

Alert



The Power of Knowledge

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THE LITIGATOR

July - August - September 2009

Workers' Compensation

JCC MUST CONSIDER NOT ONLY PHYSICAL RESTRICTION RESTRICTIONS BUT ALSO VOCATIONAL RESTRICTIONS TO ESTABLISH ENTITLEMENT TO PTD

Garcia v. Fence Masters, Inc. 34 FLW D1598 (August 6, 2009). The claimant was a 59 year old welder with work history welding. He was employment of compensable injury claimant is fluent in speak, read, or the physicians who that the claimant to sedentary or light return to his The E/C hired a than utilizing the re-rehabilitation 440.191(1)-(9).



limited education and a restricted to the field of displaced from his sixteen (16) years by a to his left shoulder. The Spanish, but cannot write in English. All of offered opinions opined was permanently limited work and could not previous occupation. vocational expert rather employment and provisions mandated by

Two days prior to final hearing, E/C expert performed a labor market survey and testified that he was instructed (by the E/C) not to assist the claimant in finding work, but only to identify positions within the claimant's physical limitations. He located ten (10) jobs within the claimant's physical restrictions and within fifty (50) miles of the claimant's residence. The claimant hired a vocational expert who testified that he investigated the jobs identified by the E/C expert and all of them had physical, vocational, and/or educational requirements that exceeded the claimant's abilities.

The JCC denied PTD benefits finding the E/C expert's testimony more persuasive than the claimant's vocational expert and concluding that the claimant was capable of performing at least sedentary work within a fifty (50) mile radius of his home. The JCC's order, however, was not clear whether she took into consideration the vocational factors that might restrict the claimant from engaging in gainful employment.

Statute 440.15 governs a claimant's entitlement to PTD benefits and requires the JCC to determine whether the employee is unable to engage in at least sedentary employment within a fifty (50) mile radius of his home due to physical limitations. The Court has held that proper interpretation of this statute for PTD benefits for injuries occurring on or after 10/01/2003, requires that the JCC also consider vocational restrictions, if any. See *Ferrell Gas v. Childers*, 982 So. 2d 36, 37 (2008) and *Wal-Mart Stores, Inc. v. Thompson*, 974 So. 2d 516, 517.

On appeal it was determined the JCC made no finding as to which, if any, vocational factors were considered in denying benefits. Because the JCC did not apply the correct legal standard in denying PTD benefits, the JCC's decision was reversed and remanded.

JCC CANNOT DENY TTD IN THE ABSENCE OF EVIDENCE THAT THE CLAIMANT SHOULD HAVE KNOWN HE/SHE WAS RELEASED TO WORK

Boggs v. USA Water Ski, Inc. 34 FLW D956 (May 13, 2009). Claimant suffered a compensable accident on 08/17/06 and was placed on a no work status by her treating chiropractor on 10/20/06. The E/C began paying benefits under the 120-day rule. On 10/10/06 (while the claimant was still on a no work status) the employer offered the claimant a light duty job which the claimant declined because she had not been cleared to return to work by her doctor. The claimant was terminated on 10/15/06 because the employer needed to fill her position and on 10/16/06 the E/C controverted the claim in its entirety.

She received treatment with her own with physician who performed surgery on 05/14/07 and placed her on a no work status from 05/14/07-12/31/07. The claimant filed several petitions seeking payment of past and future medical bills and indemnity.

The JCC found the claim to be compensable and ordered the E/C to pay for past care, but denied all indemnity benefits finding that the claimant voluntarily limited her income. For the period of disability following surgery (05/14/07-12/31/07) the JCC denied indemnity because the doctor was not an authorized physician and his opinions were not admissible.



On appeal, the Court held that a JCC cannot deny indemnity on the basis that a claimant is able to return to work in the absence of evidence that the claimant was informed she could return to work. The JCC failed to state in the order that benefits were denied because the claimant knew or should have known she could return to work.

