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APRIL/MAY/JUNE 2008

************CLIENT ALERT************

Statements made by claimant's attorney to claimant regarding statute of limitations ARE NOT PRIVILEGED...

Waffle House v. Scharman, 33 Fla. L. Weekly D1347 (1st DCA May 21, 2008). The Court has held that statements made about the statute of limitations by opposing counsel to claimant are NOT PRIVILEGED and therefore we can take the deposition of the claimant's attorney to determine what opposing counsel informed his client regarding the statute of limitations. This gives us an excellent opportunity to rebut an estoppel argument against our statute of limitations defense. Since the claimant can obtain knowledge about the statute of limitations from any source, if the claimant is informed of it by opposing counsel, that information can serve to keep our statute of limitations defense intact.

Any questions please call Steven Kronenberg, Sr. Partner (Miami Lakes Office - 305-826-7260)

PTD entitlement post October 1, 2003...

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Ferrell Gas v. Childers, 33 Fla. L. Weekly D957b (1st DCA April 7, 2008). Claimant suffered a compensable accident in 2004. The carrier provided medical care and indemnity benefits but denied PTD benefits on the basis that the claimant was physically able to perform sedentary work. After an evidentiary hearing, the JCC determined that while the claimant's physical limitations alone did not prevent him from engaging in sedentary work, the combination of his physical limitations and vocational abilities rendered him PTD.

The E/C appealed the decision on the basis that the JCC should not have considered the claimant's vocational abilities in connection with his physical limitations in awarding benefits.

F.S. 440.151(1)(b) lists the injuries which presumptively qualify a claimant for PTD and then provides that in all other cases, "the claimant must establish that he/she is not able to engage in at least sedentary employment within a 50 mile radius of the employee's residence due to his/her physical limitation." Pre 1994 statute 440.151(1)(b) required a claimant who did not have a listed injury to "establish that he/she is not able uninterruptedly to do even light work available within a 100-mile radius of the injured workers' residence due to physical limitations."

On appeal, the Court found that the pre-1994 version of 440.15(1)(b), PTD benefits may be based on physical restrictions *and vocational factors which combine to preclude the level of work provided in the statute,* see Commercial Carrier Corp v. LaPointe, 723 So. 2d 912 (Fla. 1st DCA 1999); Shaw v. Publix Supermarkets, Inc, 609 So. 2d 683 (Fla. 1st DCA 1992). The pertinent language in the current version of 440.15(1)(b) is similar to the language under which the Court has recognized that it is appropriate to consider both physical and vocational factors. As such, the order was affirmed.

False Social Security Number and assertion of a fraud defense...

Matrix Employee Leasing v. Hernandez, 33 Fla. L. Weekly D7lla (1st DCA March 10, 2008). Claimant began working for Matrix Employee Leasing and provided a social security number upon hire which appeared to be valid. The employer, however, did not verify if the number provided was valid. The carrier denied the claim on the basis that the fraudulent obtaining of employment by a claimant pursuant to §440.105(4)(b)(9) is sufficient to trigger the provisions of §440.09(4)(a) thus mandating that the claimant is NOT entitled to workers' compensation benefits. The JCC ruled in favor of the claimant.

On appeal, the Court determined that although the claimant unlawfully presented a false social security card for the purpose of obtaining employment, the claimant was still owed workers' compensation benefits where the record contained no evidence that the claimant presented a false social security card for the purpose of obtaining workers' compensation benefits.

Compensable accidents - Going or coming rule...

Kramer v. Palm Beach County, 33 Fla. L. Weekly D903a (1st DCA March 31, 2008). Claimant appealed a final order from a JCC which denied compensability of his injury asserting that the JCC applied the incorrect standard during the analysis of whether the claimant's injury qualified as a "special hazard."

The claimant was employed as a bridge tender for Palm Beach County. He suffered leg injuries after tripping on a pile of debris left in a county right-of-way as a result of Hurricane Wilma. At the final hearing, the claimant testified that he was not parked in the designated bridge tender's parking area, but rather in a parking lot at a nearby shopping center. The JCC found the claimant's injury fell within the "going and coming" rule pursuant to §440.092(2) and denied compensability.

