CASE LAW UPDATE
(5/8/21 – 4/28/22)

AVERAGE WEEKLY WAGE

Noa v. City of Aventura/Florida League of Cities
47 FLW D297c
1/26/22

The Claimant sought an adjustment to her average weekly wage (AWW) to include a pro rata share of her annual merit bonus. The bonus was paid in July 2020, *after* the accident in February 2020, but was for the period of July 2019 through July 2020. The JCC denied the adjustment, and the DCA reversed, finding that pursuant to 440.14(1)(a), the AWW includes "wages earned" during the 13 weeks before the accident. In some instances, this will include income paid/received after the date of accident, but earned in the 13 weeks prior to the accident. The DCA likened the situation to receipt of profits or commissions, which are usually paid well after they were earned.

COMPENSABILITY

Ranger Construction Industries, Inc./Charter Oak Fire Ins. Co./Travelers v. Brand
328 So. 3d 310
12/1/21

The E/C appealed the decision of the JCC that the Claimant was injured on 7/9/18 in a work accident. The JCC found evidence to support the finding of a work-related accident and injury, such as medical notes, a post-accident drug test, and the Claimant's report of an accident. The E/C relied on inconsistencies in the Claimant's testimony to argue an accident did not occur. The DCA affirmed the ruling of the JCC reminding the parties that this was a factual issue, and the DCA will not "retry" the claim. The standard of review was whether competent substantial evidence supports the decision of the JCC, and in this case, there was evidence to support the JCC's finding.

Silberberg v. Palm Beach County School Board/York Risk Services Group
47 FLW D461a
2/16/22

It was undisputed that the Claimant was injured during the course and scope of his employment, when he unexpectedly fell after going from sitting at his desk to standing. The JCC found the Claimant's fall did not arise from his employment, and denied compensability. In a lengthy opinion, the DCA affirmed the denial, and reviewed the case law surrounding the issue of causation. The DCA walked through the analysis of compensability, looking first to whether the injury arises out of the work performed in the course and scope of employment. Next, causation must be addressed, including an analysis of potential increased hazard, when a pre-existing or idiopathic condition is present. Finally, the work performed must be the major contributing cause of the injury. Using this analysis, the DCA found the Claimant's idiopathic fall did not arise from his employment, and the Claimant's employment was not the preponderant cause of the fall.

Soya v. Health First, Inc./CCMSI
47 FLW D489a
2/21/22

While walking in her place of employment, the Claimant fell. There was no evidence of any cause of the fall. The JCC denied compensability based on *Valcourt-Williams*, applying the increased hazard analysis. The DCA reversed the JCC, stating that the increased hazard analysis applies only where there is a contributing cause to the accident outside of employment. The DCA looked to the line of cases including *Caputo* and *Walker*, noting that where there is no other basis for the fall, as the Claimant is actively engaged in work activities, the causal relationship between employment and the accident is met.

In a lengthy concurring opinion, Justice Bilbrey wrote to "resolve" the confusion created by *Valcourt-Williams*. He specifically stated "workplace slip and falls, as well as other common workplace injuries, remain compensable… so long as the injury arises out of employment no matter if the Claimant is literally performing work at the time of the injury."

Aquino v. American Airlines/Sedgwick CMS
47 FLW D617c
3/9/22

The Claimant worked as a baggage handler for the Employer. After clocking out for the day and leaving the airport terminal, the Claimant was walking towards the parking-lot-shuttle bus stop, when he injured his calf muscle stepping off a curb. The Claimant reported the accident the following day, and presented to the on-site clinic for treatment. He was treated, and within 14 days, the E/C denied his claim in its entirety. Litigation ensued, and the JCC ruled in favor of the E/C. The Claimant appealed the JCC's decision, and argued that his claim should be allowed under 1) the going and coming statute, 2) premises rule, and/or 3) waiver. The DCA addressed each of these arguments.

With regard to the going and coming statute, the DCA found that the Claimant did not meet any of the exceptions to this rule, as it was clear he was not engaged in a special errand or mission for the Employer. Tying in the premises rule, the DCA found that the Claimant had left his workplace, and was making his way towards his vehicle in the employee parking lot. The area between the airport and the parking lot is public area, not owned or controlled by the Employer. As such, an argument that he was on the Employer's premises fails. Lastly, the E/C did not waive its right to deny compensability in allowing the Claimant to treat in the clinic, and then deny the claim. The claim was denied within 14 days of being reported and investigated.

