CASE LAW UPDATE
August 1, 2013 to July 4, 2014

ACCIDENT

Energy Air v. Lalonde
4/24/2014
135 So. 3d 1090
JCC found that the claimant's heat exhaustion injury was compensable and awarded the payment of past medical bills. On appeal, the employer/carrier argued that JCC erred in his finding of compensability in the absence of evidence that the claimant was exposed to dangers materially in excess of those which the general community is exposed and in awarding the payment of past medical bills in the absence of evidence that they were related to the claimant's heat exhaustion. Court determined that prior court decisions that created causation standards for establishing compensability of heat exhaustion injuries were superceded by the Legislature's adoption of the "major contributing cause" standard effective January 1, 1994. See Section 440.09(1), Florida Statutes, and Section 440.02(36), Florida Statutes.

Diagnostic tests are compensable if they are reasonably necessary to determine whether the industrial accident was the cause of the claimant's injuries.

McIntosh v. CVS Pharmacy and Holiday CVS LLC/Caremark Corporation
4/24/2014
135 So. 3d 1157
An armed robber entered the store where the claimant was working. The claimant was six months pregnant at the time. The gunman ordered the claimant to get down on the floor. However, the claimant attempted to flee and in this attempt fell landing on her stomach. She sustained a compensable physical injury to her right knee albeit a minor one for which she received treatment at an emergency room on the date of the accident. She thereafter suffered a post-traumatic stress disorder (PTSD). Medical testimony related the PTSD to the events that occurred in the accident, not to any physical injury suffered on that date. JCC determined that the PTSD was not compensable in accordance with Section 440.093(1), Florida Statutes.

On appeal, JCC's decision reversed. Court determined that Section 440.093(2), Florida Statutes, was not applicable because the relevant mental or nervous injury did not occur as a manifestation of an injury compensable under the workers' compensation statute. Following the decision in the McKenzie v. Mental Health Care, Inc., 43 So. 3d 763 (Fla. 1st DCA 2010), the court determined that with the addition of Section 440.093 in 2003, the Legislature described four situations in which mental or nervous injuries may arise in the workplace. In those situations where, as a result of a compensable accident, the claimant suffers both physical and mental injuries as was the case in this instance, there is a compensable mental/nervous injury. The JCC erred in denying compensability of the claimant's PTSD based on the finding that there was no competent and substantial

evidence establishing that the PTSD was not the natural result of the claimant's minor physical injuries.

The employer/carrier did not deny compensability of the claimant's PTSD within 120 days from the date that treatment for this condition was initially provided by the employer/carrier. In determining the question of the employer/carrier's estoppel to deny compensability of the PTSD, it was of no consequence that compensability was sought long after the date of the accident. In determining if the employer/carrier was estopped in denying compensability of the PTSD, the relevant inquiry is whether the employer/carrier denied compensability within 120 days of the first date that treatment was provided for the PTSD. The estoppel provisions of Section 440.20(4), Florida Statutes, apply to any claim for compensability of injury made following the date of accident, not just the first claim. Accordingly, the employer/carrier had to deny compensability of the PTSD within 120 days of the date that the claimant first obtained treatment for this condition unless the carrier can establish material facts relevant to the issue of compensability that it could not have been discovered through reasonable investigation within the 120-day period. Case remanded to JCC for further proceedings concerning the estoppel question.

ADVANCEMENT

Taylor v. Air Canada
4/25/2014
136 So. 3d 786
Claimant sought advancement of $2,000 as permitted by Section 440.20(12)(c)2, Florida Statutes, for the purpose of paying for costs of litigation to take the deposition of the claimant's personal physician. In following the case of ESIS/ACE American Insurance Company v. Kuhn, 104 So. 3d 1111 (Fla. 1st DCA 2012), the court determined that the need for an advancement must be in furtherance of Chapter 440's purpose "to address medical and related financial needs arising from workplace injuries". In other words, the need for an advancement of compensation must be related to medical or other needs arising from and related to workers' compensation claims. Taking the deposition of a witness who may advance the proof of compensability of a claim meets such need and can be the basis for an advancement. JCC's denial of advancement reversed under circumstances in this case.

ATTORNEY FEES

Castellanos v. Next Door Company
10/23/2013
124 So. 3d 392
The JCC, as an executive branch adjudicator, does not have the authority to declare a statutory provision unconstitutional. Court determined that the facial unconstitutionality of a statute may be raised in the District Court of Appeal on direct review under Section 120.68, Florida Statutes, after an aggrieved party completes the administrative process. In other words, the aggrieved party need not argue the facial unconstitutionality of a statute before an administrative tribunal for the issue to be reviewable on appeal.

In this case, the JCC had awarded an attorney's fee of $164.54 for 107.2 hours of legal work necessary to secure the claimant's workers' compensation benefits. The court found the statutory provision related to the payment of attorney fees in workers' compensation matters to be constitutional. However, the court certified to the Supreme Court as a question of great public importance the issue as to whether the attorney fee limitations as found in Section 440.34, Florida Statutes, were constitutional. Pfeffer and Cerino v. Labor Ready Southeast, Inc., et al, 39 FLW D1336, 6/25/2014.

Jones v. Shadow Trailers, Inc.
3/18/2014
134 So. 3d 1136
Employer/carrier conceded that claimant was entitled to benefits claimed in claimant's Petition for Benefits 8 days after it received the Petition for Benefits. Court determined that pursuant to Section 440.34(3)(a), F.S., claimant's attorney was not entitled to a fee payable by the Employer/carrier. Section 440.34(3) was amended in 2002 to state that attorney's fees were not payable under this section until 30 days after the date the carrier or employer received the Petition for Benefits. Previous to this amendment, a fee would have been payable by the employer/carrier in accordance with Allen v. Tyrone Square 6 AMC Theaters, 731 So. 2d 699 (Fla. 1st DCA 1999). This amendment was deemed substantive and applicable for dates of accidents after the effective date of the amendment.

Lord v. Santa Rosa Correctional Institute
4/24/2014
135 So. 3d 1170
The question in this case is the claimant's attorney's entitlement to employer/carrier paid attorney's fees. It was stipulated that a fee was due and the question was the amount of fees payable.

The claimant's attorney was successful in obtaining a primary care physician to treat claimant. At mediation, there was a stipulation that such medical care was authorized. The employer/carrier had difficulty in locating a doctor that would act as the claimant's primary care physician but finally located one. In awarding attorney's fees, the JCC considered the time expended by the claimant's attorney in obtaining the primary care physician but refused to consider the time following mediation in locating the doctor. The JCC determined that the employer/carrier had not acted in bad faith or unreasonably delayed in finding a physician following the agreement to provide such care and accordingly, time after the mediation should not be considered in calculating the amount of the fee. On appeal, JCC's decision reversed.

The reasonableness of the time expended by the employer/carrier in locating medical care may be relevant in determining if a fee is due in the first instance, i.e., if the employer/carrier acted reasonably in providing a doctor for the claimant, an attorney's fee payable by the employer/carrier might not be due. However, in this case, fees were stipulated to be paid by the employer/carrier. The proper legal test for determining the amount of the fee is whether the attorney time alleged was reasonable and required to

secure the benefit. Since it was reasonably necessary for the claimant's attorney to assist in finding a doctor for the claimant, the time expended after the mediation should have been included in determining the amount of a reasonable fee.

Neville v. JC Penney Corp., Willington Green Mall
4/02/2014
135 So. 3d 525
Court determined that it was error to compensate the claimant's attorney for fewer hours than those claimed in a Verified Petition for Attorney's Fees without specifically explaining the basis for reducing hours. The reasonableness of an attorney's fee award is reviewed for competent substantial record evidence in support of the award. The JCC did review the various factors and made general findings concerning the amount of the attorney's fee. However, no specific basis for reducing the claimant's attorney's hours was explained. Accordingly, the case was remanded for further proceedings with directions that the JCC make findings that would allow for meaningful appellate review.

Owen v. City of Key West
8/22/2013
118 So. 3d 1005
Court determined that JCC erred in not approving attorney's fees payable to the claimant's attorney based on an hourly basis when the attorney was defending a Motion to Tax Costs against him. See Jacobson v. Southeast Personnel Leasing, Inc., 113 So. 3d 1042 (Fla. 1st DCA 2013). By refusing to approve the payment of attorney's fees as agreed to between the claimant and the claimant's attorney for the defense of the Motion to Tax Costs, this infringed upon the claimant's constitutional right under the First Amendment to the Constitution.

