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**Section 112.18 Presumption**
Rocha v. City of Tampa/Commercial Risk Management, Fla. L. Weekly D2378 (Fla. 1st DCA October 10, 2012)

The Claimant appealed the JCC's determination that he did not meet all of the statutory prerequisites for entitlement to the Section 112.18, Florida Statutes, presumption of occupational causation for hypertension. The JCC determined that the Claimant failed to show that his hypertension resulted in total or partial disability.

The Claimant underwent a cardiac stress test on November 3, 2009, which was abnormal. He was assigned light duty restrictions and was prohibited from performing his job as a firefighter. On November 11, 2009, he underwent a cardiac assessment with another provider, who kept him off of work until November 21, 2009. An EMA was appointed, and the EMA opined that it was reasonable to restrict the Claimant's activities pending assessment by a cardiologist. However, the JCC determined that the assigned work restrictions were "precautionary, only" and did not equate to a finding that the Claimant was incapable of performing his duties due to his hypertension. The JCC concluded the Claimant failed to establish the requisite period of disability. On appeal, the Court addressed whether a Claimant

could rely solely on a medical work restriction to prove disability for the purpose of Section 112.18, Florida Statutes.

This was a case of first impression. The Court reviewed definitions of disability as defined by statute and in case law, and concluded that a Claimant who retains the physical strength and coordination to perform his job, but has been advised by a doctor through work restrictions to not engage in those job duties, as to avoid further injury or death, has met the definition of disability. The Court reasoned that the restrictions were legitimately imposed as medically necessary because of the injury and created actual incapacity by interfering with his ability to earn the wages he was receiving at the time of the injury. As the JCC had accepted the EMA's testimony that the work restrictions were reasonable, the finding of no disability was reversed, and the case was remanded for a finding of compensability of the claimant's hypertension.

**Prevailing Party Costs**

Marton v. Florida Hospital Ormond Beach/Adventist Heath Systems, Fla. L. Weekly D2386 (Fla. 1st DCA October 12, 2012)

After failing to prevail on any issue at two merit hearings, and following the JCC's Order taxing costs against the Claimant in the amount of $17,894.66, the Claimant appealed the JCC's Order and challenged the award of four categories of costs.

1. *Depositions of Medical Experts*

The JCC allowed the costs claimed and refused to apply Section 440.13(10), Florida Statutes, reasoning the dispute was not over the amount to be paid to a health care provider, but was a dispute between the parties over reimbursement. The Court held the JCC erred and Section 440.13(10), Florida Statutes, applies to the taxation of costs.

Health care provider depositions (i.e. authorized providers and IMEs) are subject to the $200 per hour witness fee cap. A records review in preparation for a deposition is also subject to the $200 per hour cap. Fees for services such as "non-refundable reservation fee for deposition" are not properly taxable costs. Physicians who have provided direct professional services that are unrelated to the workers' compensation case (i.e. fact witnesses) are subject to a cap of $200 per day.

2. *Deposition Transcription*

The JCC awarded costs for the transcription of four Claimant depositions. The Claimant objected to two depositions that were taken prior to the filing of the Petitions for Benefits at issue, and two others that were not admitted into evidence at the merit hearings. The Court held that the JCC did not abuse his discretion in taxing these costs as the depositions were taken for reasonable discovery purposes.

3. *Non-Deposition Fees Charged by Authorized Treating Physicians*

The Court held that the JCC abused his discretion in taxing costs for no-show fees and records review fees from an authorized provider. Section 440.13, Florida Statutes, only contemplates no-show fees for IMEs. The court also reasoned that because a Claimant is not

liable for payment of medical treatment or services under Section 440.13(3)(g), Florida Statutes, the cost of a records review, in conjunction with a medical appointment, is not properly taxable.

4. *Non-Deposition Fees Charged by IMEs*

The JCC awarded costs for a "reserved time fee for updated IME" and an IME's no-show fee. Because Section 440.13(5)(d), Florida Statutes, provides that a Claimant shall reimburse the Employer/Carrier for 50% of the IME physician's cancellation or no-show fee, and does not provide for a "reserved time fee," the Court reversed and remanded with instruction to ensure a no-show fee was properly charged and that the amount is appropriate.

