

WORKERS' COMPENSATION

Summer 2011

FIRM NEWS

HONORS & ACHIEVEMENTS // NEW ADDITIONS TO THE FIRM

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Robert P. Byelick has been selected as the Chairman of the volunteer Baseball Group "Clutch Hitters of Tampa Bay." The 80-member group of business leaders supports the Tampa Bay Rays' efforts to remain in the area. He was recently quoted in a related Tampa Bay Business Journal article:

"We consider helping the Rays to be business retention, the same as with other business."



David J. Abbey - attended the Florida Trucking Association Annual Membership Conference held July 28 - 31, 2011 at The Breakers in Palm Beach. This Firm represents motor carriers and their drivers in tort litigation and motor carriers as employers in employment litigation and Workers' Compensation claims.

The Keynote Address was offered by Barbara Windsor, the ATA Chairman and President & CEO Hahn Transportation, Inc. and ATA Chief Economist, Bob Costello provided an optimistic outlook for the trucking industry in the coming years. FDOT Secretary Arianth Prasad commented on the challenges it faces developing and maintaining Florida's roads.

Jeff Adams was recently re-elected to the Board of Directors for the Florida Defense Lawyers Association (www.fdla.org). Jeff was a featured speaker at the 2011 Florida Liability Claims Conference held at Disney.

Bob Byelick and **Jeff Adams** attended the recent 2011 Florida Insurance Fraud Education Committee (FIFEC: www.fifec.org) Conference in Orlando.

Bob Byelick is the Chairman of the Fischer-Carr Scholarship Committee of the Kiwanis Club of St. Petersburg. This year, the Committee raised over \$50,000.00 at it's Annual Birthday Bash which will provide thirteen 6th grade students from low income families with free college tuition upon successfully graduating from High School. This brings the total to 188 students since 2004. David Abbey also serves on this Committee.

We congratulate the following attorneys who have been named Florida 2011 Super Lawyers. These lawyers are selected through an extensive process:

David J. Abbey • John D. Kiernan
Jeff M. Adams • C. Bryant Boydston
Robert P. Byelick • Thomas W. Cope - "Rising Star"



Michael Auchampau joined Abbey Adams in February 2011. Michael has handled the defense of workers compensation cases throughout the State of Florida from Panama City to Ft. Lauderdale.



Allison Goodson married **Joseph Pace Mawhinney** in April 2011 at the Golf Club of Amelia Island. Mrs. Mawhinney focuses on civil appeals and litigation with practice experience ranging from insurer bad faith and coverage matters, to professional malpractice and automobile negligence.



Alexis Upton joined the firm in June 2011 and practices in various areas of civil defense litigation. Prior to joining the Firm, Ms. Upton served as an Assistant State Attorney for the Sixth Judicial Circuit in Pinellas County, Florida for approximately 4 years. Alexis tried over 35 jury trials over the course of her employment at the State Attorney's Office, including several trials in the career criminal division.

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**WORKERS'
COMPENSATION
CASE FILE
SUMMARY**

\$2,000.00 ADVANCE IN CONTROVERTED CASE

Lopez v. Allied Aerofoam/Specialty Risk Services, 48 So. 3d 888 (Fla. 1st DCA 10/18/10). In this contested case, the JCC denied the Claimant's request for an advance payment of compensation in the amount of \$2,000.00 based solely upon the conclusion that such an advance could not be awarded in a contested case. The 1st DCA reversed, finding Fla. Stat. §440.20(12)(c) does not limit advances to cases in which compensability is established nor does it require proof that the injured worker will be eligible to receive benefits in the future for which the Employer can recover the advanced sum. A JCC must give due consideration to the "interests of the person entitled thereto" and may award an advance payment of compensation not in excess of \$2,000.00 if a Claimant can demonstrate one of the following: 1) failure to return to employment at no substantial wage reduction; 2) a substantial loss of earning capacity; or 3) an actual or apparent physical impairment.

