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DATE: OCTOBER 1, 2010

CASE LAW UPDATE

EXPERT MEDICAL ADVISOR

AAA Gutter Cleaning, Inc. v. Cesario, 35 FLW D2102(a) (Fla 1st DCA 2010)

In this case, JCC Stephen Rosen, incorrectly interpreted Section 440.13(9)(c) to require that a disagreement between two health care providers necessary to trigger the appointment of an EMA must be between doctors of the same specialty. In Cesario, the claimant's orthopedic doctor and pain management doctor expressed different opinions with regard to the issue of major contributing cause. The First DCA reversed the JCC's denial of the E/C's request for an EMA. The Court held that a dispute between doctors of different specialties is sufficient to require the appointment of an EMA.

Practical Application:

This simple holding makes clear that a true disagreement between any of the claimant's treating doctors, regardless of their specialty, can sustain a request for an EMA to resolve that disagreement.

INDEPENDENT MEDICAL EXAMS

David Lehoullier v. Gevity/Fire Equipment Services, 35 FLW D1942(c) (Fla 1st DCA 2010)

In this case, JCC Robert McAliley granted the E/C's Motion for a Psychiatric IME. The claimant sought review of the JCC's order, so that he could avoid the IME. The First DCA granted the claimant's Petition for Certiorari and quashed the JCC's Order requiring claimant to attend the IME.

The claimant sustained various orthopedic and neurological injuries which the E/C accepted as compensable and provided treatment with several authorized doctors. Later on, the claimant developed psychological problems and filed several PFB's seeking, among other things, psychiatric care. At a

Mediation Conference, the E/C agreed to authorize a psychiatrist of its choice to treat the claimant's psychological problems.

After the Mediation, and after the claimant had begun treating with the psychiatrist, the E/C became concerned over the psychiatric treatment, as well as the longevity of the claimant's medical care with another one of his treating doctors. Thus, the E/C filed a Motion to Compel a Neuropsychiatric IME. The JCC granted the Motion, and ordered the claimant to appear for the IME. The JCC based his Order on the reasoning that since an E/C is permitted to transfer the medical care to another doctor if an IME determines the employee is not making appropriate progress in recuperation, the claimant could be compelled to attend the IME. The First DCA disagreed.

The First DCA held that there was no statutory authority in this situation to allow the JCC to compel the IME. The Court noted that in order for a claimant to be compelled to attend an IME, there must be an actual "legal dispute". It held that an E/C does not have an independent right to an IME whenever it suspects that the claimant is not adequately progressing.

The Court stated "simply expressing unilateral speculative concerns over a claimant's progress with an authorized physician is insufficient." In order to create a dispute, an E/C is required to deny a claimant's request for medical benefits, where as here, the claimant had not requested any benefit or treatment that the E/C failed to provide. Thus, the claimant was not required to attend the IME.

Practical Application:

This case indicates that a dispute exists whenever an E/C denies any request for benefits or medical treatment by the claimant. Thus, claimants will always be entitled to an IME under such circumstances. Of course, the E/C would also be entitled to an IME in that situation.

However, where all benefits that have been requested are provided, the E/C is not entitled to an IME because there is no legal dispute. In this case, the only way for the E/C to obtain an IME to address its concerns over the ongoing medical treatment would be for the E/C to first deny further medical treatment, thereby creating a dispute. Of course, this unilateral denial without medical basis will subject the E/C to potential claimant attorneys' fees, and possibly even a claim for intentional tort in Circuit Court (Aguilera situation). Before unilaterally denying medical care, the E/C should, at a minimum, have an in-house doctor or outside records review physician render a detailed report indicating that the ongoing treatment is not within normal treatment protocols. The file should be well-documented as to why the medical care is being denied. It should be very clear the adjuster is not denying medical care in order to intentionally harm, harass, coerce, or otherwise injure/damage the claimant. It might also be helpful to at least make a well-documented attempt to get the claimant to attend an IME before unilaterally denying medical care. **These types of situations are very "tricky" and should always be discussed with your top level management, as well as defense counsel, before proceeding with a unilateral denial.**

PERMANENT TOTAL DISABILITY

Nancy Blake v. Merck & Company, Inc., 35 FLW D2001(a) (Fla 1st DCA 2010)

In this case, JCC Stephen Rosen denied the claimant's claim for PTD benefits, and claimant appealed. The First DCA held that the JCC used an incorrect legal standard in determining the PTD claim. The JCC had held that in order to prove PTD absent medical evidence of a complete inability to work, the claimant must perform a job search. The First DCA reversed, indicating this was an erroneous assumption by the JCC.

The First DCA held that a claimant may prove a claim for PTD by any of three methods/standards:

1. Permanent medical incapacity to engage in at least sedentary work within a 50-mile radius of the employee's residence due to physical limitations; OR
2. Permanent work-related physical restrictions coupled with an exhaustive but unsuccessful job search; OR
3. **Permanent work-related physical restrictions that, while not alone totally disabling, preclude claimant from engaging in at least sedentary employment, when combined with vocational factors.**

Since the JCC had not applied the correct three-part standard outlined above, the First DCA reversed the JCC's denial of PTD and remanded the case back to him for reconsideration of the PTD claim.

