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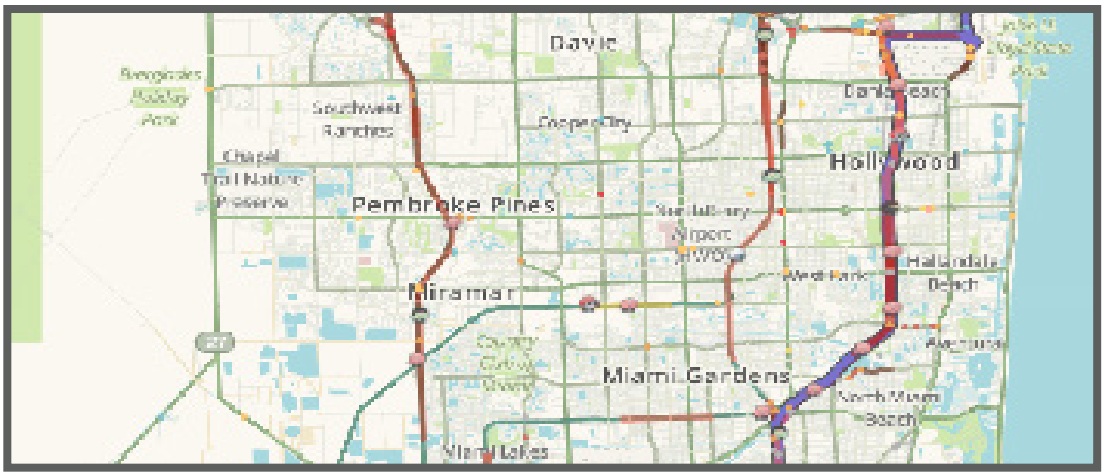

WEEK OF
DEC 22 2017

FINAL ORDERS FROM JUDGES OF COMPENSATION CLAIMS

HOW FAR IS TOO FAR FOR A DOCTOR'S VISIT?

Bladimir Abreu v. Southeast Personnel Leasing / Packard Claims Administration
OJCC Case No. 17-006434EDS

The Judge of Compensation Claims denied the Claimant's request for authorization of an orthopedic physician located in Miami-Dade County to replace the current authorized orthopedic physician located in Broward County.

The Claimant, employed as a truck driver, sustained compensable injuries as a result of an industrial accident that occurred on January 23, 2017 in Miami-Dade County Florida. The Employer/Carrier authorized physicians in Miami-Dade County to treat the Claimant. The Employer/Carrier then provided a physician in Broward County Florida to treat the Claimant. The distance from the Claimant's home to the physician in Broward County's office was only...

1 **FINAL ORDERS FROM JUDGES OF COMPENSATION CLAIMS**

2 **FIRST DISTRICT COURT OF APPEALS CASES**

3 **UPDATES FROM NERET, FINLAY & NGUYEN**

HOW FAR IS TOO FAR?
The Judge of Compensation Claims denied the Claimant's request for authorization of an orthopedic physician.
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CAN JUDGE CHANGE TERMS OF JOINT STIPULATION
The First District Court of Appeal recently issued two opinions that answer this question in regards to past ddue attorney fees
SEE PAGE 5

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35 miles. Moreover, the Employer/Carrier provided transportation to the Claimant, to and from the appointments. The Claimant alleged that an orthopedic physician in Miami-Dade County was necessary because the travel to his appointments in Broward County usually took up to three hours of travel time, which in turn makes him miss too much work and results in lost pay.