**Sanctions**

Stahl v. Hialeah Hospital/Sedgwick CMS, Fla. L. Weekly D2404 (Fla. 1st DCA October 16, 2012)

The Claimant appealed the JCC's dismissal of two Petitions for Benefits, which were dismissed due to the Claimant's failure to reimburse the Employer/Carrier for costs previously assessed against him. At a hearing on the Employer/Carrier's Motion to Dismiss the Petitions for Benefits, the Claimant testified that had he been able to pay the costs, he would have done so. He also admitted that he failed to list on his financial affidavit his monthly tithe of 10% of his income.

The Court held that although Section 440.24(4), Florida Statutes, allows the JCC to dismiss claims in cases where the Claimant fails to comply with an Order of the JCC, within 10 days after the Order becomes final, the JCC may not dismiss a Petition for Benefits absent a specific finding that a party or its attorney has "willfully, deliberately, or contumaciously" refused to comply with the Order. Reversing the JCC, the Court stated that although the JCC found that the Claimant's tithe was unreasonable in light of his other financial obligations, he did not find that this constituted a willful refusal to comply with the costs Order.

**Temporary Partial Disability Benefits**

Thayer v. Chico's FAS, Inc./Specialty Risk Services, Fla. L. Weekly D2405 (Fla. 1st DCA October 16, 2012)

The Claimant appealed the JCC's denial of her entitlement to TPD benefits. The employer was unable to accommodate the Claimant's light duty restrictions and she was terminated for failure to meet deadlines. The JCC's initial Order found that the Claimant had successfully demonstrated a causal connection between her injury and the loss of employment, rejected the Employer/Carrier's argument that the Claimant was terminated for reasons unrelated to her injuries, and awarded TPD benefits. The following day, the JCC sua sponte entered an Amended Final Order, denying the claim for TPD benefits on the basis that the Claimant failed to prove that a causal connection existed between the loss of wages and the injuries, as the Claimant did not provide evidence of an unsuccessful job search.

Citing to Toscano, the Court stated that evidence of an unsuccessful job search is an alternate means to establishing entitlement to TPD benefits. A job search is not required where a Claimant establishes that her termination was caused by her inability to perform her job due to

her compensable injuries. As the JCC found that the Claimant was unable to successfully perform her pre-injury job duties as a result of her workplace injury, he applied an incorrect legal standard in determining entitlement to TPD benefits. The JCC's Order was reversed.

**Section 112.18 Presumption**

Walters v. State of Florida DOC/Division of Risk Management, Fla. L. Weekly D2408 (Fla. 1st DCA October 16, 2012

The Claimant sought compensability of his heart disease under Section 112.18, Florida Statutes. The parties stipulated that the Claimant met all of the requirements necessary to establish entitlement to the presumption of occupational causation. The JCC found the Employer/Carrier rebutted this presumption with testimony that the heart disease was attributable to viral gastroenteritis. The JCC also stated in his Order that the virus was not work-related and the Claimant failed to prove that the virus was an occupational disease as contemplated by Section 440.151, Florida Statutes.

The Claimant appealed the JCC's Order, and argued the JCC erred in both finding the Employer/Carrier rebutted the presumption, and in shifting the burden of proof back to him to prove the virus was an occupational disease. The Claimant argued that because the source of the virus was unknown, the Employer/Carrier failed to rebut the presumption.

Reversing the JCC's Order, the Court held that there was no competent, substantial evidence presented to support a finding that the virus was not work-related, as no physician could testify to its origin, and it was the Employer/Carrier's burden to prove the Claimant did not contract the virus at work. The Court also held that in shifting the burden to the Claimant to prove the virus was work-related, the JCC failed to give proper effect to the statutory presumption. A Claimant is not required to prove occupational causation under 440.151, Florida Statutes, until the presumption of Section 112.18, Florida Statutes, is rebutted.