

**Guerra v. C. A. Lindman, Inc./Argonaut Insurance Company**  
**Case No. 1D13-5988 (July 21, 2014)**

Claimant appealed JCC's reliance upon an EMA to deny his request for cervical surgery or, in the alternative, cervical facet injections

**Facts:**

Claimant had a compensable accident on 8/31/10 with resulting diagnosed cervical herniated disk. His initial authorized orthopedic spine specialist Dr. Schechter felt that Claimant was not a candidate for surgery, but the one-time change Dr. Greenberg felt differently. Due to the existing medical disagreement, neurosurgeon Dr. Pagan was appointed as EMA to resolve the dispute and he opined in June 2011 that surgery was not appropriate. However, he gave testimony that if Claimant's condition worsened, future surgery may be necessary. Based on the EMA, Claimant withdrew his petition and proceeded with conservative care. Claimant subsequently came under the authorized care of orthopedic surgeon Dr. Montesano who opined that the cervical condition was progressively worsening and that surgery, or in the alternative cervical injections, was medically necessary. Based on Dr. Montesano's opinion, Claimant refiled a petition for benefits seeking surgery which the E/C denied based on the prior opinions of Dr. Schechter and the EMA Dr. Pagan. E/C deposed Drs. Schechter and Pagan again, and both indicated their earlier opinions on surgery had not changed but explained they had not seen Claimant or reviewed any records past May 2011. Notably, at their depositions, Dr. Schechter expressly declined to opine on Claimant's condition in 2012 or June 2013 and neither doctor expressed any disagreement with the medical opinions of Dr. Montesano. During the hearing on the new petition for benefits, over the objection of both parties and without identifying a specific disagreement in the medical opinions, the JCC appointed a new EMA to address whether the new surgical recommendation of Dr. Montesano was reasonable and medically necessary. Dr. Theofilos was appointed as the EMA, and based on his subsequent opinion that surgery was not medically necessary, the JCC issued an order on 6/24/13 denying Claimant's petition for benefits.

**Holding:**

First DCA holds the JCC erred in failing to recognize that the legal dispute before him was Claimant's current need for surgery pursuant to Dr. Montesano's recommendation, based on Dr. Montesano's uncontroverted opinion that Claimant's current medical condition was materially worse than before. Per the 1<sup>st</sup> DCA, by relying only on the prior opinions of Drs. Schechter and Pagan to form its defense, the E/C failed to present any evidence to counter the uncontroverted opinions of Dr. Montesano. In other words, the prior opinions of Drs. Schechter and Pagan did not constitute evidence of medical disagreement regarding the legal issue in dispute, i.e. Claimant's current need for surgery. Thus, First DCA holds the JCC erred in appointing an EMA, and the case was remanded for entry of an order based on the submitted evidence with the exception of evidence from EMA Dr. Theofilos.

**Smith v. City of Daytona Beach Police Dept./City of Daytona Beach Risk  
Management  
Case No. 1D13-4409 (July 16, 2014)**

Claimant appealed JCC's ruling that his claim for benefits related to a heart condition was denied based on the doctrines of res judicata and collateral estoppel.

**Facts:**

Claimant was a police officer for the Employer since 2001. In 2007, he was diagnosed with a dilated cardiomyopathy and received a heart transplant. Following this treatment, but prior to returning to work for the Employer, he also subsequently developed bradycardia and had a cardiac pacemaker surgically implanted. After a recuperation period, Claimant went back to work for the Employer. Thereafter in 2010, Claimant filed a petition for benefits relating to his heart condition which went to hearing. As a result of the hearing, the JCC issued an order denying the petition on the basis that the statute of limitations had expired, and alternatively, that the E/C had successfully rebutted the statutory presumption of compensability afforded law enforcement officers under section 112.18(1), Florida Statutes. This order became final after an appeal was later dismissed. In 2012, Claimant was hospitalized for the replacement of a lead on the cardiac pacemaker originally implanted in 2007. He subsequently filed a petition for benefits – alleging a new date of accident – again requesting compensation for his heart disease, but this time as a result of the new period of disability suffered for this condition. After an evidentiary hearing, the JCC denied benefits based on the doctrines of res judicata and collateral estoppel. Claimant appealed this order and argued, under an occupational disease theory of recovery, that his petition for benefits was not barred by doctrines of claim and issue preclusion because each new date of disability for heart disease is a new “date of accident” and hence a new claim as a matter of law.

**Holding:**

Referencing Fla. Stat. 440.151(1)(a), 1<sup>st</sup> DCA holds an essential element of a claim based on an occupational disease (including heart disease) is that the disease results in disability. But even though it is correct to focus on the date of disability in determining whether a new accident occurred, that determination alone does not control the result. Rather, 1<sup>st</sup> DCA holds a new date of accident is found only when the underlying occupational disease is compensable and the disease progression results in a subsequent period of disability. In this case, Claimant's underlying heart condition was previously adjudicated as non-compensable. And because the underlying condition was non-compensable, and in the absence of a new or different injury, 1<sup>st</sup> DCA holds that the subsequent disability arising out of treatment for that underlying condition is likewise non-compensable. Thus, 1<sup>st</sup> DCA holds the JCC correctly concluded that Claimant's cardiac condition on the new date of disability related directly back to the 2007 date of injury, thus compelling application of defenses of res judicata and collateral estoppel to bar the new claim.

**Gil v. Cargo Force, Inc./Gallagher Bassett Services, Inc.  
Case No. 1D13-5423 (July 1, 2014)**

Claimant challenged an order of the JCC denying his request for payment of TPD benefits based on his medical noncompliance.

**Facts:**

During a period of time leading up to a state mediation held on 8/8/13, and thereafter, the E/C suspended payment of TPD benefits on the basis of medical noncompliance because Claimant failed to attend multiple scheduled doctor visits. Evidence was submitted to show that at the mediation conference of 8/8/13, the E/C had agreed to authorize a spine specialist but then took no action thereafter to set an appointment. The JCC found that Claimant did not take reasonable steps to secure the medical care when first offered by the E/C and therefore denied TPD for the period both before and after the mediation.

**Holding:**

1<sup>st</sup> DCA holds that the doctrine of medical noncompliance does not result in the permanent forfeiture of benefits and will only apply during the period Claimant failed to take reasonable steps to secure medical care. Here, Claimant had missed several scheduled appointments leading up to the mediation of 8/8/13. Therefore, 1<sup>st</sup> DCA holds that because there was sufficient evidence to support a finding of medical noncompliance by the Claimant leading up to the mediation, the portion of the JCC's order denying TPD for that period was affirmed. However, considering the E/C had failed to take any action after the mediation agreement to actually set an appointment, despite its explicit agreement to authorize medical care, 1<sup>st</sup> DCA holds there was insufficient evidence to support a finding of noncompliance by Claimant after the 8/8/13 mediation conference. Thus, 1<sup>st</sup> DCA holds the JCC erred in finding Claimant was not entitled to payment of TPD benefits based on noncompliance for the period after 8/8/13.