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

Case Law Update

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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.

Florida Supreme Court Cases

Delisle v. Crane co., et al, (Fla. 10/15/18)
Evidence/Daubert Standard

At trial, the jury awarded the plaintiff $8 million in a mesothelioma personal injury action. Various defendants appealed on multiple grounds, chief among them being the evidence relied upon by the jury should have been excluded under the Daubert standard for expert testimony. The Fourth DCA agreed with the defendants, and held the trial court impermissibly allowed the expert testimony. The Florida Supreme Court quashed the opinion of the 4th DCA, and held that legislature's amendment to s. 90.702 (the Daubert amendment) impermissibly infringed on the Supreme Court's rulemaking authority, and was thus invalid. The Supreme Court held that the Daubert amendment was procedural, which is within the sole authority of the Supreme Court.

The opinion is silent on Daubert's applicability to Workers' Compensation, so what impact does it have for us? The 2015 Giamo case specifically held that Daubert applied to proceedings under Chapter 440. This was grounded on the Florida Evidence Code's applicability in Workers' Compensation. In January of last year, the 1st DCA affirmed without written opinion a claimant's challenge to Daubert in Baricko v. Barnett Transportation/York. The PCA however, contained a concurrence with opinion by Judge Wetherell, who noted that in addition to the Code's applicability in WC, the Florida Supreme Court's authority to adopt procedural rules for judicial (Article V county and circuit courts) proceedings does not apply to rules in executive branch, quasi-judicial (i.e. JCC) proceedings. Foreshadowing the Delisle opinion, Judge Wetherell stated that "even if….the Court declines to adopt the Daubert standard…for judicial proceedings because the test is procedural in nature, that decision will have no impact whatsoever on the applicability of the Daubert test in workers' compensation proceedings". This concurrence certainly muddies the water for anyone arguing Delisle is a complete invalidation of Daubert in Workers' Compensation.

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Delisle discusses at length the prior, more relaxed Frye standard vs. the Daubert standard, noting that the primary focus of Daubert was to allow the presiding judge to prevent pure opinion or junk science from being considered by a jury. Numerous federal court opinions state that Daubert should be inapplicable in a bench trial, as the fact finder (as in WC proceedings) is only the judge. Delisle states quite clearly that "medical causation testimony is not new or novel". A large majority of JCC rulings decide both causation and apportionment, which can only be based on underlying facts and the opinions of the medical experts, and may still be subject to Daubert objections. Delisle noted that a major reason put forth initially to reject Daubert was the added expense and time it added to litigation. Requiring that Daubert apply only to a non-jury system that values expedience and economy, while the rest of Florida's trial courts consider expert testimony under the more relaxed Frye standard would not seem to harmonize with the legislative intent of Chapter 440. **Click here to view Opinion**

District Court of Appeal Cases

Normandy Ins. Co. vs Sorto, Jimerico Construction, Inc., and Amerisure Ins. Co.,
(Fla. 1st DCA 10/31/2018)
Insurance Coverage/Notice and Concealment of Prior Known Loss

The DCA reversed the JCC's Summary Final Order finding Normandy Insurance responsible for an employee's foot injury. After the accident occurred, the employer, (J.A.M. Construction) notified their broker. Unfortunately, the broker had only inquired about coverage, but had not actually obtained coverage. He then hurriedly obtained coverage with Normandy later that day, but importantly did not disclose the incident to Normandy. He did, however make it clear the coverage was to begin that day. Normandy then initiated benefits, but upon learning the accident was undisclosed and prior to coverage, they objected and filed a contribution claim against the GC/purported statutory employer (Jimerico) and Amerisure. Amerisure filed a Response/Counter Motion to Normandy's Motion for Summary Final Order, alleging that Normandy's coverage was effective as of 12.01 a.m. on the date of loss, and Normandy was responsible for coverage. The JCC agreed and found Normandy responsible. The DCA considered whether an insurer must cover claims which are known to an insured, but undisclosed prior to obtaining coverage, and reversed. They analyzed prior case law which explicitly forbids insureds from saddling insurers with known losses. Insurance is meant to cover contingencies, or unknown losses, versus known losses. To hold otherwise would undermine the concept of insurance and de-stabilize the insurance system. They rejected Amerisure's reliance upon case law that found coverage for an insured where a loss had occurred after an effective date and time, noting that case did not contain the element of concealment that existed here. Finally, they rejected the argument that the JCC could not rule for Normandy without voiding coverage or erroneously reforming coverage terms. The DCA held it was within the JCC's jurisdiction to determine whether and whose coverage applied. **Click here to view Opinion**

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Howard v. City of Tallahassee, **(Fla. 1st DCA 10/15/18)**

Pre-Trial Practice/Amendments re. 120 day Rule

The DCA affirmed the JCC's decision rejecting the EMA opinion without comment but reversed the JCC's denial of the claimant's attempt to amend the Pre-Trial Stipulation. In 2016, the E/C filed a notice stating the 2004 industrial accident was no longer the MCC of the need for ongoing treatment. Following claimant's PFB seeking ongoing care, the parties completed a Pre Trial Stipulation on May 19th. The claimant failed to list avoidance of the 120 day rule, but filed a supplemental Pre Trial on June 1st, asserting the E/C's waiver of the 120 day rule. The JCC agreed with the E/C that Rule 60Q-6.113(2) and (6) required a finding of waiver, unless permitted by the Judge, for good cause shown. The Rule states, however, this is the so "absent and agreement of the parties". The original Pre-Trial contained the following standard language: "Parties may amend pre-trial stipulation up to thirty (30) days prior to hearing without filing pleadings/motion for leave of court." The DCA held under the Rule and the plain language of the Pre-Trial Stipulation, the amendment occurred prior to 30 days before the hearing and was permissible. The DCA remanded for findings regarding the 120 day rule, and whether "the Employer *failed to deny the claim within 120 days of learning that the MCC of the Claimant's condition may not be the workplace accident*." (emphasis supplied). The emphasized language seems to substitute "knowledge" for payment as a trigger of the 120 day provision. **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