The denial of indemnity from 05/14/07-12/31/07 was based on the JCC ruling that the claimant's doctor was inadmissible pursuant to 440.13(5)(e). However, the JCC ordered the E/C to pay the doctor's medical treatment during the period which was contested. As such the Court ruled that the JCC is not obligated to exclude the records and opinions of an unauthorized doctor. Because the JCC erred by concluding he was unable to consider the claimant's doctors opinion regarding TTD from 05/14/07-12/31/07, the Court reversed the denial of indemnity for this period.

St. Joseph's Health The Grangers, LLC
LIC 91
MEDICAL ABSENCE REPORT

Name: [Redacted]
Date: [Redacted]
Reason for absence: [Redacted]
By the attending physician: [Redacted]
Is the patient able to return to work? [Redacted]
Date of release: [Redacted]
Physician: [Redacted]
Title: [Redacted]

ERROR TO DENY REQUEST FOR SPECIALIST REFERRAL ON THE BASIS THAT THE CLAIMANT FAILED TO ESTABLISH OBJECTIVE RELEVANT MEDICAL FINDINGS TO SUPPORT THE REFERRAL

Morrow v. Sam's Club 34 FLW D1555b (July 31, 2009). Claimant suffered a workplace injury that the E/C accepted as compensable. Treatment was authorized at an occupational health clinic. The doctor (and nurse) at the clinic was unable to determine an objective basis for the claimant's continued complaints and recommended an orthopedic evaluation. The E/C relied on the written statements (of the nurse) that the claimant's complaints were subjective and therefore refused to authorize the referral, contending there were no objective relevant medical findings to justify the evaluation as required in 440.09, which reads:

The employer must...furnish medical benefits required by this chapter if the employee suffers an accidental compensable injury...arising out of work performed in the course and the scope of employment. The injury, its occupational cause, and any resulting manifestations or disability must be established to a reasonable degree of medical certainty, based on objective relevant medical findings....*Pain or other subjective complaints alone, in the absence of objective relevant medical findings, are not compensable. For purposes of this section, "objective relevant medical findings" are those objective findings that correlate to the subjective complaints of the injured employee and are confirmed by physical examination findings or diagnostic testing.*

The JCC agreed with the argument and evaluation, relying on the emphasized

On appeal, it was determined that the JCC's applies to *compensability* of "pain or other determining whether a claimant is entitled to his/her authorized treating physician. as is all medical treatment or care, by showing of medical necessity. The E/C the referral, and the uncontradicted medical care provider made repeated



The claimant's doctor testified that the compensable accident was the MCC of the need for the evaluation and the purpose of the evaluation was to determine whether claimant's ongoing symptoms were related to his injury. The JCC's decision was reversed.

denied the claimant's request for an language.

ruling was in error. The language in 440.09 subjective complaints." It is inapplicable in a specialist evaluation recommended by Entitlement to such a referral is governed, section 440.13(2)(a), which requires a never contested the medical necessity of evidence was that claimant's authorized recommendations for an orthopedic exam.

E/C ACTION TO OFFER CLAIMANT A CHOICE OF THREE PHYSICIANS DOES NOT REPRESENT A FAILURE OR REFUSAL TO PROVIDE THE CLAIMANT WITH REQUESTED MEDICAL TREATMENT

Dorsch, Inc. D/B/A Florida Fun Bike Super Center v. Hunt FLW D1501 (July 23, 2009). The claimant filed a grievance and subsequent petition seeking authorization of a psychiatrist. The E/C offered the claimant (on two occasions) a list of three psychiatrists from which to make a selection. The JCC found the E/C failed to "timely schedule an appointment for a psychiatrist to examine and provide medical care to the claimant as requested." The JCC cited *Butler v. Bay Center*, 947 So. 2d 570 (2006) and interpreted same as providing that once the E/C authorized an appointment with a physician within the requested speciality, the claimant had the obligation to accept care and treatment from the authorized provider. The JCC interpreted the phrase "authorized an appointment" to mean that the appointment with a physician was "actually scheduled."

