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**FLORIDA LAW WEEKLY**

Week of October 21, 2011

**ATTORNEY'S FEES AND COSTS/GOOD FAITH FOR UNTIMELY RESPONSE**

Morrison Mgmt. Specialists v. Pierre, 36 Fla. L. Weekly D2268  
(Fla. 1st DCA October 12, 2011).

E/C appealed a Final Order awarding Claimant approximately \$62,500.00 in attorney's fees and costs on the grounds the JCC erred in ignoring the E/C's Verified Response to Claimant's Fee Petition. Even though the Response was not timely filed, the E/C presented good cause for the untimely filing.

The E/C filed the Response four days late. The E/C believed based on conversations with Claimant's counsel that there was an agreement to allow additional time to file, given an anticipated continuance of the fee hearing. The E/C noted the agreement, and noted that the Claimant was not prejudiced by the Response being filed four days late.

At the fee hearing, the JCC entered an Order awarding the Claimant \$2,002.63 in costs and \$60,550.00 in attorney's fees.

The JCC noted that the E/C's mistaken interpretation of 60Q-6.124(3) does not qualify as good cause for the untimeliness of the E/C's Response. The JCC further found that pursuant to 60Q-6.124(3)(b), all of the allegations in the Claimant's Motion are to accepted as true and therefore she was constrained to award the amount requested. A Motion for Rehearing was denied and the Order was appealed.

The Court found it was undisputed that the E/C's Response was untimely and the issue is whether there was good cause to excuse the late filing. Good cause is not defined in the 60Q rules; however, the Court accepted the general definition of "a legally sufficient ground or reason or a substantial reason amounting in law to a legal excuse for failing to perform an act required by law." Therefore, because the E/C represented that Claimant's counsel agreed to an extension of the deadline for filing, and Claimant's counsel denied such an agreement, the issue for the JCC was to determine whether a sufficient good-faith basis existed for failure to timely file a response.

The Court stated there is no reason why attorneys can't agree to extensions of the deadlines in Rule 60Q-6.124(3)(b) without approval of a JCC, although it may be a better practice to file a Motion for Extension of Time. If the assertions made by the E/C's attorney are true, the failure to timely respond is not entirely unreasonable, because attorneys should be able to rely on each other's representations. Whether that rises to a level of good cause is an issue for the JCC to determine. Additionally, the law favors resolution on the merits and not by default, which is particularly important here, because by operation of Rule 60Q-6.124(3)(b), the JCC felt "constrained" to award a fee she found excessive even though there does not appear to have been any prejudice to the Claimant from the Response that had been filed four days late. The award was reversed and remanded for further proceedings.

#### **RESOLVING CONFLICTS AND MEDICAL TESTIMONY**

Hawkins v. Publix Supermarkets, Inc., 36 Fla. L. Weekly D2282 (October 17, 2011).

The Claimant argued that the JCC erred in relying on the opinion of one medical expert over another by failing to make

factual findings to support denial of the request for costs. The Court found the JCC did not err in resolving conflicts in medical testimony and the Claimant failed to preserve for appeal the issue regarding inadequate factual findings.

**COMPENSABLE ACCIDENTS/MAJOR CONTRIBUTING CAUSE**

Fortner v. Town of Longboat Key, 36 Fla. L. Weekly D2282 (Fla. 1st DCA October 17, 2011).

The Claimant was a firefighter injured while using an elliptical machine during his shift. He claimed the injury occurred because of trauma to his left ankle from work-related accidents in May 2002, September 2005, and September 2009. The JCC found no medical evidence of any work-related accidents including the elliptical machine incident. The Claimant appealed, arguing the JCC's decision was unsupported by competent substantial evidence.

The Court noted that a decision in favor of a party without the burden of proof need not be supported by competent substantial evidence. Furthermore, the medical evidence involved Dr. Vogler who testified that the Claimant came to him on August 29, 2009 with severe left ankle pain that he noted had been getting worse for approximately 12 years. The X-rays and MRI showed degenerative changes and the Claimant did not tell Dr. Vogler of any work-related accidents. Dr. O'Niell saw the Claimant for an OCD lesion, and at some point, the Claimant had an injury that caused it. However, neither physician could opine with reasonable medical certainty that the Claimant's current condition resulted from a work-related accident. The Court therefore affirmed the JCC's decision that the Claimant's employment was not the major contributing cause of the ankle injury.

**FRAUD**

Lucas v. ADT Security, Inc., 36 Fla. L. Weekly D2284 (Fla. 1st DCA October 17, 2011).

The JCC denied benefits on the ground that the Claimant violated Fla. Stat. § 440.105 by making false or misleading statements with regards to the extent of her injuries for the

purpose of obtaining workers' compensation benefits. The statements included reporting pain complaints grossly out of proportion to the physical findings, and diagnostic studies.

Specifically, the Claimant rated her pain verbally as a 4 to 8 out of 10 and written as a 5 out of 10. The doctor testified that the Claimant's behavior was inconsistent with those statements. Dr. Rogozinski testified the Claimant was observed walking into the exam room with absolutely no difficulty whatsoever; however, when she was sent to the x-ray room, she was in severe pain requiring help from her attorney, and then at the end of the examination she left the exam room with no problem whatsoever. She also sat with her legs dangling over the edge of the table for approximately 22 minutes with no signs of pain whatsoever. The doctor testified that she was theatrical in the exam room and began crying. She also walked with a normal gait which a person who had severe difficulty in moving would not do. The doctor performed a pelvic torso rotation which the Claimant noted pain; however, the doctor noted that this maneuver is used to discriminate people who malingering as even people with severe back pain would experience no pain during that test.

Dr. Rogozinski ultimately opined that the Claimant was malingering which he defined as somebody who is faking it. The Court noted that although the basis of a misrepresentation defense must be the Claimant's oral or written statements, an Employer/Carrier can prove the statement constitutes a misrepresentation by presenting evidence of the Claimant's non-verbal conduct that is inconsistent with that statement. Here, Dr. Rogozinski's testimony was evidence of the Claimant's non-verbal conduct, which was inconsistent with her reports of pain, and therefore sufficient to support the JCC's finding of misrepresentation.