

**RISSMAN, BARRETT, HURT,
DONAHUE & McLAIN, P. A.
ATTORNEYS AT LAW**

STEVEN A. RISSMAN
ROBERT C. BARRETT
JENNINGS L. HURT III
ROBERT A. DONAHUE
JOHN E. McLAIN III
RICHARD S. WOMBLE
STACIE B. GREENE
THEODORE N. GOLDSTEIN
RAYMOND A. LOPEZ
VANCE R. DAWSON
RICHARD B. MANGAN JR.
HENRY W. JEWETT II
DANIEL M. POLLACK
ART C. YOUNG
NICOLE D. RUOCCO
DANIEL T. JAFFE
BEATRIZ E. JUSTIN
GREGORY GIANNUZZI
DAVID K. BEACH
F. DEAN HEWITT
EDWARD M. COPELAND IV
DAVID R. KUHN
G. WILLIAM LAZENBY IV
R. CLIFTON ACORD II
JILL M. SPEARS
JEFFREY J. KERLEY
KARISSA L. OWENS
JOHN P. DALY
PAUL B. FULMER III

EXECUTIVE DIRECTOR
W. SCOTT PETERSON

201 EAST PINE STREET
15TH FLOOR
P.O. BOX 4940
ORLANDO, FLORIDA 32802-4940
TELEPHONE (407) 839-0120
TELECOPIER (407) 841-9726
ORLANDO@RISSMAN.COM

TAMPA COMMONS
ONE NORTH DALE MABRY HIGHWAY
11TH FLOOR
TAMPA, FLORIDA 33609
TELEPHONE (813) 221-3114
TELECOPIER (813) 221-3033
TAMPA@RISSMAN.COM

709 SEBASTIAN BOULEVARD
SUITE B
SEBASTIAN, FLORIDA 32958
TELEPHONE (772) 228-3228
TELECOPIER (772) 228-3229
SEBASTIAN@RISSMAN.COM

WWW.RISSMAN.COM

PLEASE REPLY TO: ORLANDO

AMY L. BAKER
AMANDA L. BRUS
STEVEN B. BURRES
DEREK J. BUSH
SEAN M. CROCKER
CHRISTOPHER E. DENNIS
AARON E. EAGAN
JAMES E. FAVERO III
SUSAN R. FULLER
JANNINE C. GALVEZ
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ELISE J. GEIBEL
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RICHARD B. ROBBINS
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JASON R. URBANOWICZ
MEGHAN C. WHISENHUNT
MICHAEL C. WOODARD
CHRISTINE V. ZHAROVA

FLORIDA LAW WEEKLY
Week of December 6, 2013

**Emergency services and care, Major Contributing Cause, Medical
Opinions of authorized treating physicians and emergency
providers**

Cespedes v. Yellow Transportation Inc., 38 Fla. L. Weekly D2525
(Fla. 1st DCA 2013)

The claimant challenged an Order of the JCC arguing the JCC erred by (1) improperly shifting onto the claimant the burden to prove the compensable injury was the MCC of his disability and need for surgery; (2) finding that the medical services at issue did not constitute "emergency services and care" and that lack of notice to the E/C rendered the surgery non-compensable; and (3) finding the opinion testimony from the emergency room physician, Dr. Acebal, was not admissible pursuant to the "self-help" provisions.

The First DCA affirmed the JCC's conclusion that the opinion testimony from Dr. Acebal was not admissible evidence under the self-help provisions. However, they concluded the JCC employed incorrect legal standards in conducting the MCC

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analysis. The First DCA further concluded that the JCC used an incorrect legal test to determine whether the services and care provided by Dr. Acebal were compensable "emergency services and care." Because of these errors, and based on the conclusion that the opinion testimony of physicians who have provided compensable emergency services and care are admissible as "authorized treating providers" under §440.13(5)(e), the First DCA also concluded that the JCC used improper legal standards in determining that Dr. Acebal's medical opinions were inadmissible in the proceedings below. Based on these errors, the First DCA reversed and remanded.

In this case, the claimant injured his lower back on March 20, 2006. The E/C accepted the accident as compensable and authorized treatment with Dr. Brown. Dr. Brown recommended surgery, which the claimant declined. In September 2006, Dr. Brown placed the claimant at MMI with a six percent (6%) impairment rating for an L5-S1 disc herniation. From 2006 through 2010, the claimant continued to treat with Dr. Brown due to recurrent low back pain. Dr. Brown continued to recommend surgical intervention which the claimant continued to decline.

On March 20, 2011, the claimant was admitted to and treated at Kendall Regional Medical Center. The treating physician, Dr. Acebal, ordered an MRI which revealed a massive herniated disc at L5-S1 which was severely compressing the nerve roots of the spine. Based on his observation that the claimant was immobilized and in unbearable pain, Dr. Acebal recommended and performed surgery at L5-S1 to treat the condition.

