HANDOUTS FOR ALL THREE SESSIONS ARE INCLUDED IN THIS DOCUMENT.

MISREPRESENTATION

CASELAW UPDATE

BENEFITS PAYABLE, OFFSETS

MISREPRESENTATION

Presented by:

Susan N. Marks and Laura A. Buck

Misrepresentation 440.09/440.105

By Susan N. Marks and Laura A. Buck

I. Introduction

a. Florida Statutes, Section 440.09

i. Compensation or benefits are not due or owing if any JCC, ALJ, court or jury find employee has "knowingly or intentionally" engaged in any act described in 440.105, or any criminal act for the purpose of securing workers' compensation benefits.

ii. This section applies to all accidents, regardless of the date of accident.

iii. All benefits (medical and indemnity) are forfeited, even if claimant commits misrepresentation as to only indemnity benefits. *Citrus Pest Control v. Brown*, 913 So. 2d 754 (Fla. 1st DCA 2005).

b. Florida Statutes, Section 440.105

i. It shall be unlawful for any person to:

1. Knowingly make, or cause to be made, any false, fraudulent, or misleading oral or written statement for the purpose of obtaining any benefit or payment under Chapter 440.

2. Present or cause to be presented any written or oral statement containing false, incomplete or misleading information concerning any fact or thing material to such claim.

II. Elements for a successful misrepresentation defense

a. Defense must be raised timely

   i. Rule 60Q-6.113(2)(h)

   ii. *Isaac v. Green Iguana, Inc.*, 871 So. 2d 1004 (Fla. 1st DCA 2004)

   iii. *2K South Beach Hotel, LLC v. Musteilier, DCA #19-0713*

b. E/C has burden of proving a statutory violation by a preponderance of the evidence. *Singletary v. Yoder's*, 871 So. 2d 289 (Fla. 1st DCA 2004).

   i. Statements/Actions were knowingly or intentionally made

   ii. Statements were oral or written

   iii. Statements were made for purpose of obtaining workers' compensation benefits

c. Testimony and documentary evidence needed

III. Types of Misrepresentation

a. Medical Mileage

   i. *Richmond v. Lowe's Home Centers, OJCC #14-013039*

b. Misrepresentations to Doctors

   i. *Cal-Maine Foods v. Howard*, 225 So. 3d 898 (Fla. 1st DCA 2017)

c. Past Medical History

   i. *THG Rentals & Sales v. Arnold*, 196 So. 3d 485 (Fla. 1st DCA 2016)

   ii. *Joseph v. South Lake Hospital, OJCC #19-003916*

   iii. *Mendez v. Pinnacle Property Mgmt, OJCC #17-009753*

d. Misrepresentation by Omission

   i. *Scandizzo v. Nelson & Affiliates, Inc., OJCC #15-003319*

   ii. *LaFerriere v. Wire Products, Inc., OJCC #15-013683*

   iii. *Javier v. City of Cape Coral, OJCC #18-010663*

e. Physical complaints/activities

   i. *Lee v. Volusia County School Board*, 890 So. 2d 397 (Fla. 1st DCA 2004)

   ii. *Lucas v. ADT*, 72 So. 3d 270 (Fla. 1st DCA 2011)

   iii. *Acosta v. Florida Crystal*, 53 So. 3d 1022 (Fla. 1st DCA 2011)

f. Social Security Number

   i. *Hernandez v. Food Market Corp.*, 44 Fla. L. Weekly D2647b

   ii. *Arreola v. Administrative Concepts*, 17 So. 3d 792 (Fla. 1st DCA 2009)

   iii. *Gonzalez v. Workforce Business Services, Inc., OJCC #18-020308*

g. Misrepresentation to Employer

   i. *Martin v. Carpenter*, 132 So. 2d 400 (Fla. 1st DCA 1961)

ii. *Steel Dynamics v. Markham*, 46 So.3d 641 (Fla. 1st DCA 2010)

iii. *Joseph v. South Lake Hospital, OJCC #19-003916*

IV. Considerations before raising misrepresentation defense

a. An unsuccessful misrepresentation defense results in attorney's fees, even if all other claimed benefits are denied. *Carrillo v. Case Engineering*, 53 So. 3d 1214 (Fla. 1st DCA 2011).

b. E/C cannot force a trial on a misrepresentation defense, if there is no pending Petition for Benefits.

c. Settlement negotiations when a potential defense misrepresentation exists.

