

Case Law Update

During fiscal year 2000, the courts issued more than 50 opinions that clarified various issues and exerted a significant impact on the State of Florida's workers' compensation system. Although the First District Court of Appeal (First DCA) is the jurisdiction for handling appeals from the various Judges of Compensation Claims (JCCs), the second, third, fourth and fifth districts addressed a number of workers' compensation issues in adjudicating appeals of decisions made by circuit court judges. Also, the Florida Supreme Court answered three certified questions. This article will first summarize the certified cases, then review the more significant appellate court decisions in three broad areas: medical issues, jurisdictional issues and attorney fees, and compensability issues.

Summary of Certified Cases

Otis Lee Dean, Jr., v. Quantum Resources Inc., et al, 24FLW S489a, Florida Supreme Court

This case was accepted by the Florida Supreme Court from the 2nd DCA, Hillsborough County. The higher court addressed the following certified question:

Does a self-insured public utility which undertakes, pursuant to s. 440.571, F.S. (1991), (now s. 624.46225, F.S.) to provide workers' compensation coverage to a subcontractor working on its property, obtain the benefit of workers' compensation immunity provided in s. 440.11, F.S. (1991), as to injuries sustained by an employee of the subcontractor resulting from the negligence of the public utility?

In this case the utility, Florida Power and Light Company, had agreed to insure the injured worker's employer, Quantum Resources, however the Florida Supreme Court ruled that a self-insured public utility that provides coverage to a subcontractor on its property does not obtain the benefits of immunity provided in s.440.11, F.S. (1991).

City of Clearwater v. Judi Acker, et al, 24FLW S567c, Florida Supreme Court

In this case, the Florida Supreme Court was asked to answer the following question from the First DCA:

"Where an employer takes a workers' compensation offset under s. 440.20(15), F.S. (1985), and initially includes supplemental benefits paid under s. 440.15(1)(e)(l), F.S. (1985), is the employer entitled to recalculate the offset based on the yearly 5% increase in supplemental benefits?"

In the underlying case the First DCA reversed the JCC's order that yearly increases in permanent total disability supplemental benefits should be included in the disability pension offset saying that recalculating the social security offset annually to account for the 5% increase in supplemental benefits frustrates the intended purpose of these benefits; namely, to protect recipients from the long-term effects of inflation. The Florida Supreme Court agreed with the appellate court's reasoning and answered "no" to the certified question.

Debra Ann Turner, et al, v. PCR Inc., 25 FLW S174a, Florida Supreme Court

In this case, the widow of an employee killed in an explosion and another injured employee brought a wrongful death and personal injury action in Alachua County Circuit Court. The circuit court granted summary judgement in favor of the employer and the First DCA affirmed. The district court, however, certified the following question to the Supreme Court of Florida:

"Is an expert's affidavit expressing the opinion that an employer exhibited a deliberate intent to injure or engage in conduct substantially certain to result in injury or death to an employee, sufficient to constitute a factual dispute, thus precluding summary judgement on the issue of workers' compensation immunity?"

The Supreme Court accepted jurisdiction but declined to address the certified question and quashed the district court decision. In doing so, they reaffirmed the existence of an intentional tort exception to an employer's immunity

and held that the conduct of the employer must be evaluated under an *objective* standard. They added that intentional tort exception includes an objective standard to measure whether the employer engaged in conduct that was substantially certain to result in death. Applying this standard to the experts' affidavits and other proof submitted to them, they found there was a genuine issue of fact and remanded the case for further proceedings consistent with their opinion. It was also noted that the appellants retain the ultimate burden of demonstrating to a fact finder that the employer, PCR, Inc., engaged in conduct that was substantially certain to result in injury.

Medical and Related Issues

During the past fiscal year, the First DCA was again faced with a variety of medical care and treatment issues, including attendant care, communication with health care providers, major contributing cause, sufficiency of medical evidence, utilization review, and expert medical advisors. These rulings reaffirmed previous rulings by the court and clarified new issues.

