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 Tuner, Jr.*
Paul L. Luger
Gregory S. Raub*
Anthony M. Amelio*
Matthew W. Bennett*
Robert S. Gluckman

Robert J. Osburn, Jr.
Teri A. Bussey*
Andrew R. Borah*
Jonathan L. Cooley
Allison M. Twombly
Sandra D. Wilkerson
Dominic C. Locigno
Timothy F. Stanton*
Kimberly De Arcangelis
Amy R. Ritchey
Julie C. Bixler
Zalman F. Linder
Matthew J. Troy
Geoffrey C. Curreri
C. Bowen Robinson
Michelle Bayhi

Stephen G. Conlin
Of Counsel

*Florida Bar Board Certified Workers' Compensation
† Florida Bar Board Certified Appellate

CASE NOTES
CASE LAW SUMMARY
April 2010

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

One Time Change

Pruitt v. Southeast Personnel Leasing Inc./Packard Claims Administration, (1st DCA April 27, 2010) (William H. Rogner) The claimant had requested a 1x change in their PFB, but did not designate a specific physician. The E/C did not timely respond to the request. At a subsequent mediation, the E/C agreed to provide a 1x change and agreed to attorney fees. The E/C sent a letter to the claimant two days later authorizing a specific doctor. The claimant treated with said doctor until he was again placed at MMI. The claimant then argued that he had a right to select his 1x change as the E/C did not timely respond to the initial request. The DCA held that the claimant acquiesced to the 1x change doctor and that the right to select a physician after 5 days is only an option which may be exercised by the claimant. **Click here to view Order**

Statute of Limitations/First Responsive Pleading

Certain v. Big Johnson Concrete Pumping/Summit Claims, (Fla.1st DCA 4/29/2009) The 1st DCA reversed the order of the JCC finding the claim was barred. The JCC found the E/C asserted the SOL defense in its first responsive pleading under 440.19(1)(2005). The claimant was injured in work related car accident. Although the claimant reported the accident to the employer, he rejected treatment via WC, indicating he believed it

Winter Park Office
1560 Orange Avenue
Suite 500
Winter Park, FL 32789
T (407) 571-7400
F (407) 571-7401

Ft. Pierce Office
603 N Indian River Dr
Suite 102
Ft. Pierce, FL 34950
T (772) 489-2400
F (772) 489-8875

Tallahassee Office
253 Pinewood Drive
Tallahassee, FL 32303
T (850) 386-2500
F (850) 222-5553

Pompano Beach Office
1280 SW 36th Ave
Suite 100
Pompano Beach, FL 33069
T (954) 580-1500
F (954) 580-1501

Fort Myers Office
4460 Camino Real Way
Suite 2
Fort Myers, FL 33966
T (239)939-2002
F (239) 939-2247

would take too long and he had no confidence in WC doctors. The employer did not notify their carrier of the accident. The claimant then pursued an auto negligence claim, and received a settlement. Over three years later, the claimant filed a Petition for Benefits. The E/C filed a Response to Petition for Benefits with the OJCC on November 20, 2008 indicating only "*entire claim denied*", but not mentioning the Statute of Limitations. Although prepared the same day, a Notice of denial stating "*claim has been filed more than three years after the date of accident*" was not filed until November 21, 2008. The Notice of Denial was filed with the Dept. of Financial Services. The court noted the statute clearly requires the E/C to assert the SOL defense in its first responsive pleading, and as the November 20th Response to Petition for Benefits failed to do so, the Statute of Limitations did not act to bar the claim. The fact that the November 21st filing was prepared on the 20th was immaterial. **Click here to view Order**

Final Orders
PCA

Euceda v. Southeast Personnel Leasing Inc./Packard Claims Administration, (1st DCA April 27, 2010) Dismissal of PFBs which does not implicate the SOL is a non-final order. **Click here to view Order**

Recoupment of Overpayments/Discovery

Jackson v. Computer Science Raytheon/CAN, (1st DCA April 27, 2010) The E/C alleged an overpayment. The claimant asserted various equitable defenses and the E/C filed a motion to compel the claimant's financial documents, to investigate the claimant's alleged detrimental reliance. The DCA held that recoupment of overpayments are controlled by statute and equitable arguments do not apply. Therefore the claimant's financial documents were irrelevant and should not have been compelled. **Click here to view Order**

Attendant Care (1981 d/a)

Lykes Pasco Packing Co./Travelers Indemnity Co v. Chessher, (1st DCA April 26, 2010) The JCC awarded attendant care, but did not designate the portion of compensable attendant care versus non compensable household tasks. The DCA remanded for further findings of fact. **Click here to view Order**

