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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

Thorkelson v. NY Pizza & Pasta, Inc., 956 So.2d 542 (Fla. 1st DCA, May 21, 2007)

Claimant appealed the JCC's order denying her TPD benefits related to a disability incurred from an industrial accident on August 26, 2004. Claimant argued that JCC erred in disqualifying her pursuant to 440.15(4)(e) based on the fact that her employer discharged her for misconduct after the injury. The DCA affirmed, detailing the definition and construction of the term "misconduct" in workers' compensation law. The DCA found that the use of "misconduct" in workers' compensation law

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was identical to its definition and usage in unemployment as is evidence by prior case law and statutory amendments. The DCA noted that firing for cause will not terminate workers' compensation benefits, there must be some misconduct. Misconduct had previously been interpreted to mean some willful or wanton conduct by the employee that occurred more than once. In the instant case, the claimant had multiple instances of willful insubordination that led to her firing. Additionally, the evidence showed that she willfully and repeatedly acted in her own perceived interest in disregard of her employer's express directives. Thus the evidence was sufficient to establish misconduct and terminate her benefits under 440.15(4)(e). Carriers should investigate the circumstances of an employee's termination carefully before asserting the termination as a defense to payment of temporary benefits. The "misconduct" alleged by carriers to deny such benefits may not rise to the "willful or wanton" standard discussed in this case.

Bogdan v. Department of Financial Services, Division of Workers' Compensation, 2007 WL 1266063 (Fla. 2d DCA, May 2, 2007)

Bogdan sought review of a Stop Work Order issued by the Department of Financial Services, Division of Workers' Compensation arguing that the Department erred in determining he was required to obtain workers' compensation coverage under 440.10(1)(a), Fla. Stat. (2005). Bogdan argued that he was not required to obtain workers' compensation coverage because he was a sole proprietor engaged in the construction industry. The DCA did not reach the merits on the issue because Bogdan had failed to exhaust his administrative remedies. Thus the DCA affirmed the decision of the Department.

Washington Correctional Institution v. Gross, 958 So.2d 479 (Fla. 1st DCA, May 17, 2007)

E/C appealed an order from the JCC awarding the claimant a number of medical benefits, including a heating pad and oxygen supplementation. The JCC had determined these to be medically necessary. The DCA reversed the award for these two items, stating that the award was not supported by competent, substantial evidence. There was no testimony in the record

indicating that the heating pad was medically necessary to treat claimant's condition. Additionally, claimant's treating physician testified that oxygen supplementation would not be helpful or effective in treating her conditions.

Southwood Timber Co. v. Hicks, 959 So.2d 318 (Fla. 1st DCA, May 17, 2007)

E/C appealed the JCC's order awarding attendant care benefits from the date of the hearing. The claimant was rendered a T3 paraplegic when he was struck by falling timber in 1974. Claimant filed a PFB in August 2004 for attendant care benefits. The JCC awarded attendant care "for no more than 20 hours per week and for such time as attendant care services are necessary and proper." E/C argued that JCC erred in awarding attendant care benefits for household services and that allowing attendant care benefits for household services was superceded by the statutory definition of attendant care.

At the time claimant was injured, there was no definition of attendant care. The court noted that the language in 440.13(2)(f) describing attendant care could not be applied retroactively to the extent that it might constitute a substantive change. The DCA held that the award of attendant care was proper, but that the order needed to clearly set forth the specific type and amount of attendant care services that should be performed in the future. The DCA remanded for a determination of the specific number of hours and specific types of compensable attendant care services to be awarded.

UNC Aviation Services v. Horne, 957 So.2d 698 (Fla. 1st DCA, May 21, 2007)

E/C appealed the award of attorney's fees to claimant, including an award for the value of indemnity for PTD that was awarded in a previous proceeding. The claimant was adjudicated PTD in December 1998. In April 2005, the claimant filed a PFB requesting the authorization of a new pain-management specialist in his case. On the pre-trial stipulation, the E/C asserted that claimant had knowingly and intentionally provided false, incomplete and/or inaccurate information in pursuit of benefits in violation of 440.105 and 440.09(4).

The JCC found that the misrepresentation defense was not properly before him and thus would not consider it with regard to claimant's PFB. The JCC awarded the claimant's petition and authorized a new pain management specialist. At the attorney's fee hearing, the JCC awarded attorney's fees based on the present value of all future PTD benefits due to the claimant. The JCC based the award on the theory that since the E/C had raised a misrepresentation defense, the claimant's entire future PTD benefits were in danger of being forfeited.

The DCA found this award to be error. Because the JCC found the misrepresentation defense was not properly raised and did not consider it, the claimant's benefits were never at issue and thus could not be the basis for attorney's fees. The DCA noted that it was not addressing whether a properly raised affirmative defense of misrepresentation would put PTD benefits in danger of termination such that attorney's fees would be appropriate for the whole value of those benefits.

City of Delray Beach v. Wells, 957 So.2d 694 (Fla. 1st DCA, May 17, 2007)

The DCA, per curiam, affirmed the award of the JCC based on the application of the firefighter's presumption under Fla. Stat. 112.18. The JCC had awarded benefits based on the presumption despite some medical evidence that the heart disease and hypertension were not the result of employment, but rather from a combination of genetics, smoking, inactivity, obesity, and stress. No doctor could opine as to the exact cause of his coronary condition, but one suggested that the claimant would have developed the condition regardless of his job. The JCC held that the evidence did not constitute clear and convincing evidence sufficient to rebut the presumption. Additionally, the JCC noted that predisposition is not sufficient to rebut the presumption.