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CASE NOTES
CASE LAW SUMMARY
May 2012

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

HMS Host Corp./Gallagher Bassett v. Frederic, (Fla. 1st DCA 5/29/12)
The 1st DCA reversed the JCC's granting of a one-time change, noting that while the claimant's purported PFB constituted the "written request" required by the statute, the JCC erred in finding that the E/C did not comply with the request within the five days. Specifically, the Court notes that the E/C's act of informing claimant of a particular doctor's name within five days of receiving the request satisfied Section 440.13(2)(f), even though the E/C did not actually contact the doctor. This somewhat clarifies many of the recent JCC Orders which find the Employer/Carrier must "authorize" or set appointment in order to constitute a timely response under 440.13(2)(f). It would appear that sending written correspondence to claimant advising of the identity of the new physician within 5 days should be sufficient. **Click here to view Order**

Palm Beach County School District v. Blake-Watson, (Fla. 1st DCA 5/29/12)
Factually complex pre-7/1/09 claim where 1st DCA affirms and denies in part certain issues. In July 2010, claimant filed the first of three PFBs, all of which included claims for attorney's fees. In response to this first PFB (July PFB), the E/C provided some benefits but then moved to dismiss the PFB, arguing Claimant had not made a good faith effort to resolve the dispute before filing the PFB, as is required by section 440.192(4), Florida Statutes (2008). During that dispute, Claimant filed two more PFBs, one in November 2010 (November PFB), seeking a psychiatrist and some neurological tests, and one in

January 2011 (January PFB), listing claims identical to those in the July PFB. In response, the E/C provided all requested benefits, but did not pay attorney's fees.

Shortly thereafter, the JCC granted the E/C's motion to dismiss July PFB, without prejudice, granting "leave to amend within 20 days." Claimant moved for reconsideration of this ruling, and also moved for attorney's fees based on obtaining the benefits requested in the July and November PFBs. The E/C responded to the fee motion, asserting no fees were due on the July PFB because that PFB did not comply with section 440.192(4), and no fees were due on the November PFB because the E/C had provided the requested benefits within thirty days. The JCC declined to revisit dismissal of the July PFB, but found the July PFB was amended by the January PFB, and awarded fees, but at a lower hourly rate than requested and excluding time spent defending against the motion to dismiss the July PFB.

1st DCA held that the JCC erred in dismissing the July PFB on two grounds: (1) Section 440.192 does not independently give the JCC authority to "go behind" a counsel's representations of good faith effort to resolve the dispute in a PFB, and (2) although Rule 60Q-6.125 arguably would permit the E/C to seek sanctions for failure to comply with section 440.192, the E/C did not meet the procedural requirements of that rule. Court held that the JCC erred in excluding from the fees the hours spent on the motion to dismiss, but affirmed on the JCC's finding as to the reasonable hourly fee rate.

1st DCA also held that JCC erred in awarding attorney fees on the November PFB relying upon Jennings v. National Linen Services, 995 So. 2d 1153 (Fla. 1st DCA 2008). In Jennings, the 1st DCA upheld the denial of fees despite the E/C's inability to secure a physiatrist in response to the claimant's claim, because there was no allegation of bad faith; to the contrary, the E/C diligently "attempted to schedule appointments with at least five physiatrists, four of whom declined to treat Claimant after reviewing his records." Here, as in Jennings, the E/C sufficiently established authorization as of the date of the letter, by casting a broad net to a group of physicians, and indicating willingness to authorize whichever agreed to undertake the work. **Click here to view Order**

Miami-Dade School Board v. Russ, (Fla. 1st DCA 5/29/12)

The 1st DCA reversed JCC order rejecting E/C statute of limitations defense. The Court notes that the failure to file a timely PFB is not a bar to the employee's claim unless the carrier advances the defense of a statute of limitations in its initial response to the PFB. If a claimant contends that an employer or its carrier is estopped from raising a statute of limitations defense and the carrier demonstrates that it has provided notice to the employee in accordance with s. 440.185 and that the employer has posted notice in accordance with s. 440.055, the employee must demonstrate estoppel by clear and convincing evidence.

