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**MENTAL OR NERVOUS INJURIES - PTSD:**

*McIntosh v. CVS Pharmacy and Holiday CVS, LLC/Caremark Corp./GAB Robbins Gallagher Bassett*, 9 Fla. L. Weekly D844, (Fla. 1st DCA, April 22, 2014)

The Claimant appealed the JCC's decision denying compensability of post-traumatic stress disorder ("PTSD"), arguing that the JCC conflated the standard for determining whether a mental or nervous injury arose out of an employment-related accident, with whether a mental or nervous injury occurred as a manifestation of a compensable physical injury.

In October of 2010, the Claimant, a pharmacist, was working when an armed robber ordered her to get down on the floor. The Claimant (who was pregnant at the time) attempted to flee, but fell in the process, landing on her stomach. She sustained a compensable physical injury to her right knee, albeit a minor one, for which she did receive treatment on the date of the accident at an emergency room. Psychiatrist, Dr. Abraham

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subsequently diagnosed her with PTSD. He causally related the PTSD to the events on the date of the accident, but not to any physical injury suffered in the accident. Another psychiatrist authorized by the E/C, Dr. Colin, also shared these opinions.

The 1st DCA then went through §440.093 and the four situations discussed in the *McKenzie* case, which discusses when mental and nervous injuries may arise in the work place. The 1st DCA found that the subject facts closely paralleled the second sentence in 440.093(1), that a workplace accident can cause an employee to suffer both a physical injury and a separate mental or nervous injury. They pointed out that, if a separate mental or nervous injury occurs at the same time as a physical injury requiring medical treatment, then the mental or nervous injury will also be compensable. Consequently, the 1st DCA reversed and remanded the JCC's decision, as there was competence of substantial evidence to establish that PTSD was the natural or unavoidable result of the Claimant's minor physical injuries, which were treated at the emergency room on the date of accident.

The court also addressed whether the JCC erred in concluding the E/C was not estopped by §440.20(4) (120-day pay and investigate provision). At trial, the Claimant argued that the E/C was estopped from denying compensability because they did not issue a denial within 120-days from July 11, 2012, the date treatment was initially provided with Dr. Abraham for PTSD. The 1st DCA reversed and remanded for reconsideration to determine whether the E/C did timely deny compensability, or sufficiently demonstrate facts relevant to the issue of compensability that it could not have discovered within the 120-days following the initial provision of treatment for PTSD.

**MCC/COMPENSABILITY:**

*Energy Air and Amerisure Insurance Co. v. Lalonde*, 9 Fla. L. Weekly D870, (Fla. 1st DCA, April 24, 2014)

The E/C appealed a JCC Order finding a heat exhaustion injury compensable and awarding medical bills. The E/C argued that the JCC erred in both: (1) finding compensability of the heat exposure injury, in the absence of evidence that the

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Claimant "was exposed to dangers materially in excess to which the community is exposed"; and (2) in awarding the past medical bills, in the absence of evidence that they were related to the Claimant's heat exhaustion.

The 1st DCA affirmed on both points and wrote solely to confirm that prior court created causation standards are superseded by the Legislature's adoption of the "major contributing cause" standard, effective January 1, 1994. The 1st DCA also wanted to restate that diagnostic tests are compensable if they are "reasonably necessary to determine whether the industrial accident was the cause of" the injuries.

**ATTORNEY'S FEES:**

*Lord v. Santa Rosa Correctional Institute/The Division of Risk Management*, 9 Fla. L. Weekly D870, (Fla. 1st DCA, April 24, 2014)

The Claimant appealed a JCC Order awarding only approximately half of his attorney's requested fees.

The Claimant had a compensable injury in which his authorized PCP eventually discontinued seeing workers' compensation patients. The Claimant requested authorization of a new PCP. The issue was mediated and the E/C agreed to authorize a new PCP and also conceded to entitlement to attorney's fees for securing that benefit. Subsequently, the E/C had trouble finding a doctor that would agree to treat the Claimant. The Claimant eventually moved to enforce the Mediation Agreement, which after several Orders, resulted in the E/C selecting a new PCP.

Presumably after a hearing on the Claimant's Petition for Attorney's Fees, the JCC entered an Order excluding all fees for the period between the Mediation and when the new PCP was authorized. The JCC reasoned that the Claimant is not entitled to E/C paid fees for the time expended after Mediation, because the E/C did not act in bad faith or unreasonably delay the authorization.

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The 1st DCA held that it was error for the JCC to conceptualize the attorney time as two distinct periods of entitlement, as all of the fees in dispute were alleged to be associated with a single benefit, authorizing the new PCP. The 1st DCA stated that the error was not harmless because entitlement to fees for securing that benefit had already been stipulated to. Further, the Court pointed out that the subject facts are distinguishable from the case the JCC relied on in his ruling, *Jennings v. National Linen Service*, 995 So. 2d 1153, (Fla. 1st DCA 2008), because the question here was the amount of attorney's fees, not entitlement. Consequently, the proper legal test for the amount of the fee is whether the attorney time alleged was reasonable and required to secure the benefit. The JCC did not apply that test here. Further, the 1st DCA found that new PCP was authorized as a result of the JCC's Orders, which were prompted by the Claimant's Motion to Enforce. Therefore, the 1st DCA reversed and remanded.

**ADVANCE:**

*Taylor v. Air Canada and Liberty Insurance Co.*, 9 Fla. L. Weekly D880 (Fla. 1st DCA, April 25, 2014)

The Claimant appealed after the JCC denied her request for a \$2,000.00 advance.

Compensability was controverted by the E/C. The Claimant requested a \$2,000.00 advance to pay for the deposition of her PCP, who could testify to her condition and the treatment that she received immediately after becoming ill, after eating lunch provided by her employer during a training session.

The JCC found that she had a substantial reduction in wages as a result of her accident and concluded she met the preliminary test of entitlement to an advance, per Fla. Stat. § 440.20(12)(c)(2). The JCC denied the request, however, based on the nature of the money's intended use, to pay for the cost of litigation, reasoning that monies for costs can only be awarded after a prevailing party is determined. Thus, the JCC concluded that § 440.34(3) was implicated in determining the Claimant's entitlement to the advance.

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The 1st DCA held that § 440.34(3) has no meaningful relationship to the question of whether a request for an advance has some nexus to a workplace injury. Further, in focusing on the potential use for the funds in denying the advance, the JCC misapprehended the Court's analysis in *ESIS/Ace American Insurance Co. v. Kuhn*, 104 So. 3d 1111 (Fla. 1st DCA 2012). The 1st DCA then went through the statutory qualifiers for a \$2,000.00 advance and pointed out that the Claimant must only meet one of the three qualifiers. The Court also stated that the JCC must determine that the Claimant: (1) is a proper Claimant; and (2) has provided adequate justification for the request. In *Kuhn*, the Court instructed that the need for an advance must be in furtherance of Chapter 440's purpose, "to address medical and related financial needs arising from workplace injuries." In other words, the need for an advance must be "tethered to justifiable medical and other needs arising from and related to workers' compensation claims."

The 1st DCA found that taking the deposition of a witness who may advance proof of compensability of the claim is such a need. The JCC's decision was reversed and remanded.

JEF/dbd