Kelly Air Systems, LLC/AmTrust North America of Florida & Technology Ins. Co. v. Kohlun
47 FLW D668d
3/16/22

The Claimant was injured while driving his employer-provided vehicle, but after he had verbally clocked out from work with his supervisor. The JCC found the Claimant was a traveling employee under 440.092(4). The DCA looked to whether the vehicle was for the Claimant's personal use, and it was found the Claimant did have personal use, as he could use the vehicle to travel to and

from work, and perform some personal tasks, if needed. The DCA then looked to whether the going and coming rule applies, and it was determined that the Claimant was not in a "travel status" at the time of the accident. He likewise was not a traveling employee, because he would not qualify for the travel status because he was not being paid or compensated, nor was he performing work or services of employment while traveling home. The DCA reversed the award of compensability.

DSK Group, Inc./Zurich American Ins. Co. v. Hernandez
1D19-2632
4/27/22

The Claimant was involved in a motor vehicle accident while in route from his home to a work site. He was in his personal vehicle, and he had not clocked in for work via an application on his mobile phone. The JCC determined the Claimant was a field employee, who commuted to and from his home to a job "in the field," and he was within the course and scope of his employment once he started his vehicle to proceed to the work site. The "going and coming" rule did not apply in this case because of the nature of the Claimant's daily travels because he commuted from work site to work site each day, rarely going to the employer's place of business.

The DCA reversed the finding of the JCC, and deemed the accident was not compensable. The key issue was whether the "going and coming" exclusion prevents this accident from being compensable. They noted the claimant was an hourly employee, who traveled from work site to work site throughout his day with supplies, in his personal vehicle, and was not reimbursed for his gas, but given a gas card with a monthly cap. He clocked in once at the job site, would clock in and out for breaks, and clocked out at the end of the day before driving home. The DCA found the going and coming exception did not apply because the Claimant's work did not start until he arrived at the job site. The Claimant argued that the JCC was correct in finding a compensable accident, but the traveling employee analysis should have been used to support compensability. The DCA addressed this exception, stating it does not apply while in route to a job site, unless the claimant is in a "compensation status" at the time of the accident. The DCA looked to three cases discussing same, including one involving a salaried lawyer who began work at his home in the morning, then drove from his home to a deposition location. He was in a compensation status.

The DCA concluded the Claimant in this claim was a typical community employee, or an "ordinary workman going to work." As a result, the claim is not compensable.

COVERAGE

Cabrera v. Kablelink Communications, LLC/Sedgwick CMS and New Hampshire Ins. Co.
328 So. 3d 1011
10/6/21

The Claimant worked as an independent contractor for Kablelink, and was injured while installing cable. The Claimant sought coverage under workers' compensation arguing that he qualifies pursuant to Florida Statutes, Section 440.02(15)(c)(2), which states that an injured worker working in the construction industry is considered an employee of the company if they are performing work in the industry, which is defined as "for-profit activities involving a.…substantial

improvement in the…use of any structure." The Claimant argued that by laying cable, he was performing substantial improvements on the use of a structure.

The DCA held that the determination of whether an employee is in the construction industry is based on job-specific factors. In this case, the evidence did not show whether the Claimant was working or engaged in the construction industry, as such, the DCA could not determine the Claimant's work met the definition in the statute. There was no basis to reverse the decision of the JCC, who found the Claimant was an independent contractor, not an employee in the construction industry.

HEART/HYPERTENSION INJURIES

Holcombe v. City of Naples/Johns Eastern Co., Inc.
328 So. 3d 311
9/15/21

The JCC denied the Claimant's claim for compensability of his essential hypertension under Section 112.18, finding that the pre-employment physical (PEP) revealed evidence of secondary hypertension that pre-dated the Claimant's employment. As such, the Claimant could not rely on the presumption. The DCA affirmed, finding that even though the PEP showed secondary hypertension, and the Claimant seeks compensability of essential hypertension; per the statute, hypertension is hypertension, and there is no distinguishing between the two in the statute. Furthermore, the Claimant stipulated that the PEP showed secondary hypertension, which further supports the denial. The Claimant's argument that a diagnosis of essential hypertension must have been found on the PEP is incorrect.

