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 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

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

Bocelli v. Southwest Florida Investments, (Fla. 1st DCA 6/21/10) Claimant filed a PFB on 1/2/08. JCC issued a *sua sponte* order dismissing the PFB without prejudice for lack of prosecution on 2/13/09 because the docket reflected no record activity for more than a year. Claimant was given 10 days to file a motion for rehearing or to vacate the order. Claimant timely filed a motion to set aside the order and attached several notices of deposition that had been served but not filed. The JCC did not rule on the motion and it was unclear if any steps were taken to get a ruling prior to the Notice of Appeal. A concurring opinion suggested that the JCC issue an order giving the claimant 10 days to show cause why the PFB should not be dismissed for lack of prosecution. He also noted that the claimant could have done any of the following to prevent a needless appeal: 1)filed the deposition notices at the time they were served, 2)conferred with the E/C to obtain agreement that the dismissal was erroneous prior to filing the motion to vacate the dismissal order, 3)set the motion for a hearing before the JCC, 4) or not filed the appeal because the dismissal was without prejudice, SOL had not run, and he could have re-filed. DCA dismissed the appeal for lack of jurisdiction. **Click here to view Order**

Seminole County Government v. Kimmel, (Fla. 1st DCA 6/9/10) JCC's order generally awarded indemnity benefits, but did not clarify whether they were TTD or TPD. It reserved jurisdiction if the parties were not able to calculate the type and amount of indemnity awarded. The First DCA found that the order was not a final order

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

or an appealable non-final order and dismissed the appeal. **Click here to view Order**

International Ship Repair and Marine Services, Inc., v. Aleman, (Fla. 2d DCA 6/18/10) Two employees and an employer filed a motion for summary final judgment which alleged that pursuant to the Longshore Act they were immune from a wrongful death suit brought by a representative of the deceased claimant's estate. The circuit court entered an order denying summary final judgment. The DCA found that it did not have jurisdiction to review the non-final order as it did not state that the immunity defense was not available "as a matter of law." The Court converted the appeal to a petition for writ of certiorari, but found that it still did not have jurisdiction because the order did not depart from the essential requirements of the law and result in material injury for the remainder of the proceedings, for which there was no adequate remedy on appeal. **Click here to view Order**

Temporary Indemnity/Competent Substantial Evidence

Frank Winston Crum Ins. Inc. V. De Oca, (Fla. 1st DCA 6/22/2010)
(William H. Rogner and Geoff Curreri) The 1st DCA reversed the JCC's award of TTD from 2/5/09 to 10/7/09, as it was not supported by competent substantial evidence. The only evidence was that the claimant's authorized surgeon discussed the fact on 2/5/09 that the claimant should return to work. **Click here to view Order**

Statute of Limitations/Failure to Obtain MMI/PIR/Detrimental Reliance.

Gauthier v. FIU/State of FL, Div.of Risk Management, (Fla.1st DCA 6/22/2010)
The 1st DCA reversed the JCC's finding that the SOL ran on the claimant's case. The claimant sustained a compensable eye injury in 9/05. She obtained authorized treatment and had her last authorized visit on 6/21/07. In July of 2008, the claimant scheduled a follow up for August of 2008. The E/C denied authorization for that visit. The E/C attempted on at least two occasions to obtain PIR/MMI information via DWC 25s, but the facility did not provide this information. Evidence during litigation indicated the claimant would have reached MMI with a PIR prior her 6/21/07 authorized visit. In a lengthy opinion, the DCA held that the carrier had an affirmative duty to obtain the PIR and MMI information. The PIR would have resulted in a payment of IB benefits to the claimant, and the carrier's failure to obtain this information resulted in estoppel. The DCA rejected the E/C position that they were entitled to the SOL defense because they had not made a representation upon which the claimant relied. The Court held the carrier may obtain PIR and MMI information from a physician other than the authorized treating doctor, and stated it was not the claimant's responsibility to obtain this information in a self executing system. **Click here to view Order**

Assertion of Fifth Amendment/Dismissal with Prejudice/Abuse of Discretion

Fernandez v. Blue Sky/Venecia Foods/Aequicap, Fla. 1st DCA 6/22/2010)
The First DCA held that the JCC abused his discretion in dismissing the claimant's PFB with prejudice. The claimant refused to answer a number of questions related to false or fraudulent social security information. The E/C argued that such failure undermined their ability to conduct discovery. The JCC found that the claimant did not identify specific areas that to which she could testify (to the exclusion of others) and that the failure was relevant and germane to indemnity and medical issues. However, the 1st DCA noted that

the sanction of dismissal with prejudice is the harshest penalty available, and that the E/C, as the party moving for dismissal, failed to demonstrate "meaningful prejudice", which is the required standard. **Click here to view Order**

Rule Nisi/Jurisdiction of Circuit Court to Enforce WC Order for Costs against Claimant

