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Apportionment

Newick vs. Webster Training Center, 37 Fla. L. Weekly D260a (Fla. 1st DCA January 30, 2011)

The claimant sustained a compensable shoulder injury on April 2, 2010. Prior to this accident she had dislocated her shoulder on three occasions while working for herself or someone else, but had never reported these under workers' compensation. Instead, she had treated under her own health insurance or paid out of pocket. The expert medical advisor appointed in the compensable accident opined that the need for surgery was 65% related to the 2010 work injury and 35% related to the three prior dislocations.

The JCC concluded that section 440.15(5)(b), *Florida Statutes*, was applicable and permitted the employer/carrier to apportion out 35% of indemnity benefits and 35% of the cost of surgery because the prior injuries were never claimed or treated as compensable injuries under the workers' compensation system. The claimant appealed, arguing that pursuant to Staffmark v.

Merrell, 43 So.3d 792 (Fla. 1st DCA 2010), apportionment was not applicable because the prior injuries had been occupational in nature. The claimant argued that whether the prior injuries had been deemed compensable was irrelevant.

The appellate court rejected this argument and affirmed the JCC's ruling. In order for the employer/carrier to have a remedy under section 440.42(4), *Florida Statutes* (allowing the employer/carrier to seek contribution from a prior carrier), the compensability of the previous injury is necessary. The appellate court held that because the claimant did not elect to seek workers' compensation benefits for her prior injuries and her injuries were, therefore, never deemed compensable, the employer/carrier was entitled to apportionment of indemnity and medical benefits pursuant to the opinions of the EMA.

Justice Thomas wrote a concurring opinion in which he agreed with the decision of the majority based on the holdings of Staffmark and Pearson decisions, but asserted that those decisions were not grounded in statute and should be reconsidered. Justice Thomas asserted that the appellate court, in its prior decisions, had failed to correctly differentiate between apportionment, involving only an employer and a claimant, and allocation, involving multiple employers disputing their share of liability.