Lakin v. Hernando County Sheriff's Office/Florida Sheriffs Risk Mgmt Fund
47 FLW D662f
3/16/22

The E/C denied the Claimant's claim for compensability of his hypertension, under Section 112.18. The E/C argued that there was evidence of hypertension on the Claimant's pre-employment physical (PEP); as such, he did not meet the requirements of the presumption under 112.18(1)(a). The Claimant argued that while his blood pressure was elevated on the pre-employment physical, the Claimant was never diagnosed with hypertension. An EMA was appointed, and testified the PEP did reveal evidence of hypertension. The JCC ruled in favor of the E/C, and the DCA affirmed the decision. The DCA pointed out that Section 112.18 indicates that only evidence of hypertension is needed on the pre-employment physical to negate the statutory presumption. A diagnosis is not required.

JURISDICTION

Tejeda v. City of Hialeah/Sedgwick CMS
47 FLW D80b
12/29/21

The Claimant was involved in a work-related motor vehicle accident. He underwent multiple procedures with Dr. Brusovanik, until an alternate physician, Dr. Vanni, was provided. At that time, in 2017, the parties entered into a stipulation whereby if Dr. Vanni recommended additional surgical intervention, the E/C will authorize same, and the Claimant will determine if he wanted to proceed. In 2020, the Claimant, underwent surgery with Dr. Brusovanik. At hearing, the JCC opined the surgery was medically necessary, but due to the 2017 stipulation, reimbursement of surgery was denied. The Claimant appealed the JCC's decision, and argued that the JCC did not have jurisdiction to rule on reimbursement of the surgery because it was a reimbursement dispute subject to the jurisdiction of the Department of Financial Services (DFS). Although, the Claimant admitted that he did in fact request reimbursement in his Petition for Benefits.

A reimbursement dispute is denied as "any disagreement between a health care provider or health care facility and carrier concerning payment of medical treatment." 440.13(1)(q). In this case, the dispute for reimbursement was between the Claimant and the E/C, as such, it did not meet the statutory definition, and the JCC had jurisdiction to adjudicate the issue. The findings of the JCC, denying all costs related to the surgery, were affirmed.

Zurich American Insurance Company v. Samson & DSK Group Inc. II
47 FLW D159b
1/12/22

The JCC ordered the E/C to provide medical treatment by specific physician. The medical care was not provided, and the Claimant filed a Petition for Rule Nisi in circuit court to enforce the JCC's Order. The Circuit Court entered an order requiring the E/C to provide medical care, and awarded a fine of $15,000.00 plus attorney's fees and costs to the Claimant. The E/C appealed this fine, arguing the circuit court did not have jurisdiction to fine the E/C. §440.24(1) gives the circuit court jurisdiction to issue an order to enforce the JCC's order. If it is not possible to provide the denied benefits, the court may award a monetary remedy equivalent to the lost benefit, in order to make the person whole. In this case, there was no evidence of damage incurred by the Claimant, and the fine was overturned, as it was not supported.

MENTAL INJURIES

Jones v. Columbia Correctional Inst./Division of Risk Management (also summarized under Temporary Disability Benefits)
324 So. 3d 44
7/29/21

The Claimant sustained physical and mental injuries as a result of the work accident on January 7, 2019. She reached physical MMI two weeks after the accident, and received a zero (0%) percent impairment rating. As a result, no impairment benefits were paid. She also received compensable psychological care, and was at a no-work status through "psychological MMI" on November 11, 2019. The E/C stopped paying indemnity benefits as of that date. The Claimant filed a claim for temporary indemnity benefits for the period after July 25, 2019 and continuing. The JCC, relying on the six-month limit on temporary benefits from physical MMI to psychological MMI, denied the claim for additional temporary indemnity benefits.

The Claimant appealed, and the DCA reversed the JCC's decision stating that it was error to find that the six-month limit in 440.093(3) applied in this case since the Claimant had not received, and was not receiving any permanent impairment benefits. As a result, this provision, and the statutory cap in 440.093(3) does not apply to the Claimant.

