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THE LITIGATOR

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Workers' Compensation

The Supreme Court Rules..

SUPREME COURT REVERTS BACK TO ATTORNEY'S FEES ON AN HOURLY BASIS...

Murray v. Mariner Health 32 FLW S845 (October 23, 2008). Claimant was a CNA who suffered an injury while lifting a patient. She was diagnosed with a uterine prolapse and underwent a hysterectomy. She filed a PFB which was denied by the E/C asserting no injury arose out of the course/scope of employment. The claimant prevailed at the final hearing and the parties agreed to entitlement on fees, but did not agree to an amount. At the attorney fee hearing, both parties indicated the usual rate of pay for attorney fees in workers' compensation cases was $200.00/hour. Counsel for the claimant presented evidence that he worked 80 hours on the case which, when calculated statutorily in accordance with the 2003 amendments, the attorney fee award would have been $8.00/hour for claimant's counsel. Despite same, the JCC determined fees were governed by the statutory formula and awarded a fee of $684.84.

Claimant's counsel appealed the order to the Supreme Court of Florida which revert to the law as defined by the case of Lee Engineering. This case addressed the method for determining a reasonable attorney fee award under the statute, and rejected a strict application of a contingent percentage of the benefit award. The Supreme Court advised the Lee case controlled their ruling. Furthermore, in coming to the decision, the Florida Supreme Court noted that there is a statutory ambiguity when §440.34(1) and (3) are read together. In applying the basic principles of statutory construction, the Florida Supreme Court indicated that subsection (3), the reasonableness standard, controls over section (1) which limited attorney's to a statutory fee based on the value of the benefits secured. The Court indicated that subsection (3) was more specific and, therefore, controlled over the less-specific subsection and also found that imposing subsection (1) as the controlling subsection would lead to "absurd" results including fees that could be too much or too little depending on the circumstances of the case. Claimant's counsel was awarded $16,000.00 as a reasonable attorney's fee.

ATTORNEY'S FEES NOT DUE WHEN THE CARRIER MAKES A GOOD FAITH EFFORT TO LOCATE ALTERNATIVE CARE...

Jennings v. National Linen Services 33 FLW D2795c (December 5, 2008) the claimant was under the care of a pain management physician who later decided to discontinue the pain management area of his practice and recommended the claimant's care be transferred to a physiatrist. Counsel for the claimant advised the E/C of this request on 7/12/07. On 11/6/07 a PFB was filed seeking authorization of a physiatrist. At final hearing, the E/C was still not able to locate a physiatrist to treat the claimant but attempted to schedule appointments with at least five (5) physiatrists who declined to treat the claimant. The JCC entered an order granting the claimant's request for authorization of a physiatrist, but denied the request for attorney's fees and reasoned that "the intervention and efforts of the claimant's attorney have secured no benefit not otherwise being provided the claimant by the E/C."

On appeal, it was determined that the /C has an affirmative duty to furnish all "remedial treatment, care and attendance: to treat the injury. An E/C is not responsible for paying an attorney's fee unless a JCC first determines that the E/C wrongfully refused to furnish benefits to the claimant. The E/C voluntarily furnished the claimant will all required benefits and demonstrated intent to continue doing so. The JCC's order denying the claimant's request for attorney's fees was affirmed.

CLAIMANT ENTITLED ONE TIME CHANGE IN PHYSICIANS AT ANY TIME DURING THE CLAIM....

Dawson v. Clerk of the Circuit Court 33 FLW D2254a (September 23, 2008). The claimant suffered compensable injuries on March 5, 2004. She sought treatment with Dr. Raterman until April 2007. At that time the doctor opined the MCC for the Claimant's need for treatment was 51% due to degeneration and 49% due to the industrial accident. The claimant filed a petition seeking a one time change in physician. The E/C denied the request. The JCC ruled that the claimant did not present any evidence to rebut Dr. Raterman's opinion as to the MCC and therefore she was not entitled to a one time change. The JCC also found that the provision for a one time change does not allow for a one time change of physician for the sole purpose of establishing a causal connection between a compensable injury and the continued need for treatment. The JCC concluded that, in such circumstances, it would be proper to obtain an IME.

On appeal, the Court found the JCC misapprehended the provisions of §440.13(2)(f) which discusses the claimant's entitlement to a one time change in physicians. The Court stated the statute affords the E/C the opportunity to retain control over the physician choice by authorizing same within 5 days. Therefore, the JCC's order was reversed with instructions to authorize the claimant's one time change in physicians.

SUSPENSION OF PTD BENEFITS MAY BE APPROPRIATE WHEN CARRIER ACCEPTS PTD ADMINISTRATIVELY...

