non-final orders that adjudicate jurisdiction. The DCA found no proof that the non final order in question adjudicated jurisdiction. The Record showed that the JCC declined to rule on the jurisdictional question (*although not noted in the opinion, the parties were litigating a utilization review issue*). The JCC asked the Appellants to file an evidentiary motion supporting their allegations, but rather than accept that invitation they appealed the 9/3/14 order prematurely. **Click here to view the 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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