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CASE NOTES
CASE LAW SUMMARY
September 2010

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

Apportionment /Controlling Law

Braun v. Brevard County, (Fla.1st DCA 9/30/2010) The DCA reversed the JCC's order denying the claimant's Petition to require the carrier to pay all medical benefits for a 1993 D/A at 100%. The claimant had compensable accidents with the county in 1993 (C5-6) and 2005 (C4-5). The claimant obtained $15,000 in a subrogation claim related to the later accident, and the parties stipulated the carrier could offset the cost of future remedial care at 25% for the 2005 accident. A physician authorized to treat the claimant for both injuries subsequently testified that each accident was 50% responsible for the claimant's need for treatment. The E/C then sought to allocate or apportion the two accidents. The claimant asserted he could choose the date of accident under which benefits would be paid. The JCC indicated that practically speaking, he could not see how the doctor was prescribing medications for one cervical level and not the other. He denied the claims, citing 440.42(4)(2005) and Pearson v. Paradise Ford. The DCA summarily reversed and remanded. They found that the claimant's 1993 medical care could not be apportioned, as the statute did not include medical benefits in the apportionment statute until 2003. They further held Pearson did not apply, and the law in effect required the E/C to provide treatment for the 1993 under the logical cause standard, regardless if the treatment necessarily treated post 2003 conditions or injuries. **Click here to view Order**

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Appellate Attorney Fees/Enforcement and Jurisdiction to Award Sanctions

South Florida Express Bankserv, Inc. v. Aponte, (Fla.1st DCA 9/22/2010) The First DCA previously awarded an appellate attorney fee to the claimant for defending what the DCA determined to be a frivolous appeal. The Employer then filed what the court determined to be a frivolous response to claimant's Motion for Enforcement of that Order. The Employer argued that the DCA order only instructed the JCC to establish the amount of the fee, but did not provide for enforcement of that order. The DCA summarily dismissed this and any other arguments furthered by the employer as evincing ignorance of the pertinent statutes and rules. They imposed further fees as a sanction for complete and continuing disregard of established law. **Click here to view Order**

Expert Medical Advisors/Qualifying Disputes

AA Gutter Cleaning Inc./First Commercial Claims, (Fla.1st DCA 9/22/2010) The DCA reversed and remanded an order of the JCC finding no conflict to warrant appointment of an EMA. The JCC ruled that the dispute had to occur between health care providers in the same specialty. The DCA rejected the argument that as 440.13(9)(a)(2004) requires AHCA to certify expert medical advisors "in each specialty", only disputes between doctors in the same specialty merit appointment of an EMA. **Click here to view Order**

Expert Medical Advisors/Authorized Medical Evidence to overcome EMA Presumption

Witham vs. Sheehan Pipeline Construction/Zurich American Ins., (Fla.1st DCA 9/23/2010) The DCA reversed the JCC's denial of compensability, finding the JCC impermissibly considered the opinion of a non M.D. Toxicologist, in conjunction with other admissible medical testimony, to reject an EMA opinion. The claimant collapsed at work. His resulting condition required nursing home and rehab care. The E/C, upon learning of the claimant's long time habitual alcohol abuse (among other conditions) denied the claim on multiple grounds, but essentially that the work performed was not the MCC of the accident or resulting need for care or lost wages. They also asserted a denial based upon the accident being predicated on an acceleration of alcoholism. The parties each obtained IMEs. The JCC appointed an EMA, who opined that the claimant's chronic alcohol abuse did not cause the industrial accident. Of note, the claimant testified he passed a pre-employment drug test, did not test positive for alcohol on the date of accident, and asserted he had been sober for three months pre-accident. His girlfriend, however, testified he had been drinking 12-24 beers three times a week, taking Xanax, and smoking three packs of cigarettes a day. The E/C presented the testimony of a non-M.D., PhD Toxicologist to assist in rebutting the testimony of the EMA. That expert, over claimant's objections, gave multiple opinions that the claimant's condition was not related. The DCA rejected the E/C argument that it was harmless error for the JCC to have considered this testimony as a basis for the denial, as their IME provided the same opinion. They remanded for the JCC to make such a finding without considering the testimony of the toxicologist regarding medical causation. **Click here to view Order**

Admissible Medical Evidence/Authorization by "Operation of Law"

