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CASE NOTES
CASE LAW SUMMARY
October 2013

If you have any questions regarding Case Law Summaries, please contact W. Rogers Turner, Jr. (rturner@hrmcw.com) or Matthew Troy (mtroy@hrmcw.com)

Westphal Update

On October 8, 2013 the claimant filed a notice to invoke the discretionary jurisdiction of the Supreme Court of Florida. The title of the notice is self explanatory. The City of St. Pete filed a Cross Notice to Invoke Jurisdiction on October 21st, 2013. The Supreme Court has "discretionary" jurisdiction with regard to this case. It is based on a certified question from the District Court of Appeal. Therefore, unlike in other discretionary jurisdiction cases, there are no jurisdictional briefs filed. Where jurisdiction is based on a certified question, no jurisdictional briefs are permitted under Rule 9.120(d). The Court makes its determination based on the opinion and the certified question. They do not even have a record.

The Supreme Court may decline to review a decision certified by a DCA even if all proper procedures are followed. Unlike the mandatory jurisdiction appeals, the Court's jurisdiction answer to certified questions is wholly discretionary. Under Rule 9.370(d), when a party has invoked the discretionary jurisdiction of the Supreme Court, an amicus curiae may file a notice with the Court indicating its intent to seek relief to file a brief on the merits if the Court accepts jurisdiction.

The next step is for the Supreme Court to deny, accept, or postpone a decision on jurisdiction. If they accept or postpone the decision, then the First DCA must transmit the record within sixty days and the briefing begins. There is no time frame for the Court to make its decision on jurisdiction. It could happen tomorrow and it could happen in months. On October 15th, the Supreme Court issued an Order designated Westphal as a "high profile case", due to "significant public and media interest". The only significance of this Order is that it will allow the public to access documents through a web portal, rather than having multiple parties contact the court's administrative office for details.

It is notable that the claimant WON the DCA case, but appealed to the Supreme Court. It appears the claimant's bar is seeking to have the 104 week cap or the entirety of the workers' compensation law declared unconstitutional, hoping 440.34 and all other "offending" provision are stricken. If the Court accepts jurisdiction, the claimant will likely argue that the entirety of Chapter 440 is no longer a valid alternative to previous iterations of the law. However, a more probable outcome may be that the Court would simply declare that the 104 week cap is perfectly valid and that "gaps" in benefits are not constitutionally infirm. The Court would then strike out the entirety of the First DCA's opinion, and reinstate the decision of the JCC.

HRMCWW represents a coalition of industry groups in the case, and will continue to keep you advised as the case progresses.

Castellanos v. Next Door Co./Amerisure **(Fla.1st DCA 10/23/13)**
Attorney Fees/Constitutionality

The DCA affirmed the JCC's award of a guideline fee of $164.54 based upon benefits secured, although the claimant attorney alleged spending 107.2 hours of related time. The DCA noted that based upon precedent (Kauffman, Campbell, Lundy, Wood) they were constrained to find the fee statute constitutional on its face and as applied. They did certify the following question of great public importance to the Florida Supreme Court, finding that Murray did not specifically address constitutional claims:
WHETHER THE AWARD OF ATTORNEY'S FEES IN THIS CASE IS ADEQUATE AND CONSISTENT WITH ACCESS TO COURTS, DUE PROCESS AND EQUAL PROTECTION CONSIDERATIONS AND WITH ANY OTHER REQUIREMENTS OF THE FLORIDA AND FEDERAL CONSTITUTIONS. **Click here to view Opinion**

Groseclose v. Optimum Oncology/Gallagher Bassett **(Fla.1st DCA 10/23/2013)**
104 Weeks of Benefits

The case merely reverses and remands a denial of PTD, noting without discussion that the JCC did not have the benefit of Westphal II in issuing his Order. **Click here to view Opinion**

Pasco Sheriff's Office/Commercial Risk Mgmt. v. Shaffer
(Fla.1st DCA 10/23/2013)
Presumption/Disability and Capacity to Earn

The E/C appealed the JCC's determination in a presumption claim that the claimant was disabled, as the evidence appeared to show the claimant, although on light duty, was earning her full wages. The case was a PCA, but Judge Wolf's concurrence discusses the concepts of disability and earnings in relation to a Correctional Officers claim under F.S. s. 112. He states his belief that the proper test in such cases is whether claimant was precluded from performing a substantial and significant portion of her necessary job duties. **Click here to view Opinion**

Banuchi v. Dept. of Corrections/State of FL Dept. of Risk Mgmt.
(Fla.1st DCA 10/16/13)
Expert Medical Advisors/Notices of Conflict in Medical Evidence
Matt Troy/Bill Rogner

