THE TOP TEN CASES/AREAS OF 2010

10. ATTORNEYS' FEES AND COSTS:

Shackleford v. CTL Distribution, 25 So.3d 667 (Fla. 1st DCA 2010)

Shackleford is a great case for employers and carriers. Section 440.34(3), Florida Statutes allows the assessment of costs against the non-prevailing party. There is no time limit on filing the motion to seek the costs. In this case, the order against the claimant was entered one year before the Motion to Tax Costs was filed. Absent explicit statutory authority, a Judge of Compensation Claims may not set a time limitation for filing a Motion to Seek Costs.

Jackson v. Ryan's Family Steakhouse, 27 So.3d 90 (Fla. 1st DCA 2009)

This is a case that falls under the Emma Murray time period from October 2003 through July 1, 2009 when the legislature essentially reversed Emma Murray. The claimant filed a Petition for Benefits for psychiatric treatment, prescription reimbursement and mileage. The claimant lost on psychiatric treatment, prescription reimbursement and won on mileage. The mileage reimbursement was only $201.44. The claimant's lawyer said that he spent over 40 hours prosecuting the claim and wanted a fee of almost $8,000. A guideline fee was only $40.28. The JCC awarded $3,860.00. The employer/carrier presented no evidence at trial other than the defense attorney talking about how the fee was unreasonable.

The reason this case is being presented in the case law update is because there are two or three pages from the First District on how important it is

for the trial judge to be vigilant in awarding a proper fee. The trial judge indicated on a couple of occasions that to award a $6,000 to $8,000 fee would shock the judicial conscience. However, the defense attorney provided the JCC with no real evidence to award the lower fee. The JCC lowered it anyway because a higher fee would be excessive.

The lesson for an adjuster is that when you are going to an attorneys' fee hearing, you should make sure that your lawyer is prepared and that it has actual evidence to present.

The next several cases deal with liens in workers' compensation cases, which occur when a claimant's attorney either withdraws or is terminated before the final resolution of the case.

Rosenthal, Levy & Simon v. Scott, 17 So. 3rd 872 (Fla. 1st DCA 2009)

This case presents a very typical fact pattern and is one that many adjusters typically ignore. The claimant was represented by the first lawyer in a controverted claim. After several months, a settlement offer is made while the first lawyer is still the attorney of record. The claimant turns down the settlement offer and discharges the lawyer. Then, the claimant hires a new lawyer and that new lawyer settles the case quickly for more money than the offer to the first lawyer.

The issue is who gets the attorneys' fee. In Rosenthal, the First District held that charging liens still apply to workers' compensation benefits and it is the responsibility of the Judge of Compensation Claims to apportion the amount of the attorneys' fee fairly taking into account who got what for the client and how much time was involved, among other things.

Zaldivar v. Florida Transport of 1982, 19 So. 3d 1093 (Fla. 1st DCA 2009)

This is another charging lien case. Zaldivar represented the claimant for about a year and then resigned. Almost four years later, the employer/carrier requested an attorneys' fee lien hearing. The judge granted the carrier's Motion to have a lien hearing. The First District reversed and held that a fee lien does not become ripe for adjudication until a settlement creates proceeds upon which the lien could attach. Once a case settles and the prior attorney is notified of the settlement, then the claimant's attorney's failure to institute an action in a timely fashion can result in the dismissal of a lien but not before the case is settled.

The law with respect to charging liens is very liberal. The important thing to note is not how liberal the law is, but how cautious the employer and carrier have to be to make sure that any and all claimants' attorneys are notified when a case is settled so the lien cannot later be assessed against the employer/carrier after the case is settled and benefits and fees paid.

Vassallo v. Ronnie Goldwire, 18 So.3d 670 (Fla. 1st DCA 2009)

This is a case that I don't really like. Basically, it says that Section 440.45(4)(i) which allows for a dismissal for lack of prosecution, does not allow a JCC to dismiss an attorneys' fee Petition with prejudice. What this means is that if a claimant secures benefits for his client either by Stipulation or court order and then doesn't do anything for over a year to secure his attorneys' fees, then a Motion to Dismiss for lack of prosecution will not be granted by the Judge of Compensation Claims.

