



H R L A W

This Update contains summaries of all relevant Appellate decisions usually for the preceding week, with comments on how a particular decision affects you. In addition, we review daily the Merit Orders posted on the DOAH website. This Update contains summaries and links to relevant JCC decisions for the past week or so.

Please feel free to contact Rogers Turner (rturner@hrlawflorida.com) with questions or comments on any of the listed cases.

For the week of August 30, 2021, the case author is Heather Bondhus.

HR Law Cases

JCC Anthony (Tampa)(Andy Borah) – Denied return visit with authorized provider based upon SOL. Claimant suffered an injury to his right foot which required the implantation of plates and screws. The hardware was eventually removed and replaced with new material. The claimant continued to have custom orthotics and testified that he wore them all the time. The E/C raised a statute of limitations defense and the claimant raised estoppel, asserting that the E/C owed penalties and interest on untimely benefits, the information packet was not sent to the claimant and the claimant continues using orthotics. The claimant testified he never received any information or brochure from the carrier advising him about his rights and obligations under Florida workers' compensation law. However, he admitted to receiving his indemnity checks from the carrier at the same address where the brochure would have been sent. The claims supervisor testified that there is nothing in the file that indicates the informational package and documents were returned to the carrier as undeliverable. Dr. Era testified he last saw the claimant on May 18, 2018, at which time he placed him at MMI with no impairment rating or restrictions. He testified the claimant was not wearing his orthotics at that visit as he was wearing flip flops. There was no evidence presented that the employer had any actual knowledge of the use of orthotics at any time after May 2018 or that the employer was aware that the use of orthotics by the Claimant was to be for the rest of his life. Dr. Era also testified that the bones would consolidate in six to eight weeks after surgery and would then completely calcify and consolidate in a year. At that point, the screws or hardware would no longer be considered a prosthetic device. The JCC held that whether the Claimant is owed penalties or interest has no bearing in this case as it would not act to prevent the carrier from raising the statute of limitations as a defense. [Click here to view Order](#)

JCC Forte (Ft. Lauderdale)(Paul Terlizzese) – Denied TPD. Claimant underwent spine surgery with Dr. Baynham and was ultimately placed at MMI with a 10% impairment rating and permanent restrictions. He referred the claimant to Dr. Chaitoff for pain management. Dr. Chaitoff deferred to Dr. Baynham regarding restrictions but indicated the claimant was not at MMI as he believed that the treatment he had provided or was recommending to be curative and not palliative in nature. The JCC accepted the opinions of Dr. Baynham that the facet injections and potential rhizotomy were for temporary symptom relief. The facet injection only provided the claimant a week's worth of pain relief. Dr. Chaitoff testified the claimant would not be at MMI until after the RFA procedure. The JCC found the doctor left it up to the claimant to determine when he would reach MMI by allowing the claimant to schedule the RFA procedure at his convenience. The JCC found the claimant was at overall MMI per Dr. Baynham but denied the E/C's apportionment. [Click here to view Order](#)

JCC Dietz (Sebastian/Melbourne)(Gregory White) – Granted Motion to Enforce Settlement. Claimant admitted he gave his attorney authority to settle the case as outlined in the Mediation Settlement Agreement, and to sign the Mediation Settlement Agreement on his behalf. Several days later, he changed his mind and wanted more money to settle. The JCC found the terms of the settlement agreement to be sufficiently specific and reflect assent by all the parties to the essential terms discussed at the mediation. "Buyer's remorse" is not a basis for refusing to enforce a valid settlement. [Click here to view Order](#)

