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CASE NOTES
CASE LAW SUMMARY
October 2010

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Jurisdiction of JCC post Settlement/Attorney Fee Liens

Hack v. Chuck Norris Drywall/Amerisure, (Fla.1st DCA 10/29/2010) The JCC approved an Order allocating fees in a washout. Apparently, a prior attorney represented at the time of settlement that he was seeking approximately \$2,000 in fees and costs. Subsequently, he asserted entitlement to additional fees and costs, which the JCC karate chopped. The JCC held his initial assertion at mediation to fees and costs due from the E/C amounted to a waiver, and held she was without jurisdiction to rule on his claims for further fees after she signed order approving fees and costs on the washout. The DCA gave the JCC a round house kung fu kick to the solar plexus, as she did not rule on the merits of the former attorney’s claims. [Click here to view Order](#)

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Motions to Vacate Settlements

Cordovez v. High-Rise Installation/Bridgefield, (Fla.1st DCA 10/29/2010) The parties attended a private mediation and settled the case in December of 2006. In January of 2009 the claimant moved to vacate the settlement, alleging that a “mutual mistake of fact” (condition diagnosed post settlement now alleged as related to the IA was “unknown to the parties”). The JCC denied the motion. The DCA held that the JCC

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correctly denied the motion, agreeing with his logic that claims for release from liability for personal injury cannot be voided simply because the injuries may turn out to be more severe than anticipated. The court noted that mediation is an alternative dispute resolution process not to be entered into lightly. They stated “parties have . . . the right to make, what is apparent in hindsight, a bad bargain — especially when represented by counsel.” [Click here to view Order](#)

Admissible Medical Evidence

KFC/Yum! Brands/Gallagher Bassett v. Moore, (Fla.1st DCA 2010) The DCA, in another Summary Disposition (Ruling Immediately after Appellant Brief filed without requiring an Answer Brief) affirmed a JCC’s reliance on testimony from the claimant’s “longtime treating physician”. The DCA rejected the E/C argument that the doctor’s opinion should have been rejected due to alleged conflicts between his testimony and that of the claimant. The DCA indicated that sufficient grounds existed to accept the doctor’s opinion, and repeated the standard that JCC orders will be affirmed where competent substantial evidence exists in the record to support the ruling, and will not be reversed because other evidence may be pointed to which would have supported a contrary decision. [Click here to view Order](#)

Physician Referrals/Standard for Award

Harman v. Gadsen Correctional/AIG Claims, (Fla.1st DCA 10/29/2010) Claimant sought an orthopedic evaluation based on undisputed medical testimony that the evaluation was necessary to determine whether there were objective medical findings to support her claims of knee pain. Initially, the JCC denied the request as there were no objective signs of injury. After a prior DCA opinion merely stated “reversed and remanded”, the JCC then denied the request finding that the request was for a transfer of care rather than an evaluation. The DCA, citing the recent Morrow v. Sam’s Club case, held the JCC erred in analyzing the request under the “objective relevant findings” standard in F.S.§440.09. Rather, the JCC should have considered whether the request was medically necessary under F.S.§440.13(2)(a)(2007). The court held the analysis of “transfer of care” vs. “evaluation” was a distinction without a difference, in that in either instance, the intent was to discern whether objective medical evidence existed to support the complaints. [Click here to view Order](#)

PTD benefits/Attainment of Overall MMI

Hernandez v. Geo Group/Specialty Risk, (Fla.1st DCA 10/29/2010) The DCA affirmed the JCC’s denial of PTD for periods prior to MMI. The DCA also modified the underlying order, striking those portions which ruled on the potential entitlement to PTD at a period post MMI, as opinions on the claimant’s ultimate permanent restrictions were premature. Additionally, they struck portions of the order which held the claimant failed to present vocational testimony as to employability post MMI, as such opinions could not have been given the lack of evidence of restrictions post MMI. The DCA also struck portions of the order relying on the opinions of a neuropsychologist who was not a licensed medical doctor. [Click here to view Order](#)

