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FLORIDA LAW WEEKLY

FEBRUARY 10, 2012

STATUTE OF LIMITATIONS

Lula Longley v. Miami Dade County School Board and Gallagher Bassett Svcs., 37 Fla. L. Weekly D307 (Fla. 1st DCA February 2, 2012)

The claimant filed a Petition for Benefits seeking an appointment with an authorized orthopedist, and costs and attorney's fees on March 30, 2009. The employer/carrier filed a response indicating that it had set an appointment with the orthopedist, and defended against costs and fees as not due or owing. On July 22, 2009, the parties' counsel sent a letter to the mediator requesting the cancellation of the mediation. The letter, *inter alia*, indicated that "there [were] no other outstanding issues other than attorney's fees and costs, over which jurisdiction remains reserved in the JCC."

On March 3, 2010, the claimant filed a second Petition for Benefits seeking an alternative orthopedist, or a follow up appointment with the authorized orthopedist, as well as penalties, interest, costs, and attorney's fees. The employer/carrier denied the entire claim as barred by the statute of limitations, and the judge of compensation claims agreed. The judge of compensation claims found the 2009 Petition for Benefits was no longer pending because the letter to the mediator indicated "a resolution of the issues" and thus the letter operated as a voluntary dismissal of the 2009 Petition for Benefits.

The First District Court of Appeals reversed the judge of compensation claims' finding, ruling that the parties had not settled the active claims for entitlement to attorney's fees and costs brought by the 2009 Petition for Benefits. As such, not all of the issues had been resolved. The reservation of jurisdiction for the issues of attorney's fees and costs "tolled" the statute of limitations, because the 2009 Petition for Benefits was still pending.

Because the claim for fees and costs remained pending, the judge of compensation claims erred in dismissing the 2009 Petition for Benefits on the basis that it was barred by the statute of limitations.

TEMPORARY INDEMNITY BENEFITS

Mescha Gillislee v. EMI Enterprises, Inc. and Amtrust North America of Florida, 37 Fla. L. Weekly D309 (Fla. 1st DCA February 2, 2012)

The claimant appealed an order of the judge of compensation claims awarding temporary indemnity benefits from the date of accident through a period of time, but denying temporary indemnity benefits from another period of time to the date of the final hearing. The claimant challenged two rulings of the JCC including his rejection of the adjuster's testimony regarding medical restrictions as sufficient proof of entitlement to indemnity benefits, and the JCC's calculation of

the average weekly wage. The First District Court of Appeals affirmed the former ruling, and reversed the latter.

The judge of compensation claims found that it was not disputed that the claimant received vacation pay and funeral pay during the 13 weeks prior to the industrial accident that were reported for federal income tax purposes. The First District Court of Appeals noted that this particular fact was actually disputed. Specifically, the wage statement indicated that the claimant was paid in a manner not consistent with the claimant's testimony. Presumably, based on the judge of compensation claims' finding, the judge of compensation claims rejected the wage statement and accepted the claimant's testimony regarding the average weekly wage. Notwithstanding this finding, the judge of compensation claims improperly calculated the claimant's average weekly wage.

In support of the judge of compensation claims excluding the vacation and funeral pay from the claimant's average weekly wage, the judge of compensation claims cited Orange County School Board v. Muscanell, 705 So. 2d 1027 (Fla. 1st DCA 1998), which excluded vested sick pay from the average weekly wage. The First District Court of Appeals held that the judge of compensation claims misapprehended the facts of Muscanell. The case was remanded to the judge of compensation claims to determine what Florida statute permits the inclusion of vacation and funeral pay in the average weekly wage when it was actually paid during the 13 weeks from the date of accident, without referencing Muscanell.

SMC/wig