Ernest Faulkner v. Asplundh Tree Expert Co., et al, 24FLW D1856a, 1st DCA

In this case, the employer/carrier (E/C) requested the appointment of an expert medical advisor (EMA) and the Judge of Compensation Claims agreed, ordering one be appointed. The high court reversed the order because first, the E/C was merely seeking to use the EMA process for its own investigation and second, there was no dispute for resolution and no petition for benefits outstanding.

Nordic Track and the Hartford v. Norma Zimmerman, 24FLW D2408d, 1st DCA

The JCC awarded Permanent Total (PT) benefits to the injured employee; however, the appellate court reversed, as the award was based on medical restrictions that were not related to the compensable injury to a "reasonable degree of medical certainty." The employee sustained an injured upper right arm then later complained of right-side chest-wall pain. The authorized physician stated that he did not have a "strong feeling" the new complaint was related to the work injury.

Forming Contractors, et al, v. Fulgencio Castro, 24FLW 2596c, 1st DCA

The court reversed the JCC's award of prescription and equipment costs related to the injured employee's bronchial asthma. The employee sustained back and ulner nerve damage when he fell from a ladder and, in addition, the E/C later authorized nasal surgery. The court stated that although the E/C authorized the nasal surgery, nothing in the medical record suggests a causation between the accident and any breathing difficulties.

Closet Maid et al, v. Wallace D. Sykes, 25FLW D459a, 1st DCA

The JCC awarded benefits to the injured employee stating that the workplace accident was the major contributing cause of the employee's need for back surgery. The E/C appealed and the First DCA affirmed the JCC. The court defined the major contributing cause requirement and stated that coverage is available if the workplace accident contributes more to disability or need for treatment than any other single cause and it is not required that the workplace accident be a greater cause than all other causes combined. They added that finding of major contributing cause can be supported by medical or lay testimony or both.

Walt Disney World Company v. Charlene McCrea, 25FLW D1001b, 1st DCA

The JCC awarded indefinite 24 hours of daily attendant care to be provided by the injured employee's mother and *stepdaughter*. The E/C appealed stating that attendant care is limited to 12 hours daily by a combination of family members. The employee cross appealed contending the JCC erroneously considered the stepdaughter to be a family member subject to the "12 hour combination by family members" portion of s.440.13(2)(b)(2), Florida Statutes (1997). The appellate court reversed the JCC stating that a stepdaughter is *not* a family member for purposes of this statute and is not subject to the "combination of family members" limitation. They also noted that the terms "child" and "stepchild" are legally distinct. The court affirmed the award of 24 hours of attendant care but added that the order should not have been for indefinite care. The award is construed as awarding 24 hours of attendant care only so long as nature of claimant's injury or process of recovery may require.

Terners of Miami et al v. Elisa Busot, 25FLW D1495, 1st DCA

In this case the court was asked to determine whether section 440.13(2)(d), Florida Statutes (1997), eliminates the role of the JCC in determining whether the E/C acted appropriately in transferring the care of a claimant to

another physician over the claimant's objection. The section under review states in pertinent part:

The carrier has the right to transfer the care of an injured employee from the attending health care provider if an independent medical examination determines that the employee is not making appropriate progress in recuperation.

The court decided that while the E/C has the authority under the statute to unilaterally transfer the care, the JCC still has the ability, after the fact, to determine whether the deauthorization was in the claimant's best interests.

Jurisdiction of the Judges of Compensation Claims (JCCs), Attorney Fees and Other Procedural Issues

The First and Fifth DCAs rendered a number of procedural and jurisdictional decisions during the year, covering issues such as workers' compensation immunity, wrongful discharge and statute of limitations. The First DCA also issued a number of opinions dealing with attorney fees.

McDonald's Restaurant #7160, et al, v. Mary Ann Montes, 24 FLW D1599b, 1st DCA

The First DCA reversed the JCC who had denied attorney fees to the injured employee's attorney. The court stated that the E/C did not respond to the petition for benefits within 14 days after receiving it. The E/C paid benefits within 14 days after receiving the treating chiropractor's report but not within 14 days of receiving petition. Thus attorney fees were due.

