WORKERS' COMPENSATION SECTION OF THE FLORIDA BAR

News & 440 Report

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The transition of the Office of Judges of Compensation Claims

by Bill Pfeiffer., Admin. Law Judge and DOAH/OJCC Transition Team, Tallahassee

Pursuant to recent legislative changes, effective October 1, 2001, the Office of the Judges of Compensation Claims (OJCC) will become a section within the Division of Administrative Hearings (DOAH). Since receiving the significant legislative directive on May 4th, DOAH has been working closely with the OJCC, the Division of Worker's Compensation. the Department of Labor and Employment Security, the Office of the Governor, and the Workers' Comp Section of the Florida Bar to effectuate this complex transfer.

Recognizing that the transition is a dynamic process, the information below is offered to provide you with a current summary of some initial procedural changes that will impact interested parties within the Workers' Comp. system, the OJCC and the local JCC District. The information provided is not exhaustive and will be updated as needed.

DOAH does not intend to micromanage the local office nor affect the autonomy and independence of the JCC's. DOAH's legislative instruction and sole objective is to improve the efficiency of the workers' compensation adjudicative system. On behalf of Chief Judge Sharyn Smith and all of us at. DOAH, we welcome

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Chair's Message

GONZALEZ

Hello there!

I hope this newsletter finds you well.

As most of you have heard by now, I have assumed chairmanship of the Florida Bar Workers' Compensation Section since June of 2001. This is truly a dream come true for me and by far my greatest professional accomplishment. As a result, I wanted to thank each and every one of the members of the Executive Council of our Workers' Compensation Section for giving me this wonderful opportunity to be of service to you and to our Bar. I also wanted to take this very special opportunity to say thank you to each and every one of you, our Section members, for entrusting in me the leadership of our Section. I promise to represent you well and to work hard in protecting your interests.

My thanks also go to the leadership of our Section and our Executive Council. Specifically, I owe many thank you's to **Steven Kronenberg**, now our immediate Past Chair, for his incredible leadership during his term as Chair of our Workers' Compensation Section during 2000-2001. I am also indebted to **Martin Leibowitz**, Chair-elect, for his invaluable advice and sound counsel. I truly look forward to serving this Section and its members knowing that Steven and Martin will be standing right next to me.

As you may recall, we last met as a Section while in conjunction with the Annual Florida Workers' Compensation Institute Educational Conference on Tuesday, August 21, 2001. Foremost, I wanted to thank each of our Section members who attended that meeting and participated in the discussion of the business of our Section. I am very proud of the fact that over 20 members of our Section ran for the open Executive Council seats that had been previously announced. As a result of those elections, I am proud to an-

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CHAIR'S MESSAGE

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nounce that **Dennis Smejkal** of Orlando has been elected Chair-Elect Designate of our Section, that **Nancy Cavey** of St. Petersburg has been elected Secretary of our Section, and that **Tuwana McMillan** of Orlando has been elected Treasurer of our Section. Please join me in congratulating each of them as they begin to serve your Section.

At that same election, our Section also elected nine members of our Section to a new term on the Executive Council that will begin on June 2002 and will expire on June 2005. Please join me in congratulating the following members elected to our Executive Council: **Nancy Cavey** of St. Petersburg, **Steven Kronenberg**, of Miami Lakes**, Richard Chait** of Homestead, **Janice Matson** of Tampa, **Tuwana McMillan** of Orlando, **Robert Rodgriguez** of Coral Cables, **Jacqueline Blanton** of Sarasota, **Eric Stiffler** of Ft. Myers, and **David Weissman** of West Palm Beach.

Although still serving out their term through June 2002, I wanted to thank **Paula Kelly** of Ft. Myers, **David Levine** of Miami, and **Jim Smith** of Tampa for their years of service to our Section and our Executive Council. I know that we will miss them, their leadership, and their input.

As I begin my year as Chair of this great Section, I am constantly reminded by our members that our Workers' Compensation Section was organized in 1975, beginning with only 378 members. Our Section then was established with the purpose of providing an organization open to all members who have a common interest in workers' compensation law and to provide a form for discussion and exchange of ideas leading to the improvement of workers' compensation law. This Section was also organized with the purpose of assisting Judges of Compensation claims and appellate forms in establishing methods for the more certain and expeditious administration of justice and to instill in our Florida Bar members a desire to increase their effectiveness in the trial and appellate review of workers' compensation cases. As we celebrate our 26th year in existence as a Section, I am proud to continue, as my personal theme while as Chair of this Section, the same purposes for which we were organized in 1975. That is, I am here, this Section is here, to serve you our close to 2000 members today. My purpose, and this Section's purpose, is still to provide each and every one of our members, a forum where we can learn about our workers' compensation law and exchange information and ideas about our workers' compensation law with a view to better serving the interests of our respective clients and the cause of justice. You have my promise that today, more than ever, both I and this Section are more committed to these principals than ever before.

