

440 APPELLATE & CIRCUIT COURT REPORT

By Mark L. Zientz, Esq.

CASES FILED IN THE COURTS

This report covers the last 64 appeals filed in the 1DCA through February 17, 2006. Case numbers from 1DCA05-6154 to 1DCA06-1125. Circuit court cases and appeals of cases of interest to Workers' Compensation practitioners are also included. Each of the workers' compensation orders which are the subject of these appeals may be found on the DOAH JCC website using the case search function, DOAH (LT#) and the docket tab.

The 1DCA website also has a docket function which can be used to determine the status of any appeal using the case number or the name of the party or attorney. The calendar function can be used to determine oral argument dates. Live video is available over the internet for arguments held in Tallahassee. There is now an archive of past oral arguments in the 1 DCA similar to the archive available from the Supreme Court website.

Of the last 64 appeals filed from orders of the JCC's, 38 had the Claimant as the appellant and 26 were Employer/Carrier/Service Agent as the appellant.

FEATURED CASES:

This issue features two cases of importance to watch for.

MICHAEL PHILIPS V. EDWARD J. HEALY REHAB CTR. 1D05-1513-LT #03-044576
Oral argument March 29, 2006. David Chafin, Esq. Appellant, Tamara M. Scrudgers, Esq. Appellee.

Facts: Appellant was injured on October 13, 2005. Entire claim was controverted. Claimant sought E/C paid IME even though statute no longer provided for same. JCC Basquill granted E/C paid IME and carrier planned to appeal or file Writ of Certiorari. Before order granting IME became final and before the IME was done, the parties mediated successfully and agreed to settle the claim and further agreed that attorney Chafin was due an additional fee for obtaining the IME.

JCC Basquill approved the 'washout' but not the fee for the IME. His order denied entitlement to a fee for obtaining an IME because there was no monetary benefit to which the fee schedule could be applied and the original claim was not a medical only petition.

Constitutional arguments were raised before the DCA. No Amicus participated.

CARLOS DORION V. SWISSPORT NORTH AMERICA 1D05-4484 LT#05-003715
Oral argument March 30, 2006. Alex Lancaster Esq. Appellant, Mark Tinker, Esq. Claimant

Facts: JCC denied Appellant the right to prove his disability was greater than his impairment and for benefits in accordance with his loss of wage earning capacity.

Appellant challenges the constitutionality of the 2003 amendments which eliminate all compensation for "disability" arguing that the purpose of the law is to compensate for "disability" and just compensating for "impairment" creates an inherent conflict which ends up infringing on a fundamental right to redress for injury and access to courts. §440.015 Fla. Stat. (1990) says the purpose of the law is to compensate for disability, not just impairment.

Appellees argue that using a presumptive schedule is what workers' compensation laws do to provide certainty.

In rebuttal, Appellants argue schedules have been approved for injuries to scheduled members but not for injuries to the body as a whole. The various incarnations of ch. 440 up to 2003, always allowed the opportunity for a hearing on the issue of whether or not the disability exceeded the schedule and requiring payment of the greater benefit.

Wage Loss was a pure disability compensation law with some additional benefits for some scheduled injuries. The pre- 2003 law allowed for disability compensation if the impairment was greater than 20% of the body (called supplemental wage loss) and created the 'obligation to rehire' (a form of disability benefit) for those injured workers with less than 20% impairment. Both the supplemental wage loss benefit and the obligation to rehire were repealed in 2003.

Appellant also argued that the 'strict scrutiny' test of constitutionality of workers' compensation laws is mandated by recent clarification by the Florida Supreme Court of which standard of review to use if fundamental rights are affected by the statute in question. In the past, workers' compensation laws were only subject to the rational basis test because injured workers never obtained the status of a protected class.

OTHER CASES WORTH FOLLOWING:

1DCA 06-0007 D/A 8/13/2001 LT#05-016395

ORANGE COUNTY AND UNISOURCE V. MILLS

J. Douglas Brown, Esq., Paul A. Kelly, Esq.

Issue: JCC Sculco carefully reviewed the law relating to 'medical mileage' and awarded Appellee reimbursement for mileage to and from his pharmacy. The JCC took judicial notice of the IRS medical mileage rate to set the amount per mile.

1DCA06-0913 D/A3/1/2004 LT#04-018491

JOSEPH V. PTE STRAND CO. AND UNISOURCE

Edward F. Devarona, Esq., Beth Koller, Esq.

Issue: JCC Castiello denied Appellant's request for a second \$2,000.00 lump sum advance filed on December 9, 2005. It had been over a year since a prior \$2,000.00 lump sum advance was received on October 28, 2004. There is no indication in the order if it was repaid in whole or in part. While indicating that prejudice to the E/C had to be considered, there was no specific finding of prejudice other than a finding that indemnity benefits were in dispute and not being paid. Additionally, claimant was faulted for not pressing for the earliest hearing date possible on his substantive claims following a delay caused by Hurricane Katrina.

The 1 DCA issued a show cause order on 3/22/06 asking the Appellant to show cause why his appeal of a non-final order should not be dismissed.