This makes it difficult to get an attorneys' fee issue resolved if the carrier wants to close its claim after several months without having the fee issue resolved. It makes it all the more important to press the claimant's lawyer to get the fee resolved at the time of the order or stipulation.

9. CONTRIBUTION:

Medpartners/Diagnostic Clinic v. Zenith Insurance Company, 23 So.3d 202 (Fla. 1st DCA 2009)

The number of carriers seeking contribution or indemnification has increased drastically over the last five years. This case is a good explanation of where the law is on that subject.

What this case really says is that the second employer/carrier cannot have contribution against the prior employer and carrier if that prior employer and carrier is no longer liable or responsible to the claimant. If the Statute of Limitations has run against the first carrier with respect to payments made to the claimant, the new carrier cannot collect contribution from the prior carrier.

Actually, that makes perfect sense. If the claimant couldn't make a claim against the first carrier because the Statute of Limitations has run, why should the second carrier be able to claim anything at all against the first carrier? The case also notes the very important point that the Statute of Limitations from the prior carrier is not revived simply by the new carrier paying benefits. If that were the case, the Statute of Limitations would never run in a contribution case.

8. IMMUNITY:

Coastal Masonary, Inc. v. Bayardo Gutierrez, 35 Fla. L. Weekly D342 (Fla. 3rd DCA 2010)

This case is important because it shows that what an adjuster does in a workers' compensation claim can greatly impact the rights of the insured (employer) in a liability claim. Of course, everybody knows what is meant by exclusive remedy. Workers' compensation is the exclusive remedy for an on-the-job accident. There are certain exceptions to exclusive remedy and one of them occurred when the workers' compensation adjuster makes an inconsistent and irreconcilable position with the insurance company for the employer in a liability case.

Here is what happened. The claimant contends that he had a compensable accident. The employer and carrier denied that an accident occurred as well as no notice and no causation. Then, the claimant dismisses his Petition for Benefits based upon the employer and carrier's denial and files a negligence suit. The employer, now the defendant in the negligence suit, says that the case is properly a workers' compensation case and not a liability case. Moreover, the employer in the liability claim contends that it did not waive the workers' compensation immunity defense.

The Third District says that the employer has taken inconsistent positions and then allowed the case to proceed to trial against the employer. The lesson to be learned is that if you are going to take a position that the claimant's claim is

not compensable, consider the ramifications for your insured in a negligence claim that may follow.

7. FRAUD:

Arreola v. Administrative Concepts, 17 So.3d 1792, (Fla. 1st DCA 2009)

This is an important case on the fraud defense. The claimant provided a false social security number on several occasions after his injury. Section 440.105 allows the employer/carrier a defense if the claimant makes a false, fraudulent or misleading statement for the purpose of obtaining workers' compensation benefits.

The Court says that there are really two questions involved. The first is whether the claimant made or caused to be made false, fraudulent or misleading statements. The second is whether the statement was intended by the claimant to obtain benefits.

In this case, the claimant gave a false social security number to the ambulance people, to the pharmacy for obtaining prescriptions and in a telephone interview between the claimant and the investigator.

In denying benefits to the claimant, the Court notes that illegal aliens are entitled to workers' compensation benefits, but not if they commit fraud. By using a false social security number and intending to collect workers' compensation benefits, the claimant committed fraud and is not entitled to benefits. In fact, the case, concludes with the phrase "the Statute requires everyone to be truthful, responsive and complete".

Dieujuste v. J. Dodd Plumbing, 3 So.3d 1275 (Fla. 1st DCA 2009)

This is a surveillance case. The claimant testified a couple of times that sometimes he walked with a cane and sometimes he didn't. There was surveillance of him walking without a cane and then surveillance of him putting his cane in the car and using it when he got to the doctor's office. On that basis, the carrier denied benefits on the basis of fraud.