JCC Merit Orders

Compensability

JCC Massey (Tampa) – Denied claims for temporary disability and compensability of cognitive dysfunction/authorization of a neurologist for the cognitive dysfunction. The JCC accepted the opinions of treaters, Drs. Butler and Becker, on the claimant's work status over the claimant's IME, Dr. Vlahos. The E/C's neurological IME, Dr. Shriver, and the claimant's neurological IME, Dr. Figueroa, disagreed on issue of cognitive dysfunction related to the I/A. The neurological EMA, Dr. Reddy, found no cognitive impairment. Dr. Reddy's opinions were not ideal, according to the JCC, but were more consistent with the greater weight of the evidence than those of Dr. Figueroa. Additionally, the JCC found the opinions of Dr. Shriver were logical and supported by evidence. [Click here to view Order](#)

JCC Holley (Jacksonville) – Awarded compensability, medical and indemnity benefits. The employer failed to show for Mediation and the Order to Show Cause Hearing. Therefore, the JCC entered an Order striking the Employer's defenses. The Employer failed to show for the Final Hearing. The Judge found the treatment rendered to the claimant after the accident was emergent and ordered \$87,130.89 in medical bills to be paid by the Employer. Further, the JCC ordered the Employer to reimburse the claimant for any medical bills she paid from her third-party settlement proceeds. The claimant was awarded \$26,450.76 in TTD benefits and the claimant's attorney was awarded \$12,658.18 in attorney's fees. [Click here to view Order](#)

Permanent Total Disability

JCC Humphries (Jacksonville) – Awarded reinstatement of PTD, along with medical benefits. The E/C discontinued claimant's PTD and medical benefits pursuant to a misrepresentation defense. The E/C admitted evidence that the claimant's daughter began working a night shift and her schedule rendered some of the attendant care time logs factually inaccurate. Claimant testified she does not review the attendant care logs before they are submitted. The E/C did not argue that the claimant's daughter did not perform the agreed-to hours of services per day for which she is compensated. Instead, the E/C argued the claimant's daughter engaged in a pattern of false or misleading submissions because of the time of day she allegedly performed those services. The JCC accepted the testimony of the claimant's daughter that the logs she used were not intended to show the precise time the services were provided to the claimant. The JCC held the E/C failed to prove a knowing or intentional misrepresentation for a specific purpose of deceiving and securing compensation benefits. [Click here to view Order](#)

Indemnity Benefits

JCC Stephenson (West Palm Beach) – Denied adjustment to the AWW. The claimant worked the whole of the 13 weeks before the accident. Claimant argued his AWW should be calculated as a seasonal worker due to fluctuations in his commissions. The employer testified the business operates twelve months of the year and does not lay off employees due to decreases in business. Further, a skilled sales representative could manipulate his accounts to generate the same amount of business any month of the year. The JCC found the claimant did not establish that he is a seasonal worker pursuant to the statute, or that the seasonal method of calculation would be more reasonable and fairer. [Click here to view Order](#)

JCC Massey (Tampa) – Awarded payment of interest on impairment benefits. Claimant requested additional interest on late impairment benefits. The E/C argued that there is no evidence in the record as to when the carrier first had "knowledge of the impairment," and without such evidence the alleged due dates utilized by claimant are based on mere speculation. The claimant intended to call the adjuster as a witness but failed to subpoena her to the Final Hearing. The

JCC found the carrier had knowledge of the impairment when they filed the response to the petition and specifically cited the impairment rating and the MMI date. The response to the petition was placed into evidence without objection and plainly shows knowledge of the impairment. [Click here to view Order](#)

JCC Arthur (Lakeland) – Awarded TPD. Claimant suffered an amputation of the first three toes of his right foot while operating a lawn mower. After two post-surgical follow-ups, the orthopedist, Dr. Kazmier placed the claimant at MMI with no restrictions, but also advised him to weight bear as tolerated. He reported the claimant walked with a normal gait. Claimant obtained an IME with a podiatrist, Dr. Bornstein who diagnosed the claimant with CRPS, referred him to pain management and placed him on sedentary restrictions. The claimant saw Dr. Patterson for pain management, who opined the claimant walked with a normal gait and agreed with Dr. Kazmier’s MMI date. The JCC accepted the opinions of Dr. Bornstein on MMI status and restrictions over those of Dr. Kazmier and Dr. Patterson. The JCC found Dr. Kazmier’s opinion on restrictions contradictory as he recommended the claimant weight bear as tolerated, but also asserted the claimant had no restrictions. The JCC explained that it does not comport with logic and reason that a man who suffered an amputation of the first three toes of his foot would walk with a normal gait. [Click here to view Order](#)