CASELAW UPDATE

Presented by:

Tracey J. Hyde and Christopher D. White

CASE LAW
(3/8/19 – 2/13/20)

ATTORNEY FEES

Telfer, Faherty & Anderson, PLLC v. Caplick, Southeastern Grocers/Sedgwick (also summarized under Jurisdiction)
272 So. 3d 820
5/16/19
Claimant hired Appellant law firm to represent her, and was assigned to an attorney within the firm. When her assigned attorney left the firm, Claimant followed the attorney to the new firm. Subsequently, the claim settled. Appellant law firm sought a charging lien from the settlement proceeds, arguing that it was entitled to 91% of the attorney's fees proceeds, and the attorney and new firm were entitled to 9% based on the attorney' s equity ownership interest with Appellant firm. In the alternative, Appellant law firm requested an allocation of fees based on quantum meruit. Claimant's attorney argued a quantum meruit allocation was appropriate, as there was no agreement regarding splitting fees based on any equity partnership agreement. The JCC allocated the fee on a quantum meruit basis, awarding 90% to the attorney and new firm, and the remaining 10% to Appellant law firm.

The DCA affirmed the award finding the JCC acted within his jurisdictional authority to resolve the attorney fee dispute, and competent, substantial evidence supported the resolution. The DCA further noted that if there was an agreement between Claimant attorney and Appellant law firm, that claim is outside the jurisdiction of the JCC, as it would need to be addressed by circuit court.

One Hospitality, LLC/Zenith v. Cruz
45 Fla. L. Weekly D352b
2/12/20
The Claimant filed a Petition for Benefits on 8/23/18. On 8/29/18, the E/C denied the claim in its entirety, per the Response to the Petition. Then, on 9/24/18, the E/C rescinded the denial, and agreed to provide all requested benefits. The Claimant filed a Verified Petition for Attorney's Fees, which the E/C contested. The E/C argued that they accepted compensability of the claim and agreed to provide all benefits within 30 days of the Petition being filed. The parties agreed as to the timing, and that the 30th day after the Petition was filed fell on a Saturday, 9/22/18. The E/C argued that pursuant to Rule 60Q-6.109, because the 30th day fell on a weekend, the filing of the response on 9/24/18, or a Monday, was timely. The JCC disagreed, stating that the language of 60Q-6.109 cannot supersede the statutory language of §440.34(3)(b), which outlines the 30-day deadline. The DCA agreed, stating that §440.34(3)(b) does not define if the 30 days are calendar days or business days; however, prior cases interpreting Chapter 440 have read the statute to mean calendar days, such as the one-time change provision that requires a response within 5 calendar days. The statutory interpretation is that §440.34(3)(b) provides for attorney's fees to attach after 30 calendar days; therefore, the JCC's award of fees was affirmed.

COMPENSABILITY

Sedgwick CMS/The Hartford v. Valcourt-Williams
271 So. 3d 1133
4/5/19
The DCA reversed the JCC's finding of a compensable claim in this fact specific claim. The Claimant worked from her home, and during working hours, while downstairs getting coffee in her kitchen, she tripped over one of her dogs, sustaining injuries. The DCA analyzed the JCC's application of the law to the facts, focusing on whether the injury was arising out of the employment. Stating that a claimant cannot prevail on compensability unless there is an occupational cause, or risk nonexistent in the claimant's "non-employment life," the DCA found that the causes of the accident were features in the claimant' s non-employment life, specifically her kitchen, reaching for coffee, and her dog. The DCA noted that work-at-home accidents can be compensable, but there must be a showing that the employment exposed the claimant to conditions that would contributing to the risk of injury. In this case, the employment did not contribute to the risk that the Claimant would trip over her dog while getting coffee in her kitchen.

Prada USA/Travelers v. Young
268 So. 3d 181
5/2/19
The DCA affirmed the JCC's ruling that the 120-day rule prevented the E/C from denying compensability of the lumbar spine after providing treatment for same for over 10 years and stipulating to compensability in a prior Pre-Trial Stipulation. The Claimant filed a Petition requesting an evaluation and treatment for his lumbar spine, which was denied by the E/C on the basis that the claim was barred by res judicata because the issue of lumbar spine compensability was ripe at the time of a 2015 Final Hearing. The JCC disagreed with the res judicata argument, stating that the dispute ripe in 2015 was for specific treatment for the lumbar spine, not a broad require for an evaluation and treatment for the lumbar spine. The JCC also found the E/C was precluded from denying compensability of the lumbar spine under the 120-day rule because they had accepted the condition as compensable, and there is no evidence of a break in the causal chain to support a denial of the condition. The DCA found the 120-day finding to be correct, and did not address the res judicata issue.

Blanco v. Creative Management Services, LLC/Technology Insurance Company (also summarized under Evidence)
281 So. 3d 598
10/17/19
The DCA affirmed the JCC's denial of the Claimant's exposure claim, finding that the major contributing cause of the Claimant's respiratory condition was personal in nature, and not due to exposure to construction or cement dust on the job site. The JCC agreed with the testimony of the E/C's IME physician. The Claimant argued on appeal that the E/C's IME physician was not qualified to opine on the cause of the respiratory condition because he was not a board-certified pulmonologist. The JCC found that the E/C's IME physician was qualified to render his opinion on causation, given his education, knowledge and training. The DCA agreed stating that the determination of a witness's qualifications to provide an expert opinion is at the discretion of the judge, and Chapter 440 does not limit the selection of an IME physician to a board-certified physician.

