2022 Case Law Update (8/20/21 - 6/29/22)

Monday, August 22, 2022, 2:15 pm - 4:15 pm

Introduction (ELS)

Attorney's Fees (Bichler)

Guerrero v. Benton Dickinson & Co, 338 So.3d 300 (Fla. 1st DCA 2022)(Massey, Kevin Gallagher/Thomas Vecchio)

Reversing JCC holding of no actual or real benefit secured, and holding attorney fee entitlement arises despite claimant receiving indemnity since date of accident at maximum compensation rate because AWW increased the future 80% TPD threshold and could affect potential offsets. JCC awarded increase in AWW smaller than that sought by claimant and law does not require "exact match" between benefit claimed and awarded - a "hyper-technicality." Value of the award only goes to fee amount, not fee entitlement (statutory fee formula or alternative "reasonable" fee if certain circumstances exist, citing **Castellanos**, 192 So.3d 431 (Fla. 2016).

CA: asserted the increase in the AWW was a benefit secured.
E/C asserted that no actual or real benefit was secured because no payment was made (claimant was at max CR) and the increase was less than claimed by CA in the petition (asserting specificity).

Whether JCC has jurisdiction to review a contract between claimant and CA?

Miles v. City of Edgewater Police Dept., 190 So.3d 171 (Fla. 2016) held unconstitutional 440.105 and 440.34 to the extent they prohibit a workers' compensation claimant (or union) from paying attorney's fees out of his own funds for purposes of litigating a workers' compensation claim because they impermissible infringing on a claimant's rights to free speech and seek redress of grievances.

BUT, "any fee agreement 'must nonetheless, like all fees for Florida attorneys, comport with the factors set forth in **Lee Engineering & Construction Co. V. Fellows**, 209 So.2d 454,458 (Fla. 19680 and codified in the **Rules Regulating the Florida Bar** at rule 4-1.5(b)." at 181, 182, citing **Jacobson** 113, So.3d at 1052 (440.34 does not preclude a JCC from approving a fee agreement when claimant chooses to obtain legal representation to aid in defense against EC's motion to tax costs, but such fee agreement must comport with factors of Lee Engineering and Rules Regulating the Florida Bar).

Lee Engineering: FSC relies on **Canon 12 of Canons of Professional Ethics**, which set forth the factors ultimately codified in s. 440.34, FS in 1977 to determine the methodology for calculation of CA fees.

Florida Bar Rule: licensed by FSC

Statute: 440.34: state legislature, signed by Governor:

A fee, gratuity, or other consideration may not be paid for a claimant in connection with any proceedings arising under this chapter, unless approved by the judge of compensation claims or court having jurisdiction of such proceedings.

In awarding a claimant's attorney's fee the judge of compensation claims shall consider only those benefits secured by the attorney…The amount, statutory basis, and type of benefits

obtained through legal representation shall be listed on all attorney's fees awarded by the judge of compensation claims.

In such cases in which the claimant is responsible for the payment of her or his own attorney's fees, such fees are a lien upon compensation payable to the claimant, notwithstanding s. 440.22.

A judge of compensation claims may not enter an order approving the contents of a retainer agreement that permits placing any portion of the employee's compensation into an escrow account until benefits have been secured. SOOO, why can't a JCC review a retainer agreement?????

S. 440.33, FS, identifies the Powers of Judges of Compensation Claims: "do all things conformable to law which may be necessary to enable the judge effectively to discharge the duties of her or his office."

And the methodology for doing so is identified by FSC in **Castellanos** and ethics rules.

Castellanos v. Next Door Company, 192 So.3d 431 (Fla. 2016): S. 440.34, FS is starting point in determining REASONABLENESS of attorneys fees, but JCC shall consider evidence and may deviate from the guideline fee in circumstances where CA can determine the guideline fee is unreasonable under Lee Engineering.

But can JCC review and make determination of reasonableness of result based on contract between claimant and CA?

Rules Regulating the Florida Bar Rule 4-1.5(b): Lists the **Lee Engineering** factors and, pursuant to the COMMENT is "the test for reasonableness."

(d) Enforceability of Fee Contracts. Contracts or agreements for attorney's fees between attorney and client will ordinarily be enforceable according to the terms of such contracts or agreements, unless found to be illegal, obtained through advertising or solicitation not in compliance with the Rules Regulating The Florida Bar, prohibited by this rule, or clearly excessive as defined by this rule.

COMMENT in Rule 4-1.5 (Fees and Costs for Legal Services): Lawyers should also be mindful of any statutory,, or other requirements or restrictions on attorneys' fees.

