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TO: **ALL WORKERS' COMPENSATION CLIENTS**

FROM: **WALTER C. WYATT**

DATE: **JUNE 16, 2010**

CASE LAW UPDATE

VOLUNTARY RESIGNATION DEFENSE TO TPD

Daniel Carcamo v. Business Representation International, 35 FLW D1011 (Fla 1st DCA May 6, 2010)

In this case, the claimant suffered a compensable accident on June 5, 2007 while working as a luggage handler for the employer. The claimant received medical treatment and returned to work light duty for the employer until October 11, 2008, when he voluntarily resigned from employment.

JCC Harnage of Miami denied any entitlement to TPD for all periods beginning on October 12, 2008 based on the claimant's refusal of suitable employment. Unfortunately, the First DCA disagreed with the JCC and reversed his ruling because the JCC failed to make a determination concerning the continued availability of the position from which the claimant resigned.

Practical Application:

This unfortunate appellate decision "waters down" the strength of the voluntary resignation/limitation of income defense to TPD. Even if you have a claim in which the claimant clearly voluntarily resigned for reasons totally unrelated to the work accident/injuries, you can only apply this defense to deny payment of periods of TPD during which the employer actually had an open job position

available to the claimant. Thus, while you may be able to initially deny benefits based upon a voluntary resignation, if the employer subsequently hires another worker to fill that position, then you cannot use this defense.

To utilize this defense successfully, you must be able to obtain testimony from your employer that a position was available during all times that you wish to deny payment of TPD. Obviously, in most cases, the employer will not be able to leave a position open indefinitely, and thus, this defense has its limitations.

SETTLEMENT AGREEMENT

Osvaldo Caceres v. Sadano's Supermarkets, 1st DCA Case No. 1D09-5962 (June 9, 2010)

In this very brief appellate opinion, we learn that JCC Gerardo Castiello granted the E/C's Motion to Enforce a Settlement Agreement. However, the First DCA reversed holding that because the severance agreement and release, which the JCC had concluded was a material part of the overall settlement agreement, provided that claimant may revoke the agreement within 7 days following the date of execution of the agreement, and because claimant expressly rejected the settlement prior to executing the settlement documents, there was no binding settlement agreement.

There are no detailed facts in the First DCA's opinion which provide much guidance. Thus, to help understand the decision, we looked to the underlying Order on Motion to Compel Production of Settlement Documents and to Enforce Settlement entered by JCC Castiello on November 5, 2009. Unfortunately, the JCC's Order does not completely clear up this issue. However, it appears that a global settlement of any and all claims (not just workers' compensation claims) was contemplated by the parties. It also appears there was a severance agreement and resignation which referenced a 7-day period within which the claimant may revoke the settlement. It appears this severance agreement and release may have been referenced in the Settlement Agreement and Release of Workers' Compensation Claims.

Practical Application:

It is common practice for many carriers and servicing agents to request a voluntary resignation of employment upon reaching a settlement of the claimant's workers' compensation claims. It is also common practice for employers to require a General Release of any employment-related claims (discrimination claims) for which

generally, additional consideration is provided. Certain Federal law, which prevents employment discrimination, requires that in the event of a Release, the employee must be given a period of 7 days within which to consider and potentially revoke the agreement, or the Release will not be valid. As a result, the Caceres case is somewhat troubling. If no 7-day period is included in the Release of employment-related claims, the Release may later be determined not to be valid. However, to include the 7-day waiting period apparently can also result in a workers' compensation settlement not being fully binding and enforceable until the claimant executes all the settlement documents and the 7-day waiting period has expired.

Our firm's practice has been to keep the workers' compensation settlement and any General Release of employment-related claims completely separate and apart from each other. Wherever there is a General Release of employment-related claims, the employer pays separate and additional consideration for this Release. However, given the language of the First DCA's opinion in Caceres, it is possible that no matter how separate the agreements are kept, that if they are reached together and the parties contemplate them to be part of a total package, the 7-day waiting period could result in a lack of a binding settlement as of the date of the Mediation Agreement, or date the case was settled by telephone.

There does not appear to be any definitive way around this potential problem. The best advice would probably be to make the Mediation Agreement as specific as possible in terms of it being binding as of the date of execution. However, even this may not correct the problem based upon the language in the First DCA's opinion in Caceres.

STATUTE OF LIMITATIONS

Alan Certain, Jr. v. Big Johnson Concrete Pumping, Inc., 35 FLW D962 (Fla 1st DCA April 29, 2010)

Claimant was injured in a compensable work related automobile accident on September 21, 2005. He filed a lawsuit against the other driver, and received treatment, but initially chose not to pursue a workers' compensation claim.

Subsequently, on November 10, 2008, the claimant filed a PFB seeking various benefits. The E/C responded on November 20, 2008 by preparing and electronically filing on that date, a "Response to Petition for Benefits". This Response indicated that the claim was "denied in its entirety" but did not specify

the statute of limitations, or any other basis for denial. The very same day (November 20th), the E/C also prepared a Notice of Denial which stated: "Claim has been filed more than 3 years after the alleged date of accident." However, this NOD was not actually sent to the Division of Workers' Compensation until the following day (November 21st).

JCC Shelley Punancy ruled the claim was barred by the Statute of Limitations. However, the First DCA reversed the JCC's ruling, on the basis that the actual first response to the PFB did not set forth the Statute of Limitations as a defense, or basis for denial of the claim. We can only speculate what the result would have been if both the NOD and the Response to the PFB had actually been filed or sent out on the same day.

The basis of the First DCA's ruling, is Florida Statute §440.19(1) which indicates in pertinent part that the failure to file a timely PFB is NOT a bar to the employee's claim, "UNLESS the carrier advances the defense of a statute of limitations in its initial response to the Petition for Benefits."