The DCA further found that the E/C's IME report was admissible evidence, despite the Claimant's argument that it should be stricken under McElroy v. Perry, 753 So. 2d 121 (Fla. 2nd DCA 2000). The DCA found the McElroy case does not apply in workers' compensation cases because Chapter 440 specifically provides for the selection of IME doctors to resolve disputes; Chapter 440 allows evidence from an IME physician to be admissible; and the McElroy holding was based on the potential effect an IME report may have on a jury. Given workers' compensation proceedings are before a JCC, weight of the admissibility or trustworthiness of evidence is determined by the JCC.

Premier Community Healthcare Group/Amtrust/Associated Industries v. Rivera
282 So. 3d 1020
11/13/19
In this one word order, the DCA affirmed the JCC's determination that the major contributing cause of the need for specific treatment was the work accident. The dissenting opinion detailed the facts, and stated there was no competent, substantial evidence to support the JCC's opinion, as no physician addressed the causation between the work injury and the Claimant's pre-existing conditions.

City of Titusville/Johns Eastern v. Taylor
44 Fla. L. Weekly D2874a
11/27/19
In this toxic exposure case, the DCA reversed the JCC's finding of compensability of the Claimant's claim. The order outlines the factual and medical evidence presented to the JCC. The Claimant's IME testified that the exposure to a specific fungus, while working, "most likely" caused the exposure and resulting diagnosis of fungal meningitis. This testimony did not rise to the level of clear and convincing evidence, as required by 440.02(1). Therefore, no competent substantial evidence existed to support the JCC's finding that the Claimant met his burden of proving occupational causation through clear and convincing evidence.

The DCA acknowledged that this heightened standard can be a "Herculean task" in toxic exposure claims; however, the Legislature created this heightened standard, and the DCA must defer to the Legislature.

School District of Indian River County/Ascension/Solutions of Florida/EMI v. Cruce (deceased)
44 Fla. L. Weekly D2877a
11/27/19
In another toxic exposure case, the DCA again reversed the JCC's findings of compensability of the Claimant's claim. The Claimant contracted cryptococcal meningitis, and subsequently died from the infection. The Claimant's dependents brought the claim forward, arguing that the Claimant was exposed to cryptococcus fungus while working. The medical testimony of the IME physicians conflicted, and an EMA was appointed, who found that the Claimant's infection was likely due to exposure to pigeon feces while working. The JCC accepted the testimony, and found that the Claimant met the heightened standard of clear and convincing evidence; however, he then noted that no evidence of the level of exposure was presented by the Claimant and this was excused because that would create an impossible burden on the Claimant.

The DCA found that not only did the Claimant not prove the level of exposure, he also failed to prove through clear and convincing evidence that exposure occurred in the course and scope of employment.

The expert testimony indicated this fungus was present virtually everywhere, yet no testimony showed the existence or levels of the fungus at the workplace. As such, the Claimant failed to meet his burden of proof, and the JCC erred in excusing him from proving a relationship to the work place. The Order was reversed, as there was no competent substantial evidence that the Claimant satisfied the burden of proving occupational causation by clear and convincing evidence.

Reynolds v. Anixter Power Solutions/Travelers
287 So. 3d 670
12/10/19
The Claimant was injured while at an employer-planned bowling event. The event took place during the Claimant's paid work shift, during regular work hours. The stated purpose of the event was to improve morale, and discuss goals for the upcoming year. The JCC found that the bowling event was a recreational activity, per §440.092(1), and the resulting ankle injury was not compensable. The DCA reversed, stating that attendance at the event was expressly required and it produced a substantial direct benefit to the employer, beyond health and morale. Since the event was conducted during work hours, and one purpose was to discuss goals for the upcoming year, it is reasonable to believe the activity was an expressly required incident of employment and of benefit to the employer.

CONSTITUTIONALITY

Hernandez v. Food Market Corp./Amtrust/Associated Industries (also summarized under Misrepresentation)
282 So. 3d 1005
10/30/19
The JCC denied entitlement to workers' compensation benefits on the basis the Claimant fraudulently provided an invalid social security number. The DCA affirmed the finding, stating that the Claimant provided the invalid social security number in order to obtain medical care for her work accident, as she admitted to same. The DCA rejected the Claimant's argument that §440.105(4) was unconstitutional as applied to the Claimant because it is preempted by the Immigration Reform and Control Act of 1986, as the ruling "implicates and touches upon her immigration status." The DCA found that no provision of the Immigration Act was applicable to this case or the Claimant's argument.

