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

Statute of Limitations/Prosthetic Devices

Gore v. Lee County School Board/Johns Eastern, (Fla. 1st DCA August 31, 2010) The claimant had a compensable partial knee replacement but did not seek follow up care for almost 6 years. The JCC determined the Statute of Limitations had run and denied further benefits. The DCA reversed, finding that the use of a medical device with the E/C's knowledge tolls the statute of limitations. The DCA held that the knee replacement (prosthetic) was a medical device, and held that the 1994 change removing a lifetime exemption for prosthetic devices did not change the case law regarding the continued use of medical devices. Previously the court had held that the continued use of medical devices, such as a back brace or TENS unit tolls the Statute so long as the E/C knew of the use of the medical device. The reasoning was that a claimant's use of a prescribed medical device or apparatus, with the E/C's knowledge, constitutes remedial treatment furnished by an E/C that tolls the statute of limitations pursuant to section 440.19(2). The court found no reason to treat prostheses differently from other medically necessary apparatus used to mitigate the effects of a compensable injury In effect the court held that while prosthetic devices are no longer exempt from the Statute, the Statute is tolled for so long as the claimant has the device and the E/C knows about it. It is difficult to conceive of a situation where the claimant has an authorized prosthesis, but the E/C is not charges with knowledge of it. The court suggests that the E/C should be responsible for all follow up care to prosthetics and implantable medical

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devices. For the second time this month, the DCA inserts the phrase *"place the (economic) burden on industry".* **Click here to view Order**

E/C IMEs

Lehoullier v. Gevity/Fire Equiptment Services/AIG, (Fla. 1st DCA August 31, 2010)
The JCC awarded the E/C's request for an IME regarding the need for future medical care. The DCA granted the claimant Petition for Certiorari, finding that there was no pending dispute to trigger the right to a compulsory IME under the statute. The E/C had agreed at mediation to authorize a psychiatrist, but then expressed concern regarding the claimant's condition and the authorized care being provided. The E/C sought to compel the IME. The DCA stated that a "dispute" triggering the right to an IME arises only when the E/C denies a benefit, or when the claimant disagrees with the diagnosis of an authorized treating physician. The court held that to create a dispute, the E/C must deny benefits to the claimant. In order to be entitled to an IME, the court instructed the E/C would need to obtain a peer review, and deny a benefit to the claimant based upon the decision. **Click here to view Order**

One time change/dismissal of petitions

Grueiro v. Liberty Mailing/Hartford, (Fla. 1st DCA August 25, 2010)
The DCA affirmed the JCC's denial of a 1x change in physicians where the E/C timely authorized a doctor and the claimant refused to attend the appointment. The DCA did, however, address the JCC's alternative basis for the denial, the so called two dismissal rule. The claimant dismissed a PFB containing a request for "an alternate provider and an alternate orthopedist." The JCC held that dismissing the single PFB which requested the same benefit twice satisfied the two dismissal rule from Mieses. The DCA held that to satisfy the two dismissals rule using a single dismissal, the requests must be made in separate PFBs. **Click here to view Order**

Appellate procedure

Noel v. 1641 Jefferson, LLC d/b/a Van Duke Café/Associated Industries, (Fla. 1st DCA August 25, 2010)
The DCA dismissed an appeal for late filing of the notice of appeal. **Click here to view Order**

Independent Medical Examinations/Multiple Examinations

Gomar v. Riddenhour Concrete/AmComp, (Fla.1st DCA 8/10/10)
The 1st DCA reversed the JCC's exclusion at trial of evidence regarding a second examination provided by the claimant's IME. The E/C had argued that the 2003 version of the statute limited the claimant to one independent medical examination per date of accident. The DCA reasoned that the statute provides for additional examinations per dispute, and that limiting a party to an exam in, for example 2006, when a new and distinct dispute arises in 2010, produces an absurd result and unjustly limits the party's ability to present evidence as to the new dispute. The court did not address the language

of section 440.13(5)(b)(2005) which discusses "alternate" IMEs. The DCA held that parties may obtain multiple examinations for multiple disputes, as long as the examination is by the same initial IME physician. **Click here to view Order**

Apportionment/Burden of Proof

Staffmark/Avizent v. Merrell, (Fla. 1st DCA 8/12/2010)

The DCA affirmed the denial of apportionment in this post 2003 date of accident case for reasons other than those cited by the JCC. The E/C sought to apportion temporary indemnity and medical benefits. The DCA held that the post 2003 apportionment statute permits the apportionment of both temporary indemnity and medical benefits, but found the E/C did not properly present evidence apportioning industrial and non industrial pre existing conditions. The claimant had sustained multiple low back injuries (both industrial ('94, '96 and '06) and non- industrial ('95 and '03)) before suffering the instant 2008 back injury. The opinion notes the claimant had been able to work for "several months" for the new employer after recovering from the '06 injury. The opinion is silent as to whether that recovery shortly followed a settlement of that case. An EMA had apportioned 40% of the current disability and need for treatment and 25% of the need for the current surgery to pre-existing conditions. The DCA held that that EMA's opinion did not apportion the pre-existing conditions between industrial and non-industrial conditions. The DCA accepted the term pre-existing condition as it has been interpreted in MCC opinions (Pearson v. Paradise Ford and Pizza Hut v. Proctor), referring to non-industrial injuries.

A concurring opinion predicted that apportionment (and the prospect of injured workers being asked to pay the apportioned percentage of care from their own pockets) will eventually decrease the benefits available to claimants to such an extent as to deprive them of access to courts. The analysis indicates that it is reasonable to exclude prior W/C conditions from apportionment, as carriers can (theoretically) seek allocation from prior carriers. The analysis does not discuss the most common situation though, where a prior carrier and claimant have settled the case, and the claimant has presumably been compensated for future medical and indemnity benefits. **Click here to view Order**