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**CASE NOTES**  
**CASE LAW SUMMARY**  
**February 2012**

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

*District Court of Appeal Cases*

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

**Managed Care/Alternate Care/Preservation of Error**

**Falcon Farms/Travelers v. Espinoza, (Fla.1<sup>st</sup> DCA 2/23/12)**

Claimant was authorized to see a doctor for a finger injury under a managed care arrangement. That doctor indicated the injury was not work related, and the claimant requested an alternate PCP. The JCC issued an order finding no evidence to show the injury was work related, but awarded an alternate PCP. The claimant’s only argument on appeal was that the finding of non compensability was incongruous with the award of an alternate PCP. Claimant did not present that argument to the JCC, even on rehearing. The DCA noted that an alternate is available under 440.134 for “work related treatment, and the JCC correctly denied treatment where there was no such evidence of causation. Interestingly, the DCA included the one time change language in 440.13, but does not analyze or compare it to the similar language of 440.134. [Click here to view Order](#)

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**Temporary Total Disability/Evidentiary Standard**

**Urquiza v. Greene Poultry/C&I Ins./Chartis, (Fla.1<sup>st</sup> DCA 2/14/2012)**

The 1<sup>st</sup> DCA reversed the JCC’s denial of a closed period of TTD. The E/C authorized psychiatric treatment for the claimant. That doctor placed the claimant on a no work status, which continued after the claimant left the employer. The E/C authorized a second

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psychiatrist, who agreed with the TTD opinion, specifically for a period from 9/15/10 to 1/23/10. The adjuster admitted that she received no medical records changing the claimant's status during that time from TTD to TPD. However, following a conference between the E/C attorney and the first psychiatrist, the adjuster testified she received a confirming letter from the psychiatrist indicating that the status changed to TPD. The JCC sustained the claimant's objection to admissibility of the letter, but apparently used the facts in that letter to find the claimant was informed of the change, and therefore not credible. The DCA noted that where the claimant presents evidence of TTD status, the burden shifts to the E/C to provide evidence that TTD status changed. However, where there is no evidence claimant ever became aware of the changed status, a JCC must award TTD benefits. A contrary opinion after the fact is insufficient. Although the JCC specifically noted the letter was not in evidence, the DCA noted that letter was the only evidence that could have created a question of the claimant's credibility. As such, it was an abuse of discretion to deny TTD where the only admissible medical evidence indicated claimant was on TTD status. [Click here to view Order](#)

### **Managed Care/Medical Benefits**

#### **McNealy v. Verizon/Sedgwick Claims #1/AIG Claims #2, (Fla.1<sup>st</sup> DCA 2/9/12)**

The JCC reversed the JCC's Order denying the claimant a change in PCP and attorney fees and costs. Claimant changed from her initial orthopedist to an alternate, and continued to treat with the alternate ortho. She then filed a PFB seeking authorization of a primary care provider. The JCC accepted the E/C argument that the alternate ortho was an authorized provider and a PCP, and authorizing another doctor as PCP was redundant and unnecessary. The DCA analyzed F.S. 440.134 (2000) and the applicable F.A.C. Rule, and reversed. They held that the claimant in a managed care case is entitled to a PCP and change in PCP, that the claimant did not have to establish medical necessity to obtain this benefit, and that the claimant was entitled to fees and costs for obtaining the change. [Click here to view Order](#)

### **Statute of Limitations/Tolling**

#### **Longley v. Miami Dade County School Board/Gallagher Bassett Svcs, (Fla.1<sup>st</sup> DCA 2/2/2012)**

The DCA reversed the JCC's Order finding the SOL tolled for the claimant's 3/3/10 PFB. Unfortunately, the confusing opinion omits a key fact contained in the Merit Order on appeal (attached below) which will hopefully be included in a corrected opinion. The Order states the claimant filed a PFB on 3/30/09 for a return to an authorized doctor. The carrier agreed to this and scheduled an appointment for 4/24/09. The Opinion merely states the claimant "attended" the appointment. Only after one reads the underlying Order, however, do we learn the omitted facts; that the claimant appeared at the doctor's office, had words with the doctor, was never actually examined, nor did the doctor bill for the visit. The JCC below found this visit did not constitute "treatment", which would toll the statute. The parties were supposed to appear for mediation in July, however the claimant attorney wrote a letter on 7/22/09 stating that the 3/30/09 PFB is dismissed EXCEPT as to attorney's fees "over which the JCC retains jurisdiction." The claimant then subsequently filed a PFB on 3/3/10 which sought an alternate doctor or return to the doctor the claimant was scheduled to see on 4/24/09. At that time the E/C raised the SOL defense, asserting the 3/30/09 PFB had been

dismissed, and the appointment of 4/24/09 did not toll the statute. The DCA ruled the JCC erred in finding the '09 PFB dismissed, as the 7/22/09 letter “dismissed” everything except fee claim which was still pending as of the time the 3/3/10 PFB was filed. As such, the E/C did not have a valid SOL defense.

Attorney fee and costs claims that remain “pending” or unresolved following resolution of the indemnity or medical claims on a PFB do toll the SOL for the claimant. If agreeing to resolve “issues” but reserving or allowing fee and costs issues to remain, the recommended practice would be to shortly thereafter file a motion under FL.R W.C.P. 60Q-6.107, which allows an E/C to ask the JCC to require the claimant to file a verified motion for attorney’s fees and costs and adjudicate the pending fees and costs. If this is not done, the PFB remains pending and the SOL cannot run. [Click here to view Order](#)

Underlying Order [Click here to view Order](#)  
**Average Weekly Wage**

**Gillislee v. EMI Enterprises, Inc., and Amtrust North America of Florida, (Fla. 1st DCA Feb. 2, 2012).**

The DCA remanded the JCC’s determination of the AWW and affirmed the denial of TTD/TPD. The DCA affirmed the JCC’s denial of TTD/TPD based only upon an adjuster’s testimony without medical evidence. The JCC had also excluded vacation and funeral pay actually paid to the claimant in the 13 weeks before the accident based upon Muscanell (vested sick pay not included in AWW). The DCA distinguished the case and instructed the JCC to determine if the vacation and funeral pay was includable. [Click here to view Order](#)