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CASE NOTES
CASE LAW SUMMARY
January 2009

If you have any questions regarding Case Law Summaries, please contact W. Rogers Turner, Jr. : rturner@hrmcw.com

Fourth District Court of Appeal
Rule Nisi

City of Hollywood/Florida Municipal Insurance Trust v. Benoit, (Fla.4th DCA 1/21/09) The claimant incurred a severe head injury in 1996, and a stipulation was entered into in 1997 that the carrier would provide attendant care, paying the claimant’s mother 12 days of unskilled care, seven days a week. The claimant sustained a subsequent accident, and was transferred to an inpatient rehab facility, where he receives 24 hours of attendant care (provided by the same carrier). Several weeks later, the carrier ceased paying the mother attendant care and the mother then filed a Petition for Benefits seeking the attendant care payments under the terms of the ’97 stipulation. The JCC found he was without jurisdiction to rule on the PFB, finding the proper vehicle was a Rule Nisi. The mother filed a Petition for Rule Nisi, which the circuit court granted. Noting that the result seemed absurd, both the circuit judge and the appellate court noted the finite jurisdiction of the circuit court, which limits the analysis only to whether an outstanding order has been complied with, regardless of the evidence. The court noted that the carrier should have (1) drafted an original joint stipulation and should have included more definitive limiting language and (2) that no petition to modify had been filed by the carrier.

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Note: The carrier in this case did file a Petition to Modify. While the Appeal was pending, JCC Pecko granted their petition, noting however that she was without jurisdiction to rule on the period where the Rule Nisi was pending in Circuit Court.

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Attorney Fees and Costs from Settlements

Paralegal costs

Demedrano v. Labor Finders of the Treasure Coast/Amerisure, (Fla. 1st DCA 1/12/2008)

The DCA affirmed the JCC's finding that paralegal time sought to be paid to the claimant attorney by the claimant in a washout was not recoverable as a cost. The claimant's counsel argued that such "costs" were governed by the client's retainer agreement with the claimant attorney. The DCA noted that F.S. §§57.104 and 440.34(1) controlled, and such sections dictate, paralegal time to be included in attorney time, and not as a cost. [Click here to read case](#)

Due Process/Exclusion of Rebuttal Evidence

Vargas v. Chamsy Transfer, Inc./Liberty Mutual, (Fla. 1st DCA 1/9/2008)

The 1st DCA reversed JCC Castiello's decision allowing the E/C to assert the defense of "no injury in the course and scope" for the first time at trial, and reversed his denial of the claimant's request to present evidence rebutting the case. The claimant was injured in a compensable accident in 2002, which involved left sided back complaints. In July of 2007, the claimant began experiencing right sided back complaints. The claimant was taken out of work and filed a PFB on 10/3/07 seeking benefits based on the '02 date of accident. There was no response to the PFB, and an expedited hearing was set for 4/9/08. The claimant completed a pre-trial and submitted it to the E/C. Although the pre-trial was discussed at the claimant's deposition, after not receiving the completed E/C portion, the claimant filed the pre-trial on 4/1/08. On the morning of the hearing, the E/C electronically filed the pre-trial asserting defenses to compensability. For the first time at hearing, the E/C asserted that a new injury was the cause of the right sided complaints. The JCC denied the claimant's 120 day argument, and concluded the claim was not compensable. *Isaac v. Green Iguana*, the DCA reversed finding the parties are entitled to be put on notice of the issues to be litigated. They found the JCC denied the claimant due process by not allowing any rebuttal from the claimant. [Click here to read case](#)

Permanent Total Disability/Supplemental Benefits

City of Miami Springs v. Sanchez, 1D08-0134: The First District Court of Appeals held that as a matter of law where a claimant is injured and reaches PTD prior to age 62, the Claimant is not entitled to supplemental benefits after age 65. The parties had stipulated the Claimant was injured and reached PTD prior to age 63. Therefore, the JCC erred in finding that because the E/C failed to establish Claimant's eligibility for social security retirement when he reached 65, the Claimant was entitled to continued supplemental benefits after 65. The Court reversed the Order of the JCC.

Several recent judicial level opinions had adopted the position that the Employer/Carrier carried the burden of demonstrating the Claimant's entitlement to social security retirement upon reaching 65. By reaching this decision, the Court has eliminated the Carrier's need to obtain evidence of the Claimant's eligibility for social security retirement prior to suspending supplemental benefits. [Click here to read case](#)

Medical Benefits/One Time Change

Perez v. Rooms to Go, 1D08-2234: The 1st DCA reversed an order of Judge Hofstad

awarding a change in treating orthopedist. The claimant had previously been granted a one-time change in PCP doctor. The court held that F.S. § 440.13(2)(f)(2004) is clear and unambiguous on its face, and limits a claimant to one change of treating doctor per date of accident. [Click here to read case](#)

Mental or Nervous Injuries/ Temporary Indemnity Benefits

W. G. Roe & Sons v. Razo-Guevara, 1D07-3598: The Court reverses the JCC's limitation of temporary total disability for mental or nervous injury to six months. The language in s. 440.093(3) provides "subject to the payment of permanent benefits under s. 440.15, in no event shall temporary benefits for a compensable mental or nervous injury be paid for more than 6 months after the date of [physical MMI]." The Court cites to the Merriam-Webster Dictionary in defining "subject to" as "dependent on some act or condition." The Court held the six month limitation on temporary psychiatric benefits is conditioned upon the payment of permanent benefits for the associated physical injury. "This means the limitation does not apply unless permanent benefits are being paid."

It would appear as though the Court, by adopting this particular definition of "subject to", has virtually rendered the six month limitation in s. 440.09(3) meaningless. In *Martin-Marietta Corporation v. Vargas*, 472 So.2d 833 (Fla. 1st DCA 1985), the court stated, "We have held that where a claimant has both orthopedic and psychiatric injuries, permanent disability benefits cannot be awarded prior to the claimant reaching maximum medical improvement from both disorders." As permanent benefits are not to be paid prior to the Claimant reaching maximum medical improvement from all conditions, it is hard to imagine a situation where the six month limitation would apply.

The court could have selected a different definition of "subject to" to reach a more logical result. For example, using the definition "being under the power or rule of another" or "subordinate" the Court could have reached a decision that would have held that the temporary indemnity benefits for mental or nervous injuries would not be payable six months beyond the date of physical maximum medical improvement. The term "subject to" would serve to limit the six month period if the Claimant reached psychiatric maximum medical improvement less than six months after reaching physical maximum medical improvement.

This interpretation would be more consistent with the intent of the statute and would be more consistent with the way the term "subject to" is used in other sections of the statute. However, the Court, by defining "subject to" as "dependent on some act or condition", rendered nearly meaningless the 2003 changes to s. 440.09(3). [Click here to read case](#)

Attorney Fees and Costs from Settlements

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The DCA affirmed the JCC's finding that paralegal time sought to be paid to the claimant attorney by the claimant in a washout was not recoverable as a cost. The claimant's counsel argued that such "costs" were governed by the client's retainer agreement with the claimant attorney. The DCA noted that F.S. §§57.104 and 440.34(1) controlled, and such sections dictate paralegal time to be included in attorney time, and not as a cost.

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