E/C: be careful, the COMMENT provides: Subdivision (e) is intended to clarify that whether the lawyer's fee contract complies with these rules is a matter between the lawyer and client and an issue for professional disciplinary enforcement. The rules and subdivision (e) are not intended to be used as procedural weapons or defenses by others. Allowing opposing parties to assert noncompliance with these rules as a defense, including whether the fee is fixed or contingent, allows for potential inequity if the opposing party is allowed to escape responsibility for their actions solely through application of these rules.

AWW (ELS)

Noa v. City of Aventura/Florida League of Cities, 333 So.3d 731 (Fla. 1st DCA 2022)

Claimant, an executive assistant for the City of Aventura Police Department on 2/27/20, experienced a compensable accidental injury and appealed the JCC's denial of a claim for increase to AWW. Claimant had continued working and sought the increase to include an annual merit bonus paid after the accident. Claimant sought the increase in AWW to include the portion of the merit bonus earned before the accident. E/C argued the bonus was not

earned until the date of her employment anniversary, which was after the accident. JCC held that claimant was not entitled to include the part of the bonus prior to employment anniversary date because claimant was not eligible for it until her anniversary date.HELD: Claimant entitled to increase in AWW to include that portion of the bonus earned because claimant qualified by performing satisfactorily during the entire 52 week of the bonus period. The dissent stated that it should NOT be included because a bonus (or part of it) did not accrue until after the date of the accident, and could not have been earned until it accrued.

COMPENSABILITY (Golden)

Ranger Construction Industries, Inc. v. Brand, 328 So.3d 310 (Fla. 1st DCA 2021)
DCA affirms JCC's award of compensable 7/9/18 accidental injury, finding CSE. E/C asserted "purported inconsistencies in Claimant's proof," but medical evidence demonstrated compensable diagnosis of "post-traumatic left shoulder rotator cuff tear secondary to repetitive trauma with single event complete rotator cuff failure."

Silberberg v. Palm Beach County School Board, 335 So.3d 148 (Fla. 1st DCA 2022)

Involves workplace falls (with idiopathic condition) Cf internal failure claims where there usually is a unity between the accident - the onset of a pre-existing or idiopathic condition prompted by some exertion for work - and the injury.

Teacher appealed JCC's denial of claim of a compensable accident occurring when, while teaching a class, his leg went numb just before he stood up, leading to a loss of balance and his falling. JCC held claimant's resulting injuries did not ARISE OUT OF claimant's work, even though claimant was at work and performing work when he fell. Claimant has taken a seat for five minutes in his usual chair at his usual desk, of which there was nothing special; in fact, it was similar to the chair in which was sitting at his final hearing before the JCC. When claimant stood up, he had no feeling in his left leg, which gave way, resulting in impact with a linoleum floor and broken left femur. Claimant (by stipulation) did not trip or stumble immediately before the fall and did not strike his desk or anything else except the floor. Claimant was not pushed or assaulted.

HELD: claimant's accident did not arise out of employment because the application of the "special hazard test" to claimant's idiopathic condition found that the MCC of the accident was non-work related.

ER's IME testified claimant admitted occasional numbness in left foot prior to accident. Claimant however had no preexisting conditions, such as vascular disease, diabetes, sciatic nerve injury or severe lower lumbar disc disease. The symptoms experienced by claimant just before the fall "most likely (were) due to brief compression of the nerves for the left leg due to sitting in one position," secondary to probable venous insufficiency which can give rise to compression of nerve when sitting. Claimant was thought to have a benign condition and claimant's leg could have fallen asleep at any time or place and probably would happen again if claimant sits in one position for a period of time. The fall was though to have occurred because claimant "simply started to walk too soon after standing with a numb leg and 'lost his balance.'"

CA's IME testified similarity, agreeing that it was a common phenomenon experienced by most people at some point in one's life, that could occur anywhere.

JCC: Accident was in C&S because it occurred at work. It wasn't not an unexplained fall case, because "we know how the accident happened:" due to nerve compression, which could

happen “any time and anywhere.” JCC rejected CA’s reliance on **Caputo** (and **Walker**) and followed en banc holding in **Valcourt-Williams**, finding no evidence that claimant’s “physician surroundings on the job in any way contributed to the risk of an injury more than they would have in no employment life.”

On appeal, CA asserted that sufficient evidence of causation presented because accident occurred at work and claimant had no preexisting condition.

