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CASE NOTES

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CASE LAW SUMMARIES: January, 2005

FRAUD STATEMENTS TO AUTHORIZED DOCTORS

Glen Lee v. Volusia County School Board 30FLW D55(Fla.1st DCA 2005). The claimant reported an injury with severe pain in his legs, difficulty in lifting 20 pounds and was placed light duty status by the authorized treating doctor. The claimant then returned to the doctor and informed the doctor that he could not perform light duty work and the doctor changed the claimant's work status to "no work" status. During his deposition, the claimant testified that he could only lift between 10 and 15 pounds and he had completely given up doing yard work.

Surveillance showed the claimant setting pavement stones in his yard, lifting boxes into a shopping cart and doing other bending, kneeling and shoveling work. The physician who placed the claimant on "no work " status reviewed the surveillance footage and testified that the claimant was acting inconsistently with his earlier reports. The claimant's IME examined the claimant and reviewed the surveillance footage. The claimant's IME did not conclude that the video showed any inconsistency. The JCC found the claimant knowingly made false statements when he reported his physical abilities and testified that he could not perform yard work. The JCC denied all benefits and accepted the first doctor's testimony over the second doctor's. The first DCA reiterated that the claimant's statements and medical history, prior accidents, or the extent of current injuries are "relevant and material whether made to health care providers or during testimony given at depositions, or merits hearing". "If such statements are knowingly false or fraudulent, incomplete, or misleading, benefits must be denied.

ATTENDANT CARE-ON CALL CARE

ATT Wireless/Kember v. Elizabeth Castro 30FLW D57(Fla.1st DCA 2005) The First DCA reversed the JCC's order based on:
1. An incorrect calculation of attendant care benefits, 2. Mistakenly excluding the E/C's IME, and 3. Mistakenly directing the E/C's counsel to frame his cross examination questions in a prescribed manner.

1. The claimant's caretaker testified that she provided 8 hours of attendant care in the presence of the claimant along with 4 hours per day of "on call" attendant care. "On call" care was defined during the merits hearing as including those periods of which the caretaker would call the claimant from work to check on her. The eight hours of attendant care that the caretaker provided was a mix of medically necessary attendant care and gratuitous non-compensable quality of life attendant care. The first DCA reversed the judge's order that awarded the full twelve hours and instructed the JCC to determine how many hours the caretaker actually provided medically necessary attendant care and to specifically exclude the "on call" attendant care when the caretaker is not in the presence of the claimant.

2. The E/C's IME initially charged an amount well in excess of the $400.00 statutory limit. The claimant moved to disqualify the IME as a witness. Prior to the trial, the E/C notified the JCC that the IME would waive his excess fees. Ultimately, however, the JCC excluded the IME's testimony. The first DCA ruled that the JCC erred by excluding the IME's testimony, because once the excess fee was waived, the dispute had been resolved. Therefore, there was no reason to exclude the IME's testimony.

3. During this trial, E/C's counsel used the word "possible" during numerous hypotheticals posed on cross examination to the claimant's vocational expert. The claimant's counsel objected to the use of the word "possible" and argued that the proper standard was within a reasonable degree of medical certainty. The objections were sustained and the JCC directed the E/C's counsel to frame his questions by using the phrase "reasonable degree of medical probability or certainty instead of "possible". The First DCA found that the JCC abused her discretion by sustaining the objections noting that the party should be allowed a full and fair cross examination.

*Appeal by William H. Rogner

PTD-PHYSICAL VS. PSYCHIATRIC

O Reyes v. Granite Construction/RSKCO 30FLW D63(Fla. 1stDCA 2005) In this case, the claimant filed a claim for PTD benefits. The claimant had reached physical MMI but had not yet reached psychiatric MMI. The First DCA ruled that the denial of PTD benefits applied solely to the issue of entitlement to PTD benefits from a physical standpoint as the issue of whether a claimant is entitled to PTD benefits from a psychiatric standpoint is premature because the claimant had not yet reached psychiatric MMI.

