



**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\*  
Matthew W. Bennett\*

**CASE NOTES**  
**CASE LAW SUMMARY**  
**July 2010**

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

**TPD**

**Williams v. Archer Western Con./Gallagher Bassett, (Fla. 1<sup>st</sup> DCA 7/30/2010)**  
**(William H. Rogner and Matthew W. Bennett)** Reversed the JCC’s denial of TPD based upon the recent Toscano decision. The DCA noted “no refusal by Claimant of modified work, nor was Claimant offered modified work; Claimant was not terminated for misconduct; and Claimant did not commence employment elsewhere, followed by termination for misconduct or economic reasons.” [Click here to view Order](#)

**Appellate Attorney Fees**

**South Florida Express Bankserv, Inc. v. Aponte, (Fla. 1<sup>st</sup> DCA 7/30/2010)**  
Awarded attorney fees as a sanction for filing a response to a motion to compel payment of attorney fees. A prior interlocutory appeal (PCA) awarded attorney fees for the claimant and remanded to the JCC. When the JCC eventually found the claim did not fall under chapter 440, the E/C refused to pay the appellate attorney fee. The E/C argued that the DCA was without authority to enforce its order awarding fees, which was rejected. The DCA then sanctioned the E/C for requiring the motion to be filed and filing a response to the motion to compel. The DCA noted the Appellant’s ignorance and complete disregard of established statutes and case law. [Click here to view Order](#)

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  
Gina M. Jacobs  
Stephen G. Conlin  
Of Counsel  
\*Florida Bar Board  
Certified Workers’  
Compensation  
† Florida Bar Board  
Certified Appellate  
Practice

Please direct replies or inquires to our Winter Park office

**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 36<sup>th</sup> 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

[www.hrmcw.com](http://www.hrmcw.com)

## **Medical Benefits**

**Charlotte County Public Schools/Employers Mutual v. Gary, (Fla. 1<sup>st</sup> DCA 7/30/2010)** The authorized doctor initially recommended hearing aids due to the industrial accident. The doctor later reversed her opinion based upon an incorrect pre-existing history. The DCA noted that although the JCC was free to reject the opinion of the doctor, even when uncontroverted, that rejecting the opinion did not ipso facto establish a causal connection. The DCA noted that despite appropriate questions to the doctor, the doctor was unwilling to make a causal connection. [Click here to view Order](#)

## **Medical Benefits, Diagnostic Testing**

**Laxner v. Target Corp./Sedgwick, (Fla. 1<sup>st</sup> DCA 7/30/2010)**

The DCA affirmed a denial of diagnostic testing and treatment recommended by an authorized doctor. The DCA noted that the JCC rejected the opinions of the authorized doctor and accepted the E/C's IME opinion that the extent of the injury was known and ascertainable and the testing was not needed. [Click here to view Order](#)

**McKenzie v. Mental Health Care, Inc./Summit Claims Center, 1 D09-3922**

The Court reversed the JCC's denial of psychiatric benefits, which found that the psychiatric injury was not a manifestation of her physical injuries (specifically bruising and temporary loss of voice) that occurred when the Claimant was assaulted while working at a mental health facility. In reversing the JCC's Order, which was based on s. 440.093(2), the Court clarified that s. 440.093(1) provides three scenarios where mental or nervous injuries may be claimed, and s. 440.093(2) presents a fourth.

The first scenario in s. 440.093(1) is a mental or nervous injury due to stress, fright, or excitement alone. The Court uses an example of a robbery at gunpoint, without any physical injury. While a psychiatric condition might result, this is not a compensable injury.

The second scenario is based on the second section of s. 440.093(1), which provides that no benefits may be awarded under this chapter for mental or nervous injuries without an accompanying physical injury requiring medical treatment." The Court held this is a second scenario where an individual may have a physical injury and simultaneous mental or nervous injury. The court's example was a sexual assault where the Claimant sustains a physical injury, and a mental injury, separate and apart from the physical injury. The Court noted this would result in two separate compensable injuries, and seems to indicate the major contributing cause standards of s. 440.09 alone would apply.