MISREPRESENTATION DEFENSE

Steel Dynamics, Inc./Specialty Risk Services v. Markham, 46 So. 3d 641 (Fla. 1st DCA 10/25/10). The Claimant was a welder who was involved in a compensable accident that resulted in back surgery. After his surgery, the Claimant returned to work for the Employer in a position that was less physically demanding than his prior position. Approximately seven months after working in his modified position, the Claimant submitted a letter of resignation to the Employer indicating he was accepting a new job position for economic reasons. The Claimant began experiencing complications due to his compensable injuries a year after he began his new job and was ultimately terminated. A Petition for Benefits seeking temporary indemnity benefits was filed and the Employer ultimately denied compensability based on the content of the resignation letter and opinions offered by the Claimant during his deposition testimony. The JCC found the Claimant did not intentionally and knowingly make misrepresentations for the purpose of securing Workers' Compensation benefits and the 1st DCA affirmed. The Appellate Court noted when an objective misrepresentation has been made by a Claimant following a compensable accident, the ultimate issue for the JCC to determine is intent. A JCC must decide: 1) whether the Claimant subjectively believed or intended the statement, when made, to be false and 2) whether the Claimant subjectively believed the statement would assist him in securing benefits. This case reinforces the position that merely providing false information following a compensable accident will not automatically disqualify a Workers' Compensation Claimant from receiving benefits if the Employer cannot prove the element of intent. Additionally, the Court indicated that a misrepresentation defense must be based on misrepresentation of facts and not upon opinions or perceptions of the Claimant.

LIMITATION ON ATTORNEY'S FEES

Kauffman v. Community Inclusions, Inc./Guaranty Insurance Co., 57 So. 3d 919 (Fla. 1st DCA 03/23/11). The JCC found the Employer/Carrier responsible for the Claimant's attorney's fees in this post-July 1, 2009 date of accident case. Although the JCC found a reasonable attorney's fee to be \$25,075.00, the JCC concluded he was bound by Fla. Stat. §440.34 to awarding the Claimant's attorney a statutory guideline fee of \$684.41 for obtaining \$3,417.03 in benefits. The 1st DCA affirmed and held that except in cases involving disputed medical only claims, a Claimant's attorney's fee in cases for dates of injuries occurring on or after July 1, 2009, are limited to the statutory guideline formula. This limitation applies regardless of whether the attorney's fee is awarded or simply approved by a JCC.

SPECIFIC SUBSTANCE AND LEVEL NEEDED TO PROVE EXPOSURE CLAIM

Altman Contractors/North River Insurance Co. v. Dynelle Gibson, 2011 WL 1601441 (Fla. App. 1 Dist. 04/29/11). The Employer/Carrier appealed a decision of the JCC which found that the Claimant's mold exposure injury was compensable. The 1st DCA determined that reversal was warranted because no record evidence established the levels of mold to which the Claimant was exposed to in the workplace. Pursuant to Fla. Stat. §440.02(1), an injury or disease caused by exposure to a toxic substance, including but not limited to fungus or mold, is not a compensable injury unless there is clear and convincing evidence identifying the specific substance to which the Employee was exposed and that the levels to which the Employee was exposed can cause the injury or disease sustained by the Employee.

RETROACTIVE MEDICAL TESTIMONY AS TO WORK STATUS

Feacher v. Total Employee Leasing/Guaranty Insurance Co., 61 So. 3d 1236 (Fla. 1st DCA 05/23/11). The Claimant appealed an Order of the JCC denying TTD benefits, denying TPD benefits from the date of accident until her visit with an IME and awarding TPD benefits from the IME visit through the date of the Final Hearing. The sole medical evidence of any work restrictions was from the Claimant's IME who testified that the Claimant should remain off work from the date of accident until she received medical care for her neck, back and closed head injuries. The 1st DCA noted the JCC apparently either overlooked the IME's testimony regarding work status or erroneously concluded that, as a matter of law, a doctor cannot impose work restrictions retroactively. The Court found the JCC erred in rejecting the IME's unrefuted medical testimony that Claimant should remain off work from the date of the accident until she receives medical care and cited case law authority holding that a JCC may reject unrefuted medical testimony but must give a legally valid reason.