ONE-TIME CHANGE

St. Lucie Public Schools/Relation Ins. Svcs. of FL v. Alexander
322 So. 3d 701
6/16/21

The DCA affirmed the JCC's ruling that the Claimant had the right to select her one-time change physician, after the unreasonable delay in setting an appointment with the E/C selection of a one-time change physician. In this case, the E/C timely provided the name of a one-time change doctor, but did not engage in any follow-up or scheduling with that physician. After reviewing the medical records, the selected physician declined care. The E/C located another physician. The DCA found the time period to be an unreasonable delay in setting an appointment with a new physician, and in accordance with the decision in *City of Bartow v. Flores,* the Claimant is allowed to select her physician.

Harman v. Merchant Transport/CCMSI
326 So. 3d 100
9/15/21

Upon receipt of a one-time change request in physician, the E/C timely authorized a physician; however, the Claimant argued the new physician was unreasonable, as he was located too far from the Claimant's home. The E/C then authorized a closer physician, but the Claimant continued to argue it was not reasonable. The JCC found that the authorized physician(s) were not reasonable, given the distance from the Claimant's home to the physician office, and ordered the E/C to select a new physician. The Claimant appealed, arguing that the E/C has waived its right to select a new physician because they did not timely authorize a physician. The DCA found that this argument was not preserved for appeal because it was made clear that the issue for the hearing before the JCC was solely the reasonableness of the selected physician. Further, it was undisputed the E/C timely authorized an alternate physician.

Palm Beach County School District/Sedgwick CMS v. Smith
47 FLW D382a
2/9/22

The Claimant sought a one-time change in physician, which was timely granted by the E/C. Upon learning of the form fee agreement reached between the new physician and the E/C, the Claimant objected to the provider, and requested a new physician. The JCC agreed with the Claimant, and ordered another physician be provided. The E/C appealed, and the DCA reversed the decision of the JCC stating that the statute does not allow a JCC to disqualify physicians based on a claimant's complaint about the fee reimbursement arrangement between the physician and the E/C. The JCC was outside the scope of her jurisdiction, as it is well established that reimbursement disputes fall under the jurisdiction of the Department of Financial Services (DFS). Further, the statute allows

for physicians to require higher than fee schedule arrangements, so long as the E/C agrees with the physician's higher fee, the Claimant has no recourse.

In passing, the DCA addressed the *City of Riviera Beach v. Napier* case, where they recognized a JCC could lawfully discount the testimony of an IME physician who charged more than the law allowed, but this only goes to admissibility and credibility of evidence.

PROCEDURE

Estate of R. McKenzie v. Hi Rise Crane, Inc./Bridgefield Employers Ins. Co.
326 So. 2d 1161
8/19/21

The Petition for Benefits at issue was filed by the personal representative on behalf of the deceased Claimant's estate, even though the representative had yet to be appointed same in Circuit Court. Additionally, the fraud acknowledgement attached to the Petition was signed by the deceased Claimant, prior to his death, not the personal representative. The E/C moved to dismiss the Petition, and the JCC agreed with their arguments.

The DCA reversed the JCC's dismissal the Petition for Benefits at issue on two separate grounds. First, the DCA found that the statutory acknowledgement does not provide for a dismissal, but only a suspension of benefits, per 440.105(7). Further, 440.192(2)(a)-(i) does not require a signed acknowledgement, as such this is not a basis for a dismissal. Next, the DCA found that even though the personal representative had not been appointed by Circuit Court at the time the Petition was filed, based on the relation back doctrine, the representative's powers date back in time, and in this case, to the Petition that was filed. While the personal representative prematurely identified herself as same, it was not inappropriate, and should not lead to the dismissal of the claim. The DCA remanded the case for further proceedings.

Shelton v. Pasco County Board of County Commissioners/Commercial Risk Management, Inc.
328 So. 3d 12
10/6/21

In this case involving a presumption claim, conflicts arose in the medical evidence regarding the correct permanent impairment rating, and the JCC appointed an EMA. The EMA's opinion was subsequently stricken from the record based on the E/C's *Daubert* objection. The JCC ruled in favor of the E/C, finding no impairment rating, and the Claimant appealed the decision. The DCA reversed and remanded the case, stating that an EMA is appointed to resolve conflicts in medical evidence. The striking of an EMA's opinion does not resolve these conflicts, therefore, the JCC should have appointed a successor EMA.