DCA: compensable accident must arise out of work performed in course and scope of employment. Arising out of refers to origin of the cause of the accident. C&SE refers to the time, place, and circumstances under which the accident occurs. There must be a causal connection between employment and injury, to which MCC is added 1/1/94. NOW: work performed in the C&SE must be the MCC of the cause of injury or death. There must be a link between work and the injury, such as:

-classic or “direct impact” accident: external mishap stemming from workplace environment without intervening cause (hand in press). If NO exertion in furtherance of employee’s work, the risk of accident comes EXCLUSIVELY from personal factors, and is not compensable.

So, an idiopathic condition which results in injury does NOT arise out of employment BECAUSE industry is NOT to bear risk of accident and injury that flow from an employee’s own idiosyncratic physiological responses to everyday conditions — WC is NOT socialized medicine or an insurance policy for which the employee does not pay premiums.

-UNLESS the employment in some way contributes to the risk of accident or aggravates the injury. (treating back pain triggered by bending over while seated whereby some aspect of employee’s personal condition unexpectedly becomes manifest or interacts with his work activity while he is performing his normal job duties.)

So, if an idiopathic condition presented, there is required application of the increased hazard test: whether the employee’s injury “fortuitously occurred” at work, but “could have been triggered at any time” by a normal, every day movement outside of work.” Thus claims involving “wholly normal motion” were held not compensable.

NOW, the MCC standard, identified essentially as the same standard, is applied when a personal condition is triggered by work exertion or conditions. SO, identify competing or “contributing” causes of the accident and injury.

In the instance of a workplace fall, there is the accident (the fall) and the injury (the consequences of employee’s impact with an object or the fall).

Analysis: is there a preexisting condition?

no - then the “any exertion” test any effort in furtherance of claimant’s duties of employment makes work the sole cause of the accident and resulting injuries. **Caputo**: fall while sawing shelves on job is sufficient absent competing cause; Walker MCC test satisfied when walking to front desk to deliver (or obrtain) parcel.

yes- then to satisfy MCC, the “increased hazard test” is applied: whether toe preponderant cause (the one that triggers the subsequent links in the chain including onset of idiopathic that led to the fall) was just walking that incidentally

was work, or was truly movement that stands apart from daily life as work in furtherance of employee's duties.

Valcourt-Williams: the comfort-break fall was due to the dog, a non-workplace risk. The increased hazard test was used only because the accident occurred on a comfort-break; if it occurred while at work, any exertion test. (This case is a limited holding to the facts).

CA asserts applicable test is "any exertion test" because claimant did it have a pre-existing CONDITION, one diagnosed or symptomatic prior to the accident.

Held: the increased hazard test is triggered by BOTH pre-existing conditions and idiopathic conditions. A pre-existing condition is a previously manifested or diagnosed condition.

An idiopathic condition need not be pre-existing. It is defined as including the onset of a physiological response that is idiosyncratic to the employee; it is a risk personal to the employee. It could be an idiopathic response seen in an internal failure (eg firefighter's back strain putting on underwear at firehouse, strained muscle, ruptured disc or a "snapped" knee-cap brought about by exertion in the performance of work in furtherance of employment; dizziness, labyrinthitis or epilepsy, or an external failure of equipment designed to help an idiopathic condition, like a leg brace.

Soya v. Health First, 337 So.3d 388 (Fla. 1st DCA 2022) (**Silberberg** "in action")

Massage therapist appeals denial of compensability pursuant to **Valcourt-Williams** where when leaving for work for the death, she fell into the door separating the waiting room and locker room while wearing rubber-soled shoes and carrying non-work items and walking a normal pace, where there were no anomalies in the floor as testified to by E/C's engineering expert. JCC found that per VW, claimant's employment did not necessarily expose her to conditions that would substantially contribute to the risk of injury to which she would not normally be exposed during her non-employment life. In VW, however, it was "the dog," a part of claimant's non-employment life that caused the accident.

VW is defined as to require the increased hazard doctrine only where there is a contributing cause outside of employment (the dog). VW did not overturn **Ross**, **Caputo** or **Walker** as to unexplained workplace falls where claimants were "actively engaged, the "any exertion" test applies.

VW is a personal comfort case requiring increased hazard
Ross tripped or lost her balance
Walker slipped
Caputo fell from a ladder.

The cause was "being obligated to be present on the worksite at the time of the accident." Walking into and out of is "actively engaged" in work as it is an "unavoidable part of the job."

HELD: reversed: compensable claim using any exertion test.

Aquino v. American Airlines, 335 So.3d 768 (Fla. 1st DCA 2022)

Baggage handler appeals JCC's denial of compensability under going and coming rule. Claimant was injured when, after clocking out for the day, he was walking through the airport to a shuttle to the parking lot when he injured his right leg stepping off a curb.

