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**CASE NOTES**  
**CASE LAW SUMMARY**  
**October 2009**

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

**Grounds for Dismissal of PFBs/Statute of Limitations**

Padilla v. Collins Contracting, (Fla.1<sup>st</sup> DCA 10/30/09) The DCA reversed a Summary Final Order finding the SOL had run. That Order was based in substantial part on a finding that a previously dismissed PFB did not operate to toll the Statute. The JCC had dismissed the earlier PFB, on the basis it did not contain a signed fraud statement, and did not have an OJCC # or verified motion to for substitute ID #. The DCA reversed, finding that the statute and DOAH rules did not allow for dismissal for failure to include either of those items. [Click here to read case](#)

**Employer/Employee Relationship/Definition of Employment Agency**

Bolanos v. Workforce Alliance/AmComp et. al. (Fla. 1<sup>st</sup> DCA 10/27/09) The claimant sought to obtain employment through Workforce Alliance, a not for profit agency operating under a Federal Employment Program. The Alliance used a service provider to assist in locating and placing individuals. The claimant went to WA, and was placed in touch with an individual who needed tree trimming services. The claimant was injured four hours into the job. The claimant sought to have WA and/or their agent considered an “employer” under F.S.§ 440.02.16(a), which discusses employment agencies, employee leasing companies and “similar agents”. The DCA declined to accept the claimant’s unique theory of WC coverage. [Click here to read case](#)

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## **Ripeness of Claims/Ability of JCC to Rule on Claims not Subject to Mediation**

### **Castillo v. American Airlines/Specialty Risk Svcs. (Fla.1<sup>st</sup> DCA 10/14/2009)**

The parties attended a Merit Hearing. The claimant sought to try two medical issues involving treatment for the knee, but the JCC sustained E/C's objection to those issues being tried, as they were not mediated, nor were they the subject of a Pre-Trial. Thereafter, the JCC entered an Order on the issue of whether Dr. Moya was authorized and who should pay his bill. The DCA held these issues should not have been addressed per the E/C objection, and struck all findings other than entitlement to knee injections and physical therapy. [Click here to read case](#)

## **Temporary Partial Disability/Refusal of Employment/Sheltered Employment**

### **Moore v. Service Master/Claims Ctr. (Fla.1<sup>st</sup> DCA 10/14/2009)**

The claimant underwent authorized surgery to her right shoulder. She was released to light duty and scheduled for physical therapy. The employer offered a light duty job (dusting with only the left arm), which the claimant refused to return to until her therapy was completed. The employer then terminated the claimant for not reporting to work. The claimant appealed the JCC's denial of TP benefits on three grounds: (1) that the claimant reasonably refused the light duty offer as it was too strenuous; (2) the dusting job was "sheltered employment"; and (3) after her termination she could not have "refused" further employment with the employer. The DCA found there was no medical evidence to support her refusal of the job offer. The DCA was amused the claimant characterized the offer as both too difficult and too easy as sheltered employment. They noted the sheltered employment concept applies only to PTD claims, and the legislative intent for TPD benefits is to encourage employers to bring claimants back to work. Finally, the DCA did not agree that her refusal of a modified job ceased as a matter of law concurrently with her termination. They remanded, however, as the Order did not contain findings as to the MCC of wage loss post termination.

[Click here to read case](#)

## **Temporary Benefits/Preservation of Error**

### **Holland v. Cheney Brothers/Travelers (Fla.1<sup>st</sup> DCA 10/14/2009)**

The claimant appealed an order denying TP benefits, arguing the Order did not contain sufficient findings of fact to afford meaningful appellate review. The DCA affirmed the Order, noting that issue was not preserved for appeal. The decision instructs litigants that the appropriate vehicle for preserving such an argument is a Motion for Rehearing. They acknowledge that in WC proceedings, filing a Motion for Rehearing does not toll the time for filing an appeal and that a JCC is not required to vacate an order if a Motion for Rehearing is filed.