Richardson v. Aramark/Sedgwick CMS
2/18/2014
134 So. 3d 1133
This case concerned the constitutionality of the statutory fee schedule for determining attorney's fees. The issue as to the constitutionality of this provision in the law was certified to the Supreme Court in the case of Castellanos v. Next Door Company, 124 So. 3d 392 (Fla. 1st DCA 2013). In so doing, the court determined that this case asked the same question that was certified in Castellanos. Accordingly, the court declined to follow the appellants' suggestion that the court certify to the Supreme Court additional questions of great importance relating to the instant case.

AVERAGE WEEKLY WAGE

KC Electric Company v. Walden, as plenary guardian O/C/O Kenneth Keller
10/07/2013
122 So. 3d 514
Average weekly wage calculation included the prorata portion of the corporate profits to which the claimant was entitled as a shareholder. See Pishotta v. Pishotta Tile and Marble, Inc., 613 So. 2d 1373 (Fla. 1st DCA 1993). Such corporate profits qualified as

wages defined in Section 440.02(28), Florida Statutes. "Wages" as applied to workers' compensation cases are not limited to wages as defined under the Federal Tax Code. Wages under the Workers' Compensation Act are defined as the money rate at which the services rendered is recompensed under the contract of hire in force at the time of the injury. Even though certain monies are not paid, they are included in the average weekly wage calculation if earned during the requisite period prior to the date of accident.

CAUSAL CONNECTION

Cespedes v. Yellow Transportation, Inc. (Also summarized under Remedial Treatment and Review)
11/26/2013
130 So. 3d 243
In accordance with Section 440.09, Florida Statutes, a compensable injury must be the major contributing cause of any resulting injuries. When considering major contributing cause, one must consider preexisting injuries and conditions or subsequent injuries. A major contributing cause analysis cannot be performed in a vacuum or in the absence of competing causes. If there is only one contributing cause of the claimant's need for treatment which is occupational in nature, it is error for the JCC in applying the major contributing cause standard to deny medical care. Once compensability of an injury is established, a carrier can no longer contest that the accident is the major contributing cause of the injury absent other causes. In this case, the JCC specifically found that the claimant did not have a subsequent accident or lower back injury. There was no evidence of record to substantiate the existence of a subsequent accident breaking the chain of causation from the original compensable accident as to the need for medical care at the time it was being requested.

Jose v. Goodwill Industries
1/23/2014
132 So. 3d 1189
JCC determined that claimant had failed to prove that he suffered an objective injury caused by a fall in the workplace. The claimant had fainted and fell to the ground. The doctor had testified that the claimant's diagnosis was based solely on the claimant's subjective complaints with diagnostic studies detecting no injuries. JCC's opinion affirmed on appeal. Because of the fact that the claimant failed to produce objective medical findings substantiating an injury resulting from his fall at work, the JCC correctly denied the claimant's Petition for Benefits.

COSTS

Martin v. Code Enforcement, City of Jacksonville
9/23/2013
122 So. 3d 438
The claimant's attorney had a conference with an authorized treating physician concerning the major contributing cause of the injury suffered in a compensable

accident. Ultimately, after the appointment of an expert medical adviser, it was determined that the medical condition for which treatment was sought was compensable. Court determined that a physician charge for a conference was a compensable cost.

In determining compensable costs, Rule 60Q-6.124(3)(e) requires a consideration of the statewide Uniform Guidelines for Taxation of Costs in civil actions. JCC erred in denying medical charge based on the fact that the uniform guidelines did not specifically address reimbursement of medical conferences. Court determined that the JCC abused his discretion in denying the cost of the medical conference. The medical conference was necessary to prosecute or maintain the claim for medical care. While the uniform guidelines suggest that such conference costs should not be taxed, this provision of the uniform guidelines like all of the other provisions is advisory only.

Santizo-Perez (widow as well as personal representative of minor children) v. Genaro's Corporation d/b/a King's Food and Meat Bizaar
5/19/2014
39 FLW D1021
Deceased employee was killed by a third party because of allegations that the deceased employee was sexually harassing the third party's girlfriend, an employee of the employer. The deceased employee was the manager of the store. At the time of the incident, the deceased employee was gathering shopping carts from the employer's parking lot. JCC determined that although the decedent was in the course and scope of his employment at the time of his injury, the injury did not arise out of his employment because there was no evidence that anything in the decedent's employment was related to him being at risk of being murdered. The JCC further concluded that the assailant could just have easily have killed the decedent outside of the decedent's employment. On appeal, court reversed denial of compensability.

Court ruled that some jobs are more prone to workplace assaults than others. Usually this is so because of one or both of the following factors: 1) the nature of the job, e.g., dangerous duties and 2) the nature of the environment of the job, e.g., dangerous locations. In this case, it was the environment. The decedent was collecting shopping carts at night. While collecting shopping carts at night, this was a risk incident to the hazards of industry. This incident happened because of the interaction of people connected only by the workplace that prompted the accident/incident. Accordingly, the incident deemed compensable.

Levy County Sheriff's Office/North American Risk Services v. Allen
6/30/2014
39 FLW D1356
Deputy sheriff was driving his personal vehicle from his home to his job. His job was to provide security at the county courthouse. He observed a tractor-trailer stopped onto the roadway. The deputy suffered injuries when he ran into the tractor-trailer after making a decision to stop and attempt to get the tractor-trailer off the roadway. Accident deemed compensable as being within the course and scope of claimant's employment. At the time

the deputy observed a dangerous condition that required his intervention, he was no longer going to work but was instead engaged in his primary responsibility which was the prevention or detection of crime or the enforcement of the penal criminal traffic or highway laws of the state as required by county policy.

EXCLUSIVE REMEDY

Amcon Builders, Inc. v. Pardo
9/04/2013
120 So. 3d 1254
Third DCA. Appellate court dismissed appeal of a non-final order denying the employer's Motion for Summary Judgment based on workers' compensation immunity. The trial court below made a determination on the issue of workers' compensation immunity and simply denied the Motion for Summary Judgment based on insufficient evidence. Non-final orders denying summary judgment based on a claim of workers' compensation immunity are not appealable unless the trial court specifically states that as a matter of law, such a defense is not available to a party. Court determined that case was not reviewable under Florida Rule of Appellate Procedure 9.130 as a non-final order and under the certiorari jurisdiction of the appellate court.

Hornfischer v. Manatee County Sheriff's Office
2/12/2014
136 So. 3d 703
Plaintiff filed a retaliatory discharge cause of action against employer under Section 440.205, F.S. Final summary judgment was entered in favor of the defendant employer. On appeal, summary judgment reversed since there existed genuine issues of material fact precluding entry of a summary judgment.

Court determined that the standard of review relating to an order granting a Motion for Summary Judgment is de novo. Summary judgment is proper only if 1) there is no genuine issue of material fact, viewing every possible inference in favor of the party against whom summary judgment is being sought and 2) the moving party is entitled to a judgment as a matter of law. If the record reflects the existence of any genuine issue of material fact or the possibility of any issue, or if the record raises even the slightest doubt that an issue might exist, summary judgment is improper.

Section 440.205, F.S., precludes an employer from discharging, threatening to discharge, intimidating or coercing any employee by reason of such an employee's valid claim for compensation or attempt to claim compensation under the workers' compensation law. In order for an employee to prove a violation of this provision, three elements are required: 1) the employee engaged in statutorily protective activity 2) An adverse employment action occurred; and 3) the adverse action and the employee's protected activity were causally related. In order to establish a claim under Section 440.205, F.S., the employee's pursuit of workers' compensation need not be the only reason for discharge. A cause of action under this provision may exist even if there may also be other reasons for a discharge. The actual discharge is not a condition for such a claim

since there is a cause of action for intimidation or coercion even in the absence of a discharge. The employee need not establish a specific retaliatory intent in order to prevail. Once a plaintiff establishes a prima facie case for proving a cause of action, the burden of proof shifts to the employer to proffer proof of a legitimate reason for the adverse employment action.

