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CASE NOTES
CASE LAW SUMMARY
October, 2012

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

Advance Payments/Best Interests of Claimant
Worthy v. Crowder Excavating/Chartis Claims, (Fla.1st DCA 10/31/12)

The DCA affirmed the JCC's denial of a $2,000 advance for the claimant. At the hearing, the claimant testified he was "behind on a lot of bills" but offered no testimony as to why $2,000 was any more appropriate than, for example $500. Without such testimony, the JCC reasoned he could not make a determination as to whether the advance was in the claimant's "best interest" and denied the advance. The DCA agreed, noting that they had noted previously in Lopez that the advance statute is discretionary and a JCC "may" award an advance. This is the first post Lopez ruling that provides some authority to counter the claimant position that $2,000.00 advances are "automatic." The DCA provides approval of the discretionary nature of these advances. **Click here to view Order**

Attorney Fees of Discharged Attorney
Oliver v. Dunn and City of St. Petersburg, (Fla.1st DCA 10/24/12)

Claimant's counsel secured PTD benefits for the claimant in 2010, and then was discharged in 2011. A second attorney began representing the claimant on 3/29/11. The first attorney sought a claimant paid fee, which the JCC awarded, but found that the fee should only be calculated based upon the PTD paid to the claimant through 3/29/11. The DCA held that although the PTD benefits are paid in installments, the

total value of the benefit is predictable when awarded. A concurring opinion noted that "the rule cannot be that claimants have the ability to extinguish their liability for attorney's fees simply by discharging counsel". **Click here to view Order**

Q Rules/Requirement to File Timely Verified Response to Petition for Attorney Fees
Sapp v. Miami Dade Police Dept./City of Miami Risk Mgmt., (Fla.1st DCA 10/19/12)

In the second appellate ruling on this case, the court reversed and remanded for the JCC to enter an attorney fee of $45,999. Once the JCC found no good cause existed to excuse the carrier's filing of a verified response outside of the 30 day window under the 60Q-6.124(3)(b), the JCC had no discretion to reduce the fee sought, as the legal sufficiency of claimant's petition was no longer at issue. **Click here to view Order**

Temporary Partial Disability/Burden of Proof after leaving employment
Thayer v. Chicos FAS, Inc./Specialty Risk Svcs., (Fla 1st DCA 10/16/2012)

Claimant sustained a knee injury, underwent surgery and returned with restrictions. The Employer initially provided the claimant an accommodated position. On 6/23/11 her restrictions became more severe. On July 13, 2011 the Employer withdrew the accommodation and terminated the claimant for "failure to meet deadlines." Following a hearing on the claim for temporary partial, the JCC initially awarded the claimant benefits. However, the next day he entered an amended order on his own, which denied benefits. The JCC reasoned that the claimant failed to meet her burden to show that a causal connection to TPD benefits existed after termination, as she did not provide evidence of an unsuccessful job search. The DCA reversed and remanded, noting that Toscano discusses a job search element only where the claimant cannot show that the compensable injury prohibited adequate performance of her prior job. Where the claimant proves such a connection, the industrial accident remains the MCC of wage loss, unless the E/C proves the lost wages were due to an intervening subsequent cause. The DCA noted the claimant proved her termination was due to her industrial accident, and no evidence existed of any other cause for claimant's wage loss. **Click here to view Order**

Cost Orders/Requisite finding of willfulness to dismiss subsequent PFB
Stahl v. Hialeah Hospital/Sedgwick CMS, (Fla. 1st DCA 10/16/12)

Claimant filed a number of claims between 2004 and 2007, all of which he dismissed in 2007. After receiving two separate PFBs in February of 2011, the E/C filed a Motion to Tax costs the following month pertaining to the previously dismissed Petitions. In June, the JCC ordered the claimant to pay over $7,000 in costs. Several weeks after obtaining the cost order, the E/C moved to dismiss the two PFBs citing the claimant's failure to comply with the recently obtained cost order. The claimant initially filled out an affidavit, omitting the 10% he had been tithing to his church since his return to employment in March of 2011. He later amended this at trial, saying he "forgot" to include it. The JCC noted that the claimant's decision to ignore the prior cost order but pay discretionary funds to the church was not reasonable, and dismissed the PFB. The DCA reversed and remanded, noting the JCC failed to make the requisite findings that the claimant's failure to pay was

willful, deliberate or contumacious, per Jones v. Royalty Foods Inc. and prior cases. **Click here to view Order**

Firefighter Presumption/Proof of Disability
Rocha v. City of Tampa/Commercial Risk, (Fla.1st DCA 10/10/12)

