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

CASE NOTES
CASE LAW SUMMARY
May 2010

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

Medical Evidence/Household Duties

ABC Home Health/AIG Claims v. Lawson, (Fla. 1st DCA 5/26/2010) The E/C appealed the JCC's award of a hot tub, dental evaluation and lawn maintenance. The DCA affirmed as to the first two benefits, but reversed the award of lawn care, finding no requisite medical evidence to establish that there was a medical need for such an award, or that there would be adverse medical consequences if the yard were not maintained. **Click here to view Order**

Employee Misconduct

Jones v. Fla. Unemployment Appeals Comm./Carnival Cruise Lines, (Fla. 1st DCA 5/26/2010) The DCA affirmed the FUAC determination that the claimant was not entitled to UC benefits. On December 2, the claimant requested to be out of work on unpaid leave beginning December 14. On December 10, the claimant received an email denying her request. Despite this, the claimant failed to appear for work Dec. 14-17th. When contacted on the 17th, she indicated she would not return until December 31st. At that time, and even at hearing, the claimant would not give any reason for her absence other than "personal reasons". The DCA analyzed the definitions of "misconduct" found in F.S. 443.036(29)(2008) (found also in 440.02(18)(2009) and considered whether there was (a) ***Conduct demonstrating willful or wanton disregard of an employer's interests***

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

and found to be a deliberate violation or disregard of the standards of behavior which the employer has a right to expect of his or her employee; or (b) Carelessness or negligence to a degree or recurrence that manifests culpability, wrongful intent, or evil design or shows an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his or her employer. The DCA found her failure in the Record to offer any valid explanation for her absence removed any opportunity for the hearing officer to determine whether her absence was justified. **Click here to view Order**

Appeals/Dismissal as Sanction

Roth v. G.W. Rod Busters/USIS, (Fla.1st DCA 5/28/2010) The First DCA dismissed *per curiam* the claimant's appeal for failure to timely respond to an Order to Show Cause. On 2/25/10, the Court issued an Order to Show Cause why the appeal should not be dismissed, as the Order appeared to be non-final and non-appealable. That Order gave the appellant 10 days to respond. The DCA Docket showed separate responses filed on 4/9/10 and 4/18/10 asking that the court consider the appeal alternatively as a Petition for a Writ of Mandamus. The DCA dismissed the appeal under the sanction provisions of Fl.R.of App.P. 9.410. The DOAH docket suggests the claimant sought to appeal a September '09 order based on either a mistake of fact or that it was a subject to review for 24 months. The JCC denied that invitation, and the DCA dismissed the claimant's attempt to appeal the October 13 evidentiary order. **Click here to view Order**
Underlying Order **Click here to view Order**

AWW/JCC's power to reject Stipulations

Salinas v. C.A.T. Concrete LLC/Claims Center, (Fla. 1st DCA 5/21/2010)
The parties agreed on the Pre-Trial Stipulation that the claimant's AWW was $600.00. At Trial, the claimant testified he was an illegal immigrant and had not filed tax returns. The JCC found pursuant to Fast Tract Framing v. Caraballo that the claimant therefore had no wages, and denied the claim for TPD. The First DCA affirmed the JCC's decision, and further affirmed the JCC's rejection of the claimant's unauthorized treating physician's testimony. The DCA rejected the claimant's argument that his due process rights were violated by the JCC's finding, noting that the claimant's own testimony refuted the stipulation. They also noted the claimant failed to show how he would have cured the alleged violation. A lengthy dissent and concurrence discuss the propriety and ability of the JCC to reject stipulations of parties. **Click here to view Order**

Payment of Medical Bills

Bryan LGH Medical Center v. Florida Beauty Flora, Inc./Associated Industries Insurance Co., (Fla. 1st DCA 5/20/2010) Per Curiam affirmance of the JCC's dismissal of claim by a hospital seeking payment of medical bills. The DCA noted that although the hospital had standing to bring a claim independently against the E/C for payment of bills, the claim must be filed with the Department of Financial Services, not with the JCC.
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Connolly v. Pasco Co. Sheriff's Office/Commercial Risk Management, (Fla. 1st DCA 5/20/2010) Per Curiam affirmance noting that issues not raised before the JCC are not preserved for appeal. If an error first appears in a Final Order, the party must file a

motion for rehearing. **Click here to view Order**

Camejo-Alfonso v. One Low Price Cleaners/Hartford, (Fla. 1st DCA 5/20/2010) Dismissed appeal for failure to timely respond to Order to Show Cause. **Click here to view Order**

Attorney Fees under F.S. 57.105

Maradriaga v. 7-11/Kemper Ins. (Fla.3d DCA 5/14/2010) Claimant previously attempted to appeal an Order of the JCC finding that a settlement had been reached. The DCA dismissed that appeal, finding the Order was not a final order or a non-final order subject to appeal. In dismissing the appeal, the DCA issued an Order to Show Cause why fees should not be assessed against Appellant. In response, the Appellant repeated his previous argument, and indicated he relied upon a Per Curiam decision without an opinion. Such decisions have no precedential value. The DCA noted this was not the first time Appellant's attorney had tried to appeal a clearly non-appealable order. The DCA found that fees should properly be assessed against appellant and his attorney, as the claimant attorney's response to the court's order "continues to evince ignorance of the rules of appellate procedure and case law". Finally, the court noted that as 57.105 does not allow the Appellant to be excluded from the sanction, the JCC on remand should determine whether the Appellant/Claimant should have the opportunity to obtain "conflict free counsel". **Click here to view Order**

