HURLEY ROGNER
MILLER, COX, WARANCH & WESTCOTT, P.A.

Rex A. Hurley *
William H. Rogner *†
Scott B. Miller *
Derrick E. Cox *
Michael S. Waranch *
Paul L. Westcott *
Gregory D. White *
W. Rogers Turner, Jr.*
Paul L. Luger
Gregory S. Raub *
Anthony M. Amelio *

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Jonathan L. Cooley
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Sandra D. Wilkerson
Dominic C. Locigno
Timothy F. Stanton *
Kimberly De Arcangelis
Amy R. Ritchey
Julie C. Bixler
Zalman F. Linder

Stephen G. Conlin
Of Counsel

* *Florida Bar Board Certified Workers' Compensation*

† *Florida Bar Board Certified Appellate Practice*

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CASE NOTES

CASE LAW SUMMARY
MAY 2008

If you have any questions regarding Case Law Summaries, please contact W. Rogers Turner, Jr.: rturner@hrmcw.com

Lowry v. Central Leasing Management, May 5, 2008, Judge Terlizzese
Attorney's Fees

The claimant appealed the JCC's order awarding the claimant's lawyer a reasonable attorney's fee in the amount of $1,854.58 based on total benefits secured for the claimant in the amount of $11,045.75. The claimant argued that the JCC's application of § 440.34(1) denied access to counsel, denied access to courts, and "confiscated" legal time since the amount of fees worked out to a little more than $16.00 per hour. The First DCA affirmed the JCC's ruling, finding they were constrained by prior cases such as Murray v. Mariners Health/ACE USA, 946 So.2d 38 (Fla. 1st DCA 2007) and Wood v. Fla. Rock Indus., 929 So.2d 542 (Fla. 1st DCA 2006).

Lentini v. City of West Palm Beach, May 5, 2008, Judge Punancy
Firefighter's Presumption

The claimant appealed an order of the JCC finding that the E/C successfully rebutted the firefighter's presumption of § 112.18(1). The First DCA affirmed, finding that where the claimant can offer no evidence of occupational causation and relies exclusively on the statutory presumption, all

that is required to rebut the presumption is competent substantial evidence that convinces a JCC that the disease was caused by some non-work factor, not that it was caused by any sort of specific hazard or non-occupational hazard.

Caldwell v. Wal-Mart Stores, May 5, 2008
Right to an IME

The claimant sought PTD benefits from her employer, Wal-Mart. Wal-Mart informed the claimant it selected Dr. Christopher Brown as the IME. The evaluation was set to take place on November 20, 2006, but the claimant did not show. Wal-Mart rescheduled the appointment to take place on January 11, 2007, but the claimant did not show. Claimant's counsel then wrote to Wal-Mart's counsel indicating that he did not think the employer had the right to schedule the claimant's IME.

Wal-Mart filed a Motion to Compel the claimant to submit to an IME. The JCC entered the order compelling the claimant's attendance at the IME on February 28, 2007. Wal-Mart's counsel notified the claimant's attorney in writing that the exam was rescheduled for March 29, 2007. Shortly after the original notice, Wal-Mart's counsel sent another letter reminding the claimant of the appointment. No objection was made to the examination or the proposed date, but the claimant once again failed to appear. Wal-Mart filed a Motion for Sanctions on April 25, 2007. On May 22, 2007, the claimant filed a motion called Motion for Reconsideration of Order Entered February 28, 2007. The claimant alleged that Dr. Brown was an advocate for the insurance industry and the JCC erred by granting the motion without an evidentiary hearing. Wal-Mart pointed out that the request for reconsideration was untimely since it was filed three months after the Judge's Order.

During the hearing on the motion, claimant's counsel said he learned new information that changed his argument on the claimant's duty to submit to the exam. He said that he recently learned that Wal-Mart had access to a report by Dr. Elizabeth Ciano, regarding the claimant's medical condition. He said the report was the equivalent of an IME and the employer was not entitled to another one. Wal-Mart pointed out it was merely a peer review and not an IME. The JCC denied the claimant's motion.

The claimant sought review by certiorari to challenge the July 25, 2007 order denying her motion for reconsideration. The First DCA issued an order directing her to show why the petition should not be dismissed for lack of jurisdiction. The First DCA ultimately found that the petition was untimely and ineffective to confer jurisdiction on the court. The court found that the claimant should have filed a petition for writ of certiorari back on February 28, 2007.

Butler v. City of Jacksonville, May 8, 2008, Judge Dane
PTD Benefits/Firefighter's Presumption

The First DCA reversed the JCC's order denying the claimant's claim for PTD benefits resulting from an accident on March 12, 1996. The claimant argued that he was entitled to the presumption that his peripheral vascular disease (PVD) was caused by his occupation as a firefighter. He also argued that he was entitled to PTD because his PVD met or equaled a listed impairment.

The First DCA agreed and reversed, finding that the JCC did not apply the presumption or make any findings that the employer rebutted the presumption. The court noted that the claimant and the employer presented evidence that the claimant's PVD was caused by the claimant's atherosclerosis which was caused by his hypertension. The employer conceded that the claimant was entitled to the presumption as to his hypertension. The employer did not present any evidence that the claimant's PVD was caused by a specific non-work related event or exposure. As such, the JCC erred in denying PTD benefits.

Waffle House v. Scharmen, May 21, 2008, Judge Roesch
Statute of Limitations/Attorney Client Privilege

The E/C appealed an order of the JCC finding the E/C failed to provide the claimant with notice of his rights under Florida Workers' Compensation Law. Based on the finding, the JCC found that the E/C was estopped from asserting a statute of limitations defense. On appeal, the E/C argued that the JCC abused her discretion by denying them the opportunity to depose claimant's counsel to see if claimant's counsel informed the claimant of the applicable statute of limitations.

The First DCA agreed with the E/C and found that no privilege attaches to attorney client communications consisting of non-privileged information or the attorney's recitation of statutory language. The court found that the attorney's communication of the applicable statue of limitation to a client was just a recitation of statutory language. As such, it was not privileged.