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**RES JUDICATA:**

*Smith v. Time Customer Services and Travelers*, 38 Fla. L. Weekly D1246, (Fla. 1st DCA January 31, 2013).

Authorized provider, Dr. Sidholm issued a prescription for an "orthopedic mattress." Subsequently, he issued a second prescription for a "Sleep Number i10 mattress base." A Petition was filed seeking authorization of the "orthopedic mattress." At a subsequent mediation the E/C agreed to provide the mattress.

Approximately one month later, the claimant filed a Petition seeking the "Sleep Number i10 mattress and base." Within the next month, a Final Hearing was held relative to a prior PTD claim. At the hearing, the claimant requested the JCC reserve adjudication on the Petition for the Sleep Number i10 mattress and base because no mediation had been held in regard to the Petition. An Order was entered awarding PTD benefits and reserving adjudication for the Sleep Number i10 mattress and base claim.

Subsequently, another Final Hearing was scheduled for the Sleep Number i10 mattress and base issue. One day before the

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hearing, the claimant filed a Notice of Voluntary Dismissal on the basis the E/C had previously agreed to authorize the orthopedic mattress. Consequently, the hearing was canceled. Around three months later, the JCC affirmed the prior Order, which awarded PTD benefits and reserved jurisdiction as the Sleep Number i10 mattress and base claim.

One week after the Order was affirmed, Dr. Sidholm wrote another prescription for a Sleep Number i10 mattress and base. Thereafter, the claimant filed another Petition requesting the same.

The E/C filed a Motion for Summary Final Order seeking dismissal with prejudice alleging the claim was barred by *res judicata* because the claimant had filed several Petitions seeking the same orthopedic mattress. The claimant responded that a Summary Final Order was not appropriate because the case involved issues of fact regarding both medical testimony and a specific type of mattress sought, based on a new prescription. The JCC then entered an order granting Summary Final Order and dismissing the Petition with prejudice.

The First DCA held that, because there was no adjudication of the claimant's entitlement to a Sleep Number i10 mattress and base, the doctrine of *res judicata* should not have applied in a summary manner. In support, the Court found that this was a new claim, based on a new prescription, which was issued after the 2011 Voluntary Dismissal. The Court also found that the claimant's entitlement to a Sleep Number i10 mattress and base may potentially be a different benefit from the one agreed to by the E/C (i.e. "orthopedic mattress"). Consequently, the Court reversed and remanded the JCC's Order.

**EMA:**

*Arnau v. Winn Dixie Stores and Sedgwick CMS*, 37 Fla. Law Weekly D269, (Fla. 1st DCA February 5, 2013).

The claimant suffered a compensable chest injury. Authorized provider, Dr. Spierer, placed the claimant at MMI and opined the claimant needed no further care. The claimant then exercised his one-time. One-time change provider, Dr. Badell, recommended the claimant be examined by a thoracic surgeon to determine the cause of his continuing chest pain. The E/C's IME, Dr. Stein, opined that such an examination was unnecessary.

An EMA (Dr. Campbell) was then appointed. Dr. Campbell opined that the claimant was not at MMI and that an evaluation by a thoracic surgeon was medically necessary as a result of the industrial accident. Dr. Campbell's report was entered into evidence. His deposition was not taken. The report indicated

that Dr. Campbell had reviewed the prior records, the deposition testimony of the authorized providers, etc...

The JCC rejected the EMA's opinions on the basis that the claimant's unreliable testimony (assumably as to his medical history) undermined the factual predicate upon which the opinion of Dr. Campbell was premised. The JCC accepted the opinions of Dr. Spierer regarding the nature of the claimant's condition and denied the thoracic surgical evaluation. The JCC also denied an associated claim for temporary indemnity benefits, based on Dr. Spierer's opinion that the claimant had reached MMI.

The First DCA found there was not sufficient clear and convincing evidence to reject the EMA's opinion, which is presumptively correct. Since Dr. Campbell did not testify, there is no indication that he actually relied on the claimant's testimony or a history given by the claimant. Further, Dr. Campbell's opinion was in line with that of Dr. Badell. Consequently, the Court found there was no clear and convincing evidence to sufficiently reject the EMA's opinion. The JCC's decision was reversed and remanded.

**STATUTE OF LIMITATIONS:**

*Black v. Tomoka State Park and Division of Risk Management/State of Florida*, 38 Fla. L. Weekly D270, (Fla. 1st DCA February 5, 2013).

Analogous to the facts in *Longley v. Miami Dade School Board*, here the claimant had filed a prior Petition for medical benefits and attorney's fees and costs. The claim for medical benefits was resolved via the claimant's Voluntary Dismissal of the Petition for Benefits, but claims for fees and costs were reserved. A subsequent Petition for Benefits was filed and denied based on the Statute of Limitations. The Court found that the Statute of Limitations was tolled by the claims for fees and costs. The JCC's decision was reversed and remanded.

**PTD:**

*Buttrick v. By the Sea Resorts, Inc. and Summit Claims Management/Claims Center*, 38 Fla. L. Weekly D270, (Fla. 1st DCA February 5, 2013).

This is an opinion from the second appeal filed by the claimant in regard to the JCC's denial of her PTD claim. Previously, the JCC's decision was reversed and remanded because the JCC failed to make a finding as to whether the claimant achieved MMI. Upon remand and review, the JCC found that she had specifically and expressly found the claimant reached statutory MMI, based on the stipulation of the parties. Consequently, the

JCC found that the MMI date is the date the claimant exhausted her entitlement to temporary benefits.

The First DCA found that, whether MMI has been reached, is a medical question that should be based on facts set forth in the medical records or through medical opinion testimony. Therefore, statutory MMI has no place in the determination of whether a claimant is entitled to PTD benefits. In support, the Court reasoned that statutory MMI has nothing to do with the employee's ultimate medical condition or prognosis. Further, the JCC is not bound by the party's stipulation regarding MMI, if it is not supported by the record.

Here, the records contained no medical evidence that the claimant had reached MMI. Consequently, the JCC's decision was once again reversed and remanded to clarify the claimant's MMI status based on expert medical testimony. Only after a determination is made in regards to whether the claimant has reached MMI, can a determination be made as to whether the claimant qualifies for PTD benefits. The Court also suggested, if the JCC finds the claimant has not reached MMI, the JCC can determine whether the claimant will be PTD when she does reach MMI. The Court also noted that, any failure to conduct a good faith job search, is premature because no MMI date has been ascertained.

JEF/rls