ERACLIDES GAZETTE

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Romero v. Vazquez: An End to Discovery as We Know it?

By: Sarah Kippers, Associate, Gainesville

Historically, employers and carriers in Florida workers' compensation claims have been able to access a claimant's medical history. Once an employee reports an injury to his employer, he waives his physician-patient privilege for any medical treatment that is reasonably related to the alleged work injury. This allows the employer/carrier to obtain medical records from a broad spectrum of previous and current medical providers. See Florida Statute 440.13(4)(c). Despite statutory language and case law allowing such discovery, claimant's attorneys are using a recent non-final order from the First DCA in Romero v. Vazquez as argument that the employer/carrier is not allowed to conduct medical discovery in the absence of a pending PFB, because the JCC has no jurisdiction. (Case No. 1D15-0623, OJCC No. 14-006910) While some may worry that the Vazquez order threatens to turn discovery in Florida workers' compensation on its head, a detailed look at the facts of the Vazquez case demonstrates why that interpretation of the case may be misplaced.

The claimant, Edwin Vazquez, suffered a severe head and brain injury while working on a construction site, leaving him incapacitated, and the claimant's estate filed a petition for benefits on his behalf against three different employers. The employers all denied compensability based on lack of an employer/employee relationship, each pointing the finger at the other. The claimant voluntarily dismissed his petition and filed suit against all three potential employers in civil court. One employer, Carlos Romero, then voluntarily provided benefits to the claimant, and filed a Request for Contribution against the other two employers. However, the claimant declined both indemnity and medical benefits offered by Romero, and continued to pursue his action in civil court.

After the claimant dismissed the petition, employer Carlos Romero issued a Notice of Production for medical records from the hospital where the claimant treated immediately after his accident. The claimant objected, stating there was no right to conduct discovery because there was no pending petition. The JCC denied the claimant's objection, and cited to ample case law in support of his assertion that the employer/carrier has

both the right and the duty to investigate a workers' compensation claim once it receives notice of the injury.

Several months later, employer Carlos Romero filed a Motion to Compel Production and Deposition against the claimant – still without a pending petition--for use in his contribution case against the other two employers. The JCC granted the employer/carrier's motion, compelling the claimant to attend a deposition as well as provide discovery and attend the final hearing regarding the contribution issue between the three employers. Claimant's counsel filed a writ of prohibition to prevent the JCC from exercising jurisdiction over the employer's discovery requests.

In a brief opinion, the First DCA granted the Claimant's writ of prohibition against the employer's attempted discovery of medical records from a non-party hospital and other discovery related to the contribution case. The Court specifically held that "[d]ismissal of a PFB divests a JCC of jurisdiction;" thus, the JCC erred in retaining jurisdiction over the discovery matters. Claimant's counsel and staff counsel for the OJCC both requested rehearing by the DCA in early September.

Since the First DCA released this opinion, some claimant's attorneys have started to object to any subpoenas issued by the employer/carrier without a pending petition, stating that Vazquez disallows any discovery absent a petition. There have also been a number of JCC opinions across the state where the judge declined jurisdiction over discovery matters without a pending petition. The legal legacy of Vazquez remains uncertain; however, a complete picture of the underlying facts in Vazquez seems to indicate that it has much more to do with a judge's ability to compel discovery without a petition rather than the employer/carrier's right to conduct discovery without a petition. The DCA makes no mention of an employer/carrier's entitlement to conduct discovery on its own absent a pending petition, but rather concerns itself with the judge compelling discovery from the claimant when the claimant was not a party to the pending contribution action and was not receiving any benefits through workers' compensation. However, while we wait to see if the DCA decides to rehear arguments in the Vazquez case, we will likely continue to see claimants' attorneys use Vazquez as a shield against discovery and for judges to shy away from accepting jurisdiction with no petition pending.

Recovery of Sick Leave in Previously Denied Compensation Cases

By: Lori Bethea, Associate, Tallahassee

Imagine that while reviewing a request for payment of TT benefits in a case that was denied, but has just been deemed compensable, you discover that, during the time in question, the claimant was off work due to his injury **and** was paid full wages by the Employer through his sick leave account. However, now that the case has been picked up as compensable, the claimant wants his sick leave hours back, plus penalties and interest on the "back" indemnity benefits and the claimant's attorney wants an attorney's fee. Is the claimant entitled to a credit for his leave and/or does the carrier owe benefits for the period in which he received full wages through sick leave?

