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 S. Gluckman

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

Stephen G. Conlin
Of Counsel

*Florida Bar Board Certified Workers' Compensation
† Florida Bar Board Certified Appellate

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

Sanctions/Dismissal with Prejudice/Preservation of Error
Verkruyesse v. Fl. Carpenters Regional Council/Ulico Casualty, (Fla.1st DCA 1/29/2010) The DCA affirmed JCC Castiello's dismissal with prejudice of a PFB. The claimant was a no show for her first deposition, nor did she file a motion for protective order. The Court entered a Motion to Compel the claimant to appear for a second noticed deposition. One business day before that deposition was to occur, the claimant filed a motion for protective order. That motion was denied, and the claimant failed to appear again. The E/C filed the motion to dismiss and to assess fees and costs. The Court overlooked the claimant's response to the motion, and entered the order, based in part on the impression that the claimant failed to file a responsive pleading under the Q Rules. The claimant immediately appealed. The DCA affirmed the JCC, noting the claimant failed to seek to address the error via a motion for rehearing, and thus waived the issue. The DCA also affirmed on the merits, finding that CSE supported the claimant's willful violation of a court order. They noted her failure to appear for the depositions, and further noted that the alleged grounds("claimant moved to Ohio") in the second motion for protective order (filed one business day before the deposition) was known by the parties since the claimant filed a letter with that information with the JCC two months earlier. In other words, there was no reasonable ground

for the second motion for protective order. **Click here to view Order**

Temporary Benefits/Amendment to Pretrial/AWW

Rene Stone Work Corporation and Florida Citrus & Industry/USIS v. Gonzalez, (Fla. 1st DCA 1/25/10) The DCA reversed the JCC's award of temporary indemnity. The claimant is an illegal alien who never had a social security number. The employer did not require him to document his citizenship status, and admitted they did not report the claimant's wages to the IRS or pay any payroll taxes on the claimant. The JCC accepted the claimant's testimony re. wages and ruled his AWW was $290. A CPA helped the claimant file taxes for 2008 (D/A: 9/4/08), and on his attorney's advice, only reported income from this particular employer, omitting wages earned from other employers. The claimant testified that he filed the tax return for the sole purpose of obtaining workers' compensation benefits. The CPA also provided testimony. One week after trial, the E/C moved to amend the pretrial stipulation to include a misrepresentation defense, based on the claimant's and CPA's testimony that the claimant did not report all the wages he earned during the relevant tax year. The DCA found that the E/C should have, or could have known of the potential misrepresentation defense prior to the final hearing if they had been more diligent in their discovery. As to the issue of the AWW, the DCA rejected the E/C's argument that the claimant failed to comply with F.S. § 440.02(28) by not filing "*correct"* forms (emphasis in original). However, the E/C's interpretation of the various IRS publications was not introduced as evidence at the final hearing and the testimony of the CPA was unrefuted. The DCA found that the claimant complied with the plain meaning of the statute by timely filing a tax return and informing the IRS of the wages that he earned with the employer with whom he was injured. **Click here to view Order**

Medical Bills/Temporary Benefits/AWW

J.B.D. Brother's and Masonry, Inc and Florida Citrus Business & Industry/USIS v. Miranda, (Fla. 1st DCA 1/25/10) Claimant was an illegal alien (DOA 7/23/08). The employer did not immediately report the accident to the carrier, instead paying for the claimant's medical care and lost wages until he recovered. Those payments, and the wages the employer paid the claimant, were paid "under the table." The employer stopped paying in September 2008 and the claimant then filed a Petition for Benefits. Thereafter, the employer reported the accident to the carrier. The carrier accepted compensability, but denied indemnity benefits, as there were no wages reported to the IRS. The following April, the claimant filed several forms with the IRS. The parties stipulated that the wages the claimant ultimately reported to the IRS equated to an AWW of $480, but the E/C argued that because the claimant did not properly report his income to the IRS by failing to file the correct forms or complete information, he failed to establish wages for the purposes of calculating an AWW. The JCC rejected the E/C's argument, and the DCA agreed, citing *Rene Stone Work Corp (above).* The DCA reversed that portion of the JCC's Order which directed the E/C to pay the bill for an MRI that had been recommended by an authorized treating physician prior to the filing of the PFB. Specifically, the DCA stated that the JCC lacked jurisdiction to order payment of the MRI bill, and that medical bills submitted by an authorized medical provider are under the exclusive jurisdiction of AHCA. The DCA affirmed the JCC's award of TTD benefits, without discussion. **Click here to view Order**

