MKRS LAW
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Case Law Update

It was a bit of a slow news month for the 1st DCA, so we are exploring some noteworthy and interesting JCC trial orders instead.

DeWaal-Navas v. City of Gainesville

OJCC Case No. 14—018123MRH (1/16/15)
Judge Hill, Gainesville District

Issue: Whether the Claimant was an "employee" at the time of her motor vehicle accident between the HR department and the lab facility as part of her pre-employment physical exam to determine whether she was in the course and scope of her employment at the time of injury?

Facts: On 12/4/13, the Employer made the Claimant a conditional job offer, expressly conditioned upon her passing a pre-employment physical exam and obtaining a one-year CDL license within three weeks. The Employer selected the location and paid for Claimant's physical exam, however, she was not paid for her time to travel and attend same, and she was permitted to choose the date and time. The Claimant underwent the lab work but could not complete the physical exam without producing her driver's license (which she had lost, but knew the HR Department had a copy). She drove to the Employer's HR Department to obtain a copy, and on the way back to the facility to complete the physical exam, she was involved in a motor vehicle accident. The Claimant reported to work on the scheduled start date of 1/6/14, and on 1/8/14, the physician who performed the physical notified the Employer that she was unable to obtain her CDL license due to her diabetes. She was terminated that day.

Analysis/Conclusion: The general rule is that there is no entitlement to workers' compensation benefits before hiring. However, a claimant can be found to be an "employee" where the claimant is required to attend orientation prior to beginning the position, he/she was paid for attending, and it was not part of the application process. *Jenks v. Bynum Transport, Inc.,* 104 So. 3d 1217 (Fla. 1st DCA 2012). The JCC also considered that where an accident does not occur on the employer's premises, the JCC must consider whether the employer controlled the time, place, and manner of the circumstances resulting in the injury to determine whether it compensably occurred within the course and scope of employment *Jordan v. Pinellas County Sch. Bd.,* 680 So. 2d 448 (Fla. 1st DCA 1996).

The JCC ruled that the Claimant was not “an employee” at the time of the accident, because she was still essentially completing the application process and was required to pass the physical exam prior to being accepted as an employee. Because she was not paid for the time expended, controlled the date of the exam, and was driving between the locations due to her losing her driver’s license, the JCC ruled that the Employer did not have sufficient control over the circumstances surrounding the injury. The claim was not deemed compensable.

Take Away: For employers, ensure that any pre-hiring qualifications are specified in writing as conditions to obtain employment. As the employer did in this case, it is always advisable to have potential employees sign an acknowledgement of this policy. You may even want to take this a step further and have applicants acknowledge that no injuries sustained while completing these pre-hire conditions will be covered under workers’ compensation, as they are not yet considered “employees” until they have satisfied the conditions of employment.

Ginyard v. Southeast Personnel Leasing, Inc.

OJCC Case No. 14-021707MAM (1/27/15)
Judge Massey, Miami District

Issue: Whether the Claimant satisfied his burden to prove entitlement to a $2,000.00 advance?

Facts: The Claimant sustained an injury while involved in a motor vehicle accident. The E/C denied compensability of the case, and the Claimant instead received medical treatment and a $10,000.00 loan through his personal injury case for the same accident. He also borrowed $3,000.00 from a relative. The Claimant did not work since the accident, but his pre-injury wages would have totaled less than the $10,000.00 loan received. The Claimant testified he was not behind on any “bills” (but was two months behind on rent, one month behind on his car payment, and had not paid his car insurance or phone bill that month). He did not provide an accounting of what he did with the $13,000.00 in loans or why that would not have covered the $2,039.00 per month in his monthly bills.

Analysis/Conclusion: The Judge noted the three factors to consider per Fla. Stat. § 440.20(12)(c), and specifically noted that only one of the three factors had to be proven. Despite the fact that the Judge found the Claimant established at least one prong (he earned no income since the accident and met the “has not returned to the same or equivalent employment” prong), the JCC denied the advance in his application of the cases of *ESIS/Delta Airlines v. Kuhn,* 104 So.3d 1111 (Fla. 1st DCA 2012) (must show a nexus between the loss of earnings and the workplace injury) and *Worthy v. Jimmie Crowder Excavating*, 100 So. 3d 727 (Fla. 1st DCA 2012) (must show that amount requested is appropriate as opposed to a lesser amount).

Interestingly, the JCC noted the following in ultimately concluding that the Claimant was NOT entitled to the advance:

- Because the Claimant is not a medical expert, he could not have demonstrated through his testimony alone that he had physical restrictions based on an alleged medical condition leading to his loss of earning capacity, and could not have demonstrated that he was assigned a physical impairment, as that would also constitute hearsay.

- The Claimant received loans in excess of what his wages would have been since the accident if he kept working. Therefore, he could not establish how another $2,000.00 loan added to his already existing debt would help his situation. Rather, it would only put him further into debt.