Practical Application:

Standard number 3 above is very important, and expands the realm of cases that may qualify as valid PTD claims. This case makes it crystal clear that PTD benefits may be awarded to a claimant who is physically capable of performing sedentary work, but is not vocationally qualified to do any jobs that are available within a 50-mile radius of his home. Additionally, the claimant does not even have to do a job search to be determined to be PTD. It will be enough if the claimant can present vocational evidence that, based on his education and past work experience coupled with his physical restrictions, there are no actual jobs available in his locale. Thus, it will be extremely important for E/C's to retain their own vocational experts to refute any negative opinions from claimants' vocational experts.

UNAUTHORIZED MEDICAL CARE/SELF HELP PROVISIONS OF STATUTE

Romano v. Trinity School for Children, 35 FLW D2052(c) (Fla 1st DCA 2010)

In this case, JCC Doris Jenkins refused to consider the opinions of Dr. Walker, a physician who provided Un-authorized treatment to the claimant, during a period of time which the First DCA characterized as

“when the E/C wrongfully denied medical care.” The claimant sustained compensable orthopedic injuries, which subsequently resulted in psychiatric problems. In February 2009, the claimant made a request for psychiatric care, which the E/C initially denied by fax on February 24, 2009. Thus, the claimant obtained unauthorized psychiatric care on her own with Dr. Walker on March 20, 2009.

Subsequent to the claimant’s initial appointment with Dr. Walker, both the claimant and the E/C obtained an IME. The E/C’s IME determined that the claimant suffered from depression which was causally related to the work accident. As a result of its IME, the E/C then authorized psychiatric treatment with Dr. Forman beginning on September 1, 2009.

Claimant later filed several PFB’s seeking reimbursement for past psychiatric care with Dr. Walker, future psychiatric care with Dr. Walker rather than Dr. Forman and temporary indemnity benefits. In support of claimant’s request for temporary benefits, her attorney sought to admit the deposition of Dr. Walker, which otherwise was not permissible as Dr. Walker was not an authorized doctor, IME or EMA. The claimant argued that because she had previously made a specific request for psychiatric care, which was “wrongfully denied”, she was entitled to use the “self help” provisions of F.S. Section 440.13(2)(c) and seek her own psychiatric care, as the E/C had initially denied such care.

Based on the evidence, including the E/C’s IME and the opinion of psychiatrist, Dr. Forman, the JCC made a determination that the care rendered by Dr. Walker was “unquestionably medically necessary”. However, the JCC still denied the claimant’s request to admit the deposition of Dr. Walker into evidence.

The First DCA held that the claimant met her burden of proving 3 specific things:

1. She made a specific request for care,
2. She allowed the E/C a reasonable time to respond, and
3. She obtained care that was determined to be compensable, reasonable and medically necessary.

Since the claimant met her burden as set forth above, the First DCA reversed the JCC’s decision and held that Dr. Walker’s deposition testimony should have been admitted into evidence for consideration of the claimant’s claim for temporary benefits. The Court did not address the question of whether Dr. Walker would be authorized for future psychiatric care. However, the Court did make a somewhat disturbing statement. The Court stated: “Contrary to the JCC’s determination, claimant was not required to obtain a referral prior to unilaterally seeking treatment with a psychiatrist.”

Practical Application:

The above case appears to indicate that whenever a claimant requests a particular type of medical care which is denied by the E/C, the claimant may obtain care on her own, and if her authorized doctors or IME physicians later find that the care requested was reasonable and medically necessary, the doctor the

claimant sought on her own becomes an authorized treating physician, whose opinions will come into evidence. Further, it is likely that the claimant would be entitled to continue to treat with the formerly unauthorized doctor. Thus, when denying a request for medical care, caution should be exercised, as if denied, the claimant may seek treatment on her own, which may by operation of law become authorized, depending of course on the opinions of the actual authorized doctors and IME's.

ONE TIME CHANGE/ALTERNATE TREATING PHYSICIAN

Jorge Grueiro v. Liberty Mailing, Inc., 35 FLW D1913(c) (Fla 1st DCA 2010)

In this appeal, JCC Sylvia Medina Shore denied the claimant's request to select his own choice of alternate treating physician. The JCC found that the E/C had timely offered and authorized its own choice of an alternate doctor after the claimant made his request for a change. The claimant then failed to attend the appointment with the E/C's choice of doctor. The Claimant appealed, and the First DCA affirmed the JCC's denial of the claimant's request.

Practical Application:

This case demonstrates the importance of selecting a conservative physician immediately upon receiving a request for a one-time change, and timely offering that new doctor to opposing counsel (i.e., within 5 days of receipt of the request). If you do that, you are in a rock solid position. Under no circumstances will the claimant then be able to switch to a doctor of his/her choice. We also know from prior case law that even if the offer of the alternate doctor is not timely, if the claimant nevertheless treats with that doctor, he may have waived his right to select the doctor. In any event, it is of utmost importance to carefully select and timely offer your own choice of new treating physician.

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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