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CASE NOTES
CASE LAW SUMMARY
September 2013

If you have any questions regarding Case Law Summaries, please contact W. Rogers Turner, Jr. (rturner@hrmcw.com) or Matthew Troy (**mtroy@hrmcw.com**)

<u>Westphal v. City of St. Petersburg/City of St. Petersburg Risk Management/State of Fl.</u> **(Fla.1st DCA 9/23/2013)**
Constitutionality of Cap on 104 Weeks of TTD/Ripeness of PTD claims

In an 18-page majority opinion, followed by 58 pages of dissenting views, a bitterly divided First District Court of Appeal receded *en banc* from the February 2013 three- judge panel opinion in *Westphal v. City of St. Petersburg*, and reaffirmed the validity of the Florida Workers' Compensation law. Sharply reversing course, the Court determined that the 104 week cap on TTD benefits is constitutionally sound. The Court, however, went further. The Court also receded from its 2011 *en banc* decision in *Matrix Employee Leasing, Inc. v. Hadley*, and ruled that a claimant in TTD status at the expiration of the 104 weeks is eligible to receive PTD benefits. This mammoth opinion may not be the last word because the Court also certified the following question to the Supreme Court of Florida:

"Is a worker who is totally disabled as a result of the work place accident, but still improving from a medical standpoint at the time temporary total disability benefits expire, deemed to be at maximum medical improvement by operation of law and therefore eligible to assert a claim for permanent and total disability benefits?"

The question might remain unanswered by the Supreme Court. The District Court's certification of a question does not, by itself, send the case to the Supreme Court for review. A party must first seek review in the Supreme Court. It remains to be seen whether the City will seek Supreme Court review or will simply pay the nine months' worth of past PTD benefits now due to Mr. Westphal. As the prevailing party Mr.

Westphal is unlikely to seek review in the Supreme Court. Moreover, the Supreme Court is not required to accept the case even if asked. The Supreme Court is authorized to consider a certified question, but is permitted to decline to do so.

Assuming no review by the Supreme Court, we should consider the *en banc* decision to be a victory for industry, albeit one with a caveat. Under *Westphal*, a claimant who remains in TTD status at the expiration of the 104 weeks of temporary benefits becomes eligible for PTD benefits for as long as the claimant remains totally disabled. When that claimant is eventually released to return to work the entitlement to PTD benefits ceases. In practice, it means that a very small number of claimants will receive at least some PTD benefits before reaching overall MMI.

Although this may ruffle some feathers in the claims community, the original *Westphal* decision had far-reaching and potentially disastrous consequences for the workers' compensation system. As noted by Judge Wetherell in his dissenting opinion, the panel decision, had it survived, "could have led to the incremental dismantling of the entire workers' compensation system." While the *en banc* opinion may not be perfect, its predecessor was far worse.

As HRMCWW authored the amicus brief on behalf of a large coalition of industry leaders, we will be certain to keep you informed of any further developments. **Click here to view Opinion**

Martin v. City of Jacksonville Code Enforcement/City of Jacksonville Risk Mgmt (Fla.1st DCA 9/23/13)
Taxable Costs/Physician Conferences

The DCA reversed the JCC's denial of payment of costs incurred by the claimant. Claimant's counsel conferenced with the authorized doctor, who opined the claimant's work was the MCC of the claimant's right foot neuroma. The E/C obtained an IME, and thereafter, an EMA determined that although the claimant did not have a neuroma, she had one of several possible conditions necessitating a surgery. As the EMA opined the employment was the MCC for the surgery, the E/C agreed to authorize the surgery and stipulated to an attorney fee and taxable costs. The DCA noted the JCC erred in disallowing the $600 conference fee as a taxable cost. Primarily, they noted that although the Guidelines generally prohibit costs for "consulting by non-testifying experts" (no depos were taken in the case), the JCC's finding that the conference was "necessary to prosecute… the claim" and the advisory, rather than mandatory nature of the Uniform Guidelines allows an award of such costs. The Court also held the JCC erred by ruling that the prior Marton case required reference to the Uniform Guidelines. **Click here to view Opinion**

United States Court of Appeal Sixth Circuit

Jackson et al v. Sedgwick/Coca Cola/Drouillard (6th Cir. 9/24/13)(*en banc* decision)
Federal Racketeering Action/Applicability to State Workers' Compensation Case