Workers Compensation Immunity/Intentional Tort Exception

Hunt, et al v. CCA/Bay County Sherriff, (Fla.1st DCA 5/14/2009) The First DCA affirmed the circuit court's determination that the defendant was entitled to summary judgment. The plaintiffs were three prison nurses, who sustained injuries during an inmate uprising where they were held hostage. They filed suit in Circuit Court against their employer CCA and the Sherriff Department, alleging negligence. The DCA noted that the plaintiff's complaint did not allege an intentional tort, or conduct that was virtually certain to result in injury or death. Without such an allegation, the trial judge properly found immunity attached. The plaintiff's also argued that they should have been allowed to proceed against the employer on the unrelated works exception theory. This exception to immunity allows a claim to be filed based upon the actions of a co-employee, if that conduct was "with willful and wanton disregard or unprovoked physical aggression or with gross negligence when such acts result in injury or death or such acts proximately cause such injury or death". The complaint alleged that a jail employee had failed to follow procedures which led to the jail break. The DCA noted the complaint did not make a specific allegation against the individual jailer. Further, CCA alleged immunity in their answer to the complaint, which required the plaintiffs to file a Reply within 20 days to the affirmative defense. The plaintiffs did not allege this doctrine until two years after the time to have replied, and therefore waived that issue. **Click here to view Order**

Appeals/Dismissal for Failure to File Record on Appeal

Reyes v. Areda Const.et.al., So.3d (Fla.1st DCA 5/14/2009)
Tunovic v. Dillards/Gallagher Bassett Svcs.
Nelson v. Jacksonville Sheriff's Office

The First DCA dismissed three separate appeals for failure to timely file the Record on Appeal. The Appeals were dismissed as a sanction. Fl.R.App.P. 9.180 governs appeals in Workers' Compensation Proceedings. That Rule indicates preparation of the Record is governed by Rule 9.200. Although that rule appears to provide discretion if the Record may be delayed, the petitioner has the ultimate responsibility for timely providing the Record. A review of the Appellate dockets indicates Notices of Appeal were filed in August and two in November of 2009, respectively. In March of 2010 the DCA issued orders that the Record on Appeal be filed within 20 days. The dismissals followed. **Click here to view Order** **Click here to view Order** **Click here to view Order**

Employer/Carrier Actions/Alleged Fraud/Powers of JCC

McArthur v. Mental Health Care Inc./Summit Claims, (Fla. 1st DCA 5/14/2010) The DCA affirmed without discussion the JCC's finding that the claimant committed fraud, and that he was not entitled to a 1x change based upon that finding. The DCA wrote to also affirm the JCC's failure to address the claimant's request that the JCC strike the defenses of the E/C based on their alleged misrepresentations. The claimant alleged the carrier and/or their attorney misrepresented the claimant's medical history and conditions to deny benefits improperly. The claimant argued that F.S. s. 440.105 makes it unlawful for any person to make false, fraudulent or misleading statements for the purpose of obtaining or denying WC benefits. The statute indicates that criminal, civil, or administrative penalties may attach to such behavior. The DCA explained that the authority for denying all benefits where the JCC find the claimant violates 440.105 is found in F.S. 440.09(4). However, the penalties for attorneys and carriers that violate that section is found in F.S. 440.106. For attorneys, a Circuit or special grievance committee under authority of the Fl S.Ct. may forward any report they generate to the state attorney. When an agent, adjuster or other claims professional is found to have violated s.440.105, the agency having authority over that person or company may revoke their license. The DCA noted the JCC has only the powers found in chapter 440, and no authority exists to strike the defenses of an E/C for such an alleged violation. **Click here to view Order**

Temporary Indemnity/Refusal of Suitable Employment/MMI

Carcamo v. Business Representation International/North River Ins. Co., (Fla. 1st DCA 5/6/2010) (William H. Rogner and Robert Gluckman) The DCA affirmed the JCC's denial of TTD, but reversed and remanded the JCC's denial of TPD. The JCC had ruled the claimant was foreclosed from an award of TPD, accepting a date of MMI in January of 2008. However, the JCC entered into a lengthy analysis of the merits of TPD after that date, and then denied them based on a refusal of suitable employment offered by the employer. The DCA considered the JCC's analysis of TPD post MMI presupposed the claimant was not actually at MMI, and remanded for clarification of MMI. The DCA also noted that while it was proper for the JCC to determine that the claimant refused an offer of suitable employment, the appropriate analysis would be to determine whether claimant's refusal of employment continued after October 12, 2008, and whether claimant's refusal was justifiable. See § 440.15(6), Fla. Stat. (2006). In support, the court cited Moore v. Servicemasters, 19 So. 3d at 1147 (*although employer not required to continually reoffer job to avail itself of statutory defenses based on unjustified voluntary limitation of income, employer must establish continued availability of job for each applicable period to obtain continued benefit of defense).*

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