



Representing Major PEOs
in Southwest & Central
Florida

Over 30 years combined experience
in Workers' Compensation



Russell H. Young, Esq.



Mary Ann Noud, Esq.

Working for You

Another Claimant Falls Into The Gap

Total disability on the date of statutory maximum medical improvement is not enough to support a permanent total disability claim. *Matrix Employee Leasing, Inc. v. Hadley*, 1D09-3360 (Fla. 1st DCA, Nov. 29, 2011).

On January 28, 2007, Claimant injured his left knee and leg in a compensable accident. He underwent a number of surgeries as a result of complications from the initial surgery. Claimant's authorized treating physician anticipates Claimant will need additional surgeries and testified that Claimant is not yet at MMI. In May 2009, Claimant was placed on a no-work status pending the additional surgeries. Claimant's physician was unable to provide a definitive opinion of Claimant's disability status once he reaches MMI, although he testified that Claimant will "most probably" be able to go back to at least light-duty work at some point and that Claimant will "probably" have only a 10% to 15% impairment rating after MMI. The Employer / Carrier paid Claimant 104 consecutive weeks of temporary total disability benefits until January 18, 2009. At that point, the E/C began paying impairment benefits. Claimant filed a petition for benefits

seeking an award of PTD benefits because he remains in a total disability status per his physician. The E/C denied the claim, asserting that Claimant must first reach MMI to make the issue of PTD ripe for adjudication because the law does not authorize the payment of pre-MMI "temporary PTD benefits." In the order appealed, the Judge of Compensation Claims awarded Claimant PTD benefits.

The First District Court of Appeal concluded that this case was controlled by its decision in *City of Pensacola Firefighters v. Oswald*, 710 So.2d 95 (Fla. 1st DCA 1998). The Court began its analysis by noting that § 440.15 governs the payment of disability benefits; and that subsection (1) provides for the payment of PTD benefits to employees who have a "total disability adjudged to be permanent." [Emphasis in original opinion.] TTD benefits are payable for no more than 104 weeks, after which the employee's permanent impairment rating must be determined. See § 440.15(2)(a). The permanent impairment rating is used to pay "impairment income benefits," commencing on "the day after the employee reaches MMI or after the expiration of temporary benefits, which-

ever occurs earlier," and continuing for a period determined by the employee's percentage of impairment. See § 440.15(3)(g).

According to the Court, "The statutory scheme in § 440.15 works seamlessly when the injured employee reaches MMI prior to the expiration of the 104 weeks of temporary disability benefits. But where, as here, the employee is not at MMI at the expiration of the 104 weeks, there is the potential for a 'gap' in disability benefits because TTD benefits cease by operation of law after 104 weeks and entitlement to PTD benefits is generally not ripe until the employee reaches MMI. We recognized this 'gap' in *Oswald* and attempted to ameliorate its impact as much as possible within the confines of the applicable statutory language."

"The Legislature has not amended the applicable statutes in response to *Oswald* and its progeny, and we see no reason to recede from this settled precedent at this point, notwithstanding the policy issues raised by the JCC and the dissent. . . . we do not have the authority to rewrite the statutes to eliminate the potential 'gap' in disability benefits; that remedy lies with the Legislature, not the courts."

Let us save you money
by defending your
claims and
preparing your
washout settlement
documents.

Newsletter Challenge

Did You Know . . .



We provide defense coverage in Ocala, Gainesville, Orlando, Lakeland, Tampa & St. Pete, Bradenton, Sarasota, Fort Myers & Naples. Need last-minute representation for a mediation or hearing? Just call us!



Answers to November Newsletter Challenge

- 1) physical injury
- 2) accident OR injury
- 3) pre-existing
- 4) prolonged
- 5) aggravation
- 6) greater
- 7) action OR intention

Congratulations to Mike Benishek, Pacific Tomato Growers, whose correct entry was drawn for the \$25 gift card.



Get a free 2011 Russell H. Young & Associates mouse pad imprinted with a quick-reference statute guide. Send your request to:

sally@youngandassociates.com

- 1) **True or False?** In some instances, an adjuster may put her interests above the duty for fair and honest treatment of the claimant.
- 2) **True or False?** It's okay for an adjuster to refer a claimant to a person from whom the adjuster anticipates he will receive compensation for any resulting business.

Wojick v. Fla. Dept. of Children and Families, 1D11-0918 (1st DCA, Nov. 22, 2011). Per Curiam.

Claimant appealed an order of the JCC compelling her to attend a functional medical evaluation. The Court stated: "We hold the JCC lacked jurisdiction to rule on the matter here, given there is no pending claim for benefits, no statutory authority for an FME per se within chapter 440, and insufficient proof that the FME in this case was 'medically necessary' as that phrase is used in § 440.13(2)(a)."

"We further note, without addressing the constitutional argument that the order to compel violates Claimant's right to privacy, that a claimant always has the right to reject medical assistance, although the consequences may include forfeiture of certain workers' compensation benefits."



Adjuster Ethics

- 3) **True or False?** An adjuster must exercise extraordinary care when dealing with elderly clients.
- 4) **True or False?** An adjuster may not interview any witness, or prospective witness, without the consent of opposing counsel.
- 5) **True or False?** If any

witness making or giving a signed or recorded statement requests a copy of the statement, the adjuster must provide it.

Send your answers to: maryann@youngandassociates.net

An entry will be drawn at random from all correct submissions. The winner will receive a \$25 gift card.

Page Too . . .

Lintz v. Brighton Partners, OJCC# 09-028432DBB (Sarasota District, Dec. 1, 2011).

Claimant injured her back in a work accident. E/C accepted the accident and injury as compensable, but apportioned and reduced the medical benefits payable to Claimant by 30%. Claimant was authorized to treat with Dr. Nair (who also treated her prior to the accident); and Claimant underwent an E/C IME with Dr. Feiertag.

"The fact that claimant may not have suffered a permanent impairment attributable to her pre-existing non work related back condition does not preclude apportionment of her medical benefits. E/C must present evidence of a preexisting condition resulting from non-occupational causes, which it has done. There must also be a showing that claimant's work injury is the result of an acceleration or aggravation of that non-occupational preexisting con-

dition, and E/C must present evidence of the extent of that preexisting condition. Dr. Nair agreed with Dr. Feiertag in all but the percentage of claimant's preexisting condition, and Dr. Feiertag opined claimant's work accident was an aggravation of her preexisting condition and a permanent progression. Thus E/C could properly apportion medical benefits."



Merry Christmas & Happy 2012!
Russell H. Young & Associates