Medical

JCC Arthur (Lakeland) – Awarded psychiatric care and TPD. Claimant suffered a compensable heart attack. Dr. Pandya was appointed as the EMA and diagnosed the claimant with major depressive disorder and an anxiety disorder. He opined that the industrial heart attack was the major contributing cause of the diagnoses and the need for psychiatric care and psychological counseling. Dr. Pandya reviewed surveillance after making these diagnoses and testified that although the surveillance did not show depression or anxiety, his opinions were not changed as he relied on the MMPI test and his interview with the claimant. Because the claimant manifested his mental or nervous injury before reaching physical MMI, the JCC ordered the E/C to pay temporary partial disability benefits from that date until six months to the day after the date of physical MMI. [Click here to view Order](#)

JCC Grindal (Sarasota) – Denied wheelchair accessible van. Claimant suffered a compensable accident when she was struck by an intruder on the head with a hammer approximately 30 times and then shot in the head and back. The E/C offered 24/7 wheelchair accessible transportation to both medical and non-medical locations and agreed to allow her mother to accompany her. Claimant testified that she experiences anxiety at the thought of entering a vehicle with a stranger. The claimant’s mother testified about the difficulties she has getting the claimant into her car and admitted a video into evidence showing her assisting her daughter into the car. She also testified that she believes that relying on a van service would negatively impact their quality

of life. The authorized medical physician offered no testimony that the wheelchair transportation service offered by the E/C is insufficient to meet the claimant's physical needs or is prevented by a psychiatric limitation. The claimant offered no medical testimony to support the need to avoid strangers as a restriction from her injury. The JCC explained that the quality of life considerations are not contemplated by the statute or case law. The claimant has failed to meet her burden in establishing that the purchase of a wheelchair accessible van is more appropriate than the 24/7 transportation service authorized by the E/C. [Click here to view Order](#)

JCC Walker (Pensacola) – Denied reauthorization of pain management and all benefits based on misrepresentation. Claimant falsely completed Employee Earnings Reports and knowingly misrepresented his physical limitations to an authorized doctor. The claimant completed twelve Employee Earnings Reports, denying having received any income and denying any sources of wages. When the claimant was later deposed, he admitted that he owned a lawn care business and receives income from cutting lawns. Claimant was also seen on surveillance performing activities that conflicted with the symptoms and limitations he reported to his authorized provider. The claimant asserts that the E/C is estopped from raising a misrepresentation defense because they did not do so within 120 days from the first date of surveillance. The JCC compared this to the 120-day rule, where the E/C's failure to deny compensability within 120 days of an initial provision of benefits pertains solely to the concept of compensability. The E/C still has the right to challenge other issues relevant to benefit entitlement, including major contributing cause. The JCC held the E/C is not estopped from asserting a misrepresentation defense and found the claimant knowingly falsified Employee Earnings Reports and purposefully misrepresented his physical limitations to his treating doctor in order to obtain workers' compensation benefits. [Click here to view Order](#)

Attorney Fees

JCC Sojourner (Orlando) – Awarded appellate attorney's fees of \$1,237.50 to Bill McCabe and \$1,560.00 to Jennifer Killen. The JCC accepted their time entries without reduction and awarded McCabe \$375.00 per hour and Killen \$325.00 per hour. [Click here to view Order](#)

JCC Massey (Tampa) – Awarded an attorney's fee of \$15,772.50. It was based on 70.1 hours at \$225.00 hour. [Click here to view Order](#)