CARRIER MUST FURNISH MEDICAL TRANSPORTATION

Williams v. Onyx Waste Services of Florida/Sedgwick CMS, 2011 WL 2638186 (Fla. App. 1 Dist. 07/07/11). The Claimant appealed an Order of the JCC denying, among other things, transportation to medical appointments. The Claimant conceded he was physically capable of driving but he filed a claim for transportation to authorized medical appointments because his car was broken down and he lacked reliable transportation. The JCC ruled the Employer/Carrier was not responsible for the Claimant's transportation to medical appointments or the cost thereof because no doctor wrote a prescription for transportation to medical appointments and Claimant was not medically restricted from driving. The 1st DCA pointed out that transportation to medical appointments does not, itself, have to be independently medically necessary. It referred to well-settled law that a Workers' Compensation Carrier must either furnish transportation to authorized medical appointments or pay the reasonable cost thereof because travel is incidental to medical care, not because the transportation itself is medical care or attendance. The case was remanded to the JCC to enter an Order providing that the Employer/Carrier was responsible for transportation to medical appointments or the reasonable cost thereof, with the Employer/Carrier having the first opportunity to determine the means of transportation.

SCHOOL DISTRICT OF HILLSBOROUGH COUNTY AND BROADSPIRE V. MARYANN DICKSON

Recently, in the matter of School District of Hillsborough County and Broadspire v. Maryann Dickson, 2001 WL 2685607 (Fla. 1st DCA 2011), the Employee/Claimant sustained a compensable workplace injury to her left knee. After substantial improvement, Claimant fell and reinjured the knee, requiring surgical intervention and additional treatment. Although the Employer/Servicing Agent issued its notice of denial within 120 days of the time it first provided medical treatment for the Claimant's injuries, the notice was dated outside of that window due to a typographical error. Without the Employee/Claimant raising the defense, the JCC determined the injury was compensable. The JCC reasoned the Employer/Servicing Agent was precluded from denying the compensability of the additional injury and treatment based upon the 120-Day Rule. The Employee/Claimant's resulting Motion for Rehearing was denied.

On appeal, the Employer/Servicing Agent successfully obtained a reversal of the JCC's Final Order. The First DCA cited two bases for its decision: "First, the JCC violated the E/C's right to due process by sua sponte raising the application of section 440.20(4) and denying the E/C the opportunity to present evidence regarding the section's applicability. Second, section 440.20(4) does not operate to preclude an E/C from denying a specific claim for benefits on grounds that the claimant's need for such benefits did not stem from a compensable accident or injury." *Id.*, at 2. The Final Order was therefore reversed and remanded for proceedings consistent with the Employer/Servicing Agent's arguments on appeal and the First DCA's resulting opinion.

Employment Law Corner

RETALIATION FOR FILING WORKERS' COMPENSATION CLAIM

Fla. Stat. §440.205 states "no employer shall discharge, threaten to discharge, intimidate, or coerce any employee by reason of such employee's valid claim for compensation or attempt to claim compensation under the Workers' Compensation law." This law applies even if an Employee fails to prevail on a controverted claim and in instances where an Employee isn't terminated. In order to establish a claim for retaliation, an Employee must show 1) he engaged in a statutorily protected activity; 2) he suffered an adverse employment action; and 3) the adverse action was in some way related to the protected activity. Employees are often able to establish the required causal connection between protected activity and an adverse employment action by providing evidence that 1) their Employer knew of their protected activity and 2) that the Employer's adverse employment action occurred relatively soon after the Employer became aware of the Employee's protected activity. In *Andrews v. Direct Mail*, 1 So. 3d 1192 (5th DCA 02/06/09), the plaintiff sustained a fall caused by a broken curb in the vicinity of her Employer's outside break area. She filed a Petition for Benefits (PFB) and was fired approximately seven weeks later, after a number of incidents she contended were retaliation for filing her workers' compensation claim. In addition to showing the alleged adverse employment action took place soon after the filing of the PFB, the plaintiff offered evidence indicating some of the people involved in the decision to fire her knew of her workers' compensation claim thereby meeting the requirements outlined above for setting forth a retaliation claim.