The JCC found the E/C's "initial response" to Claimant's PFB was various documents (notice of appearance, request for production, letter of representation, notice of deposition, and letter to the mediator) dated November 9, 2009 and concluded that, because the E/C did not therein assert a statute of limitations defense, the E/C waived that defense. The E/C argued its "Response to the Petition for Benefits," filed November 10, 2009, should be considered its "initial response." The 1st DCA agreed with E/C citing Certain v. Big Johnson Concrete Pumping, Inc., 34 So. 3d 149 (Fla. 1st DCA 2010), which states the "initial response" from the E/C indicating it "denied the claim in its entirety" evinces the need for an "initial response" to explicitly state a position either denying or conceding the particular claims therein. 1st DCA found that Certain fits with the requirement in

Section 440.192(8) that an E/C in a "response to benefits" must "list all benefits requested but not paid and explain its justification for nonpayment," although that requirement does not appear to be intended as a definition.

The JCC also found the E/C's failure to respond to the petition for benefits within fourteen days, as required by section 440.192(8), waived the statute of limitations defense. The 1st DCA reversed on this issue, noting that the court reached the contrary conclusion in Denestan v. Miami-Dade County, 789 So. 2d 515 (Fla. 1st DCA 2001), and Claimant conceded the error. **Click here to view Order**

Voluntary Resignation/Effect on Unemployment Benefits

Sullivan v. Fl. Unemployment Appeals Commission/SMG, (Fla.1st DCA 5/15/2012)
The DCA reversed the UC Benefits Commission Determination that denied unemployment benefits. Claimant settled a workers' compensation claim (alleging chest pains and blue hands after her boss yelled at her). As a condition of settlement, the employer asked claimant to sign a voluntary resignation, which the claimant initially refused to do as it was silent as to whether she could collect UC benefits. Eventually, her attorney added language stating the employer would not contest the claimant's rights to seek such benefits, and the claimant signed the agreement. The UC Agency denied her subsequent application for benefits, asserting her reason for quitting was "personal" and not attributable to the employer. The Commission denied her appeal, again citing similar language which is contained in F.S. 443.101(1)(a) which precludes benefits in any week where the claimant "voluntarily left work without good cause attributable to her employing unit". They also found she was the "moving party" with respect to the resignation. The DCA analyzed a number of cases which affirmed denials of benefits for claimants who resigned in the context of job cuts or reorganizations. Ultimately they followed the reasoning of the Rodriguez case, and found it significant that the employer procured the resignation, and sufficient good cause existed for the claimant to resign, and thus be entitled to benefits. **Click here to view Order**

Severance Agreements/Effect on Settlement of All Benefits

RISCO USA Corp./Travelers v. Alexander, (Fla.1st DCA 5/15/2012)
The claimant had two separate periods of employment with the employer. During his first stint, the claimant injured himself in 2005, subsequently had surgery in 2006, and obtained an attorney several months later. After termination, the employer subsequently rehired him. In 2008, while represented he entered into a severance agreement. The claimant then filed a PFB for the '05 accident in 2010. The E/C argued the claimant settled his claim by virtue of the settlement agreement. The claimant argued that the E/C failed to establish the scope of the agreement, and argued that the release covered only the second period of employment. The JCC agreed and awarded benefits. The DCA analyzed the language of the release, which released the E/C "*from all causes of action…which you ever had….from the beginning of your employment to the time of the agreement…(for) any claims arising from relating to in any way your employment relationship with the company*". The DCA analyzed the Estupinan case, which analyzed a Release stemming from a negligence action. There, the court held the releases can be broad enough to cover WC benefits, when referring to "full discharge of all claims". The DCA reversed the JCC, noting that where a claimant is represented, no words of art are required, the release does not have to be submitted to the court, and the claimant settled his WC case. A dissent argued the carrier had not proven their affirmative defense. **Click here to view Order**

Going and Coming/Special Errand/Dual Purpose

Stewart v. Lakeland Funeral Home/Constitution State Service Co., (Fla.1st DCA 5/1/2012)

The First DCA affirmed the JCC's denial of compensability, as the claimant's motorcycle accident did not fall under the special errand or dual purpose exception to the going and coming rule. Claimant's job required him to attend memorial services for the deceased if he had been the family's primary contact, whether or not he was scheduled to work. On the date of accident, claimant chose to go to the funeral home to load equipment for the service, although he could have gone straight from home to the service. The funeral home had staff available to load the equipment. The injury occurred on the way to the funeral home. Claimant acknowledged the trip fell under the going and coming rule, but argued the ride to the funeral home constituted a special errand or was for a dual purpose. The court rejected the special errand argument, noting his need to attend the service was neither irregular nor sudden. The court then rejected the dual purpose argument, as the claimant was simply injured going to work and had not yet undertaken any business of the employer. **Click here to view Order**