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CASE NOTES
CASE LAW SUMMARY
March 2009

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

PEOs/Coverage by Estoppel/Definition of Wages

Centimark/Broadspire and JK Johns Roofing and Sheet Metal v. Jose Gonzalez/S.E. Personnel/Packard Claims, (Fla.1st DCA 3/17/09) The DCA affirmed an Order of JCC Thurman that promissory estoppel did not exist to create coverage for the claimant's injuries under the PEO's insurance policy. Claimant, an employee of ALM, fell from a roof. ALM was a subcontractor of JK Johns, who was in turn a subcontractor of Centimark Roofing. The PEO (S.E. Personnel) provided payroll services and workers' compensation coverage to ALM. Their policy stated their coverage applied only to employees leased, not subcontractors. The court noted the JCC correctly found that the claimant was not a leased employee under the PEO, but a direct employee of ALM. As their role was clearly communicated, and no promise was made on their part to insure the claimant, estoppel clearly did not apply. The court reversed the JCC's finding, however, that the claimant's earnings, unreported for tax purposes, were "wages", as the JCC did not have the benefit of recent decision in Fast Tract v. Caraballo, 994 So.2d 355 (Fla.1st DCA 2008). That decision holds that for a claimant to have their income included as "wages" under the statute, they must have reported such income for federal tax purposes. Click here to read case

Enforcement of Settlement Agreements

Lanza v. Damian Carpentry/FCCI, (Fla. 1st DCA 3/13/09) Claimant filed a PFB. The carrier asserted an SOL defense and never paid any benefits. The claimant offered to settle the case for $17,500, which the carrier accepted. No terms were discussed other than that amount. Later, the claimant attorney sent a letter with a "breakdown", which netted the claimant $10,000 and included a past fee for benefits obtained. The carrier declined to assign a side fee, and sent the check to the claimant attorney. The claimant attorney then asked the carrier to rescind the denial of the SOL defense to create a "benefit" to the claimant, which they declined to do. The carrier then moved

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to enforce the settlement. Several attempts were made to procure the claimant attorney's presence at the hearing. The record showed the claimant attorney failed to initially appear, stating as grounds a medical emergency. At a rescheduled hearing three months later, an associate appeared who indicated the original attorney again had a medical reason for not appearing. The record indicated the original attorney responded to the JCC's message re: his appearance saying "*he didn't care what the judge was going to do about the hearing*". Based on that, the JCC conducted a hearing without evidence from the claimant, and ruled the parties had an enforceable settlement. The DCA rejected the claimant's arguments that there was no settlement, holding that the claimant attorney's "self serving" breakdowns of the $17,500 were not essential terms upon which the parties failed to agree. They found the claimant attorney's fee was a non essential term, and once the non-contingent settlement offer was accepted, any terms re: attorney fee arrangements were between the claimant and his attorney (and the JCC). Click here to read case

Notice Defense

Gregory v. Crum Staffing/Broadspire,(Fla. 1st DCA 3/10/2009) The First DCA reversed the JCC's Order denying benefits based on the claimant's alleged failure to timely notify the employer of an injury within the statutorily required time frame. The claimant argued for reversal, alleging the employer had actual notice of the injury. The JCC found the supervisor witnessed the incident in question, heard the claimant say "something about an injury" and knew the claimant sought medical attention within 30 days of the incident. The JCC found "the statute" required actual knowledge of the injury to be communicated to the employer. The DCA distinguished between the requirement of reporting "an injury" under F.S. § 440.185(1)(2005), with the "actual knowledge" language contained in the exception provision found in subsection (a). The DCA further held that the employer's witnessing and knowledge of the facts surrounding a case satisfied any requirement the employee regarding notice. The DCA repeated that an employee's notice responsibilities "need not detail every facet of the injury". Click here to read case

Final Orders/Sufficiency of Findings of Fact

Mitchell v. HO Communications/Wausau Ins., (Fla. 1st DCA 3/10/2009) The First DCA considered for the second time in the same case an appeal of an Order denying a claim for PTD benefits. In their first opinion, the DCA instructed the JCC to provide a clearer foundation for findings related to impairment and disability for a right knee condition, as well as causation and permanent impairment for an alleged psychiatric condition. The DCA found the trial court did so that for the knee condition. However, with regard to the psychiatric condition, they instructed the JCC to clarify the extent of psychiatric injury (temporary vs. permanent), and if there is a permanent injury, to provide a basis for assigning a numerical impairment rating. Click here to read case

