HURLEY, ROGNER, MILLER,
COX, WARANCH & WESTCOTT, P.A.
REX A. HURLEY, ESQ., WILLIAM H. ROGNER, ESQ., SCOTT B. MILLER, ESQ., DERRICK E. COX, ESQ.,
MICHAEL S. WARANCH, ESQ., PAUL L. WESTCOTT, ESQ., GREGORY D. WHITE, ESQ.,
W. ROGERS, TURNER, JR., ESQ., PAUL L. LUGER, ESQ., ROBERT J. OSBURN JR. ESQ., GREGORY S. RAUB, ESQ.
MATTHEW W. BENNETT, ESQ., NISHA G. DESAI, ESQ., ANTHONY M. AMELIO, ESQ., ESQ.,
ROBERT S. GLUCKMAN, ESQ., TERI A. BUSSEY, ESQ., ANDREW R. BORAH, ESQ., ESQ.
1560 Orange Avenue, Suite 500, Winter Park, FL 32789 * Phone (407) 571-7400 * FAX (407) 571-7401
603 North Indian River Drive, Suite 102, Ft. Pierce, FL 34950-3057 * Phone (561) 489-2400 * FAX (561) 489-8875
www.hurleyrogner.com

CASE NOTES

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CASE LAW SUMMARIES: September, 2004

JUDICIAL PROCEDURE

Valdes v. Galgo Construction, 29 Fla. L. Weekly D2165 (Fla. 1st DCA Sept. 29, 2004). An attorney fee hearing was held on December 2, 2003. The parties agreed to fee entitlement and the JCC directed attorneys for both parties to submit a proposed Order. There was a dispute over whether or not the claimant's attorney would submit a proposed Order and if so what it should contain. Apparently, this was a "contentious" dispute between the claimant's attorney and the Judge. The 1st DCA noted that the DOAH Rules allow a JCC to request a party to submit a proposed Order. However, the DCA also noted that no party is compelled to prepare a proposed Order and by failing to do so a party does so at "his own peril". The JCC was waiting for the proposed Order from the claimant's attorney before he issued an Order. The DCA issued a "Writ of Mandamus" ordering the Judge to prepare an Order on attorney's fees within thirty days citing case law and the statute indicating that an Order must be rendered in a timely manner.

HORSE PLAY

Galaida v. Auto Zone, Inc., 29 Fla. L. Weekly D2160 (Fla. 1st DCA, Sept. 27, 2004). Employee Galaida, while working at an auto parts store, walked outside to his car which was parked in the store parking lot for the purposes of obtaining a cigarette. As he opened the car door,

a loaded gun fell to the ground, shooting him in the leg. Originally, the employee claimed that he was the victim of a drive-by shooting but later admitted he was wounded by his own gun. All parties agreed that the employer had a policy against the possession of fire arms at the store, and the JCC found that the store policy was violated by the claimant and that he had substantially deviated from his work activities and was not entitled to benefits. The claimant attempted to argue on appeal that he was injured while tending to a personal comfort, taking a smoke break, when he was injured. However, the DCA found that a part of the personal comfort doctrine incorporates an element of foreseeability. And in this instance, the DCA found that it was not foreseeable that a worker would be shot in the leg while tending to a personal comfort. Specifically, being exposed to a gun was not a foreseeable consequence of the authorized cigarette break. The claimant had also attempted to argue that his accident was compensable under the "horse play" doctrine. The claimant argued that his injury was only due to a momentary deviation from his employment. However, the DCA disagreed and the JCC's decision was affirmed.

PENALTIES

Amerimark, Inc. v. Hutchinson, 29 Fla. L. Weekly D2161 (Fla. 1st DCA, Sept. 27, 2004). The employer/carrier mailed a washout check to its attorney on the 14th day. The employer/carrier's attorney received the washout check ten days later and placed it in the mail the same day to the claimant's attorney. The JCC concluded that the payments were late because they were sent on the 14th days to the E/C's counsel rather than to the claimant or his counsel and assessed a 20% penalty. The JCC agreed that if the employer/carrier had sent the checks directly to the claimant or his attorney on the day it sent the check to the employer/carrier's attorney then it would have been timely.

The DCA, however reversed because the JCC below failed to decide whether the E/C's untimely payment was "willful or made in good fait,." citing Florida Rule of Workers' Compensation 4.150 and the case of Frix v. Allstate Insurance, 854 So.2d 258 (Fla. 1st DCA 2003). The DCA noted that "willfulness" was defined as a "deliberate defiance of a JCC's Order." Therefore, the JCC reversed the imposition of the penalty and sent it back to the JCC for a determination as to whether or not the late payment was willful or in bad faith.

TRAVELING EMPLOYEE

Thompson v. Keller Foundation, Inc., 29 Fla. L. Weekly D2159 (Fla. 1st DCA, Sept. 27, 2004). The injured employee in this case was a traveling construction worker and joined several other co-workers playing pool and eating wings at a sports bar for an hour prior to driving to a restaurant for dinner. On the way to the restaurant the claimant was involved in a motor vehicle accident. The JCC concluded that the claimant's injuries were not compensable as he was engaged in "amusement activities". The DCA, however, reversed finding that the claimant was "traveling employee" and noting that a traveling employee is deemed to be in continuous conduct of his employer's business including during times when he is not actually working but engaged in normal and necessary activities. The DCA therefore found that as long as the claimant's injury arose out of a risk which was "reasonably incidental to the conditions of his employment" that his injury was therefore compensable.