The First DCA reversed the JCC's Order, which treated claimant's "notice of conflict" as a Motion to Appoint an EMA. Although not noted in the appellate opinion, the pleading was entitled "Notice of Conflict in Medical Opinions and *Request* for the Court to Appoint an Expert Medical Advisor (EMA)." In the body of the Notice, the claimant used the word "request" three times. The JCC indicated that it was the claimant's responsibility to pay for such an examination under F.S. s 440.13(9)(f)("…*the party* ***requesting*** *such examination must compensate the advisor for his or her time in accordance with the a schedule adopted by the department".*) The claimant objected, proceeded to a Merit Hearing without an EMA and was denied benefits. The DCA examined the EMA statute, and characterized claimant's Notice of Conflict as "not a request to appoint an EMA, but rather a request for a JCC to take notice of his mandatory obligation to appoint an EMA". The DCA justified this analysis by indicating that parties need to inform the JCC of a conflict given a JCC's caseload, and the interest in obtaining the EMA early in litigation. However, such conflicts in many situations become apparent at least by the time of a Pre Trial Stipulation. The practical effect of course is that no claimant will ever file a Motion or even a Request to appoint and EMA, when a JCC's EMA appointment based upon a mere notice of conflict will shift the burden of payment to the E/C. Given the above analysis, the court did not need to address claimant's constitutional arguments. **Click here to view Opinion**

Banks v. Allegiant Security/Zurich Ins.Co (Fla.1st DCA 10/11/2013)
Continuances/Statutory Timeframes to Conduct Merit Hearing

The DCA reversed the JCC's denial of the Pro Se claimant's motion to continue a final hearing. The claimant sought the continuance to obtain counsel. Claimant's initial attorney ceased representing the claimant seven weeks before trial. Subsequently, the JCC's office advised the claimant to obtain counsel. The claimant appeared at the Merit Hearing without an attorney and requested the JCC allow her two more weeks to obtain an attorney. The JCC denied the request, and subsequently denied her claims finding she had not proven entitlement to the benefits sought. The claimant appealed, asserting that (1) the JCC applied the incorrect rule of law; (2) the JCC abused his discretion in denying the request and; (3) the denial violated claimant's constitutional rights. The DCA declined to address points two and three, as they found the JCC applied the incorrect rule of law in denying the continuance. They noted the JCC's analysis seemed to focus almost exclusively on the 210 day time limits. The DCA noted these limits are not set in stone, and the claimant can agree to waive those limits. Further, the court noted the JCC did not analyze the "good cause" and "circumstances beyond the moving party's control" elements of a request for continuance. **Click here to view Opinion**

Brandywine Convalescent Care/Associated Industries v. Ragoobir
(Fla.1st DCA 10/16/13)
Expert Medical Advisors/Sufficient Evidence to reject EMA opinion

The DCA reversed and remanded the JCC's Order awarding PTD benefits. The DCA noted the JCC should have afforded the EMA's opinion the statutory presumption of correctness, as he did not have a sufficient basis to reject the EMA opinion. The EMA issued a report noting the claimant had light duty restrictions. At his deposition, the claimant attorney asked if the EMA would defer to the authorized pain management physician "*for the types and nature of pain management and the **status** through that specialty*." There were no follow up questions specifically addressing work restrictions, and on cross-examination, the doctor confirmed nothing on direct examination altered the opinions in his report. An EMA's opinion is presumed to be correct unless the JCC finds "clear and convincing evidence to the contrary." Here, the JCC made no such findings. He determined his opinions in the report and deposition were conflicting and equivocal, and rejected them. The DCA also reversed the PTD award which was based upon the claimant's vocational expert's reliance on the vague "status" testimony. The opinion further holds that that while it was appropriate for the JCC to reject the E/C's voc expert's testimony relating to observations of pain and their impact on "vocational factors," the JCC should likewise have rejected the claimant voc expert's similar observations and testimony, as well as his own. Physical limitation related to pain is a medical issue to be addressed only by a medical expert. **Click here to view Opinion**

Dominguez v. Circle K Stores, Inc. **(S.D.Fla. 9/3/2013)**
Releases/Effect of FLSA Release

A month after being awarded PTD, the claimant retained a different attorney for an FLSA claim. Nine months later she settled her FLSA case for $32,000, and signed a release as to Circle K for "all claims". The Federal District court approved the settlement, without reserving jurisdiction. Four months later, the carrier suspended PTD benefits. JCC Spangler ultimately denied the carrier's motion to approve that action, finding latent ambiguities and mistakes in the agreement. Claimant then went back to District Court to set aside or modify the final order approving her FLSA settlement. The District Court judge ruled that under Federal Rule 60(b), extraordinary circumstances existed to set aside the agreement. Those included: both parties failing to disclose all relevant facts to the judge, particularly the existence of the WC case. The JCC said if he would have known claimant was foreclosing her right to PTD benefits for $20,000 (the amount less fees she received) he would not have found the agreement fair or reasonable. The employer argued the claimant was represented by counsel and had 21 days to consider the agreement. Her FLSA attorney testified he did not know of the WC case. The judge found that at all times, Circle K was aware of the existence of the WC case. While he did not make a finding of bad faith, the Judge stated it was possible Circle K was trying to avoid the impact of the PTD Order.

(If you would like a copy of the Order, please e-mail Rogers Turner)

K-C Electric Co./Bridgefield Ins. Co. v. Walden, as Guardian for Keller
(Fla.1st DCA 10/7/2013)
Calculation of AWW/Inclusion of Pro-Rata profits as earned income

The DCA affirmed the JCC's determination that claimant's earned and reported (to the IRS) pro rata profits as a business shareholder were includable in the AWW calculation. The JCC and DCA rejected the E/C arguments that the 1994 amendments to F.S. 440 equated the definition of WC wages with the IRS definition of wages, noting the Legislature could have written the law that way if they wished. **Click here to view Opinion**

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