COVERAGE

FWCJUA v. American Residuals and Talent, Inc.
284 So. 3d 1115
10/3/19
FWCJUA challenged the order of the Office of Insurance Regulation, which reversed FWCJUA's denial of coverage to American Residuals and Talent, Inc (ART). FWCJUA found that ART was not an employer under Florida Law. The DCA noted that the facts showed ART's financial arrangements with its clients were sufficient to establish it was an employer under Florida law. The Order of the Office of Insurance Regulation was affirmed.

EVIDENCE

Falk v. Harris Corporation/Liberty
267 So. 3d 578
4/11/19
The JCC denied the Claimant's claim for PTD and impairment benefits based upon the opinion of the EMA. The evidence showed that the EMA deferred his opinion to the opinion of one of the other physicians in the case. The JCC applied the EMA presumption of correctness to the EMA's decision to defer his opinion to another doctor. The DCA reversed, stating that when an EMA offers no independent opinion, but only a blanket deference, the JCC should have stricken the EMA physician and appointed another.

Izaguirre v. Beach Walk Resort/Travelers
272 So. 3d 819
5/16/19
Where Claimant failed to notify the E/C of their IME within 15 days of the examination, as required by §440.13(5)(a), the JCC was correct in striking the IME report. The Claimant argued that the language of §440.13(5)(a), specifically failure to timely provide notification of the IME *shall* preclude use of the findings, is a directory provision, not mandatory. The DCA stated that exclusion of the IME was mandatory, per statute.

SBCR, Inc./Bitco v. Doss
275 So. 3d 1290
8/1/19
The Claimant was accepted PTD, and was paid PTD and supplemental benefits, pursuant to §440.15(1). Upon reaching age 62, the E/C stopped payment of supplemental benefits, pursuant to statute, which states supplemental benefits are not payable after age 62, unless the employee is not eligible for social security retirement or disability benefits because the compensable injury prevented the employee from working sufficient quarters to be eligible. The Claimant argued that his supplemental benefits should continue because he was not entitled to social security disability benefits, as he did not work enough quarters. At the hearing before the JCC, Claimant testified that had it not been for the work accident, he would have continued working, and earned enough quarters to be eligible for social security disability benefits. The JCC accepted the Claimant's testimony, and awarded continuing supplemental benefits, per §440.15(1). The DCA reversed the JCC's decision stating that the finding of ineligibility was based solely on the Claimant's testimony. There was no evidence to show he was denied social security benefits, or that he would have earned sufficient quarters had the work accident not occurred. The JCC's finding was based on speculation, not competent substantial evidence.

Blanco v. Creative Management Services, LLC/Technology Insurance Company (also summarized under Compensability)
281 So. 3d 598
10/17/19
The DCA affirmed the JCC's denial of the Claimant's exposure claim, finding that the major contributing cause of the Claimant's respiratory condition was personal in nature, and not due to exposure to construction or cement dust on the job site. The JCC agreed with the testimony of the

E/C's IME physician. The Claimant argued on appeal that the E/C's IME physician was not qualified to opine on the cause of the respiratory condition because he was not a board-certified pulmonologist. The JCC found that the E/C's IME physician was qualified to render his opinion on causation, given his education, knowledge and training. The DCA agreed, stating that the determination of a witness's qualifications to provide an expert opinion is at the discretion of the judge, and Chapter 440 does not limit the selection of an IME physician to a board-certified physician.

The DCA further found that the E/C's IME report was admissible evidence, despite the Claimant's argument that it should be stricken under McElroy v. Perry, 753 So. 2d 121 (Fla. 2nd DCA 2000). The DCA found the McElroy case does not apply in workers' compensation cases because Chapter 440 specifically provides for the selection of IME doctors to resolve disputes; Chapter 440 allows evidence from an IME physician to be admissible; and the McElroy holding was based on the potential effect an IME report may have on a jury. Given workers' compensation proceedings are before a JCC, weight of the admissibility or trustworthiness of evidence is determined by the JCC.

2K South Beach Hotel, LLC/Continental Indemnity v. Mustelier
45 Fla. L. Weekly D111c (Order issued following E/C Motion for Written Opinion after the DCA initially PCA'd the JCC's decision via Order dated 10/15/19)
1/15/20
On the morning of the final hearing, the E/C attempted to amend its defense to include a misrepresentation defense and admit surveillance video into evidence. The E/C argued that the Claimant had falsely testified she never used a cane, when her physician testified three weeks earlier that she presented to him using a cane. The JCC denied the E/C's attempts to amend its defenses and evidentiary exhibits. The DCA addressed each of the E/C's arguments on appeal, and rejected each one. The DCA found there was competent substantial evidence to support the JCC's finding the Claimant was prejudiced by the late amendments to defenses and evidence, and that this prejudice was incurable. The JCC did not abuse his discretion in denying the motion to amend the pretrial to include surveillance. The JCC did not err in denying the testimony of the surveillance witnesses. The medical evidence supported the JCC's award of benefits, including water therapy and a psychiatric evaluation.

