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CASE NOTES
CASE LAW SUMMARY
July 2011

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Attorney Fees/2009 Statutory Fee Amendments

Kaufman v. Community Inclusions Inc., (Fla. 7/27/11)

The Supreme Court denied for lack of jurisdiction the claimant’s Petition to Grant Certiorari Review of the First DCA’s 3/23/11 decision. The initial DCA opinion affirmed the JCC’s finding that the he was limited to awarding a guideline fee under the 2009 amendments to F.S. s. 440.34, regardless of whether the fee was “awarded” or “approved”. That opinion also denied the claimant’s constitutional challenges to the law. The Supreme Court did not issue an opinion, merely denying the request to review the DCA decision. Another fee case B.F. v. AMS Staff Leasing (SC11-815) is still pending before the Supreme Court. The Supreme Court stayed proceedings on that case on 5/6/11, pending a decision in Kaufman. As of 7/29, there is no denial of that case on the Court’s docket. [Click here to view online docket](#)

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Carrier Penalties/Late Indemnity Payments

Citrus County School Board/School Board Ins. Trust v. State of Fl/Dept. of Financial Svcs., (Fla.1st DCA 7/22/2011)

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The First DCA affirmed a \$13,250 penalty assessment levied under F.S. §440.20(8)(b). After auditing indemnity payments the carrier made from 9/26/04 -9/25/09, the state determined that 169 of 498 payments were “late” (i.e. paid after their due date), and assessed penalties for each late payment. The carrier appealed the assessment, noting that only four of the 169 payments were paid after seven days of becoming due. The carrier argued that the penalty statute should be read in conjunction with the penalty language of 440.20(6)(a), which also discusses late payments, but imposes penalties only where payments are not made within seven days of a payment’s due date. The DCA rejected this argument, noting that the plain language of (8)(b) requires only “timely payment” and requires penalties for “late payments”. Importantly, the court noted that the penalties in (8)(b) are to secure carrier compliance, and do not result in penalties being paid to the claimant, which is specifically the focus of (6)(a) penalties. Finding the carrier compliance section clear and unambiguous, the court approved the State’s penalty calculation.

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Misrepresentation/Requisite Elements/Temporary Benefits

Lucas v. ADT Security/Sedgwick CMS, (Fla. 1st DCA July 22, 2011)

The DCA reversed the JCC’s finding disqualifying the claimant from further benefits based upon misrepresentation. The court also reversed a denial of TTD, but affirmed a denial of TPD. In his Order, the JCC found that:

“Claimant intentionally or knowingly has made numerous false and misleading statements with regards to the extent of her current injuries and which were made for the purpose of obtaining workers’ compensation benefits.” He continued: These statements include reporting pain complaints grossly out of proportion to the physical findings on examination and diagnostic studies, by her reporting non-organic physical signs including collapsing ankle weakness in the face of a normal MRI, by her posturing and cog wheeling, and by her persistent attempts to be placed on TTD status. This also includes her evasiveness with Dr. Graham-Smith. While no one example in and of itself may rise to the level to support the EC’s fraud defense, taken together, they present an overwhelming pattern of statements, behavior, and conduct that cannot be innocently explained nor ignored by the undersigned.”

Although the DCA found the record lacked evidence as to some of the findings of the doctor, the DCA closely examined the findings of the JCC, noting that “posturing and cog wheeling” (medical terminology for faking) were not “statements” under the statute, but similar to presentation on surveillance which was previously found in Dieujuste to be insufficient to support a finding of misrepresentation. The DCA also noted the carrier did not show that the claimant’s attempts to remain on TTD were capable of being proven false, i.e. they did not show the claimant wanted to be off of TTD status. The court noted that as the claimant never indicated she could not do certain motions there was an insufficient basis for misrepresentation. The court also found the E/C failed to present an objective method of measuring the claimant’s subjective complaints of pain.

The JCC rejected the treating doctor’s opinion re: TTD, finding there was no evidence of injury. In reversing however, the court noted that the claimant did have TTD restrictions

for almost three months, and found that as the claimant was not told she was off of TTD status during that time, it was error to deny TTD (citing Cocho v. Continental (Fla. 1st DCA 1995)).