Ivo Vilches v. City of Dunedin, et al, 24FLW D 1670c, 1st DCA

In this case, the E/C did not pay permanent total (PT) benefits and supplemental benefits within 21 days of receipt of the injured employee's Request for Assistance, but the EC did voluntarily accept him as PT within 21 days after receiving the Petition for Benefits. The Judge of Compensation Claims (JCC) denied the request for attorney fees and the 1st DCA affirmed. The court, in affirming the JCC ruling noted that the Request for Assistance could not, by itself, trigger the injured employee's right to attorney fees

and does not legally constitute a "claim" for this purpose.

Ruben Arboleda v. Premier Beverage Co., et al, 24FLW D1882a, 1st DCA

The injured employee received care from an unauthorized doctor and the E/C later paid for this care. The employee filed a petition for benefits for additional care more than two (2) years from the date of the last treatment but within two (2) years of the E/C's payment of the medical bills of the unauthorized physician. The court reversed the JCC stating that the employee was within the two (2) year statute of limitations as set forth in s.440.19 (1) F.S. The controlling factor was that the E/C didn't authorize the last medical treatment, and the statute did not run until the carrier authorized treatment in the form of paying the bill.

General Crane Inc., et al v. Grady McNeal, et al, 24FLW D2212b, 4th DCA

The injured employee worked for Form Works Inc. His employer contracted to lease a crane and operator from General Crane Inc. The employee was injured by the leased crane and received workers' compensation from his employer, Form Works, Inc. He sued General Crane and the driver in circuit court. General Crane company argued workers' compensation immunity as outlined in s.440.11, F. S., and claimed the crane operator was the "borrowed servant" of Form Works, Inc. The trial court rejected this argument and directed a verdict in favor of the injured employee. The Fourth DCA agreed.

Limerock Industries, Inc., v. Riley James Pridgeon, et al, 24FLW D2462e, 1st DCA

This appeal came from the Circuit Court where the injured employee filed a tort (a private or civil wrong) action alleging negligence by the employer. The employer had erroneously classified the injured employee as an independent contractor and the circuit court ruled the employer was not entitled to workers' compensation immunity as defined in s.440.11, F.S. because the employer "failed to secure coverage" on the employee. The appellate court reversed, stating that the employer did have a policy of workers' compensation in effect and the injured employee, even though he was classified incorrectly, was indeed an employee and was covered by the policy.

Claims Management, Inc., v. George Philip, 24FLW 2755c, 1st DCA

The employee was injured on February 17, 1995. The E/C last furnished remedial medical care and treatment on April 17, 1995. The injured employee filed petitions for benefit March 24, 1997 and August 18, 1997. The E/C denied

benefits and argued the claim was barred because the petition for benefits was filed more than one year after the last date remedial care was furnished as defined in s.440.19(1), F.S., and more than two years after the date of injury as per s.440.19(2), F.S. The JCC ruled in favor of the injured employee who argued that when payment for indemnity benefits is made or remedial care is furnished, one year should be added to the time which had not expired under the 2 year limitation period. The First DCA reversed, stating that because he did not file his petition for benefits either within two years of the date of injury or within one year after the furnishing of remedial treatment, his claim was barred.

Brenda Diana Chase v. Walgreen Company, 24FLW D2819a, 5th DCA

The injured employee filed an action in circuit court claiming she had suffered adverse retaliation by the employer as defined under s.440.205, F. S., because she filed a valid workers' compensation claim. The circuit court ruled in favor of the employer and dismissed the claim with prejudice stating that she had no cause of action because she had not been discharged (terminated) by the employer. The Fifth DCA reversed the circuit court ruling stating that the plain language of s.440.205, F.S. creates a cause of action not only for discharge, but also for threatening to discharge, intimidating, and coercing the employee because of her workers' compensation claim.

