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CASE NOTES
CASE LAW SUMMARY
September 2008

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

<u>Cova & De La Heria v. Law Office of Evan Ostfield/S.E. Personnel/Broadspire</u>, (Fla.1st DCA 9/29/08)
Attorney Fees/Liens
The claimant and his current counsel sought reversal of an award of fees to the claimant's prior attorney from his current attorney. Claimant had been represented by prior attorney, who withdrew all pending Petitions for Benefits. The DCA held that without a pending Petition, the court was without jurisdiction to enter the Order awarding fees.
http://opinions.1dca.org/written/opinions2008/09-29-08/07-3552.pdf

Although not discussed in the appellate opinion, the underlying order in the case shows that the prior counsel sought fees based on a lien and quantum meriut (services rendered) theory. It appears he sought this request approximately six months after the case was settled. The order notes the claim was settled without contacting prior counsel.
http://www.jcc.state.fl.us/jccdocs20/WPB/Palm%20Beach/2005/002297/05002297_364_06062007_11170525_i.pdf

Protocol Communications v. Andrews, 1D07-2957 (Fla. 1st DCA 2008): The First District Court of Appeals rejects the employer/carrier's argument that the JCC erred in awarding authorized care with a physician who had been designated as an IME. First, the Employer/Carrier failed to object to the designation of the Claimant's unauthorized treating physician as an IME. The Court held that tacit agreement is sufficient to bring the doctor within the provisions of s. 440.13(5)(a), which allow the doctor to provide treatment. Furthermore, as the employer was not furnishing necessary care, and the Claimant could obtain care on her own per s. 440.13(2)(c), the designation as an IME does not negate the status as a treating physician.
http://opinions.1dca.org/written/opinions2008/09-26-08/07-2957.pdf

Torres v. Costco Wholesale Corp., 1D07-4214 (Fla. 1st DCA 2008): Claimant appealed the JCC's denial of interest on cost from the date the Employer/Carrier agreed to the amount of costs, and further argued that as the amount of costs were not in dispute, the JCC was not required to enter an order awarding costs for them to become due and therefore there should be prejudgment interest on costs. The Court held that the JCC has no authority to award interest on costs for any period prior to the cost award.
http://opinions.1dca.org/written/opinions2008/09-26-08/07-4214.pdf

Orange County v. Willis, 1D07-4552 (Fla. 1st DCA 2008): The Court reversed the JCC's award of attorney's fees based upon JCC's Order requiring them to pay Claimant's medical bills. The Court indicated the Claimant's medical care was never in jeopardy and the failure to pay bills was merely a mix-up. The Court also noted the Claimant filed a PFB instead of contacting the carrier. The Court held that the claim for payment of bills was a reimbursement dispute and resolution was with AHCA and the Claimant did not have standing to enforce payment of the doctor's bill. The JCC lacked jurisdiction to award fees as it was ancillary to a reimbursement dispute.
http://opinions.1dca.org/written/opinions2008/09-26-08/07-4552.pdf

Sanders v. City of Orlando, ___So.2d___(Fla.S.Ct.9/25/08)

The Florida Supreme Court quashed the opinion of the 1st DCA in Flamily (Sanders named for the estate), which found the JCC was without jurisdiction in 2004 to vacate a 1996 settlement agreement in Flamily's Workers' Compensation case. The Supreme Court held that, contrary to the 1st DCA's ruling, the 2001 amendments to 440.11(2)(c) do not remove the JCC's jurisdiction to rule on vacating settlement agreement with represented claimants. The court found the amendments were designed to streamline the settlement process, but not divest such

jurisdiction from JCCs.