HEART/HYPERTENSION INJURIES

McDonald v. City of Jacksonville
286 So. 2d 792
12/20/19
The JCC denied the Claimant's claim for compensability of his coronary artery disease. The Claimant satisfied the prerequisites for entitlement to the presumption, but per the JCC, the Claimant failed to establish a work-related cause of the trigger of his heart attack. The DCA found the JCC erred by placing that burden on the Claimant. Where the Claimant meets the statutory prerequisites for the presumption, it is the burden of the E/C to rebut the presumption by showing a non-occupational cause of the heart disease. In this case, the medical evidence showed the triggering event was a myocardial infarction, which was presumed to be work-related. The E/C must put forth evidence to show a non-occupational cause of the myocardial infarction, or trigger. The DCA reversed and remanded the case for further findings as to whether the E/C overcame the statutory presumption.

JURISDICTION

Telfer, Faherty & Anderson, PLLC v. Caplick, Southeastern Grocers/Sedgwick (also summarized under Attorney's Fees)
272 So. 3d 820
5/16/19
Claimant hired Appellant law firm to represent her, and was assigned to an attorney within the firm. When her assigned attorney left the firm, Claimant followed the attorney to the new firm. Subsequently, the claim settled. Appellant law firm sought a charging lien from the settlement proceeds, arguing that it was entitled to 91% of the attorney's fees proceeds, and the attorney and new firm were entitled to 9% based on the attorney's equity ownership interest with Appellant firm. In the alternative, Appellant law firm requested an allocation of fees based on quantum meruit. Claimant's attorney argued a quantum meruit allocation was appropriate, as there was no agreement regarding splitting fees based on any equity partnership agreement. The JCC allocated the fee on a quantum meruit basis, awarding 90% to the attorney and new firm, and the remaining 10% to Appellant law firm.

The DCA affirmed the award finding the JCC acted within his jurisdictional authority to resolve the attorney fee dispute, and competent, substantial evidence supported the resolution. The DCA further noted that if there was an agreement between Claimant attorney and Appellant law firm, that claim is outside the jurisdiction of the JCC, as it would need to be addressed by circuit court.

Napier v. City of Riviera Beach/Gallagher Bassett
278 So. 3d 881
8/29/19
The JCC erred in addressing the Claimant's MMI status, as the claim for indemnity benefits and addressing MMI was not ripe for the merits hearing. A Petition for indemnity benefits was filed 10 days prior to the merits hearing on compensability of a medical procedure. Because the indemnity claim had not been mediated at the time of the merits hearing, the JCC did not have jurisdiction to address MMI status, as it related to the claim for indemnity benefits.

UPS/Liberty Mutual v. Miller
278 So. 3d 948
9/20/19
The DCA dismissed an appeal of an order denying motion to enforce settlement agreement, stating it did not have jurisdiction over the non-final order. The court advised that because an order denying a motion to enforce a settlement agreement left open the possibility for additional claims to be filed in the case, the JCC's order was interlocutory and non-final. Alternatively, an order granting a motion to enforce settlement agreement would be a final order because it would preclude further claims from being filed in the particular case.

MENTAL OR NERVOUS INJURIES

Kneer v. Lincare/Travelers Insurance (also summarized under Temporary Disability Benefits)
267 So. 3d 1077
4/3/19
The Claimant challenged the constitutionality of §440.093(3), arguing the six-month limitation on temporary partial disability benefits for mental injuries once physical MMI is reached violates his access to courts, due process and equal protection. The Claimant sustained a back injury, and was placed at MMI with a permanent impairment rating and physical restrictions. Approximately 18 months later, he sought psychological treatment for depression due to the back injury. The E/C authorized treatment, and the Claimant then filed a Petition seeking TPD benefits. The E/C denied same, pursuant to §440.093(3), and the JCC agreed, denying entitlement to TPD benefits. The DCA affirmed the denial of TPD benefits stating §440.093(3) creates no constitutional issue. Per the DCA, the Claimant missed his "window" of time to receive TPD benefits for a psychiatric injury. Furthermore, the Claimant presented no evidence of work restrictions related to his psychiatric injury.