The First DCA talked about the requirements of denying a claim. It is not enough for the claimant to make false, fraudulent or incomplete or misleading statements. The claimant must do so in order to secure benefits. That is already settled. This case really hinges on the fact that the Statute also requires the claimant to make a "false statement either oral or written". Surveillance itself is not a false statement especially when the claimant has already testified that sometimes he used a cane and sometimes he didn't. This is not a great case, but I don't think this makes it any harder to prove a fraud defense.

6. COURSE AND SCOPE/INTOXICATION:

Thomas v. Edd Bircheat, 16 So.3d 198 (Fla. 1st DCA 2009)

This is one of those cases that can only happen in the "workers' compensation world". The claimant smelled of alcohol and was unable to even do simple tasks on the job. He could barely walk. When the claimant's supervisor informed the owner of the claimant's condition, the owner instructed the supervisor to discharge the claimant and have the claimant wait on the work site while a ride home was arranged for him. The claimant continued to work even after he was told he should not work any longer and after he was terminated. Naturally, that is when the accident happened.

It is long settled law that an employee has a reasonable time to vacate the premises after he has been terminated and that if an accident occurs during this reasonable period of time, it will be compensable. It doesn't matter why the claimant was terminated; just that he has a reasonable amount of time to vacate the premises.

But that is not the end of the story. The claimant's claim was denied by the trial judge and affirmed by the appellate court because he was intoxicated. The employer/carrier was able to prove that the injury was occasioned primarily by the intoxication of the claimant. There was not a presumption because the employer did not have a drug free workplace, but it could prove that the work related injury was occasioned primarily by the intoxication. They would prove that through eye witness testimony.

5. MEDICAL APPORTIONMENT/THE BREAST IMPLANT CASE:

Mullins v. 7-Eleven, Inc., 5 So.3d 35 (Fla. 1st DCA 2009)

The claimant sustained a compensable accident which resulted in the partial rupture of her right breast implant. The IME doctor testified that the partial rupture of the implant was caused 25% by the accident and 75% by the age or defective condition of the implant. The JCC found that the accident was compensable, but apportioned out 75% of the benefits related to the treatment of the breast implant.

The Appellate Court reversed and required the carrier to pay for 100% of the breast implant treatment. Here is the reasoning. First, they held that breast implants were, in fact, prosthetic devices. Just because they serve mostly cosmetic purposes does not make them any less a prosthetic device.

Then, they went on to hold that apportionment was not appropriate in this case, but rather the carrier had to pay the entire 100%. Section 440.15(5)(b) (apportionment) only applies when the injury is the result of an acceleration or aggravation of a pre-existing condition. The First District held that there was no pre-existing condition here at all, but rather just the degrading or deterioration of an artificial device.

4. MEDICAL BENEFITS:

Butler v. Bay Center, 947 So.2d 570

Butler v. Bay Center really provides a good review of the medical case law. It has several holdings. First, it indicates that most changes in medical benefits are procedural and therefore apply to any date of accident. Next, the case stresses that the employer/carrier have the initial right and duty to authorize the physician who will treat the claimant. If the employer/carrier fails to provide initial treatment after there has been a specific request, then the claimant may choose his own doctor. However, even then, the employer and carrier are not required to authorize that unauthorized physician for the claimant for future treatment. The case only requires the employer/carrier to pay the amount personally expended by the claimant for treatment.

The claimant may request one change of physician during the course of his treatment for any one accident. That is not one change per specialty; it is one change per accident. If the claimant never actually treats with the authorized treating physician, he does not have the right to request the one time change. That is the way that some claimants were trying to get around the employer authorization by requesting a one time change before they ever even saw the first doctor.