The court determined that there were genuine issues of fact concerning the liability of the employer for a Section 440.205, F.S. cause of action if the reasons for discharging the claimant were questionable. The employer asserted that the injured worker was discharged because he failed to obtain a report from his authorized treating physician concerning his medical condition and fitness to return to work. According to the employer, this amounted to neglect of duty warranting discharge. However, the obtaining of medical information on the claimant's ability to return to work following a workers' compensation accident is not the responsibility of the injured worker but rather the employer. Basically, the employer discharged the injured worker for allegedly failing to perform a function that was the obligation of the employer. There was also evidence of the fact that the doctor's report was in fact sent to the employer.

The injured worker was also discharged by the employer allegedly because he was absent from work without leave. However, there was conflicting evidence since the employee testified that because of medication he was taking, he could not perform his responsibilities on the job and his supervisor instructed him to leave work and return to his home.

There were also emails in the employer's records of the negative attitude toward the injured worker by his supervisory personnel. The case was referred to the state for the investigation of alleged insurance fraud. Based upon this evidence, the court determined that the injured worker's discharge could be determined by a jury to be pretextual.

In support of the Motion for Summary Judgment, the employer asserted that a significant period of time lapsed between the claimant's filing of a workers' compensation claim and his discharge thus proving that there was no causal connection between the claimant's protected activity of filing a workers' compensation claim and the adverse employment action of discharging him. Notwithstanding this, the court determined that the plaintiff/injured worker would still be entitled to a trial.

The court determined that employee causes of actions for retaliatory discharge under Section 440.205, F.S., are often ill suited for final disposition by a Motion for Summary Judgment. Since the employer failed to establish the non-existence of a material fact concerning whether the injured worker's discharge was causally related to his filing of a workers' compensation claim, it was error to grant the Summary Judgment in favor of the employer in this instance.

Pena, et al. v. Design-Build Interamerican, Inc.
1/22/2014
132 So. 3d 1179

In this civil cause of action, lower court entered order granting summary judgment in favor of the defendants. On appeal, orders granting summary judgment are considered de novo. In doing so, the appellate court must review the record in a light most favorable to the non-moving party. If the evidence raises any issue of material fact, is conflicting, or permits different reasonable inferences, it should be submitted to the jury as a question of fact. Court ruled in this case that there was conflicting evidence of material facts and therefore, the lower court erred in granting Motion for Summary Judgment.

There was a question as to whether the plaintiff in this case was employed by a subcontractor of the general contractor or employed by another company not a subcontractor. If the plaintiff was not employed by the subcontractor, there could be a cause of action against the general contractor. If employed by the subcontractor, both the subcontractor and the general contractor would be immune from liability (horizontal immunity).

Cause of action also brought against president of the two companies that potentially the claimant was employed by. As a corporate officer, there is immunity from civil liability unless the corporate officer or supervisor engages in an intentional act or where the supervisor/manager is culpably or criminally negligent. In determining the immunity of managers and supervisors, the focus should be on the business purpose (or absence thereof) of the decision in question not necessarily the means utilized to accomplish that purpose. In this case, the plaintiff asserted that the corporate officer's decision to go on vacation instead of being present to supervise the job did not constitute a managerial or policymaking function and thus he was not entitled to immunity. Court disagreed and held that such allegation did constitute a business purpose for which there was immunity. Summary judgment in favor of president affirmed.

Suarez v. Transmontaigne Services, Inc. et al.
12/04/2013
127 So. 3d 845
Lower court granted Final Summary Judgment in favor of defendant based on exclusive remedy provisions of the workers' compensation statute. The basis of the ruling was that the plaintiff was acting as the defendant's "borrowed servant." On appeal, because there were material issues of fact as to the relationship of the plaintiff with the defendant, lower court's decision reversed. An order granting Summary Judgment is reviewed on appeal de novo.

Where an employee works for one employer, known as his general employer, another entity may still have immunity from a negligence claim of the injured worker if the injured worker is deemed to be a "special employee". To obtain such immunity, the special employer must establish that the employee was acting as the special employer's "borrowed servant" at the time of the work related injury. There is a presumption that the employee is not a borrowed servant but instead continues to work for and be an employee of the general employer.

In order to establish a special employer/employee relationship and rebut this presumption of continued employment with the general employer, the alleged special employer must establish: 1) there was a contract for hire, either express or implied, between the special employer and the employee; 2) the work being done at the time of the injury was essentially that of the special employer; and 3) the power to control the details of the work resided with the special employer. The critical element is the existence of the contract for hire. The remaining factors are indicia of such a contract. Since the contract is frequently implied, factors showing a consensual relationship between the special employer and special employee are such things as right of control and payment of compensation. The special employer must show deliberate and informed consent by the employee to be employed by the special employer.

In this case, there remained disputed issues of fact as to whether the injured worker was acting as a borrowed servant. The alleged special employer owned and operated various corporate entities and there was a general conflict as to the identity of the employing company. Consent to employment by the injured worker cannot be inferred by acceptance of direction from the alleged special employer by the special employee. Court determined that it was error to enter Summary Judgment Order in this case because of conflicting factual scenarios.

State of Florida v. Brock
4/30/2014
39 FLW D907
Defendant in criminal case charged with one count of fraud under Section 440.105(4)(b)9, Florida Statutes, based on the fact that he had used a fraudulent Social Security number when he was hired by an employer. The defendant also was an illegal alien who had completed a Homeland Security I-9 Employment Eligibility Verification Form that improperly listed the fraudulently obtained Social Security number. Lower court ruled that in order to sustain a violation of Section 440.105(4)(b)9, Florida Statutes, the state is required in criminal proceedings to plead and prove not only that the defendant obtained employment by false, fraudulent or misleading oral or written statements as evidence of identity but also the accused did so with the intent to secure workers' compensation benefits. On appeal, this decision reversed. A defendant can be guilty of a criminal violation of this provision, irrespective of the existence of any workers' compensation claim.

HEART DISEASE/HYPERTENSION

Johns Eastern Company and Indian River County BCC v. Bellamy
3/12/2014
137 So. 3d 1058
In this heart/hypertension case for a firefighter/paramedic, court determined that JCC relied upon an incorrect standard in determining whether the employer/carrier successfully rebutted the occupational causation presumption as found in Section 112.18(1)(a), F.S. In order to rebut the presumption of compensability as provided in Section 112.18, F.S., the employer has the burden of persuasion. If the claimant is

relying solely on the presumption to support a claim for benefits, the employer/carrier can rebut the presumption with "competent evidence". On the other hand, when there is evidence supporting the presumption which is accepted as credible by the JCC, the presumption can only be rebutted by "clear and convincing evidence".

Appellant's Motions for Clarification, Rehearing, and Rehearing En Banc denied. Appellees' Motion for Rehearing concerning appellate attorney's fees under Section 440.34(5), F.S., granted.

Pasco County Sheriff's Office v. Shaffer
10/23/2013
125 So. 3d 1051
JCC's order affirmed. See Rocha v. City of Tampa, 100 So. 3d 138 (Fla. 1st DCA 2012). Summary of facts in case and issues are found in opinion of concurring judge.

The issue in this case was whether the claimant, a correctional officer, can be considered disabled in accordance with Section 112.18, Florida Statutes, when she is paid her wages and works full-time but had medically imposed restrictions that precluded her from performing a substantial and significant portion of her job duties. JCC determined that the correctional officer was precluded from performing a necessary daily part of her job description and thus was disabled. This decision was affirmed on appeal. Claimant suffered from benign essential hypertension. During the period of time that disability was found, the claimant was not allowed to have inmate contact and was restricted to desk work. The dispositive factor of the analysis as to whether the claimant suffered from a disability as that term is used in Section 112.18, Florida Statutes, is the capacity to earn wages rather than the wages that were paid.

IDIOPATHIC INJURIES

Lopez v. All Star Investigations, Inc.
12/17/2013
128 So. 3d 265
Where an unexplained fall happens while the claimant is actively engaged in his duties of employment, and where there is no other established basis for the fall, the causal relationship between the employment and the accident is met. Claimant in this case was engaged in work activity at the time of his fall but JCC concluded that the claimant had failed to prove a specific occupational cause for his injuries. In order for the JCC to make that determination, the judge must find a preexisting idiopathic condition existed and caused the fall on the job. Order of JCC denying benefits reversed.

