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CASE NOTES

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CASE LAW SUMMARIES: October, 2005

TEMPORARY BENEFITS

Osceola County School Board v. Booz, FLW D 2387, October 11, 2005.

This case involved a volunteer worker who sustained a compensable accident. The JCC awarded temporary disability benefits based upon the $20 per week minimum compensation rate referenced in § 440.12(2), Florida Statutes. The 1st DCA reversed this decision and found that the claimant was not entitled to any disability benefits because she was earning no wages as a volunteer or in any other occupation in the 13 weeks preceding the industrial accident. Since the claimant had no wages, she did not qualify for award of disability compensation.

120 DAY RULE

Cherie Solsaa v. Werner Enterprises, Inc., FLW D2385, October 11, 2005.

The claimant suffered a heart attack and died while in the course and scope of employment. The self-insured employer was headquartered in Nebraska and they commenced payment of death

benefits on October 21, 2002. They continued to pay such benefits until August 4, 2003, when the employer ceased benefits upon the receipt of a medical report that found that the claimant's heart attack was not caused by his employment. The deceased claimant's wife petitioned for the reinstatement of death benefits.

The 1st DCA found that the employer/carrier paid benefits for more than 120 days and, accordingly, was estopped of from denying the claim. "Because it had not denied compensability of the heart attack within 120 days of the initial provision of benefits, the employer/carrier waived the right to deny compensability."

State of Florida v. Charles N. Reese, 30 FLW D 2387, October 11, 2005

In this case the JCC applied the statutory presumption from the "Heart-Lung" statute, § 112.18, Florida Statutes, to hold the claimant/correction officer's hypertension and heart disease were comenpensable. The employer/carrier argued that the claimant provided no proof that the claimant successfully passed the pre-employment physical and, accordingly, that the claimant was not entitled to the presumption. The 1st DCA held that although the statute states that firefighters and law enforcement officers must have successfully passed a pre-employment physical to be entitled to the presumption, the term "correctional officer" is left out of this section of the statute. The 1st DCA stated that this omission "plainly revealed" the legislature's intent not to subject correctional officers to the condition precedent.

In summary, law enforcement officers and firefighters must produce evidence of a pre-employment physical, but correctional officers need not do so. This distinction really does not make much sense. No rationale was offered by the Court for this distinction.

THIRD PARTY LIEN

Summit Claims Management, Inc. v. Lawyers Express Trucking, FLW D 2413, October 12, 2005.

This was an appeal to the 4th DCA involving a third party lien. The Circuit Court denied the workers' compensation lien by final summary judgment. The 4th DCA affirmed the decision holding that the employer/carrier had actual notice of the third party suit and yet failed to file a "Notice of Payment of Workers' Compensation Benefits" in

accordance to § 440.9(3)(a). The 4th DCA stated that although this section places no time limit on the filing of the Notice of Lien, that a reasonable interpretation of the statute is that such a notice must be filed before any settlement or judgment is recovered. In summary, it is imperative that employer/carrier file a Notice of Payment as soon as they are aware of a third party claim or even the possibility of a third party claim.

VOCATIONAL ASSESSMENTS

Delgado v. A. Garcia Harvesting, Inc., FLW D 2421, October 17, 2005.

The employer/carrier accepted the claimant as permanently and totally disabled. The employer/carrier then obtained an Order from the Court directing the claimant to submit to monthly job interviews for the purpose of aiding him in his vocational rehabilitation. The claimant appealed this Order on the basis that there was no provision in Chapter 440 authorizing the JCC to order him to conduct monthly interviews. The 1st DCA agreed and reversed the JCC's decision.

The 1st DCA reasoned that the procedure for conducting vocational assessments after an employee has been accepted as permanently and totally disabled is governed by § 440.15(1)(e), Florida Statutes (2002). This statute provides that the employer's right to conduct vocational evaluations must be carried out pursuant to § 440.491, which governs how a carrier may obtain a re-employment assessment and thereafter re-employment services if the rehabilitation provider recommends such services. These conditions need to be satisfied before the claimant may be subjected to no more than annual interviews. The employer/carrier produced no evidence in this case that there was ever a re-employment assessment or recommendation for re-employment services. In summary, the employer/carrier must have a re-employment assessment or at least a recommendation of re-employment services before subjecting the claimant to annual interviews.

AVERAGE WEEKLY WAGE

Sonny Glassbrenner, Inc. v. Anthony Dowling, FLW D 2425, October 18, 2005.

In this case the JCC awarded an upward adjustment of the AWW based on a similar employee that earned $10.50 per hour. The evidence

established that the claimant only earned $10.00 per hour at the time of the accident. The 1st DCA held that the similar employee provision was not applicable in this case.

The 1st DCA also reversed the award of reimbursement to the claimant for a disabled parking permit. The 1st DCA found that the claimant did not request that the employer/carrier furnish him with a permit before purchasing it and that none of the medical evidence reflected a need for the permit. Accordingly, the 1st DCA reversed the award of the permit as well.

ATTORNEY'S FEES

Nash v. Specialty Risk Services, Inc., FLW D2431, October 18, 2005.

The claimant proceeded to a merits hearing on numerous issues, but all were either withdrawn or denied by the JCC except for an award of medical mileage in the amount of $94.10. The claimant's attorney filed a Verified Petition for Attorney's Fees seeking 107 hours which he stated no less than 50-70% of which were expended securing the medical mileage reimbursement. The employer/carrier argued that 15 hours was a reasonable amount of time expended by the claimant's attorney obtaining the medical mileage (the only successful claim). The JCC accepted the testimony of the employer/carrier's attorney and awarded a reasonable fee of $3,000.00 based upon 15 hours that was reasonably expended on the mileage issue. The 1st DCA found that there was competent, substantial evidence to support the JCC's ruling and affirmed the decision.

CASE NOTES

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