The employer/carrier is not statutorily authorized to provide the claimant with a choice of three physicians. The employer/carrier has the right to choose the physician if they do so timely within five days of the request.

Dawson v. Clerk of the Circuit Court of Hillsborough County, 991 So. 2d 407

A one time change of doctors is mandatory for the employer/carrier to provide. This is true even if the prior treating doctor indicated that the claimant had reached maximum medical improvement and that the accident was no longer the major contributing cause of the claimant's need for treatment. The Statute no longer requires the employer to offer a list of three alternative physicians to the claimant to choose from.

Carmack v. State of Florida, Department of Agriculture, 34 FLW D2357 (Fla. 1st DCA 2009)

Carmack is a big case. It also answers a question that has been asked a lot. The claimant requested a referral for psychiatric treatment from the carrier and the carrier did not respond timely. The claimant sought treatment on his own from a specific doctor of his own choice.

The question before the Court was if the employer and carrier fail to act timely, does the choice of physicians switch to the claimant? The Court answered this question directly saying that once the employer and carrier pay for the initial disputed treatment and provide authorized medical care to the claimant, that the employer and carrier do not have to accept the claimant's selection for medical care in the future. Once the period of wrongful denial ends, the employer/carrier have the right to select a physician and provide the claimant with his authorized medical care. In sum, the carrier has to pay the medical bills

for the unauthorized doctor during the period of wrongful denial, but retain the right to control the medical after the wrongful denial.

Parodi v. Florida Contracting Company, 16 So.3d 958 (Fla. 1st DCA 2009)

This is a case that looked like it had a lot of meaning before the Carmack case came out. It dealt with authorization of the claimant's choice of physician after the carrier denied the claim. It also dealt with which doctors opinions could be entered into evidence. After reading Carmack which came out three months after Parodi, it is fairly clear that Carmack is the governing case as far as authorization of physicians is concerned. Once again, Carmack clearly states that once the carrier authorizes a physician and pays the medical bills that were owed during its period of denial, then the carrier – not the claimant – has full right to choose the future physicians. What that ends up leaving for the Parodi case is that the doctors that the claimant chose during the period of the carrier's denial should be considered "authorized treating doctors" for the purposes of having their opinions put in evidence. It is not reasonable to deny care to the claimant or to force the claimant to chose his own doctors and then allege that the opinions of those doctors cannot be properly placed into evidence.

Florida Detroit Diesel v. Nathai, 28 So.3d 182 (Fla. 1st DCA 2010)

This case deals with an over technical defense by the employer/carrier. The claimant wanted to obtain a second opinion to determine what type of treatment might allow him to return to work. The orthopaedic doctor testified that

the second opinion was medically necessary to determine whether there was any type of treatment that could help the claimant return to work. However, he also testified that a second opinion was not necessary from an orthopaedic standpoint because surgery was not medically necessary. The carrier alleged that it did not have to grant the second opinion.

The court held that there is no statutory requirement that the phrase "medically necessary" would be narrowed or restricted to a specific field of medicine. In other words, an orthopaedic doctor does not have to say that the claimant needs a second opinion from an orthopaedic standpoint. All he has to say is that it is medically necessary for the claimant to have a second opinion.

Harrell v. Citrus County School Board, 25 So.3d 675 (Fla. 1st DCA 2010)

This is the biggest medical case of the year. It deals with the timeliness issue. The claimant asked for a one time change. Within five days, the employer/carrier sent a letter to the claimant agreeing to the one time change and advising that a date and time of the appointment would be provided under separate cover. The specific doctor was not named. Two weeks later, the carrier sent a second letter naming the specific doctor.

The First District ruled that simply acknowledging a claimant's statutory entitlement to a one time change is not sufficient to comply with the five day requirement set forth in Section 440.13(2)(f). While the employer/carrier are not required to schedule the specific appointment with the newly authorized doctor

within five days, the employer and carrier are required to authorize at least one specific doctor during that period of time.