The "going and coming rule" of s. 440.092(2) bars claims for injuries suffered going to or coming from work as not arising out of and in the C&SE.

CA asserted compensability because injury occurred while traversing the ground between two parts of employer's premises, work site and parking lot regularly used by employees.

Exceptions to "going and coming rule" that allow for compensability: if claimant is engaged in a special errand. CA asserts no exception because accident occurred on employer's premises.

The test for whether an injury occurs on the employer's premises is whether employer exercises "actual domination or control." (Absent such evidence, parking lot claims are NOT compensable).

Because claimant's injury occurred on a public sidewalk and employer did not exercise any domination or control over the airport-employee parking lot, claim denied. Parking lot not converted merely because employees traverse public areas of the airport and park in non-exclusive airport-employee parking lot.

Kelly Air System, LLC v. Kohlun, 337 So.3d 883 (Fla. 1st DCA 2022)

ER appealed non-final order of JCC awarding benefits to air conditioning service technician injured in MVA traveling in employer's truck from the final service call location home after clocking out. Claimant was allowed to use employer-provided vehicle to and from work and to make incidental personal trips.REVERSED pursuant to going and coming rule, s. 440.092(2), which precludes benefits for injuries occurring while going to or from work.

Focus is on whether claimant had employer provided transportation for exclusive personal use, which he did, baring compensability. Where a carpool is furnished by employer and injury occurs, compensability can arise.

Claimant was held not to be in "travel status" because he was not getting paid; he had clocked out. Traveling employees, under s. 440.092(4) are covered so long as they are not traveling to or from work, per the statute's wording. The question is "travel status," whether being paid by ER. The line between going and coming exclusion and traveling employee's inclusion depends on the point of arrival at and departure from work; when does work begin and end, based on facts of claim?

Held: going to and coming from work (even in travel status) is uncompensated travel that is not otherwise connected with employment.

Claimant held at time of accident not in travel status and going and coming rule applied to bar compensability. Claimant was going from work and was not being paid.

DSK Group, Inc v. Hernandez, 337 So.3d 814 (Fla. 1st DCA 2022)

Employer appeals award of compensability to hourly paid Electrician who was injured in MVA on way to first job of the day and who had not clocked in as he does so upon arrival at work. ER did not provide gas reimbursement, but provided a credit card in name of ER to offset some of fuel expenses with a monthly limit of $165.

CA recognized claim barred by going and coming rule, but sought compensability under traveling employee rule.

REVERSED: claimant's work day did not start until he arrived at first job of the day and he clocked in, during which time ER paid claimant. Claimant was NOT in "compensation status"

at time of accident so as to qualify as traveling employee. Where an employee is being compensated or reimbursed for his time traveling, or if he is traveling between two compensated activities, then claimant would not be traveling to or from work, even if claimant was traveling from his home.

Pierce v. Holmes, 339 So.3d 438 (Fla. 1st DCA 2022)

ER appealed JCC's award of compensability to construction worker who was passenger in a car driven by a co-employee going home from work in April 2015, when the driver passed out from dehydration, causing a single car motor vehicle accident rendering claimant incomplete tetraplegic (quadriplegic). Each employee were leased to client company by PEO ER.

Claimant sued in circuit court leasing company and client company. PEO did not appear. Client company asserted workers' compensation immunity, asserting compensability because of special hazard exception to going and coming rule. Summary judgment in favor of client company, which claimant subsequently stipulated to dismiss client company from tort action and voluntarily dismissed tort action against PEO. Claimant then filed WC proceeding against PEO, as general employer, and client company, as special employer under s. 440.11(2). PEO asserted claim bared by going and coming rule for which no exception applies.

JCC awarded benefits: 1. PEO estoppel from asserting going and coming rule because it benefited from client company's argument and dismissal in circuit court and the two employers shared a special relationship. 2. Going and coming rule does not apply because co-employee's dehydration was a special hazard. 3. Injury arose directly our of employment in that co-employee's dehydration was a "ticking time bomb" for claimant.

REVERSED and REMANDED

1. Estoppel does not apply because elements of which were not proved because no mutuality of parties and the PEO and client company are adverse (if tort, each perhaps could have liability, but if in WC, each enjoy tort immunity per s. 440.11(2) extending immunity to special employers. (It did not help PEO that client company argued in circuit court that case should be WC; nor was PEO helped when client company asserted special hazard for compensability). 2. Special hazard exception to going and coming rule's bar of compensability to allow compensability did not apply because co-employee driver's dehydration, while it might have occurred in the course of the driver's employment, it did not occur in the course of claimant passenger's employment and employer's alleged negligence of not providing driver enough water on job site was not foreseeable by passenger claimant. Driver's dehydration caused the accident, but it did not cause claimant passenger's involvement in the accident; it was claimant's decision to ride with driver that occurred beyond time and space limits of employment; nothing about claimant's job put claimant in driver's car. Thus, 3. Claimant's injuries did not arise out of the course and scope of employment.