JCC Stephenson (West Palm Beach) – Awarded costs to E/C. The only taxable cost to which the claimant objected was the cost of the E/C's IME with Dr. Thomas Goldschmidt, which was \$10,628.75. The E/C argued the cost covered two dates of accident. The JCC compared the IME's fee to the fee of the EMA, which was only \$3,900.00. The JCC found the \$700.00 fee for the E/C's conference with the IME to be excessive, allowing \$200.00 as reasonable and taxable. Further,

the \$850.00 administrative fee for the Claimant's videographer being present during the IME was also unreasonable. The JCC found \$6,050.00 to be reasonable and taxable for costs associated with the IME. [Click here to view Order](#)

JCC Kerr (Miami) – Awarded attorney's fees and costs. Claimant filed eight Petitions for Benefits that were either resolved or dismissed. Claimant's attorney sought fees based on four letters written to the carrier in 2017 enclosing mileage reimbursement forms and requesting payment. No PFBs were filed as the benefits were provided. The JCC found Claimant's counsel was not entitled to fees for those benefits. Claimant's counsel sought fees for his "successful efforts in forcing E/C to formally abandon" their statute of limitations affirmative defense. The JCC found that while E/C raised the affirmative defense, it is uncontested there was no litigation on the issue and benefits continued to be provided even though the defense was raised. Therefore, Claimant's counsel was not entitled to fees for defeating the SOL defense. The JCC held Claimant's counsel is entitled to attorney fees and costs for securing an alternate physician and payment of medical bills. He is also entitled to fees and costs for obtaining the order granting the entitlement to fees and costs. [Click here to view Order](#)

JCC Young (St. Petersburg) – Awarded E/C paid fees and costs. Claimant's counsel secured authorization of physical therapy, injections, back indemnity and an increase in the average weekly wage. The JCC found claimant's counsel reasonably expended 50.3 hours out of the 84.7 hours claimed. The JCC awarded claimant's counsel \$300.00 per hour, for a total of \$15,090.00. [Click here to view Order](#)

JCC Clark (Ft. Myers) – Awarded attorney's fees and costs to claimant's prior attorney. Claimant's prior attorney argued he is entitled to 80% of the settlement fee given the various benefits he secured on behalf of the claimant. Claimant's current attorney argued prior counsel did not spend his time efficiently and never received a settlement offer from the E/C. The JCC found a 50/50 split of the fee to be the most reasonable resolution. [Click here to view Order](#)

Motion Hearings

JCC Owens (Port St. Lucie) – Awarded \$2,000.00 emergency advance. The Claimant and his attorney appeared at the hearing on the advance. The Carrier was unrepresented and did not appear for the hearing. The JCC found the claimant was under work restrictions as a result of the accident, his indemnity had been suspended one or two months prior to the hearing and he was in dire circumstances. He needed the advance to make his mortgage and car payments. [Click here to view Order](#)

JCC Johnsen (West Palm Beach) – Granted E/C's Motion to Tax Costs of \$1,254.50. The Claimant sought a one-time change in the PFB. The one-time change was provided after the PFB was

filed. The E/C argued that there was no good faith effort made prior to the filing of the PFB and the one-time change physician named in the PFB was not provided. The JCC found the E/C was the prevailing party on the claim raised in the PFB. The claimant objected to the costs as both unreasonable and supported by hearsay invoices. The JCC found the costs claimed were reasonable and also found according to Rule 60Q-6.124(3)(a)6, it was only necessary to list the costs incurred. The JCC found the attached invoices were not required and further found that evidence the invoices were paid was not required. The JCC found that counsel for the E/C simply had to show the costs were incurred which was done in the Verified Motion. [Click here to view Order](#)

Please note that the DCA Opinions and Merit Orders contained in this newsletter are non-final until 30 days after their rendition. Until that time, they are subject to amendment, vacation, or other action which may remove or alter some or all of the decision. Please contact any HR Law attorney if you have a question as to the finality and applicability of an Opinion or Order. We endeavor to include any amendments or alterations to Opinions or Orders that may occur at a later date.