MISREPRESENTATION

Hernandez v. Food Market Corp./Amtrust/Associated Industries (also summarized under Constitutionality)
282 So. 3d 1005
10/30/19
The JCC denied entitlement to workers' compensation benefits on the basis the Claimant fraudulently provided an invalid social security number. The DCA affirmed the finding, stating that the Claimant provided the invalid social security number in order to obtain medical care for her work accident, as she admitted to same. The DCA rejected the Claimant's argument that §440.105(4) was unconstitutional as applied to the Claimant because it is preempted by the Immigration Reform and Control Act of 1986, as the ruling "implicates and touches upon her immigration status." The DCA found that no provision of the Immigration Act was applicable to this case or the Claimant's argument.

PERMANENT DISABILITY BENEFITS

Crispin v. Orlando Rehabilitation Group/Gallagher Bassett
283 So. 3d 339
11/20/19
The Claimant was 73 years old when accepted as PTD. The E/C paid her five (5) years of PTD benefits, per §440.15(1)(b). The Claimant later argued that during the 5 years of receiving PTD benefits, she was off MMI for a period of time, and therefore, entitled to additional PTD benefits. The DCA determined that the 5 year provision in the statute should be read as a "calendar period," rather than a "bank" of benefits. As Claimant was paid her 5 calendar years, no additional PTD benefits are owed.

PROCEDURE

Randstad North America/ESIS v. Barr
267 So. 3d 564
4/3/19
The E/C's Petition for Writ of Certiorari seeking to quash part of an order appointing an EMA was denied, as the E/C failed to establish the required irreparable harm. The E/C argued that they were prejudiced by the JCC allowing medical records from a non-authorized physician to be provided to the EMA. The DCA found that the E/C's argument of irreparable harm was speculation.

Godwin v. Hillsborough County School Board/Broadspire
277 So. 3d 141
8/29/19
The DCA affirmed the JCC's denial of compensability with no discussion. The Order addressed the second issue only, which was the Claimant's argument that the JCC erred when he conferred with the EMA without counsel present and not on the record. The facts indicated that following receipt of the EMA report, the JCC spoke with the EMA about a test that was recommended. Following the discussion, the JCC ordered a status conference, explained the discussion with the EMA, and instructed the Claimant to undergo the recommended test. The Claimant never raised an objection or questioned the JCC's discussion with the EMA, until the appeal was filed. The DCA declined to agree with the Claimant's argument that they had no relief other than to appeal the claim. The DCA referenced Rules 60Q-6.126(1), §440.422, and the Code of Judicial Conduct, stating that the Claimant could have raised a motion to disqualify the JCC.

REMEDIAL TREATMENT

Meehan v. Orange County Data & Appraisals/Johns Eastern
272 So. 3d 458
3/20/19
Following a work-related exposure and related illness in 1997, the parties entered into a stipulation where the E/C accepted compensability of the "building related illness associated with indoor air quality problems." In 2015, the E/C denied further care based on a peer review report finding the work exposure was no longer the major contributing cause of the need for treatment. The Claimant sought continued compensability and medical care, and the JCC denied the claims. The DCA reversed and remanded finding that because compensability of the " building related illness" was established per the 1997 stipulation, the E/C had the burden of establishing a break in the chain of causation or evidence to support such break. In reviewing the evidence, the DCA found that the E/C failed to meet this burden because the competent substantial evidence did not establish the major contributing cause of the need for treatment of the "building related illness" was no longer the work accident.

De La Rosa v. Cheney Brothers, Inc./Clarendon National
267 So. 3d 453
4/9/19
The JCC denied the Claimant's claim for authorization of a physician to provide treatment for the 2002 neck injury, finding the major contributing cause was no longer the accident, but the Claimant's degenerative condition. The DCA affirmed the ruling with no discussion of the issues.

Krysiak v. City of Kissimmee, TOHO Water Authority/PGCS (also summarized under Temporary Disability Benefits)
45 Fla. L. Weekly D354b
2/13/20
The Claimant appealed the JCC's finding that the Claimant was not entitled to make his own selection of a one-time change physician, and that TPD benefits are not due or owing. On the first issue, the JCC found that the E/C did not respond timely to the one-time change request. Nevertheless, they authorized a physician, Dr. Reuss, and scheduled an appointment. The Claimant objected to Dr. Reuss, and requested Dr. Winters be authorized. The Claimant then attended at least two appointments with Dr. Reuss. The JCC found the Claimant acquiesced to the E/C's choice of physician, and the DCA agreed. The DCA noted that if the Claimant did not want to agree to Dr. Reuss, he should have notified the E/C that he was attending the appointment "under protest." Since this did not occur, he waived the right to select his one-time change physician.

