MKRS LAW

DECEMBER 2014

Case Law Update

City of Ft. Pierce v. Donald Spence

Case No. 1D14-937 (12/30/2014)

Facts:

In this case the E/C appeals and the Claimant cross-appeals the award of facet injections and denying authorization of an orthopedic surgeon and a cervical discectomy and fusion at C5/6.

The Claimant had a compensable accident on 10/21/2012. The authorized pain management doctor recommended bilateral cervical facet medial branch blocks and attributed 70% of the need for the injections to a non-work related spine condition which had been found by the Claimant's family doctor.

The JCC accepted the pain management doctor's percentages but discounted them based upon his reasoning that the degenerative condition was normal aging. The JCC relied on ***Bysczynski v. United Parcel Services, Inc.***, 53 So.3d 328 (Fla. 1st DCA 2010).

Issue:

Whether the JCC correctly applied ***Bysczynski*** in awarding the facet injections concluding that the preexisting cervical degenerative condition was "normal aging".

Outcome and Analysis:

In reversing the award of the facet injections, the DCA relies on the case of ***Osceola County School Board v. Pabellon-Nieves,*** 39 FLW D2511 (Fla. 1st DCA Dec. 3, 2014) wherein the Court held that the correct analysis is not whether the preexisting condition is "age-appropriate" but whether or not there is medical evidence that it is the MCC of the need for the requested treatment.

The Court instructs that in ***Bysczynski*** the preexisting degenerative condition did not **independently** require any treatment either before or after the Claimant's two compensable accidents. In this case there was medical evidence that the preexisting degenerative condition **is the MCC of the current need** for the injections which the JCC accepted.

Of note is the cross-appeal wherein the DCA finds that Dr. Roush's care was compensable. The DCA stated that it was error to exclude under 440.13(5)(e) his medical opinion that the discectomy and fusion was needed. However, the DCA

finds it to be harmless error based on the JCC's alternate finding that the pain management doctor's opinion that the facets and not the disks are the pain generators. Even though, Dr. Roush's opinion was unrefuted, the JCC gave a reason for the rejection which was supported by the record which the JCC is allowed to do. Citing ***Trejo-Perez v. Arry's Roofing***, 141 So.3d 220 (Fla. 1st DCA 2014).

The key here would appear to be the JCC's acceptance of the 70% of the pre-existing condition as the cause of the need for the injections and then labeling it "normal aging" and then "discounting it" was error.

Take Away:

This case provides further illumination on the often elusive and difficult **Bysczynski** case when conducting an MCC analysis. The Court moves away from the "age-appropriate" or "normal aging" phraseology and applies an MCC analysis that the preexisting condition (and not the work accident) is the MCC of the need for the facet injections which made the injections not compensable.

Additionally, a JCC can reject unrefuted medical testimony if he provides a reason which is supported by the record evidence.

City of Miami Beach v. Anthony Marten

Case No. 1D14-3109 (12/30/2014)

Facts:

The Employer/Servicing Agent challenged the late payment of income impairment benefits. IIBs are paid based on the assigned PIR for the work accident. The JCC determined that the IIBs were paid late because they were paid more than 20 days after the date of MMI. The authorized doctors had indicated that the Claimant had no permanent impairment rating as a result of the work accident. It was undisputed that the E/SA paid within 20 days of first having knowledge that the Claimant's IME had assigned a PIR.

Issue:

When are income impairment benefits due? Within 20 days of the date of MMI or within 20 days from the E/SA's first knowledge of a PIR being assigned.

Stated alternatively: Are IIBs due within twenty days of the E/SA's first knowledge of an assigned PIR, even if the assigning doctor is the Claimant's IME?

Outcome and Analysis:

The Court cites the plain language of the statute, **F.S.** 440.15(3)(a), that states that IIBs are due and payable within 20 days after the carrier has knowledge of a PIR. Because the E/SA paid within 20 days of learning of the first PIR being assigned in the case, no penalties or interest were due.

The Court makes no distinction that the first assigned PIR in the case is from the Claimant's IME. This would indicate that ignoring a Claimant's IME's opinion regarding an assigned PIR based on the work injury cannot be ignored. A Carrier should not ignore any PIR that is learned of in the case. If IIBs have not been paid or perhaps if there underpaid, the additional due should be paid.

This holding would logically flow that only the opinions of an authorized provider, an EMA of an IME come into evidence. A claimant's IME has weight and based on this case cannot be ignored.

Take Away:

A carrier should not ignore any PIR that is assigned as a result of a work accident whether from an authorized treating physician or the Claimant's IME. Once the E/SA has knowledge of a PIR in a case, whether from an authorized treating physician or the Claimant's IME, it cannot be ignored.