However, they note failure to file a Motion for Rehearing will not defeat the preservation requirement. Bottom line: file a Motion for Rehearing if you think the Order you may appeal needs more specific findings. [Click here to read case](#)

## **Medical Experts/Discovery Regarding Bias/Payments**

**Buck v. Chin(Fla.3d DCA 10/14/2009)** In a personal injury action, the DCA quashed a trial court ruling which allowed the Plaintiff to request all 1099's or

equivalent information of her medical expert, evidencing all IME related income. While not ruling on the apparent due process considerations to the doctor, the DCA noted that discovery into such financial matters is governed under Fl. R. Civ. P. 1.280(b)(4)(A)(iii), and should only be granted in exceptional circumstances, such as where an expert has clearly falsified or misrepresented the data. In this case, the Plaintiff alleged that discrepancies in interrogatories and in deposition testimony regarding IME income required the requested information, but the DCA disagreed. [Click here to read case](#)

### **Correctional Officers/In Line Disability**

Crystal v. State of FL/Dept. of Mgmt. Svcs., (Fla.1<sup>st</sup> DCA 10/8/2009) The 1<sup>st</sup> DCA reversed and remanded a determination by a hearing officer (Not a WC case) that determined the claimant did not fit the definition of correctional officer for purposes of qualifying for in line disability benefits. The hearing officer found that definition required that the claimant be in a “special risk position”, which was error. The DCA noted that F.S. 112.18(1) refers only to the definition of correctional officer found in 943.(10)(2), which does not mention special risk. [Click here to read case](#)

### **Attorney Fee Liens/Time Frame to seek Lien**

Zaldivar v. Florida Transport 1982/Associated Industries, (Fla.1<sup>st</sup> DCA 10/8/2009) The former attorney filed a PFB in 2003, and withdrew from the case and filed a lien in 2004. In 2008, the E/C sought to schedule a hearing on the fee lien. The claimant was still receiving benefits and the case had not settled. The DCA found the JCC improperly required the claimant to file a verified petition. They noted that the lien may attach to future benefits, and as the benefits in this case were still ongoing, it is proper to allow the former attorney to decide the appropriate time to file a petition and set a hearing with regard to the lien. [Click here to read case](#)

### **Medical Mileage/Burden of Proof**

Florida Retail Federation/Claims Ctr. v. Nofal, (Fla.1<sup>st</sup> DCA 10/5/2009) The E/C appealed the JCC’s Order awarding PTD and other benefits on nine separate grounds. The DCA affirmed on all issues, except the award of mileage in excess of what the E/C had already paid. The DCA found the claimant submitted no proof whatsoever to show he was entitled to additional mileage, and the JCC’s award of “mileage submitted not previously paid” was reversed. [Click here to read case](#)

### **Res Judicata/Multiple Dates of Accident**

Perpignan v. KFC/Yum! Brands/Gallagher Bassett, (Fla. 1<sup>st</sup> DCA 10/5/2009) Claimant had separate ’04 (shoulder, back and neck) and ’06 (neck) dates of accident. In 2007, the claimant attended a merit hearing on compensability of the ’06 accident, which included claims for testing of the neck. At that hearing, the JCC determined the claimant failed to prove compensability for a 2006 neck injury. The carrier had indicated a week before trial that the ’04 neck was compensable, but after the merit hearing, rescinded their acceptance of the ’04 neck. The claimant then filed PFBs for the ’04 neck condition and testing. The DCA reversed the JCC’s determination that the most recent claims were barred by res judicata from the ’07 trial. They held nothing in the DOAH rules requires

a claimant to consolidate different DOAs, and the only thing at issue in the first trial was the '06 DOA. They further held the Rx for evaluation came after the merit hearing, and should have been authorized regardless of compensability as they were diagnostic tests. [Click here to read case](#)

### **Appeals/Failure to Comply with Court Orders/Dismissal**

G.F.I. Management Svcs./Aequicap v. Mills, (Fla. 1<sup>st</sup> DCA 10/5/2009) The DCA dismissed the underlying appeal for counsel's failure to comply with the DCA's Orders. The E/C timely appealed a June 19, 2009 Order on July 7, 2009. After filing the Notice of Appeal, the DCA entered an order requiring them to file a conformed copy of the order on appeal within 10 days, or the appeal "could" be dismissed. On August 7, 2009, the DCA entered an order directing Appellants to show cause within 10 days as to why they had not complied. Four days later, counsel for the Appellant filed the conformed copy, but did not respond to the Order to Show Cause until August 25, 2009. Counsel indicated in their response that the failure to attach the conformed copy was unintentional, and that she was out with a sick child and on vacation from 8/12 through 8/21. The DCA was unimpressed, finding counsel's response did not explain why she never responded to the initial Order, or why someone in her office could not have responded timely to the second Order. [Click here to read case](#)