

# NEWSLETTER

## ALABAMA LAW UPDATE

### ATTENDANT CARE IN ALABAMA: THAT WAS *THEN*, THIS IS *NOW*



**John Welsh**  
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AV rated by  
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#### Then

The issue of attendant care provided to an injured worker by family members was initially presented to the Alabama Court of Civil Appeals in the 2003 case of Osorio v K&D Erectors, Inc., 882 So. 2d 347 (Ala.Civ.App. 2003). In Osorio the plaintiff was found to be permanently and totally disabled after an accident where he fell thirty feet from a roof and suffered a severe closed-head injury; partial blindness; paralysis in his left leg; loss of use of his left arm; and multiple fractures to his skull and ribs. The injured employee also suffered severe cognitive and language deficits.

As a result of the injuries the claimant had to live with family members who helped care for him by assisting him with grooming, personal hygiene, preparing food, bathing and dressing. While the employer did not dispute that the claimant was permanently and totally disabled, the employer challenged a trial court's requirement compelling the employer to compensate the claimant's family members for the attention and assistance they rendered to the claimant.

The Alabama Court of Civil Appeals held in Osorio that the employer did not have to pay the claimant's family member for attendant care on the basis that while such care certainly improved the claimant's independent

functioning, it did not "improve his disabled condition." Thus the employers medical obligations were limited.

#### Now

Fast-forward 11 years to present day. On June 14, 2014, the Alabama Court of Civil Appeals released an opinion in the case of Alabama Forestry Products Industry Workers' Compensation Self-Insurers Fund v. Harris which effectively overruled the Osorio case. In so doing, the Court has considerably expanded the scope of an employer's medical obligations and exposure in Alabama Workers' Compensation cases.

The Harris case stemmed from a 1990 accident which resulted in severe injuries to Mr. Harris's pelvis and right lower extremity. In 1991 Harris's authorized treating physician wrote a letter stating that, due to ambulatory difficulties it was "imperative that [Harris] have help at home during his recovery phase." In response his employer paid various members of Harris's family on a monthly basis for ongoing assistance to Harris.

Harris settled his workers compensation in 1992 and pursuant to the terms of the settlement agreement medical benefits would remain open. Thereafter, Harris's employer continued the monthly payments to Harris's family members for almost 20 years. In 2011; however, Harris requested that his future son-in-law replace his daughter as his paid care-giver. The third party administrator complied and made several payments to Harris's son-in-law before it was

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## FLORIDA LAW UPDATE

### A TOTALLY DISABLED INJURED WORKER MAY FILE A PETITION FOR PTD BEFORE BEING PLACED AT MMI BY AN AUTHORIZED PROVIDER.



**Stephanie Alexander**  
Vernis & Bowling  
of Northwest Florida, PA

In Westphal v. City of St. Petersburg, 122 So. 3d 440. (Fla. 1st DCA 2013), on rehearing en banc, Florida's First District Court of Appeals, construing the interplay between the 104 week cap on temporary indemnity benefits in FS 440.15(2)(a) and the necessity for maximum medical improvement FS 440.15(3)(d) as a prerequisite to a claim for permanent total disability, held "that a worker who is totally disabled as a result of a workplace accident and remains totally disabled at the end of his or her eligibility for temporary total disability benefits is deemed to be at maximum medical improvement by operation of law and is therefore eligible to assert a claim for permanent and total disability benefits." Westphal, 122 So. 3d 440, at 442.

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## NORTH CAROLINA LAW UPDATE

## NORTH CAROLINA INDUSTRIAL COMMISSION RULES UPDATE

**T. Nicole Tackett, Esq.**

Vernis &amp; Bowling of Charlotte, PLLC

Pursuant to Session Law 2013-294, the Rules Review Commission (RRC) of the Office of Administrative Hearings reviewed 35 permanent rules adopted by the Industrial Commission. Ultimately, all 35 rules were approved.

Following approval of these rules, the RRC received 10 or more letters requesting legislative review of 8 of the rules. These rules will be subject to legislative review during the May 2014 legislative session. Because some

of the other newly approved rules are dependent upon these 8 rules in question, the Industrial Commission has requested that certain approved permanent rules be held in abeyance at least until these 8 rules are reviewed by the legislature.

The remainder of the approved permanent rules of the Industrial Commission shall go into effect on July 1, 2014. **Copies of all approved rules, rules subject to review and rules in abeyance can be found on the North Carolina Industrial Commission website.**

**Revised Maximum Compensation Rate for 2014**

The North Carolina Industrial Commission has revised the maximum weekly benefit for 2014 from \$912.00 to \$904.00, for claims arising on or after January 1, 2014. ❖