JURISDICTION

Covell v. Cracker Barrel Old Country Store, Inc.
8/15/2013
118 So. 3d 991
The JCC has jurisdiction to compel the production of documentary evidence even though

no formal petition for benefits has been filed. Court clarified opinion related to the jurisdictional issue but did not decide whether the claimant was entitled to the discovery that was requested.

Department of Agriculture and Consumer Services and State of Florida, Division of Risk Management v. Anderson
2/13/2014
132 So. 3d 900
JCC erred by reserving jurisdiction over claims that were not subject to a pending Petition for Benefits at the time of the final hearing. The JCC may properly reserve jurisdiction over petitions that have been filed but not mediated because mediation is mandatory under Section 440.25(2), F.S.

Hamm v. PMI Employee Leasing
4/07/2014
134 So. 3d 1150
Where no Petition for Benefits or other claim for death benefits had been filed, the JCC does not have jurisdiction to address an employer/carrier's motion seeking to determine beneficiaries due death benefits under the Workers' Compensation Act. In this case, the employer/carrier by its motion essentially requested an advisory or declaratory opinion to determine beneficiaries due workers' compensation death benefits. However, the JCC has no powers beyond those specifically conferred by statute and there is no provision for the JCC to retain jurisdiction in this instance.

Roig v. Mosquera
5/07/2014
138 So. 3d 568
JCC entered order requiring employer to provide claimant with orthopedic care in the county in which she resided. Further proceedings before the JCC determined that there had been a failure to comply with the ruling. Thereafter, the claimant filed Rule Nisi proceedings in circuit court to enforce the order of the JCC. Circuit court indicated that it did not have jurisdiction to determine factual disputes as to whether the Appellee/Employer had complied with the order requiring the provision of orthopedic care.

The question as to the employer's compliance with the order of the JCC had already been resolved by the JCC. Court determined that trial court erred in determining that an alleged factual dispute precluded a ruling on the claimant's Motion for Rule Nisi. Case reversed and remanded for further proceedings consistent with order.

LIMITATION OF ACTION

Childers v. Clay County Board of County Commissioners
12/10/2013
128 So. 3d 201
Employer/carrier defended claim filed by claimant based on Statute of

Limitations. Claimant had filed two petitions for benefits outside of the running of the Statute of Limitation. The employer/carrier had responded to one petition asserting the Statute of Limitations as a defense. However, no response was made to the second petition. The question in this case is whether the failure to assert the Statute of Limitations as a defense to the second petition precluded the Statute of Limitations defense as referenced in Section 440.19(4), Florida Statutes (2007). Court determined that the failure to respond to the second petition had the effect of waiving the Statute of Limitations defense relative to the second petition.

Concurring opinion agreeing with the majority that the Statute of Limitations defense must be asserted each time a newly filed petition is made. The concurring opinion referenced the case of Medpartners/Diagnostic Clinic Med Group P.A. v. Zenith Insurance Company, 23 So. 3d 202 (Fla. 1st DCA 2009) which provided that once the Statute of Limitations expires under Section 440.19, Florida Statutes, it cannot be revived by the furnishing of remedial care (i.e., the use of the word "toll" in Section 440.19(2), Florida Statutes, requires that there must be some viable period to extend or prolong). In the concurring opinion, however, the judge determined that this case did not constitute a revival of an expired limitations period as referenced in Medpartners but rather one of the right to maintain an otherwise viable Statute of Limitations defense that was not properly advanced in the initial response as required by statute. The pleading requirement of Section 440.19(4) is petition-specific.

City of North Bay Village v. Guevara
11/06/2013
129 So. 3d 1100
In footnote 1 to opinion, court noted that Appellee's attorney had been sent an order scheduling oral argument electronically through the "casemail" function of the eDCA system in accordance with the court's administrative order 12-1 which stated that all orders issued by the court would be transmitted to registered eDCA users in electronic format only through a link provided via casemail. Appellee's counsel failed to open the casemail containing the order scheduling oral argument and did not appear at the scheduled oral argument. Court determined that such failure to open the casemail containing the order scheduling oral argument did not excuse the appellee's attorney from failing to appear at the argument without notifying the court that she would not appear. All counsel are responsible for keeping any eDCA email addresses current and are responsible for actively monitoring that address.

Claimant, a law enforcement officer, was placed on light duty following a physical examination that revealed high blood pressure. His supervisor completed a Notice of Injury which was received by the employer's workers' compensation carrier. The carrier sent claimant an initial claim package via certified mail which included the informational brochure approved by the Department of Financial Services entitled "Facts for Florida Injured Employees" as required by Section 440.185(4), Florida Statutes (2006). Over two years after this incident, the claimant filed a Petition for Benefits. JCC denied the employer/carrier's Statute of Limitations defense on the basis that the information forwarded to the claimant did not contain any information regarding the statutory

presumption of causation afforded to law enforcement officers under Section 112.18(1), Florida Statutes (2006). In addition, the JCC noted that the employer/carrier did not authorize any medical treatment upon receiving notice of the claim; rather, the employer/carrier fully controverted the claim with the filing of a Notice of Denial.

On appeal, it was determined that JCC erred in determining that the employer/carrier was estopped from raising the Statute of Limitations defense. There is no statutory requirement that the employer/carrier provide an injured worker any details regarding the presumptions found in Section 112.18(1), Florida Statutes. In this instance, the employer/carrier sent to the claimant the pamphlet published by the Department of Financial Services as required by Section 440.185(4), Florida Statutes. Because the claimant did not file a Petition for Benefits within the limitation period, and further because the record did not support a finding that the employer/carrier should be estopped from raising the Statute of Limitations defense, the court found that the claimant's right to file a petition was barred by the statute of limitations as set forth in Section 440.19(1), Florida Statutes.

Pomerantz v. Palm Beach County Sheriff's Office
2/07/2014
131 So. 3d 823
The Judge of Compensation Claims properly found that the Statute of Limitations was tolled for a one-year period from the date the claimant was furnished with a prescription for medication by his authorized physician and that a petition for benefits filed more than one year from the date of the prescription was untimely. Court rejected claimant's argument that the Statute of Limitations began to run from the date the claimant last took the prescribed medication.

NOTICE OF INJURY

Caceres v. Sedano's Supermarkets
6/03/2014
39 FLW D1166
In accordance with Section 440.185(1), Florida Statutes, the claimant must advise his employer of an injury within 30 days of either the date of the injury or the date of the initial manifestation of injuries. Under the plain language of the statute, these are two separate dates from which a report of injury may be timely made and the use of either date is sufficient for timely compliance.

This case dealt with whether timely notice of a repetitive trauma injury allegedly sustained by the claimant was made. The date of injury in a case of repetitive trauma is generally deemed to be the last date of exposure to the trauma. The court determined that the JCC appeared to assume that any report of injury more than 30 days after the claimant's accident was untimely. There was nothing in the final order that indicated that the JCC considered the date the claimant began having symptoms as the alternate date for timely reporting of the claim based on the alleged repetitive trauma. Case reversed and

remanded for further findings regarding the date of accident and first date that symptoms began in regards to timely notice of accident.

PENALTIES

Alachua County School Board/Florida School Boards Insurance Trust v. Office of the State of Florida, Chief Financial Officer for the Department of Financial Services, Division of Workers' Compensation
3/27/2014
138 So. 3d 480
The Division of Workers' Compensation (Division) imposed an administrative penalty against the Appellant for late payment of benefits. Appellant objected to the penalty assessment and asserted that the penalty assessed could only be made by referring the case to a JCC consistent with the terms of Section 440.021, Florida Statutes. The Division asserted that a review of the penalty assessment could only be made in accordance with Section 440.525(3), Florida Statutes, and reviewed pursuant to the terms of Section 120.57, Florida Statutes.

Court determined that jurisdiction to determine penalties where the question is the amount of penalties would be adjudicated in accordance with Section 440.021, Florida Statutes, i.e., when an audited entity challenges the penalty assessment itself - the amount of the penalty - referral is required to the JCC in accordance with Section 440.021, Florida Statutes. In this case, the audited entity was not challenging the amount of the penalty but rather whether the penalty could be assessed in the first instance. Therefore, review of the penalty could only be made pursuant to Section 440.525(3), F.S.