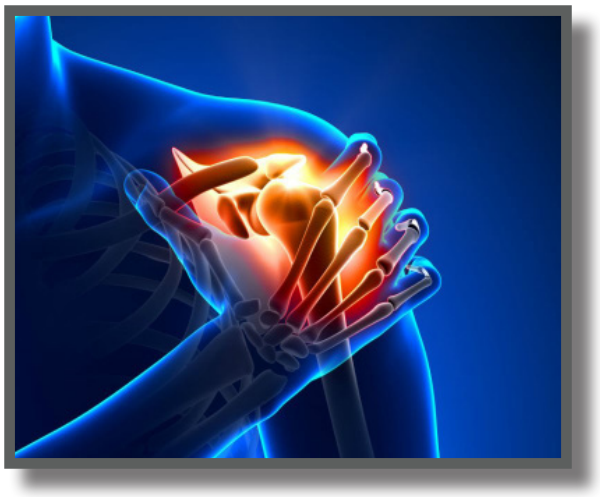
The Judge of Compensations concluded that the Employer/Carrier met its obligations required as permitted by section 440.13 (2)(a) to furnish the Claimant such medically necessary treatment, remedial treatment, care, and attendance that the nature of the injuries require. The Judge held that, absent a proper objection to an authorized physician, and demand for a change in treating physician as permitted in by Section 440.13 (2)(f) (A.K.A one-time change), the Judge had no statutory authority to grant the employee's request to require a transfer of care.

NFN'S TAKE

- Traveling 35 miles is not sufficient to cause a change of physician.
- Does the Judge have authority under the Statute to grant specific requests made by the Claimant. Still not settled until First District Court of Appeal decides.
- This issue of how long is it reasonable to make a Claimant travel to his/her appointment is on a case by case basis unless Employer/Carrier wants to take matter up on appeal.

NO NEED TO CHASE, JUST MAKE SURE THEY KNOW THE JOB IS ON THE TABLE

Karen D. Sanders v. Signature Healthcare/Gallagher Bassett Services Inc. OJCC Case No. 17-009813JW



The Judge of Compensation Claims ruled in favor of Claimant's request for Temporary Partial Disability, in part, holding that the Claimant satisfied her initial burden of proving a causal connection between the compensable injury and the subsequent loss of income; but the Employer/Servicing Agent successfully asserted, as an affirmative defense to TPD, that the Claimant refused suitable employment during a set period of time in which it was available. The Claimant suffered a compensable injury to her right hip and right arm on September 3, 2015, and initially treated at "Go Now Doctors" urgent care. The Claimant was taken off of work on the same day, but was placed on light duty within the week, on September 9, 2015. Then on September 24, 2015, the Claimant was taken off of work once more. The following day, she began treating with Dr. Michael Gilmore and was placed on modified work restrictions of no use of the right arm; she was then offered work in the form of transitional duties. The Claimant began having difficulty performing her job duties without the use of her right hand. The Claimant then requested to work on a P.R.N status (i.e. when needed). Per the Claimant's testimony, it was not her intention to request P.R.N, however, due to her shoulder, she could not continue working.

The Employer's former human resource manager, testified that during the time the Claimant was offered transitional duties, meetings were held, and the Claimant attended same. In October of 2015, the Claimant was assigned to the rehab patients with whom she would not have to use her right arm. The Claimant did not express any concerns and was cooperative. She never went to human resources to address problems she was having with any doctor's appointments. Moreover, the Claimant requested to take the month of November off, and the Employer sent her ADA papers to complete. The Claimant was called

several times regarding the availability of work, and the need for the ADA document, but she did not respond. The last time the Employer attempted to contact the Claimant, was November 4, 2015, when she was informed that if she did not return she would be terminated. The Claimant was terminated on March 22, 2016, officially, because she was still in the system. A little over a year later, on March 31, 2017, the Employer closed operations.

The medical evidence established that on September 3, 2015, the Claimant was taken off of work for less than a week, and subsequently placed on light duty on September 9, 2015. She was then taken off of work on September 24, 2015, until September 30, 2015, when she was placed on modified duty. She remained on modified duty until about 2017, when the Claimant was placed on light duty, following right shoulder arthroscopic reconstruction surgery. The last medical record dated May 8, 2017, reflects that the Claimant has not reached MMI, and had work restrictions concerning the use of her right arm.

The Judge of Compensation Claims reasoned that the Claimant satisfied her initial burden of proving causal connection between the compensable injury and the loss of income when the Employer accepted the injury as compensable; and the Claimant's earnings dropped to zero (below 80%). The Claimant testified that she had not had any earnings since she last worked in 2015. The Judge of Compensation Claims then reasoned that since the Claimant met her burden her initial burden, the burden had then shifted to the Employer to establish that the Claimant is not entitled to TPD by establishing an affirmative defense. The Employer argued against entitlement to TPD on the grounds that: 1) the Claimant was voluntarily limiting her income by refusing suitable employment and; 2) the Claimant has an ability to work and be gainfully employed, but chooses not to.