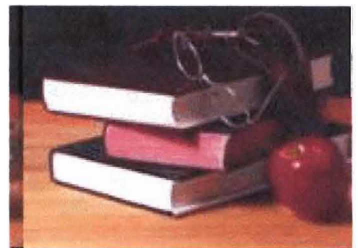
Lee County Parks & Recreation/Lee County Board of Commissioners v. Fifer 33 Fla. L. Weekly D2537a (1st DCA October 29, 2008). Claimant suffered a compensable injury on February 25, 1983. After she attained MMI (1990) she received palliative treatment from the carrier. The E/C administratively accepted the PTD in 1991 and began paying PTD benefits. In January 2004 the claimant underwent an IME with Dr. Moorefield, who recommended an FCE. The claimant failed to attend the FCE and the E/C suspended her benefits on October 8, 2004. At final hearing, the claimant sought PTD benefits from the date of termination to the present and continuing. Both parties submitted evidence addressing whether the claimant was PTD and stipulated to the 1983 version of the statute.

The JCC found no statutory authority for the E/C to unilaterally suspend the PTD benefits for her failure to attend the FCE. The JCC ordered the E/C to recommence PTD benefits.

On appeal, it was determined that since the E/C *voluntarily* paid PTD benefits and there was no adjudication, the E/C was entitled to unilaterally suspend benefits for failure to attend the FCE or for any other reason. As such, there was no enforceable workers' compensation order regarding the claimant's entitlement to PTD benefits and the E/C was entitled to suspend such benefits at any time before such an order was rendered. It was also determined that the JCC's order did not make any findings regarding the claimant's entitlement to PTD benefits from the date they were terminated and forward.

The JCC's award of PTD benefits was reversed. Additionally, the case was remanded for the JCC to make findings regarding the claimant's entitlement to PTD benefits from the date they were terminated forward, applying the provision of §440.15, Florida Statutes (1983).

AVERAGE WEEKLY WAGE IS DETERMINED BASED ON WAGES EARNED...



Eaton v. Pinellas County School Board 33 Fla. L. Weekly D2706a (1st DCA November 21, 2008). Claimant (a teacher) sustained a compensable injury to her low back. The E/C asserted an AWW of $599.24 which was based on the weekly amount the claimant was paid in the thirteen weeks preceding the accident. The claimant asserted an AWW of $740.57 the weekly amount she earned in the thirteen weeks preceding the accident. The JCC found that the claimant's position was similar to a seasonal employee whose AWW is calculated on a 52 week average and using the higher amount would result in the claimant receiving a windfall. The JCC concluded the AWW should be based on the contract (she was hired with a salary of $31,400.00 per year), basing the AWW on the amount the claimant was paid rather than the amount she earned, or $599.24.

CON'T...
AVERAGE WEEKLY WAGE IS DETERMINED BASED ON WAGES EARNED...

On appeal, it was determined the JCC incorrectly interpreted section §440.14(1)(a). The statute unambiguously provides that the AWW "shall be one-thirteenth of the total amount of wages *earned* in such employment during the 13 weeks." It was further stated that the statute speaks in terms of wages *earned* by the claimant and not in terms of money *paid* to the claimant. The order was reversed and the claimant was entitled to an AWW calculation based on the amount earned.

IMPORTANCE OF VOCATIONAL EVIDENCE IN DEFENDING AGAINST A PTD CLAIM...

Advanced Masonry Systems v. Molina 2009 Fla. App. Lexis 1294 (opinion filed February 19, 2009). The E/C defended against a claim for PTD by asserting that the claimant had a substantial earning capacity, but that he voluntarily limited his income and refused suitable employment. The E/C supported their contentions with vocational evidence of several physician-approved work opportunities, the claimant's refusal to attend English classes offered to him and a potential employer's decision not to hire the claimant because of his inability to speak English and the claimant's refusal to accept a job offer because it did not pay as much as he wanted. The JCC rejected the E/C defenses and proof but on appeal, the First DCA reversed the JCC's decision and found that the E/C offered enough proof to support that the claimant was not entitled to PTD benefits.

COVERAGE B ISSUES???
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(954) 370-9970

OF IMPORTANCE...... The State is adjusting the use of state telephones for appearance of adjusters and other parties via telephone for court events. Effective March 15, 2009, no long distance telephone calls are to be made from the JCC or State Mediator offices.

FAILURE TO RESPOND TO A REFERRAL FROM AN AUTHORIZED PROVIDER WITHIN 3 BUSINESS DAYS IS AN AUTOMATIC CONSENT TO THE MEDICAL NECESSITY OF TREATMENT...

Elmer v. Southland Corp. 2009 Fla. App. Lexis 1686 (opinion filed February 27, 2009). An authorized provided made a referral to a pain specialist directly to the E/C, which was not acknowledged. Despite same, the JCC denied the claimant's request for the referral because he found the medical evidence showed the referral was not reasonable and medically necessary. On appeal, the claimant argued that pursuant to §440.13(3)(d) (1), Florida Statutes (2002), the E/C was estopped from arguing the referral was not medically necessary because it failed to timely respond to the doctor's written referral requests. §440.13(3)(d) provides that:

> a carrier must respond by telephone or in writing, to a request for authorization by the close of the 3rd business day after receipt of the request. A carrier who fails to respond to a written request for authorization for referral for medical treatment by the close of the 3rd business day after receipt of the request **consents to the medical necessity for such treatment**.