On appeal, it was determined that the JCC erred in this interpretation. *Butler* does not stand for the proposition that an appointment must be scheduled within the specified time. It requires only that the appointment be authorized.

SETTLEMENTS MUST CONTAIN EVIDENCE OF THE TERMS OF THE AGREEMENT TO BE ENFORCEABLE

Santana v. American Airlines 34 FLW D1376 (July 8, 2009). The claimant asserts the JCC erred by ordering her to execute and submit completed settlement documents. While the parties in a workers' compensation case may reach a "valid, binding oral settlement," the record must contain some evidence of the terms of the agreement. See *Bonagura v. Home Depot*, 991 So. 2d 902 (2008). Here, the JCC based his orders granting Appellees' motion to enforce settlement entirely upon an unsworn motion filed by the E/C.

The JCC's order was reversed and remanded to the JCC for further proceedings. See "Client Alert" - Page 4.

DID YOU RECEIVE THESE IMPORTANT MESSAGES FROM US? **ALERTS TO NEW CASE LAW AND LEGISLATION:**

Santana v. American Airlines, 11 So.3d 1008 (Fla. 1st DCA 2009) - Oral settlement agreements are enforceable, but the JCC must have competent substantial evidence to rely upon in enforcing the agreement. A mere Motion to Enforce the agreement does not constitute competent substantial evidence. Therefore, we recommend that all Motions to Enforce settlement agreements be sworn and notarized, and that adjusters maintain documentation confirming oral settlement agreements that they negotiate, such as correspondence confirming the terms of settlement.

Attorney fee legislation - The Florida Legislature passed a law this summer which amends section 440.34. The new statute does not include the word "reasonable," which makes the Emma Murray decision inapplicable to the calculation of attorney's fees and provides only one method for calculating fees -- the statutory formula. Therefore, attorney's fees on cases with a date of accident prior to 7/1/09 can be formulated based on an hourly rate or the statutory formula, whichever the JCC deems to be "reasonable," and attorney's fees on cases with a date of accident after 7/1/09 can only be calculated by using the statutory formula.

IF YOU DID NOT RECEIVE AN E-MAIL ALERT FROM US ON THESE MATTERS, PLEASE NOTIFY CHRISTINE SIMPSON @ CSIMPSON@KELLEYKRONENBERG.COM FOR INCLUSION IN OUR E-MAIL LIST.

*******H1N1 - SWINE FLU*******

The expected swine-flu pandemic has generated significant debate among employers. For example, New York state has adopted a regulatory proposal mandating influenza vaccines for health care workers. It has come under attack as an unlawful condition of employment. Opponents argue that the regulation is an unlawful restraint on employment with regard to individuals who may legitimately oppose vaccines. There are numerous issues which create risk both from an employment, as well as a liability perspective. Religious or other conscientious objections based on a protected status may result in civil rights claims. Individuals with preexisting conditions who may be unnecessarily excluded from a program may bring ADA claims. Failure to properly screen individuals for risk factors may result in liability risks. We currently recommend against mandatory inoculation policies.

Kelley, Kronenberg recommends implementing the following employment practices to prepare for a pandemic:

- Mandate that sick workers stay home (CDC recommends 24 hours after fever subsides except in the health care industry, where a seven day leave is recommended, even where symptoms have subsided). Those who show flu-like symptoms during the workday should be separated from others and asked to go home promptly);
- Improve hygiene and infection control practices;
- Encourage and facilitate vaccination;
- Prepare the organization for elevated absenteeism with alternative staffing contingencies;
- Should outbreaks occur in the community, screen employees for symptoms and consider social distancing within the facility.

For further information on implementing these or other strategies, please contact Angelo Filippi, Director, Employment & Labor Law Division, Fort Lauderdale office: (954) 370-9970.

