



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

## Case Law Update

FEBRUARY 21, 2014

**WINTER PARK**  
1560 ORANGE AVENUE, SUITE 500  
WINTER PARK, FL 32789  
TEL: (407) 571-7400  
FAX: (407) 571-7401  
[www.hrmcw.com](http://www.hrmcw.com)

---

This Update contains summaries of all relevant Appellate decisions for the preceding week, with comments on how a particular decision affects you. In addition, we review daily the Merit Orders posted on the DOAH website. This Update contains summaries and links to relevant JCC decisions for the past week.

Please feel free to contact Rogers Turner ([rturner@hrmcw.com](mailto:rturner@hrmcw.com)) or Matthew Troy ([mtroy@hrmcw.com](mailto:mtroy@hrmcw.com)) with questions or comments on any of the listed cases.

### *First District Court of Appeal Cases*

#### Gadol v. Masoret Yehudit, Inc./US Administrator Claims Onetime Change

(Fla. 1<sup>st</sup> DCA 2/21/14)

Claimant appealed denial of his choice of one-time change in physician. JCC found that E/C chooses one-time change regardless of whether they were late in the authorization. First DCA reversed. The claimant asked for the one-time change on 10/22/12. Seven days later, the E/C attempted to authorize Dr. Berkowitz, who declined. The Claimant was never notified of this effort. On 11/12/12, the E/C informed the claimant of an appointment with Dr. Sheikh scheduled for 11/20/12. The first attempt to authorize was already 2 days late. The case cites to Hinzman that five days to respond means five calendar days. The court also cites Perez v. Rooms to Go, that the claimant can acquiesce to the E/C selection even if late by actually attending the appointment. That did not happen in this case as the claimant refused to see Dr. Sheikh. [Click here to view Opinion](#)

**Franklin, Jr. v. City of Riviera Beach Fire and Rescue**  
**Medical Benefits/Due Process**

(Fla.1<sup>st</sup> DCA 2/26/2014)

Claimant sustained compensable hearing loss in 1999, and the carrier continued to provide medical benefits, including hearing aids. In 2012, claimant's authorized doctor wrote an Rx for "upgraded hearing aids per audiologist's request". The claimant met with a "hearing specialist" with the audiologist's office, and the adjuster received a recommendation for a TRUE 17 Belltone hearing aid that the adjuster felt was too expensive. The claimant then filed a PFB. In the response, on the Pre-Trial, and at trial, the carrier's position was that an upgraded hearing aid had never been denied, but their objection was to the expensive model. The DCA reversed the JCC's denial of the claim, which was based on a lack of medical evidence to support the claim. The DCA found this to be a denial of due process, in that the E/C stipulated to the provision of upgraded hearing aids. They reversed and remanded the case for a determination as to appropriate upgraded hearing aid model the E/C should provide. [Click here to view Opinion](#)

As often occurs, the underlying Merits Order provides additional facts. At trial, the claimant offered the medical records of the authorized doctor, which made no mention of the appropriate model to be provided. The claimant attempted to prove his case by presenting the testimony of the "hearing specialist" referred to in the appellate opinion. The JCC's Order notes that the hearing specialist was not an audiologist, but rather a sales representative for Belltone. The JCC found the doctor wrote the prescription based upon mistaken facts. He also found that the adjuster wrote the doctor thereafter to try and clear up the mistaken assumption, but never received a response. [Click here to view Order](#)

**Pomerantz v. Palm Beach County Sherriff/USIS**  
**Statute of Limitations/Effect of Prescription Medications**

(Fla.1<sup>st</sup> DCA 2/7/2014)

The DCA affirmed the JCC's finding that the SOL barred the claim. The JCC found the effective date for SOL calculation was the date the claimant last received medication prescribed by an authorized physician. The DCA rejected the claimant's argument that the 2006 Ginsburg case controlled. There, the court found that where the E/C was aware of the duration of claimant's 30 day supply of medications, the JCC on remand was instructed to determine the SOL from the last date the claimant took medications within that 30 day period. Here, the evidence showed that the authorized physician allowed the claimant to fill prescriptions and take the medication "as needed", even though the medication's specific instructions called for daily dosages. The DCA noted that where the taking of the medication is completely within the claimant's discretion, and outside of the E/C's awareness, allowing the tolling period to extend past the date of receipt of the medication would defeat the self executing nature of the WC system. [Click here to view Opinion](#)

**Andino-Rivera v. Southeast Atlantic Beverage Co./Gallagher Basse**  
**Temporary Benefits/Timely Responses to Medical Referrals**

