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CASE NOTES
CASE LAW SUMMARY
November, 2012

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

Apportionment/Requisite Medical Evidence
Eaton v. City of Winter Haven/PGCS, (Fla.1st DCA 11/26/12)

In February of 2008, claimant sustained a non WC related low back injury and underwent a discectomy at L5-S1. He returned to work in May of 2008 with no restrictions or impairment assigned. In August of 2008 claimant had a compensable low back injury while working as a garbage collector, and underwent a second discectomy at the same level in November of 2008. The surgeon released him without assigning restrictions or impairment in August of 2009, referring him to pain management. The pain management doctor ultimately assigned a 4% impairment rating. The claimant subsequently sought PTD benefits and the E/C asserted apportionment as to the prior injury. The JCC found 50% of the claimant's benefits should be apportioned, relying on the testimony of the surgeon and pain management physician. The DCA reversed, finding the JCC relied on testimony which did not satisfy the E/C's burden to provide medical evidence of pre-existing impairment or disability. The DCA noted that the testimony of the surgeon that "each accident is equally responsible" and they were "probably 50/50", without evidence of an actual prior impairment rating, is insufficient to sustain the affirmative defense of apportionment. The case illustrates the requirement to track the exact language of the statute when seeking to apportion benefits. Do not assume that a prior medical procedure or diagnostic study, standing alone will suffice. **Click here to view Order**

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Major Contributing Cause/Required Evidence of Ideopathic or Pre-Existing Conditions
Ross v. Charlotte County Public Schools/Employer's Mutual, (Fla.1st DCA 11/13/12)

The DCA reversed the JCC's denial of compensability, which occurred prior to release of the recent Caputo and Walker cases. Claimant fell when her foot caught on linoleum flooring. After the accident she was advised she had a "mild to moderate" vestibular problem. The E/C asserted her fall was due to this disorder, but failed to introduce evidence about vestibular disorders, whether claimant had that or any other pre-existing condition, whether she had any such disorder at the time of the accident, or whether such a disorder in any way caused her fall. Not surprisingly, the JCC failed to find any of those things, but rather found her case may have been caused by an idiopathic condition, and then improperly analyzed the increased hazard involved in the fall. The Court accepted the claimant's position that in the absence of an established competing cause, the claimant satisfied the MCC standard. **Click here to view Order**

Medical Benefits/Failure to Make "Appropriate Progress"/MMI
Avery v. City of Coral Gables/Johns Eastern, (Fla.1st DCA 11/7/12)

Claimant received ongoing authorized psychiatric treatment following a 1993 accident, consisting of medication management by a psychiatrist and separate psychotherapy sessions. After nine years, the E/C obtained a psychiatric IME, and based upon that doctor's opinions, de-authorized both doctors asserting the claimant was not making appropriate progress per F.S. 440.13(2)(c). They then authorized an alternate psychiatrist. The DCA reversed and remanded the JCC's approval of the E/C's authorization, noting that 440.13(2)(c) contemplates de-authorization if an IME determines "the employee is not making appropriate progress ***in recuperation***". The court noted that where, as in this case, the claimant is post MMI they cannot be "in recuperation" as their treatment at that point is not curative. They noted that the IME's opinion that no further improvement could be anticipated necessarily means the claimant's treatment is palliative, and not curative. In such circumstances the E/C's remedy is to seek a determination of overutilization form the Dept. of Financial Services Div. of Workers' Compensation under F.S. s. 440.13(11)(c). **Click here to view Order**