McCONNAUGHHAY · COONROD
POPE · WEAVER · STERN P.A.
1709 Hermitage Boulevard, Suite 200 ▪ Tallahassee ▪ FL ▪ 32308
jnmcconnaughhay@mcconnaughhay.com ▪ T (850) 222-8121 ▪ F (850) 222-4359 ▪ www.mcconnaughhay.com

November 15, 2022

What's New In Our Industry
Florida

The following is an update on recent activities in Florida related to Workers' Compensation. Bills related to Workers Compensation will be summarized as filed.

Legislative

The following dates have been established for the 2023 Legislative Session in Florida:

November 22, 2022	Organization Session (Joint Media Advisory)
December 12, 2022	Interim Committee Week #1
January 3-6, 2023	Interim Committee Week #2
January 17-20, 2023	Interim Committee Week #3
January 23-27, 2023	Interim Committee Week #4
February 6-10, 2023	Interim Committee Week #5
February 13-17, 2023	Interim Committee Week #6
February 20-24, 2023	Interim Committee Week #7
March 7, 2023	Regular Session convenes 12:00 noon deadline for filing bills for introduction
April 22, 2023	All bills are immediately certified Motion to reconsider made and considered the same day
April 25, 2023	50th day rule (Senate) – last day for regularly scheduled committee meetings
May 5, 2023	60th day – last day of Regular Session

WORKERS' COMPENSATION

Administrative

Florida Division of Workers' Compensation Holds Practitioner Dispensing Workshop, More to Follow

The Division of Workers' Compensation held a rule-making workshop relating to practitioner dispensing on November 1, 2022 at its offices in Tallahassee. Nearly 100 workers' compensation industry representatives attended in person; many of them presented live comments in an effort to support their various clientele.

The Division described the meeting as a workshop designed to allow all perspectives, so that they can proceed with rulemaking regarding authorization and regulation of various aspects of physicians and others who dispense medications, in place of a pharmacy. The Division's starting perspective is that dispensing of medications requires authorization, but that carriers can't refuse to authorize physicians to replace the pharmacy for medication dispensing.

Physicians and provider groups support the ease of access to medication and "efficiency" of physician dispensing. They opposed prior authorization requirements by carriers, likening them to delays in treatment for serious injuries. One likely result from that discussion is that the Division will increase its monitoring and audit of carriers who fail to respond to authorization requests. However, Employers, Carriers, Pharmacies, PBMs and large TPAs responded, almost with one voice, that the Division does not have the legal authority to mandate authorization of physician dispensing, as the Law presumes that a pharmacy will be used. The claimant controls his choice of pharmacy, but not whether he can go somewhere besides a pharmacy to get drugs.
Additionally, industry representatives discussed the harm to patient safety caused by avoiding the pharmacy review of medications. Some representatives presented examples of patients who were harmed, or even died, as a result of lack of pharmacy review of medications.

Industry also presented testimony referencing recent Workers' Compensation Research Institute (WCRI) Data Reports demonstrating that the perverse incentives of the business model known as practitioner dispensing have led physicians to change what they prescribe, presumably to the detriment of injured workers. The physician dispensing business model has also led to a rapid acceleration of Drug Costs per Claim in Florida. As a result, Florida now has the highest drug costs per claim in the country, which are as much as ten times what other states spend per claim. According to WCRI, this is primarily because of practitioner dispensing.

Stay tuned for more rule-making on practitioner dispensing. Please contact Ralph Douglas in our Tallahassee office if you have any questions.

It should be noted that the Department withdrew a previously issued Advisory Opinion that Industry cannot deny authorization to dispense medication simply because the dispensing entity is not a "pharmacy" as traditionally defined, even though by law the practitioner is allowed to dispense medications.

Judicial

The following summaries of cases decided by the First DCA related to Workers' Compensation issues and are provided for review.