(Fla.1<sup>st</sup> DCA 2/4/14)

The DCA affirmed the JCC's denial of a one-time change, rejecting the argument that the claimant could choose a pain management physician from an initial general surgeon. However, the DCA reversed the denial of TP, finding the claimant was under authorized medical restrictions, was not at overall MMI and no affirmative defense applied. The DCA remanded the issues of whether the E/C timely responded under the provisions of F.S. s 440.13(3)(i) (the "ten day rule") to requests for specialist referrals. The rule does not require authorization of the referral, but failure to timely respond results in a waiver of the right to contest medical necessity of the referral. Claimant sustained a lumbar and hernia injury in one specific incident. Separate health care providers at different times made referrals for pain management. Without making a determination as to when the E/C responded to these requests, the JCC ruled that those referrals were not "warranted or required". The DCA instructed that the JCC make findings as to whether the first request received a timely response. If so, then the JCC is to determine whether the E/C timely responded to the second request. Although there is no specific analysis, the case can be argued as holding that claimants may not choose a one-time change physician from a different specialty than there currently authorized doctor. [Click here to view Opinion](#)

## **JCC Merit Orders**

### **Compensability**

JCC Humphries (Jacksonville) – Awarded compensability. Bifurcated hearing. The claimant got into an argument with a co-worker, raised his voice, but did not make initial contact. The JCC found the claimant's conduct on a construction site was not unexpected and that the claimant was not the aggressor. [Click here to view Order](#)

JCC Sojourner (Lakeland) – Awarded compensability and IBs. Presumption claim. The claimant was previously found to have sustained hypertension with hypertrophy, CAD and cardiovascular conditions. Under a 2006 d/a the claimant alleged AFib and a 40% PIR for a 2012 d/a. The E/C accepted the AFib as compensable but under the 2006 d/a. The JCC found the 2012 hospitalization for AFib was a new date of disability and therefore a new d/a. However the JCC found that a 10% PIR was appropriate for the new AFib. [Click here to view Order](#)

JCC Pitts (Orlando) - Awarded compensability of hearing loss. The claimant developed hearing loss as an EMT. The EMA (Fetchero) opined that the claimant sustained noise related hearing loss. The JCC found the E/C did not properly preserve the issues of the source of the noise for the EMA to address work versus non work related sources. The JCC also denied the E/C's notice and SOL defenses finding each day at work was an exposure and the claimant's diagnosis required a medical opinion. [Click here to view Order](#)

JCC Humphries (Jacksonville) - Awarded compensability. Presumption claim. The claimant underwent a catheterization due to an abnormal stress test. The catheterization diagnosed CAD. The claimant was off work for 3 days following the catheterization following standard procedures. The JCC found that the restrictions for the testing satisfied the disability requirement. [Click here to view Order](#)

### **Indemnity Benefits**

JCC Hill (Gainesville) – Denied TPD. The claimant returned to work light duty for one day and left early due to pain. The claimant did not return any phone calls or letters from the employer regarding returning to work light duty and was terminated. The JCC analyzed the WC and UC statutes and case law interpreting misconduct, and found the claimant’s failure to communicate or follow up constituted misconduct which operated as a bar to TPD. [Click here to view Order](#)

JCC Holley (VTC Ft. Lauderdale) – Awarded periods of TPD. The claimant was diagnosed with bilateral carpal/cubital tunnel. The JCC awarded TPD for the period when she was under restrictions and not working for the employer. [Click here to view Order](#)

JCC Medina-Shore (Miami) – Denied TPD. Awarded fees for defeating 440.105. The claimant alleged she was pain free for two years before she began to experience increasing back pain. Around that time she treated at an ER for back pain after lifting her grandchild but did not mention that incident to the doctor or in her depo. The JCC found the claimant’s omission reasonable but found her allegations not credible. The JCC found the claimant reached MMI and denied TPD. [Click here to view Order](#)

JCC Lorenzen (Tampa) – Awarded TPD. The claimant sustained two injuries in 2011 and 2012 with the related employers but two carriers. The second carrier eventually accepted the claimant as PTD. The claimant had poor recovery following a hand injury and the JCC found that he was prohibited from using his left hand. TPD was awarded for weeks when the claimant made less than the 80/80 formula. The JCC then found the claimant’s left shoulder injury caused further disability and awarded TPD from the second carrier. [Click here to view Order](#)