However, even though failing to respond results in authorization of the referral, the E/C is only required to continue providing the recommended treatment for as long as it is reasonably and medically necessary and a result of a compensable injury pursuant to §440.13(2)(a) and ©.

WELCOME
OUR NEW ASSOCIATES!

We are pleased to welcome the following associates who have joined the firm:

Jessica Blackman - Fort Myers
Suzette Cozzi - Fort Lauderdale
Christopher Cumberland - Panama City
Iris DuBois – Miami Lakes
Robert Friedman - Fort t. Lauderdale

SPECIAL REPORT ON THE STATUTE OF LIMITATIONS...

Batista v. Publix Supermarkets, Inc., 993 So. 2d 570 (Fla. 1st DCA 2008). The E/C's last recorded payment for medical benefits under this claim was May 5, 1990. On September 16, 1996, the Claimant filed a Petition for Benefits seeking authorized medical treatment. The Claimant then filed a Request to Produce and a subsequent Motion to Compel Production. A hearing on the motion was scheduled and notice was sent to all parties. The E/C failed to attend the motion hearing and an order was entered compelling the production of discovery materials. Ten years later, on February 14, 2007, a final hearing was held on the 1996 Petition. The E/C asserted a statute of limitations defense. The Claimant argued that the E/C waived its statute of limitations defense when it failed to raise it at the motion hearing ten years ago. The JCC found that the E/C did not waive its statute of limitations defense because the motion hearing was not properly noticed. The appellate court disagreed with the JCC, holding that the procedural rules in effect at the time of the motion hearing allowed a certificate of service to serve as prima facie evidence of proof of service and the E/C failed to rebut this proof of service. The appellate court also stated that if the E/C believed that the motion hearing was inadequately noticed ten years ago, they should have moved to abate the order compelling production rather than waiting ten years to assert their statute of limitations defense at a final hearing.

Roberson v. St. Johns County School Board, 973 So. 2d 598 (Fla. 1st DCA 2008). The Claimant's claim was initially accepted as compensable and medical treatment was provided. At a later date, the E/C denied compensability of the claim based upon a pre-existing condition causing the Claimant's disability. A Notice of Denial was filed with the Division and sent to the Claimant. A Notice of Action/Change was also filed with the Division and sent to the Claimant, indicating the assignment of a 0% impairment rating. Three weeks later, the Claimant's doctor notified the E/C that the Claimant had reached MMI and had a 10% impairment rating. The E/C chose not to file this impairment rating information with the Division or send it to the Claimant because the claim had already been denied. After the statute of limitations had run on the claim, the Claimant discovered the assignment of the 10% impairment rating and filed a Petition for Benefits associated with the rating. The E/C raised a statute of limitations defense, but they were ultimately estopped from raising this defense due to their misrepresentation of a material fact and the Claimant's detrimental reliance on this misrepresentation. The material misrepresentation was informing the Claimant of a 0% impairment rating when another rating was later assigned to the Claimant's condition. The detrimental reliance was the Claimant's decision to not file a Petition for Benefits based on the 0% rating, when the 10% rating would have indicated to the Claimant that she may be entitled to benefits under the claim.

CON'T...
SPECIAL REPORT ON THE STATUTE OF LIMITATIONS...

Palmer v. McKesson Corp., 34 Fla. L. Weekly D463 (1st DCA February 27, 2009). The claimant suffered a compensable injury. She was provided with a TENS unit as part of her treatment in February of 2002. She last received authorized medical care on June 7, 2002. On July 5, 2005, the claimant filed Petitions for Benefits requesting supplies for her TENS unit and continued authorization of the doctor who last treated her in June of 2002. The E/C raised a statute of limitations defense. The claimant countered that defense by arguing that the statute of limitations had been tolled by the provision of TENS supplies and medications. As proof of her argument, the claimant presented testimony from a former employee of the TENS supply company and a prescription card. The E/C presented a payout ledger which showed no payments matching the testimony of the TENS supply witness and no payments for prescriptions obtained with the prescription card. Furthermore, the E/C presented evidence of the prescription card being issued in error by the pharmacy management company without the carrier's authorization or knowledge. The JCC rejected the claimant's evidence and found that the statute had run. The claimant appealed, arguing that the JCC had erroneously shifted the burden to her to prove that the statute of limitations had not run. The First DCA rejected the claimant's argument, holding that, when a statute of limitations defense has been properly raised by an E/C, the claimant has the burden of proving the applicability of an exception to the statute of limitations which serves to toll the statute. The claimant failed to prove the applicability of an exception to the statute of limitations, namely, that she received medical treatment after June 7, 2002. Consequently, the JCC's decision was affirmed.

NEWS UPDATE:

The WC attorney fee issue is currently being addressed at this Legislative Session. We will send a "Client Alert" and post the information on our website immediately, should any new legislation go into effect.

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