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CASE NOTES

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CASE LAW SUMMARIES: January, 2004

APPEALS

Battles v. Florida State Hospital and Florida Dept. of Insurance,
29 FLW (D) 177 (Fla. 1st DCA, Jan. 8, 2004).

Where a transcript of testimony of witnesses who appeared at an Attorneys Fee Hearing is unavailable and the parties are unable to provide a satisfactory substitute for the transcript, the Order on Appeal must be reversed and remanded for a hearing de novo.

AVERAGE WEEKLY WAGE

Gary James v. Armstrong World Industries, Inc. and Specialty Risk Services, Inc., 29 FLW (D) 93 (Fla. 1st DCA, Dec. 31, 2003).

____The JCC denied a claim for adjustment of average weekly wage where the claimant suffered a back injury in 1982, and continued working for the employer until 2000, when he underwent back surgery related to the 1982 accident and became permanently totally disabled. The JCC calculated the claimant's average weekly wage based on his earnings during his thirteen weeks prior to the 1982 date of accident rather than the earnings during the thirteen weeks prior to the surgery in 2000. The 1st DCA agreed.

The 1st DCA held that the claimant worked for the employer during substantially the whole of the thirteen week period preceding the injury in 1982. Thus, the Court rejected the argument that the "date of accident" should be the date of disability versus the date of injury as provided in §440.14, Fla. Stat. (1982).

COMPENSABLE ACCIDENTS

Hutchinson v. Lykes Smithfield Packing Gallagher Bassett Services, Inc., and Traveler's Property and Casualty, 29 FLW (D) 177 (Fla. 1st DCA, Jan. 8, 2004).

The JCC found that a claimant suffered only temporary aggravation for preexisting condition (COPD) and awarded medical and temporary indemnity benefits only through date of MMI of that temporary aggravation. The claimant appealed. The 1st DCA reversed in part. The 1st DCA held that where an employer/carrier commences payment of benefits after the claimant's preexisting chronic obstructive pulmonary disease was exacerbated by a work accident, failed to provide written notice to the claimant within 120 days that the employer/carrier merely elected to provide benefits, but were reserving the right to investigate and possibly deny the claim at a later date, the employer/carrier waives the right to challenge compensability of claimant's pulmonary condition. Although that portion of the Order was affirmed, the 1st DCA reversed the JCC's Order limiting the employer/carrier's responsibility to just the temporary aggravation of the claimant's COPD. The 1st DCA held that once the employer/carrier knew, or reasonably should have known that the claimant had medical needs, they could have investigated within the statutory 120 day period. Due to the fact that the employer/carrier failed to comply with the statutory provisions, it waived the right to challenge compensability of the claimant's COPD condition. Thus, the employer/carrier is deemed to have accepted compensability of the claimant's pulmonary condition. The JCC's Order limiting the waiver of the compensability was reversed.

INDEPENDENT MEDICAL EXAMINATION

Klatt v. Walmart Stores, Inc. and Integrated Administrators, 29 FLW (D) 28 (Fla. 1st DCA, Dec. 16, 2003).

The First DCA held that a claimant is permitted to proceed with an IME by a physician specializing in a specific condition, in this case, stomach conditions.

PERMANENT TOTAL DISABILITY BENEFITS

Goodwill Industries of Central Florida v. Heard, 29 FLW (D) 51 (Dec. 24, 2003).

The JCC awarded permanent total disability benefits based on a finding that the positions offered by the employer constituted sheltered employment. The 1st DCA reversed. The 1st DCA held that the positions offered by the employer which included greeter, cashier and clothing sorter were established positions and not created solely for the claimant. Moreover, it was found that the employer routinely accommodated individuals with special needs. The employer acted no differently towards the claimant than other disabled employees who are not injured in the course of employment. Thus, the job position offered to the claimant did not constitute sheltered employment and thus the award of permanent total disability benefits was erroneous.

City of Miami v. Arostegui and Dept. of Financial Affairs, Div. Of Worker's Compensation Administration Trust Fund, 29 FLW (D) 175 (Fla. 1st DCA, January 8, 2004).