Sandifort v. Akers Custom Homes, Inc.
47 FLW D1508
7/13/2022
The question in this case was whether the reliance of a claimant and her other children on the deceased minor child's supplemental Social Security income meets this "dependency" requirement in establishing entitlement to death benefits resulting from the death of the employee. The deceased's mother had relied upon SSI benefits payable because of the deceased's permanent learning disability. Court determined that the payment of the Social Security disability benefits that the mother had relied upon because of the deceased son's disability was not of the type of compensation resulting from a compensable injury that created dependency on the deceased. Benefits payable under Section 440.16(1)(b), Florida Statutes, provides for entitlement on account of dependency upon the deceased and the amount of compensation is calculated as a percentage of the average weekly wage. In other words, dependency must be established based upon the decedent's wage earning capacity. SSI benefits received from the Federal government are welfare payments paid on the deceased's behalf to assist in his support not in support of the claimed beneficiary for death benefits.

Baptiste v. Sunrise Community
47 FLW D1560
7/20/2022
Employer/carrier prevailed in claim filed by claimant. Costs awarded against claimant which included one-half of a cancellation fee for the claimant's failure to appear at a scheduled Independent Medical Examination scheduled by the employer/carrier. The claimant actually showed up at the IME but brought with her, without prior notice, a videographer to record the examination, which she had the right to do. The IME doctor refused to examine the claimant because of the presence of the videographer and accordingly, the examination was cancelled and a non-appearance fee was charged. JCC determined that the claimant appearing at the IME with a videographer without notice constituted a constructive failure to appear for the IME and therefore costs were awarded for one-half of a "no show" fee under Section 440.34(3), Florida Statutes. On appeal, case reversed in regards to the order requiring the payment of one-half of the no show fee.

A JCC should consider the statewide uniform guidelines for taxation of costs in civil actions in determining the taxation of costs in a particular proceeding. But the guidelines are advisory and the JCC has broad discretion in determining the taxation of costs in a proceeding. No show fees can be deemed a part of costs but if a claimant can show good cause for failure to attend an IME, no sanctions are awarded. The JCC must also ensure that the cancellation fee was properly charged and the amount was appropriate under the circumstances.

No show fees under Section 440.34(3), F.S., as a prevailing party cost. There is no provision in this statutory section for a constructive failure to appear for an IME and accordingly, assessing costs for a constructive failure to appear is not provided for under the statute. Under Florida Rule of Civil Procedure 1.360(a)(1)(A), there is a provision that if an examination is to be recorded or observed by

others, advanced notice of such must be given. There is no corollary for this under the Workers' Compensation Rules or statutes. Court determined that it was error to award costs since the claimant actually did show up for the IME.

Girardin v. An Ft. Myers Imports LLC d/b/a Auto Nation Toyota Ft. Myers
47 FLW D1700
8/10/2022
The employer/carrier denied attendant care because the claimant did not provide the employer/carrier with a sufficiently written prescription pursuant to Section 440.13(2)(b)1, Florida Statutes. The employer/carrier had maintained that the JCC could not award attendant care because they had not yet received a written prescription that satisfied the statute's specificity requirements citing the the case of *James W. Windham Builders, Inc. v. Overloop*, 951 So.2d 40(Fla. 1st DCA 2007). The failure to provide a specific provision for attendant care and denial of such attendant care does not relieve the employer/carrier from its obligation to monitor a claimant's injuries and provide needed benefits or excuse any attempt to hide behind a wall of willful ignorance in providing attendant care simply because the prescription did not specifically say the type of care needed. The court determined that the employer/carrier in this instance was using the statute requiring specificity did not absolve the employer/carrier from their duty to monitor the claimant's injuries and provide needed benefits or excuse an attempt to hide behind a wall of willful ignorance in providing benefits.

Tiburcio v. Hillsborough County Sheriff's Office
47 FLW D1750
8/17/2022
Claim filed for benefits based on claimant's heart disease pursuant to the terms of Section 112.18(1)(a), Florida Statutes, known as the Heart-Lung Statute. Although the JCC found that the claimant qualified for the statutory presumption that his heart disease was accidental and suffered in the line of duty, the judge denied benefits finding that the claimant departed in a material fashion from a medically prescribed course of treatment, giving rise to the application of the so called "reverse presumption" under Section 112.18(b)1a, Florida Statutes. Order denying benefits reversed on appeal.

