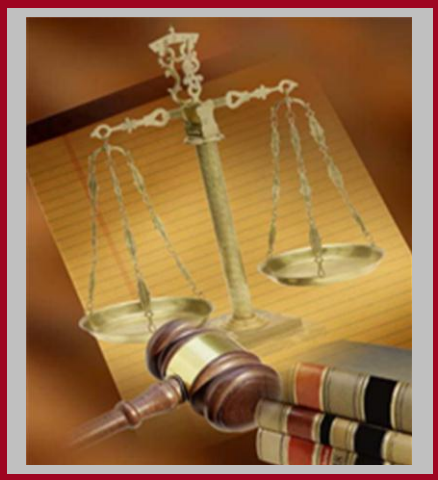
FALL 2011 VOLUME 1 ISSUE 2

HAYES, SCHLOSS, & ALCOCER, P.A.

WORKERS COMPENSATION NEWSLETTER



"The law is reason free from passion."
- Aristotle

IN THIS ISSUE:

COSTS-

Judges agree that Claimants are barred from filing Petitions until ordered costs are paid.

The First District Court of Appeal issued two opinions on March 31, 2011 dealing with the Employer/Carrier's entitlement to Claimant paid costs when the Employer/Carrier is the prevailing party.

In Punsky v. Clay County BOCC, the Employer/Carrier filed a motion to tax costs under section 440.34(3) for defending against the claimant's Petition for Benefits. The Judge of Compensation Claims granted the motion and awarded Claimant paid costs and the First DCA affirmed. The Claimant had, in part, argued that his right to access courts is denied if costs are awarded to an Employer or Carrier for successfully defending against compensability of a claim. The Appellate Court noted that a Judge of Compensation Claims lacks jurisdiction to address constitutional issues and, therefore, it was proper for the Claimant to raise this issue for the first time on appeal. The Claimant did need to create a record in the lower court in support of this constitutional challenge of access to courts. The First DCA rejected the constitutional argument because there was no support in the record for his argument that the award of costs is "an injury which is both real and immediate, not conjectural or hypothetical." The Court further concluded that, in enacting section 440.34(3), the legislature opted to make the award of costs mandatory and to expand it to allow the prevailing party, not just the Claimant, to recover reasonable costs. The order goes on to state that it also furthers a reasonable public policy to reimburse the costs of litigation, regardless of who the prevailing party may be. The legislature was likely trying to reduce frivolous litigation by enacting this statute.

(continued on page 2)

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TRANSPORTATION -

THE FIRST DCA REVISITS THIS ISSUE

In the recent case of Williams v. Onyx Waste, (Fla. 1st DCA 7/7/11), the Claimant was physically able to drive and filed a claim for transportation to authorized medical appointments because his car was broken down and he lacked reliable transportation.

The First DCA reversed Judge Basquill's denial of transportation to medical appointments because the JCC improperly requested the Claimant prove that transportation itself was medically necessary; a conclusion contrary to the settled law on the issue.

The First DCA pointed out that a workers' compensation carrier must either provide transportation to authorized medical appointments or pay the reasonable cost thereof. This rationale is based on the proposition that travel is incidental to medical care, not because the transportation itself is medical care or attendance. The Court went on to add that the Employer/Carrier has the first opportunity to determine the means and method of providing medical benefits (alternative transportation) to the Claimant's personal care.

COSTS – CON'T.

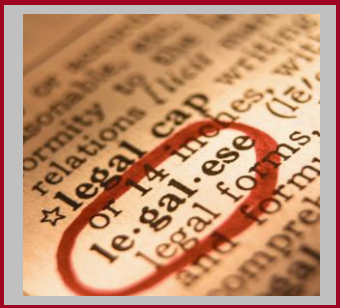
In Hernandez v. Palmetto General Hospital, the other March 31, 2011 opinion, the Employer/Carrier had moved to dismiss the Claimant's new Petitions for Benefits pursuant to section 440.24(4) because the Claimant had not complied with the cost order. The Claimant and her new attorney, for various reasons, failed to attend the hearing on this motion to dismiss and the Judge granted it with prejudice, despite the Claimant filing a detailed financial affidavit. In turn, the Claimant filed this appeal. The Appellate Court found that the Judge of Compensation Claims erred in dismissing the Petitions with prejudice based on the Claimant's "unreasonable" failure to appear at the hearing on the order to show cause as there is no reading of the record that supported a finding of the level of willful or flagrant conduct necessary to justify dismissal of the Petitions with prejudice. The Judge of Compensation Claims also dismissed the Petitions with prejudice as the Claimant had failed to comply with the order requiring her to reimburse the Employer/Carrier for costs. The Appellate Court stated the lower court Judge went too far by dismissing the Petitions for Benefits with prejudice. They found that section 440.24(4) only authorizes claims to be dismissed "until the employee complies with such order," and, thus, the statute could not support the dismissal of the new Petitions with prejudice.