JCC Sculco (Orlando) - Awarded TPD. The unrepresented claimant received restrictions for compensable hernia injuries but was at MMI per the EMA (Galliano). However a dermatologist did not assign MMI until a later date. The JCC found that as the claimant had restrictions and had not reached overall MMI, he met his initial burden to receive TPD, and no E/C defenses overcame that position. [Click here to view Order](#)

JCC Rosen (St. Petersburg) - Awarded TPD. The claimant sustained a shoulder injury. The E/C offered help for any work requiring two hands, but the help would have required another staff member to leave their patients. The JCC found the claimant was restricted from her employment, including difficulty driving and awarded TPD. [Click here to view Order](#)

### **Medical Benefits**

JCC Hill (Gainesville) – Awarded TENS Unit. 1997 d/a. A new physician took over in 2013 and recommended the TENS unit to treat the claimant’s various complaints and opined that the IA was the MCC and the treatment was medically necessary. [Click here to view Order](#)

JCC Anderson (Daytona Beach) – Denied pain mgmt. Denied E/C’s 440.105 defense. The JCC found res judicata barred the 440.105 defense for any misrepresentations that had occurred before the most recent merit hearing. The JCC also found that while the claimant violated opioid agreements, this was not a misrepresentation. The JCC however found the claimant's significant prior back injury and treatment was the MCC of the need for future pain mgmt. [Click here to view Order](#)

JCC Pecko (Ft. Lauderdale) - Denied second opinion, hip injection and out of pocket expenses. 1999 d/a. The claimant had a prior second opinion 12 years earlier. The JCC found no medical necessity existed for a new second opinion. Further the JCC found the IA was no longer the MCC of any need for treatment for the claimant's hip, and that a 2010 shoulder surgery was not related. [Click here to view Order](#)

JCC Lazzara (VTC Ft. Lauderdale) - Denied PT for claimant's back. The claimant alleged his back resulted from a compensable knee injury. The JCC found the claimant did not present evidence of causation within a reasonable degree of medical certainty. [Click here to view Order](#)

JCC Basquill (West Palm Beach) - Awarded dental eval. A year after a cervical fusion the claimant awoke with chipped teeth. The authorized doctor signed conflicting conference summaries, however the JCC found that in depo the doctor opined that the evaluation was necessary to determine causation. [Click here to view Order](#)

JCC Spangler (VTC Miami) - Awarded continued treatment. Denied E/C's SOL defense. The E/C filed a motion to dismiss PFBs for failure to prosecute. The claimant responded to the motion and filed a new PFB. The JCC entered a 2012 order dismissing the old PFB. The JCC rejected the E/C's argument that the prior order should be vacated and re-issued dismissing all PFBs, which would have perfected the E/C's SOL defense. [Click here to view Order](#)

JCC Sojourner (Lakeland) - Awarded trial SCS and MRI. 2002 d/a. The JCC found a trial SCS was reasonable and medically necessary but authorization for permanent implantation was premature. [Click here to view Order](#)

JCC Hogan (Ft. Lauderdale) - Awarded continued pain mgmt. 1998 d/a. The E/C argued the doctor was authorized but limited to two visits per year based upon a peer review and subsequent IME. The JCC accepted the opinions of the doctor and claimant's IME that more than two visits per year were medically necessary. [Click here to view Order](#)

JCC Lewis (Ft. Lauderdale) - Awarded screened enclosure and mat. Denied secondary hot tub, porch modifications and claimant's choice of doctor. 1993 d/a. A prior order awarded a hot tub. The JCC accepted that a screened enclosure was medically necessary as the E/C's doctors opined that the hot tub was not medically necessary, which had already been decided. The JCC also found a small non slip mat necessary, but not the mat the claimant purchased. The claimant lives in North Florida but spends up to a week per month in South Florida. The JCC found a second tub or access to one was not medically necessary. The JCC similarly found that the claimant chose to place the tub on the porch for convenience. Finally the JCC found the E/C retained the right to select a physician for the claimant's one time change. [Click here to view Order](#)

*Please note that the DCA Opinions and Merit Orders contained in this newsletter are non-final until 30 days after their rendition. Until that time, they are subject to amendment, vacation, or other action which may remove or alter some or all of the decision. Please contact any HRMCWW attorney if you have a question as to the finality and applicability of an Opinion or Order. We endeavor to include any amendments or alterations to Opinions or Orders that may occur at a later date.*

<b>Treasure Coast</b>	<b>North Florida</b>	<b>Miami-Dade</b>	<b>Broward</b>	<b>Southwest Florida</b>	<b>Atlanta</b>
772-489-2400	850-222-1200	305-423-7182	954-580-1500	239-939-2002	404-459-2722