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**CASE NOTES**  
**CASE LAW SUMMARY**  
**October 2011**

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

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**Misrepresentation/Sufficiency of Evidence**

**Lucas v. ADT Security/Sedgwick CMS, (Fla. 1<sup>st</sup> DCA 10/17/2011), on motion for rehearing**

The DCA, on the E/C’s motion for rehearing, withdrew their 7/22/11 opinion reversing the JCC’s finding of misrepresentation, and affirmed the underlying Order. The 7/22/2011 opinion recited what seemed to be ample evidence of the claimant misrepresenting her condition to doctors, but found her behavior didn’t rise to the level of a written or oral statement made for the purpose of obtaining benefits. In their prior opinion, the DCA closely examined the findings of the JCC, noting that “posturing and cog wheeling” (medical terminology for faking) were not “statements” under the statute, but similar to presentation on surveillance, which was previously found in Dieujuste to be insufficient to support a finding of misrepresentation.

On rehearing, however, the DCA quoted extensively from the E/C doctor’s testimony concerning his exam, which provided multiple findings inconsistent with the claimant’s representations of pain and inability to function. The DCA wrote that Deijuste specifically holds that even without a specific oral or written misrepresentation, the E/C can prove misrepresentation by presenting evidence of the claimant’s nonverbal conduct inconsistent with prior statements. They noted the IME’s

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extensive testimony, accepted by the JCC, was evidence of Claimant's nonverbal conduct that was inconsistent with her reports of pain. Based upon this clarification, they affirmed the JCC's denial of benefits. [Click here to view Order.](#)

### **Claimant's Burden of Proof/Medical Evidence**

#### **Fortner v. Town of Longboat Key/Gallagher Bassett, (Fla 1<sup>st</sup> DCA 10/17/2011)**

The claimant sought benefits related to a 1/10 ankle injury. However, he also alleged he injured his ankle in workplace accidents with the same employer in '02, '05, and '09. The claimant appealed the JCC's finding, asserting that no competent, substantial evidence (CSE) existed to support the claim of an injury in 2010. The DCA repeated that there doesn't have to be CSE when the JCC finds in favor of the party without the burden of persuasion. The Court then reviewed the evidence, finding that indeed, there was no evidence to support the claimant's allegation that he injured his ankle in 2010. [Click here to view Order.](#)

### **Preservation of Error**

#### **Hawkins v. Publix Supermarkets/Publix Risk Mgmt., (Fla.1<sup>st</sup> DCA 10/17/2011), on motion for rehearing**

The DCA withdrew their PCA without opinion issued in August, and again affirmed the JCC's denial of benefits. However, the court wrote to clarify the JCC did not err in resolving conflicts in the medical testimony, and that claimant/ Appellant failed to preserve for appeal the issue he now raises about inadequate factual findings, citing *Hamilton v. R.L. Best Int'l* (holding if error is one that first appears in final order, aggrieved party must bring it to JCC's attention by filing motion for rehearing). [Click here to view Order.](#)

### **Attorney Fees/Deadlines to File Verified Response/Good Cause**

#### **Morrison Management/Xchanging, Inc. v. Pierre, (Fla.1<sup>st</sup> DCA 10/12/2011)**

The DCA reversed and remanded an attorney fee and cost award of \$62,552.63. The JCC below found that the E/C's did not file a verified response within the 30 day time limit in which to respond, and that she was "constrained" to award the fee sought by the claimant. Counsel for the E/C attempted to argue that claimant's counsel agreed to an extension of time for filing the verified response, as well as a continuation of the attorney fee hearing. The E/C's filing would have been timely, had the initial Petition been served by mail. However, no "five days for mailing" applied, as the Petition had been served electronically. Counsel for the claimant alleged only that he agreed to a continuance of the hearing. The JCC did not take testimony in this regard (except for the untimely verified responses to the Petition for Fees). The DCA indicated that, on remand, the JCC should take testimony as to whether there existed "good cause" to excuse the late filing. Their opinion suggests good cause may exist, based upon an apparent good faith misunderstanding, the fact that the dispute was only to amount, that no real prejudice would ensue in considering the late filed verified response, and that generally disputes should be resolved on their merits. [Click here to view Order](#)