Following the accident, and his release to return to work, the Claimant was terminated by the Employer for violation of the substance abuse policy, after failing a drug test. The Claimant had previously violated the policy, and was terminated for this second offense. The JCC found that the Claimant's intentional violation of the policy rose to the level of misconduct, and TPD benefits were denied. On appeal, the Claimant argued that there was no competent substantial evidence to support the Claimant was under the influence of a substance while working. The only evidence to support these assertions was testimony of someone who had no interaction with the Claimant on the day of his termination. No test results were submitted, and no one with personal knowledge of the incident testified. The DCA reversed the JCC's finding of misconduct, as there was no admissible evidence to support the denial of TPD benefits based on misconduct.

SANCTIONS

Phillips v. Leon County Public Works/PGCS/Cruickshank
277 So. 3d 1076
7/9/19
The JCC denied the Claimant's Motion for Sanctions, which alleged E/C counsel raised an improper and unsupported discovery objection in a motion for protective order. The DCA discussed the interplay between Section §440.32 and Rule 60Q-6.125, both governing sanctions, and the "safe harbor" provision contained in the rule, but not in the statute. The DCA noted the conflict between the statute and the rule, and found that the sanction in Section §440.32(3) was a stand-alone provision, with no safe harbor language. As a result, 60Q-6.125 could not act to preclude the filing of a motion for sanctions. Section 440.32 states that sanctions are mandatory, and does not place any time limitation on the filing of a request for same. The case was remanded for further hearing on the Claimant's Motion for Sanctions.

STATUTE OF LIMITATIONS

Schiano v. City of Hollywood Police Dept./EMI
277 So. 3d 309
8/21/19
On 8/30/17, the Claimant's counsel faxed a request for a replacement neurologist and a one-time change in orthopedic physician to counsel for the E/C. The following day, the Claimant filed a Petition for Benefits seeking these benefits. On 9/1/17, counsel for the E/C emailed Claimant's counsel stating the name of an orthopedist, per the one-time change request. Then, on 9/6/17, a Response to the Petition for Benefits was filed stating that all benefits are denied, as the Statute of Limitations had run. At the hearing and on appeal, the Claimant conceded that the statute of limitations had run on his claim. The Claimant argued that the E/C's provision of the name of an orthopedist acted as an initial response to the Petition, and since the statute of limitations defense was not raised, the E/C is precluded from later raising it. The JCC and DCA disagreed with this argument. The E/C's email did not revive the claim.

The Claimant also argued that the E/C should be estopped from raising the statute defense because the Claimant relied on the 9/1/17 email from the E/C with the new physician's name. The DCA found that the record does not suggest any reliance, as the Claimant filed the Petition before the email was received.

Phillips v. Tyson Foods
284 So. 3d 1156
11/20/19
The Claimant was injured in 1976, and accepted PTD, administratively, in 1986. In 1987, the Division of Workers' Compensation began paying him PTD supplemental benefits, and at the same time, the E/C stopped paying PTD benefits. In 2018, the claimant filed a Petition for Benefits seeking medical and disability benefits from 1986 to the present and continuing. The JCC denied the Petition, finding the statute of limitations ran, even though the Division was paying supplemental benefits. The JCC opined that the statutory obligation to pay supplemental benefits was with the Division, not the Employer, as such, the statute was not tolled.

The DCA reversed finding that the payment of supplemental benefits by the Division constituted compensation under §440.19(1)(a), and the statute did not specify that the compensation must be paid by the employer or carrier. As a result, the statute of limitations had not run.

TEMPORARY DISABILITY BENEFITS

Kneer v. Lincare/Travelers (also summarized under Mental or Nervous Injuries)
267 So. 3d 1077
4/3/19
The Claimant challenged the constitutionality of §440.093(3), arguing the six-month limitation on temporary partial disability benefits for mental injuries once physical MMI is reached violates his access to courts, due process and equal protection. The Claimant sustained a back injury, and was placed at MMI with a permanent impairment rating and physical restrictions. Approximately 18 months later, he sought psychological treatment for depression due to the back injury. The E/C

authorized treatment, and the Claimant then filed a Petition seeking TPD benefits. The E/C denied same, pursuant to §440.093(3), and the JCC agreed, denying entitlement to TPD benefits. The DCA affirmed the denial of TPD benefits stating §440.093(3) creates no constitutional issue. Per the DCA, the Claimant missed his "window" of time to receive TPD benefits for a psychiatric injury. Furthermore, the Claimant presented no evidence of work restrictions related to his psychiatric injury.

Varricchio v. St. Lucie County Clerk of Courts/Ascension Insurance
271 So. 3d 1206
4/29/19
The DCA affirmed the JCC's denial of temporary indemnity benefits, finding the Claimant was at MMI for the claimed time period. The testimony of the authorized provider showed that the Claimant was at MMI two (2) weeks after undergoing a lumbar rhizotomy, even though the doctor did not see the Claimant on the date of MMI. According to the DCA, the only medical evidence before the JCC supported the JCC's finding of MMI and the date of MMI, as well as the fact that the post-MMI care was for palliative treatment only. Furthermore, the DCA found that the doctrine of equitable estoppel did not bar a retroactive assignment of MMI under the facts in this case because the Claimant failed to satisfy the required elements of estoppel.