Arthur Leslie Clements, et al, v. Wildlife Conservation Society, 25FLW D245b, 5th DCA

The Wildlife Conservation Society loaned a seven foot crocodile to the St. Augustine Alligator Farm. The injured employee of the alligator farm was cleaning the pool drains when the crocodile jumped the fence and seized the employee's left arm in its jaws. The arm was eventually amputated. The employer had workers' compensation coverage and immunity from a tort action; however, the employee filed an action in circuit court against the Society. The lower court ruled that the Society was also immune from a tort action. They stated that the owner of a dangerous instrumentality (in this case the crocodile) enjoys the same limited liability or immunity from a tort action as the employer of an employee injured by the instrumentality where it is leased to, and under the control of the employer. The First DCA affirmed.

Andrew Smith v. Burke Painting and FTBA, 25FLW D350a, 1st DCA

The injured employee filed a Request for Assistance seeking an increase in his average weekly wage (AWW) based on prior employment in the industry and then filed a Petition for Benefits seeking this relief. The carrier filed a Notice of

Denial in response, agreeing to increase the AWW but stating they would continue to verify wages with the prior employer and would adjust the AWW if appropriate. The day after the Notice of Denial was filed, the carrier issued the injured employee an indemnity check reflecting the requested increase. The injured employee sought attorney fees and the JCC denied the request. The First DCA affirmed, stating that neither the filing of nor the denial of request for assistance entitles the JCC to award attorney fees because there must be a successful prosecution of a claim.

Charles N. Silvers v. Timothy J. O'Donnell Corp., a/k/a/ O'Donnell Corp., 25FLW D503a, 5th DCA

In this case, the injured employee brought suit against the employer in the Circuit Court for Orange County for violation of s.440.205, F.S., which provides: "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 [this law]." The lower court entered a directed verdict in favor of the employer. The Fifth DCA reversed stating that, although it was minimal and largely circumstantial, the injured employee presented sufficient evidence to merit submission to the jury that the employer and supervisors knew he was applying for workers' compensation when they fired him. The court noted that the employee was injured on December 12, called in sick on December 13, came to the employer's business office and was referred for medical care on the morning of December 14. When he returned from receiving his medical care at noon on the 14th with a work release slip, he was fired for allegedly being late on previous occasions, and this reason for his discharge was disputed in the record. They also noted that it appeared that at least three other employees had allegedly been fired after they filed workers' compensation claims.

Pamela G. Holderbaum, et al, v. Itco Holding Company Inc., 25FLW D634b, 3rd DCA

The deceased employee, Stacy Holderbaum, was a supervisor for Itco Tire Company and informed an employee, Quinones, who was under his supervision, that he, Quinones, was laid off from his job at the tire company. Quinones, in front of other supervisory employees, threatened Holderbaum's life and carried out the threat that same day by murdering Holderbaum with a pistol the other supervisors knew Quinones kept at the workplace. The widow and child of Holderbaum filed a tort action in the Circuit Court of Dade County. The lower court entered a summary judgement in favor of the employer upholding the employer's workers' compensation immunity defense under s.440.11(1), F.S.

The Third DCA affirmed the summary judgement

order and stated that while the other (supervisory) employees may have been negligent, perhaps grossly or even culpably so, their mistakes, in failing to remove Quinones or his weapon from the premises or to warn Holderbaum prior to the shooting neither exhibited a deliberate intent to injure nor was substantially certain to result in injury or death so as to constitute an intentional tort and thus overcome the employer's immunity.

Crawford & Co., and UNC Aviation Services v. Jodie Nash, 25FLW D756e, 1st DCA

The JCC awarded attorney fees for securing PT benefits for the injured employee. The employee's attorney had filed a petition for benefits seeking PT Benefits on August 11, 1997, and the E/C accepted the employee as PT on April 8, 1998. The court, however, reversed the JCC, stating that there was no record of any evidence to show that the E/C should have accepted the employee as PT prior to the acceptance date and no evidence that the attorney secured any benefits.

