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CASE NOTES

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CASE LAW SUMMARIES: MAY, 2006

ATTORNEY'S FEES

Wood v. Florida Rock Industries, 31 FLW D1458, May 25, 2006, Judge Condry

The First District Court of Appeal punted the question of attorney's fees to the Florida Supreme Court. The court granted appellants motion for certification and certified the following question: Do the amended provisions of section 440.34(1) Florida Statutes (2003) clearly and unambiguously establish the percentage fee formula provided therein as the sole standard for determining the reasonableness of an attorney's fee to be awarded a claimant?

As of now, claimant's attorneys are awarded attorney's fees based on the amount of benefits secured on behalf of the claimant. Attorneys may also be awarded a fee not to exceed $1,500 once per accident for a medical only claim. Claimant's attorneys are hopeful that the Florida Supreme Court will change the compensation scheme that is currently in place.

COMPETENT, SUBSTANTIAL EVIDENCE

Dollar General v. MacDonald, 31 FLW D1222, May 3, 2006, Judge Terlizzese

The 1st DCA held that the JCC's findings were not supported by competent, substantial evidence. The claimant suffered two injuries, March 1, 2003, and August 13, 2003. The claimant's petition for benefits listed only her first injury of March 1, 2003. In her petition, the claimant asserted that the injury was the cause of her need for treatment for injuries to her back,

neck, hands, and wrist.

The claimant testified that she did not experience any neck or hand pain until August 13, 2003, her second accident. The claimant's IME opined that the claimant suffered from a herniated disk after picking up boxes in August, not in March.

The JCC awarded the claimant benefits based on her cervical conditions stemming from her injury on March 1, 2003. The 1st DCA reversed, stating that the only medical evidence presented failed to support a conclusion that the claimant was entitled to treatment for an injury that occurred in March 2003. The court also rejected the claimant's argument that the E/C tried by consent the issue of the claimant's injury in August. The E/C jointly stipulated that the claimant's accident occurred on March 1, 2003 and the E/C specifically defended that the claimant's cervical injury did not arise out of the March accident.

120-DAY RULE

Citrus County School Board v. Carlucci, 31 FLW D1221, May 3, 2006, Judge Lorenzen

In this case, the JCC applied the 120-day rule to the claimant's entitlement to further benefits under F.S. 440.09(1)(b). The court found that just because the carrier did not deny the case within 120 days, the carrier could still deny the case based on major contributing cause.

Here, the JCC found that the claimant had reached MMI with no impairment rating, and the industrial injuries were no longer the MCC of the need for any continuing need for treatment or surgery. Following, the claimant was no longer entitled to medical benefits.

City of Ocoee v. Trimble, 31 FLW D1418, May 22, 2006, Judge Condry

The E/C paid for a cardiac evaluation. After receiving the cardiologist's report, the E/C wrote the claimant a letter and advised him that no further medical treatment would be authorized for that date of injury. Over a year later, the claimant filed a petition for benefits seeking benefits for hypertension. The JCC ruled that the claimant's hypertension was, by default compensable because the E/C failed to deny within the 120 days.

The 1st DCA noted that an E/C who does not deny compensability has not waived anything other than the ability to contest whether the injury arose out of, and in the course of employment. Following, the provision of a cardiac evaluation and the passage of 120 days did not waive the E/C's ability to defend against a subsequent claim for hypertension, or any other condition by arguing that the workplace injury is not the major contributing cause of the hypertension, or other contested condition.

The court also noted that the effectiveness of a denial does not depend on a claimant's understanding of the denial.

REIMBURSEMENT FROM SPECIAL DISABILITY TRUST FUND

Special Disability Trust Fund v. Rescare Home Health, Inc., 31 FLW D1253, May 4, 2006, Judge Remsnyder

The 1st DCA affirmed that the E/C was entitled to reimbursement from the Fund. The claimant was injured on June 16, 1989. The E/C timely filed a notice of claim. A proof of claim was filed on March 6, 1996. The proof of claim was reviewed on August 15, 1996 and a letter requesting more information was sent by Fund counsel. The E/C responded on October 18, 1996 and the Fund requested a pay history on December 20, 1996. No reply was received. On September 20, 2000 the Fund sent the E/C a letter, requesting the E/C to advise whether they intended to pursue the claim. No response was received until April 7, 2004. On July 20, 2004, the Fund informed the E/C that the claim was barred.

The Fund claim was timely filed within the two-year limitations period set forth in F.S. 440.49(2)(g). The Fund argued that the four year limitations period in F.S. 95.11(3)(f) applicable to actions founded on "statutory liability" applied to bar the claim because all proof from the E/C in support of the claim was not submitted within four years.

The E/C satisfied the first step of the process. Further, the first step had not been completed. The court declined, as did the JCC to impose an additional statute of limitation for the first phase of the reimbursement process.