Practical Application:

As always, remember that a Statute of Limitations defense is very difficult to prevail upon, and there are many exceptions. In order to win on this defense, "every 'T' must be crossed, and every 'i' must be dotted". There are many loopholes to this defense, because it is perceived by the courts as a very harsh remedy.

If you wish to deny a case based on the Statute of Limitations, you must make absolutely certain that your very first response to an untimely Petition for Benefits clearly asserts the defense in no uncertain terms. It is best to use a phrase such as "claim is denied on the basis of the Statute of Limitations, which has run." Even if your first response to the PFB is a letter, it must assert the Statute of Limitations defense. We would also advise you make certain that, while not required, in an abundance of caution, you continue to assert the Statute of Limitations defense in each and every Notice of Denial or Response or letter responding to any subsequent Petition for Benefits. Also, be aware that even accidental payment of unauthorized medical bills could void the Statute of Limitations defense, and "re-open" the claim.

ONE-TIME CHANGE/ALTERNATE TREATING PHYSICIAN

Eddie Pruitt v. Southeast Personnel Leasing, Inc., 35 FLW D933 (Fla 1st DCA April 27, 2008)

On June 2, 2008, the claimant slipped and fell at work sustaining injuries to his low back and shoulder. The accident was accepted as compensable and the claimant was provided with treatment with Dr. Kelman. The claimant became dissatisfied with Dr. Kelman and on November 14, 2008, filed a Petition for Benefits (PFB) which, among other things, requested an alternative treatment physician. On November 21, 2008, the E/C filed a Response to the PFB. However, due to an administrative oversight, the E/C failed to address the claimant's request for an alternate treating physician. Despite the E/C's oversight, the claimant failed to select an alternate physician. Several months later at a Mediation Conference, the parties agreed that the E/C would provide the claimant with an alternate treating physician. Two days after the Mediation, the E/C sent the claimant a letter advising him of an appointment with Dr. Donshik, a newly authorized physician. The claimant attended several appointments with Dr. Donshik. After Dr. Donshik opined that the claimant's work place injury was no longer the MCC of the claimant's need for additional care, the E/C issued a notice denying further medical treatment.

The case proceeded to a Final Merits Hearing in May of 2009 at which the claimant argued he was entitled to select an alternate treating physician of his own choice. The claimant's argument was the E/C had forfeited its right to choose the physician by failing to respond within 5 days of receiving claimant's request.

The E/C argued that the claimant failed to previously select an alternate treating physician but also acquiesced in the E/C's selection of the alternate physician by actually treating with Dr. Donshik. As a result, the First DCA held that the claimant was not entitled to choose the alternate physician and the claimant's one-time change had been exhausted by the carrier's selection of Dr. Donshik.

Practical Application:

First, it should be obvious that adjusters should respond to any WRITTEN request for a one-time change of physician promptly. You only have 5 days to select a physician and notify opposing counsel, or you may lose your right to select the doctor of YOUR choice, and then the claimant's attorney can pick the doctor. Selection of the correct doctors can be so very important in terms of the direction

the claim heads, and whether it can be resolved quickly for a reasonable amount, and without a lot of lengthy and expensive treatment modalities.

Even if you are not within the 5 days, it is also wise to go ahead and schedule the appointment with the doctor of your choice and send notification letters to the claimants and their attorneys. With any luck, if you do your work fast enough, the claimant will attend the first appointment with YOUR chosen doctor, and then you will at least have an argument that the claimants waived their right to select the doctor. It is unclear if the claimant will have acquiesced in the E/C's choice of doctor if he only treats once with that physician. As noted above, in the Pruitt case, the claimant saw Dr. Donshik several times.

ATTENDANT CARE

ABC Home Health v. Patricia Lawson, 1st DCA Case No. 1D08-4152 (May 26, 2010)

In this case, JCC Doris Jenkins awarded the claimant lawn care, a hot tub and a dental evaluation. The First DCA reversed the award of lawn care services because there was no evidence which established a medical need for the claimant's yard to remain well-maintained or that there would be any adverse medical consequences if the yard was not maintained. The court noted that the statute in effect for the claimant's date of accident (the 1990 version) expressly prohibits an award of services to assist an injured worker in performing "household duties".

Practical Application:

The Lawson case simply reiterates the statutory principle that attendant care must be medically necessary and does not include household duties. Cooking and housecleaning are other examples of what might be considered household duties that are not covered under workers' compensation unless a physician can provide competent substantial evidence that such services are medically necessary.

AWW/UNREPORTED WAGES

Simeon Salinas v. C.A.T. Concrete, LLC, 1st DCA Case No. 1D09-4208 (May 21, 2010)

In the Salinas case, the parties had previously stipulated to the claimant's average weekly wage (AWW). However, the AWW included wages that were never

reported to the Internal Revenue Service for Federal income tax purposes. At a Merits Hearing, the E/C presented evidence that the claimant did not report his income to the IRS. In fact, the claimant testified himself that he was an illegal immigrant who had never filed any Federal income taxes. As a result, despite the prior Stipulation, JCC Gerardo Castiello accepted the E/C's requirement that the Stipulation was refuted by competent substantial evidence. The First DCA affirmed.

Practical Application:

Normally, stipulations between the parties are binding and cannot be changed. However, wherever there is competent substantial evidence that the Stipulation was incorrect, the possibility does exist that the issue can be revisited and the Stipulation can be voided.

Please feel free to contact any of our workers' compensation attorneys listed below if you wish to discuss any of these cases and their application to your claims. You may reach us at the telephone numbers or e-mail addresses listed below:

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