While many in the claimants' bar argue that this case requires an actual appointment with a specific doctor to be named within five days, the case does not say that. During the five day response time, the carrier has to name the doctor and authorize that doctor.

This case is somewhat challenging to deal with because five days is such a short period of time for a response. The request or petition has to get from the mail room to the adjuster and to be responded to all during that same period of time. There are a lot of practical problems in doing that. But, the appointment does not have to be scheduled during that time. There simply has to be a response indicating what specific doctor will be authorized.

There are also many doctors who won't accept the authorization until they review the medical records. That doctor should be named in the response letter. I would add a sentence in the response that the records have been sent to the doctor and as soon as he indicates that he will see the claimant that appointment will be set up. In other words, you should document what you are doing to secure the appointment.

3. IMPAIRMENT BENEFITS:

Seminole County Government v. Baumgardner, 28 So.3d 145 (Fla. 1st DCA 2010)

This case is not a big deal, but it is one that we needed an answer for. The claimant was injured in a compensable accident and gets an impairment rating. He returns to his prior job at the same hours and the same rate of pay. Shortly thereafter, the claimant fails to earn 100% of his average weekly wage but this was unrelated to his accident. Because the reduction in earnings was not causally related to the accident, the carrier paid the claimant at the 50% reduction provision of Section 440.15(3)(c). The holding of the Court is that the claimant still gets 100% of his impairment benefits regardless of whether the wage reduction is causally related to his job injury. Therefore, the claimant's impairment benefits are paid at the rate of 75% of his average weekly temporary total disability benefits rather than reduced by 50%.

2. TEMPORARY DISABILITY BENEFITS:

Auman v. Leverock's Seafood House, 997 So.2d 476

We need to take a short walk down memory lane for temporary disability. The Auman case is the place to do it. The claimant is entitled to 104 weeks of temporary disability benefits for each separate date of accident. Additionally, the weeks are not calculated by the "calendar" calculation but rather by the "bank method". To be a little bit more precise, if the claimant has used 100 weeks for the first accident with the employer and then has a second accident with that same employer, that claimant is entitled to an additional 104 weeks for the second accident not just the four weeks left over from the first accident. Further, the way of calculating temporary disability benefits is not simply to take two years from the date of the accident and say that is 104 weeks, but rather the carrier can use only the weeks where the claimant actually collected temporary disability. Stated slightly different: 104 weeks is measured in terms of cumulative payments received rather than consecutive weeks from the date of the accident.

W. G. Roe & Sons v. Razo-Guevara, 199 So.2d 708

This temporary total case deals with Section 440.093-mental or nervous injury. That statutory provision allows payment of up to six months of temporary disability from a psychiatric standpoint if the claimant has already reached maximum medical improvement from a physical injury, assuming that the claimant is eligible for receipt of payments of permanent impairment benefits.

In the Roe case, the Court stated that the six month limitation on temporary psychiatric benefits is conditioned upon the payment of permanent benefits for the associated physical injury. That means that the limitation of six months on psychiatric benefits does not apply unless permanent impairment benefits from the physical injury are being paid. If the claimant is not being paid permanent benefits, that statutory subsection does not apply and the claimant is entitled to more than six months worth of psychiatric temporary disability benefits.

Pierre v. R & S Assembly Inc., 35 Fla. L. Weekly D683 (Fla. 1st DCA 2010)

This is a pretty new case that is quite important. The claimant sustained a compensable accident and benefits were provided. He was released to medium duty and actually returned to a modified medium duty position until he was terminated for economic reasons. The claimant then filed for temporary partial disability which the carrier denied indicating that the temporary partial was not causally related to the accident.

To obtain temporary partial disability, the claimant has the burden of demonstrating a causal connection between his injury and subsequent wage loss. Although the Court says that a job search is not an absolute prerequisite to an award of temporary partial disability, it is still necessary for the claimant to show a causal connection between the injury and the resulting loss of earnings. They state that an unsuccessful job search is a "pertinent" factor in determining whether the claimant has satisfied his burden. The Court ruled against the claimant. They did not say they were doing it 100% because the claimant didn't

do a job search, but it was fairly clear that if a claimant doesn't do a job search, that will be held strongly against him.