When faced with two different, but applicable statutes, courts favor a construction that gives affect to both statutes rather than construing one statute as being meaningless or repealed by implication. The two applicable statutes in this case should be read together to make available both a DFS audit report-focused review process as contemplated in Section 440.525(3) (an APA-based process) and a 440.021 review process before the JCC for resolving narrower disputes involving only the amount of the penalty or interest assessment.

PERMANENT TOTAL

Brandywine Convalescent Care v. Ragoobir
10/16/2013
124 So. 3d 344
Court determined that JCC erred in rejecting an Expert Medical Advisor (EMA) opinion. JCC had appointed an EMA to resolve a conflict in medical opinions regarding the claimant's work restrictions from an industrial injury. The EMA had rendered a report indicating that the claimant was capable of performing light duty work with certain specified functional restrictions. The EMA testified by deposition that he would defer to the current pain management specialist as to the types and nature of pain management but stated in the deposition that his opinions as to the claimant's ability to work were in no

way changed as a result of deferring to the pain management doctor. JCC concluded that the EMA's opinions on physical work restrictions were equivocal and therefore inconclusive. The JCC's rejection of the EMA opinions on the claimant's ability to return to work was deemed by the court to be error. EMA opinions are presumed to be correct unless there is clear and convincing evidence to the contrary as determined by the JCC. In this case, there was no clear and convincing evidence as to the reasons why the JCC rejected the EMA opinion.

JCC determined that the claimant was permanently and totally (PT) disabled based upon a doctor's opinion that the claimant was unable to work in at least sedentary employment within a 50-mile radius of the employee's residence, due to physical limitations, i.e., accepting the doctor's testimony that was contrary to the opinions of the EMA. If these opinions were not accepted, the JCC ruled that the claimant was still PT based on the case of Blake v. Merck & Company, 43 So. 3d 882 (Fla. 1st DCA 2010) and the fact that the permanent restrictions combined with vocational factors created a PT status. In this regard, the judge accepted the claimant's vocational expert's opinions over the employer/carrier's vocational expert as to the claimant's ability to return to work. However, the claimant's vocational expert assumed that the EMA had adopted the opinion of the pain management doctor that the claimant was precluded from sedentary work in combination with vocational factors and physical restrictions. The claimant's vocational expert's opinion did not constitute competent and substantial evidence supporting a finding of PT even for this alternate way of establishing PT liability.

Court determined also that the JCC erred in rejecting the employer/carrier's vocational expert's opinion based upon personal observations of the claimant's physical limitations related to pain as a vocational factor. Pursuant to Section 440.09(1), Florida Statutes (1994), pain is compensable only with objective relevant medical findings. Any disability resulting from a compensable injury must also be established to a reasonable degree of medical certainty based on objective relevant medical findings. A physical limitation related to pain is a medical issue to be addressed only by a medical expert.

Goding v. City of Boca Raton
8/22/2013
121 So. 3d 1117
Claimant was deemed permanently and totally disabled entitled to permanent total and PT Supplemental Benefits (PTS). At the time of this accident, PTS benefits would cease at age 62 if the injured worker was eligible for social security benefits for retirement and disability. Court determined that because of the fact that the claimant was not eligible for both retirement and disability benefits at age 62, PTS benefits would not stop. At no time after the age of 62 would the claimant be entitled to both retirement and disability benefits for social security purposes and therefore, there is no limitation on PT supplemental benefits.

The law relating to termination of PTS benefits was changed in 2003 after this accident and as noted by the court in Footnote 1 to the opinion such benefits would end at age 62 regardless of whether the claimant has applied for or is eligible to apply for social

security retirement and disability benefits because of the compensable injury. The only exception to discontinuance of PTS benefits at age 62 under the current law is if the compensable injury prevented the claimant from working sufficient quarters to be eligible for social security benefits.

Sarasota County School Board v. Roberson
4/16/2014
135 So. 3d 587
In determining permanent total disability, the JCC can consider the claimant's psychiatric disability and is not restricted to physical limitations.

Savard v. Rio Vista Management Group d/b/a McDonalds
12/10/2013
129 So. 3d 1111
On Motion for Rehearing. Original opinion dated August 22, 2013 withdrawn (38 FLW D1792) and this opinion substituted. In light of opinion in Westphal v. City of St. Petersburg, 122 So. 3d 440 (Fla. 1st DCA 2013), JCC's order denying permanent total disability benefits reversed and remanded for further proceedings in which the JCC may receive additional evidence. Upon reversal and remand with general directions for further proceedings, a trial judge is vested with broad discretion in handling or directing the course of the proceedings thereafter.

Young v. American Airlines
12/31/2013
130 So. 3d 272
The JCC rejected uncontroverted medical opinions concerning the disability status of the claimant. On appeal, the court determined that JCC erred in failing to provide a valid reason for rejecting the unrefuted medical opinions based on findings such as flawed medical history, inherent illogic, or incredibility, or any other reasonable basis for finding the doctor's opinions unreliable or unworthy of belief. The JCC may reject unrefuted medical testimony but must give legally valid reasons for doing so. JCC's order reversed in its entirety and case remanded with instructions for entry of a final order awarding permanent total disability benefits along with the applicable penalties, interest, attorney's fees, and costs.

PROCEDURE

Banks v. Allegiant Security
10/11/2013
122 So. 3d 983
Appellate court determined that JCC erred in denying claimant's pro se request for a continuance of the final hearing to allow her additional time to seek alternate legal representation. JCC questioned the claimant's ore tenus request for a continuance and was mainly concerned about meeting the time requirements for holding a hearing set forth in Section 440.25, Florida Statutes. Court determined that time frames established

in Section 440.25, Florida Statutes, are neither inflexible nor inviolable. These time frames are subject to waiver by the claimant upon good cause shown.

Section 440.25(4)(b), Florida Statutes, allows for a continuance if the requesting party demonstrates to the Judge of Compensation Claims that the reason for the request for continuance arises from circumstances beyond the parties' control. There was no finding in this case that the need for the continuance was caused by circumstances beyond the control of the party requesting such. There were also no specific findings regarding the reason for the claimant's inability to obtain alternate legal representation by the time of the final hearing.

Case remanded to JCC to provide a sufficient basis for the appellate court to determine whether the appropriate rule of law in denying the claimant's request for a continuance had been followed. The granting of a continuance is discretionary. Consequently, discretionary factors such as injustice to the moving party and prejudice to the opposing party must be considered by the JCC.

Brown v. Jerry Pybus Electric
11/06/2013
124 So. 3d 436
JCC had denied petition for benefits filed by claimant's attorney based on the "two dismissal rule" as found in Rule 60Q-6.116(2). This rule should be strictly construed in favor of the party whose action would be barred and thus, a voluntary dismissal must be by a filing or an announcement of dismissal on the record. Administrative rules must be interpreted according to their plain language whenever possible.

In this case, the dismissals relied upon to invoke the two dismissal rule involved petitions that were resolved administratively (by stipulation or at mediation). There was no evidence that the claims were "voluntarily dismissed" as that term is used in the two dismissal rule. An order of the JCC closing a file and dismissing petitions does not constitute a voluntary dismissal because it was not instigated by the claimant. The dismissal must be made by the filing of a formal notice of dismissal or announcing on the record of the voluntary dismissal. The claimant's having to take action to keep claims open (by filing a written objection to an order closing file) is not equivalent to a claimant's taking action to voluntarily dismiss a petition for benefits.

Franklin v. Riviera Beach Fire Rescue
2/26/2014
132 So. 3d 1219
Claimant suffered from compensable accident resulting in a partial loss of hearing in both ears. Claim was filed for upgraded hearing aids. Employer/carrier agreed to provide the upgraded hearing aids but challenged the specific model requested by the claimant. Court determined that JCC erred in denying claim in its entirety based on insufficient evidence to establish the need for upgraded hearing aids. The employer/carrier had routinely provided upgraded hearing aid at the request of the authorized treating physician. The employer/carrier conceded that the issue in regards to

the upgraded hearing aids was preference of the particular hearing aid being requested as opposed to medical necessity.

Since the issue of compensability of the upgraded hearing aids was not noted as an issue in the pre-trial stipulation, the court found that the JCC abused his discretion in denying the claim for compensability. This constituted a denial of the claimant's due process rights where the JCC considered defenses of medical necessity and major contributing cause which were not raised in the employer/carrier's pre-trial stipulation.