Misrepresentation/Sufficiency of Evidence

Dieujuste v. J. Dodd Plumbing Inc./Federated Mutual Ins. Co., (Fla.1st DCA 3/10/2009) The First DCA reversed an Order of the JCC disqualifying the claimant from receiving WC benefits. The JCC found the claimant violated F.S. §§ 440.09(4) and 440.105. The DCA held that the JCC's findings in this regard were not based upon competent, substantial evidence. The record reflected that the claimant had a compensable knee injury, two knee surgeries and had a recommendation for a total knee replacement. The claimant was deposed on two occasions and admitted that he could ambulate without a cane, and did so frequently. On the date of an authorized

medical appointment, the claimant was seen on surveillance ambulating to the doctor's office without a cane, and then at some point he was handed a cane. The E/C asserted misrepresentation, alleging that the claimant was attempting to portray himself as more disabled to doctors than he actually was. The E/C alleged that the claimant's statements of pain to his doctors, as well as statements that he had problems standing or putting weight on his leg were false or misleading. The DCA noted the language of F.S. §§ 440.09(4) and 440.105 discusses misleading "oral or written statements", and found that all doctors had testified that the claimant's presentation was consistent with what they had been told and that his objective findings supported the claimant's statement to them. The DCA found the surveillance video was not a statement or presentation which would qualify as a misrepresentation under the statue. Click here to read case

Ripeness/Dismissal of Claims/IMEs

Farnam v. U.S Sugar Corp./Gallagher Bassett, (Fla. 1st DCA 3/6/09) Although the opinion is unclear, it appears that in a case with two dates of accident, the JCC accepted a stipulation of the parties' that the E/C was no longer the MCC of the claimant's lower back condition from a single accident. The DCA affirmed the Judge in this regard. However, the DCA reversed the JCC's rulings on two additional issues. The JCC considered a new claim for low back injuries due to repetitive trauma, which had not yet been mediated. Although she acknowledged it was not ripe, she incorporated findings essentially denying the new repetitive trauma claim, and then denied the claimant's request for an IME, finding that no dispute existed to award the IME. Click here to read case

Firefighter Presumption

Punsky v. Clay Count Sherriff's Office/Scibal Insurance, (Fla. 1st DCA 3/6/2009) In an unusual move, the First DCA (without identifying this as a corrected or revised opinion), issued the second opinion in a week on the same case (See original 2/27/09 Punsky case in the 03/02/09 HRMCW newsletter for a complete summary). The court added additional analysis and some additional facts from the case, and certified the following question to the Supreme Court:

> SHOULD CALDWELL V. DIVISION OF RETIREMENT, FLORIDA DEPARTMENT OF ADMINISTRATION, 372 SO.2D 438 (Fla. 1979), BE CONSTRUED TO MEAN THAT THE HEIGHTENED BURDEN OF CLEAR AND CONVINCING EVIDENCE IS REQUIRED TO REBUT THE "FIREFIGHTER'S PRESUMPTION" IN SECTION 112.18(1) WHEN THAT STATUTE EXPRESSLY PROVIDES THAT THE PRESUMPTION MAY BE REBUTTED BY THE LESSER BURDEN OF "COMPETENT EVIDENCE"?

Although the holding of the court from the 2/27 opinion remains in force, the certification to the Supreme Court certainly leaves the question of the proper burden of proof in presumption cases in an uncertain state. Click here to read case

Dismissal/Failure to Prosecute

Fuente v. Embro Inc./Associate Industries, (Fla.1st DCA 3/6/09) The First DCA found the JCC abused his discretion in dismissing the claimant's PFBs. Both parties failed to appear at a noticed Pre-Trial Hearing or file a written Pre-Trial. The JCC found it was the claimant's burden to move his case forward, and dismissed the PFBs. Subsequent motions to vacate the Order of Dismissal indicated the parties had

misunderstood the court's directions re: filing the PFB by mail, and noted that the opposing counsel did not object to vacating the Order. Dismissal for lack of prosecution is only proper where "a petition, response, motion, order, request for hearing, or notice of deposition has not been filed during the previous 12 months unless good cause is shown." F.S. § 440.25(4)(i), (2008). The DCA found the JCC's order lacked any findings indicating a petition, response, motion, order, request for hearing or notice of deposition had not been filed in Claimant's case in the 12 months preceding the dismissal. The Court noted that even if the JCC's Order had been meant as a sanction, dismissal is too harsh unless the failure to appear is done with "willful disregard for the authority of the JCC". Click here to read case

Appointment of EMA

Brown v. Vanguard Security/Claims Center, (Fla. 1st DCA 3/4/2009) The First DCA reversed JCC Harnage's denial of a motion for EMA. The JCC accepted the E/C IME physician's opinion over that of the claimant. The JCC noted that the opinions of the treating physician (*the opinion is silent as to whether this doctor was authorized or not*) did not comport with logic or reasoning. The DCA rejected the E/C's supplemental filing and argument that Dawson v. Circuit Court Clerk of Hillsborough City, appears to support the JCC's reasoning. The court found the two cases distinguishable, noting the rejected opinion in Dawson was from a non-treating (*and non-authorized*) doctor , while here the rejected opinion was from a treating doctor. The Dawson opinion seems to conflict with the 2004 Champman v. Nationsbank case that the court also cites in this opinion, which holds that "the JCC does not have authority to resolve conflicts between physician opinions once the claimant has filed a motion for EMA". Click here to read case