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Medical benefits - Apportionment

Jewell v. Gevity HR, 36 Fla. L. Weekly D622 (Fla. 1st DCA March 23, 2011)

Claimant sustained a compensable back injury. The authorized treating neurosurgeon recommended surgery and opined that 60% of need for surgery was related to the industrial accident while 40% was related to preexisting conditions. The E/C authorized surgery asserting that they were only responsible for 60% of the costs.

JCC allowed apportionment of surgery costs. Under §440.15(5)(b), apportionment requires either (1) a finding of aggravation or acceleration of a preexisting condition or (2) a finding of merger with a preexisting condition. In allowing apportionment, the JCC relied on the merger rule based on the treating neurosurgeon's opinions; however, merger requires the combining of a preexisting permanent impairment or disability with a subsequent compensable permanent impairment or disability.

Although evidence of preexisting conditions was present, there was no evidence of preexisting permanent impairment or disability. Accordingly, the First DCA reversed holding that the JCC could not rely on merger rule to apportion costs of claimant's medical care without evidence of a preexisting permanent impairment or disability.

Attorney's fees

Kauffman v. Community Inclusions, Inc., 36 Fla. L. Weekly D622
(Fla. 1st DCA March 23, 2011)

In the Kauffman case, the E/C denied compensability for injuries the claimant sustained while attempting to transfer a patient into a recliner on 7/23/09. At trial the injury was found to be compensable and the E/C was ordered to pay \$3,417.03 to the claimant. The JCC also found the E/C responsible for the claimant's attorney's fees pursuant to §440.34(3), and found a reasonable fee to be \$25,075.00; however, the JCC stated that he was bound by the statutory fee schedule in §440.34(1). As a result, the prevailing claimant attorney was entitled to \$684.41 on 100.3 hours, or about \$6.84 per hour. The claimant appealed, arguing the JCC misinterpreted §440.34 and that, if interpreted correctly, the amended statute is now unconstitutional.

The First DCA rejected the claimant's argument that §440.34 allows attorney's fees exceeding the guideline fee when the fee is "awarded" rather than merely "approved" by the JCC. Although §440.34(1) provides that a fee may not be paid for a claimant unless approved by the JCC, §440.34(3) provides that a claimant is entitled to recover a fee from an E/C "in an amount equal to the amount provided for in subsection (1) or subsection (7)." Except in cases where §440.34(7) applies, the statute limits claimants' attorney's fees to the formula set forth in subsection (1) regardless of whether the fee is awarded or approved.

The court went on to summarily reject the claimant's constitutional challenges "for the same reasons [the court] rejected similar challenges to §440.34, as previously amended in 2003." It was noted that the Supreme Court did not address any constitutional issues in Murray however, and did not cast any doubt on the reasoning used in prior first DCA opinions rejecting constitutional claims like those in Kauffman.

The E/C asserted that the represented claimant did not have standing to raise constitutional arguments. This argument was

rejected as the First DCA noted that in Murray, the Court at least implicitly concluded that a workers' compensation claimant has standing to challenge the validity of the fee provisions in §440.34, even though she herself is adequately represented by counsel.

Attorney's fees - Customary hourly rate in district

McDermott v. United Parcel Serv./Liberty Mutual, 36 Fla. L. Weekly D640 (Fla. 1st DCA March 28, 2011)

Claimant sought review of the JCC's decision awarding the claimant's attorney fees at a \$200 hourly rate. The First DCA held that the JCC properly rejected claimant's attorney's testimony that he should be awarded an hourly fee of \$300 to \$400, where JCC found that testimony was based on attorney's personal experience in jurisdictions other than workers' compensation and in other venues.

Further, the argument of the E/C's attorney, that \$200 was the customary hourly rate in the district was insufficient to support an award of fees to the claimant's attorney at that rate where E/C's attorney did not also *testify* concerning customary hourly rate. In determining the customary fee, the JCC must rely on evidence properly submitted.