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FLORIDA LAW WEEKLY

Week of November 16, 2012

Deauthorization/Overutilization

Avery v. City of Coral Gables,
37 Fla. L. Weekly D2588 (Fla. 1st DCA Nov. 7, 2012)

This is an appeal of the JCC's order approving deauthorization of two treating doctors under section 440.13(2)(d), Florida Statute, on the finding that the Claimant was not making "appropriate progress in her recuperation." Section 440.13(2)(d), Florida Statute, allows for the E/C to transfer care of an injured employee from the attending health care provider if an IME determines that the employee is not making appropriate progress in her recuperation. The Claimant had two industrial accidents in 1993. MMI was agreed on, and she was accepted as PTD on August 19, 1994. The Claimant had been treating with Dr. Pino, a psychiatrist, since 1994. In 2001 he referred the Claimant to Dr. McDougall for psychotherapy. She was attending 1 to 4 appointments per week until November 2009. On June 1, 2009 the Claimant had an IME with Dr. Greer due to overutilization concerns. Dr. Greer found the treatment excessive, and unwarranted. Therefore, the E/C transferred the

Claimants care to Dr. Amiel, and issued a Notice of Denial on November 5, 2009, deauthorizing Dr. Pino, and Dr. McDougall, under section 440.13(2)(d), Florida Statute, on the basis that the Claimant was not making "appropriate progress." The issue before the Court was whether section 440.13(2)(d), Florida Statute, is applicable as a matter of law to a Claimant who is post-MMI, and is receiving only palliative care. Palliative care by definition is not designed to improve. Even though the Court has not defined "recuperation" there is legal support to justify a period of recuperation after a Claimant has reached MMI. However, the treatment being rendered must be curative. Dr. Greer testified that he did not expect any improvement in the Claimant's condition. This statement logically precludes an opinion that the Claimant is not making appropriate progress in recuperation. The JCC found the treatment was unwarranted and excessive. The Court noted those findings were more in line with utilization review, and the proper forum for utilization review is with the Division of Workers' Compensation. The Court reversed, holding a claimant who has reached MMI cannot be in "recuperation" where the treatment being rendered is not curative.

Compensable Accidents/Increased Hazard

Ross v. Chalotte County Pub. Schs.,
37 Fla. L. Weekly D2620 (Fla. 1st DCA Nov. 13, 2012)

The Claimant appealed the JCC's finding that her claim was not compensable. The Claimant tripped on some linoleum flooring at work. She was advised after the accident that she had mild to moderate vestibular problems. The E/C asserted that the fall was due to a pre-existing vestibular problem, but introduced no evidence that the Claimant in fact had the problem, and whether it predated the accident. The JCC did not make a finding that the Claimant had the vestibular problem, but rather said the injury "may" have occurred due to an idiopathic condition. The JCC then went on to perform an increased hazard analysis, and found the Claimant could not establish the injury arose out of her employment because it could have happened elsewhere. The Court reversed the JCC's holding. In this case the JCC, and the parties were not aware of the recent decisions in *Caputo,* and *Walker.* Since there was an absence of medical evidence to establish a pre-existing condition, the Claimant did not have to show an increased hazard to establish a causal connection between her employment, and her injury. Also, in the absence of

competing causes, the Claimant satisfied the major contributing cause requirement of section 440.09(1), Florida Statute. While not commenting on it the Court also noted the JCC erred in finding the wall the Claimant fell against was not an increased hazard.

Advance

Delta Airlines, Inc. v. Kuhn,
37 Fla. L. Weekly D2620 (Fla. 1st DCA Nov. 13, 2012)

The Claimant suffered a shoulder injury on October 26, 2006. She was placed at MMI on April 4, 2007 with a 5% PIR. She continued to work for the insured with no reduction in pay. On July 22, 2011 she filed a PFB for a $2,000 advance under section 440.20(12), Florida Statute. She asserted she met the statutory requirements because she has a permanent impairment, and an advance is in her best interest. However, she was not behind on any of her financial obligations, and had no imminent need for the money. She only wanted it to provide her with a "cushion" should unexpected bills come up. Claimant's counsel argued that case law makes an award of an advance "pretty much automatic" where the Court only needs to consider the interests of the Claimant. The JCC awarded the advance finding it was in the Claimant's best interest, and expressly considered no other factors. The Court disagreed, and reversed. Since section 440.20(12), Florida Statute, uses the words "may be ordered" rather than shall, it can only be interpreted to invest the JCC's with discretion. The Court concluded that a financial "cushion" for a claimant is not, by itself, a justifiable basis for the award of an advance. To hold otherwise would result in automatic $2,000 advances from E/C's to claimants despite no connection to a pending claim for medical or related care, or even a demonstrated need for the funds. The type of interest that is furthered by an advance under section 440.20(12)(c)(2), Florida Statute, must at least have some plausible nexus to the purpose of Chapter 440 which is to address medical and related financial needs arising from workplace injuries.