HURLEY ROGNER
MILLER, COX, WARANCH & WESTCOTT, P.A.

Rex A. Hurley*
William H. Rogner*†
Scott B. Miller*
Derrick E. Cox*
Michael S. Waranch*
Paul L. Westcott*
Gregory D. White*
W. Rogers Tuner, Jr.*
Paul L. Luger
Gregory S. Raub*
Anthony M. Amelio*

Robert J. Osburn, Jr.
Matthew W. Bennett*
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Teri A. Bussey
Andrew R. Borah
Jonathan L. Cooley
Allison M. Twombly
Sandra D. Wilkerson
Dominic C. Locigno
Timothy F. Stanton

** Florida Bar Board Certified Workers' Compensation*
† Florida Bar Board Certified Appellate Practice

CASE NOTES

CASE LAW SUMMARY
March 2007

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

MARTIN V. CARPENTER DEFENSE

Robert Thompson v. Cone Distributing, Inc. and Wausau Insurance Company, 32 FLW D 796 (First DCA March 26, 2007)

The First DCA found there was no competent substantial evidence to support the JCC's finding that there was a medical relationship between the claimant's workplace injury and undisclosed prior injury and therefore reversed and remanded the matter.

Please direct replies or inquires to our Winter Park office

www.hrmcw.com

Winter Park Office
1560 Orange Avenue
Suite 500
Winter Park, FL 32789
T (407) 571-7400
F (407) 571-7401

Ft. Pierce Office
603 N Indian River Dr
Suite 102
Ft. Pierce, FL 34950
T (772) 489-2400
F (772) 489-8875

Tallahassee Office
257 Pinewood Drive
Tallahassee, FL 32303
T (850) 386-2500
F (850) 222-5553

Ft. Lauderdale Office
1451 W Cypress Creek Rd
Suite 300
Ft. Lauderdale, FL 34950
T (954) 958-0323
F (954) 958-0322

VENUE/FORUM NON CONVENIENS

Wynn Drywall, Inc. v. Aequicap Program Administrators, Inc., fka Professional Insurance Underwriters, Inc., 32 FLW D 700 (Fourth DCA March 14, 2007).

Wynn Drywall, Inc. appealed a nonfinal Order denying its Motion to Transfer Venue/Forum Non Conveniens under section 47.122, (Fla. Stat. 2006). That provision provides: "For the convenience of the parties or witnesses or in the interest of justice, any court of record may transfer any civil action to any other court of record in which it might have been brought."

The Fourth DCA noted that a plaintiff's forum selection is presumptively correct. The burden is on the defendant to establish that either substantial inconvenience or undue expense requires a change for the convenience of the parties or witnesses. Wynn Drywall presented an Affidavit identifying witnesses who would testify in the matter and showed the witnesses were located in or near Duval County. Aequicap presented no evidence (just arguments) in opposition to the motion. The Fourth DCA found that Wynn Drywall demonstrated that Broward County is a forum non conveniens and remanded with instructions to transfer venue to the Fourth Judicial Circuit in Duval County.

PERMANENT IMPAIRMENT BENEFITS/PENALTIES AND INTEREST

Robert McCurdy v. City of Hialeah and Cambridge Integrated Services, 32 FLW D 578 (First DCA February 28, 2007).

The claimant appealed the denial of PTD benefits and the denial of penalties and interest on the award of permanent impairment benefits.

The First DCA found the PTD denial was supported by competent substantial evidence. The E/C conceded the claimant was entitled to penalties and interest on the award of permanent impairment benefits. The Order was reversed and remanded for the limited purpose of awarding penalties and interest.

EMA

Jeffrey Alvarado v. Wackenhut Corporation and Gallagher Bassett Services, Inc., 32 FLW D 632 (First DCA March 6, 2007)

There was conflicting testimony from two neuropsychologists concerning whether the claimant's work-related accident caused any neurological dysfunction. The E/C's motion for a neuropsychological EMA was granted. The claimant appealed.

The First DCA found that Florida Administrative Code Rule 59A-30.002(10) (2006) defines an EMA as a "physician." Section 440.13(1)(r) Fla. Stat. (2002), defines physician. A neuropsychologist is not included as a physician under that provision and the First DCA therefore quashed the Order and remanded the matter for an appointment of a "physician" to resolve the dispute.

ATTENDANT CARE

James W. Windham Builders, Inc., and FCBI/USIS v. Kim Van Overloop, 32 FLW D 631 (First DCA March 6, 2007).

The claimant injured his ankle in April 2004 which required emergency surgery. The claimant's treating physician orally prescribed attendant care to the claimant's wife. A written prescription was ultimately drafted on November 11, 2004.

