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CASE NOTES

CASE LAW SUMMARY
JUNE 2007

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

HOSPITAL CHARGES:

One Beacon Ins. V. Agency for Health Care Admin., 958 So.2d 1127 (Fla. 1st DCA, June 27, 2007)

One Beacon sought review of a decision by the Agency for Health Care Administration (AHCA) regarding the amount the insurer was required to reimburse the ambulatory surgery center under workers' compensation laws for a service not listed in the Reimbursement Manual for Ambulatory Surgical Centers (ASCRM). The service in question was a surgery that took place in 2003.

The DCA found that the applicable ASCRM was the 1992 version because the ASCRM had not amended between 1992 and 2005. The applicable provision in the manual stated that "[r]eimbursement of a compensable ambulatory surgical center charge not itemized in the schedule of maximum reimbursement allowances shall be at 70 percent of the ambulatory surgical center's *usual and customary* charge."

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However, as the DCA held, the statute was amended, effective January 1, 1994 and removed all reference to the charges of any individual service provider in favor of a calculation of such charge based on the average fees of all providers in a given geographical area. This change created a conflict between the statute and the administrative rule and in such a conflict the statute prevails. Thus the DCA held that the insurer was only required to reimburse the surgical center based on the customary charge for the service in the community, rather than that of the center.

OCCUPATIONAL DISEASE AND DATE OF DISABILITY:

Orange County Fire Rescue v. Jones, 959 So.2d 785 (Fla. 1st DCA, June 21, 2007)

Claimant was a firefighter with Orange County Fire Rescue who was first diagnosed with hepatitis C on February 23, 1992. E/C accepted the hepatitis C as a compensable occupational disease and authorized treatment. E/C then paid TTD for a period of time and then claimant returned to work full-time. On November 3, 1997, claimant began treatment with interferon and ribavirin for his hepatitis C. The doctor removed claimant from work for approximately four months. E/C paid indemnity during this time period. When claimant finished treatment in December of 1998, his doctor opined that claimant was at MMI and claimant was assigned a 25% impairment rating. Claimant then returned to work full-time and has continued ever since.

Claimant asserted a new date of accident on November 3, 1997 when he was required to leave work because of the effects of treating his disease. E/C argued that there cannot be more than one date of accident. The DCA recognized the possibility of multiple dates of accident in occupational disease cases. In this case, the DCA reiterated that the date of accident in occupational disease cases is determined by the date of disability. A disability is defined as the date on which the claimant becomes incapable of performing work, partially or totally, in the last occupation in which he was exposed to the hazards of the disease. This means that detection does not necessarily coincide with the date of disablement. Thus the DCA found that the claimant's new date of accident was proper because he became incapacitated when he began the interferon treatment on November 3, 1997.

WORKERS' COMPENSATION IMMUNITY:

Bakerman v. The Bombay Co., 2007 WL 1774420 (Fla., June 21, 2007)

Claimant was injured in September 1997 when he fell off a wooden ladder at work while trying to retrieve merchandise. The ladder was in apparent poor condition and claimant had complained to his manager numerous times about the danger of the ladder. His manager had complained to the district manager and requested a new ladder. Nothing was done about the ladder.

Claimant received benefits under workers' compensation, but later sued Bombay under an intentional tort claim. Bombay asserted workers' compensation immunity. The court refused to grant summary judgment for either party and the case went to a jury. The judgement was entered in favor of the claimant for $118,228.20 after a finding of Bombay being 67% at fault and the claimant being 33% at fault. Bombay appealed.

The Third District reversed the judgment of the trial court pointing to *Turner v. PCR, Inc.*, 754 So.2d 683 to emphasize the common thread in liability cases of evidence that the employer tried to conceal the danger. Thus the Third District reasoned that without any evidence of concealment of danger, the evidence was

legally insufficient to support liability under the intentional tort exception to workers' compensation immunity.

The Florida Supreme Court reversed the Third District's ruling finding that the test is on of objective substantial certainty of harm or death and that it did not include an element of concealment. To add an element of concealment would allow employers to enjoy immunity from civil suits unless an employee could affirmatively show a concealment of danger by the employee. Rather, concealment is merely one factor in a nonexclusive list of what will establish substantial certainty as a matter of law.

***Note** – this case is applicable only to Dates of Accident before 10/1/03. As of that date, the applicable statute was amended.