Gallagher Bassett/Delta Health v. Mathis, ___So.2d.___ (Fla. 1st DCA 9/22/08)

DCA reverses finding of compensability of neck condition, finding JCC erred in basing finding on equivocal statements of neurologist re. causation. Court writes 13 page opinion concerning essentially issue of whether competent, substantial, evidence exists in record to support ruling. Court adds gratuitous language in closing suggesting that treatment for compensable shoulder injury (not appealed issue) might necessarily include treatment for (Now) non-compensable cervical condition.
http://opinions.1dca.org/written/opinions2008/09-22-08/07-5234.pdf

W.Rogers Turner, Jr. and William H. Rogner for Employer/Carrier

McDonalds/Fla. Hospitality Mutual Ins. v. Lopez, ___So.2d___(Fla. 1st DCA 9/23/08)

The First DCA reversed an Order of JCC Kuker ordering the E/C to pay for past chiropractic visits in excess of the 24 visits mandated under the ’03 version of the statute. The claimant had sought payment for approximately 60 visits, which the JCC awarded, partially per F.S. §440/13/(2)(c) (finding the chiropractor became authorized following a request by the claimant). The court noted that the treatment must still be “medically necessary” and the statute limits medically necessary chiropractic care to 24 visits.
http://opinions.1dca.org/written/opinions2008/09-23-08/07-2739.pdf

Providence Property and Casualty/Certified HR v. Wilson, ___So.2d___(Fla.1st DCA 9/23/08)

William H. Rogner for Appellants

The First DCA affirmed an Order from JCC Condry awarding claimant a statutory one time change in physician, despite the fact that the claimant was told by the initial treating physician that no further care was needed. After waiting a year to return to the Dr., the claimant then requested a one time change. The carrier denied the claim,asserting (1) no Major Contributing Cause and (2) relying on the language of the statute and recent case law that the claimant’s entitlement to a one time change exists “during the course of treatment”. The DCA found this reliance misplaced. The court noted that the statute indicates the request for a change in doctor “shall” be granted, and such language mandates the change regardless of the first doctor’s opinion re. MCC. In discussing the “course of treatment” issue, the court reconciled prior language in Butler v. Bay Center suggesting that a claimant must be in the course of

treatment when making the request, with language in Nunez v. Pulte Homes equating an evaluation with treatment. They reasoned that the doctor's evaluation of this claimant and rendering a diagnosis "during the course of treatment" was sufficient, noting that the doctor's subsequent discharge of the claimant was irrelevant. The court did not comment on the claimant's year long absence in seeking medical treatment, or what does constitute a length of "course of treatment.
http://opinions.1dca.org/written/opinions2008/09-23-08/07-3802.pdf

Crum Services/Frank Winston Crum Insurance v. Harmon, ___So.2d ___(Fla. 1st DCA 9/23/08)
The First DCA reversed a ruling by JCC Remsnyder denying payment of a medical bill. The JCC ruled the bill had not been placed in evidence. The court, without any real comment, found their review of the record showed the bill had been placed in evidence and reversed. Additional multiple appeal and cross appeal issues were affirmed without comment.
http://opinions.1dca.org/written/opinions2008/09-23-08/07-5507.pdf

Fast-Trac, Inc./Travelers v. Caraballo, ___So.2d____ (Fla. 1st DCA 9/15/08)

The DCA reversed and remanded a determination by JCC Hofstad that the claimant was due 104 weeks of indemnity benefits based on wages earned, but not reported for Federal Income Tax purposes. The claimant argued that the language of 440.02(20)(2003) defining "wages" as those reported for tax purposes does not require the employee to report income to the IRS, but rather that he report them only to his employer. The majority rejected this, as well as other arguments of the claimant, finding the statute's language clear. Judge Padavono, however, wrote a written dissent based primarily on the effect the decision will have on undocumented workers.

Thigpen v. United Parcel Service, ______ So.2d ______, (Fla. 4th DCA, Sept.10, 2008)

The claimant, a long time delivery man for UPS, sued when he was terminated. He claimed the performance related reasons for his termination were pre-textual, and the real reasons were in retaliation for a number of on the job accidents the claimant had. The trial court entered an order granting a new trial, after it found that its admission of testimony by a former UPS supervisor as to an alleged system to root out "injury repeaters", was irrelevant and unfairly prejudicial, and led to an excessive (6 million dollar) verdict. The DCA found the trial court did not abuse its discretion in ordering a new trial, and affirmed.