Romano v. Trinity School for Children/Summit Claims Center, (Fla.1st DCA 9/13/2010) The DCA reversed the JCC's refusal to admit a non authorized, non IME or EMA physician's testimony, per the recent Parodi decision. In Parodi, the DCA noted that otherwise inadmissible medical testimony may become admissible if the claimant makes a specific request for medical treatment, allows the E/C a reasonable time to respond, and then obtains care that is reasonable, medically necessary and causally related. Here the claimant requested authorization of a psychiatrist which was denied by the E/C, and obtained treatment with Dr. Walker on her own. Subsequently the E/C authorized Dr. Forman, but not until both parties obtained IME's months later. The claimant subsequently filed PFBs seeking payment for past treatment with Dr. Walker, future treatment with him in lieu of Dr. Forman, and temporary benefits. In support of their position that Dr. Walker was authorized, the claimant offered the testimony of the adjuster that discussed the initial request and denial of authorization of Dr. Walker. However, the written request and denial were not offered into evidence. The DCA held the adjuster's testimony sufficient to show a request and failure to provide within a reasonable time. The DCA specifically ruled that the claimant, per F.S. 440.13(2)(c)(2007) is not required to attach supporting documentation of the need for a request, as a pre-requisite for the JCC to deem that physician authorized by operation of law. However, F.S. s.440.02(40)(2007)("specificity") does require a Petition for Benefits to include a written recommendation by a physician that treatment (including psychiatric treatment) is being recommended. **Click here to view Order**

Award of Temporary Indemnity/Admissible Medical Evidence

City of Auburndale/PGCS v. Searfoss, (Fla.1st DCA 2010) The DCA reversed and remanded the JCC's award of TTD benefits, finding the JCC relied solely on the opinions of an unauthorized doctor in determining the claimant was entitled to TTD. The DCA noted that doctor's testimony did not become admissible, even under Parodi. **Click here to view Order**

Attorney Client Privilege/Discovery

Hagans v. Gatorland Kubota LLC/Sentry Ins.(Fla.1st DCA 9/16/2010) The DCA quashed an Order of the JCC compelling the claimant to provide a list of prior doctors and medical treatment contained in his attorney's "client intake form". The court noted that attorney client privilege protected the list. They noted the JCC correctly ruled the claimant's prior claims and medical history are discoverable, but compelling the attorney to produce the list was an abuse of discretion. The DCA noted the claimant produced all information in his possession regarding prior claims. The rules regarding attorney client privilege are not subject to a balancing test (ie. such lists are not discoverable if the E/C has no other means to obtain that information). The DCA noted that other means of discovery are available to discover the facts at issue, although the court notes that interrogatories, previously prohibited under the prior "4.0" rules of procedure, still appear to be prohibited under the current "Q" rules. The court considered the request to produce a "list" as a prohibited interrogatory. **Click here to view Order**

PTD/Burden of Proof

Blake v. Merck and Co./Specialty Risk Services, Fla. 1st DCA 9/7/2010) The DCA reversed and remanded the JCC's Order denying PTD benefits. The JCC's denial was based on the following language: "*I interpret this (the "50 mile radius PTD standard") to mean that, regardless of all vocational expert opinions, the burden rests on the shoulders of the injured employee to at least make a reasonable effort to secure employment if the evidence does not show her to be totally medically disabled. That the claimant here failed/refused to do a job search or to check any jobs made available to her negates an award of permanent total disability."* The DCA held this was error, citing to post 2003 case law holding that a claimant not having a listed injury may prove entitlement to PTD by (1) permanent medical incapacity to engage in at least sedentary employment, within a 50-mile radius of the employee's residence, due to physical limitation; (2) permanent work-related physical restrictions coupled with an exhaustive but unsuccessful job search; or (3) permanent work-related physical restrictions that, while not alone totally disabling, preclude Claimant from engaging in at least sedentary employment when combined with vocational factors. The DCA noted the JCC appeared to apply the incorrect legal standard in denying benefits based on a failure to look for work. In a footnote, they indicated the record showed that although the E/C vocational expert identified open jobs at trial, no offers of employment had been made to the claimant, nor had she refused any employment. The case was remanded for the JCC to determine whether the claimant is entitled to PTD benefits based on evidence of permanent work-related physical restrictions that, while not alone totally disabling, preclude Claimant from engaging in at least sedentary employment when combined with vocational factors. **Click here to view Order**