Deborah O'Connor v. North Okaloosa Medical Center

Case No. 1D14-0623 (12/12/2014)

Facts:

The Claimant challenged the denial of TTD for a finite period based upon res judicata. The Claimant had reflex sympathetic dystrophy of the right hand and wrist as a result of a compensable work accident. Authorized treatment was provided for over six years. After six years of treatment the authorized anesthesiologist placed the Claimant at MMI on 1/14/2011 and opined the Claimant was unable to work.

Based on the MMI the E/C suspended all temporary benefits. The Claimant had not exhausted her entitlement to 104 weeks of temporary benefits when the suspension occurred. By 9/2011, all other authorized doctors had placed the Claimant at MMI. Claimant filed a PFB for PTD based on the 1/14/2011 date of MMI. The parties had stipulated to an MMI date of 1/14/2011.

In this case the JCC had entered a prior Order on 3/1/2012 denying the claim for PTD from 1/14/11 as not ripe for adjudication and was denied without prejudice. This ruling was based on the Claimant not being at MMI. In the prior Order the JCC found the Claimant to be totally disabled from 1/14/2011.

Following the denial of the PTD claim, the Claimant filed a PFB seeking TTD from 1/14/2011 and continuing. The E/C defended on res judicata as to TTD benefits from 1/14/2011 through 2/14/2012 the date of the prior Order.

The JCC agreed with the res judicata defense and reasoned that the Claimant could have pled for TTD as an alternative to PTD. The JCC however awarded TTD from 2/15//12 (the day after the prior Order) to 9/19/2012 when MMI was reached.

Issue:

Does res judicata apply to the period of claimed TTD from 1/14/2011 to 2/14/2012 because the claim for TTD could have been pled as an alternative claim to PTD in the original PFB and first hearing?

Outcome and Analysis:

The Court held that the principal of res judicata applies in workers' compensation cases. The Court instructed that the doctrine of res judicata stands for the principle that a final order is absolute and puts to rest every justiciable issue as well as every actually litigated issue.

However, the Court ruled that res judicata applies only when the elements of res judicata are present and are properly applied. The necessary element of res judicata is the existence of a final judgment on the merits in a previous action. Where there is no prior adjudication on the merits, res judicata does not apply.

The Court holds that the prior Order on PTD expressly withheld adjudication on the entirety of the claim for PTD from 1/14/2011 and continuing with no portion being adjudicated with finality because the claim was premature. The denial of the prior claim was made without prejudice. The subsequent claim for PTD was therefore not barred by res judicata.

Take Away:

Before the principle of res judicata applies, there must be an adjudication by a court of competent jurisdiction on the merits of the claim. The prior Order's denial of the whole claim was without prejudice; the prior adjudication was not final.

John A. Elliott v. Securitas Security Services USA, Inc

OJCC # 11-0038855SLR Judge Rosen Decision date 12/29/2014

Facts:

This is an evidentiary Order on the Claimant's objection to the medical composite to be submitted to an expert medical advisor. An EMA was appointed as a result of a conflict in the opinions of two healthcare providers. The issue was MCC of the Claimant's left knee and right hip. The E/C had accepted the left knee as compensable but denied any causal relationship between the work accident and the right hip.

The Order appointing the EMA directed the parties to compile the medical composite to go to the EMA. The parties could not agree on certain records. The Claimant argued that records from unauthorized physicians that are not IMEs should not be included because the opinions would be inadmissible. The Claimant also objected to records from the first responders on the same basis. The Claimant also took the position that the EMA should not give opinions which usurp the JCC's authority to resolve factual issues regarding medical claims and defenses.

Issue:

Whether the medical records from unauthorized physicians who are not IMEs should be allowed to be considered by the EMA? Additionally, whether the opinions of the EMA can be restricted?

Outcome and Analysis:

The JCC ruled that the medical records from unauthorized physicians who are not IMEs are admissible for facts and that an expert can rely on inadmissible opinions in reaching that expert's conclusions. All medical records properly discovered were order to be provided to the EMA including the first responders.

Regarding the restriction of an EMA's opinion, the JCC ruled that a JCC may not overrule the EMA's opinions without clear and convincing evidence. The JCC noted there were no **Daubert** objections in any of the depositions.

Take Away:

An EMA can consider medical records from unauthorized physicians who are not IMEs and rely on what otherwise would be inadmissible opinions in reaching his/her final conclusions.

The EMA resolves the conflict in the medical opinions as opposed to the JCC who is bound by the EMA's opinion unless there is clear and convincing evidence to reject the EMA's opinion.