PTD-BURDEN OF PROOF AND ATTENDANT CARE

Adams Building Materials v. Brooks 30 FLW D74(FLa.1st DCA 2005) The claimant in this case was a paraplegic who lived in a rental home which was not handicap accessible . The E/C had made many modifications, to the home in order to accommodate the claimant's disability. At no time had the carrier denied any request for modification. The claimant filed a petition asking the carrier to build the claimant a "new" house that fully met all of his needs. None of the doctors could provide testimony as to why a "new" house was any

more medically necessary than modifying the existing house. However, the JCC awarded the new home along with 12 hours of attendant care benefits. The doctors in the claim had testified that the claimant would need at least 8 hours of attendant care and the claimant's caregiver testified that she provided between 12 and 14 hours of attendant care. The 1st DCA reversed the JCC on both points. They ruled that a prescription for attendant care was necessary in the award of attendant care benefits and that the maximum that the JCC could award would be 8 hours per day. The first DCA reversed the issue of the new house stating that it was the claimant's burden to show that a "new" house was medically necessary in place of modifying his existing home.

MCC-TEMPORARY EXACERBATION

Echelbarger v. Carpenter Company/Kember 30FLW D134(Fla. DCA 2005) The claimant suffered a compensable injury and was placed at MMI with a 6% impairment rating. However, the treating doctor reviewed medical records that showed that the claimant suffered from a significant preexisting condition and testified that the claimant's injury was only a temporary exacerbation of previous soft tissue back injury. The JCC agreed with the doctor and denied any future medical care based on the accident only being a temporary exacerbation. The first DCA reversed stating that the claimant could not have only suffered from a temporary exacerbation of a preexisting injury and also suffer from a new permanent impairment as a result of the new injury. In order for the judge to determine that a claimant suffered from a temporary exacerbation of a previous injury, the judge may not find that there is any new permanent impairment.

STATUTE OF LIMITATIONS- CLAIMS FOR CONTRIBUTION

City of Pembrooke Pines v. Jorge Villa Senor. 30FLW D142(Fla.1stDCA 2005) The claimant in this case worked for the City of Pembrooke Pines and filed a claim based upon exposure to sunlight at his job. During the time of his exposure, the employer was insured by two different companies. The claimant filed a petition against the second carrier and was awarded benefits. Approximately four years later, the second carrier filed a claim for contribution against the first carrier. The issue on appeal was whether the statute of limitations begins to run when the judge announces her order or when it is memorialized by signing the order, and whether the four year statute of limitations found in section 95.11(3)(f), Florida Statutes applies to claims of contribution or whether the two year statute of limitation found in section 440.19, Florida Statutes should apply. The First District Court of Appeal ruled that the statute of limitations begins to run when the judge signs her order and the four year statute of limitations is the proper one for claims of contribution among carriers.

ADJUSTER'S PERSONAL LIABILITY-INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Liberty Mutual Insurance v. Steadman. 30FLW D165 (Fla.2DCA 2005) The claimant in this case suffered from a lung condition and sought authorization for a bilateral lung transplant. The workers'

compensation adjuster denied the benefit and the case went to trial. The judge ultimately awarded the bilateral lung transplant but Liberty mutual failed to comply with the JCC's order and the claimant did not receive her transplant until approximately nine months after trial. After the surgery, the claimant filed suit in circuit court for intentional infliction of emotional distress, contending that the carrier's conduct in delaying authorization for surgery was motivated by greed and was a deliberate act intended to cause her stress and accelerate her demise.

The carrier moved to dismiss the claim based on workers' compensation immunity. The circuit court denied the motion to dismiss and the Second District Court of Appeal reversed, holding that the carrier was immune from suits of this nature due to a delay in payment. According to the 2nd DCA, the exclusive remedy for the claim of intentional infliction of emotional distress arising from a delay in payment is covered under the workers' compensation act through penalties and interest and other such penalties provided for in the workers' compensation statute.

CASE NOTES

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