

## Coming Attractions

### ***Westphal v. City of St. Petersburg 122 So. 3d 440 (FLA 1<sup>st</sup> DCA 2013)***

The courts have struggled with the issue of a claimant that has received 104 weeks of temporary total benefits that is still unable to work but has not reached maximum medical improvement. By statute and caselaw, the claimant must be at MMI for eligibility for PTD benefits. The courts define this situation as a “gap” in benefits, i.e. eligibility for temporary benefits is exhausted but the claimant does not meet the requirements for permanent total disability despite his inability to work.

Prior to *Westphal*, the leading case on this issue was *Matrix Employee Leasing v. Hadley*, 78 So. 3d 621 (Fla. 1<sup>st</sup> DCA 2011). This case held that if a claimant could prove that upon obtainment of MMI he would be totally disabled he was eligible for PTD benefits despite not obtaining MMI.

### ***Westphal I***

The First District Court of Appeal with a panel of three judges ruled that the 104 week limitation on temporary benefits was unconstitutional. The 104 limitation was passed by the legislature in 1993. Citing the doctrine of “natural justice,” a court cannot ignore whether the benefits are reasonable. Once the court held the 104 week provision unconstitutional, the court decided that under the doctrine of judicial revival the number of weeks 260 of temporary benefits that was placed in the statute prior to the 1993 change to 104 weeks was the new limitation for temporary benefits. This decision resulted in unsettled turmoil in the compensation industry; several prior constitutional challenges to the 1993 did not find the 104 week limitation unconstitutional.

### ***Westphal II***

In an unusual procedural move, the First District decided to rehear *Westphal* en banc, the entire court, not just three judges that sat as a panel. The court decided to withdraw their earlier opinion and issued a new decision. The court held that an injured worker that has not reached MMI after the 104 weeks but has not reached MMI is entitled to PTD benefits if they are unable to work. The court receded from the *Hadley* decision and indicated that a claimant is “deemed” to be at MMI if they have received 104 weeks of temporary benefits and cannot work and is eligible for PTD benefits.

***This case is pending in the Florida Supreme Court.***

### ***Elsa Padgett v. State of Florida (11-13661 CA 25 11<sup>th</sup> Judicial Circuit)***

This is an Order issued by a Miami Circuit Judge that ruled that the provisions of chapter 440 are unconstitutional. In this case an employer asserted a defense to a negligence claim that they were immune from a civil lawsuit based on the workers’ compensation exclusive remedy. Although the employer withdrew the affirmative defense of exclusive remedy, the Miami Circuit Judge reviewed

affidavits and published material and issued a ruling that the provisions of Chapter 440 were unconstitutional since it did not provide an adequate remedy. This decision has been appealed.

**Castellanos v. Next Door Co. 124 So.3d 392(Fla. 1<sup>st</sup> DCA 2013)**

This case is pending before the Florida Supreme Court. A major part of the 2003 reforms was the limitation on claimant hourly fees paid by the employer carrier. This limitation was ruled unconstitutional by the Murray decision. The legislature enacted a law that once again limited hourly attorney fees effective July 1, 2009. This decision challenges the legislative limitation on hourly fees effective July 1, 2009.

## **Major Workers' Compensation Decisions since June 2014**

**Caceres v. Sedano's Supermarkets 138 So.3d 1224 (Fla 1<sup>st</sup> DCA 2014)**

This decision reinforces the long held doctrine that a repetitive trauma claim can be brought within the last date of exposure to the trauma. These holdings generally eliminate late reporting defenses to repetitive trauma injuries.

**Brevard County v. Acosta 141 So.3d 233 (Fla. 1<sup>st</sup> DCA 2014)**

This case discusses the "hindrance to recovery" doctrine. The hindrance to recovery doctrine requires the workers' compensation provider to pay for treatment that is not caused by the work related accident but is necessary to provide a recovery for the work related condition. Typically this doctrine arises in situations of weight loss, diabetes, and other disorders that inhibit recovery of the work related condition. This decision clarified that hindrance to recovery is not applicable if treatment for the non work related condition is only "incidental" to the recovery for the work related condition.

