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Permanent Total Disability– Apportionment

Eaton v. City of Winter Haven and PGCS, 37 Fla. L. Weekly D2694 (Fla. 1st DCA November 26, 2012).

Claimant appealed the JCC's Order apportioning his permanent total disability benefits. In February 2008, the claimant suffered a non-occupational injury to his low back and underwent an L5-S1 discectomy. He went back to work without any restrictions and without a permanent impairment. In August 2008, the claimant suffered a second low back injury at work. He had a lumbar disckectomy at the same level. He was placed at MMI and assigned a 4% permanent impairment rating by the pain management provider.

The claimant then filed a petition for PTD benefits. The Employer/Carrier asserted, among others, an apportionment defense. The JCC found the claimant to be permanently and totally disabled but concluded that the Employer/Carrier was entitled to apportion 50% of the

claimant's PTD benefits based on the authorized treating physician's testimony that each accident was equally responsible for the claimant's condition.

The First DCA reiterated its prior holding in Staffmark v. Merrell, 43 So.3d 792 (Fla. 1st DCA 2010) which requires evidence of an "anatomical impairment rating attributable to the pre-existing condition" for apportionment to be applied to permanent indemnity benefits. In this case, the Employer/Carrier asserted an apportionment defense but failed to submit medical evidence of an anatomical impairment rating attributable to a pre-existing condition. The JCC had no medical evidence which could support a finding of a pre-existing permanent impairment, a necessary element of entitlement to apportionment. Thus, the JCC erred in apportioning the claimant's PTD benefits.