Hernando County Sheriff's Office/North American Risk Services v. Sikalos
7/25/2014
39 FLW D1333
JCC properly excluded from Grice offset calculation claimant's in-line-of-duty disability benefits where the claimant contributed to the pension fund supplying those benefits. The fact that the in-line-of-duty disability benefit fund is maintained by the state and not the claimant's employer did not change the result in this case.

Moya v. Trucks & Parts of Tampa, Inc.
12/20/2013
130 So. 3d 719
JCC entered order determining that claimant was not entitled to further medical care for cervical and shoulder problems and that the accident was only a temporary aggravation of a pre-existing condition. Thereafter, an additional petition was filed requesting right shoulder treatment. The employer/carrier filed a Motion for Summary Final Order asserting that the previous order entered by the JCC was Res Judicata prohibiting a relitigation of the issue concerning treatment of the claimant's right shoulder. The claimant filed a response attaching a medical report from the treating physician noting the need for treatment to the shoulder. Thereafter, the JCC entered an order granting the Motion for Summary Final Order. The appeal of this case concerned the granting of the Motion for Summary Final Order. Review considered de novo.

Rule 62.-6.120 provides for the filing of a Motion for Summary Final Order and directs the opposing counsel to file a response to the motion within thirty days together with supporting depositions, affidavits, and other documents. The JCC then enters an order and if there are no genuine issues of material fact, the moving party is entitled as a matter of law to the entry of a final order if dispositive of the issues in the case. Issues that would be dispositive of the case include whether the claim is barred by the doctrine of Res Judicata, which was the issue in this case.

The response in this instance by the claimant to the motion was only that the authorized treating physician had written a prescription for treatment to the claimant's shoulder. Court determined that the response to the motion by the claimant failed to demonstrate any material fact issue precluding application of the doctrine of Res Judicata based upon a previous order entered. The claimant argued that the treatment was for diagnostic purposes but the affidavit attached to the response to the motion did not

demonstrate the existence of any new facts inconsistent with the JCC's prior order denying treatment.

White v. State of Florida, DOC Holmes Correctional Institute
3/04/2014
134 So. 3d 1134
JCC denied compensability of claim. On appeal, claimant argued that since the employer/carrier had originally agreed to the use of the "pay and investigate" rule set forth in Section 440.20(4), Florida Statutes, that she was entitled to some benefits payable until compensability was denied even though it was subsequently determined that the claimant did not suffer from a compensable accident. In particular, the claimant was arguing that she was entitled to the payment of impairment benefits even though the JCC determined that the claimant did not sustain a compensable accident.

In order to obtain IB benefits, Section 440.15(3)(a), F.S., requires an MMI determination and a specific impairment rating by a doctor. There was no competent and substantial evidence in the record in this case that the claimant reached MMI during the period when the case was handled as if compensable.

REMEDIAL TREATMENT

Andino-Rivera v. Southeast Atlantic Beverage Company
2/04/2014
132 So. 3d 1191
Under Sections 440.13(3)(d) and (i), Florida Statutes, an employer or carrier forfeits the right to contest the medical necessity of an authorized doctor's referral for additional medical treatment unless the employer or carrier responds to the authorized doctor's written request for a referral within the time allowed. Although a carrier is not required to grant the request for a referral within times specified in these sections, it must at least respond to each written request within the time prescribed. If no response is given, the carrier is deemed to agree to the medical necessity of the referral, in the absence of a timely grant or denial. Court determined that JCC erred in this case by not determining whether the employer or carrier timely responded to the referral made by two different doctors for pain management. Case reversed and remanded for additional proceedings to determine if a response was made to the request for referral care. If the JCC finds that neither the carrier nor the employer responded to the request for referral care, the court directed the JCC to award an evaluation with a pain management specialist to whom a referral was made.

Banuchi v. Department of Corrections/Indian River Correctional Institute/State of Florida
(Also summarized under Review)
10/16/2013
122 So. 3d 999
Claimant's attorney filed a motion requesting that the JCC enter an order appointing an Expert Medical Advisor (EMA) because of a conflict in the medical evidence as to the claimant's maximum medical improvement date. The motion to appoint the EMA asked

the JCC to make the appointment on his own motion. Rather, the JCC entered an order requiring the appointment of an EMA as requested by the claimant's attorney thereby making the claimant responsible for all costs associated with the EMA.

Court determined that JCC erred in considering the motion for the appointment of an EMA a motion filed by the claimant requiring the claimant to be responsible for the cost of an EMA. Claimant's attorney notified the JCC of the conflict in the medical evidence. JCC should have ordered the EMA and in accordance with Section 440.19(9), F.S., the appointment should have been made on the judge's own motion to be paid for by the employer/carrier.

Brevard County School Board v. Acosta
6/09/2014
39 FLW D1213
JCC ordered employer/carrier to be responsible for the claimant's left shoulder surgery, requiring the repair of a condition that was not related to an on-the-job accident. The award was based on a "hindrance-to-recovery" finding that the left shoulder surgery, non-work related, created a hindrance to the claimant's recovery from a compensable right shoulder injury and therefore the left shoulder surgery was compensable. In determining whether non-work related conditions are compensable pursuant to the "hindrance to recovery doctrine", the relevant inquiry in this case was not whether the left shoulder surgery was medically necessary but rather why it was medically necessary, i.e., what is the purpose of the left shoulder surgery? Unless the purpose is to remove a hindrance to treating the compensable right shoulder injury, the doctrine would not apply. In this case, there was no evidence that the left shoulder problems were a hindrance to the recovery of the compensable right shoulder condition. Accordingly, it was error to require the employer/carrier to be responsible for the claimant's left shoulder surgery. Dissenting opinion.

Bustamante v. Amber Construction Company
8/01/2013
118 So. 3d 921
Claimant requested his one time change in physicians. Adjuster timely responded to the request and advised the claimant's attorney that medical notes would be sent to a clinic to determine if one of their doctors would see the claimant. The adjuster also advised the clinic that it was authorized to evaluate and treat the claimant; however, that notice was not sent to the claimant or the claimant's attorney. Court determined that the failure of the adjuster to notify the claimant or the claimant's attorney of a newly authorized doctor precluded a finding that the authorized doctor had been timely provided.

A timely response to a request for a one time change in physicians is not met where the employer/carrier simply agrees that a change would be provided and advises that it was in the process of scheduling an appointment. Based on the plain reading of the statute, the employer/carrier is required to authorize at least one specific physician within five days of the claimant's request. In this case, the clinic was notified that they were authorized to treat the claimant but the claimant was not so advised. Unilateral notice to the clinic was

not sufficient to comply with Section 440.13(2)(f), Florida Statutes. Court determined that JCC abused his discretion in naming the clinic doctor as the authorized treating physician.

Cespedes v. Yellow Transportation, Inc. (Also summarized under Causal Connection and Review)
11/26/2013
130 So. 3d 243
On Motion for Rehearing and Motion for Rehearing En Banc, original opinion at 38 FLW D933. Original opinion dated April 24, 2013 withdrawn and this opinion substituted.

Ordinarily, physicians must be authorized by the carrier to be eligible for payment for treatment provided to an injured worker. However, this rule does not apply to emergency care physicians. In emergency care situations, licensed physicians are both permitted and required to provide such care regardless of whether authorization has been furnished. Physicians' medical opinions providing emergency care are admissible as an authorized treating provider under Section 440.13(5)(e), Florida Statutes.

Under Section 440.13(1)(f), Florida Statutes, emergency services and care is defined by reference to Section 395.002, Florida Statutes (2005). Emergency services begin when a physician undertakes a medical screening examination or evaluation to determine whether an emergency medical condition exists. The relevant questions regarding whether emergency services and care is provided are: 1) whether the service provider is a licensed physician or other appropriate personnel acting under the supervision of a physician; 2) whether an evaluation, screening or examination was conducted by that physician or other authorized personnel; and 3) whether such care was undertaken by the physician with the intent of determining if an emergency medical condition exists. These questions can be answered by the fact finder without resort to medical opinion testimony. If each of these questions are answered in the affirmative, then emergency services have been performed.

Simply because emergency care is provided does not make such care compensable under Chapter 440 even though not authorized by the employer/carrier. Neither does this fact alone render the providing physician eligible for payment under Chapter 440. In addition, this does not make the emergency care provided by the doctor compensable. The compensability of such emergency care is dependent on additional elements. The first element is that the medical care must be medically necessary and secondly, the emergency care must be as a result of a workplace accident.