SOOOO, PEO's exposure in tort is defined by contract with client company!!!

COVERAGE (Mark Zientz)

Cabrera v. Kablelink Communications, 328 So.3d 1011 (Fla. 2021)

Independent contractor appealed JCC's denial of workers' compensation benefits asserting he nonetheless qualifies for workers' compensation benefits because he is an "employee" in "the construction industry."

Residential cable line installer fell from a ladder in 2016 and "was severely injured." Putative employer and claimant previously signed an agreement recognizing claimant to be "an independent contractor and not an employee." JCC held claimant to be an independent contractor who did not qualify for WC benefits.

Claimant's assertion that his installation of residential cable was work "in the construction industry," so as to make claimant a statutory employee was reviewed against s. 440.02(8), definition of construction industry because there was no NCCI classification code for claimant's work as "within the construction industry." Nor was there any rule incorporating him as such; nor did claimant fall within the definition per se:

"Construction industry" means for-profit activities involving any … substantial improvement in the … use of any structure …. The division may, by rule, establish codes and definitions thereof that meet the criterial of the term "construction industry" as set forth in this section.

AFFIRMED.

HEART/HYPERTENSION INJURIES (Geoff Bichler)

Holcombe v. City of Naples, 328 So.3d 311 (Fla. 1st DCA 2021)

DCA affirmed JCC's holding that CA could not rely on presumption s. 112.18 as pre-employment physical (PEP) revealed evidence of secondary hypertension predating claimant's employment. Hypertension is hypertension; no distinguishing between primary and secondary hypertension, denying CA's assertion that "essential hypertension" specifically must be found in PEP.

Larkin v. Hernando County Sheriff's Office, 336 So.3d 54 (Fla. 1st DCA 2022)

DCA affirmed JCC denial of presumption where EMA testified PEP did reveal evidence of hypertension. Diagnosis NOT required to negate statutory presumption, only evidence of condition is necessary.

Sargent v. Bradford County Sheriff's Office, 47 FLW D1192 (Fla. 1st DCA June 1, 2022)

DCA affirmed JCC's denial of heart disease by correctional officer who, when hired originally as part-time passed the PEP, but when switched to full-time, a new PEP was not completed. E/C denied claim that claimant for compensability of heart disease asserting that claimant had not

passed a PEP before starting full-time. JCC held CA failed to meet his burden showing passing of PEP before full-time position as corrections officer.

JURISDICTION

Tejeda v. City of Hialeah, 33 So.3d 13 (Fla. 1st DCA 2021)

Firefighter injured his back due to compensable MVA, resulting in multiple surgeries with Dr. Brusovanik. Subsequently, in 2017, Dr. Vanni was designated new authorized physician and Dr. Brusovanik was deauthorized, although parties stipulated: "If Dr. Vanni opines that Claimant does require further surgical intervention, the Employer/Servicing Agent will authorize same, and the Claimant will decide whether he wants to undergo such procedure." Ub Hyde 2020, claimant nonetheless underwent spinal fusion surgery with Dr. Brusovanik who was deauthorized and without obtaining opinion as to medical necessity from Dr. Vanni. JCC's holding finding surgery medically necessary but denying claim for fusion surgery because Dr. Brusovanik was deauthorized, upheld.

CA asserted the surgery was a reimbursement dispute, asserting no subject matter jurisdiction of JCC (which can be raised any time). A "reimbursement dispute," for which jurisdiction vests with Department of Financial Services, is a dispute between a carrier and a provider concerning payment for medical treatment per s. 440.13(1)(q). It is not a dispute between claimant and e/c.

JCC has jurisdiction to interpret the meaning of a stipulation and contract to determine the rights and responsibilities of the parties under the workers' compensation law.

A stipulation properly entered into and relations to a matter upon which it is appropriate to stipulate is binding upon the parties and courts and the JCC.

Zurich American Ins. Co. v. Samson, 331 So.3d 1234 (Fla. 2nd DCA 2022)

Petition for Rule Nisi to enforce order of JCC for E/C to provide care with specific orthopedic surgeon. Award of $15k not supported by evidence because no evidence of damages was presented.

