



**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**  
**June 2011**

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

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/ Change of PCP/Burden of Proof**

**Thiess v. City of Panama City Beach/Fla. League of Cities, (Fla.1<sup>st</sup> DCA 6/30/2011)**

The DCA reversed the JCC’s order denying a change in PCP under a managed care plan. The DCA found that the JCC erred in finding the claimant failed to sustain his burden of proof in failing to introduce a copy of the managed care plan. The DCA noted that the statutory provisions required all such plans to provide for a change in PCP. Similarly, as all such plans under the statute provide a change of PCP as a matter of right, it was error for the JCC to deny the change based upon a lack of proof of medical necessity. [Click here to view Order](#)

Stephen G. Conlin  
Of Counsel

**One Time Change vs. Request for Specialist Consultation**

**Castillo v. Total Source Inc./AIG, (Fla.1<sup>st</sup> DCA 6/30/2011)(On Motion for Rehearing)**

The DCA granted Appellee’s Motion for Rehearing. The original opinion was issued by the DCA on March 31, 2011. In the earlier opinion, the court held that the claimant had an absolute right to a 1x change in physician, regardless of the date of accident. The DCA withdrew that opinion, and substituted it with an opinion which does not include

\*Florida Bar Board  
Certified Workers’  
Compensation  
† Florida Bar Board  
Certified Appellate  
Practice

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

*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

that pronouncement. The substituted opinion noted that the claimant sought an evaluation with a spine specialist, as recommended by the authorized orthopedist Dr. Ellowitz. The E/C then authorized, and the claimant treated several times with, Dr. Jarolem. The claimant subsequently sought to return to Ellowitz, which the carrier denied. The DCA found the initial request was for a specialist evaluation under 440.13(2)(a), and that no record evidence existed that the claimant sought a onetime change in orthopedist under subsection (2)(f). The DCA agreed that the claimant could return to Dr. Ellowitz, under the above analysis, and that there was no evidence (or statutory basis) to de-authorize Dr. Ellowitz, although the claimant had treated on multiple occasions with Dr. Jarolem. [Click here to view Order](#)

### **Illegal Employment Status/PTD Benefits**

#### **HDV Construction Systems/Gallagher Bassett v. Aragon, (Fla.1<sup>st</sup> DCA 6/28/2011)**

The DCA affirmed the JCC's Order awarding PTD benefits. The JCC found that the employer could not use the claimant's illegal immigrant status as a shield against paying PTD, after hiring him with knowledge of his illegal status. The DCA approved of the JCC's reliance on the Candelo case, which provides the rationale that industry should have the burden of being responsible for injuries to employees they hired with knowledge of their illegal status. The opinion also approves the medical/vocational analysis for PTD benefits, rejecting the Employer's position that a finding of PTD in this case "rewards" the claimant. The claimant cross appealed the JCC's finding that he could not award ongoing PTD benefits. While the DCA noted several recent cases discuss "new periods" of PTD benefits in the context of *res judicata*, they held the JCC is empowered to award ongoing PTD benefits. [Click here to view Order](#)

### **Temporary Partial Disability/Standard of Appellate Review**

#### **Morrison v. Dept. of Veteran's Affairs/State Div. of Risk Mgmt., (Fla.1<sup>st</sup> DCA 6/8/2010)**

The First DCA affirmed the JCC's denial of TPD. The court found that although the claimant had intermittent restrictions, the JCC did not err in finding the claimant failed to prove her case. The DCA noted that one treating doctor testified that none of the claimant's restrictions were due to the workplace accident. The court found the JCC properly discounted the second doctor's equivocal opinions regarding the need for restrictions, and the need to "backdate" the restrictions. Significantly, the DCA included the following language: "**We further remind the workers' compensation community that although we normally review a JCC's order to determine whether competent, substantial evidence supports it, "[a] decision in favor of the party without the burden of proof need not be supported by competent, substantial evidence.**" [Click here to view Order](#)