A side issue argued in this case was that the Claimant's constitutional right to privacy was violated by the E/C attorney meeting with the treating physician. The DCA held that there is no legitimate expectation of privacy, citing their decision in *S&A Plumbing v. Kimes*, whereby it determined that §440.13(4)(c) does not violate Florida's constitutional right to privacy. The Claimant argued that *Kimes* is superseded by *Weaver v. Myers*, wherein the Supreme Court held that amendments to the medical malpractice law that allowed *ex parte* conferences with medical providers violated the right to privacy. The DCA found that *Kimes* is distinguishable because of the nature of the workers' compensation system, and the physician involved is hired to evaluate the causal connection between the work performed and the injury. The Claimant demonstrated no violation of her right to privacy that was real and immediate.

Addison Drywall/Bridgefield v. Torres/CRB Contractors/Normandy
270 So. 3d 440
5/13/19
The DCA affirmed the JCC's ruling on all counts, but addressed only one issue in this appeal and cross-appeal. The Claimant filed a cross-appeal for the JCC's failure to award TTD benefits beyond the date of the hearing. The DCA stated that there was no need for the JCC to add a definitive date for the end of TTD benefits, or other language stating benefits should continue for as long as proper. Due to the self-executing nature of the statute, the E/C is required to continue to provide TTD benefits for so long as the Claimant remains eligible for same.

Clarke v. Florida Dept. of Financial Svcs./Division of Risk Mgmt.
275 So. 3d 846
7/23/19
The DCA remanded the JCC's order denying TPD benefits, as well as penalties, interest, attorney's fees and costs. The E/C argued that the Claimant voluntarily limited his income, when he left employment with different employers following the work accident. They further argued that there was no causal connection between the workplace accident and the loss of income because the

Claimant left his last job for personal/family reasons. The DCA found that the JCC failed to make findings as to whether work remained available to the Claimant, and if there was a break in the causal connection between the injury and loss of earnings. As such, the issues were remanded to the JCC to determine if the Claimant refused suitable employment, and if he did, without just cause, TPD benefits shall be paid based on deemed earnings.

MJM Electric, Inc./OCIP/Sedgwick v. Spencer
275 So. 3d 1283
7/29/19
The DCA reversed and remanded the JCC's denial of the E/C's voluntary limitation of income defense because the Claimant had been terminated from his employment. The DCA reiterated the holdings in prior cases that the E/C is not required to repeatedly offer suitable employment. The termination of an employee will result in the rescission of the offer of suitable employment, but the claimant can still be found to have refused suitable work. In these cases, the JCC must following a three-part inquiry: 1) did the employer establish continued availability of suitable employment after termination; 2) did the injured employee continue to refuse suitable employment after termination; and 3) was the refusal justified? The DCA remanded the case for reconsideration of the voluntary limitation of income defense under this inquiry.

Publix Risk Management/Publix Super Markets, Inc. v. Carter
278 So. 3d 204
7/29/19
Less than a month before her work accident, the Claimant accepted a demotion in her position, and her hourly wage dropped. Additionally, her overtime-work opportunities were restricted. The Claimant continued working after her accident, but was earning less wages, again, due to her demotion and wage decrease. The Claimant filed a Petition for TPD benefits. The E/C argued that there was no causal connection between the workplace injury and the resulting inability to earn pre-injury wages. The reason for the inability to earn pre-injury wages was due to the Claimant's voluntary demotion and hourly wage decrease. The DCA agreed, finding that the Claimant did not show her loss of earning was caused by her disability. The JCC's award of TPD benefits was reversed.

Olvera v. Hernandez Construction of SW Florida, Inc./US Administrator Claims
283 So. 3d 447
11/15/19
The DCA reversed and remanded the JCC findings that the Claimant was at MMI, and not entitled to TPD benefits. The EMA gave conflicting opinions on the Claimant's MMI status. The JCC interpreted the testimony of the EMA physician to indicate that the Claimant was at MMI "unless or until" he undergoes surgery. The DCA found that this opinion was a hypothetical, speculative opinion from the EMA. They further stated that the EMA physician did testify that the Claimant was not at MMI because he required surgery. As this opinion was supported by evidence in the record, and not based on speculation, the Claimant is entitled to TPD benefits.

BENEFITS PAYABLE, OFFSETS

Presented by:

Jennifer T. Reimsnyder and Melissa A. Volk

THERE ARE NO HANDOUTS for the BENEFITS PAYABLE, OFFSETS PORTION of the WEBINAR