In October 2018, construction worker fell into a trench, injuring his neck and shoulder. Petition filed 6/27/19 for benefits and response 7/23/19 indicated would authorize and provide orthopedic treatment. Claimant presented but was turned away from two orthopedic appointments (same doctor) and on 10/28/19, filed a petition for Rule Nisi seeking finding that Zurich be held in civil contempt and fined a compensatory disgorgement of profits of $3.75m and a fine of $37,000 (one percent of profits) or a stop-work order. At hearing 11/5/22, Zurich asserted it had coordinated treatment with appointment scheduled for 12/2/22. Circuit Court held, based on evidence of affidavits of claimant and adjuster that Zurich had deliberately delayed and withheld necessary orthopedic treatment in a manner that offended the court's judicial conscience. The court ruled it unnecessary to impose a disgorgement of profits, daily fine, or stop-work order to. Coerce future compliance, but instead ordered Zurich to provide treatment at the 12/2/19 appointment. Claimant's request for disgorgement of profits of $3.75m or a fine of $37k was excessive and instead imposed a fine of $15k to restore the

respective positions of the parties, along with an award of attorney's fees and costs as prevailing party.

Zurich appealed the $15k fine on the basis of no jurisdiction.

Rule Nisi petitions are appropriate under s. 440.24(1) where an employer or carrier fails within 10 days after an order becomes final to comply with its terms. Jurisdiction vests with any circuit court in Florida where business is transacted by employer or carrier. If appropriate, the circuit court may issue a rule nisi directing the employer or carrier to show cause why a writ of execution or such other process as may be necessary to enforce the order shall not be issued.

The circuit court must determine whether there is a valid workers' compensation order in effect and whether there was a default on that order. If enforcement is required, an evidentiary hearing is to take place in circuit court.

The circuit court, pursuant to s. 440.24(1), has wide latitude and may enforce compensation orders by fashioning a monetary remedy equivalent to a lost (past) benefit. (Eg. Value of housing). The purpose of the monetary award is to make claimant whole.

The circuit court may enforce a judgement with its contempt powers, either civil or criminal. If criminal contempt, the parties are entitled to constitutional due process akin to a criminal defendant and the purpose is to punish.

If civil contempt, the purpose is remedial in nature and for complainant's benefit. Civil contempt may be ordered after providing notice and opportunity to be heard. Civil contempt sanctions may be compensatory or coercive. Compensatory damages must be based on evidence of actual loss suffered by the injured party. Coercive civil contempt sanctions must include a purge provision (allowing withdrawal of sanction once order is effected by compliance).

Here there is no evidence of actual loss suffered by claimant. The fine of $15k was a flat unconditional fine with no opportunity to purge prior to its imposition. The fine accordingly could not be upheld.

Laboratory Corporation of America v. Davis, 339 So.3d 318 (Fla. 2022)

FSC finds cause of action arises for workers' compensation claimant under Florida Consumer Collection Practices Act (attempt to collect an illegitimate debt violating s. 559.72) where claimant who was receiving bills from two medical providers who provided care for work-related injuries asserted payments due from e/c/sa. The billing providers asserted circuit court had no jurisdiction as jurisdiction for reimbursement disputes exclusively vests with the Department Financial Services.

See above: **Tejeda**.

ONE-TIME CHANGE (Beach): Why is doctor selection sooo important to warrant litigation?

Hartman v. Merchant Transport, 326 So.3d 100 (Fla. 1st DCA 2021)

Claimant who experienced compensable burn to right foot on 2/7/19 requested one time change of physicians, which e/c/sa timely furnished physician on 2/9/19, which claimant declined as too far from his residence. Claimant declined a second physician provided 2/28/19who was 46 miles and between 45-50 miles from claimant's residence declined as too far away, even though e/c/sa offered to furnish transportation. CA filed petition seeking specific physician of his choice, even though that doctor would not accept WC and CA did not pursue authorization.

CA asserted e/c/sa must offer a reasonable doctor, which CA defined to include as practicing within 50 miles of claimant's residence. CA asserted at final hearing, the only issue for the JCC to consider was that of time and distance of travel. JCC held that although e/c/sa was commendable in efforts to provide claimant a new doctor, the offer of transportation did not render the distance reasonable. The JCC granted the one time change, but allowed e/c/sa to select a physician a reasonable distance from claimant's residence.