On appeal, the claimant argued that his injury fell with the "premises" exception to the rule or was a "special hazard," another exception to the general rule. The Court agreed that the injury did not occur on the employer's premises and affirmed on that ground, however, further agreed with the claimant that the injury fits within the special hazard exception. The Court relied on the two prongs to the special hazard exception: (1) the presence of a special hazard at a particular off site location, and (2) close association of the access route to the work premises. As such, the order was reversed with instructions to the JCC to apply the proper standard.

Employer/Employee relationship and leased employees...

Crum Services v. Lopez, 33 Fla. L. Weekly D679g (1st DCA March 6, 2008). Crum Services is a P&G which provides leased employees to its' clients. Crum enters into contractual agreements to provide payroll services and workers' compensation benefits for the employees it leases to its clients.

Claimant sought compensation for his injury. Evidence presented at final hearing supported that the claimant was offered a job (on the spot) with P&G Roofing by Daniel Del Sol. The claimant never completed any paperwork for Crum, P&G Roofing or any other entity. On May 26,2005, the claimant suffered a broken ankle which occurred only three days after he commenced work. The claimant was taken to the doctor and a follow up visit with an orthopedist which was paid for by Mr. Del Sol.

The contract between P&G and Crum Services states that certain paperwork must be completed by the employee prior to the employee commencing work. The agreement also stated that P&G Roofing "assume(s) full responsibility for workers' compensation claims of other parties hired by or working for you." The JCC found that P&G Roofing was statutorily responsible for providing workers' compensation coverage to the claimant. The JCC also found that Crum was the proper carrier to provide workers' compensation coverage to the claimant regardless of the specific language in the lease agreement.

On appeal, the Court disagreed with the JCC's findings stating that while there is no question that a general contractor is responsible for providing workers' compensation coverage to any employee of an uninsured subcontractor, that is not the issue in this case. The question is whether a *service leasing company* is responsible for providing coverage to all employees whom a contractor hires for a particular job or only those employees who meet the requirements agreed to by the parties. The Court found that Crum never had an employer-employee relationship with the claimant under the terms of the lease agreement and therefore workers' compensation coverage falls to P&G Roofing rather than Crum.

MSA Note:
Our firm has a dedicated MSA department to assist with MSA issues. Even if your company has a preferred MSA vendor, we may be able to provide services that are outside the scope of your vendor's expertise. In this regard, please consider our MSA department to assist with analysis of the claimant's Medicare/SSD status and the need for a formal MSA and/or CMS approval; reduction of an already-prepared allocation that is an obstacle to settlement via medical conferencing and tailoring of the settlement, handling of annuity and/or Medicaid issues, verification or disputing of Medicare liens, preparation of Medicare-compliant settlement documents and addendums as needed, as well as the handling of the CMS submission and the securing of final approval. Our MSA attorneys are innovative and advanced in their MSA handling with proven results.

Alert: Proposed Amendments to the Longshore and Harbor Workers' Compensation Act:

On April 20th, 2008, the U.S. House of Representatives passed a bill, H.R. 2830, also known as the Coast Guard Authorization Act of 2007. The bill, which is now pending before the Senate, is intended to help strengthen the Coast Guard's capacity for border control, effective response to national security threats, and drug trafficking detection and interception. Interestingly, the bill also includes a provision, Section 428, titled "Recreational Marine Industry." Having no obvious nexus to the coast guard or national security issues, this section rather effectively broadens the recreational vessel exclusion of the Longshore Act. Currently, section 2(3)(f) of the Longshore Act permits an exclusion for employers from having Longshore insurance when they have employees who build, repair or dismantle recreational vessels exclusively under sixty-five feet in length. Bill H.R. 2830 would increase the length of an excluded recreational vessel to 165 feet, thus removing many employees of marinas, shipbuilders and related trades from Longshore coverage. It is expected that this bill, if passed into law, will help stimulate marine industry growth by cutting expensive Longshore insurance costs.

Please contact **Robert Bamdas, Partner, West Palm Beach Office,** with any questions regarding the Proposed Amendments.

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