In another point addressed on appeal, the DCA found that the parties had stipulated that the Claimant's left ventricular hypertrophy (LVH) condition was compensable. In the Order, the JCC ruled that the condition was not compensable. The DCA stated that a joint stipulation by the parties is binding on the JCC, and the JCC erred in making this finding on compensability. Again, the case was reversed and remanded for further proceedings.

REMEDIAL TREATMENT

Jones v. Grace Healthcare
320 So. 3d 191
6/30/21

The Claimant's authorized physician referred him to a physician qualified to provide a certification for medical marijuana, and the Employer denied this referral. In the Final Compensation Order, the JCC acknowledged that the medical evidence showed medical marijuana was a medically necessary benefit in the case. Nevertheless, he affirmed the denial of the referral, as state law precludes marijuana from being reimbursable under Chapter 440. The JCC also determined that the statute prohibited reimbursement for initial and subsequent evaluations to obtain certification for medical marijuana. Finally, there is potential federal criminal liability should an employer pay for or facilitate a worker's use of marijuana.

The DCA affirmed the JCC's position, but with different reasoning, stating that an evaluation with a physician to provide certification for access to medical marijuana could not be medically necessary as a matter of law because marijuana is not reimbursable or medically necessary. Since the referral for the evaluation is tied to the potential receipt and use of marijuana, that evaluation cannot be deemed medically necessary. A claimant cannot force an E/C to pay for an evaluation by a physician when the purpose of that evaluation is to obtain treatment utilizing marijuana. As a result, the denial of the evaluation is appropriate.

ABM Industries, Inc./ACE/ESIS v. Valencia
327 So. 3d 469
9/29/21

The Claimant requested a one-time change in physician, and faxed the written request to the adjuster. The adjuster responded to the one-time change request more than 5 days after it was made. The Claimant then sought medical care with the physician she selected, Dr. Lazzarin, and the E/C denied he was an authorized physician. The E/C argued that they timely responded to the request because it was faxed to the adjuster, not sent to E/C's counsel, as E/C's counsel had previously directed the Claimant and her attorney. The JCC denied the E/C's argument, and found Dr. Lazzarin was authorized. The E/C argued in the alternative that if Dr. Lazzarin was found to be an authorized provider, there was a conflict between the first physician, Dr. Rosabel, and Dr. Lazzarin. The JCC rejected this argument as well, and the case was appealed.

The DCA confirmed that Dr. Lazzarin was the appropriate one-time change physician, given the E/C's untimely response to the request. However, they reversed the JCC's findings, stating that an EMA was required in the claim because a conflict did exist between the opinions of Dr. Lazzarin and Dr. Rosabel. Once the JCC found Dr. Lazzarin was an authorized provider, the JCC was required to appoint an EMA to resolve the conflict. The DCA instructed the JCC to appoint an EMA for further proceedings.

Arrez Brothers Carpentry, LLC/Norguard Ins. Co. v. Alvarado Ortiz
47 FLW D511a
2/23/22

The E/C appealed an order of the JCC granting many requested benefits. The DCA reversed the award of treatment provided by a hospital and an accompanying radiology bill from the hospital billing service. The DCA found that nothing in the record supported a finding that the hospital and radiology services were a result of an emergency condition, as outlined in *Cespedes v. Yellow Transp., Inc./Gallagher Bassett*. Given the lack of evidence to support an emergency, the award of this medical care was reversed.

STATUTE OF LIMITATIONS

Hospital East, LLC d/b/a Kindred Hospital-North Florida/Sedgwick CMS v. Hampton
46 FLW D2433a
11/10/21

The JCC ruled that the Statute of Limitations had not tolled in the claim, as there was a pending reservation on the amount of attorney's fees and costs owed to the Claimant's Attorney from a prior Final Compensation Order. The JCC and Claimant relied on *Black v. Tomoka State Park* and *Longley v. Miami-Dade County School Board*, which indicate that Statute of Limitations is tolled when claims from a Petition remain pending, including costs and fee claims. The DCA reversed the decision of the JCC, stating the reservation over the amount of fees and costs does not toll the statute of limitations because "amount and entitlement are distinct for fees and costs." The situation of a reservation on amount versus a reservation on entitlement are distinguishable because the former will not toll the statute, while the latter will, but is also subject to a dismissal based on lack of prosecution.