The third scenario is based on the third sentence of s. 440.093(1), which provides "A physical injury resulting from mental or nervous injuries unaccompanied by physical trauma requiring medical treatment shall not be compensable under this chapter." In such cases, where stress or fright occur, and this causes a physical injury (The court uses a heart attack or internal failure as an example), the injuries would not be compensable.

The final scenario is spelled out in s. 440.093(2), where mental or nervous injuries occur as a manifestation of a compensable injury. This is the traditional scenario of chronic pain or loss of limb causes depression. This is compensable, again if the injury is the major contributing cause of the mental or nervous condition. The Court did not apply the major contributing cause standard for this element in any detail.

In this case, both parties focused their trial argument on s. 440.093(2), which was

the focus on appeal. However, in reviewing the case *de novo*, the First District Court of Appeal indicated this more likely fell under the second sentence of s. 440.093(1), and reversed the case for further proceedings and the taking of evidence. [Click here to view Order](#)

### **TPD Benefits/Causal Relationship/Burden of Proof/Affirmative Defense**

**Wyeth/Gallagher Bassett v. Toscano, (Fla.1<sup>st</sup> DCA 7/7/2010)** In a lengthy opinion, the First DCA clarifies the standard for awarding TPD benefits. The DCA affirmed the JCC's award of TPD, commenting extensively on the burden of the claimant to prove prima facie entitlement to TPD (restrictions and resulting reduction in wages) and the affirmative duty of the E/C to prove the industrial accident was not the MCC of wage loss prior to MMI. The opinion indicates that no job search is required where the E/C fails to introduce evidence of a competing or superseding cause of wage loss. [Click here to view Order](#)

### **PTD/Evidence/Vocational Testimony**

**Hernandez v. Paris Ind. Mfg./Bridgfield/Summit, (Fla.1<sup>st</sup> DCA 7/7/2010)**

The 1<sup>st</sup> DCA reversed and remanded a denial of PTD benefits, finding the JCC improperly refused to consider testimony of a vocational expert. After the claimant filed for PTD, the E/C conducted a vocation evaluation/reemployment assessment pursuant to s.440.491(1)(e). That expert's report contained findings which were detrimental to the E/C's defense of the PTD claim. That report was provided to the claimant, and the E/C and claimant listed the expert on the Pre Trial. Less than 30 days before trial, the E/C sought to "delete" their expert and replace him with an additional expert, which the JCC allowed over the claimant's objection. At trial, the JCC based his denial on the second expert's more favorable report, and denied the admission of the first report and its findings, holding that each side gets only one vocational expert. The First DCA specifically held there is no limit on the number of vocational experts either side may have, and summarily rejected the E/C's objections as to work product privilege. The DCA noted that due process requires the JCC to admit relevant evidence, unless a specific exclusion or privilege applies. [Click here to view Order](#)

### **SDTF/Assessments**

**Fl.Sheriff's WC Self Ins. Fund v. Dept. of Financial Services, (Fla.1<sup>st</sup> DCA 7/7/2010)** The First DCA affirmed the finding of the Fl. Dept. of Financial Services that the Fl. Sherriffs WC Fund was not entitled to reimbursement of assessments between 2002 and 2008 of over 6.6 million dollars. The Court rejected the argument that the Fund should receive a refund because the SDTF applies only to dates of accident after July 1, 1998, and their coverage of claims did not begin until 2002. The Court found the language of s.440.49 applies to all insurers, regardless of their coverage dates or founding. The court also rejected the Fund's constitutional arguments. [Click here to view Order](#)

### **Impairment Income Benefits/Duties of E/C/Ripe IssuesElias v. Worldwide Wide**

**Concessions/Comp Options, (Fla.1<sup>st</sup> DCA 7/7/2010)** The First DCA affirmed the

JCC's denial of TPD and an increase in Impairment rating. However, the DCA reversed and remanded the JCC's failure to rule on payment of IB benefits at the correct rate. The claimant in her pre-trial memo and on a motion for rehearing, sought to have IB benefits paid based upon an AWW that was agreed upon at trial. The Judge failed to rule on the issue. The DCA rejected the E/C argument that the claimant did not request increased IBs at the correct rate, and found that no support had been given for the rate at which IBs had been paid. The Court again emphasized that the E/C bears the burden to place benefits in the hands of claimant with as little economic or administrative burden as possible. [Click here to view Order](#)