UPDATED CMS MANDATORY REPORTING REQUIREMENTS

MEDICARE SET-ASIDE

**** AUGUST UPDATE TO 05/21/09 ALERT AND APRIL/MAY/JUNE NEWSLETTER****

CMS MANDATORY REPORTING REQUIREMENTS FOR ALL CARRIERS AND SELF-INSURED EMPLOYERS: All Carriers and Self-Insured Employers are required to identify and report to Medicare any claims involving Medicare beneficiaries after the claim is resolved/partially resolved through settlement, judgment, award, or other payments, including assumption of ongoing responsibility for medical treatment, regardless of compensability of claim. (Statutory authority: 42 U.S.C. 1395y(b)(7)&(b)(8)).

FAILURE TO COMPLY WILL RESULT IN A PENALTY OF \$1,000.00 PER DAY PER CLAIM. Reporting will be in an electronic format through Medicare's Coordination of Benefits (COBC) secure Website:

<https://www.section111.cms.hhs.gov/MRA/LoginWarning.action>

NEW TIME LINE FOR ALL CARRIERS AND SELF-INSURED EMPLOYERS:

05/01/09 - 09/30/09 - Electronic registration via the Coordination of Benefits Secure Web Site.

07/01/09 - Testing Query function if completed registration.

01/01/2010 - 03/31/2010 - Testing period and submission of first production files accepted by COBC.

04/01/2010 - 06/30/2010 - Deadline for production files via pre-determined schedule during 2nd quarter of 2010.

EXEMPTIONS TO REPORTING REQUIREMENTS:

1. Low Dollar Threshold for Workers' Compensation and Liability claims.
 - a. Where the Total Payment Obligation to the claimant (TPOC) is within the following ranges, same is exempt from reporting:
 - i. Any payment(s) made prior to 01/01/2010.
 - ii. \$0 to \$5,000.0 from 01/01/2010 to 12/31/2011.
 - iii. \$0 to \$2,000.00 from 01/01/2012 to 12/31/2012.
 - iv. \$0 to \$600.00 from 01/01/2013 to 12/31/2013.
 - b. Multiple TPOC made after 01/01/2010, must be added together to determine if threshold was exceeded. Any TPOC occurring prior to 01/01/2010 should not be considered or added when calculating TPOC for purpose of reporting threshold. Deductibles should be added to TPOC for determining threshold.
2. Workers' Compensation claims involving ongoing responsibility for medicals (ORM).
 - a. W/C claims meeting all of following criteria are excluded from reporting through 12/31/2011:
 - i. Medical only claim.
 - ii. Claim involving lost time of no more than seven (7) calendar days.
 - iii. All payments made directly to medical provider.
 - iv. Total payment does not exceed \$750.00.
3. Special Exception for Minor Resolved injuries where Medical Not Closed - applied to reporting termination of ongoing responsibility for medical (ORM).
 - a. Must initially report ORM, but can terminate ORM in subsequent report if obtain statement in writing from treating physician that no further medical items or services associated with the claim is needed.
4. Qualified Exception for Inactive Files - applies to ongoing responsibility for medical assumed prior to 07/01/2009.
 - a. Inactive files - If the claim was administratively closed or removed from current claims record prior to 01/01/2009, reporting of the case/claim is not required.
 - b. If claim is later reopened and payment for medical treatment is made (ORM) it must be reported with full information including original date of injury.
5. Extension for ORM - where claim is resolved/partially resolved prior to 07/01/2009, but the RRE assumed ORM prior to 07/01/2009 and continues after 07/01/2009. CMS is permitting delay in reporting to allow RRE time to go back and determine the Medicare status of individuals where the RRE has ORM after 07/01/2009. The extension is through the third calendar quarter 2010. (July - October)

Please contact Attorney GAIL BAKER, MSA Department Head, in our Fort Lauderdale office at (954) 370-9970.