The JCC found the E/C responsible for attendant care finding the written prescription (although completed after the fact) was sufficient because it merely formalized the doctor's previous oral prescription and also because the JCC found the carrier's actions amounted to an attempt "to hide behind a wall of willful ignorance concerning the claimant's needs for attendant care following the surgery." (The E/C had advised the doctor regarding workers' compensation billing information, but failed to inform him of the statutory requirement of a written prescription and there were also many discussions between the claimant's wife and the adjuster and the wife was never advised a written prescription was required).

Section 440.13(2)(b), Fla. Stat. (2004), provides, in part, that the E/C shall not be responsible for attendant care until a prescription for same is received and that prescription can not be applied retroactively. The First DCA found the statute to be clear and unambiguous and disagreed with the JCC that the written prescription met the statutory definition.

The First DCA, however, agreed the E/C attempted to avoid payment of attendant care by willful ignorance and affirmed the JCC's Order. The First DCA noted E/Cs are duty-bound to monitor a claimant's injuries and provide needed benefits. The First DCA pointed to 440.015 Fla. Stat. (2004), noting that the legislature's intent was that the workers' compensation law "be interpreted so as to assure the quick and efficient delivery of disability and medical benefits to an injured worker."

FIREFIGHTERS' PRESUMPTION

City of Tarpon Springs and Florida League of Cities, Inc. v. Michael Vaporis, 32 FLW D 678 (First DCA March 12, 2007).

The claimant was hired as a firefighter on January 27, 1986. He successfully passed his physical. On February 14, 2005, the claimant suffered a heart attack.

The claimant sought workers' compensation benefits applying section 112.18 Fla. Stat. (2005). This is known as the "firefighters' presumption". The provision reads: "Any condition or impairment of health of any ...firefighter...caused by tuberculosis, heart disease, or hypertension resulting in total or partial disability or death shall be presumed to have been accidental and to have been suffered in the line of duty unless the contrary be shown by competent evidence. However, any such firefighter...shall have successfully passed a physical examination upon entering into any such service..., which examination failed to reveal any evidence of any such condition...."

The JCC found for the claimant with the explicit finding that the sole medical testimony "[fell] far short of establishing that some other specific hazard or non-

occupational hazard was the cause of claimant's disease."

The First DCA found the JCC erroneously applied a greater burden of proof to the E/C and that all the statute requires is competent substantial evidence that convinces the JCC the disease was caused by some non work-related factor, not that it was caused by any sort of "specific hazard or non-occupational hazard". The matter was reversed and remanded for consideration of the evidence under the proper burden of proof.

APPEALS/COMPETENT SUBSTANTIAL EVIDENCE

Landmark Towers, LLC and Aequicap Insurance Company/Claims Control v. Francisco Ibarguen, 32 FLW D 686 (First DCA March 13, 2007).

The JCC held the industrial accident was the major contributing cause of the claimant's condition and need for treatment. The JCC accepted one doctor's testimony over that of another. The First DCA noted that although they disagreed with the JCC's conclusion, they could not substitute their conclusions for that of the JCC because competent substantial evidence supported the ruling. The First DCA commented that it is within the JCC's discretion to resolve a conflict in the evidence and make credibility determinations. The Order was affirmed.

EXEMPTION/CONSTRUCTION INDUSTRY

Florida Department of Financial Services as Receiver for Associated Businesses & Commerce Insurance Corp. v MJ Versaggi Trust d/b/a Verisaggi Properties, 32 FLW D 676 (Second DCA March 9, 2007).

In 1997, the MJ Versaggi Trust ("Trust") began refurbishing an apartment building. It contracted with ABC Insurance Company to secure workers' compensation coverage. In addition to its employees, the Trust engaged two other men, Freundo and Lehmkuhle, to work on the project. For purposes of calculating the ABC policy premiums, these men were treated as independent contractors and not deemed to be covered employees.

In 1998, ABC became insolvent and went into receivership. The Department, as ABC's receiver, conducted an audit of the policy and determined Freundo and Lehmkuhle should have been treated as employees instead of independent contractors. The Department advised that an additional policy premium was due and the Trust refused. The Department sued.

The Trust moved for Final Summary Judgment which was granted. The Trust tendered copies of notarized forms completed at the time of hire by Freundo and Lehmkuhle, titled "Construction Industry Certificate of Election to be Exempt from the Florida Workers' Compensation Law." Each form also included an "Affidavit of Independent Contractor status".

The Second DCA found that merely completing the form, as in this case, does not satisfy the requirements for an exemption under 440.05(3). The provision provides that the Notice of Election must be mailed to the Division of Workers' Compensation and the Notice is not effective "until 30 days after the date it is mailed." After the Division receives the Notice and determines that it meets the statutory requirements, it issues a Certificate of Election.

The Second DCA reversed the Final Summary Judgment Order and remanded for further proceedings.