Attorney fees/Final Orders

Utility Lines Const. SVC/Asplundh Tree Expert Co./Liberty Mutual Insurance Corp. v. Crosby, (1st DCA April 26, 2010) The JCC entered a "Final Order Determining Entitlement to Attorney's Fee," but reserved jurisdiction to address the amount of the fee. The DCA held that this was a non appealable non-final order. **Click here to view Order**

Admissible Medical Testimony/Previously Authorized Doctors

Russell v. Orange County Public Schools/USIS, (Fla.1st DCA 4/20/2010) The DCA reversed an Order which excluded the testimony of a previously authorized orthopedist,

and denied an EMA based on alleged conflict with the excluded testimony. The DCA noted the issue was one of first impression, but held that to exclude a previously authorized doctor's testimony would defeat the purposed of the statute allowing only certain medical opinion testimony. The DCA also characterized the objection to the testimony as gamesmanship. The court further noted that accepting the JCC's logic would lead to absurd results, remarking that a doctor who releases a claimant is no longer technically "treating" and thus an argument could be made that such opinions would also be inadmissible. **Click here to view Order**

AWW/Inclusion of Fringe Benefits

Target Woodwork/REM v. Atlantic Mutual & Rodriguez, (Fla. 1st DCA 4/20/2010) The DCA reversed the JCC's Order including health insurance benefits in the AWW, finding the benefits had not vested at the time of the injury. The claimant was injured on the 88th day of employment, and his benefits were set to vest on the 90th day. The DCA noted prior case law that the benefits must be a real and present value to the claimant on the date of injury, and prospective receipt of such benefits precludes their consideration as wages for purpose of the AWW calculation. **Click here to view Order**

Insurance Contracts/Material Misrepresentation

Mercury Insurance Corp. v. Markham (Fla. 1st DCA 4/20/2010) In this non WC case, a car insurer denied coverage to an insured, alleging that the insured made a material misrepresentation on his application for insurance. The denial centered on the application's questions as to whether the vehicle had been "modified". The trial court denied partial summary judgment, finding that that the term "modify" in the contract was ambiguous. The DCA disagreed, attaching pictures of the vehicle in question, and noting that the driver admitted his truck had been "altered" in many ways. The Court found that a reasonable person standard applied, and reversed the trial court's refusal to find the insurance company rightfully rescinded the policy. The opinion contains interesting language from cases interpreting what are, and are not, material misrepresentations, and may be useful where claimant's seek to argue they did not intend for their misstatements/misrepresentations to be material (i.e., to obtain benefits). **Click here to view Order**

Penalties and Interest/Trial of Issues by Consent

New Hope Baptist Church/GuideOne Ins. v. Duran, (Fla.1st DCA 4/13/2010) The DCA modified the JCC's Order finding penalties were due. The carrier paid indemnity a day late, and agreed that five dollars was the appropriate interest due. However, the claimant admitted that the late payment was more than five dollars than what she was entitled to. The carrier modified the JCC's order to read that the overpayment would be classified as interest. The E/C also objected per the recent decision in Mieses v. Applebees, that the claim for penalties and interest was not properly before the court. In Mieses, penalties and interest were properly dismissed by the court. The DCA here found the issues were properly before the court via the claimant's trial memorandum and argument at final hearing, and the issue was also tried by consent as the E/C failed to object at the time of the trial. **Click here to view Opinion**

Burden of Proof/Major Contributing Cause vs.Causal Connection

Cangelosi v. Picadilly Cafeteria/Broadspire, (Fla. 1st DCA April 9, 2010)
The claimant sustained injuries in 1990 and subsequently sought compensability of various other conditions. The JCC had found the claimant's conditions not compensable under the Major Contributing Cause standard. The DCA reversed, finding Major Contributing Cause applies only to dates of accident on or after January 1, 1994. The DCA remanded for the JCC to determine whether the conditions were compensable under the less stringent "causal connection" standard that applies to the 1990 date of accdident.
http://opinions.1dca.org/written/opinions2010/04-09-2010/09-5152.pdf

Prevailing Party Costs/Effective Date of Law

Trent v. Charlotte Sanitation/CNA Claims Plus, (Fla. 1st DCA 4/8/10)
The DCA affirmed the JCC on three of the appealed issues, however they reversed on the award of prevailing party costs to the E/C. As the E/C conceded, the claimant's date of accident preceded the 10/1/03 amendments providing that E/C's may also be awarded prevailing party costs. See Kaloustian v. Tampa Armature Works Co., 5 So.3d 572 (Fla.1st DCA 2009). **Click here to view Order**