Orange County/ASC v. New, (Fla. 5th DCA 6/25/10) The E/C obtained an award of prevailing party costs of $2594.97 against the claimant. When the costs were not paid, the E/C sought enforcement via the Rule Nisi procedure contained in F.S. s. 440.24. The claimant challenged this under subsection (1) of that section, arguing that the enforcement mechanism of that Chapter is available only against Employers and Carriers. The Circuit Court agreed, and found it was without jurisdiction to entertain the motion. The E/C appealed, arguing that the legislature overlooked this section when it amended the law in 2003 to give E/Cs the ability to obtain prevailing party costs. Prior to 2003, only claimants could obtain such costs. The E/C also argued that the section was unconstitutional by not providing an enforcement mechanism to E/Cs in the same manner as it provides for claimants. The Fifth DCA rejected these arguments, indicating they could not simply fix the alleged "glitch". The DCA reasoned it is entirely plausible the legislature intended the expedited enforcement mechanism to apply only to claimants, and further suggested the E/C may seek to enforce their award "in the appropriate court having jurisdiction over the amount in controversy", ie. county court. **Click here to view Order**

Attorney Fees/Jurisdiction of JCC for proceedings outside of Chapter 440

Castellon v. RC Aluminum/AIG Svcs., (Fla.1st DCA 6/25/10) The claimant attorney successfully negotiated and resolved a dispute between the claimant and his Health Insurance Company. The dispute with the health insurer arose out of the same facts as the WC claim, but was not subject to a proceeding under chapter 440. The claimant and his attorney agreed to a fee, and asked the JCC to approve the fee. The First DCA affirmed the JCC's ruling that F.S. s. 440.34(1) (2007) only allows a JCC to approve a fee for services in connection with proceedings under Chapter 440. As such, the JCC was without jurisdiction to approve the fee, even though the benefits arguably provided a "tangential benefit" to the claimant in his workers' compensation case. **Click here to view Order**

Expert Medical Advisors/Timeliness of Request

Romero v. JBPainting and Waterproofing, Inc./Summit, (Fla. 1st DCA 6/21/2010) The 1st DCA found the JCC abused his discretion in rejecting the claimant's motion to appoint an EMA. The claimant's 6/18/09 PFB seeking IBs at 5% was placed on the expedited hearing docket. Two doctors had given the claimant a 0%, and the claimant's IME gave the claimant the 5% on 5/14/09. On 8/12/09, the claimant filed a "notice of Conflict in Medical Opinions", which the JCC denied as "vague, nonspecific and lacking attachments". At the 8/26/09 Expedited Hearing, the JCC agreed with the claimant's renewed position that a conflict existed, but found the request for an EMA was now untimely. The JCC additionally found the IME doctor had not "put his opinion in the proper context to truly create conflict", and then denied Claimant's request for payment of IBs at 5%. The DCA reversed, finding claimant's request complied with the standard

of being made with "reasonable promptness". Specifically, they noted that although claimant was on notice of the disagreement of the medical providers as of the 5/14/09 IME report, the claimant had "no reason to believe benefits would not be provided" until the E/C issued their Notice of Denial on July 2, 2009. The DCA also reversed as to the JCC's denial of the EMA on the grounds that the IME's opinion was not in the proper context and not sufficiently persuasive. **Click here to view Order**

Settlement/Enforcement

Cacares v. Sedanos Supermarket/Johns Eastern,(Fla.1st DCA 6/9/2010) The 1st DCA reversed the JCC's Order enforcing a settlement agreement. The JCC concluded that the severance agreement and release was a material part of the settlement. However, under that agreement, the claimant had seven days following execution of the settlement documents to revoke the release. As the claimant revoked the agreement without ever executing the documents, the agreement was not enforceable. **Click here to view Order**

Compensability/Subsequent Conditions/Stipulations of Parties

Jackson v. Merit Electric/ACE/ESIS, (Fla.1st DCA 6/9/2010) The 1st DCA reversed the JCC's determination that a subsequent back condition was not related. The claimant had a compensable knee injury in 1984. In 2003, the claimant alleged that when rising up after making a pool/billiard shot, he experienced back pain that he related to his original knee injury. In 2007, he filed a PFB alleging that the back injury was compensable. The JCC then signed an order following a stipulation of the parties that the "back condition was compensable" and that a specific doctor was authorized to provide treatment. Subsequently, that doctor opined that the back condition had no work connection whatsoever. The E/C then denied further treatment. The DCA noted that while the carrier was not bound to treat the back forever by its stipulation, they sustained the burden to show the causal connection was thereafter broken. The DCA discussed at length the inexact nature of the stipulation, the need for specifics regarding exactly what "compensable" meant, and the fact that there was insufficient basis for the doctor to opine that the intervening pool incident was the cause of the claimant's back problems. **Click here to view Order**

Appeals/Timely Filing of Notice of Appeal

Holmes v. Brown, Terrell, et al, (Fla.1st DCA 6/9/2010) The DCA holds that a pro se appellant's notice of appeal filed four and a half years after the entry of a Final Order is not timely and must be dismissed for lack of jurisdiction. **Click here to view Order**