The Judge noted that although the Employer is not required to continually reoffer a job to avail itself to the statutory defense, he must establish; however, that the job is continually available for each applicable period to obtain the continued benefit of the defense. The Judge of Compensation Claims found that in the instant case, there were three distinct time periods affecting the affirmative defense: from September 3, 2015 (date of accident), to March 22, 2016 (date of termination); from March 23, 2016, through March 31, 2017 (date Employer sold business) and; from April 1, 2017, to present.

The Judge of Compensation held that the Claimant refused suitable employment for the first period of time because there is competent substantial evidence supporting the fact that the Employer made light duty accommodations to the Claimant in the following weeks. With respect to the second and third time periods, the Judge looked at the totality of the circumstances and found that the light duty work was no longer available to the Claimant after March 22, 2016, when she was terminated. More so, after March 31, 2017, when the Employer sold its business.

The Judge also rejected the Employer's affirmative defense that the Claimant has an ability to work and be gainfully employed, but chooses not to. The Claimant testified that she looked for work within her restrictions after her termination but was unsuccessful. The Claimant was assisted by a vocational consultant to help her with creating a resume, and to perform internet job searches. The Judge of Compensation Claims reasoned that the evidence presented supports a finding that the Claimant looked for work without success, which is enough to overcome the Employer's second affirmative defense.

NFN'S TAKE

The initial burden is on the Claimant to prove entitlement to Temporary Partial Disability, but once met, the Employer has the burden to prove that it is not entitled to same. Although the Employer is not required to continually offer the Claimant a job, it is required to demonstrate that the job is available to the Claimant for every period the Claimant is entitled to TPD benefits.

... BUT IS IT WORK RELATED?

Jean Pierre Louis v. Waste Management Inc./Gallagher Bassett Services OJCC Case No. 16-001479CJS

The Claimant filed a PFB seeking benefits for a low back condition under a repetitive trauma theory using a date of loss of 11/28/15 (the last day he worked for his employer). The E/SA defended the claim on the grounds that the Claimant failed to notify the employer pursuant to section 440.185, Fla. Stat. The JCC agreed. The first time the Claimant reported the injury as work-related was on May 19, 2017, the date of the filing of the PFB. Considering the nature of a repetitive trauma injury, the Judge found that the first time the Claimant was on notice of the condition was when he sought medical treatment many years before, although he never communicated to his employer of the accident/condition until seven years later. There was no evidence suggesting that the Claimant told his employer or that the employer had actual knowledge; rather, the supervisor testified that the Claimant never reported a low back injury.

The JCC reviewed the exceptions to the reporting requirements contained in 440.185; specifically, whether the cause of the injury could not be identified without a medical opinion, and whether the Claimant advised the employer within 30 days after obtaining a medical opinion indicating that the injury arose out of and in the course and of employment. The Claimant testified that his employer knew of his hospitalization for a back condition dating back to 2010, but even then he did not report to his employer that it was work-related. Moreover, the JCC found that the Claimant probably knew his condition was work related sometime in 2013 while treating for same which triggered his obligation to report it to his employer within 30 days, although he did not. Consequently, the JCC held that although the facts lend themselves to a finding of compensability for a repetitive trauma injury, the Claimant's failure to report barred him from receiving any workers compensation benefits for the injury.

NFN'S TAKE

In repetitive trauma cases, it is important to discover when was the first time a Claimant knew his injury was work-related. If more than 30 days past without reporting the injury, you may have a viable affirmative defense to a claim for benefits.

Can the Judge Change The Terms of Joint Stipulations for Past Due Attorneys' Fees?

Two Recent Cases Held Before Same Judge of Compensation Claims Answer The Question.