The presumption of compensability based on a claim for heart and hypertension injury is precluded if the police officer has materially departed from a prescribed course of treatment set by his personal physician and such departure is demonstrated to have resulted in a significant aggravation of the heart disease resulting in a disability or increasing the disability or the need for medical treatment. "Prescribed course of treatment" means prescribed medical courses of action and prescribed medications for the specific disease or diseases claimed and as documented in the prescribing physician's medical records. In order for the doctrine of the reverse presumption provision to apply, the prescribed medical courses of action and prescribed medicines must be for the specific disease for which benefits are claimed. The employer/carrier can only benefit from the reverse presumption if they can show that the claimant's departure from the prescribed course of treatment resulted in a "significant aggravation" of the condition causing disability, an increase in disability, or an increase in the need for medical treatment. This aggravation requirement pre-supposes that the claimed condition was previously diagnosed.

It is not enough for the employer/carrier to rely on the failure to follow a course of treatment and medication prescribed for his hypertension, high cholesterol, obesity, and other conditions that may

have been risk factors for the development of heart disease. However, there was no diagnosis of heart disease for which treatment had been recommended which had not been treated as recommended.

Bonhomme v. Staff Team Hotels Corporation
47 FLW 2073
10/12/2022
The question in this case is whether there was an excuse for the claimant to notify the employer/carrier that an accident had occurred in the workplace pursuant to Section 440.185(1), Florida Statutes. In this case, the claimant alleged a May 22, 2019 injury but did not notify the employer of such an accident until well after the 30-day time period for reporting such as required in Section 440.185, Florida Statutes. In accordance with this statutory provision, failure to timely advise the employer of an accident within 30 days of the event precludes entitlement to workers' compensation benefits.

Exceptions to this rule include those situations where the employer had actual knowledge of the injury; the claimant could not discern that the work caused his injury without a medical opinion; or "exceptional circumstances, outside the scope of these circumstances justifying such failure." A diagnosis of the condition is not necessary to start the clock under the statute unless the claimant either was unaware at the time of the accident caused him some bodily harm or he was not aware that the incident itself caused the debilitating symptoms.

Medical records reflected that following the May 22 alleged incident, the claimant made numerous visits to seek medical care but never mentioned an alleged neck and back injury that the claimant was claiming related to the incident of May 22. The court referenced the Supreme Court decision of *Escarra v. Winn Dixie Stores*, 131 So. 2d 483 which made reference to the fact that the starting of the time to give notice does not begin until the claimant as a reasonable man should recognize the nature of the seriousness and probable compensable character of his injury or disease. However, the court pointed out that the Supreme Court's opinion was applying a different version of this time-bar statute. The current statute runs the 30 days either from when the employee suffers the injury or from its initial manifestation of the injury which was not readily apparent at the time of the accident. One exception to this requirement is that the cause of the injury could not be identified without a medical opinion. In this case, there was never any doubt in the claimant's mind that the cause of the pain underlying his injuries related to the May 22 incident. Accordingly, a medical opinion was not needed to clear that up. The 30-day requirement notice could be delayed if there is a finding of "exceptional circumstances." Court found that there were no exceptional circumstances in this case warranting a delayed notice of accident to the employer/carrier.

Conflicting IMEs required the appointment of an EMA. The EMA determined that the May 22 incident was the result of a diagnosed herniated disc. However, the EMA relied on evidence presented by the claimant as to facts not in evidence. Court determined the EMA's opinion in this instance was improper and accordingly, belief in the Expert Medical Advisor's presumed correctness of the facts presented a clear and convincing amount of evidence to the contrary as determined by the JCC.

Sims Crane & Equipment Company v. Preciado
47 FLW D2083
10/12/2022

An appellate court may raise subject matter jurisdiction sua sponte even where neither party raises the issue. Courts are bound to take notice of the limits of their authority and if want of jurisdiction appears at any state of the proceedings, original or appellate, the court should notice the defect and enter an appropriate order. Courts of compensation claims are not courts of general jurisdiction and therefore do not have general jurisdiction over any subject matter beyond that specifically conferred by statute. Workers' compensation is purely a creature of statute. All rights and liabilities under that system are created by Chapter 440, as is the deputy's power to hear and determine issues in a workers' compensation case.