Advances in Controverted Cases

Lopez v. Allied Aerofoam/Specialty Risk, (Fla. 1st DCA 10/18/2010) The DCA reversed the JCC's denial of a statutory \$2,000 advance, holding the JCC erred in denying the request based solely on the fact that the E/C controverted the case. The JCC noted the claimant had suffered an apparent physical impairment. The DCA noted that F.S. s. 440.20(12)(c)(2009) allows a JCC to award an advance, after giving due consideration to the "interests of the person entitled thereto," where a claimant demonstrates one of the following: (1) failure to return to employment at no substantial wage reduction; (2) a substantial loss of earning capacity; or (3) an actual or apparent physical impairment. The court noted the statute does not require proof that the injured worker will actually receive any benefits in the future from which the employer can recover the sum advanced, nor does the statute limit advances to cases in which compensability is established. In so holding, they cited to the 1999 Williams case, which discussed the issue of employer prejudice (ie. paying money they may never actually owe) but found it significant that numerous legislative changes to Chapter 440 had not seen fit to clarify this issue. This case has already prompted mass requests for advances from claimant attorneys. However, the claimant must still prove one of the three elements above to be awarded such advance. [Click here to view Order](#)

Underlying Order denying advance: [Click here to view Order](#)

TPD/Effect of Prior Stip on 104 week cap

Roto-Rooter/Specialty Risk Svcs v. Sepulveda, (Fla. 1st DCA 10/18/2010) The DCA reversed and remanded an order of the JCC awarding TPD benefits "not to exceed 104 weeks". The court affirmed the period of time in which benefits were awarded, but remanded for the JCC to interpret the impact of a prior joint stipulation resolving a past period of TPD for \$7,750. The E/C asserted as a defense the payment of 104 weeks of benefits. The JCC determined the E/C paid 66 weeks of benefits, but indicated the JCC was to determine if the 66 weeks of benefits had been paid pursuant to that prior stipulation. The Stipulation apparently did not clearly indicate that fact. [Click here to view Order](#)

Medical Benefits/Choice of Doctor

A. Vanish Pest Control/Assoc. Ind. V. Martinez, (Fla. 1st DCA 10/18/2010) In a very short opinion, the DCA reversed the JCC's order awarding the claimant a "back specialist of his own choosing" as no such provision exists in the statute, citing Carmack v. State Dept. of Agriculture. [Click here to view Order](#)

Medical Benefits/Evidence to Support Psychiatric Award

St. Johns River Power Park/Scibal Assoc. v. Griffis, (Fla. 1st DCA 10/18/2010) The DCA affirmed an award of a psychiatric condition without opinion. A written dissent however, discussed that the JCC's award was not based on competent substantial evidence. The dissent noted that imprecise questions were asked of the doctor, and that that witness was unaware that a lumbar condition had been deemed unrelated to the industrial accident. [Click here to view Order](#)

Misrepresentation/Specific Intent

Steel Dynamics/SRS v. Markham, (Fla.1st DCA 10/25/2010) In a lengthy 11 page Opinion, the DCA affirms via summary affirmance (ie. The court did not require the appellant to file an answer brief) that the JCC was correct in finding the claimant did not make misrepresentation for the purposes of obtaining benefits. The facts were numerous, but indicated the claimant worked a physical job, had a compensable event, resigned in a letter to employer (without mentioning his injury), was hired by another employer whom he told about his injury, and ultimately resigned. The DCA looked scornfully upon the E/C's position that the claimant made misrepresentations to his employer a year and a half before he sustained a disability. They further wrote extensively as to the difference between opinion testimony (here the claimant testified his subsequent employment was not "physical") and testimony representing or misrepresenting facts. The DCA noted that opinions are based on experiences, and emphatically affirmed the JCC's order. This opinion quite clearly expresses the position of the DCA that workers' compensation misrepresentation should not be asserted based upon differences in opinion or perception, but upon clear misrepresentations of facts, with the intent to secure workers' compensation benefits. The court declined to specifically hold whether differences in opinion could ever qualify as a reason for termination of benefits under F.S. 440.09(4). [Click here to view Order](#)

