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April 29, 2013

Florida Law Weekly

Week of April 5, 2013

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PTD-Penalties

Bon Secours Health System v. Bonanno, 38 Fla. L. Weekly D710
(Fla. 1st DCA March 28, 2013)

The claimant sought payment of penalties on late PTD and supplemental payments. The JCC found the payments were made untimely, but did not make findings as to whether the untimely payment resulted from conditions over which the E/C had no control.

The 1st DCA held the failure to make factual findings on whether the untimely payment in the case resulted from conditions over which the E/C had no control was not harmless error as the facts of the case could conceivably permit a finding of excusable delay under the law. The case was reversed and remanded for further proceedings on that issue.

Discovery-Location of Adjuster's deposition

CVS Caremark Corp. v. Latour, 38 Fla. L. Weekly D711 (Fla. 1st DCA March 28, 2013)

After filing a PFB, the claimant's attorney noticed the claims adjuster for deposition in Flagler County, which was the county where the accident occurred. The E/C filed a motion for protective order seeking to quash the notice arguing that the adjuster could not be required to travel 60 miles to attend a deposition outside of Orange County where she worked for the servicing agent. The claimant argued that Flagler County was the proper county for the adjuster's deposition because that was where the injury occurred and was where the Employer's business was located. The JCC denied the motion for protective order without a hearing. The E/C then petitioned for a writ of certiorari.

The 1st DCA held that the JCC departed from the essential requirements of law in denying the E/C's motion for protective order and granted the petition for writ of certiorari and quashed the challenged order.

The 1st DCA noted that Workers' Compensation Law provides that depositions of witnesses or parties be taken in the manner prescribed by the Florida Rules of Civil Procedure. While the Florida Rules of Civil Procedure sets forth the procedure by which deposition of a corporate representative of a party may be noticed, the rules do not prescribe where the deposition is to be taken.

The court cited Fortune Ins. Co. v. Santelli, 621 So. 2d 546 (Fla. 3d DCA 1993) for the proposition that the deposition of a defendant's corporate representative should be taken in the county where the corporation has its principal place of business if the defendant is not seeking affirmative relief in the proceeding.

While the plaintiff can be required to be deposed in the forum where the action is pending, a defendant "will not be required to travel a great distance and incur substantial expenses to be deposed by the plaintiff, unless the defendant is seeking affirmative relief." Id. at 547.

Procedural Due Process

Knight v. Walgreens, 38 Fla. L. Weekly D717 (Fla. 1st DCA March 28, 2013)

This claimant had sustained two prior industrial accidents, involving his back, one with a former employer and one with Walgreens in 2008, before being injured at Walgreens again in 2010. The E/C initially denied compensability of the 2010 claim. Following a final hearing in April 2011, the JCC determined the claim to be compensable since the E/C's argument was on MCC grounds, which didn't apply since the E/C failed to present evidence of non-industrial causes for the claimant's back condition.

In November 2011, the claimant filed a petition seeking authorization for a neurosurgical evaluation. In its response to the petition, the E/C indicated that the claim for a neurosurgeon had never been denied and that the neurosurgeon the E/C contacted, Dr. Schmitz, cancelled the appointment because he wished to first review medical records. Shortly thereafter, the E/C issued a Notice of Denial to the entire claim based on misrepresentations made by Claimant to the authorized pain management physician regarding his use of prescribed pain medications.

The claimant then filed a petition seeking reinstatement of his terminated benefits. The E/C asserted the entire claim had been denied based on the same alleged misrepresentations.

In the pretrial stipulation, the E/C indicated the PFB for a neurosurgical evaluation "has never been denied." In closing argument at trial, counsel for the E/C maintained that the only reason Claimant's request for a neurological evaluation was denied was the suspicion of fraud by Claimant. Counsel for the E/C argued that if the JCC did not find evidence of fraud, the JCC should consider Dr. VerVoort's opinion that Claimant sustained a temporary exacerbation and has since returned to baseline, relieving the E/C of the duty to furnish any further treatment. In addition, the E/C argued the neurosurgical evaluation was not medically necessary.

Following the hearing, the JCC denied claimant's request for a neurosurgical evaluation and reinstatement of his medical benefits. According to the JCC, Claimant failed to meet his burden to prove that same were medically necessary and that the MCC of each was the compensable injury.

In his motion for rehearing, claimant argued the JCC had overlooked the fact that the E/C had stipulated to the authorization of the neurosurgeon referral, as indicated in its response to the PFB and the pretrial stipulation. Claimant further argued the E/C's attempt to rely on the "no medical necessity" opinion obtained subsequent to their stipulation on the evaluation was improper; as was the JCC's acceptance of said defense in light of the fact that same was not identified in the pretrial stipulation. In its objection to Claimant's motion for rehearing, the E/C maintained that it never denied Claimant's request for the neurosurgical evaluation.

In the order denying Claimant's motion for rehearing, the JCC found the E/C had proven Claimant's compensable injury was not the MCC of any further treatment based on Dr. VerVoort's medical opinions.

The First DCA held the JCC violated the procedural due process rights of the claimant by *sua sponte* considering the defenses of medical necessity and major contributing cause that were not properly raised.

The First DCA noted that the E/C failed to raise the medical necessity defense in its response to the petition or on the pre-trial statement, indicating that the sole basis for denial was on misrepresentation. Furthermore, the E/C represented that it was not denying the claim for authorization of a neurosurgeon, except to the extent that the claim was precluded by alleged misrepresentation.

The purpose of the pretrial stipulation is to put the parties on notice of what is in dispute, and considering that Claimant could have obtained other medical evidence had he been put on notice that there was a dispute regarding medical necessity or on an issue of causation, the JCC's invocation of an issue not set forth in the pretrial was improper and harmful.

Further, the JCC erred in ruling Claimant had the burden to present evidence on MCC, especially where no such issue was articulated on the pretrial stipulation. Moreover, as the JCC correctly found in the April 2011 order, MCC did not apply to the case because there was no evidence of any non-industrial accident involving the claimant's back.