This scenario was recently addressed in a PCA opinion following a decision by Judge Lazzara in the case of Rodriguez v. Tallahassee Fire Department/City of Tallahassee, (Case No. 1D15-1201, OJCC No. 14-016085). In Rodriguez, the claimant's cardiovascular condition was picked up as compensable after he had undergone surgical intervention and been out of work for a period of time, during which time his full wages were paid from his sick leave account. Following acceptance of the claim, the claimant's sick leave account was credited for the time he had used and the employer was reimbursed. Nevertheless, the claimant filed a petition for the TTD benefits as well as penalties,

interest and attorney's fees. The JCC denied the claim for TTD benefits as the claimant had been paid full wages, and suffered no economic loss during the periods in question. The claimant's attorney argued that penalties and interest were due as the carrier had not "initiated payment" of TTD benefits per the statute. However, the JCC found the argument to be without merit as the claimant had been paid full wages during all relevant dates of disability. The JCC also rejected claimant's argument that penalties and interest should be determined based on the date the carrier reimburses the employer for the full wages paid. Since there is no statutory requirement as to when reimbursement has to be remitted to the employer, no penalties and interest would be due. The JCC did reserve on the issue of attorney's fees to hear arguments on whether or not, but for the filing of the petition for benefits, the claimant's sick leave reimbursement would have occurred.

A claimant cannot be required to exhaust his sick leave during a period in which he would have otherwise been entitled to temporary total disability benefits. These situations most often arise when compensability is initially denied, the claimant cannot work, takes sick leave to continue receiving wages, and the accident/injury is later picked up by the employer/carrier. Pursuant to Section 440.20(14), when the employer pays full wages for any period of disability, and the case is contested but later deemed compensable, the employer is entitled to be reimbursed by the carrier for the amount that would have been due under workers' compensation. Of course, if the employer paid full wages, the claimant received more than he would have received under workers' compensation. Since the statute only provides for reimbursement in the amount of benefits that would have been due, is the employer entitled to any sort of offset for the difference? Unfortunately, no. The statute further states that anything paid by the employer over and above the compensation amount, shall be considered a gratuity. This may sound harsh, but on a positive note, if sick leave had not been paid during the denial period, the employer/carrier would have to pay back benefits, as well as penalties and interest.

Settlement Negotiations Impacted by Harden

By: Jonathan Alvarez, Associate, West Palm Beach

Settlements arise as a result of an agreement between two parties. In theory, these agreements are contracts under the law. When an adjuster or defense attorney and a claimant's attorney agree to settle a claim, it is understood that an enforceable contract has been created. However, simply agreeing to settle the claim is not exactly the same as settling the claim, and unforeseen circumstances may lead to problems in having the agreement being enforced at a later time.

Such was the case in Harden v. Kolb Enterprises, Inc., (OJCC# 14-014998, 1D15-0735) a recent 1st DCA decision. In Harden, the claimant's attorney and the adjuster came to an oral agreement to settle the case. A few days later, the employer/carrier's attorney sent the settlement papers, containing additional terms not originally discussed during the settlement negotiations. A month went by, and the claimant decided that she no longer wanted the settle the claim, and refused to sign the documents. A Motion to Enforce Settlement was filed by the employer/carrier, and the Court reasoned that the only explanation for the claimant's change of mind was that she wanted to get additional medical treatment, and as a result refused to sign the settlement papers. The additional terms in the settlement papers were: 1) that all past and present medical benefits were being resolved, 2) that the right to medical care and treatment terminated upon execution of the settlement papers, 3) that the claimant indemnified and held the employer/carrier harmless from any medical bills, hospital charges, liens or subrogated claims of whatever nature, cost or expense, including but not limited to costs of defense and attorney's fees for any such action or actions, including any liens,

arising out of the injuries or damages sustained by the claimant, and 4) that the employer/carrier had 30 days to make payment on the settlement proceeds.

The First DCA affirmed the JCC's findings, stating that the parties had agreed to settle the case, but only as to the terms discussed in the initial settlement negotiations. The JCC based his decision on an earlier case, Bonagura v. Home Depot, 991 So.2d 902 (Fla. 1st DCA 2008), and a legal concept known as a "meeting of the minds." "Meeting of the minds" refers to the situation where there is a common understanding among the parties as to the terms in the formation of a contract (agreement). In essence, the JCC found that like in the Bonagura case, any additional language in the written documents, not already agreed to, constituted a new offer to settle additional matters, and as such, the new offer did not need to be accepted. However, whether the additional terms are accepted has no bearing on the original, binding, oral settlement agreement. In the Harden case, because the adjuster and the claimant's attorney never discussed the additional terms in the settlement papers, it cannot be said that a meeting of the minds had been reached as to those terms.