The JCC denied compensability of the claimant's hypertension and denied benefits, finding he did not prove the disability prong F.S.§112.18(2009). The claimant underwent an abnormal stress test during an annual physical, at which time the cardiologist placed him on light duty and prohibited from firefighting for several weeks. The EMA testified these restrictions were "precautionary only" and did not establish the requisite disability. The DCA examined numerous prior cases addressing the disability prong of presumption, and found the claimant's situation fell between the Bivens/Shacklett facts (*no medical work restrictions due to the covered condition*) and the McArtor/Carney facts (*where it was physically impossible for claimants to work during hospital treatment for the covered condition*). They held the claimant met the definition of disability, because his work restrictions both (a) were legitimately imposed as medically necessary "because of the injury" and (b) created actual incapacity by interfering with his ability "to earn in the same or any other employment the wages which the employee was receiving at the time of the injury." They further reasoned that to hold otherwise would encourage such a claimant to ignore the advice of his doctor "in fear that a panel of judges, years hence might deem the work restriction unwarranted". They also held it would encroach upon the doctor-patient relationship, and violate both the basic tenets of public safety and the clear purposes of the Workers' Compensation Law. Finally, they deemed this holding to be consistent with the accepted use of medical work restrictions to prove disability under other sections of Chapter 440. **Click here to view Order**

Medical Evidence/Ripeness of Opinion/IME reports
Young v. American Airlines/Sedgwick, (Fla.1st DCA 10/8/2012)

The JCC denied a cardiologist opinion and PTD. The DCA reversed both of these findings and remanded. The DCA noted the JCC abused his discretion in finding that there was no current recommendation for the cardiologist evaluation that was last recommended in ***2006***. The DCA found the statute does not contain any authority to rule that such a referral can become stale in the absence of a change in condition. The DCA reversed the finding of PTD, which was based on the E/C vocational evaluator's reliance on restrictions found only in the E/C's IME report. The DCA held the records were not properly authenticated, and F.S. s. 440.29(4)(2003)(*Motion to Admit Records of Authorized Medical Providers*) does not apply to authenticate IME reports. The DCA declined to allow the E/C to depose their IME, noting this would give the E/C a "second bite at the apple" and remanded the case for award of a cardiologist evaluation and PTD, unless the JCC finds the now uncontroverted opinions of the authorized provider unpersuasive. **Click here to view Order**

Prevailing party costs
Frederick v. Monroe County School Board/Gallagher Bassett, (Fla.1st DCA 10/5/12)

The DCA affirmed the JCC's award of prevailing party costs against the claimant. The claimant filed a Petition for PTD. An EMA opinion came out adverse to the

claimant's position and she "somewhat belatedly" withdrew her petition. The E/C then sought costs of over $16,000. Claimant objected to an award of costs, arguing that such an award would be unfair as she filed the PFB in good faith, the award would limit her constitutional access to courts, and finally that she did not have the means to pay the costs. The JCC ultimately ordered the claimant to pay $11,834 in taxable costs. The DCA reluctantly affirmed the cost award, noting that the statute merely provides taxable costs to the prevailing party, without consideration of fairness or ability to pay. The DCA urged the legislature to revisit this statutory provision, noting such awards (coupled with limited attorney fees) may have a chilling effect on the decision to file or not file an otherwise valid claim. **Click here to view Order**

Attorney Fees under 440.30/Fees for proving Entitlement
Shannon v. Cheney Bros./Travelers, (Fla.1st DCA 10/2/2012)

The E/C deposed the claimant prior to a PFB being filed. The E/C stipulated the claimant attorney was due a fee under 440.30, but the parties disagreed on a reasonable hourly rate. After the claimant attorney filed a verified petition for attorney fees and the E/C filed their verified response, the E/C deposed the claimant attorney regarding rate. The claimant attorney then filed an amended fee petition, seeking additional fees for attending his own deposition, or in the alternative requesting an expert witness fee under F.S.440.31. The JCC awarded fees for attending the first deposition but not the second, and denied requested fees for proving entitlement to fees for attending the second deposition. The DCA examined the history of F.S. 440.30, and noted that the JCC erred in denying fees for attending the second deposition, as the filing of the initial fee petition was not a "claim" under that section, so entitlement still existed. The DCA affirmed however, the denial of a fee sought for proving entitlement to fees, as the question regarding entitlement under F.S.440.30 is essentially answered by the fact of whether a claim (a Petition for Benefits) has or has not been filed. **Click here to view Order**