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# CASE NOTES

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## CASE LAW SUMMARIES: March, 2006

### **BAD FAITH CLAIMS**

Ingraham v. Travelers Indemnity Co., 31 FLW D724 (3<sup>rd</sup> DCA March 8, 2006)

The claimant alleged a bad faith cause of action arguing that Travelers violated section 626.9541(1)(i)3, Fla. Stat. (1998) by denying his case on contradictory grounds and ignoring evidence supporting his claim. The trial court dismissed the claimant's complaint with prejudice. The Third DCA affirmed the dismissal and reiterated the Florida Supreme Court's opinion in Aguilera that if a claimant is to be successful regarding a "bad faith" claim, the claimant must show that the insurer committed an intentional tort that is sufficiently separate, "subsequent to and distinct from the original workplace injury". Mere negligent conduct, simple bad faith and minor delays in payment are not enough to establish a cause of action.

### **ATTORNEY FEES**

Murillo v. Tri-State Employment Services, Inc. and Travelers Insurance Co., 31 FLW D700 (1<sup>st</sup> DCA March 3, 2006)

The claimant appealed the JCC's Order granting the defense attorney fees pursuant to 440.32(2) Fla. Stat. (2002), asserting the JCC lacked jurisdiction to award fees because the claimant had served a Notice of Voluntary Dismissal.

The First DCA held, that "after a voluntary dismissal by a plaintiff, the trial Court does have jurisdiction to award attorney's fees where the fees are authorized by statute or a contract between

the parties.” The First DCA went on to note that although the claimant served a Notice of Voluntary Dismissal as to Travelers, the claim pending before the JCC was never dismissed and “any attempt to dismiss less than the entire action is a nullity, and does not terminate the Court’s jurisdiction.”

Transportation Casualty Insurance Company v. Feldman & Buechele, 31 FLW D802 (3<sup>rd</sup> DCA March 15, 2006)

The Circuit Court awarded \$56,800.00 in attorney fees and costs pursuant to section 627.428 Fla. Stat. (1991). That section authorizes an award of attorney’s fees for insureds who successfully sue their insurers. The Third DCA reversed citing 440.34 Fla. Stat. (1991). That section provides that JCCs, not Circuit Court Judges, are authorized to award attorney fees in workers’ compensation cases. The Third DCA noted, though, that when section 440.34(1) is read in connection with section 440.24(1), it allows Circuit Court Judges to award attorney’s fees in proceedings such as a Rule Nisi action to enforce payment of compensation.

## **STATUTE OF LIMITATIONS**

Rice v. Reedy Creek Improvement District and Unisource Administrators, Inc., 31 FLW D698 (1<sup>st</sup> DCA March 3, 2006)

The claimant injured his back on both March 18, 2000 and April 3, 2000. The claimant last received authorized care on September 30, 2002 (that was the last benefit of any kind). The claimant filed a Petition on September 4, 2003. The claimant filed a second Petition on January 8, 2004. On March 10, 2004 the claimant voluntarily dismissed his first Petition. A third Petition was filed on March 12, 2004. On April 12, 2004, the claimant voluntarily dismissed his second Petition. At trial, the JCC found the claimant’s claim was barred by the Statute of Limitations.

The First DCA reversed. The First DCA found that the first Petition was timely, and prior to dismissing that Petition, the claimant had filed another Petition. The First DCA held that a timely filed claim which was still pending, precluded dismissal of a claim filed more than two years from the date of accident and filed more than one year from the last payment of benefits.

## **EMA**

City of Tampa and Commercial Risk Management v. Charles Thompson, 31 FLW D828 (1<sup>st</sup> DCA March 17, 2006)

There was a conflict between the opinion of the claimant’s treating physician and the opinion of the E/C’s IME regarding causation. The JCC denied the E/C’s request for appointment of an EMA. The First DCA found the JCC committed reversible error and remanded with instructions that the JCC appoint an EMA as requested by the E/C.

## **EXCLUSIVE REMEDY**

Bruno v. Destiny Transportation, Inc., JDH Concrete Plumbing, Inc., Dustin Gamboa and Louis Garcia, 31 FLW D688 (2<sup>nd</sup> DCA March 3, 2006).

The claimant was an employee of LCC, a general construction contractor, hired by Lykes Fertilizer, to reconstruct concrete walls on Lykes' property. LCC contracted with JDH Concrete Plumbing, Inc. to provide a concrete pump and pump operators to propel concrete into wooden wall forms on the job site. JDH, in turn, leased Gamboa and Garcia from Destiny, an affiliate of JDH, to operate the pump equipment.

The claimant was injured while guiding the flow of concrete into the wall forms by using a hose attached to the concrete pump that Gamboa and Garcia operated. The claimant received workers' compensation benefits from LCC and then filed a personal injury suit against Destiny, Gamboa, and Garcia. Final Summary Judgement was entered in favor of the defendants based on statutory immunity and the claimant appealed.

The Second DCA found that statutory immunity did not extend to Destiny, Gamboa and Garcia. The Second DCA found that although LCC was a statutory employer in this matter, and that the same immunities from liability enjoyed by an employer extends to each employee of the employer, statutory immunity did not apply where an employee of one subcontractor is injured by an employee of another subcontractor. The Second DCA reasoned that if a subcontractor is not liable for payment of workers' compensation benefits for the employees of the other subcontractor, the injured employee should not be limited to recovery under the workers' compensation scheme (one who does not have the duty to provide workers' compensation coverage has no reason to expect workers' compensation immunity).

The Second DCA also found that the question as to whether Gamboa and Garcia were borrowed servants created questions of fact precluding summary judgement. The Second DCA noted that if Gamboa and Garcia were borrowed servants of LCC, then Destiny, Gamboa and Garcia would be immune from suit under Florida workers' compensation laws. This matter was reversed and remanded.

## **CASE NOTES**

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