



# HURLEY ROGNER

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## CASE NOTES

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### CASE LAW SUMMARIES: September, 2006

#### ATTORNEY'S FEES

Nash v. AMR Corp., 31 Fla. L. Weekly D2388 (Fla. 1<sup>st</sup> DCA  
September 18, 2006)

There was no abuse of discretion in allowing the claimant and employer to present evidence on the issue of the reasonableness of claimant's appellate attorney fees.

The employer failed to file a verified response to claimant's fee petition, but the employer's unverified response was specific enough to put the claimant on notice regarding the employer's objections to claimant's verified petition. Counsel for the E/C also provided testimony at the hearing on the reasonableness of the fee, and the claimant could have requested a continuance to alleviate any problems with surprise. Thus, the DCA held there was no abuse in discretion for the JCC to allow both sides to present evidence on the

issue of reasonableness of claimant's appellate attorney fees.

Even though the DCA reviews the amount of appellate attorney's fees awarded by the JCC for an abuse of discretion, the DCA exercises de novo review of the JCC's construction of the requirements and meaning of the order finding the claimant entitled to appellate attorney's fees.

Buitrago v. Landry's, 31 Fla. L. Weekly D2340 (Fla. 1<sup>st</sup> DCA September 13, 2006)

The DCA, as in *Wood, Lundy, and Campbell*, certified the following question of great public importance:

DO THE AMENDED PROVISIONS OF SECTION 440.34(1), FLORIDA STATUTES (2003) CLEARLY AND UNAMBIGUOUSLY ESTABLISH THE PERCENTAGE FEE FORMULA PROVIDED THEREIN AS THE SOLE STANDARD FOR DETERMINING THE REASONABLENESS OF AN ATTORNEY'S FEE TO BE AWARDED CLAIMANT.

#### SETTLEMENT AGREEMENTS

Gunderson v. School District of Hillsborough County, 31 Fla. L. Weekly D2339 (Fla. 1<sup>st</sup> DCA 2006)

The DCA found that the settlement agreement, signed by the deceased and the E/C immediately prior to his death, became a binding, enforceable contract upon the later entry of an order approving attorney's fees. The E/C argued that even though the widow signed the settlement documents, the claimant's failure to execute a general release and resignation prior to his death invalidated the agreement.

The DCA looked to whether or not there was a valid contract that had been fulfilled or whether there were still conditions precedent or subsequent that would make the contract incomplete. The settlement became binding upon the wife's receipt of the order approving attorney's fees.

The DCA held that the death of a claimant following the execution of a settlement agreement will not affect the agreement's enforcement if the personal representative can show that a binding contract was reached. Thus, the claimant's widow's signing of the necessary documents performed all duties required of the claimant, and requiring performance on the E/C's part. The court took a dim view of the E/C's allegations, noting that they could rest assured the

deceased claimant would not apply for reinstatement.

### RES JUDICATA

Nelco Companies v. Lott, 31 Fla. L. Weekly D2395 (Fla. 1<sup>st</sup> DCA September 20, 2006)

The DCA held that res judicata did not apply to bar employer's fraud defense to employee's second series of petitions because the claimant made subsequent misrepresentations to treating physicians after seeking additional benefits.

Res judicata may apply to bar all matters actually raised and determined, as well as to all other matters which could properly have been raised and determined in the prior action, whether they were or not. In the instant case, res judicata would only apply if the E/C argued that the claimant made misrepresentations prior to the 2000 settlement. However, res judicata does not apply because the E/C argued that after the 2000 settlement, the claimant made subsequent misrepresentations. Thus, the E/C's defense was not barred by the earlier settlement since the defense was based upon facts that allegedly arose after the 2000 settlement and dealt with misrepresentations after the filing of new petitions for benefits.

### UNEMPLOYMENT COMPENSATION

Lake v. Unemployment Appeals, 931 So.2d 1065 (Fla. 4<sup>th</sup> DCA July 5, 2006)

The U/C Appeals Referee held that the claimant was not entitled to unemployment compensation benefits because she was found to have voluntarily left her employment. The DCA affirmed the referee's ruling that the claimant had voluntarily resigned when she agreed to a lump sum settlement of her workers' compensation claim which provided that she would not return to work in lieu of taking the E/C's offer of light duty work.

### SPECIAL DISABILITY TRUST FUND

Lockheed Martin v. Special Disability Trust Fund, 31 Fla. L. Weekly D2391 (Fla. 1<sup>st</sup> DCA September 18, 2006)

The E/C sought reimbursement from the Special Disability Trust Fund (SDTF) for workers' compensation benefits paid to the claimant. The JCC ruled against the E/C, and the DCA reversed holding that the E/C

did not file outside the 2 year time period.

Section 440.49(7)(a), Florida Statutes, provides that E/C may seek reimbursement from the SDTF if they file a written notice of the claim "within 2 years after the date the employee last reached MMI, or within 2 years after the date of the first payment of compensation for PTD, wages loss, or death, whichever is later."

In the instant case, the E/C sent a check to the claimant in 1992, and the claimant reached MMI in 1994. The E/C filed a notice of reimbursement with the SDTF in 1995, which is approximately one year after the claimant had been found MMI. Thus, the E/C was found to have filed its notice within 2 years of one of the occurrences listed in the statute. The lasted occurrence was in 1994 when the claimant reached MMI and not the date of the check sent in 1992.

### COMPENSABILITY

Brown v. Justin C. Johnson & Associates, P.A., 31 Fla. L. Weekly D2340 (Fla. 1<sup>st</sup> DCA September 13, 2006)

The DCA held that the JCC properly followed the applicable law, as discussed in Suniland Toys & Juvenile Furniture, Inc. v. Karns, 148 So.2d 523 (Fla. 1963), (preventative medical treatment connected with employment may be compensable, if the "injury originated in some risk connected with the employment or flowing as a natural consequence from the employment.").

Although not discussed in the DCA opinion, the underlying Compensation Order of the JCC (available on the DOAH website <http://www.jcc.state.fl.us/jcc/>) denied the claim, based on the finding that the claimant had failed to prove that his injuries were sustained within the course and scope of his employment. The claimant, an attorney, suffered a stroke while riding his bike, which his employer provided. The Employer provided massages conducted at the claimant's home and a gym membership since the employer thought this would keep his employer's more productive and healthy. The stroke occurred several days after one of the massages. The claimant argued that his daily massages provided by the employer caused his stroke. The JCC stated that he could not extend workplace to home unless the massage was an activity incidental to employment. The massages were not incidental since they were not required, and the claimant's employment was not based on whether or not he had the massages.

#### **CASE NOTES**

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