MKRS LAW

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Case Law Update

CASE 1:

Deborah Gadol v. Masoret Yehudit, Inc./US Administrator Claims,
Case No. 1D13-2567 (Fla. 1st DCA 2/21/14)

Claimant appealed an order of the Judge of Compensation Claims which denied the Claimant the choice of selection of a physician, to serve as the one time change doctor, under Florida Statutes Section 440.13(2)(f).

Facts:
On October 22, 2012, the Claimant requested a one time change in physicians. On October 29, 2012, the Employer/Carrier attempted to authorize and schedule Dr. Berkowitz, but the physician's office declined. The Claimant was not notified of the efforts. On November 12, 2012, the Employer/Carrier informed the Claimant that Dr. Sheikh was authorized and scheduled for evaluation on November 20, 2012. On November 12, 2012, the Claimant's counsel notified the Employer/Carrier's counsel that the Claimant would not attend, based on "untimely notice". The Claimant's counsel sent a good faith effort or advanced copy of a Petition for Benefits on November 12, 2012. The Employer/Carrier rescheduled the initial evaluation with Dr. Berkowitz to occur on December 4, 2012, and notified the Claimant of the new appointment date on November 14, 2012. The Claimant filed a Petition for authorization of Dr. Ellowitz on November 14, 2012.

The Judge of Compensation Claims ruled that the Claimant can select their choice of a physician upon the expiration of the five day period, however, the Employer/Carrier can still select and schedule a physician, before the Claimant exercises their rights.

Holding:
The First District Court of Appeal reiterated the recent case law on five days, meaning five consecutive days, including non business days. They also held that the Claimant has the right to select a physician at the expiration of the five day period, so long as the Claimant did not actually start seeing the Employer/Carrier alternative physician that was authorized on an untimely basis. In essence, where the Employer/Carrier untimely authorizes a one time change physician, and the Claimant attends an appointment with that physician, the Claimant would waive their right to selection.

CASE 2:

Cynthia Richardson v. Aramark/Sedgwick CMS,
Case No. 1D13-4138 (Fla. 1st DCA 2/18/14)

The Claimant appealed an order where the Judge of Compensation Claims awarded only a guideline attorney fee.

Facts:
No facts were provided within the opinion. However, the Claimant's positions were to challenge the constitutionality and fairness of Florida Statute Section 440.34.

Holding:
The First District Court of Appeal affirmed the Judge's underlying decision, which awarded a statutory guideline fee. The Appellate Court also declined the request by Claimant's counsel to expand the certified question that was sent to the Florida Supreme Court in the prior case of **Castellanos v. Next Door Company**, 124 So. 3d 392 (Fla. 1st DCA 2013).

At trial, the Claimant's attorney argued based on multiple attacks on the current attorney fee law. The First District Court of Appeal had previously certified a single question of great public importance to the Florida Supreme Court, and they refused to expand their referral to the Florida Supreme Court, on a additional grounds.

CASE 3:

Jeffrey Pomerantz v. Palm Beach County Sheriff's Office and USIS,
Case No. 1D13-2950 (Fla. 1st DCA 2/7/14).

The Claimant challenged an order of the Judge of Compensation Claims, finding that the Claimant was barred from additional benefits, by the running of the statute of limitations, under Florida Statute 440.19.

Facts:
The Claimant had a 2008 compensable accident, and received authorized medical care and treatment, up through the last filled prescription in July of 2011. A Petition for Benefits was not filed until October of 2012.

Holding:
The District Court of Appeal found no merit to the Claimant's argument that the Employer/Carrier should have been estopped from raising the statute of limitations defense. The Appellate Court also found that the statute of limitations had expired, and acted as a bar, at the point that one year had passed from the last filled prescription. The court rejected the Claimant's argument that the statute of limitations would not run until the

Claimant last allegedly took a pill from the prescription, which supposedly occurred eight months after the prescription was filled, in March of 2012. The court distinguished their earlier decision in **Ginsberg v. ChemMed Corp.**, 929 So. 2d 633 (Fla. 1st DCA 2006), as in that claim, the Employer had actual knowledge of the treatment, and the Claimant taking the medications, and **Ginsberg**, there was a non-renewable and thirty day prescription. In **Pomerantz**, there were refills available, and the Claimant had been instructed to take the medication on an as needed basis. The decision implies that it was significant that the Employer had no knowledge, and the administration of the prescription, or taking of the medications, was solely within the Claimant's discretion. To rule otherwise, a Claimant could have kept one pill left in a prescription bottle, and had a photograph taken while swallowing the pill, while signing their next Petition for Benefits. Obviously, that would lead to uncertainty in the system, which is intended to be "self executing".