Subsequently, the claimant filed a PFB seeking temporary indemnity benefits, authorization for continued treatment with Dr. Brown, and compensability of the surgery performed by Dr. Acebal. At hearing, the claimant attempted to offer the opinion testimony of Dr. Acebal. The JCC held that Dr. Acebal's medical opinion was inadmissible under §440.13(5)(e) because he was not an "authorized physician, IME or EMA." Both Dr. Brown and the authorized treating pain management physician, Dr. Salamon, opined that the claimant's surgery was not performed on an emergency basis.

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In the JCC's Order, he found that Dr. Brown diagnosed a "work related L5-S1 disc herniation and radiculopathy," and that the E/C agreed and stipulated to the compensability of the low back condition. The JCC also found that there were no identifiable causes for the claimant's low back condition other than the compensable work place injury and a pre-existing spondylosis, which Dr. Brown opined contributed ten percent (10%) to the claimant's symptoms. The JCC also found that there was insufficient evidence to support the E/C's contention that the accident was no longer the MCC of the need for treatment. The JCC awarded ongoing treatment with Dr. Brown.

Notwithstanding these factual issues resolved in the claimant's favor, the JCC found that the claimant failed to prove the compensable injury was the MCC of the need for surgery. The JCC further found the claimant failed to satisfy his burden to persuade the JCC that Dr. Acebal's "unauthorized" care and services constituted "emergency services and care". In addition, the JCC found the E/C did not receive timely notice of the alleged emergency care. Thus, the JCC denied compensability of the surgery and temporary indemnity benefits associated with the surgery.

Major contributing cause

To avoid responsibility for the surgery, the E/C attempted to demonstrate a break in the causation chain between the workplace accident and the compensable lower back injury; however, the JCC found the claimant did not have a subsequent low back injury. The JCC found that the only two causes of the claimant's lower back condition were the L5-S1 herniated disc and a pre-existing spondylosis. The JCC did not find that the pre-existing spondylosis was the MCC of the claimant's need for medical treatment, but rather awarded ongoing medical care because there was insufficient evidence to support the E/C's assertion that the workplace accident was no longer the MCC of the claimant's need for medical treatment.

The First District held that on these facts the JCC's conclusions on the issue of MCC were inconsistent.

Emergency Services and Care

Under §440.13(1)(f), "emergency services and care" is defined, by reference to §395.002 which indicates that emergency services and care begin when a physician undertakes a medical screening, examination, or evaluation to determine an emergency medical condition exists. In this case, the JCC concluded that the surgery performed was not an emergency and that Dr. Acebal provided no emergency services or care without considering the variety of services covered under §395.002.

Under the requirements of §395.002(10), the relevant questions regarding whether emergency services and care were provided are: (1) whether the service provider is a licensed physician; (2) whether an evaluation, screening or examination was conducted by that physician; (3) whether such care was undertaken by the physician with the intent of determining "if an emergency medical condition exists." These questions went unanswered by the JCC. Thus, the First DCA found that he employed an incorrect legal standard in determining whether Dr. Acebal provided emergency services and care.

The court noted, however, that simply because emergency care was provided does not make such care compensable. Rather, the compensability of emergency care, and the providing physician's eligibility for payment for such care, is dependent on additional elements provided under §440.13(2)(a). This section outlines that, to be compensable, such care must be not only "emergency care", but also "medically necessary," and it must be provided for a compensable injury.

Emergency providers

Section 440.13(5)(e) permits admission of medical opinion testimony from a physician who has proven to have provided emergency care and services. Thus, if on remand the JCC determines, without relying on Dr. Acebal's medical opinion testimony that Dr. Acebal provided medically necessary and compensable emergency service and care, the JCC must then find Dr. Acebal a treating provider "authorized" to provide such care. Since he is then deemed an "authorized" provider, the JCC

must admit Dr. Acebal's medical opinion testimony to determine whether the surgery performed qualifies as emergency services and care.

The surgery

As previously mentioned, under §395.002(10), "emergency services and care" includes treatment "to determine if an emergency medical condition exists and, if it does, the care, treatment, or surgery necessary to relieve the emergency medical condition..." An "emergency medical condition," as defined by §395.002(9)(a) is a medical condition manifesting itself by acute symptoms of sufficient severity, which may include severe pain, such that the absence of immediate medical attention could reasonably be expected to result in serious jeopardy to patient health, serious impairment to bodily functions or serious dysfunction of any bodily organ or part.

Along with the massive herniated disc previously mentioned, the claimant's symptoms included associated weakness and numbness, unbearable pain, and inability to move; conditions which, according to Dr. Acebal's testimony, impaired the claimant's ability to walk, a bodily function. Further, the doctor testified that if this condition was not addressed, it could have caused serious jeopardy to the claimant's health, such as cauda equina syndrome.

The E/C also attempted to deny compensability of the surgery based on the fact that the emergency provider failed to give the E/C timely notice of the treatment, as required under §440.13(3)(b). It was undisputed that notice was never provided to the E/C after Dr. Acebal's treatment. This was viewed as a billing dispute over which the JCC lacks jurisdiction.

Based on the foregoing, the First District reversed and remanded for further proceedings and findings of fact.