This case has been discussed in the WC world for several years. Plaintiffs were injured while working for Coca Cola in Michigan. They alleged that the E/C conspired with a "cut off doctor" (Drouillard) to present essentially bad faith medical evidence to deprive them of Michigan WC benefits. The plaintiffs sued defendants under the Federal RICO (organized crime and racketeering) statute. The RICO statute contains provisions for treble damages and reasonable attorney fees. The Federal District (trial) court initially dismissed the plaintiff's claims. The Sixth Circuit then reversed the dismissal, and remanded the case. After the District court again dismissed the case, the Sixth Circuit heard the appeal *en banc* (all the federal court's judges) and affirmed the dismissal. The *en banc* decision discusses the multiple reasons why such RICO actions are inappropriate for a state WC action (such as the right of claimants to present contrary medical evidence to the W/C judge), but ultimately determines the dismissal was warranted as plaintiffs/claimants could not prove an injury to "business or property" which the RICO statute requires. **Click here to view Opinion**

Pedrez-Martinez v. YRC/Gallagher Bassett (Fla.1st DCA 9/19/2013)
Bill Rogner – Per Curiam Affirmance – no written opinion
Scott Miller prevailed at trial on a Statute of Limitations Defense. Claimant appealed, arguing that although the carrier paid IBs timely, the amount was ultimately 20 cents under what it should have been. The DCA affirmed the JCCs determination that carrier's timely payment was not a dereliction of their duties, but rather an honest and deminimus error that could not excuse claimant's three year delay in filing a PFB. **Click here to view Opinion**

Carroso v. State (Fla.2d DCA 9/18/13)
Misrepresentation/Monetary Value of Benefits/Relationship to Degree of Felony
The state prosecuted the claimant for workers' compensation fraud. Claimant served his 14 month sentence during the pendency of the appeal. The trial court based the length of his sentence for a second degree felony upon the finding that claimant's misrepresentation resulted in fraudulently obtaining "more than $20,000, but less than $100,000" in benefits. Claimant received approximately $27,000 in indemnity total, with $17,000 of that received prior to deposition. The state presented the misrepresentations in the 2006 deposition as the basis for the criminal offense. The court instructed the jury to calculate that amount based upon the value of indemnity benefits paid to claimant before and after his deposition containing the misrepresentation. The Second DCA found error in the calculation of damages related to the fraud, noting specifically that the state did not present evidence connecting the misrepresentation in his 2006 deposition to the intent to misrepresent *prior* to that date. The DCA also found the trial judge erred admitting the pre-deposition WC checks into evidence.

The DCA further noted that these errors allowed the jury to equate the administrative penalty (loss of benefits) under Chapter 440 with the criminal sanction. They also describe the amount of future benefits the carrier "saves" by the misrepresentation sanction cannot be a monetary value assigned for purposes of establishing the criminal punishment.

It is unfortunate that the State did not offer or present additional evidence from the underlying WC case. The DCA noted that no evidence was presented as to the outcome of the claimant's workers' compensation case. The State admitted only the claimant's 2006 deposition transcript, along with minimal testimony from the WC defense attorney concerning misrepresentation. However, the JCC's 2006 **Order** denied all benefits based upon misrepresentation, and lists substantially more detail as to the misrepresentation. The Order finds the claimant denied but actually had three prior automobile accidents, was represented by attorneys in two of those, had identical physical complaints in addition to his fractured arm (for which he sought WC), and that he had treated for those complaints a year prior to the accident. This additional information would have likely provided the jury with evidence that although the claimant was not deposed until 2006, his failure to disclose this information to the carrier or medical providers at the onset of the claim resulted in the payment of the majority of benefits prior to the deposition. **Click here to view Opinion**

New Repackaged/Relabeled RX Law

Senate Bill (S.B.) 662 became effective July 1, 2013. The law revises the requirements for determining the amount of reimbursement for prescription medications. Under the new law, the reimbursement rate for repackaged or relabeled prescription medication dispensed by a dispensing practitioner will be capped at 112.5 percent of the average wholesale price, plus $8.00 for the dispensing fee. The average wholesale price shall be calculated by multiplying the number of units dispensed times the per-unit average wholesale price set by the original manufacturer of the underlying drug dispensed, based upon the published manufacturer's average wholesale price published in the Medi-Span Master Drug Database as of the date of dispensing.

The law also changes the way physicians are allowed to dispense medications, by prohibiting a dispensing practitioner from possessing such medication unless payment has been made within 60 days of the practitioner taking possession of that medication.

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