Post 10/1/2003 PTD benefits/overall MMI

Crum and Crum Ins. v. Richmond, (Fla.1st DCA 10/25/2010) The DCA reversed and remanded the JCC's award of PTD benefits, finding the record lacked the required evidence that the claimant would be totally disabled upon reaching overall MMI. The Claimant had multiple related and non related medical conditions. Claimant did not present proof that he will be totally disabled after reaching MMI for the right shoulder and low back conditions. Rather, Claimant argued that PTD status should be determined based on his condition as it existed at the expiration of temporary disability benefit eligibility, regardless of whether he had reached MMI. The court noted, however, the test for PTD prior to the date of MMI is not whether a claimant is totally disabled upon the expiration of temporary disability benefit eligibility, and will have a permanent impairment after reaching MMI. The test is whether a claimant is totally disabled upon the expiration of temporary benefit eligibility, and will remain totally disabled after the date of MMI. The court distinguished "impairment" from "disability" and rejected the claimant's argument that Emanuel vs. Piercey Plumbing controlled, noting that the Piercey award was made post MMI. The DCA acknowledged this ruling creates a "gap period" for claimants that have exhausted temporary benefits but have yet to reach overall MMI, noting that issue should be addressed by the legislature. [Click here to view Order](#)

Entitlement to Penalties and Interest

Jones v. City of St. Petersburg, (Fla.1st DCA 10/25/2010) The E/C voluntarily accepted the claimant as PTD on July 23, 2009, retroactive to May 6, 2009. They took a credit for IB payments, but paid no penalties and interest. After the claimant filed a PFB seeking PTD, PTD supps and penalties and interest from March 23, 2009,

the E/C agreed to pay PTD and PTD supplemental benefits retroactive to March 29, 2009, but denied the claim for penalties and interest. The adjuster testified at the subsequent hearing that the employer elected to accept Claimant as permanently and totally disabled for administrative reasons retroactive to May 6, 2009, because the employer received a medical opinion from a treating physician that Claimant had an overall impairment rating of 34% on May 13, 2009. The JCC denied the claim for penalties. The DCA analyzed the penalty statute, and noted the first issue to be determined by the JCC was the date when PTD benefits became due. The court then noted that it is not the burden of the claimant to prove entitlement to the benefits to prove entitlement to penalties. The DCA noted that the E/C presented no evidence as to why their acceptance did not occur until July 23d, found no evidence that the delay was beyond the control of the carrier, and awarded penalties from May 16, 2009 forward. With regard to interest, the DCA reversed and remanded the JCC's finding that no interest was due, as the legislature did not characterize F.S. s. 440.20(8)(a)(2007) as punitive. That section awards interest without regard to fault, and thus interest is due whenever a carrier untimely pays benefits. [Click here to view Order](#)

Temporary Benefits and Medical Benefits/Requisite Proof

Morton's of Chicago/Broadspire v. Lira, (Fla.1st DCA 10/13/2010) The DCA affirmed in part and remanded in part the JCC's order determining a cervical injury was compensable, and awarded TTD and medical bills. The DCA rejected as waived the E/C argument that the claimant's IME testimony should be stricken, as the IME charged in excess of allowable charges. The DCA awarded a period of TTD post surgery, although they cite to no specific medical testimony regarding that disablement in the record. They remanded the case to determine entitlement to TPD for a period where the JCC awarded TTD. The most interesting aspect of the opinion is the DCA's finding of compensability of hospital and doctor charges for the surgery the JCC determined to be compensable. The E/C did not stipulate the bills would come into evidence. The claimant provided "no meaningful evidence connecting the bills" to the treatment received. Nevertheless, the JCC determined the JCC was within his discretion to determine the relatedness of the bills. The DCA noted that "significantly", the E/C did not offer evidence they were NOT causally related. The DCA rejected other bills where the connection to the awarded cervical condition and surgery was not evident. Also interesting, the decision does not characterize whether the claimant was seeking reimbursement of the bills for sums personally paid. The underlying Order is also unclear. The general rule is the claimant does not have standing to seek reimbursement of bills by a third party provider, nor does the JCC have jurisdiction to order payment to third parties. The opinion then states that although they found the bills compensable here, they clarify that in the future litigants must present admissible evidence connecting the treatment to the injury. [Click here to view Order](#)