MANAGED CARE AGREEMENT

Mack v. Westminster Suncoast Manor, 31 FLW D1278, May 8, 2006, Judge Hafner

The 1st DCA affirmed the dismissal of the claimant's petitions for benefits. The claimant exhausted the grievance process under the managed care agreement so the JCC had jurisdiction. The petitions, however, continued to be governed by the managed care agreement. The E/C had not denied treatment requested by the claimant. The E/C dictated which provider would provide treatment. Under the terms of the managed care agreement, the E/C had the sole authority to select a specialist. The JCC properly dismissed the claimant's petitions because the E/C had acted in compliance with the terms of the managed care agreement.

STATUTE OF LIMITATIONS

Ginsberg v. Med Corp., 31 FLW D1344, May 11, 2006, Judge Remsnyder

The court held that the JCC should have used the date the claimant finished the course of treatment by taking the last dose of prescription medication as the date the statute began to run. Instead of using the date that the claimant's prescription medication was filled, the court found that the statute of limitations began to run at the end of the claimant's 30-day supply of medication, so long as the claimant was taking the medication as prescribed.

VERIFIED PETITION FOR ATTORNEY'S FEES

Villazano v. Horace Bell Honey Co., 31 FLW D1348, May 11, 2006, Judge Terlizzese

The claimant filed several petitions for benefits. The parties eventually resolved all the claims and the final hearing was cancelled. The JCC served Notices of Administrative Closure of Case, which indicated the case would be closed unless a verified petition for attorney's fees was filed within 45 days. On October 9, 2004, the JCC entered an order closing the file. The order provided that if a verified petition was not filed in the office within 30 days from the date of the order, all attorney's fees and costs would be dismissed and forever barred.

The appellant filed his verified petition on March 2, 2005. The E/C filed a motion to dismiss with prejudice and the JCC granted the motion. The 1st DCA reversed, finding that the JCC did not have authority, pursuant to either statute or rule to set a time limitation for filing the verified petition for fees.

IMMUNITY

Steadman v. Liberty Mutual, 31 FLW S316, May 18, 2006, Appeal from 2nd DCA

The Florida Supreme Court quashed and remanded the decision of the 2nd DCA. The Second District Court of Appeal relied upon the Third District Court of Appeal's decision in Inservices, Inc. v. Aguilera, 837 So.2d 464 (Fla. 3d DCA 2002), quashed, 905 So.2d 84 (Fla. 2005). At the time the Second District Court of Appeal issued its decision, Aguilera was pending review in the Florida Supreme Court. The Court remanded the case to the Second District Court of Appeal for reconsideration upon the Court's decision in Aguilera. The Court expressed no opinion as to whether a valid cause of action existed.

In a dissenting opinion, Justice Wells pointed out that Steadman's claim was based entirely on delay. In Aguilera, the Court noted that the mere delay of payments are not actionable torts. Following, Justice Wells indicated that he would have affirmed the case based upon Aguilera.

RES JUDICATA

Olmo v. Rehabcare Starmed, 31 FLW D1487, May 31, 2006, Judge Hafner

The 1st DCA held that the claimant's claim for PTD was not barred by res judicata. The claimant was injured in May 29, 2001 when she injured her back assisting a patient. The E/C authorized Dr. Zak, an orthopaedic surgeon. In April of 2002, Dr. Zak recommended a lumbar discectomy and fusion at L5-S1, the E/C refused to authorize the surgery.

The claimant filed a petition in February of 2004, requesting TTD/TPD from August 19, 2003, an IME, and authorization of the surgery recommended by Dr. Zak. The E/C responded that 104 weeks of temporary benefits had been paid, an IME was being scheduled, and the surgery was not authorized because they attributed the need for surgery to a pre-existing condition. On December 14, 2004, the JCC ruled against the E/C and required them to authorize the back

surgery. The surgery was performed on June 13, 2005.

On February 20, 2005, the claimant filed another petition for benefits seeking PTD from June 1, 2003 and continuing. By that time, the claimant was no longer eligible for any temporary benefits. The second petition came for hearing on August 5, 2005. The parties stipulated that the claimant was not at MMI, but when she did reach MMI she was have a permanent impairment.

The E/C argued that the claim for PTD was barred by res judicata because the claimant had not made the claim at or before the hearing to determine whether the back surgery would be authorized. The JCC accepted this and ruled against the claimant on the basis of res judicata.

The 1st DCA, however, reversed and found that the claimant was under no obligation to litigate a claim for PTD at the time of the first hearing. The court noted that the parties stipulated that she was not at MMI. Moreover, the reason she sought surgery was to avoid or alleviate any permanent disability. The court held that the claimant might have elected to make a claim for PTD at the time of the first hearing, but she was not required to.

CASE NOTES

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