Miami-Dade County v. Ricardo Acosta, et al, 25FLW D906a, 3rd DCA

Miami-Dade County owned the property where Miami International Airport was located and leased part of it to American Airlines. In their leasing agreement, the county agreed to remediate the leased premises of hazardous substances. The county contracted with OHM Remediation Services who, in turn, subcontracted with Resource Reclamation Services Industries to remove the hazardous substances. The contract between OHM and Resource Reclamation provided that Resource Reclamation would obtain and provide workers' compensation coverage for their employees, which they did. The employee of Resource Reclamation was injured and received workers' compensation benefits. He also filed suit against the county in the Circuit Court for Dade County. The county moved for summary judgement on the basis it was entitled to workers' compensation immunity. The judge denied the motion; however, the Third DCA reversed, ruling that the county was the statutory employer and was immune from tort liability where it had provided workers' compensation coverage.

Rosalind Gerth as personal representative of Kenneth Gerth, deceased, v. Nelson J. Wilson, 25FLW D1281a, 2nd DCA

This case was appealed from the Circuit Court of Sarasota County. The employee was killed when he fell down an improperly guarded open elevator shaft. The fall was the second one at the employer's business and resulted in an OSHA Federal violation, punishable up to six (6) months imprisonment. The trial court issued summary judgement in

favor of the employer. The Second DCA reversed the order and certified the following question of great public importance to the Florida Supreme Court:

"Does a violation of an OSHA regulation which causes worker injury abrogate the workers' compensation immunity if the same violation subjects the employer to imprisonment exceeding sixty days?"

Shear Homes, Inc. v. George Sheppard, et al, 25FLW D1490, 1st DCA

In this case the E/C appealed an order which required it to pay attorney fees and costs to the claimant's attorney. The E/C argued that the claimant had waived any right to recover attorney fees and costs when the claimant elected to seek benefits from the Florida Workers' Compensation Insurance Guaranty Association (FWCIGA) after the self-insured workers' compensation fund which had insured the employer became insolvent. The First DCA agreed with the E/C and reversed the order, citing the clear unambiguous language of Florida Statute section 631.929 which provides that an injured worker with a date of accident before January 1, 1994, may "elect to seek medical care, treatment, and attendance, and compensation..." from FWCIGA. However, if the claimant chooses to do so the claimant "forego(es) the remedy to seek benefits from his employer or the insolvent self-insurance fund" and "there shall be no entitlement to attorney's fees, penalties, interest, or costs."

Parry v. South Miami Hospital, 25FLW D1500, 1st DCA

In this case the court reversed an Order holding that the claim was barred by the statute of limitations. The court noted that the uncontradicted medical evidence demonstrated that the claimant was treated by her authorized treating physician for symptoms relating to her 1992 accident on February 14, 1992, October 26, 1993, October 25, 1994, and August 15, 1996. Thus, there was no two-year lapse between treatments before she filed her claim in March 1997. Consequently, her claim was not barred by the statute of limitations.

Eligibility, Compensability and Indemnity Issues

One of the most highly litigated issues is compensability, the determination of whether specific injuries occurred within the "course and scope" of em-

ployment. Compensability issues, along with issues of calculation and continuation of indemnity benefit payments, kept the First DCA very busy during the past fiscal year. Some of the key topics were: offsets, impairment income benefits and clarification of the “pay and investigate period.”

Barbara Hunt v. Exxon Co., et al,
24FLW D2229a, 1st DCA

The E/C initially paid for the injured employee’s treatment and then denied after the 120 day “pay and investigate” period set forth in s.440.20(4), F.S., elapsed. The JCC ruled in favor of the E/C and dismissed the petition for benefits with prejudice, stating that the denial was not untimely and that the E/C established material facts that they could not have discovered within the 120 day limitation period. The First DCA reversed the JCC noting that the E/C did not, at any point during the 120-day period, ask the authorized physician’s opinion if the cubital tunnel syndrome was related to her employment. The case was remanded to the JCC to consider causal relationship between work activities and diagnosis and psychiatric care.