CA asserted that e/c/sa was timely in its authorization of a doctor but untimely in the authorization of a reasonable doctor, forfeiting the right of doctor selection to CA. E/C/SA asserted CA failed to preserve argument for appeal, as CA indicated only issue was reasonableness of distance between claimant's residence and physician's office. It is e/c/sa's failure to to provide an alternate physician that triggers a forfeiture of e/c/sa's right of doctor selection. This was not raised at final hearing. CA never amended his petition to a physician closer to claimant's residence and JCC awarded the claim specifically pled and requested: an alternate physician within 50 miles from claimant's home and attorney's fees and costs. CA never argued e/c/sa failed to provide a physician timely based on the distance factors, allowing a forfeiture of the right of doctor selection.

Palm Beach County School District v. Smith, 337 So.3d 383 (Fla. 1st DCA 2022)

DCA reverses JCC striking authorized physician due to fee-related objection by CA.

E/C timely granted CA one time change of physicians, but fee arrangement authorized an advance payment of $800 for the initial evaluation and treatment, which exceeded the base rate provided in the WC fee schedule. **Rule 69L-7.020, FAC**. CA asserted the higher fee transformed the AHCP into an IME, for which CA wanted to video. E/C modified fee agreement with physician to align with statutory provision allowing for fees in excess of fee schedule.

JCC disqualified physician as one time change of physician and awarded claimant doctor selection.

HELD: JCC has no jurisdiction to strike physician based on fee agreement as any defect in the first draft was cured timely before claimant saw doctor.

-JCC's jurisdiction does not extend to fee disputes between E/Cs and treating physicians. Exclusive jurisdiction for fee disputes is with Department of Financial Services.

-S. 440.13(13)(b) expressly allows for higher-than-fee-schedule arrangements. ("…if a physician or health care provider specifically agrees in writing to follow identified procedures aimed at providing quality medical care to injured workers at reasonable costs, deviations from established fee schedules shall be permitted."). Such may include, but are not limited to, the timely scheduling of appointments for injured workers, participating in return-to-work programs with injured workers' employers, expediting the reporting of treatments provided to injured workers, and agreeing to continuing education, utilization review, quality assurance, pre certification, and case Managment systems that are designed to provide needed treatment for injured workers).

-There is no statutory recourse for litigating complaints before a JCC about reimbursements passing between E/Cs and authorized treating physicians. S. 440.13(6) establishes a self-regulating system between E/Cs and physicians where carriers can disallow or adjust payments where billing errors exist or there are violations of practice parameters or protocols established by law, with carriers having a statutory obligation to identify and disallow over utilization or billing errors, without order of JCC or the department. And, only health care providers may initiate proceedings about prepayment disputes.

CA cites **Riviera Beach v. Napier**, 791 So.2d 1160 (Fla. 1st DCA) authorizing JCC to discount testimony of IME who charged more than what the law allowed, finding JCC has jurisdiction to determine the admissibility of evidence. CA does not have option to disqualify E/C authorized physicians in a proceeding before a JCC.

In Napier, DCA affirmed JCC's disallowance of testimony of IME who charged more than limit proscribed in then **Rule 38F-7.020, FAC** (limiting ME payment to $200 per hour for a maximum of two hours for a total maximum payment of $400 (where e/c paid $700) as having removed him from statutory category of IME qualified to testify. Since the ruling July 13, 2001, statute changed removing such limit.

However: JCC Grindal in **Perez v. Florida Service Painting, Inc**., OJCC Case No. 20-024051 (order 4/11/22) initially struck IME who charged $750 for deposition on basis it exceeded $200 hourly rate limitations of s. 440.13(10). While JCC recognized the FAC no longer limits IME payments, JCC relied on **Hancock v. Suwannee County School Board**, 149, So.3d 1188 (Fla.1st DCA 2014) as finding JCC had jurisdiction to consider the reasonableness or appropriateness of a fee charged by an IME, where additional $1,500 charged to examine claimant with video. VACATED 4/28/22.

JCC Weiss, in **Arias v. Ryder Integrated Logistics**, OJCC Case No. 21-005368, ordered admissible e/c/sa's IME who charged in excess of statutory $200 fee limit as: 1. A matter between doctor and the party taking doctor's deposition; 2. Akin to a Miles fee, right to contract issue and allowing parties to waive statutory limits; 3. Prevailing party recovery of costs are limited to statutory limit; 4. Striking of testimony is too harsh a sanction; 5. Fee disputes vest with DFS.

PROCEDURE (Bichler)

Shelton v. Pascal County Board of County Commissioners, 328 So.2d 12 (Fla. 1st DCA 2021)

DCA reverses JCC's striking from record opinion of EMA in presumption case based on E/C's **Daubert** objection, holding that where EMA opinion does not resolve conflict in medical opinion, JCC is to appoint successor EMA.