Dismissal of Petitions for Benefits divests the JCC of jurisdiction. The loss of jurisdiction occurs even when the dismissal of a Petition for Benefits is without prejudice. The effect of a voluntary dismiss is to remove completely from the court's consideration the power to enter an order, equivalent in all respects to a deprivation of jurisdiction. Chapter 440 does recognize limited exceptions in which a JCC has jurisdiction over certain matters in the absence of a Petition for Benefits. See *Vazquez v. Romero,* 179 So.3d 402(Fla. 1st DCA 2015). Most of the exceptions generally involve discovery requests or disputes. See also 440.33(1), Florida Statutes. See case for additional circumstances where the JCC has jurisdiction to decide issues where there is no pending Petition for Benefits.

In this case, without the existence of a Petition for Benefits, the claimant filed with DOAH a motion requesting the JCC to vacate an arbitration determination that the parties had voluntarily entered into. Section 440.1926 allows for a process for alternate dispute resolutions as opposed to the filing of a Petition for Benefits pursuant to Chapter 440, Florida Statutes. This provision, however, specifically states that such provision for arbitrations shall be governed by Chapter 682, the Florida Arbitration Code.

The JCC interpreted the jurisdiction to apply to the ability of a JCC to interpret the statute utilizing the *in pari materia* statutory construction processes to allow for the JCC to have jurisdiction in this matter. On appeal, court determined that utilizing this statutory process for interpretation did not apply in this case since the language of the statute is clear that there is no occasion for resorting to the rules of statutory interpretation and construction. The employer/claimant can mutually agree to seek consent from a JCC to enter into binding arbitration in lieu of any other remedy provided for in Chapter 440 to resolve all issues in dispute regarding an injury. However, the enforcement of an arbitration award is available in the same manner and with the same powers as a final compensation order entered by the JCC. Section 4440.211 and 440.1926, Florida Statutes, provides separate and distinct provisions setting forth two avenues of dispute resolution. One mandatory per pre-employment or pre-accident contractual agreements of the parties and one optional formed post-employment and post-accident subject to the consent of the JCC. The claimant in this case filed a Motion to Vacate the arbitration award with the JCC. However, the JCC did not have jurisdiction to modify the arbitration agreement/findings.

City of Orlando v. Moore
47 FLW D2173
10/26/2022

Claim made for hypertension benefits. The JCC determined benefits were payable after having appointed an Expert Medical Advisor based on conflicting medical reports/opinions concerning MMI dates and permanent impairment ratings. Employer/Carrier appealed based on the fact that there were no conflicting medical opinions warranting the appointment of an EMA and there was no competent and substantial evidence to support the judge's acceptance of the EMA's opinion.

Once an EMA is appointed, his/her opinion is presumed to be correct unless there is clear and convincing evidence to the contrary as determined by the JCC. Clear and convincing evidence is evidence "of a quality and character so as to produce in the mind of the JCC a firm belief or conviction without hesitancy as to the truth of the allegation sought to be established." This heightened standard of proof does not change the appellate court's standard of review, however, the appellate court's function is not to conduct a de novo proceeding or re-weigh the evidence by determining independently whether the evidence as a whole satisfies the clear and convincing standard but to determine whether the record contains competent and substantial evidence to meet the clear and convincing evidence standard. The appellate court determined that there was competent and substantial evidence to support the JCC's determination to accept the findings made as to the award of benefits.

The Employer/Carrier had objected to the EMA's opinion based on *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 US 579(1993). The objection based on *Daubert* was first raised in an amendment to the parties' pre-trial stipulation. The appellant did not re-affirm the objection at trial or on re-hearing. The objecting party made no attempt to depose the EMA to ascertain whether he had a sufficient basis for his opinions and did not file a Motion in Limine, Motion to Strike, or any other motion to limit or exclude any medical expert's opinion and provided no specifics on the basics of the *Daubert* ojection. Court determined that appellants had failed to preserve their *Daubert* argument for appeal. To be preserved on appeal, the issue must be presented in the lower court and the specific legal argument or ground to be argued on appeal must be a part of the presentation.

Court reminded appellants that the standard of review in workers' compensation cases is when a competent and substantial evidence supports the decision below, not whether it is possible to recite contradictory record evidence which supported the arguments rejected below. Dissenting opinion discussing methodology in determining medical findings related to hypertension findings and the percentage of impairment for determining benefits payable.