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CASE NOTES
CASE LAW SUMMARY
March 2013

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

District Court of Appeal Cases

CVS Caremark/Gallagher Bassett v. LaTour, (Fla.1st DCA 3/28/13)
Depositions/Adjuster not required to appear for deposition in county where action venued

The E/C sought review of the JCC's order compelling the claims adjuster to appear in Flagler County, where the action was filed, rather than Orange County, where the adjuster worked. The DCA reviewed the Florida Civil Rules as well as Federal Law, which hold that although a plaintiff may be compelled to attend deposition in the county where the action is filed, a corporate representative of a defendant *who is not seeking affirmative relief*, may not be compelled to travel outside the county of the corporations' principal place of business. It would seem to follow, however, that where the carrier is seeking affirmative relief, (i.e. asserting the affirmative defense of misrepresentation, for example), the adjuster may be required to attend a deposition in the county where the action is pending. Interestingly, while the proceedings were pending before the 1st DCA, the claimant re-noticed the adjuster deposition for Orange County and deposed the adjuster. The claimant then asserted the action was not moot, as they intended to seek sanctions against the adjuster for failing to appear at the Flagler deposition. The DCA noted that the matter was indeed moot, removing the possibility of sanctions. **Click here to view Order**

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Bon Secours Health System/Gallagher Bassett v. Bonanno, (Fla.1st DCA 3/28/13)
Statutory Penalties/Record Evidence
The DCA affirmed the JCC's award of PTD benefits and interest, but reversed and remanded as to the imposition of penalties. The DCA noted that the JCC's order contained no findings as to the basis for the award of penalties. Penalties may only be awarded under F.S.§440.20(6) and Jones v. City of St. Petersburg where the failure to pay timely was due to conditions over which the E/C had no control. The DCA sent the case back to the JCC as the facts of the case could conceivably present an argument for excusable delay. **Click here to view Order**

Prescription Partners, LLC v. State of FL, Dept. of Financial Services, (Fla.1st DCA 3/28/13)
Reimbursement Disputes/Standing
In a lengthy opinion, the DCA reversed a ruling of DFS that Prescription Partners did not have standing to bring reimbursement disputes. As the opinion explains, Partners is a Florida business that contracts with physicians to purchase and process their claims for reimbursement of pharmacy-related services. The contracts typically provide for the physicians to assign all of their right, title, and interest in and to the claims, including the right to bill and receive payment from insurance carriers or self-insured employers. As consideration for the physician's unqualified assignment of the claim, Partners pays the physician a percentage of the claim's value, regardless of the amount Partners is ultimately able to collect from the payor. After lengthy proceedings under Chapter 120, DFS ruled that Partners was not a health care provider, carrier or employer authorized to seek reimbursement under Chapter 440, nor were they a true party in interest under Chapter 120. The DCA reversed the Agency's ruling, finding that nothing in Chapter 440 prohibited doctors from assigning their rights to reimbursement to Partners, and that by virtue of such assignment, Partners possessed all rights and abilities to seek reimbursement under the law enjoyed by the underlying physicians. **Click here to view Order**

Knight v. Walgreens/Sedgwick CMS, (Fla.1st DCA 3/28/13)
MCC and Medical Necessity/Due Process

The DCA reversed the JCC's denial of a neurosurgical evaluation, finding that he improperly considered the MCC and medical necessity defenses, which had not been listed on the Notice of Denial or Pre-Trial Stipulation. The Pro Se claimant had a number of prior work related back injuries, including a prior Order establishing compensability for the instant back injury. After that Order, the carrier authorized Dr. Vervoort, who prescribed medications and a pain patch and recommended a neurosurgical eval. At a subsequent visit, the doctor obtained a drug screen that did not show the claimant was using his medications. The doctor discharged the claimant. The carrier then unsuccessfully attempted to authorize a neurosurgical consult, but received a negative response from one provider. Several weeks later the claimant filed a PFB for the consult. The carrier asserted that they had never denied the consult, but that the provider they contacted wanted to review records. A week later, the E/C filed a notice of denial asserting the entire claim was denied based upon alleged misrepresentations to Dr. Vervoort concerning the pain meds. The claimant filed another PFB seeking reinstatement of benefits, and in the ensuing Pre Trial, the E/C asserted the claim for the neurosurgical eval "had never been denied". The JCC ultimately denied the E/C's misrepresentation defense, but found the claimant failed to sustain his burden to prove medical necessity or causal relationship of the need for the eval or ongoing benefits, based upon Dr. Vervoort's testimony. The DCA noted that the claimant had a procedural due process right to be apprised of all defenses, and the JCC could not rely on the defenses of medical necessity and causal relationship asserted for the first time by the E/C at trial. They also noted the E/C asserted on the pre-trial that the only basis for the denial of the eval was their misrepresentation defense. The DCA noted the claimant was not required to present evidence of MCC, as there was no evidence of a non-industrial cause of the claimant's back injury. **Click here to view Order**

Sheaffer v. Publix Supermarkets/Hartford, (Fla.1st DCA 3/8/13)
Income Impairment Benefits/Requisite Medical Evidence