Competent and substantial evidence supported the finding that the doctor in this instance was providing emergency medical care. The next question is whether the emergency doctor's treatment and testimony can be introduced into evidence as an authorized treating provider as that term is used in Section 440.13(5)(e), Florida Statutes (2005), i.e., does the doctor qualify as an independent medical examiner, expert medical examiner, or authorized treating physician.

The question in this case was whether surgery qualifies as compensable emergency services. The need for emergency medical services can be as a result of acute symptoms of sufficient severity which may include severe pain as to require treatment. In this case, the doctor observed the claimant in "unbearable pain." In other words, pain can serve as the basis of an emergency medical condition if, in the absence of immediate medical attention, the claimant could reasonably be expected to suffer serious impairment to bodily functions or serious dysfunction of any bodily organ or part. The court in this case determined that the JCC had erred in determining that the treatment provided by the doctor was not deemed emergency services.

Under Section 440.13(3)(b), Florida Statutes, a health care provider who renders emergency care must notify the carrier by the close of the third business day after he/she has rendered such care. Under this provision, however, there is no penalty set forth to the claimant for the emergency health care provider's failure to give the employer/carrier timely notice of the emergency treatment. To the extent that this statutory notice requirement might affect the compensation that the doctor is entitled to receive for his treatment, as opposed to his eligibility for payment based on the compensability of the treatment, the JCC has no jurisdiction over any billing disputes between the doctor and the employer/carrier relative to the provision of compensable care. The Department of Financial Services has exclusive jurisdiction over such disputes.

Collins v. Mosaic Fertilizer LLC
8/22/2013
121 So. 3d 1119
JCC erred in rejecting testimony of an Expert Medical Advisor (EMA) that the compensable accident caused claimant's injuries. When the JCC rejects the opinion of an EMA, on appeal that decision is reviewed based upon the competent and substantial evidence standard. There must be clear and convincing evidence in existence to contradict the opinions of an EMA.

Flagler Hospital, Inc. v. Association Insurance Company
3/12/2014
133 So. 3d 644
Court determined that Department of Financial Services (Division of Workers' Compensation) lacked jurisdiction over a claim for the reimbursement of medical bills until the compensability of the claim is established. The health care provider had sought the Division's jurisdiction in accordance with Section 440.13(7)(a), F.S., to determine a conflict in the reimbursement amounts of bills payable when compensability of the accident in the first instance had not been determined.

Gadol v. Masoret Yehudit, Inc.
2/21/2014
132 So. 3d 939
Claimant appealed JCC's order denying the claimant his choice of doctors as the "one-time change" of physicians to which he was entitled to under Section 440.13(2)(f), F.S. (2012). It was asserted that the employer/carrier had failed to authorize a specific

physician as requested by the claimant within 5 days of the claimant's request for authorization of the one-time change.

Upon receiving the request for the one-time change in doctors, employer/carrier attempted to make arrangements for an appointment with one doctor. That doctor's office declined. The claimant was not notified of these efforts being made for the one-time change. Another attempt was made to find a different doctor for the claimant outside of the 5-day response period and claimant refused to go to that appointment due to the "untimely notice" of the second doctor's authorization.

The court indicated that the specific issue in this case related to a substantive benefit provided in Section 440.13(2)(f), F.S., i.e., the claimant initiated one-time change in physician without regard to medical necessity. A petition for benefits can constitute the written request of the employee for a one-time change. The employer/carrier must timely respond by informing the claimant of the new doctor's name. The 5-day response period refers to calendar days, not business days. In this case, the employer/carrier's response to the request was deemed to be inadequate; thus, the claimant was allowed to choose his own doctor. The claimant can waive his right to select his own physician in this circumstance where the claimant never named his selection of the doctor that he chooses and treated with the employer/carrier's selection of the alternate physician. See Perez v. Rooms to Go, 997 So. 2d 511 (Fla. 1st DCA 2008). However, a delay of the claimant in naming his own chosen alternate doctor does not constitute a waiver where the claimant did not attend the appointment scheduled by the employer/carrier's choice. See Harrell v. Citrus County School Board, 25 So. 3d 675 (Fla. 1st DCA 2010).

Stahl v. Hialeah Hospital (Also summarized under Review)
12/17/2013
127 So. 3d 1283
JCC granted employer/carrier's Motion to Compel an independent medical examination (IME). Claimant filed a writ of certiorari to review the order.

In regards to the IME, the claimant asserted that since there was no dispute, the granting of an IME was not authorized under Section 440.13(5)(a), Florida Statutes (2003). The court found, however, that there was a dispute since the claimant had filed a claim for indemnity benefits which was still pending and which the employer/carrier was contesting.

The claimant also objected to the examiner based on the fact that the employer/carrier had already selected its independent medical examiner. Court found that this argument had merit and concluded that each party was allowed to have one independent medical examiner (one single doctor) per accident. Exceptions to this rule are as found in Section 440.13(5)(b) in which an alternate examiner can be utilized. In this case, the employer/carrier did not cite any exception to the one independent medical examiner rule.

Trejo-Perez v. Arry's Roofing
6/03/2014
39 FLW D1162
Claimant's treating doctor recommended the claimant be evaluated by a Spanish speaking neuropsychologist. The employer/carrier provided a neuropsychologist but authorized a translator to accompany the claimant to this appointment rather than scheduling a Spanish speaking neuropsychologist. The basis of a referral to a Spanish speaking psychiatrist in neuropsychologist was the possibility that the referral doctor would get the wrong information without adequately communicating with the claimant. The JCC found that the referral based solely on the possibility that one could get the wrong information did not equate to medical necessity for such a referral and accordingly denied the specific request for the Spanish speaking physician or psychologist.

A determination of reasonable medical certainty depends on the substance of the evidence rather than the use of "reasonable medical certainty" terminology or on any other so called magic words by a medical witness. This is a factual issue that remains within the adjudicatory function of the JCC based on the substance of the evidence presented. Court on appeal determined that there was sufficient evidence of record sustaining the JCC's determination of a lack of medical evidence concerning the necessity for treatment. It may have been preferable for a Spanish speaking physician to treat the claimant but Section 440.13(2)(a), Florida Statutes, requires that recommended treatment be medically necessary if the employer is to pay for it. Court determined that the JCC did not err in rejecting the testimony of the authorized doctor that a Spanish speaking physician was necessary to provide care for the claimant.

Unrebutted medical testimony can be rejected by the JCC so long as there is a reasonable evidentiary basis for doing so. A reasonable basis for the JCC to reject medical testimony can include conflicting medical evidence; evidence that impeaches the expert's testimony or calls such testimony into question, such as a failure of the claimant to give the medical expert an accurate or complete medical history; or conflicting lay testimony or evidence that disputes the claim.

Concurring opinion concluding that the provision of a qualified psychiatrist, coupled with an interpreter, met prevailing standards of care related to medical necessity of treatment as provided for in Section 440.13(k), Florida Statutes (2014). Dissenting opinion opined that this case of first impression incorrectly denied a Spanish speaking claimant a medically necessary evaluation by a Spanish speaking psychiatrist, a treatment which the claimant's authorized doctor recommended that the claimant receive.

REVIEW

Banuchi v. Department of Corrections/Indian River Correctional Institute/State of Florida
(Also summarized under Remedial Treatment)
10/16/2013
122 So. 3d 999

Statutory interpretation is a question of law, reviewed de novo on appeal. Interpretation of written pleadings is also reviewed de novo on appeal.

The claimant had sought a ruling from the appellate court that the EMA provisions of the workers' compensation statute were unconstitutional. However, an appellate court, when presented with the possibility of reading a statute in a constitutional manner versus determining it unconstitutional has a duty to construe the statute in such a way as to avoid conflict with the constitution.

Cespedes v. Yellow Transportation, Inc. (Also summarized under Causal Connection and Remedial Treatment)
11/26/2013
130 So. 3d 243
JCC entered order favorable to the claimant in regards to certain findings but denied benefits to the claimant. Claimant appealed. There was no cross appeal filed by the employer/carrier on the findings of the JCC that were favorable to the claimant. Court determined that a cross appeal is an appellee's exclusive method of obtaining relief from error in an order and absent a cross appeal, an appellee may not seek affirmative relief from any part of the order. The appellee may only defend the order.