Permanent Total Disability/Evidence under the Pre 2003 SS Standard

Paz v. A.Duda and Sons/CNA, (Fla.1st DCA 10/13/2010) The DCA reversed the JCC's denial of PTD benefits under the 2002 version of the statute, which utilizes the

five step sequential analysis. The JCC erred in finding the claimant was not performing substantial gainful employment due to reasons unrelated to his accident. The DCA noted that causation is not an element at that step, but a simple yes or no question. The DCA reversed the JCC's finding under step four of whether the claimant is capable of performing past relevant work, as they noted the ruling was based on a hypothetical that did take into account subsequent medical restrictions. The DCA indicated the JCC had to specifically reject that medical opinion in order to make that finding. Similarly, the DCA held that the JCC erred in accepting the E/C's affirmative defense that the claimant retained a substantial earning capacity. They again noted this finding failed to take into account the subsequent opinions of the treating doctor regarding increased restrictions.

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WC Exclusivity/Constitutional Issues/Premature Appeals

Mejia v. Chevron/Broadspire, (Fla.1st DCA 10/15/10) The DCA declined to address the claimant's argument that the MCC standard unconstitutionally deprived her of access to courts. The claimant argued that she is barred from bringing a civil cause of action for negligently inflicted injuries in a work-related accident, where those injuries are not compensable under Florida's Workers' Compensation Law because the work-related accident is not the "major contributing cause" of the injuries. The DCA would not address the merits of this claim, finding it premature and speculative, as the claimant has not attempted to file a civil action for negligence against her employer in circuit court nor has the employer raised the affirmative defense of workers' compensation immunity/exclusivity. [Click here to view Order](#)

Jurisdiction of JCC/Appealable Issues

Dept. Of Revenue/Div. of Risk Mgmt. v. Groman, (Fla.1st DCA October 15, 2010) The DCA dismissed the appeal as the order complained of was non-final and non-appealable. The JCC excluded the opinions of an EMA and appointed a substitute EMA. The parties incorrectly asserted the JCC lacked "jurisdiction" to so rule. The DCA clarified that they are allowed to review non-final orders *adjudicating jurisdiction* under Florida Rule of Appellate Procedure 9.180(b)(1)(A), that pertains to orders wherein the JCC's jurisdiction over the parties, the subject matter, or the case is at issue and adjudicated. That rule does not serve as a means to facilitate an interlocutory appeal where there is no such dispute. The Appellant also requested the DCA to correct the JCC's decision and remand back to the JCC, which the appellate court noted conflicted with the argument that the JCC lacked "jurisdiction" to so rule. The DCA also rejected the notion that the issue could not be treated in the alternative as a petition for writ of certiorari, as the JCC's decision striking the EMA could be addressed following entry of a final order on the matter. [Click here to view Order](#)

Firefighter Presumption/Qualifying Conditions

City of Venice/PGCS v. Van Dyke, (Fla.1st DCA 10/8/2010) The DCA affirmed the ruling of the JCC, rejecting the E/C argument that the employee's aortic disease could not be considered compensable under F.S. §112.18(1)(2007), because the condition is not "heart disease". The DCA noted that although the aorta is not "in the heart", it is one of the structures of the heart. Additionally, the claimant's medical treatment included

implantation of an aortic valve. The E/C also appealed the JCC's finding that a claim for compensability of hypertension was dismissed "without prejudice". As that claim was not before the JCC, the DCA struck that portion of the Order. [Click here to view Order](#)

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