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

CASE NOTES
CASE LAW SUMMARY
November 2009

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

Orders on Appeal/Finality

Life Care Center/Gallagher Bassett v. Benjamin, (Fla. 1st DCA 11/30/09) The E/C appealed the JCC's Order determining impairment benefits. However, the Order did not reduce the benefits to a dollar amount and instructed the parties to administratively determine the amount. The DCA held the Order was not final, as it had not resolve the essential issue at trial (amount of IBs). Click here to read case

Contribution between Carriers/Statute of Limitations

Med Partners/SRS v. Zenith Ins., (Fla. 1st DCA 11/30/09) Claimant had a low back injury with SRS as the insured in 3/99. The claimant had a second accident insured with Zenith in 10/01. The claimant last received benefits (IBs) from SRS in 12/00, and never filed a PFB for that DOA. After the second accident, the employer told the claimant "her time had run" for her '99 accident, and was told to fill out a new NOI. The claimant ultimately received back surgery, and settled her case with Zenith for $335,000. In all, Zenith paid 618,000, and then filed a contribution claim against SRS. SRS defended based on the SOL having run. The JCC ordered SRS to pay the entire 618K to Zenith. The DCA reversed, noting that the cases relied upon by the JCC that the statute had been "tolled" were inapplicable to the facts, and involved pre '94 language regarding the SOL. The DCA confirmed that contribution is available only where the carrier remains liable for benefits to the claimant. Click here to read case

Please direct replies or inquires to our Winter Park office

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

Pompano Beach Office
1280 SW 36th Ave
Suite 100
Pompano Beach, FL 33069
T (954) 580-1500
F (954) 580-1501

Fort Myers Office
4460 Camino Real Way
Suite 2
Fort Myers, FL 33966
T (239)939-2002
F (239) 939-2247

Miami Dade County v. Davis: Reversed the JCC's award of compensability for cardiac presumption based on s. 112.18. Before beginning work with Miami-Dade County, the claimant had a pre-employment physical that revealed history of heart disease, including prior bypass surgery. The Court held that section 112.18 forbids the use of a physical examination from a former employing agency for purposes of claiming the presumption against the current employing agency.

In this case, the claimant had passed certification in the '70's and worked as a firefighter for Gainesville. He had a heart condition and had bypass surgery. He subsequently left firefighting and then began working for the Village of Tequesta as a firefighter in 1993 and did not have a pre-employment physical. He began working as a firefighter for Miami Dade County in 1995 and had an examination. Click here to read case

Hunter v. Seminole County Fire Rescue: Affirmed the JCC's denial of the s. 112.18 presumption. The court distinguished the s. 633.35 pre-certification physical from the s. 112.18 pre-employment physical. It is not enough that the claimant pass the s. 633.35 pre-certification physical to qualify for the presumption. This is a mandatory examination that all firefighters must pass. The s. 112.18 pre-employment physical is an examination the employer may choose the employee to take. The presumption does not apply unless the Claimant passes an actual pre-employment physical showing no evidence of heart disease. Click here to read case

Fuller v. Okaloosa Correctional Institution: The Court reversed the JCC's finding that the E/C rebutted the statutory presumption of compensability afforded by s. 112.18(1), Florida Statutes. The court found that once the presumption was applied, the carrier needed medical evidence to establish non-occupational causation, within a reasonable degree of medical certainty. The JCC had found that the Claimant had RVOT tachycardia. One physician could not testify whether this pre-dated the claimant's employment. The other physician testified the claimant did not have that condition at all. Therefore, the court found there was not CSE to rebut the presumption. Click here to read case

Carmack v. State of Florida Department of Agriculture: The DCA affirmed the decision of the JCC that the carrier could select a physician for ongoing care, even after being obligated to reimburse claimant for care obtained on his own. The Court noted the statute allows the Claimant to obtain initial care and treatment at the carrier's expense. When viewed in the context of the remainder of s. 440.13, the failure to provide care and claimant's utilization of self help procedure does not bar the employer from maintaining control of future care. The claimant had also argued that the JCC's decision was based on case law that was not presented to the JCC, but the product of his own research. The DCA found no issue with the JCC conducting legal research. Click here to read case

Prevailing Party Taxable Costs/Requirements of Proof

Hillsborough County/N.Am.Risk v. Hilsdale (Fla.1st DCA 11/10/09) The E/C prevailed at a Merit Hearing in December of '07. In December of '08 the E/C filed a Motion to Tax Prevailing Party Costs. The claimant filed an unsworn response to the motion, and the judge allowed the claimant attorney to examine

the E/C attorney, without giving the E/C attorney the opportunity to testify. The JCC denied costs, finding among other grounds, that the E/C had not proven their expenses via receipts, invoices or other documentary evidence. The DCA held this was error, as the DOAH rules require only a showing that the costs were incurred, and the E/C's representation that they were required to guarantee any costs advanced or incurred was sufficient, citing to WRT Spinelli case. The court noted that additional proof might be required if specific costs were objected to via a verified response from the claimant, but opinion indicates that documentary back up for every costs should not be required. Click here to read case

Impairment Ratings/Evidence Regarding MCC/Appeals and Finality
Rojas v. Medley Hardwoods, Inc./CompOptions, (Fla. 1st DCA 11/2/2009) The claimant appealed numerous findings, with the DCA rejecting his arguments on all but two points. The DCA noted that the JCC erred in awarding an 11% rather than a 12% whole body impairment. The DCA also finds the JCC overlooked uncontroverted medical evidence showing the claimant was taking authorized medications after a certain date. The opinion is also interesting in that the E/C moved to stay the appellate proceedings based upon a prior finding of fraud for the same DOA but different benefits. The claimant apparently has appealed that order. The DCA declined this invitation, finding it would defeat the finality sought by the parties. However, the parties will now have a JCC Order on appeal denying further benefits, and a DCA opinion and mandate instructing the E/C to authorize a gastroenterologist. Click here to read case