The JCC directed the employer to pay permanent total disability supplemental benefits with penalties and interest. However, at the time of the agreement between the employer and claimant regarding continued payment PTD benefits, the Worker's Compensation Trust

Fund was responsible for the payment of the supplemental benefits pursuant to §440.15 (1) (e), Fla. Stat. (1975). The 1st DCA reversed. The Court held that the agreement between the parties did not read that the employer would pay benefits directly to the claimant. Furthermore, the claim for supplemental benefits was mature and ripe prior to the specific adjudication. Thus, the claimant's failure to litigate the issue prior to the current proceeding bars the claim and the doctrine of res judicata applies as well.

TEMPORARY PARTIAL DISABILITY BENEFITS

Sumter County Board of County Commissioners v. Preferred Governmental Claims Solutions Fee Connell, 29 FLW (D) 179 (Fla. 1st DCA, January 8, 2004).

The JCC in this case awarded temporary partial disability benefits when the only issue framed by the pleadings and tried by the parties was for permanent total disability benefits. The employer/carrier appealed. The 1st DCA agreed with the employer/carrier and reversed the award of temporary partial disability benefits and on remand directed the JCC to consider and rule on the claim for permanent total disability benefits which was mature and ripe for determination at the time of trial.

TORTS/WORKER'S COMPENSATION IMMUNITY

Horn v. Tandem Healthcare of Florida, Inc., 29 FLW (D) 218, (Fla. 2nd DCA, Jan. 14, 2004).

The Circuit Court held that the plaintiff was a borrowed employee of the employer and thus worker's compensation immunity applies and granted summary judgment in favor of the defendants. The plaintiff appealed. The 2nd DCA held that in order to prevail on summary judgment in this matter, the record must conclusively demonstrate that the plaintiff was a valid employee of the defendant. The 2nd DCA held that where there is nothing in the record indicating that suggested the employer was engaged in supplying help on a contractor fee basis; nor express contract between the plaintiff and the defendant; or implied contract for hire, there is no conclusive evidence to show that the claimant was a borrowed employee of the defendant. Thus, the 2nd DCA indicated there were issues of material fact and the ruling of summary judgment was reversed.

Van Bebber and Associates, Inc. v. Cook, Matassa and Florida Neighborhood Centers, 29 FLW (D) 230, (Fla. 2nd DCA, Jan. 16, 2004).

A claimant was injured while employed by a subcontractor working on a renovation project. The claimant obtained benefits under his employers worker's compensation insurance. Thereafter, the claimant filed suit against the general contractor and others for alleged negligence. The general contractor asserted the claimant's claim was barred by the exclusivity provision of §440.11, Fl. Stat. (1999) and sought summary judgment. The circuit court found that the claimant was a statutory employer of the general contractor and entered

summary judgment in favor of the defendant on all claims. However, the court declined to enter summary judgment on the claim that the general contractor negligently designed the project plans. The 2nd DCA disagreed and reversed.

The 2nd DCA held that the “dual persona” exception to the worker’s compensation immunity was not applicable in this case. Thereafter, the claimant attempted to argue “dual capacity.” The 2nd DCA indicated that a dual capacity argument has been disfavored by the courts due to the fact that it is normally used to destroy employer immunity simply when there are separate legal theories that can be brought against the employer. Thus, the court declined to adopt the dual capacity doctrine because it would circumvent the legislative plan and purpose of chapter 440. The court reversed and remanded with instructions to enter summary judgment in favor of the defendant.

TORTS/EXCLUSIVE REMEDY

Goodman v. J. K. Hartigan and Jessica Hartigan, 29 FLW (D) 34 (Fla. 5th DCA, Dec. 19, 2003).

_____The 5th DCA entered a summary judgment in favor of the defendant based on worker’s compensation immunity. In this case, the plaintiff was injured when she was exercising a horse on a track located on the employer’s property, and the horse was spooked by a dog personally owned by the facility managers. The employee did initially seek benefits under worker’s compensation from her employer and recovered a settlement. Thereafter, she filed a separate suit against the managers for negligence who managed the employer’s property. The 5th DCA held that it was erroneous to enter summary judgment in favor of the defendant on the grounds of worker’s compensation immunity where there was dispute as to whether or not the actions of the defendant in allowing their dog to roam loose fell within their managerial or policy making duties.

CASE NOTES

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