Stipulation of compensability of left ventricular hypertrophy condition is binding upon parties and JCC erred in finding condition not compensable.

Hardin v. Hell Truck Lines, Inc., 337 So.3d 1287 (Fla. 1st DCA 2022)

Writ of prohibition filed in DCA related to order on Claimant's Motion for Determination of Material Breach of Contract DISMISSED for lack of facial basis for relief sought; premature.

REMEDIAL TREATMENT (BEACH)

ABM Industries, Inc. v. Valencia, 327 So.3d 469 (Fla. 1st DCA 2021)

Written one time change request faxed to adjuster who responded untimely. E/C asserted timely response by E/C counsel upon receipt (E/C attorney directed to send request to attorney). JCC's order awarding right of doctor selection affirmed. Claimant presented to one time change before response issued.

But EMA required where one time physician's opinion conflicted with previously authorized provider.

Arrest Brothers Carpentry, LLC v. Ortiz, 33 So.3d 817 (Fla. 1st DCA 2022).

Lack of evidence of emergency medical condition to award treatment of provider.

STATUTE OF LIMITATIONS (Beach)

Hospital East, LLC v. Hampton, 330 So.3d 565 (Fla. 1st DCA 2021)

The reservation of jurisdiction over the amount of fees and costs does NOT toll the SOL but the reservation of jurisdiction over entitlement of fees and costs DOES toll SOL. **Langley v. Miami-Dade County School Board**, 82 So.3d 1098 (Fla. 1st DCA 2012). The payment of attorney's fees does not extend SOL because it neither is a payment of compensation nor the furnishing of medical treatment. **Sanchez v. American Airlines**, 169 So.3d 1197 (Fla. 1st 2015).

TEMPORARY DISABILITY BENEFITS (ELS)

Doss v. UPS, 331 So.3d 216 (Fla. 1st DCA 2021)

DCA affirmed JCC's denial of claim for TTD as Statute of Repose, which terminated elgibility of TTD to 401 weeks as applied was NOT unconstitutional violation of right of access to courts.

In November 1997, claimant experienced a right knee sprain, returning to work until September 2016 when claimant underwent authorized arthroscopic knee surgery. Claimant was off work, returning to work and was placed at MMI February 7, 2017 with 14% ppi and no restrictions. Claimant received fewer than 260 weeks of temporary benefits during entire course of claim.

Under 1997 law, claimant's eligibility for temporary benefits terminates on the expiration of 401 weeks after the date of injury. This 7.7 year expiration date is a cap on bank of maximum number of weeks payable. Under 1997 statute, claimant entitled to maximum 104 weeks of TTD. But the FSC in **Westphal v. City of St. Petersburg**, 194 So.3d 311 (Fla. 2016) was unconstitutional violation of right to access to courts, reviving the prior statute which provided a 260 week limitation.

Here, claimant asserted that similar to **Westphal**, claimant unconstitutionally was denied access to courts because of the statutory limitation. HELD: the statutory limit of 401 weeks IS a constitutional reasonable alternative to tort litigation. The statute, s. 440.15(3)(c) terminates TTD eligibility 401 weeks post-injury. Claimant sought additional TTD benefits 19 years (!) after the workplace injury, far beyond the SOL for a tort action.

WORKERS' COMPENSATION IMMUNITY (Golden)

Tampa Electric Co. V. Gansner, 327 So.3d 1281 (Fla. 2nd DCA 2021)

Workers' compensation immunity extends horizontal immunity from general contractor to subcontractor and no evidence of gross negligence to warrant exception as a matter of law. Order granting partial summary judgment REVERSED and REMANDED to for trial court to enter order granting motion for summary judgment on affirmative defense of horizontal immunity.

Electric Boat, general K, is immune from simple negligence due to workers' compensation immunity.

Subcontractor is NOT immune from liability where the MCC of accident was subcontractor's own gross negligence. Elements of Gross Negligence: 1. Circumstances constituting an imminent or clear and present danger amounting to a more than normal or usual peril; 2. Knowledge or awareness of the imminent danger on the part of the tortfeasor, and 3 an act or omission that evinces a conscious disregard of the consequences. Simple negligence is that course of conduct which a reasonable and prudent man would know might possibly result in injury to persons or property. Gross negligence is where a reasonable and prudent man would know would probably and most likely result injury to persons or property.

Facts held not to establish a prima facile case of gross negligence where barrier tape not put up when moving stairs causing claimant/plaintiff to fall three and a half feet to ground.

Thank you. See you next year!