In Lakeland Reg'l Med. Ctr. V. Weech, a First DCA opinion of December 2010 held that the Employer/Carrier may seek enforcement of a cost award in circuit court.

May you all reap a full harvest this autumn.

"Everyone must take time to sit and watch the leaves turn."

- Elizabeth Lawrence



RECENT APPELLATE RULINGS ON CASES HANDLED BY OUR FIRM

On 7/21/11, the First District Court of Appeal upheld Judge Basquill's Final Order in Russell Payne v. City of Riviera Beach and Gallagher Bassett Services. Judge Basquill ruled in favor of the Employer/Carrier and denied the law enforcement officer's claims for compensability of his coronary artery disease under alleged accident dates in 2002, 2005, 2007 and 2008. The 2005 claim was barred by the statute of limitations and the Claimant did not provide timely notice of his 2005 and 2008 accidents. Further, the Judge found that the Claimant's condition was not causally related to his work activity. The Judge found that the presumption of Section 112.18 applied, but the Claimant did not present evidence of causation which permitted the Employer/Carrier to rebut the presumption. The Employer/Carrier's IME testified to many non-work related causes for his coronary condition. The Judge found that that was enough to rebut the presumption.

ATTORNEY FEES –

KAUFFMAN IS DENIED REVIEW BY THE SUPREME COURT.

In July 2011, the Supreme Court denied review of the Kauffman v. Community Inclusions attorney fee case. The Kauffman case was the Claimant bar's attempt to have the Supreme Court find that the changes the legislature made in 2009 to the attorney fee statute, 440.34, in taking out the word "reasonable" were unconstitutional. The Judge of Compensation Claims found that a reasonable fee would have been $25,075.00; but awarded a statutory fee of $648.41 to the Claimant's attorney for securing $3,417.03 in benefits based on the revised Section 440.34 (2009). The First District Court of Appeal agreed with the JCC. They rejected the Claimant's equal protection, due process, separation of powers, and access to courts challenges to the amended statute. Little comment was made other than to reason that the First DCA's prior opinions that 440.34 is constitutional remain intact. The Employer/Carrier argued that the Claimant, who was in fact represented by counsel, did not have standing to raise those constitutional arguments; however, the First DCA disagreed.

For now, claimant attorney fees in cases with accident dates after July 1, 2009 remain limited to a statutory fee or up to $1,500 in a medical only situation. While Claimant's attorneys may be awarded minor fees in some instances for securing benefits with little value, they will also benefit by the cases where they secure several hundred thousand dollars' worth of medical and/or indemnity benefits on a litigated permanent total disability claim and the statutory fee may be in excess of $600 per hour.

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THE ATTORNEYS AT HAYES, SCHLOSS & ALCOCER, P.A. ARE AVAILABLE TO SPEAK TO YOUR GROUP ON ANY WORKERS COMPENSATION RELATED ISSUE

"bee care full win yew ewes spell checkque:?."
- Pamela Pantsuit

FALL 2011 VOLUME1 ISSUE 2

HAYES, SCHLOSS & ALCOCER, P.A.

This newsletter is intended for general information only. The information included in this newsletter should not be construed to be formal legal advice or as establishing an attorney/client relationship.

*The attorneys at **Hayes, Schloss, & Alcocer, P.A.** primarily represent the interests of Employers/Carriers/Servicing Agents in the area of Workers' Compensation.*

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IF THERE ARE ANY TOPICS YOU WOULD LIKE TO SEE COVERED IN A FUTURE EDITION OF THIS NEWSLETTER PLEASE LET US KNOW