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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

CVS Caremark Corp/Gallagher Bassett v. McIntosh, (Fla. 1st DCA 5/22/15)
120 Day Rule/Standard of Proof for TTD/Medical Claims

This was the second appeal related to the claimant's workplace injuries while working as a pharmacist (McIntosh v. CVS, 135 So. 3d 1157 (Fla. 1st DCA 2014). The E/C appealed the JCC's award of psychiatric care on remand, while the claimant cross-appealed denials of claims for TTD and inpatient psychiatric care. The DCA affirmed the award of psychiatric care, affirming the JCC's finding that the E/C failed to provide evidence of material facts it could not have discovered through reasonable investigation to deny compensability of the claimant's PTSD. The DCA reversed the JCC's denial of TTD and inpatient care however. With regard to TTD, the facts showed the JCC rejected the treating psychiatrist's opinion on that issue, as he noted the claimant had returned to work post accident, albeit for periods she was not claiming. The JCC also based that denial on a finding that the claimant was not wholly credible and thought she was not working due to unrelated reasons. The DCA noted that once claimant provided evidence of work related disability, the burden then shifts to the E/C to provide evidence that her disability status had changed. There was no such evidence. Additionally, the DCA found it "irrelevant" that the JCC rejected the medical evidence of TTD, citing to case law that holds that the inquiry is whether the claimant should have "reasonably relied on the instructions given to her by her treating physician". As there were no findings to overcome claimant's reliance on the restrictions, the denial of TTD was error. The DCA found the JCC's rejection of the authorized psychiatrist's opinions on inpatient care "conflicting" as he had accepted his opinions regarding ongoing psychiatric care, but provided a faulty basis as to why certain testimony was persuasive while other testimony was not. The JCC asserted the doctor's qualifying statement that she should have at least have an evaluation to determine if such care were necessary supported rejecting his testimony on the inpatient issue. The DCA found that rather than detracting from his opinion on inpatient care, it

supported it. The DCA remanded for the JCC to clarify the denial of inpatient care and to consider the alternate recommendation for an evaluation of that care. **Click here to view Opinion**

Pearson v. BH Transfer/Chartis Claims, Inc., (Fla. 1st DCA 5/27/15)
Medical Benefits/Waiver of Defense of Medical Necessity

The DCA reversed the JCC's denial of surgery. The DCA noted the carrier failed to respond to the request attached to the PFB within 10 days, and therefore forfeited their right to contest that the surgery was reasonable or medically necessary. **Click here to view Opinion**

The underlying **Order** provides additional facts (the doctor making the request for surgery later characterized the surgery as "elective" and an EMA found the surgery not medically necessary), and more analysis of F.S.s.440.13(3)(i) by the JCC than the DCA. However the bottom line here is that carriers receiving requests for authorization under this subsection must respond to the request within 10 days if they want to challenge medical necessity.

Booker v. Sumter County Sheriff's Office/NARS, (Fla. 1st DCA 5/29/15)
Daubert Standard/Timeliness and Sufficiency of Daubert Motions

The DCA affirmed the JCC's denial of compensability, but wrote to address the majority of the claimant's issues, which centered on the Daubert standard. Daubert seeks to eliminate expert testimony that is based on "pure opinion". It requires that if an expert testifies, such opinions must be (1) based on sufficient facts or data, (2) be the product of reliable principles or methods; (3) and be based on the expert's reliable application of principles and methods to the facts of the case. The judge has discretion to act as a gatekeeper of such testimony under Daubert. In this case, the claimant appealed the JCC's finding that his Daubert objection to the E/C's IME was untimely. The DCA noted that although the basis of the E/C's IME's opinions were clear in his IME report in April of 2014 and again in his May deposition, claimant's first objection came two weeks prior to the September 28, 2014 Final Hearing, and filed a motion to strike only four days prior to the Final Hearing. Thus it was untimely. In addition to requiring a timely Daubert objection, the motion must be facially sufficient, placing the opposing party on notice of the specific objections and giving them an opportunity to cure the defects. (i.e. any "conflicting medical testimony"). Unsubstantiated facts, suspicion or speculation is not sufficient. Likewise, a generalized "Daubert objection" during a deposition is also insufficient. In finding the JCC did not abuse her discretion in admitting the testimony, they analyzed the actual testimony of the E/C's experts, noting that the doctors "were well-acquainted with the claimant's medical history and current medical condition, they relied on published medical studies generally accepted within the medical community, and they applied the results of those studies to the facts of this case in reaching their opinions on causation." **Click here to view Opinion**

Carlson, et al v. Fedex Ground Package Systems, Inc., (11th Cir. Ct. of App. 5/28/2015)
Independent Contractors/Employees

The 11th Circuit reversed the Federal District Court's award of summary judgment for Fed Ex, finding the question of whether the drivers are employees or independent contractors is a jury question. The drivers allege they are employees. The case provides a lengthy analysis of applicable Florida law on the independent contractor/employee issue. **Click here to view Opinion**

Suarez v. Steward Enterprises/Travelers **(Fla. 1st DCA 5/12/15)**
Applicability of Witness Fee Cap to EMAs