- The Claimant's situation is distinguishable from the recent case of *Bonner v. Miami Dade Public Schools,* 148 So. 3d 152 (Fla. 1st DCA 2014) , as his struggle with a couple of months of bills did not constitute sufficient financial hardship. While the JCC acknowledged the Claimant does not need to "be out on the street," he must establish the advance is truly needed, is a direct result of his industrial accident and injuries, and would materially help his situation.

- The Claimant did not demonstrate that $2,000.00, as opposed to a lesser amount, would be appropriate, as the one or two months of bills he testified being behind on were less than $2,000.00 total. He also did not provide an accounting or plan as to how the money would be used if the advance were to be awarded.

Take Away: Pay very close attention to the Claimant's financial affidavit and DWC-19s if an advance is requested. When the E/C performs the calculations, there may be ways to poke holes in a claimant's ability to establish the requisite nexus and the amount requested. The bullet-pointed analysis and conclusions above provide excellent questions to pose to a claimant on cross-examination at the time of a hearing on the advance and during his deposition.

Navarro v. Contender Boats

OJCC Case No. 13-014039MRH (1/23/15)
Judge Hill, Gainesville District

This is a case in which other issues were adjudicated, however, we will focus on one issue to compare to a previous case on this same narrow issue.

Issue: Whether the failure to copy defense counsel on a one time change request nullifies a written request sent to the Carrier alone (for purposes of determining who selects the doctor)?

Facts: On 9/5/14, the Claimant faxed a request for a one time change to the adjuster directly, without copying defense counsel. On 10/24/14, a PFB was filed seeking a one time change with Claimant's choice in physician. On 10/27/14, E/C's counsel emailed Claimant's counsel responding with authorization of their choice of physician.

The Claimant argued that, by the plain language of Fla. Stat. § 440.13(2)(f), the Carrier failed to respond within 5 days of the written request, and therefore, he has the right to choose the physician. The E/C argued that the failure to serve defense counsel with the one time change, knowing the E/C is a represented party, constitutes a violation of Florida Bar Rule 4-4.2, and nullifies the request. In that scenario, the E/C argued that the defense counsel's emails constituted a timely response, and they should have the right to select the physician.

Analysis/Conclusion: The JCC ruled that there is no binding authority to support the E/C's argument, because there is nothing in Fla. Stat. § 440.13(2)(f) that requires defense counsel to be copied. The JCC concluded that she lacks jurisdiction to adjudicate the ethical violation issue and its application to a one time change request, as those policy considerations should more properly be directed to the Legislature.

The JCC ruled that the E/C did not timely authorize the one time change, and therefore, the Claimant had the right to select the physician.

NOW….COMPARE TO A 2013 CASE ON THE SAME ISSUE…..

Coleman v. American Airlines

OJCC Case No. 12-010751RJH (10/24/13)
Judge Humphries, Jacksonville District

Facts: On 1/29/13, Claimant's counsel faxed a letter to the Carrier's main line, addressed to "Grievance Coordinator," without identifying the claim or OJCC numbers, or the adjuster's name (of whom counsel was aware), and without copying defense counsel (of whom counsel was aware). The Carrier was not governed by Managed Care, a fact which was established that Claimant's counsel should have been aware. The request for a one time change was "buried" within two pages of various medical and indemnity requests. On 3/1/13, Claimant's counsel filed a PFB requesting a one time change with a physician of her choice. On 3/5/13, defense counsel filed a Response authorizing a one time change of the E/C's choice.

Analysis/Conclusion: The JCC ruled that the Claimant's faxed letter did not establish a good faith written request for a one time change. Rather, the first proper request was demonstrated to be the PFB, to which the E/C responded timely. First, the JCC noted that the way the fax was addressed and how the one time change was "camouflaged" was purposefully deceptive and was found to be "trickery." However, the JCC also quoted Rule 4-4.2 of the Rules Regulating the Florida Bar, and opined that the rule requiring a represented party's attorney to be copied governs the JCC in this case (despite Claimant's counsel's "frivolous" argument that the rules do not apply to workers' compensation). In fact, the JCC stated that the Rule MANDATES that Claimant's counsel copy E/C's counsel, and there is no authority to support the proposition that the Rule does not apply to workers' compensation attorneys. The JCC opined that Claimant's counsel violated that Rule by not copying defense counsel on the request for a one time change. The E/C were permitted to utilize their choice in physician.

Take Away: JCCs interpret their ability to apply rules and statutes outside of Chapter 440 differently. Ergo, it always pays to "know your judge," but remember, these trial orders represent persuasive, not binding, authority. Ultimately, the Carrier should always be alert for a one time change request and similar "camouflage" as done here, however, it should always be argued that Claimant's counsel has an ethical DUTY not to communicate unilaterally with an employer representative or adjuster who has retained counsel (just as defense counsel is not permitted to unilaterally communicate with a represented claimant).