This opinion again indicates the court's view that findings of misrepresentation must be based on actual, false, fraudulent or misleading oral or written statements for the purpose of obtaining benefits. In considering denying claims under this section, the E/C will have the burden to show that the claimant has actually asserted things that are demonstrably false, and those assertions must be made with the intent to obtain benefits. [Click here to view Order](#)

Temporary Benefits/Penalties/Ripeness

West v. University of Miami/Gallagher Bassett Svcs., (Fla.1st DCA 7/22/2011)

The DCA reversed an award of TPD, as the JCC found MMI prior to that date. The court reversed a denial of penalties for properly awarded late payments, finding such penalties mandatory rather than discretionary. The JCC also erred in denying a claim for authorization of a plastic surgeon, finding the E/C never asserted ripeness as a defense. The DCA remanded the case on the issue of authorization of a plastic surgeon. [Click here to view Order](#)

Medical Benefits/Waiver of Defenses

City of Panama City/PGCS v. Bagshaw, (Fla.1st DCA 7/22/2011)

The DCA reversed an Order finding the E/C waived its right to contest causal relationship of a requested medical procedure under 440.13(3)(i)(2002)(generally referral to a specialist or procedure over \$1,000). The court also reversed the award of attorney fees and costs. Subsection(3)(i) holds that a carrier must award or deny a written request within ten days. The DCA compared that section with their prior analysis (of that section and s.440.13(3)(d)'s "three day" language.) in Elmer v. Southland Corp/7-11. There, the court held that an E/C's failure to respond removed their right to contest medical necessity. However, the requested treatment still has to conform to the statutory requirement that such treatment still be "as a result of the compensable injury". Under the ten day section, a carrier may still contest causal relationship of the requested procedure, even though they waive arguments as to reasonableness and medical necessity. In this case, the E/C sought an EMA on the issue of causation, which the DCA noted "could take more than ten days". [Click here to view Order](#)

EMA/Legal Standard to Accept/Reject Opinion

Trevino v. Dept. of Revenue/Div. of Risk Mgmt State of FL, (Fla.1st DCA 7/22/2011)

The JCC denied diagnostic testing for the C-Spine and denied authorization of a lumbar evaluation by an anesthesia pain clinic. The claimant alleged the JCC erred by employing the improper legal standard, as the EMA had recommended them. The DCA affirmed the denial of the C-Spine testing. The claimant's PFB sought a cervical CT and discogram. The EMA recommended a cervical evaluation at which time the diagnostic

testing would be considered. The court held the JCC's denial comported with the EMA recommendation and was a reasonable interpretation. The court reversed the denial of the lumbar evaluation. The JCC found the EMA made no treatment recommendations for the lumbar spine. However, the EMA recommended the evaluation in his report and the parties did not question the EMA about the recommendation in deposition. As the only evidence in the record showed the EMA made this recommendation, the DCA remanded for a lumbar evaluation at an anesthesia pain clinic. [Click here to view Order](#)

Reimbursement Disputes

Amerisure v. Martin Memorial/Dept. of Financial Svcs., (Fla. 1st DCA July 18, 2011)

The DCA found that the Department of Financial Services did not have subject matter jurisdiction to determine a reimbursement dispute where benefits were denied on a non-compensable heart condition. [Click here to view Order](#)

Average Weekly Wage/Temporary Partial Disability

Garcia-Lopez v. Affordable Plumbing/Vinings Insurance Co., (Fla. 1st DCA July 18, 2011)

The claimant appealed a JCC's denial of TPD. The claimant was a minor illegal alien, unlawfully working in construction. The claimant testified that he reported his earnings for taxes; however, the JCC found after the evidence closed that nothing short of the actual tax return would suffice to prove that the claimant had reported his wages. The DCA noted that nothing in the statute limits wages to only what is reported by the employee. "[W]e regard as dicta any language in Fast Tract suggesting that only wages reported by the employee may be included in the statutory definition of wages." The DCA noted that there is a presumption that appropriate taxes are withheld when wages are paid and that wages reported by the employer OR employee satisfies the statute.