If an Employee is able to establish a claim for retaliation, the burden shifts to its Employer to show that its reason for the adverse employment action was not a pretext by offering a legitimate and non-discriminatory reason justifying its action. It often is rather easy for an Employee to establish a claim for retaliation by showing a protected activity and an adverse employment action occurred close in time to one another. In order to best protect its interests, it is extremely important that an Employer maintain a detailed log of the facts, witnesses and circumstances that can establish its legitimate, non-discriminatory reason for taking adverse action against an Employee.

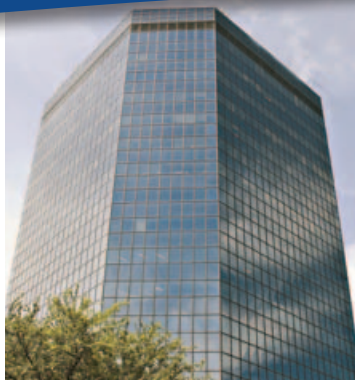
EMPLOYER MUST PAY EMPLOYEE FOR TIME MISSED FROM WORK TO ATTEND WC DOCTOR'S VISIT

An Employee sued her Employer for violation of the Fair Labor Standards Act (FLSA) for not paying her for time missed from work for attending an appointment at a Workers' Compensation doctor that was set by the adjuster. The Employer offered to pay the Employee for the time missed from work to attend the appointment but told the Employee that it would have to come out of her accrued paid leave benefits. The Employee decided to take a day of unpaid excused absence instead and sued her Employer for the time missed from work.

The Court relied upon the U.S. Department of Labor (DOL) regulations and a DOL opinion letter in holding that time spent by an Employee waiting for and receiving medical attention at the direction of the Employer during the Employee's normal working hours, on days when they are working, constitutes hours worked. Therefore, since the WC servicing agent arranged for the Employee to see a doctor during the Employee's normal working hours, the time spent traveling to and from and visiting the doctor's office were compensable hours of work. The Court did not order the Employer to pay for two other doctor's appointments because neither the servicing agent nor the Employer directed the Employee to attend them.

BOTTOM LINE –

This case illustrates that directing an Employee to attend a doctor's appointment for a work-related injury during their normal work hours may result in the Employer owing that Employee for the time they are out of work for the appointment. Thus, communication with the Employee in scheduling the initial doctor visits for non-working hours and having the Employee schedule their own follow-ups in conjunction with their Employer's policy will avoid problems down the road.



If you have an interest in a firm seminar listed, please contact Donna Ernst at :
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Continuing Education Seminars:

The firm regularly provides seminars on topics of particular concern to its clients. These seminars are approved for continuing education credits for adjusters and some have been approved for continuing education credits for attorneys. They provide an excellent opportunity to discuss emerging areas of the law, including:

- ✓ *Latest Trends Involving Medical Benefits*
- ✓ *Latest Trends Involving Indemnity Benefits*
- ✓ *Average Weekly Wage Issues*
- ✓ *Discovery Issues Involving Adjusters*
- ✓ *Workers' Compensation Fraud*
- ✓ *Ethical Issues for Worker's Compensation Adjusters and Agents*
- ✓ *Hot Topics in Workers' Compensation*
- ✓ *Defending Workers' Compensation Claims*
- ✓ *Attorney Fees, Settlements and Costs*
- ✓ *Workers' Compensation Liens and Offsets*
- ✓ *Employment Law and Workers' Compensation Issues for Employers*
- ✓ *Coordinating Employee Leave - ADA, FMLA and Workers' Compensation Benefits*

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