Heriberto Olavarria v. Okeelanta Corporation, et al,
24FLW D2316a, 1st DCA

In this case, the JCC denied the injured employee PT and wage loss benefits. The JCC denied wage loss because the employer offered the employee a job, which he refused. The court affirmed the PT denial but reversed the wage loss denial for three (3) time periods in 1996 and 1997 because the employer’s own vocational expert said the offered job was not within the employee’s medical restrictions. The employer later modified the job after May of 1997, and, in addition, the court stated that the JCC was correct in ruling the modified offer was not sheltered employment.

Workers of Florida, et al, v. Michael Williams,
24FLW D2365a, 1st DCA

The JCC awarded an injured employee who was receiving temporary total disability (TTD) a \$2,000 cash advance and the E/C appealed, arguing that a precondition to a cash advance is proof that the employee must achieve in the reasonable foreseeable future, some type of permanent disability status. The court affirmed the JCC and said they could find nothing in s.440.20(12)(c), F.S., requiring this proof and that an advance not exceeding \$2,000 is simply allowed upon the employee showing he or she has suffered either a substantial loss of earning capacity or a permanent impairment.

HRS District II, et al, v. Ann L. Pickard,
24FLW D2368a, 1st DCA

The court clarified their original opinion in 24FLW D1749a regarding the 100% pre-injury average weekly wage (AWW) cap and offset of the combined social security disability, state disability retirement and workers’ compensation. They stated that the offset is applicable to benefits paid on or after May 1, 1997, the date of the Florida Supreme Court decision in *Escambia County Sheriff’s Department v. Grice*, 692 So. 2d 896 (Fla 1997) and should not be retroactively applied.

Gracette Wilkins v. Broward County School Board, et al,
25FLW D278a, 1st DCA

During the attorney fee hearing before the JCC, a dispute arose regarding the calculation of permanent total supplemental benefits. The employee argued that these benefits should be only excluded between age 62 and 65 and she should be entitled to benefits after age 65 citing *Burger King Corporation v. Moreno*, 689 So. 2d 288 (Fla. 1st DCA, 1997). The JCC ruled that where an employee is injured and reaches permanent total disability prior to age 62, the employee is not entitled to supplemental benefits after age 65. The appellate court affirmed the JCC stating that the *Moreno* case was different in that *Moreno* was age 69 and was receiving social security retirement when she was injured. Section 440.15(1)(e)1, F.S. (1993) states that PT Supplemental benefits cease at age 62 if the employee is eligible for both social security retirement and social security disability. *Moreno* was not eligible for both social security retirement and social security disability and was awarded PT Supplemental benefits after age 65.

Boynton Landscape, et al, v. James Dickinson,
25FLW D543b, 1st DCA

The employee was injured in 1979, accepted as PT in 1980. In 1986, the E/C began taking a social security offset. The injured employee filed claims for attendant care and hearings were held on these claims in 1987, 1989 and 1994. In 1997, another claim for attendant care benefits was filed along with a claim to recalculate the social security offset and refund all offsets taken since October 7, 1986. The JCC found that the offset should have been based on a weekly figure of \$60.81 instead of \$65.86 used by the E/C and ordered a refund of the entire amount offset between October 7, 1986 and January 8, 1998. The E/C argued that the doctrine of res judicata barred the claim because the claim was ripe for adjudication at the three- (3) previous merit hearings. The appellate court agreed and reversed the JCC. The injured employee argued that he had no way of knowing whether the E/C was correctly calculating the offset during this period of time but the court

added that he had equal access to the social security information, noting that the court failed to see how barring him from raising a claim more than ten years after the fact would result in any injustice to him.