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440.105/Jurisdiction of the JCC

Florida Dept. of Trans./York v. Rippy, (Fla. 1st DCA July 18, 2011)

The DCA held that the JCC had no jurisdiction to address the E/C's Motion to Terminate Benefits based upon 440.105/440.09 as there was no PFB pending when the motion was filed. [Click here to view Order](#)

Due Process/Applicability of 120 day provision

School Board of Hillsborough Cty/Broadspire v. Dickson, (Fla.1st DCA 7/12/2011)

Claimant sustained an initial compensable knee injury in 9/08. Claimant had surgery, and was noted to have no give way weakness by her treating doctor. Thereafter, in 7/09, the claimant then sustained a subsequent injury to the same knee, which admittedly occurred at home. The claimant sought treatment for the new incident, and the treating doctor initially felt it was related to the initial injury. After re-examining the MRI however, the doctor subsequently opined the MCC for treatment was the new, non WC accident. The carrier obtained that doctor's opinion re. no MCC, and issued a denial. At the Merit

hearing on a second recommended arthroscopy of the knee and continued treatment, the JCC, despite neither side arguing for its application, found that the 120 day rule was mandatory, controlled the situation, and resulted in the carrier's waiver of their right to contest the claims. The DCA found the JCC misinterpreted the law, deprived the E/C of their due process invoking that provision, and held that the 120 day provision, under Checkers v. Weithoff, applies only to the issue of initial compensability. [Click here to view Order](#)

Taxable Costs/Pre Depo Conferences

Brascom v. Hillsborough County Sheriff/Commercial Risk Mgmt. Inc., (Fla. 1st DCA 7/11/2011)

The DCA found the JCC did not abuse her discretion in awarding prevailing party costs for a pre-depo conference between the E/C counsel and the E/C IME. The Court noted the case law argued by the claimant supporting their argument was decided under a prior version of the Statewide Uniform Guidelines for Taxation of Costs in Civil Actions, and that the current version contains no such prohibition against awarding those costs to the prevailing party. [Click here to view Order](#)

Expert Medical Advisor/Retroactive Application

Snider v. Mumford Inc/d/b/a/ Majik Market/Atlantic International Ins. Co., (Fla.1st DCA 7/7/11)

The claimant sought non-skilled attendant care recommended by an unauthorized psychiatrist for her 1982 DOA. The JCC appointed an EMA as the authorized psychiatrist disagreed. The JCC relied on Butler v. Bay Center as authority for retroactive application of the EMA statute. The court reversed, finding that their prior decision in Southern Bakeries (*analyzing a statute altering parties' responsibilities to pay for IME*) controlled. Southern Bakeries holds that the question of whether to consider something substantive or procedural involves an analysis of the "entitlement to a service, and the responsibility for payment thereof". The court does not analyze whether or not an EMA exam (obtained solely as evidence to the JCC) is a "service" (i.e. as opposed to a medical procedure or actual treatment). The decision notes that the party seeking the EMA is to be charged the cost of the EMA. The decision does not discuss that in this case, the E/C would have been obligated to pay as the requesting party. The decision also discusses the "tie breaker doctor" provision under the controlling 1982 version of the statute, but does not discuss whether or not the E/C requested that the JCC appoint such a doctor under that provision. As the JCC denied benefits based upon the presumptively correct opinion of the JCC, the case was reversed and remanded.

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Medical Benefits/Transportation

Williams v. Onyx Waste Svcs/Sedgwick CMS, (Fla.1st DCA 7/7/11)

The DCA affirmed a denial of PTD and Motion to Disqualify the JCC without comment. They reversed, however, the JCC's denial of transportation to and from medical appointment based upon a lack of evidence that the transportation was medically necessary. The claimant admitted he was capable of driving and had a car, but it was not functioning. The JCC's denial, noted that no doctor had written a prescription for the transportation, nor had any doctor determined the claimant was unable to drive. The

DCA observed that it is settled law that the E/C is required to provide transportation incident to the provision of medical care, whether by reimbursement of mileage or provision of actual transportation. The DCA notes that the carrier has “the first opportunity to determine the means of transportation”. [Click here to view Order](#)