It is important to understand the implications of Harden, and its predecessor, Bonagura. The simple fact that an agreement to settle has taken place does not mean that the case has been settled. Ironically, all it means is that an agreement has taken place. There must be a common understanding between both parties as to each term before a court will enforce them. Unless each material term in the settlement agreement has been discussed and agreed to by both parties, a court of law will not enforce those terms as part of the settlement agreement. At the very least, certain steps can be taken to minimize the risk of having an unenforceable settlement agreement, especially when a shrewd claimant's attorney can exploit such an opportunity. At a minimum, these items should be addressed between both parties and in writing:

1. That it is an overall settlement of the entire claim, to inlcude any and all other dates of accident with the employer;
2. When and how benefits end;
3. That the employer/carrier will prepare the settlement documents;
4. That any prior attorney's fee liens or past fees owed to other attorneys are included in this settlement;
5. Whether subrogation liens are maintained or waived;
6. Whether there are any Medicare/Medicaid or MSA issues;
7. If there is an advance, that it comes out of the ultimate settlement, or how prior advances will be handled for repayment;
8. That the claimant will hold employer/carrier harmless for any unpaid unauthorized medical treatment, bills; and,
9. If permitted, the general release and effective date of resignation, and whether there is separate consideration required.

As always, if there are concerns, please contact one of us to assist with considerations for settlement, and securing an enforceable settlement contract.

Georgia's Posted Panel Changes

By: Ryan Lawson, Associate, Atlanta

On July 1, 2015, several legislative changes went into effect which slightly amended the workers' compensation rules and statutes. Among these changes was an increase in the Temporary Total Disability and Temporary Partial Disability rates from $525.00/$350.00 to $550.00/$367.50, respectively; an increase to maximum death benefits to the surviving spouse from $150,000.00 to $220,000.00; an extension to the reimbursement period for insurers instituting claims under the Subsequent Injury Trust Fund from 2020 to 2023, although the accident in question must still have occurred prior to June 30, 2006; and, several important amendments to the posted panel requirements under O.C.G.A. § 34-9-201 which form the basis of this update.

Prior to the legislative changes of July 1, 2015, there were three specific ways in which the employer could satisfy the posted panel of physicians requirement. First, the employer could have used a conformed panel of physicians; second, the employer could have used a traditional posted panel of physicians; and third, the employer could contract with a certified managed care organization pursuant to O.C.G.A. § 34-9-208 and Board Rule 208. The conformed panel differed only slightly from the traditional posted panel in that it required ten doctors or medical practitioners instead of six, but could contain general surgeons and chiropractors to help reach that figure. Both panels required that the physicians be from non-affiliated practices to be counted, and both contained the same provisions with respect to requiring at least one minority physician, at least one orthopedic surgeon, and a limitation on the number of industrial clinics (two).

As of July 1, 2015, the "conformed panel" has been removed and is no longer an option for employers to satisfy their obligations under O.C.G.A. § 34-9-201. Because chiropractors and general surgeons were only specifically allowed under the conformed panel architecture, and not mentioned under the provisions for the traditional "posted panel," it can be reasoned that neither of these groups are valid members of the posted panel going forward, and should be removed from any outstanding panels.

Another interesting and important change is that the requirement that all physicians come from separate practices has been removed. It is not clear whether this was just an inadvertent legislative mistake which occurred when the entire text of O.C.G.A. § 34-9-201(b)(2) was stricken, or whether it was a calculated change. Either way, until such time as revisions to the law are made, posted panels may not be invalidated because there are not at least six physicians from *different practices*. Hypothetically, this would allow the placement of a single orthopedic practice that contained at least one minority practitioner and 6 total doctors to singularly satisfy the posted panel requirements. While I do not recommend taking this approach, it serves as a good illustration as to the additional firepower we now have when faced with defending a posted panel.

Litigation over posted panels is frustratingly common as claimants try to find creative ways to select their own doctors. The new changes to the posted panel requirements mean that claimant's attorneys now have one fewer method of invalidating a posted panel, and you should feel more confident in defending your posted panel going forward.