TEMPORARY DISABILITY BENEFITS

N. Hannoush Jewelers, Inc./Massachusetts Bay Ins./Hanover Ins. Group v. Bly
322 So. 3d 702
6/30/21

In this two-issue appeal, the DCA affirmed the JCC's Order, but addressed only the JCC's award of TPD benefits, "subject to the payment of unemployment benefits." The DCA found the award of TPD benefits to be appropriate, as well as the JCC' s allowance for the E/C to reduce the amount of TPD benefits paid by the unemployment benefits the claimant received during the time period. The Claimant unsuccessfully argued that the E/C did not properly reserve their right to "offset" the unemployment compensation from the TPD benefits. The DCA stated that receipt of unemployment benefits does not result in an offset, as an offset is a reduction in the amount of benefits the E/C must pay. Unemployment benefits do not reduce entitlement to TPD benefits; instead, TPD benefits are supplemental to any unemployment compensation received by the Claimant. Given this, the E/C did not waive its ability to account for the Claimant's receipt of unemployment compensation when addressing the amount of TPD benefits owed.

Jones v. Columbia Correctional Inst./Division of Risk Management (also summarized under Mental Injuries)
324 So. 3d 44
7/29/21

The Claimant sustained physical and mental injuries as a result of the work accident on January 7, 2019. She reached physical MMI two weeks after the accident, and received a zero (0%) percent impairment rating. As a result, no impairment benefits were paid. She also received compensable psychological care, and was at a no-work status through "psychological MMI" on November 11, 2019. The E/C stopped paying indemnity benefits as of that date. The Claimant filed a claim for temporary indemnity benefits for the period after July 25, 2019 and continuing. The JCC, relying on the six-month limit on temporary benefits from physical MMI to psychological MMI, denied the claim for additional temporary indemnity benefits.

The Claimant appealed, and the DCA reversed the JCC's decision stating that it was error to find that the six-month limit in 440.093(3) applied in this case since the Claimant had not received, and was not receiving any permanent impairment benefits. As a result, this provision, and the statutory cap in 440.093(3) does not apply to the Claimant.

Doss v. UPS/Liberty Mutual
46 FLW D2431a
11/10/21

The Claimant injured his right knee in November 1997. He treated for his injury, and returned to work. In 2016, he underwent knee surgery, and was off work for a period of time before being placed at MMI and full duty. The Claimant sought payment of TTD benefits while he was out of work. The E/C denied the benefits on the basis that §440.15(3)(c), F.S. (1997), as enacted at the time of the Claimant's accident, terminated temporary benefits 401 weeks after the accident date. The JCC agreed with the E/C's argument. The DCA affirmed the ruling of the JCC, addressing the constitutionality of 440.15(3)(c), and distinguishing the case from *Westphal*, as the Claimant never asserted loss of wages due to the accident, as was the case in *Westphal*. A subsequent Motion for Rehearing and/or Rehearing *en banc* was denied, as was a Petition to the Florida Supreme Court for Certiorari review.

WORKERS' COMPENSATION IMMUNITY

Tampa Electric Co. v. Gasner & Carter, et. al.
327 So. 3d 1281
11/10/21

The DCA determined the Employer of Gasner and Carter, Zachry Industrial, was a subcontractor of Tampa Electric, and the exclusive remedy provisions of the workers' compensation statute preclude civil causes of action. Zachry Industrial provided workers' compensation benefits to the injured workers. Tampa Electric argued that it has a contractual obligation to customers to provide electricity, and this obligation arose from a tariff, which is reviewed and approved by the Public Service Commission. Once approved, the tariff is a contract between the utility company and its customers with the force and effect of law. Tampa Electric's tariff was in place at the time the

Zachry employees were injured. Because, at that time, there was a contractor/subcontractor relationship existing, Tampa Electric's status as a statutory employer would not be defeated by the existence of other regulations and contracts.