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CASE NOTES
CASE LAW SUMMARY
March 2011

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Jurisdiction/Employment Contract

Owens v. CCJ Auto Transport

The claimant was injured outside of Florida. The JCC held that he had no jurisdiction because the last act needed to finalize the claimant’s contract of employment was to pick up the employer’s truck in Utah. He would then drive a truck throughout the United States. The First DCA reversed and found that the claimant was in Florida when he accepted the offer of employment, which was the last act required to complete the employment contract. The First DCA found that picking up the truck in Utah was necessary to perform the employment contract, but not to form it. [Click here to view Order](#)

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Standard for Sanctions/Dismissal of PFBs

Hernandez v. Palmetto General Hospital, (Fla.1st DCA 3/31/2011)

The DCA found the JCC abused his discretion in dismissing claimant’s PFBs with prejudice as a sanction. The JCC previously ordered the claimant to pay the E/C prevailing party costs for dismissal of several PFBs. That order was affirmed by the First DCA. Thereafter, the E/C moved to dismiss additional PFBs under 440.24(4) as a

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sanction for failure to pay the outstanding costs. The claimant responded via her initial attorney alleging she was unable to pay the costs, and filed an affidavit. A hearing was set and the claimant's initial attorney withdrew. The claimant then spoke to a new attorney, whose office mistakenly told the claimant the hearing on E/C's motion was cancelled. The claimant failed to appear and the JCC dismissed the subsequent PFBs "with prejudice". The prior attorney testified they informed the claimant of her need to attend the hearing either alone or with new counsel. Thereafter, the claimant moved to vacate the order of dismissal. The JCC denied that motion. The DCA found the JCC abused his discretion, as there was no evidence the claimant's failure to appear (although arguably "unreasonable") was willful. Although some sanction may have been available, the JCC should not have dismissed the PFB "with prejudice". The DCA noted dismissal may be warranted under 440.24(4), but only until such time as the claimant complies with the underlying order. [Click here to view Order](#)

Prevailing Party Costs/Power of JCC to award to E/C

Punsky v. Clay County Brd of County Commissioners/Scibal Associates, (Fla.1st DCA 3/31/2011)

The JCC awarded the E/C prevailing party costs, which included costs of depositions, court reporters, and independent medical examiners. The claimant appealed on multiple grounds, all of which the DCA rejected. The claimant argued that costs were limited to \$250 for the E/C. This limitation in 440.19(6) does exist, but only where the E/C prevails on a claim brought in "law or admiralty", rather than a DOAH W/C claim. They rejected the argument that F.S. 440.24(4) applies, as that deals with enforcement of a cost award, rather than the ability to order such costs. The DCA found that any constitutional arguments (essentially that if the claimant is unable to pay costs, a JCC may dismiss further petitions, thus limiting access to courts) were not supported by record evidence. Finally, the court ruled that the Legislature's specific amendments of 440.34(3), indicated their intent to allow the prevailing party to be reimbursed all reasonable costs of litigation, without limitation as to depositions or IME charges. [Click here to view Order](#)

Attorney Fees/Evidence regarding community hourly rate

McDermott v. UPS/Liberty Mutual, (Fla.1st DCA 3/28/2011)

The DCA reversed and remanded the JCC's finding that the reasonable hourly rate in the district (Ft. Myers) is \$200 per hour. The claimant attorney offered evidence that the prevailing community rate was \$300-\$400. The defense attorney presented argument, rather than testimony that the prevailing rate in the area is \$200, which the JCC accepted. The DCA noted that although the JCC may reject even uncontroverted evidence that he or she disbelieves, the JCC is not empowered to substitute his personal experience or subjective belief in making ultimate findings. [Click here to view Order](#)

Attorney Fees/2009 Limits to Guideline Fees

Kauffman v. Community Inclusions, Inc./Guarantee Ins., (Fla.1st DCA 3/23/2011)

In a fairly brief opinion, the First DCA affirmed the JCC's award of a statutory fee in a post 7/1/2009 D/A case. Following the S. Ct. decision in Murray, the Florida Legislature limited claimant attorney fees to a statutory guideline fee. The JCC in this case awarded

the claimant \$3,417.03 in benefits, but also found a reasonable fee would be \$25,075. However, the JCC concluded the statute limited him to awarding anything other than a guideline fee, and awarded a statutory fee of \$684.41. The DCA rejected the appellant's statutory construction argument that deviation from an hourly fee could occur where the fee was "awarded" rather than "approved". The DCA also rejected arguments based upon due process, equal protection, separation of powers and access to courts. The appellant claimant will likely file a motion for rehearing and rehearing en banc with the First DCA. In addition, they will likely file a motion with the First DCA to certify this as a question of great public importance. If the 1st DCA grants the motion and certifies the question, the FL. S. Ct. will have discretionary jurisdiction, and decide whether or not to hear the case. [Click here to view Order](#)

Medical Benefits/Appportionment

Jewell v. Gevity HR/Chartis Ins., (Fla.1st DCA 3/23/2011)

The First DCA reversed the JCC's finding that the E/C could apportion the claimant's medical care. The authorized treating neurosurgeon opined that 40% of the need for the claimant's back surgery was due to a pre-existing condition. The JCC found that the carrier only had responsibility for 60% of the claimant's disability (if any) and need for treatment. The DCA examined the apportionment statute, which allows apportionment where there is merger of a "pre-existing permanent disability or impairment with a subsequent compensable permanent disability or impairment...". The DCA found that by the clear language of the statute, the neurosurgeon's testimony regarding only a pre-existing condition was insufficient to prove merger and apportionment. [Click here to view Order](#)

Presumption Claims/Due Process

Clay County/Scibal Associates v. Bramlitt, (Fla.1st DCA 3/16/2011)

The E/C appealed the JCC's finding of compensability as to hypertension, which the DCA affirmed without comment. The DCA reversed the portion of the JCC's decision ordering reimbursement of past medical bills, as no CSE existed that the E/C stipulated to determination of that issue. [Click here to view Order](#)

PTD/Burden of Proof

Langevin v. First Union National Bank and ACE/ESIS, (Fla.1st DCA 3/3/2010)

Although the JCC erred in finding the claim was barred by the doctrines of res judicata and law of the case, the DCA nevertheless affirmed the order on the merits because the JCC properly found Claimant failed to satisfy the pre 2003 five-step sequential inquiry used to establish catastrophic injury under section 440.15(1)(b), Florida Statutes. See, e.g., Butler v. City of Jacksonville, 980 So.2d 1250, 1252 (Fla.1st DCA 2008). [Click here to view Order](#)