

**RISSMAN, BARRETT, HURT,
DONAHUE & McLAIN, P. A.**
ATTORNEYS AT LAW

STEVEN A. RISSMAN
ROBERT C. BARRETT
JENNINGS L. HURT III
ROBERT A. DONAHUE
JOHN E. McLAIN III
RICHARD S. WOMBLE
STACIE B. GREENE
THEODORE N. GOLDSTEIN
RAYMOND A. LOPEZ
VANCE R. DAWSON
RICHARD B. MANGAN JR.
HENRY W. JEWETT II
DANIEL M. POLLACK
ART C. YOUNG
NICOLE D. RUOCCO
DANIEL T. JAFFE
BEATRIZ E. JUSTIN
GREGORY GIANNUZZI
DAVID K. BEACH
F. DEAN HEWITT
EDWARD M. COPELAND IV
DAVID R. KUHN
G. WILLIAM LAZENBY IV
R. CLIFTON ACORD II
JILL M. SPEARS
JEFFREY J. KERLEY
KARISSA L. OWENS
JOHN P. DALY

EXECUTIVE DIRECTOR
W. SCOTT PETERSON

201 EAST PINE STREET
15TH FLOOR
P.O. BOX 4940
ORLANDO, FLORIDA 32802-4940
TELEPHONE (407) 839-0120
TELECOPIER (407) 841-9726
ORLANDO@RISSMAN.COM

TAMPA COMMONS
ONE NORTH DALE MABRY HIGHWAY
11TH FLOOR
TAMPA, FLORIDA 33609
TELEPHONE (813) 221-3114
TELECOPIER (813) 221-3033
TAMPA@RISSMAN.COM

709 SEBASTIAN BOULEVARD
SUITE B
SEBASTIAN, FLORIDA 32958
TELEPHONE (772) 228-3228
TELECOPIER (772) 228-3229
SEBASTIAN@RISSMAN.COM

WWW.RISSMAN.COM

PLEASE REPLY TO: ORLANDO

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FLORIDA LAW WEEKLY

For the week of October 25, 2013

Expert Medical Advisors

Yolanda Banuchi v. Department of Corrections/Indian River Correctional Institute/State of Florida Division of Risk Management, 38 Fla. L. Weekly D2178 (Fla. 1st DCA October 16, 2013)

Claimant appealed the Judge of Compensation Claims' Order denying benefits as the JCC failed to appoint an expert medical advisor on the JCC's own Motion after Claimant brought to JCC's attention that there was material disagreement in the opinions of the health care providers. The 1st DCA reversed the JCC's Order and remanded the case with instructions.

The claimant suffered a compensable accident on September 9, 2008. In the summer of 2011, a dispute arose regarding entitlement to temporary partial disability benefits and a Petition for Benefits was filed seeking those TPD benefits.

AMY L. BAKER
AMANDA L. BRUS
STEVEN B. BURRES
DEREK J. BUSH
SEAN M. CROCKER
CHRISTOPHER E. DENNIS
AARON E. EAGAN
JAMES E. FAVERO III
SUSAN R. FULLER
PAUL B. FULMER
JANNINE C. GALVEZ
LARALEE M. GARVIN
ELISE J. GEIBEL
CHRISTOPHER A. HANSON
LAURA F. LYTLE
ERIC F. OCHOTORENA
JEREMY T. PALMA
D. BLAKE REHBERG
KELLEY A. RICHARDS
DAVID J. RISSMAN
RICHARD B. ROBBINS
JUAN A. RUIZ
BRYAN R. SNYDER
LARRY D. SPENCER
MEREDITH M. STEPHENS
ELIZABETH M. STUART
F. PAUL TIPTON
NICOLETTE E. TSAMBIS
JASON R. URBANOWICZ
MEGHAN C. WHISENHUNT
MICHAEL C. WOODARD
CHRISTINE V. ZHAROVA

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Subsequent to the filing of the Petition, Claimant filed a Notice of Conflict in medical opinions, requesting that the JCC, on its own motion, appoint an EMA. The JCC treated Claimant's notice of conflict as a motion to appoint an EMA and granted the motion. By doing so, the JCC made Claimant responsible for all costs associated with the EMA.

Subsequent to the initial order, Claimant filed a motion for rehearing clarifying that she did not file a motion for appointment of an EMA, but rather specifically asked the JCC to do so on the JCC's own Motion. The JCC denied the motion for rehearing.

The 1st DCA, in a case of first impression, interpreted the JCC's mandatory statutory obligation to appoint an EMA when the JCC becomes aware of a disagreement in the medical evidence. This mandatory statutory obligation is found under Section 440.13(9)(c), **Fla. Stat.** That statute sets forth that "the [JCC] shall, upon his or her own Motion . . . order the injured employee to be evaluated by an [EMA]" if the JCC becomes aware of the disagreement. Upon so ordering, the Carrier then becomes responsible for compensating the EMA.

The 1st DCA held that the JCC erred in reading Claimant's notice to be a motion for appointment of an EMA. Instead, because the JCC was timely put on notice of a disagreement in the medical opinions, and the JCC determined that the disagreement was sufficient to warrant the appointment of an EMA, the JCC should have, on his own Motion, ordered Claimant to be evaluated by an EMA, directing the Carrier pay for the evaluation.

As such, the 1st DCA reversed the denial of Claimant's entitlement to temporary partial disability benefits, finding that the denial was based, at least in part, without the benefit of an EMA opinion and remanded with specific instructions.

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Permanent Total Disability Benefits

Brandywine Convalescent Care v. Khemwattie Ragoobir, 38 Fla. L. Weekly D2183 (Fla. 1st DCA October 16, 2013)

The Employer/Carrier appealed the Judge of Compensation Claims' failure to afford an expert medical advisor's opinion a presumption of correctness and the JCC's award of permanent total disability benefits to Claimant. The 1st DCA reversed the JCC's Order, finding that the JCC was not free to reject the EMA's opinion.

The Judge of Compensation Claims appointed an EMA to resolve a conflict in medical opinions regarding Claimant's work restrictions. The EMA found that Claimant was capable of light duty work with certain specified functional restrictions.

Claimant's counsel, during deposition of the EMA, obtained an affirmative answer to whether the EMA would defer to the pain management specialist "for the types or nature of pain management and the status through that specialty."

The 1st DCA noted that the EMA was not specifically asked whether he was retracting or receding from his opinions on the claimant's work restrictions. Further, on cross-examination, the EMA's report was attached to the deposition and the EMA noted that nothing during the direct examination by Claimant's counsel changed his opinions contained within his report.

An EMA's opinion is presumed to be correct unless the Judge of Compensation Claims finds clear and convincing evidence to the contrary. The JCC concluded that the EMA's opinions on work restrictions were equivocal and therefore inconclusive.

However, the 1st DCA noted that the JCC did not make a finding of clear and convincing evidence to the contrary. The 1st DCA found that the EMA in the instant case clearly rendered an opinion on the issue of physical work restrictions as detailed within the report.

As the JCC improperly rejected the presumption of correctness that should have been accorded the EMA's opinion on

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physical work restrictions, the JCC's conclusion that Claimant was medically incapacitated from performing any kind of work was error. Further, the record was devoid of any evidence to support a finding of PTD based on the three alternative methods of proving entitlement to PTD described in case law.

As such, the 1st DCA reversed and remanded the JCC's award of PTD benefits for further proceedings consistent with the opinion and for determination of Claimant's ability to engage in at least sedentary employment with vocational factors were combined with the permanent work related physical restrictions identified in the EMA report.

SMC/sca