Burgos v. Atlas Paper Mills.Zenith, (Fla.1st DCA 1/21/2009)(PCA Opinion) ***William H. Rogner for Apellees*** **-** The JCC determined our client was the prevailing party even though the claimant prevailed on some claims and the E/C prevailed on others. The JCC awarded the E/C costs following a merit hearing. The claimant appealed the judge's finding. Although the First DCA declined to provide a written opinion on the issue, this decision affirms the JCC's findings in favor of the employer/carrier. **Click here to view Order**

Prevailing Party Costs/Timeliness
Shackelford v. CTL Dist./Gallagher Bassett, (Fla. 1st DCA 1/12/10) The 1st DCA approved the JCC's award of prevailing party costs to the E/C. The claimant argued the E/C's 11/12/08 motion, which sought costs from a hearing held on 11/2/07, was untimely. The DCA noted the JCC correctly ruled that no time limitation exists for a party seeking prevailing party costs. The DCA also noted the claimant failed to meet his burden to show the JCC abused his discretion in failing to disallow certain items as taxable costs. The opinion notes that time limits for seeking prevailing party costs do exist in civil litigation, and that parties with the power to do so may consider extending such a limit in WC cases. Click here to read case

Attorney Disqualification/Representation of Multiple Parties
Lincoln Associates/Guarantee Ins. v. Wentworth Const./Summit Claims and Mejia, (Fla. 1st DCA 1/12/10) The DCA reversed the JCC's order denying a motion to disqualify a law firm. The DCA found error, as the firm undertook to represent opposing parties in the same matter. The employee filed PFBs against Lincoln/Guarantee and Wentworth/Summit. Lincoln alleged claimant was a borrowed servant of Wentworth, and Wentworth alleged the claimant was an employee of Lincoln. Two months before the final hearing, Guarantee retained the firms "SIU Unity/Fraud Investigation Unit" to audit Lincoln in an effort to determine whether the claimant was on Lincoln's payroll, and to locate the owner of Lincoln. When Lincoln/Guarantee's attorney learned of this, he moved to disqualify the firm as attorney for Wentworth. In reversing, the DCA cited Rule of Professional conduct 4-1.7, which requires only a showing that an attorney/client relationship exists with both parties. The court noted concurrent representation gives rise to an "irrefutable presumption" that a conflict exists. The law firm conceded it represented both parties, and failed to provide written consent from both parties, and failed to prove that representation of both would not adversely affect the interests of both parties. Click here to read case

Discovery/Imposition of Sanctions
Lincoln Associates/Guarantee Ins. v. Wentworth Const./Summit Claims and Mejia, (Fla. 1st DCA 1/12/10) The same parties were involved in a separate appellate proceeding, where the JCC imposed sanctions against Lincoln for failure to attend scheduled depositions. Following a hearing on a motion to compel discovery and impose sanctions, the JCC entered an order compelling a representative of Lincoln to appear for deposition, and reserved jurisdiction as to sanctions, which could include the striking of defenses. After no representative of Lincoln appeared for a second noticed deposition, the

JCC entered an order imposing sanctions, and striking the defenses of Lincoln and the carrier as to employer/employee relationship and compensability. The DCA cited Q rules and prior case law requiring the JCC to make specific findings as to willfulness, noting that no such findings appeared in the order striking defenses. Click here to read case

Statutory One Time Change/Temporary Benefits

Harrell v. Citrus County School Board/FSBIT, (Fla. 1st DCA 1/15/2010) The DCA was again called upon to interpret the statute regarding a claimant's request for a one time change in physician. The DCA reversed the JCC's Order finding that the claimant was timely provided with a one time change physician, and subsequently not entitled to choose her own physician. After treating with an initial doctor, the claimant requested a one time change on 10/9/08. On 10/14/08, the E/C sent a letter to the claimant attorney indicating they agreed claimant was entitled to a one time change, and that appointment information would follow. On 10/28/08, a second letter was sent informing the claimant of an appointment set for 11/14/08. Five days later, the claimant filed a PFB requesting a different doctor as her one time change based on an untimely response. The JCC subsequently denied the one time change, finding no ongoing MCC, and further finding that the E/C timely informed the claimant of the appointment on 10/14/08. The DCA noted the claimant is entitled to a one time change regardless of the initial doctor's opinion re: MCC, and further found no CSE to support the finding that the E/C's physician was mentioned in the 10/14/08 letter. The DCA noted that merely acknowledging the claimant's statutory entitlement to a one time change is insufficient, and that the statute requires the E/C "shall authorize an alternative physician…within five days.."(emphasis in original). The DCA acknowledged that per Dorsch v. Hunt, the E/C is not required to schedule the appointment within five days, but clearly states the physician must be identified. There is no discussion of the practical consideration of such a requirement. However, it appears the indication is to specifically authorize a specific physician, and then, when that doctor refuses to see the claimant, argue that the E/C fulfilled their duty by duly authorizing the doctor. The TP issue was affirmed as it was supported by CSE. Click here to read case