St. Lucie Falls Property Owners Ass'n v. Morelli, 956 So.2d 1283 (Fla. 4th DCA , June 6, 2007)

Claimant was employed by an employee leasing company and was leased out to a property management company when he was injured on-site. Claimant filed a claim against the employee leasing company and received a lump-sum settlement. Claimant then filed a negligence action against the property owners' association. The association asserted the workers' compensation immunity defense. Claimant then filed for summary judgment on that defense, which was granted. The association appealed the decision.

The Fourth District held that there were genuine issues of material fact on whether the employee was a "borrowed servant" and the issue of the association's control over the leased employee of a "help services company." The Fourth District held that contractual privity was not required under 440.11(2) Fla. Stat. (1999) and thus the trial court could not preclude the usage of 440.11(2) as a matter of law. Secondly, there was a material issue of fact with respect to whether the claimant could be considered a borrowed servant under common law which would allow for the immunity defense. Because there were issues of fact as to both of these claims, summary judgment was reversed.

COURSE AND SCOPE OF EMPLOYMENT

Garcia v. City of Hollywood, 2007 WL 1610156 (Fla. 4th DCA, June 6, 2007)
Garcia, a minor child sued the City of Hollywood in a liability action claiming that the City was liable for damages caused to her when she was struck by a car driven by a city police officer. The court denied liability stating that the police officer was outside the course and scope of his employment and thus the city could not be held liable. The court looked at the facts surrounding the incident and found that the police officer was not in the process of carrying out a primary responsibility of his job as a police officer. The police officer was off-duty and made the personal decision to go to the police station an hour early to study for his upcoming Lieutenant's exam; he was not furthering any interest of his employer nor performing any duties of his employment. He was simply in transit to the police station.

RULE NISI

U.s. Foundry & Mfg., Inc. v. Carner, 959 So.2d 378 (Fla. 3d DCA, June 13, 2007)
Claimant filed a worker's compensation action against E/C and was awarded permanent and temporary disability benerfits. E/C appealed. During the pendency of the appeal, claimant petitioned circuit court for rule nisi to enforce the temporary benefits. Claimant argued that E/C had abandoned the issue of temporary benefits on

appeal because it was not included on the initial brief and thus the circuit court had jurisdiction to issue the rule nisi. Circuit court granted the rule nisi and E/C appealed the order of the circuit court. The Third District held that a circuit court's jurisdiction on a claimant's petition for rule nisi application is solely limited to enforcing the terms of such a compensation order that is in full force and effect. Rule nisi is premature when the appeal from a workers' compensation award is still pending. E/C by appealing divested the circuit court of its jurisdiction to consider the rule nisi. E/C listed the temporary benefits on its notice of appeal. Third District reversed the award of rule nisi by the circuit court.

DEFINITION OF EMPLOYEE:

Orange County Sch. Bd. V. Powers, 959 So.2d 370 (Fla. 1st DCA, June 13, 2007)

The claimant was a university student at the University of Central Florida (UCF) who paid for 12 semester hours in order to participate in an intern program. The claimant was injured while student-teaching when a kid pushed her from behind causing her to hit a wall. The claimant upon asking for treatment at the school was told to contact UCF about treatment. UCF advised the student that it was not responsible for her injuries. The claimant then brought this workers' compensation action against the Orange County School Board (OCSB). OCSB filed a notice of denial asserting that claimant was not an employee.

The JCC found that the claimant was employee under 440.02(15)(a) Fla. Stat. (2003) because she was receiving remuneration or valuable consideration from OCSB in the form of education despite not receiving any monetary remuneration. Additionally, the JCC found that 1012.39(3) Fla. Stat. (2003) which extended to interns the legal protections afforded to educators in turn entitled her to workers' compensation benefits.

The DCA reversed stating that education received in exchange for payment of tuition is not remuneration for purposes of the statute. Furthermore, the DCA found that the subsection providing legal protection to interns did no supersede workers' compensation statutes and did not automatically provide the claimant with coverage. In order for the claimant to receive benefits, she must still satisfy workers' compensation law, including the definition of an employee.

Alternatively, the claimant argued that if she was not an employee, she was a volunteer eligible for benefits under 440.02(15)(d)(6) Fla. Stat. (2003). However, the JCC found that claimant was not at OSCB for the purpose of aiding, but rather to further her own goal of completing the UCF course work. The DCA agreed, holding that her motive in working at OSCB precluded her from being a volunteer under the statute.