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FLORIDA LAW WEEKLY

Week of May 27, 2011

LIFE CARE PLAN AND ATTENDANT CARE:

Bronson's, Inc. and Travelers v. Robertman, 36 Fla. L. Weekly D1053, (Fla. 1st DCA May 18, 2011).

The employer/carrier appealed alleging that the JCC erred in: (1) awarding benefits that were not in default and ripe, due and owing; (2) awarding attendant care benefits; and (3) denying the E/C's Motion for Appointment of EMA.

The claimant sustained serious brain and hip injuries in a compensable accident on March 19, 1982. Following the accident, the claimant, 52 years old, lived with his parents and continued to work for the employer. On March 23, 2010, he filed a Petition for Benefits requesting all benefits recommended in a life care plan prepared on March 15, 2010 by a vocational expert/certified life care planner.

The JCC approved the life care plan and authorized the contained recommendations. Costs estimated in the life care

plan included attendant care for eight hours per day, the purpose of which was to provide a safe environment and financial management for the claimant. Also included were estimated costs of a projected future hip replacement in 2015, and estimated costs for assisted living beginning in 2025. Dr. Sharfman signed a note on March 18, 2010 (three days after the plan was prepared), stating that all of the recommendations in the plan were medically reasonable and necessary as a result of the work accident.

Entered at trial was testimony by the vocational expert and treating doctors, Dr. Evans and Dr. Gerber. Dr. Sharfman's testimony was never taken and his records were not entered into evidence.

At trial, the JCC found the claimant required supervision throughout the day by his mother and, consequently, needed passive, on-call attendant care because of his inability to think clearly. The employer carrier argued that there was no prescription for attendant care.

The JCC then approved the plan, but noted that some of the recommendations may need to be modified in the future if conditions or circumstances change. He also awarded attorney's fees and costs to the claimant for securing the benefits awarded.

On appeal, the 1st DCA found that a substantial portion of the benefits awarded were not in default and ripe, due, and owing. The court also found that a life care plan in itself is not a benefit recognized under workers' compensation law.

In conclusion, the JCC erred in adopting the life care plan as a whole, rather than awarding only those benefits from the plan, which were supported by evidence of medical necessity. Therefore, the JCC's award of benefits for recommendations made in the life care plan, which were not ripe, due, and owing was erroneous.

As for the attendant care issue, the 1st DCA found that Dr. Sharfman's note did not meet the requirements of 440.13(2)(b), because it failed to specify the type of assistance and the level of care required. Specifically, "providing a safe environment" is too vague. Additionally, financial management is not a compensable form of attendant care. Finally, Section

440.13(2)(b) requires the prescription itself to specify the time periods of care, the level of care required, and the type of assistance required. As a result, the note was not specific enough. The court also noted that the vocational expert's testimony was not competent to establish medical necessity.

Consequently, the 1st DCA reversed approval of the life care plan and the award of benefits that were not ripe, due, and owing. They also reversed the award of attendant care benefits.

TORTS - WORKERS' COMPENSATION IMMUNITY:

Fossett v. Southeast Toyota Distributors, LLC, 36 Fla. L. Weekly D1055, (Fla. 1st DCA May 18, 2011).

The claimant originally sought employment from SET, a car dealership. SET then directed the claimant to apply with Adecco, from whom SET leased employees. The claimant was hired by Adecco and worked on SET's property where she was injured.

The claimant settled the workers' compensation claim with Adecco and sued SET in negligence.

The 1st DCA found that Adecco was a help supply services company, as defined by Florida Statute § 440.11. Moreover, a contract between SET and Adecco, stated that employees provided by Adecco would be under the direction, supervision and control of SET. Thus, based on the borrowed servant doctrine, SET would have also been considered a special employer as SET had the legal right or power to control the details of the claimant's work for Adecco.

TTD/TPD:

Feacher v. Total Employee Leasing/Guarantee Insurance Company, 36 Fla. L. Weekly D1104 (Fla. 1st DCA May 23, 2011).

The claimant appealed the JCC's order denying TPD and TTD from the date of accident until her visit with an IME.

The sole medical evidence of work restrictions came from the claimant's IME stating she was TTD from the date of accident through at least the date he saw the claimant and continuing until she received medical care.

As for TPD benefits, the JCC denied benefits for the period before the claimant's IME visit, finding there was no medical evidence of work restrictions for that period. In making the determination the JCC rejected the claimant's testimony that, on the date of accident, an ER doctor told her she could not return to work. In support, the JCC noted: the ER records did not contain work restrictions; the claimant's memory was poor; and the IME doctor did not review the ER records. Consequently, the JCC made its' decision under the impression the claimant's testimony was the only evidence to support disability for that period. As a result, the JCC found there was no evidence of disability at all for that period.

The 1st DCA stated that either, the JCC overlooked the IME doctor's testimony or erroneously concluded a doctor cannot impose work restrictions retroactively. The court then acknowledged the TPD issue was likely moot given the TTD issue.

As for TTD benefits, the 1st DCA found that the JCC rejected the IME's unrefuted medical testimony that the claimant should remain out of work from the date of accident until she received medical care without giving a legally valid reason. The court then reversed and remanded the case.

REIMBURSEMENT FOR OUT-OF-POCKET MEDICAL EXPENSES:

Clay County Board of County Commissioners/SCIBAL Associates v. Bramlitt, 36 Fla. L. Weekly D1105 (Fla. 1st DCA May 23, 2011).

The E/C appealed, arguing that the JCC erred in: (1) concluding that the claimant's hypertension is compensable; and (2) ordering the E/C to reimburse the claimant for out-of-pocket medical expenses.

The 1st DCA affirmed the first issue, but reversed the second issue, because the claimant did not file a Petition for Benefits seeking reimbursement for the out-of-pocket medical expenses. The court also held the JCC's finding, that the E/C stipulated to determination of the issue, was not supported by competent substantial evidence. Consequently, due process barred ruling on the matter of reimbursement because it was not at issue.

JEF/dbd