University of West Florida et al, v. William Mixson, 25FLW D544a, 1st DCA

The First DCA reversed the JCC and stated that it was an error to cap the injured employee's total benefits at 100% of the average current earnings as computed under social security law rather than 100% of the average weekly wage as set forth in *Escambia County Sheriff's Department v. Grice*, 692 So. 2d 896 (Fla.1997). They also noted that the E/C contended that the cost-of-living increases to the injured employee's in-line-of-duty disability retirement benefits should have been included in the Grice offset calculations. The First DCA rejected this argument in *State v. Herney*, 24FLW D2467 (Fla. 1st DCA October 29, 1999) however, they certified the following question to the Florida Supreme Court, as they did a similar question in *Herney*, as a question of great public importance:

"When calculating the offset for disability retirement benefits pursuant to *Escambia County Sheriff's Department v. Grice*, 692 So. 2d 896 (Fla.1997) is the employer entitled to include cost-of-living increases to those benefits?"

City of St. Petersburg v. Carlos Nasworthy, 25FLW D595d, 1st DCA

The JCC awarded the injured employee impairment benefits as outlined in s. 440.15, F.S. (1995) The injured employee's average weekly wage (AWW) was \$1,249.96; 66-2/3% of the AWW was \$833.35. However, the maximum compensation rate payable for 1996 was capped at \$465.00 per s. 440.12 (2), F. S., per week. The JCC awarded 50% of \$833.35, 66-2/3% of the AWW. The E/C appealed, stating that the correct amount payable was 50% of the maximum compensation rate payable of \$465.00, which was \$232.50 per week. The court agreed with the E/C and reversed the JCC stating that impairment income benefits are payable weekly at rate of 50% of the employee's average weekly temporary total disability benefit and this benefit was the maximum compensation rate per s. 440.12 (2), F. S., or \$465.00 per week. Fifty (50) percent of this amount is \$232.50, the amount paid by the employer.

Shiwana J. Irving v. Ametek, Inc., et al, 25FLW D882b1st DCA

At the time the employee was hired, she completed a medical history questionnaire and stated that she had never had any arm, hand, or shoulder injury. She also answered

"no" to the question "have you ever had a workers' compensation injury" on the form. She was injured on her third day of work, November 18, 1995. A notice of injury was completed and she was referred for medical care. She never returned to work and filed a petition for benefits February 19, 1997.

The employer/carrier E/C denied the claim and the JCC also denied the claim primarily on the authority of *Martin Co. v. Carpenter*, 132 So. 2d 400 (Fla.1961). The appeal court affirmed the JCC's ruling stating that, as in *Martin*, the injured employee misrepresented her medical history at the time of initial hiring and there was a causal relationship between her injury (right shoulder) and a prior medical condition, a right shoulder injury in 1994 which occurred while moving boxes at a prior place of employment.

Georgette Webber v. Volusia County Health, et al, 25FLW D1140b, 1st DCA

In this case, the court reversed the JCC's ruling. They stated that the E/C may *not* take an offset against the *cost of living adjustment* for the injured employee's state disability retirement benefits or health insurance subsidy the employee received in conjunction with state retirement benefits.

Florida Power et al, v. Lloyd Van Loan, 25FLW D1489, 1st DCA

In this case the claimant was injured and was accepted PTD in 1994. The claimant also began receiving social security disability benefits in 1994; however, the E/C did not begin taking a social security offset until 1998. When the E/C began taking the offset they used the supplemental benefits payable in 1998 in their initial calculation and once the offset amount was determined it was then subtracted from the maximum compensation rate in effect in 1994 to determine the amount due to the claimant. The claimant argued that the amount of supplemental benefits included in the offset calculation should be the amount of supplemental benefits payable during the year the claimant was accepted PTD, and not the year the E/C began the offset. The claimant also argued that the offset should not be deducted from the maximum compensation rate in effect in 1994 (\$ 444) but rather, it should be deducted from the claimant's "actual compensation rate" (66 2/3 % of the AWW which equaled \$507.37).

The First DCA agreed with the claimant's position regarding the number which is to be used in the offset calculation and held that offsets should be calculated using the supplemental benefits payable during the year in which the claimant is accepted PTD. However, the court agreed with

the E/C on the second issue and held that the offset should be applied against the maximum compensation rate in effect during the year of the accident, and not against the “actual compensation rate.”