The JCC denied a claim for payment of income impairment benefits, accepting the treating and E/C IME psychiatrist's opinions that the claimant had no permanent psychiatric impairment. The DCA reversed and remanded, ordering the carrier to pay the statutory maximum 1% rating and attendant PICA (2008 D/A). The carrier authorized Dr. Guthrie to evaluate the claimant psychiatrically. Dr. Guthrie placed the claimant at MMI with a 0% psychiatric rating, but opined she needed to follow up every 2-3 months and obtain medications and therapy. Thereafter, the claimant filed a PFB for payment of psychiatric impairment income benefits. Both parties obtained IMEs. The E/C IME felt the claimant had "recurrent major depression which was moderate and in remission", agreed with Guthrie's 0%, while the Claimant's IME assigned a 6% rating. In what can only be characterized as a de novo re-weighing of the evidence, the DCA asserts the guides and statute require the doctor to take into account the claimant's medication regime. Testimony indicated that without continuing on her medications, her psychiatric condition would deteriorate. The opinion continues that, as the JCC relied upon Dr. Guthrie's alleged unsupported basis for his opinion that she had a 0% rating, and further that "no reasonable view" supports a 0% rating, they instruct that a 1% rating must be assigned. **Click here to view Order**

Hope for MCC

On 3/7/13, The First District issued a PCA (affirms JCC's decision without written opinion) in Mosley vs. Alachua County School Board. The underlying 2/20/12 Order of JCC Hill in Gainesville essentially rejected the current approach (in vogue since the DCA issued Pearson v. Paradise Ford) that prior work accidents do not enter into an MCC discussion regarding the current accident. The claimant had a prior 2009 lumbar fusion which, after settlement with the School Board and third parties, netted the claimant $90,000. In September of 2010, she had a new ankle/back injury with the same E/C. After issuing a 120 day letter, the carrier obtained medical evidence that there was no evidence of a new lumbar injury and denied the case. JCC Hill did not discuss Pearson, but denied the existence of a new lumbar injury as the claimant would essentially be obtaining double recovery. The fact that the JCC realized the absurdity of not considering the prior lumbar fusion is encouraging. Although not binding, the underlying Order is persuasive authority that Major Contributing Cause should indeed include consideration of prior injuries, even if they were work related. Of course, the proximity and severity of the claimant's prior accident and continued complaints were strong factors in the JCC's (and likely the DCA's) decision.

Valera v. Florida Keys Aqueduct Authority/Florida Municipal Insurance,
(Fla.1st DCA 3/6/2013)
Prevailing Party Costs/Authority of JCC

The JCC found each party prevailed on certain issues at Hearing, offset those costs against each other, and determined the E/C was the prevailing party. The DCA reversed and remanded, agreeing that the JCC exceeded his authority in offsetting costs. The DCA suggests in so doing, the JCC effectively sought to enforce his own order. Such enforcement proceedings are properly brought in circuit court. The court instructed the JCC to enter findings as to the issues prevailed upon by both parties, and award costs to each accordingly. **Click here to view Order**

Villalta/Estate of Villalta v. CORNN INTERNATIONAL, INC., L&W DRYWALL SERVICES, INC., , and LESTERS FUEL OIL SERVICES, , d/b/a TROPIC AIRE OF NORTH FLORIDA,
(Fla.1st DCA 3/6/2013) Case 1D11-6260
Workers' Compensation Immunity/Ordinary vs. Gross Negligence/Summary Judgment

The DCA reversed the trial court's entry of summary judgment for the subcontractor Tropic Aire, an HVAC installer. The plaintiff was a drywall subcontractor, who died following a fall from a scaffold. The estate sued multiple entities, including Tropic Aire, who asserted immunity based on 440.10(1), which states that a subcontractor providing services on the same project as another subcontractor is given immunity from suit by an employee of the other subcontractor, as long as certain circumstances are satisfied including that the first subcontractor's "own gross negligence was not the major contributing cause of the injury." Because Tropic Aire was not within the vertical (drywall) chain of a contractor to subcontractor to sub-subcontractor relationship with L&W, (see below), immunity was properly claimed under section 440.10(1), rather than section 440.11(1), Florida Statutes. Although the trial court felt that the evidence gave rise to only ordinary negligence on the part of the subcontractor, the DCA noted the standard for summary judgment requires the trial court to consider the evidence in the light most favorable to the opposing party, without resolving factual conflicts in the evidence. Noting the line between ordinary and gross evidence is often uncertain and indistinct, the court indicated this question should have been resolved by the jury. **Click here to view Order**

Villalta/Estate of Villalta v. CORNN INTERNATIONAL, INC., L&W DRYWALL SERVICES, INC., , and LESTERS FUEL OIL SERVICES, , d/b/a TROPIC AIRE OF NORTH FLORIDA,
(Fla.1st DCA 3/6/2013) Case 1D11- 6848
Workers' Compensation Immunity/Vertical vs. Horizontal Immunity

In a companion case to the case above, the DCA affirmed the trial court's granting of summary judgment as to the drywall contractor (Cornn) hired by the subcontractor. The court noted that the Cornn was entitled to immunity from suit under F.S.s. 440.11(1), with an exception only if the claimant can show the contractor committed an intentional tort. Appellant brought suit under F.S. 440.10(1)(e), which allows an exception where the contractor commits gross negligence. The claimant's reliance on this theory confused the immunities available in a vertical subcontracting relationship (contractor subs out work, who then further sublets work) to a horizontal relationship (subcontractors engaged on the same construction project but under different subcontracts outside of the vertical chain). As the claimant's estate presented no evidence that Cornn committed an intentional tort, and because Cornn was in a vertical subcontracting relationship, the trial court properly found Cornn immune from suit. **Click here to view Order**