Yeimis Banegas v. ACR Environmental, Inc. and Berkley Specialty Underwriting Managers, Case 1D17-1251 (November 6, 2017)

This case illustrates what the Employer/Carrier/Servicing Agents deal with all the time. If you want to settle the Claimant's case, you are held hostage to having to pay an excessive side attorney fee. In this case, the parties entered into a settlement agreement wherein case was settled for $35,000 out of which Claimant's attorney would take a statutory fee. In addition, the parties submitted a Joint Stipulation for an E/C paid fee of $10,000 for securing mileage reimbursement of $55.00. The Judge entered an Order approving the washout and another order approving in part and denying in part the Joint Stipulation. The Judge awarded only $3,250.00 in fees to the Claimant's attorney and ordered that the rest $6,750.00 be given to the Claimant out of the $10,000 Joint Stipulation. A Motion for Rehearing was filed which was granted and an evidentiary hearing was scheduled. No live testimony was taken. Only evidence before the Judge was the pleadings, the affidavit from Claimant's attorney as well as evidence from the Employer/Carrier that they wanted to settle the case because the Claimant was difficult.

The Judge reached same result and Order was appealed. First District Court of Appeal held Judge erred in determine what was the reasonable amount of the fee because neither argument of counsel nor the Judge's eduction and deletion on time entries based on the Judge's subjective and personal experience of what was reasonable are not sufficient to rebut the affidavit from Claimant's counsel. In other words, there was no evidence to support the Judge's findings because the only evidence was the affidavit of the Claimant's attorney. The First District Court of Appeal then held that the Judge had no authority to reform/change the Joint Stipulation of the parties.

Leonardo Gomez v. Frank Crum, Inc., and Broadspire, Case No. 1D-17-1173 (November 6, 2017).

Parties entered into a global settlement agreement with washout of $110,225 inclusive of a statutory fee plus a Joint Stipulation for Past Attorney's Fees for $148,500. Judge approved the washout but denied the approval of the Order on the Joint Stipulation for Past Attorney's Fees awarding a fee of $17,908.80, ordering that $130,592.00 be paid to the Claimant out of the amount of the Joint Stipulation and approving the rest in taxable costs. Claimant's counsel appealed.

Judge in its Order found that side fee was probably carved out of the overall global settlement amount. Judge found that out of the total paid to settle this case by the E/C, the percentage ultimately received by the Claimant caused the Judge to look at case closely. Judge found fee excessive and that it shocks the conscience of the tribunal.

Judge also found that although the Employer/Carrier makes a business decision on how much to allocate for a settlement, this does not necessarily translate into the best interest of the Claimant which Judge must consider. Judge recognized that he is required to be viligant in only approving fees that are reasonable. Judge went on to evaluate the Lee Engineering factors but it appears that there was no evidence regarding reasonable amount of time, reasonable hourly rate and other factors.

The First District Court of Appeal reversed the Judge under the same reasons as the Banegas case above. Court held that Judge had no jurisdiction to allocate a different amount than one in Joint Stipulation, and that in absence of evidence Judge could not reduce the hours and make other findings.

One interesting difference in this case is that in Banegas after the First District Court of Appeal reversed the Judge, the JCC entered the Order approving the Joint Stipulation. In this case, the Judge had previously denied the Claimant's Motion to Disqualify the Judge, but after the opinion from the First District Court of Appeal, the Judge recused himself from the case and in the Order indicated that he was recusing himself because he could not in good conscience approve the fee.

NFN'S TAKE

- Do not agree to a Joint Stipulation for Past Due attorney fee unless it is owed. If Claimant's attorney wants additional fees, let them ask for E-Parte Fee from Claimant.
- Does the E/C/SA and defense attorney have an obligation to protect the Claimant's interest in a global settlement by only agreeing to pay in fees what is reasonable?
- Why have Judge's approve fee if they have no discretion to determine what is reasonable? What is the purpose of all that nice language from opinions from the First District Court of Appeals regarding the duty of the Judges to be viligant of only approving reasonable fees, when First District Court of Appeal then takes away such discretion.
- Easiest thing for Judge would have just been to approve the Order on the Joint Stipulation of Past Due Fees after the First District Court of Appeal reversed his Order, but the right thing to do was to recuse himself as he could not in good conscience approve the fee.

FIRM ANNOUNCEMENTS: WEEK OF DECEMBER 22, 2017

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The Law Offices of Neret, Finlay & Nguyen were honored earlier this month with an Excellence Award from In Touch.

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