Moore v. ServiceMaster Commercial Services, 19 So.3d 1147 (Fla. 1st DCA 2009)

This is the big indemnity case of the year. Because temporary disability cases are always fact intensive, I need to give you a couple of facts. The claimant was injured in a compensable accident and was paid a short period of temporary total disability benefits. The doctor said that the claimant could return to light duty while undergoing physical therapy. The employer, as part of a return to work program, offered the claimant extremely light duty. The claimant refused the job alternatively saying that it was sheltered employment at one point and saying that it was too hard at another point. The claimant then contended that she was entitled to temporary partial disability.

Much of the case is spent on saying that the concept of sheltered employment does not apply to temporary partial disability benefits. It applies to permanent total benefits, but not to temporary partial benefits but instead the view is that it is beneficial to the claimant and the employer that a light duty program exits and the claimant should return to work when offered this modified duty. If the job offer is a sham rather than real, the claimant won't be required by the judge to take it but the employer should be a lauded for light duty programs.

If the claimant doesn't accept a suitable offer of employment by the employer, the claimant is not entitled to temporary partial disability benefits

during the continuation of such refusal, unless the refusal is justified. The claimant is not entitled to receive any temporary partial disability benefits during the entire continuation of this refusal.

The employer and carrier, according to the Court, are not required to reoffer the same job to the claimant every two weeks, but they also said that the employer must establish the continued availability of a job for each applicable period of time to obtain the benefit of the defense. I don't know how you can not continually reoffer the job and avail yourself of the defense.

Lastly, the Court held that voluntary limitation of income caused by a refusal to accept a suitable job does not permanently foreclose the right to temporary partial. That is unlike the other temporary partial provision which allows permanent non-payment if the claimant is fired for misconduct.

A perfectly good example of how the employer could offer the claimant a light duty job, and after a while, the claimant would be entitled to temporary partial, would be where the doctor put the claimant back on temporary total to do surgery and then released the claimant to light duty again without a similar offer of employment from the employer. Misconduct may mean never but suitable gainful employment means for a while.

1. PERMANENT TOTAL DISABILITY:

Advanced Masonry Systems v. Molina, 4 So.3d 62 (Fla. 1st DCA 2009)

This is a case which demonstrates exactly how hard it is for a claimant to prove permanent total disability. The claimant had two failed back surgeries. Prior to the hearing, the parties actually stipulated that the claimant had a catastrophic injury which is the threshold qualification for proving permanent total disability. The trial judge found the claimant to be permanently and totally disabled and the appellate court reversed.

There were several important conclusions in this case. The first is that the claimant's testimony that he is in too much pain to attend employment interviews or search for employment was insufficient to override medical evidence that the claimant is capable of sedentary work within restrictions. Next, the vocational expert actually found several potential jobs for the claimant and when the claimant didn't interview or try to get those jobs, that was the refusal of suitable gainful employment.

Last, and probably most interesting is the fact that the claimant, who is Spanish speaking, refused to take free English classes that the employer and carrier found for him. The vocational expert found that one potential employer would not hire the claimant because he could not communicate in English. This went against the claimant as well.

Garcia v. Fence Masters, Inc., 16 So.3d 200 (Fla. 1st DCA 2010)

This is a permanent total claim where the denial by the trial judge was reversed by the appellate court and remanded for additional findings. The only point of including this in a case law update was that the vocational expert obtained by the employer and carrier did not actually look for work for the claimant, but rather did a labor market survey that entailed looking for job listings in the newspaper and on the internet. This is a very risky way of defending a claim as serious as permanent total and it is advised that when an employer/carrier are going to defend a permanent total claim, that they do a whole lot more vocational than simply a market survey.