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## CASE NOTES

### CASE LAW SUMMARY October 2007

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#### **Troche v. Geico, October 5, 2007, Judge Hofstad**

The claimant appealed a finding of Judge Hofstad denying the claimant’s claim for carpal tunnel syndrome. The 1<sup>st</sup> DCA found that the claimant suffered a repetitive injury and reversed the JCC.

The JCC denied the claim due to the statute of limitations. The claimant originally filed a claim for his wrist injury on April 12, 2000. The JCC found that the claimant was barred from refileing the claim more than two years later.

The court found that in repetitive injury cases, the date of injury is deemed to be the last date of exposure to the trauma. The court held that even though the claimant filed a previous workers’ compensation claim for the same injury, the claimant continued to suffer a new repetitive trauma each time he performed his job

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duties. As such, the claim was not barred by the statute of limitations.

**Mitchell v. XO Communications, October 15, 2007, Judge Jenkins**

The claimant appealed an order denying his claims for PTD and PTD supplemental disability benefits. Claimant argued that the findings of the JCC were not supported by competent, substantial evidence. The court rejected the claimant's argument. The 1<sup>st</sup> DCA pointed out that the claimant has the burden to prove entitlement to PTD. A decision in favor of the party without the burden of proof is not required to be supported by CSE.

The court did find that the JCC's Final Order was inconsistent in its findings of fact and conclusions of law. The JCC, for example found that Dr. Gonzalez testified that the claimant had a 14% psychological permanent impairment rating all of which was attributable to the workplace accident. The JCC accepted the opinions of Dr. Gonzalez. In her conclusions of law, however, she found that at least a portion of the rating from Dr. Gonzalez was attributable to complaints other than the claimant's workplace accident. The case was remanded for additional proceedings.

**Desir v. Nouveau Associates, October 30, 2007, Judge D'Ambrosio**

The claimant, a catastrophically injured worker, sought an award of certain living expenses. The JCC found that the expenses sought, water and utility bills were not medically necessary under F.S. § 440.13 and denied the benefit. The 1<sup>st</sup> DCA found that the E/C was responsible for paying the difference between what the claimant paid before his accident and post-accident living expenses attributable to the injury.

The claimant suffered paralysis from the neck down. The E/C purchased and built a home specifically designed to address the claimant's needs as a quadriplegic. Before the accident, the claimant and his family lived in a two-bedroom apartment. He paid a total of \$700.00 per month which included water, sewer and garbage fees. The claimant paid his utility bills directly. The E/C stipulated that the claimant's water and sewer bill in the new home was approximately \$161.00 per month.

The claimant took the position that he was required to pay \$700.00 per month toward his present living expenses and that the \$700.00 he paid would include water, sewer and garbage. The claimant agreed to pay the portion of the electric utility bill not attributable to the injury. The E/C argued that the claimant should pay \$700.00 per month, attributable solely to rent, and he should also pay his water, sewer and garbage over and above the rent.

The 1<sup>st</sup> DCA found that the claimant made the showing that his responsibility did not exceed payment of \$700.00 plus electric utilities. Since the claimant made that showing, the E/C then had the burden to demonstrate special circumstances existed so that the claimant should be credited with both rent and utilities. The court found that the E/C did not make a showing that additional amounts should be paid by the claimant.

**Interior Custom Concepts and Protegrity Services v. Slovak, October 31, 2007, Judge Pecko**

The E/C appealed an order of the JCC awarding Attorney's Fees and Costs. The 1<sup>st</sup> DCA agreed with the E/C and found that there was no competent, substantial evidence in the record to support the JCC's calculation of attorney's fees owed.

In April 1999, the claimant suffered a compensable injury to his left hand. The E/C accepted the claimant as PTD in 2001. In May 2005, the claimant participated in a vocational evaluation and re-employment assessment. The vocational consultant opined that the claimant may be able to return to work with restrictions of his left hand. The E/C scheduled an FME in order to determine whether the claimant remained permanently and totally disabled. The claimant did not appear. Pursuant to F.S. § 440.15(1)(e)(1), the E/C suspended the claimant's PTD benefits effective October 7, 2005.

Subsequently, the claimant filed a Petition for Benefits. The E/C then filed a Motion to Compel the claimant's attendance at the FME. Following a hearing on the motion, the JCC agreed with the claimant that Chapter 440 does not expressly provide for an FME and thus the court could not compel the claimant's attendance at the exam. The E/C reinstated the claimant's PTD benefits effective December 16, 2005.

Following the ruling, the parties prepared a joint stipulation and the E/C agreed to pay the claimant \$5,470.88 in past due benefits for the period of October 7, 2005 through December 16, 2005. The E/C agreed claimant's counsel was entitled to fees and costs. The E/C argued that claimant's counsel was entitled to a percentage of the benefits actually obtained for the claimant, or \$5,470.88 in past due PTD benefits. The claimant argued that the benefits secured included both the past due PTD benefits and the full present value of total PTD benefits to be paid out to the claimant over his life span.

The JCC found that the claimant's attorney was entitled to a fee equal to the percentage of the value of the benefits obtained, which were the PTD benefits to be paid to the claimant over his lifetime, for a total of \$478,530.12. The JCC ordered the E/C to pay claimant's counsel \$48,603.00 in attorney's fees and \$139.58 in costs.

The E/C argued that there was no competent, substantial evidence to show that the E/C intended to permanently cut off the claimant's PTD benefits. The court noted the letters sent to the claimant and his counsel indicated that the suspension of benefits was only temporary. The court agreed with the E/C and found that the benefit obtained by counsel was \$5,470.80.