



## 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](mailto:rturner@hrmcw.com)) with questions or comments on any of the listed cases.

### *District Court of Appeal Cases*

**Gil v. Tenet Healthcare, \_\_\_ So. 3d \_\_\_ (Fla. 4<sup>th</sup> DCA 11/16/2016**

**WC Immunity/Issues of Fact Arising out of WC Denial Precluding Summary Judgment**

The deceased employee's widow sought death benefits, alleging his cancer arose out of exposure at work. The WC carrier responded to the PFB stating "*Entire claim denied as claimant's employment is not the major contributing cause for his death.*" The widow then dismissed the workers' compensation and filed a wrongful death suit against the hospital in circuit court. The circuit court awarded summary judgment, finding the hospital was not estopped from asserting immunity because it had not taken inconsistent positions. The DCA reversed and remanded, noting that where an employer denies benefits because "the injury did not occur in the course and scope of employment, or that there was no employment relationship," the employer may be subsequently estopped from claiming immunity on the grounds that "the worker's exclusive remedy was workers' compensation . . ." However, if an employer merely states a defense within the workers' compensation proceeding, an employer will not be estopped from later asserting immunity. The hospital claimed its notice of denial did not deny that the injury occurred in the scope of the decedent's employment, but instead asserted the "medical causation" defense. The DCA recited the text of F.S. s. 440.09(1), noting that the defense anticipates the employee suffering a "compensable injury," but allows the E/C to assert that the compensable injury is not the major contributing cause for the employee's "need for treatment." They noted the E/C did not assert their medical causation defense clearly enough. They wrote that "the notice of denial did not indicate there was a compensable injury, and instead generally provided that the "entire claim [was] denied because "claimant's employment was not the major contributing cause for his death." As the notice of denial was ambiguous, the DCA found it was unclear whether the hospital denied benefits because the injury occurred outside the scope of employment or because the injury "received" in the course of his employment did not result in the deceased employee's subsequent injury. [Click here to view Opinion](#)

**Temporary Partial Disability/Additional Benefits under Westphal II**

The First DCA found that the reasoning in Westphal II (extending eligibility for TTD benefits to 260 weeks) applies equally to also extend the same period to Temporary Partial Disability benefits. The DCA considered the claimant's appeal of the JCC's finding that his PTD claim was not ripe. Claimant argued at hearing that the Westphal I ruling (expiration of TTD at the end of statutory period) made his PTD claim ripe. However, claimant had been paid 104 weeks of indemnity, was not at MMI, and was on a temporary partial disability status. The JCC found Westphal I applied only to TTD and not TPD. The day after the hearing the Supreme Court issued Westphal II, and claimant argued that ruling should apply to TPD, although the opinion discussed only "temporary disability benefits". The DCA found that phrase applied both the TTD and TPD, as a "gap period" prior to PTD is created in either instance. Noting that Westphal II revived the pre-1994 limitation of 260 weeks for TTD, they extended the same period here to TPD. The court limited the revival only to the 1991 version of F.S. 440.15(4)(c) however, and declined to indicate whether the entirety of subsection (4) was revived. [Click here to view Opinion](#)

The opinion does not address the (admittedly remote) issue of whether combined weekly benefits for each category (520 total) might be available. The opinion also fails to explore the distinction between TP status and the ability to earn versus TT status, whose inability to earn creates the "gap period" Westphal sought to address

**Entitlement to Attorney Fees/Medical Benefits**

In a case litigated by Paul Luger and handled on appeal by Bill Rogner, the First DCA issued a very favorable ruling for E/Cs in relation to attorney fee entitlement where medical benefits are claimed. The claimant fell from a scaffold. The E/C initially denied compensability and the claimant subsequently filed a PFB for indemnity, payment of an outstanding hospital bill and attorney fees. Within 30 days of the filing of the PFB, the E/C accepted compensability, paid indemnity and accepted responsibility for the hospital bill. They paid the bill several weeks later, but more than 30 days after the filing of the PFB. The claimant then filed a Petition for Attorney Fees, arguing that through their efforts, they obtained payment of the hospital bill for their client. The JCC denied entitlement. The DCA noted that entitlement under F.S. s. 440.34(3)(b) does not attach until 30 days have run from the date of the filing of the PFB. They acknowledged prior case law has held that "successful prosecution" requires acceptance and payment, and that "timeliness of payments of benefits occurs when the check is placed in the mail", but noted those cases concerned only *payments made directly to claimants*. Where, as in this case, the actual benefit is not payment of the bills, but being relieved from financial responsibility for such payment, the carrier's acceptance of responsibility for the bills is the "insulation from financial responsibility" being requested. After that point, when and how much is paid becomes a matter between the carrier and health provider. A footnote

acknowledged the separate issue, not present in this case, of providers that may not actually even provide billing information to the carrier within 30 days. Finding the carrier accepted responsibility within the 30 day grace period, they affirmed the JCC's denial of attorney fees.

[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.*

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