HURLEY ROGNER
MILLER, COX & WARANCH, P.A.

Case Law Update

May 19, 2017

WINTER PARK
1560 ORANGE AVENUE, SUITE 500
WINTER PARK, FL 32789
TEL: (407) 571-7400
FAX: (407) 571-7401
www.hrmcw.com

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

Dominguez v. Compass Group/Gallagher Bassett, (Fla. 1st DCA 5/16/17)
One Time Change/Res Judicata

The DCA reversed the JCC's denial of a claim seeking a one-time change. The E/C initially authorized Dr. Arango to treat the claimant's 4/1/12 hand crush injury. Dr. Arango placed the claimant at MMI on 10/13/13 with a 3% PIR. Claimant then sought authorization of a PCP in May of 2014, and the JCC subsequently entered an Order a year later finding no medical evidence to support the requested benefit. In February of 2016, the claimant filed a PFB seeking a one-time change in physician, which the E/C defended on several grounds, including res judicata. The JCC ultimately denied the request, granting the E/C's Motion for Summary Final Order on the grounds that the 5/15 Order's findings were res judicata as to medical necessity. The DCA held this was error, citing to their 2008 decision in Providence Prop. & Cas. v. Wilson, which held that a claimant's right to a one-time change of treating physician is absolute if the request is made during the course of treatment. Wilson also states that the "course of treatment" requirement is met so long as the claimant has been treated with an authorized physician, even if a claimant was subsequently discharged from medical care. As such, res judicata did not apply and the claimant is entitled to a one-time change. **Click here to view Opinion**

-More-

AT&T Communications/Sedgwick v. Rosso, (Fla. 1st DCA 5/2/2017)
Medical Benefits/Home Renovation/Sufficient Evidence to Support Medical Necessity

The DCA affirmed the JCC's awards of lawn care, attendant care up to 4 hours per day, a brace and evaluation and treatment with a podiatrist to include a shoe evaluation. However, the DCA held the JCC erred in the award of home renovations for the claimant. Claimant's accident occurred in 1989. Aged 73 at the time of hearing, the claimant developed foot drop following spinal fusion surgery in 2014, leading to the claimed benefits. The DCA found the JCC properly awarded lawn care as it would improve her compensable depression and anxiety. They also affirmed the remaining benefits listed above as the E/C waived the right to argue medical necessity by failing to timely respond to the requests. However, in relation to the home renovations, the DCA found no CSE (competent substantial evidence) existed that would support the award. The claimant hired a Rehab Nurse to conduct a home assessment and make renovations. Analyzing the renovations under the "medical apparatus' line of cases, the DCA noted the JCC pointed to testimony of the claimant's authorized psychologist and pain management doctor, in addition to an unauthorized orthopedic surgeon to award the nurse's home recommendations. However, the psychologist only indicated he agreed "per the home study", with no mention of medical necessity. The orthopedist indicated he agreed with some of the recommendations, but never indicated which. Finally, the pain management doctor deferred to the Rehab Nurse, which was insufficient as the nurse's opinion or testimony alone cannot support medical necessity. The opinion notes the JCC originally denied the home renovations, but reversed herself on rehearing, accepting the claimant's argument that the claimant's date of accident warranted a "liberal construction" of the statute in the claimant's favor. Although they discussed whether the amendment to the statute in 1990 should be retroactive, they ultimately held they did not need to reach that decision as the E/C did not urge that position in their brief, and the award could not stand regardless based on the failure of medical necessity testimony. **Click here to view Opinion**

Leon v. CSB Svcs., Inc./NARS, (Fla. 1st DCA 5/5/2017)
Authorized Physicians/Medical Necessity

The DCA reversed and remanded the JCC's Order denying a replacement orthopedist. Claimant was placed at MMI in 2002 for his 2000 WC injury. Thereafter, he moved to Lima, Peru, and the E/C authorized Dr. Linares. The JCC denied a 2014 PFB seeking authorization of Dr. Linares, as the E/C stipulated he was authorized. However, thereafter (although the E/C was unable to depose the doctor) it appeared the doctor was resistant to cooperate with the Florida WC system or carrier. The JCC's prior Order found that he was actually refusing payment from the E/C and being paid via Peru's "socialized medicine scheme". By the summer of 2015, the claimant felt the doctor was refusing to treat and filed a PFB seeking authorization of an orthopedist to replace the doctor. The E/C thought he was still treating the claimant and responded there was no need for a replacement. They did not argue either in their response or in the Pre-Trial that such treatment was not medically necessary. After a Merit Hearing, however, the JCC ruled the claimant failed to prove the requested benefit was medically necessary. The DCA held this was error, as the E/C never pled the medical necessity defense. Additionally, by stipulating to Dr. Linares' authorized status, the DCA found this removed the need for the claimant to prove that element. **Click here to view Opinion**

NCCI et al. v. Fee, **(Fla. 1st DCA May 9, 2017)**

Workers Compensation Insurance Rates/Sunshine Laws

In response to the ruling in Castellanos, NCCI announced a 14.5% rate increase, which increased to 19.6% after Westphal. Attorney James Fee requested documents from NCCI, the ratemaking agency, and ultimately filed suit in circuit court in Leon County alleging that (1) the increases violated Sunshine law by failing to allow participation in meetings, (2) other Sunshine Law violations voided the increase on its face, (3) NCCI violated state law by denying Fee certain records and (4) NCCI violated the Public Records Act by failing to respond to his requests. After a public hearing on the rates but before the rate went into effect, the circuit court held a hearing, and ultimately determined the increase was void based on Fee's arguments. NCCI and OIR (the Office of Insurance Regulation) appealed. The DCA, in a highly detailed 19 page Opinion, reversed the Circuit Court's ruling in its entirety, finding that the Judge erred in finding Sunshine and Public Records Violation. The DCA ordered reinstatement of OIR's final order approving the 14.5% rate hike. The following day, the DCA issued an Order stating the following: "Appellee's attorneys are directed to show cause, within ten (10) days of the date of this order, why reasonable attorneys' fees and costs should not be granted in accordance with NCCIs motion seeking an award of attorneys' fees pursuant to section 57.105(5), Florida Statutes (2016). See Boca Burger, Inc. v. Forum, 912 So. 2d 561, 569 (Fla. 2005). NCCI need not reply, but may do so within ten (10) days of the response." **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.

Treasure Coast	North Florida	Miami-Dade	Broward	Southwest Florida
772-489-2400	850-222-1200	305-423-7182	954-794-6933	239-939-2002