The DCA granted the claimant's Petition for Certiorari which quashes the JCC's Order denying claimant's request to limit the EMA's deposition fee to $200 per hour. The EMA indicated his deposition fee was $750 per hour, and required that the claimant provide a deposit of $750 prior to agreeing to provide testimony. The EMA asserted he believed he was not bound by the $200 per hour limit due to his status as an EMA. The JCC declined to determine the fee, concluding that giving a deposition is not a service contemplated by either the statute or the rule governing EMAs. Further, the JCC concluded that because "the EMA is not a mere health care provider, but an expert," the fee limitation in section 440.13(10) did not apply. Certiorari is appropriate where a ruling (1) constitutes a departure from the essential requirements of law; (2) would cause material harm; and (3) cannot be adequately remedied on appeal. The DCA analyzed those factors against all of the relevant statutes, rules and case law governing EMAs, health care providers and discovery. They noted that when read as a whole, the limits apply to EMAs as health care providers. They noted all elements of certiorari were met in this situation, and a concurring opinion analyzed further potential issues that could arise where the EMAs fee exceeded the limitation in the statute. **Click here to view Opinion**

Broadspire/Crawford & Tampa and Stone Container Corp. v. Jones, (Fla. 1st DCA 5/8/2015)
Effective Date of Causation Standard/Attendant Care

Bill Rogner

Claimant sustained injuries in a workplace explosion in 1981 and has received authorized medical care for orthopedic injuries and psychological care for PTSD since that time. In October of 2013 claimant sought payment of attendant care to his wife, which the E/C denied on the basis the care was (1) needed for an unrelated memory problem and (2) was of the type ordinarily provided by family members (gratuitous services). The JCC awarded 12 hours, the maximum allowed under F.S. s. 440.13(2)(b)(2013).

The DCA rejected the E/C's first point on appeal, finding the JCC did not err in applying the 1981 causation standard. A lengthy analysis of the second issue concluded that the JCC erred in awarding the 12 hours of attendant care. The award was based on the treating doctor's opinions that such care was medically necessary, but the only specific services so identified were for "daily reminders and the expressions of emotional support" for occasional anxiety attacks. The DCA found these actions were gratuitous, in contrast to the statute's requirement that such services be "extraordinary" (i.e. assistance with bathing, dressing, administering medications and sanitary functions). Further, there was no evidence of safety related concerns to justify on call care. The DCA reversed and remanded the attendant care issue for additional specific findings. **Click here to view Opinion**

Babahmetovic v. Scan Design Florida Inc. / Zenith Insurance **(Fla. 1st DCA 5/1/2015)**
120 day Rule/One Time Change in Physician
Bill Rogner

The DCA reversed the JCC's denial of a one time change based upon the E/C's timely denial under the 120 day rule. Claimant received an opinion from his treating physician a month after the accident indicating that the workplace injury (a lumbar strain) was 40% of the cause "regarding the lumbar spine". Twelve days later, the E/C issued a denial of compensability asserting the IA was not the MCC of the need for treatment. The E/C asserted they properly denied compensability as they did so within 120 days of providing payment or compensation under F.S. 440.20(4)(2013). Claimant then requested a one time change which the E/C denied. The parties asked the JCC to determine whether the IA was the MCC of the injury and need for treatment and whether the claimant was entitled to a one time change if the claim were not compensable. The JCC ruled in favor of the carrier noting that the doctor determined the claimant's sprain from the accident combined with prior pathology and determined the IA was only 40% responsible for the need for medical care. In reversing, the DCA examined the concepts of MCC and compensability, and noted there was no evidence that anything other than work caused the actual initial injury (the sprain). As such, they determined MCC was inapplicable to determine the compensability of the sprain. The DCA then examined the 120 day issue, reciting the language that upon initial payment, the carrier is to notify the employee it is paying pending further investigation and will notify the claimant within 120 days whether they accept or deny claim. The carrier here did not issue a 120 day letter, which the DCA found precluded a denial based upon that statute/rule. The opinion holds "…an E/C who pays yet does not provide written notice "upon commencement of payment" cannot avail itself of the 120 day rule to deny compensability, because it has elected to "pay" rather than "pay and investigate". The court distinguished the 2008 Falcon Farms case which denied a one time change, noting in that case there was no evidence of an injury.

*The employer/carrier is filing a Motion for Rehearing and Rehearing en banc, based on the fact that the issue of the 120 day rule was not preserved below, or otherwise preserved for appeal. The case appears to conflict with prior case law regarding an employer/carrier's responsibility under the 120 day rule, and the trigger being if an employer/carrier is "uncertain" of their responsibility. The ruling also imposes a procedural default for any carrier that pays any money prior to filing the 120 day letter, and could encourage carriers to deny claims rather than lose that ability later. **Click here to view Opinion**

Macy's/Macy's Inc. v. Calderon **(Fla. 1st DCA 5/1/2015)**
PTD/MMI

The DCA affirmed 4 of 5 issues on appeal without comment. They affirmed the fifth issue, however of whether the claimant's date of PTD should have commenced as of "statutory" MMI, or upon the date of actual medical MMI, per Westphal, which is awaiting a ruling by the Florida Supreme Court. **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.