F.T.M.I. Operator LLC v. Limith
6/09/2014
39 FLW D1210
The only remaining portion of a filed Petition for Benefits that had not been dealt with by the JCC related to the JCC's retention of jurisdiction on the issue of attorney's fees. In order to have an effect on the running of the statute of limitations, the employer/carrier filed a motion with the JCC requiring the claimant to file a Verified Motion for Attorney's Fees under Rule 60Q-6.124(4). This motion was denied. A Motion to Dismiss for Lack of Prosecution under Section 440.25(4)(i), Florida Statutes (2001), was also filed and denied by the JCC. Employer/carrier sought appellate review of these non final orders by the JCC by the filing of a Petition for Writ of Certiorari.

Court determined that a Writ of Certiorari was not an appropriate relief for reviewing the non final orders in this case. The employer/carrier failed to demonstrate the requisite "irreparable harm" as a condition for the filing of the Writ of Certiorari. The threshold jurisdictional question in granting a Writ of Certiorari is whether there is a material injury that cannot be corrected in a plenary appeal, otherwise termed an "irreparable harm". Court determined that an appeal of the decisions by the JCC in this case could be considered through the regular appellate processes should a determination be made at some future date that the statute of limitations had not run. Concurring opinion recognizing the dilemma that employer/carriers have where the JCC retains jurisdiction over a pending claim for attorney's fees precluding the running of the statute of limitations. The remedy suggested in the concurring opinion was an amendment to Chapter 440 or the 60Q rules to establish deadlines for the adjudication of fee claims.

Stahl v. Hialeah Hospital (Also summarized under Review)
12/17/2013
127 So. 3d 1283
To obtain a writ of certiorari, the claimant must show that there has been 1) a departure from the essential requirements of the law, 2) resulting in material injury for the remainder of the case 3) that cannot be corrected on post-judgment appeal. Claimant objected to the independent medical examination itself and the choice of independent medical examiners.

Stanley Steemer International, Inc. v. Smith
6/09/2014
39 FLW D1214
Claims related to attorney's fees and costs were not ripe for appellate review where the Judge of Compensation Claims retains jurisdiction over the amount of the fees and entitlement to costs. The judge had only decided that attorney fees were awardable.

SETTLEMENT

Cabrera v. Outdoor Empire, Inc. (Cabrera II)
3/27/2014
134 So. 3d 573
In Cabrera I, the claimant, unrepresented, was allowed to withdraw from a settlement agreement since the JCC had not approved the settlement. Because of the fact that the claimant was not represented by counsel and because the JCC had not approved the settlement, the settlement as alleged was not binding or enforceable. Thereafter, the claimant obtained the services of an attorney and settled the case at mediation which included the payment of an attorney's fee. Thereafter, the claimant again expressed displeasure with the amount of the settlement, the manner in which it was negotiated, and the means by which the settlement checks would be processed. Additional testimony was received by the JCC who determined that the agreed upon settlement included both dates of accident that the claimant allegedly suffered from while employed by the employer. Court determined on appeal that there was competent and substantial evidence to support the JCC's determination that "any and all dates of accidents" agreed to in the settlement documents settled the claimant's multiple claims of injury with the employer. DCA decided case by Summary Affirmance when the initial brief filed failed to present a preliminary basis for reversal of the JCC's order.

On appeal, the claimant asserted that he had not signed the settlement documents. This issue was not asserted in the proceedings before the JCC and because of the failure to do so, this issue was not preserved for appeal purposes. In Florida, pro se litigants are bound by the same rules that apply to counsel.

The court specifically found that there was no evidence that the claimant had been tricked into settling all of his dates of accident. The formation of the contract depends not on the agreement of two minds in one intention but on the agreement of two sets of external signs - not on the parties having meant the same thing but on their having said the same

thing. In this case, the claimant had voluntarily entered into the agreement that expressly settled and extinguished the claimant's entitlement to workers' compensation benefits for all workers' compensation injuries. The claimant's subjective belief as to whether both accidents were settled is irrelevant to the legal issue in this instance.

Diaz-Llerena as Limited Guardian of the Person and Property of Octavio P. Llerena v. Spillis, Candela & Partners, Inc.
8/09/2013
121 So. 3d 1086
JCC granted employer/carrier's motion to dismiss petition for benefits determining that benefits claimed had been settled. The claimant admitted that there had been a settlement but argued that the benefits claimed were due under the terms of the agreement and the agreement had not yet released the employer/carrier since the employer/carrier had not satisfied all sums due under the agreement. Court reversed judge's dismissal with prejudice concluding that the JCC should have had an evidentiary hearing and considered the terms of the parties' settlement agreement to determine if the terms of the agreement had in fact released the employer/carrier from liability and whether the employer/carrier had complied with the terms of the agreement.

Luces v. Red Ventures
2/28/2014
39 FLW D471
JCC's order disapproved an agreement between the claimant's attorney and the employer/carrier for the employer/carrier to pay a fee of $1,500 for the obtaining of medical benefits for the claimant pursuant to Section 440.34(3)(a), Florida Statutes. There was no supporting evidence of record showing that the claimant's attorney ever got the claimant medical benefits which entitled the claimant's attorney to a fee under the terms of this statutory provision. The judge's order disapproving the fee directed that the $1,500 be paid to the claimant. This part of the judge's decision was reversed. There was nothing in the stipulation that if the JCC did not approve the stipulated attorney's fee that the amount would be paid to the claimant. The JCC is not a court of general jurisdiction and cannot reform contracts. The JCC was without authority to redirect the attorney's fees from counsel to claimant as an exercise of plenary equitable jurisdiction.

On remand, the court indicated that the parties could petition for the approval of attorney's fees payable to the claimant's attorney under Section 440.34(3)(b), Florida Statutes, not paragraph (3)(a), Florida Statutes. Court determined that an agreed upon amount of $500 in the parties' agreement designated as "out of pocket costs" payable by the employer/claimant (not her attorney) was not subject to the JCC's approval. This amount was a negotiated payment to be made to claimant herself, not an attorney's fee subject to the JCC's approval under Chapter 440.

TEMPORARY PARTIAL

Southeast Milk/Zurich North America v. Fisher
4/14/2014

135 So. 3d 582
Where the claimant was fired by the employer, it was error to award temporary partial disability benefits without determining whether the claimant had been discharged for misconduct. Termination for misconduct precludes an award of temporary partial disability benefits.

TEMPORARY TOTAL

Holl v. United Parcel Service
6/09/2014
39 FLW D1210
Section 440.15(3)(c), Florida Statutes (2002), limited the payment of "temporary impairment and supplemental income benefits" to 401 weeks. Court determined that this 400 week limitation of "temporary benefits" included the 104 weeks of temporary benefits as provided in Section 440.15(2) and (4), Florida Statutes. Dissenting opinion. Since decision of court concerned the interpretation of a statutory provision, the appeal was reviewed de novo.

Westphal v. City of St. Petersburg
9/23/2013
122 So. 3d 440
(En banc opinion. Original opinion at 38 FLW D504) Previous court decision determined that 104 weeks of temporary total limitation deemed unconstitutional. This en banc opinion withdrew prior opinion determining unconstitutionality of statute.)

Court determined that for those cases that have not reached maximum medical improvement at the expiration of the 104-week limitation of temporary benefits, a permanent total claim was ripe for adjudication notwithstanding the fact that the claimant had not reached medical MMI. See Matrix Employee Leasing, Inc. v. Hadley, 78 So. 3d 621 (Fla. 1st DCA 2011). In making the determination as to permanent total disability, the judge would be called upon to determine whether the claimant was PT as of the end of the 104-week period considering medical evidence as it existed at the expiration of the 104 weeks. Prior case law had determined that PT could be determined at the expiration of the 104 weeks of temporary benefits but considering the claimant's medical condition at an anticipated MMI at a later date. In so ruling, the court withdrew/overturned its previous decision in Matrix Employee Leasing Supra. Multiple concurring/dissenting opinions. Issue certified to Florida Supreme Court. Supreme court accepted jurisdiction. See also Groseclose v. Optimum Oncology-Comprehensive Cancer Center, 38 FLW D2232 (Fla. 1st DCA 2014).