In this matter the claimant had a compensable right shoulder injury. The claimant argued that the left shoulder which was in need of repair but not as a result of the work related injury should be repaired as a fully functional left shoulder was necessary to aid in the recovery when the claimant could not use his right shoulder during the recovery period for the right shoulder repair. The court reversed the Judge of Compensation Claims that in this situation the benefits were only incidental to the recovery of the work related accident.

**Hernando County Sheriff's Office v. Sikalos 141 So.3d 1236 (FLA 1<sup>st</sup> DCA 2014)**

As a result of the Grice case, employers may reduce workers' compensation benefits for providing collateral benefits that are triggered as a result of disability. Therefore, in our cases we reduce benefits for the receipt of in line of disability payments.

In this matter, Hernando County reduced the workers' compensation payments as a result of the claimant's receipt of in line of disability payments. The court ruled that since employees contribute 3%

of their salary effective July 1, 2011 to the fund paying this benefit the employer could no longer reduce workers' compensation benefits for the receipt of in line of disability payments. The court cited the provision that prevents employers from charging employees for the cost of workers' compensation benefits in support of this holding.

**Levy County Sheriff's Office v. Allen 140 So.3d 1150 (Fla 1<sup>st</sup> DCA 2014)**

A Deputy Sheriff was traveling on Highway 24 from his home in Cedar Key to work as a bailiff in Bronson Florida. On his way to work, he spotted a tractor trailer jutting on the side of the road and subsequently struck the trailer. The courts ruled that the deputy was acting within the course and scope of his employment and received compensation benefits for this accident.

The Deputy testified that he "instantaneously" became concerned about the road hazard and intended to perform duties to reduce this risk. Before the Deputy could carry out any of these functions, he wrecked into the tractor trailer. This case is significant that compensation benefits were awarded prior to the deputy actually engaging in any activities related to making the highway safer.

**Gil v. Cargo Force 141 So.3d 253 (Fla. 1<sup>st</sup> DCA 2014)**

Clarifies that in those cases where the claimant is not compliant with medical care benefits can only be denied during the period of denial, not for the entire claim.

**Gaiimo v. Florida Autosport 154 So3d. 385 (Fla. 1<sup>st</sup> DCA 2014)**

This case examined a new requirement under the Florida Evidence Code that requires expert opinions to meet the "Daubert" test to be admissible. Under Daubert, an expert opinion must be based on

1. Sufficient facts or data
2. The testimony is the product of reliable principles or methods
3. The expert applied the principles and methods reliably to the facts of the case.

In this case, the claimant received an 8% rating for a non work related cervical injury A few months later, the claimant was involved in a work related automobile accident. The employer provided permanent total benefits but argued that benefits should be apportioned as a result of the non work related cervical injury.

The employer relied on the opinion of the neurologist that 85% of the disability was a result of the preexisting condition. The appellate court reversed holding that the neurologist opinion did not meet the Daubert test.

**Morales v. Zenith Insurance Company 152 So.3d 557 (Fla. 2014)**

The Florida Supreme Court reviewed a decision on whether the workers' compensation carrier was responsible for paying the judgment in a wrongful death claim. In this matter, the claimant was killed while working for a nursery. The claimant's surviving spouse settled with the workers' compensation carrier and subsequently obtained a default wrongful death claim against the employer for \$9.52 million.

This case came to the Florida Supreme Court by certification from the federal court. The Supreme Court ruled that by settling the workers' compensation claim the widow could not collect the wrongful death judgment.

**City of Ft. Pierce v. Spence 155 So3d 1197(Fla 1<sup>st</sup> DCA 2015)**

In this matter the claimant had degenerative pain in his neck as well as a compensable injury to the neck. The treating doctor opined that 70% of the need for facet injections was as a result of the non-work related conditions and the remainder was a result of the work related injury. The Judge of Compensation Claims held that the facet injections were still required under the workers' compensation law since the degenerative issues were a result of the normal aging process. The court ruled that the carrier did not have to provide the facet injections.

**Luxor**

The Court confirmed that palliative treatment must be medically necessary and that it does not matter if the claimant has a permanent work restriction.

**Esad Babahmetovic v. Scan Design Case #1014-2986**

Decision provides that if compensation payments are provided without the issuance of the 120 letter the carrier cannot deny compensability. Prior law held that a carrier could deny compensability regardless of whether a 120 letter was issued.