## GEORGIA LAW UPDATE

## 2013-2014 GEORGIA LEGISLATIVE CHANGES

**David W. Willis, Esq.**

Vernis &amp; Bowling of Atlanta, LLC

**O.C.G.A. §34-9-200(a): 400 week cap on medical benefits**

- Effective for claims 7-1-13 forward
- Does not apply to catastrophic claims under O.C.G.A. §34-9-200(g)
- Most claims will be unaffected due to settlement or CAT status
- Consequences of new law unknown, but several possibilities
  - Decrease in medical costs for employers/insurers
  - Increase in number of claimants seeking CAT designation
  - Possible reduction in MSA values, though CMS may challenge as impermissible shifting of burden to Medicare

**O.C.G.A. §34-9-203(c): payment of mileage expenses**

- Effective for mileage reimbursements made on or after 7-1-13
- Payment/reimbursement of mileage now due 15 days from employer/insurer's receipt of charges and reports...not 30 days
- If employer/insurer object to all or part of the mileage reimbursement request must notify claimant within 15 days and explain why and/or request additional information

**O.C.G.A. §34-9-222: lump sum advances**

- Effective for advance requests 7-1-13 forward
- Repayment now made with interest at 5% per annum, not 7%
- A claimant must receive TTD for at least 26 weeks/show hardship
- State Board has wide discretion; repayment made by reducing number of weeks of benefits (PPD) or payment amount (TTD)

**O.C.G.A. §34-9-240: return to work**

- Effective for 240 return to work offers 7-1-13 forward
- If a light duty job is offered under 240 process the claimant is required to attempt the job for 8 hours or 1 scheduled workday, whichever is greater
- The failure of the claimant to do so can result in TTD suspension

**O.C.G.A. §34-9-261 and §34-9-262: increase to max TTD and TPD rates**

- Applies to claims for injuries 7-1-13 forward
- New maximum TTD rate is \$525 per week
- New maximum TPD rate is \$350 per week

**O.C.G.A. §34-9-104: notification of release to light duty work**

- Effective January 1, 2014
- "Back to the old days"...file the 104 on the front end
- Remember to serve a copy upon the claimant/opposing counsel
- Must still be within 60 days of a light duty release from the ATP ❖

## CONSTITUTIONALITY OF FLORIDA'S WORKERS' COMPENSATION FEE CAP TO BE ADDRESSED BY THE FLORIDA SUPREME COURT

### Florida Law Update



**Will Ramhofer Esq.**  
 Vernis & Bowling of Miami, PA

On October 23, 2013, in the case Castellanos v. Nextdoor Company, et. al., Florida's First District Court of Appeal ("First DCA") affirmed the JCC's award of attorney's fees to claimant's counsel in the amount of \$164.54, representing a percentage of the benefits secured as provided under the statutory guidelines set forth in Florida Statutes Section 440.34. The claimant's attorney in Castellanos incurred 107.2 hours of professional time towards the benefits secured, which equates to a fee recovery of \$1.53 per hour. The claimant argued that the guideline fee was inadequate and challenged the constitutionality of the fee cap provision.

Under the current statutory framework, for dates of accident post July 1, 2009, claimant's attorneys are strictly limited to fees equaling a percentage of benefits secured, or in limited situations, an hourly fee not to exceed \$1,500.00, based on a maximum hourly rate of \$150.00 per section 440.34. Despite constitutional challenges, the First DCA held that section 440.34 was constitutional on its face and as applied, but, nonetheless, certified the following to the Florida Supreme Court as a question of great public importance:

**Whether the award of attorney's fees in [Castellanos] is adequate, and consistent with the access to courts, due process, equal protection, and other requirements of the Florida and [United States] constitution.**

Proponents of Castellanos argue that the current fee cap can result in inadequate attorney's fees awards such as in the situation of Mr. Castellanos' attorney. Due to the substantive nature of the attorney's

fee provision in section 440.34, claimant's attorneys may still seek an upward deviation from the statutory guidelines in exceptional situations for dates of accidents prior to July 1, 2009. Advocates of the current fee cap maintain that the former, more liberal standard encourages litigation and increases workers' compensation costs, while critics contend that the fee cap may reduce the deterrent effect of large attorney's fee's awards. Despite the obvious monetary repercussions and policy concerns, the question remains whether the limits imposed by the Florida Legislature violate provisions of the Florida and United States Constitutions, including access to courts, due process, and equal protection.

Notably, the Florida Supreme Court accepted jurisdiction in Castellanos on March 13, 2014, the same day it ruled in Estate of McCall v. United States, 39 Fla. L. Weekly S104 (Fla. 2014), a case in which the Court found Florida's caps on non-economic damages in medical malpractice claims unconstitutional. In addition, the Florida Supreme Court previously accepted jurisdiction in Westphal v. City of St. Petersburg, a case dealing with statutory provision of benefits under the Florida Workers Compensation Act, which is set for oral arguments on June 5, 2014. Although it is debatable what bearing the Supreme Court's recent activity may have on the Castellanos decision, one thing is certain, the Court is poised to address the constitutionality of the statutory provision of benefits in Westphal, and the attorney's fee cap in Castellanos, cases which may possibly have a considerable repercussions on Florida workers' compensation law.

The attorneys at Vernis & Bowling are monitoring the progress of this case closely in light of its potential to considerably impact the management of workers' compensation claims in the State of Florida. ❖

## A TOTALLY DISABLED INJURED WORKER MAY FILE A PETITION FOR PTD BEFORE BEING PLACED AT MMI BY AN AUTHORIZED PROVIDER.

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The holding relieved the injured worker of the obligation, established in City of Pensacola Firefighters v. Oswald, 710 So.2d. 95 (Fla. 1st DCA 1998), that, "an employee whose temporary benefits have run out — or are expected to do so imminently — must be able to show not only total disability upon the cessation of temporary benefits **but also that total disability will be existing after the date of maximum medical improvement.**" Westphal, 122 So. 3d 440, at 442, quoting Oswald 710 So.2d. 95, at 98 [Emphasis added]

The en banc opinion also concluded that The Court had interpreted the Workers' Compensation Law incorrectly in Matrix Employee Leasing v. Hadley, 78 So.3d 621 (Fla. 1st DCA 2011), and receded from the rule adopted therein, stating, "Nothing in the text of the applicable statutory provisions suggests that the Legislature intended to create a gap in which some totally disabled workers will be

ineligible to apply for total disability benefits. Moreover the notion that there can be a period of time during which a disabled worker is not entitled to be compensated for his or her workplace injury is contrary to the basic purpose of the Workers' Compensation Law." Westphal 122 So. 3d 440, at 444.

Finally, the First District certified as a question of great public importance whether a worker who is totally disabled, but improving, at the time temporary total disability benefits expire, is deemed to be at maximum medical improvement by operation of law and eligible to assert a claim for permanent and total disability benefits. See Westphal 122 So. 3d 440, at 448.

The Florida Supreme Court accepted jurisdiction. Oral arguments were heard on June 5, 2014. Vernis & Bowling will provide updates as they become available. ❖

## NOTABLE WINS & RESULTS

**Daniel Webb, North Florida:** Fugate v. State of Florida / Bureau of Vital Statistics. Claimant seeking compensability of low back condition after fall. Employer/Carrier able to show evidence that the compensable work injury was not the major contributing cause of the claimant's low back complaints via an independent medical examiner. The Judge of Compensation Claims denied the compensability of the low back condition via Order after a Final Merits Hearing.

**Nicole Tackett, North Carolina:** In Armstrong v. Averitt Express, Defendants showed surveillance of Plaintiff lifting weights to the treating physician and obtained a full duty release, resulting in termination of Plaintiff's weekly benefits by the court.

**Larry Feinstein, Central Florida:** In a Florida case with multiple dates of accidents and multiple body parts allegedly involved in the accidents, the employer/carrier resolved a portion of the claim regarding compensability for a spinal injury for a lump sum of money (far less than the cost of surgery and related indemnity benefits), in exchange for an agreement that the work injuries were not the major contributing causes of her spine condition, and any claims for such were dismissed with prejudice. Fast forward to the present, where the claimant (who is now over 65) is undergoing a multi-level fusion for that back condition. The e/c not only recognized a current savings, but the claimant's ability to successfully prosecute a permanent total disability claim in the future will certainly be hampered. ❖

## ATTENDANT CARE IN ALABAMA: THAT WAS THEN, THIS IS NOW

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discovered that Harris's son-in-law actually lived, and was employed, in a different city, whereupon the third party administrator terminated all payments for attendant care. Harris's attorney filed a declaratory judgment action seeking reinstatement of the attendant care payments. Harris's authorized treating physician testified by deposition that Harris's severe physical limitations from his injury preclude him from independently performing ordinary activities of daily living and that he will require assistance with those activities for the rest of his life. The doctor admitted, however, that while such assistance would likely prevent further deterioration, such assistance would not improve his underlying physical condition.

The Trial Court agreed with Harris and ordered the employer to reinstate attendant care payments to Harris's family and the employer appealed. In its June 14, 2014 opinion, the Alabama Court of Civil Appeals overruled the Osoorio case and held that attendant care falls within "reasonably necessary medical and surgical treatment and attention" pursuant to Code §25-5-77 of the Alabama Workers Compensation Act. The Court further held that when a non-professional family member supplies treatment or services designed to prevent further physical or mental deterioration, then

an employer may be compelled to compensate that non-professional family member for such services for up to 8 hours per day at minimum wage.

### Now What?

It is not hard to appreciate the considerable impact the Harris case could have on medical exposure in Alabama claims. At the current minimum wage of \$7.25 family-provided attendant care could result in an additional \$406 per week in medical expenditure. At that rate a 35 year old male claimant with a 42 year life expectancy could incur an **additional** \$899,371.20 in medical costs over and above the traditional medical costs which already comprise the majority of an employer's exposure on most claims.

As we face new and evolving challenges in claims, however, take note that parties are still free to negotiate the scope of their rights and obligations when settling cases. In cases where it is not possible to settle future medical benefits, it may be very wise to define the scope of what future medical treatment will be covered and what types of care and attention will not. It may save you a lot of money in the long run. ❖

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