How can I make such claims, you may ask. Where is the evidence of such commitment you may request. To answer these questions, I would merely point to our Executive Council. A body of 27 practitioners from around the state with such incredible experience in workers' compensation law, that there doesn't exist a more knowledgeable and prepared Board to represent your interests. **Paula Kelly** and **Tom Conroy** serve as our CLE liaison, **Pam Foels** and **Dorothy Sims** serve as our Section CLE Chairs. **Gerry Rosenthal** heads our winter meeting and seminar. **Fred Deutschmann** puts together our Certification Review Course, **Ray Malca** chairs the Trial Advocacy Workshop, **Mark Zientz** is responsible for Membership issues, **Steve Kronenberg** chairs our Legislation Committee, **Tuwana McMillan** looks after all Financial Contribution issues, **Steven Kronenberg** also serves as our Judicial Liaison, **Nancy Cavey** is our Rules Committee Liaison, **Tom Conroy** also helps our Section with any pro-bono appellate cases. **Robert Rodriguez** and **Nancy Cavey** co-chair our Professionalism Committee, **Martin Leibowitz** single handedly runs our Technology Committee, **Dennis Smejkal** and **Robert Rodriguez** also serve as AHCA Liaison, **Nancy Cavey** is also responsible for our Order Bank, **Jim Smith** and **Steve Coonrod** serve as Board Certification Liaions, **George Cappy** and **Janice Matson** head up our Public Relations/Media Team, **Steve Coonrod** and **David Levine** are our DOAH Liaisons. **David Weissman** is our Law School Liaison, **Robert Barrett** and **Peter Burkert** are working on an Awards Program for our Section, and **Mark Zientz** and **Vince Lloyd** as well as **Nancy Cavey** and **Richard Sicking** are working on Ad Hoc Committees pertaining to the newest 2001 Chapter 440 Statutory Amendments.

As you can see, you have elected a group of individuals to your Executive Counsel that are committed to serving you by exploring and learning about every facet and aspect of workers' compensation law in Florida. It is my sincerest hope that all of you will engage in, and become a greater participant of, the work of each of these committees. I am personally inviting each and every one of you to join us and work with us, to

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make our Section that organization open to all members which provides a forum for discussion and exchange of ideas that leads to improvement of Florida's workers' compensation law.

Whether fortunate or unfortunate for every Chair of this Workers' Compensation Section of the Bar, being of service has also meant spending a great deal of time keeping our members informed regarding any legislative activity and representing our Bar's interest during the most recent legislative sessions. Whether fortunate or unfortunate, it seems as if 2002 will be no different. With NCCI's annual rate filing calling for an overall premium increase of 7.3%, a House and Senate which during the 2001 Legislative Session each passed significant Workers' Compensation Reform Bills, Session 2002 will more likely than not bring about more workers' compensation debate, bills, and new laws.

As a result, over the summer and early part of the fall, I have been meeting with key leaders that without a doubt will have some significant input during the 2002 Legislative Session when it comes to workers' compensation matters. I am appreciative of **Senator Bill Posey**, Chair of the Florida Senate Banking and Insurance Committee as well as **Senator Jack Latvala**, past Chair of that same committee, and **Senator John McKay**, President of the Florida Senate for allowing me to meet with each of them to discuss the Florida Bar's Workers' Compensation's interest in and concerns about our present system and the reforms previously proposed. I am as equally thankful to **Representative Leslie Waters**, Chair of the House of Representatives Insurance Committee, **Representative Dennis Ross**, a member of that same committee, and **Representative Tom Feeney**, Speaker of the House**,** as well as **Representative Sandy Murman**, Speaker Pro Temp of the House, for their time with me and allowing me to communicate to them our sincerest hope to create a fair workers' compensation system in Florida for both employers and employees alike. I am also quite thankful to **Representative J.D. Alexander**, Chair of the House Council on Competitive Commerce, for also allowing me to participate with him in discussions regarding the future of Florida's Workers' Compensation System.

My summer and early fall activities have also allowed me to visit some old as well as some new friends. Whether it be speaking with **Bill Canady**, General Counsel to Governor Jeb Bush, **Terrence Russell**, President of the Florida Bar, **Mark Clark**, President of the Academy of Florida Trial Lawyers, **Stuart Colling**, President of the Florida Workers' Advocates, **Margaret Young**, Director of the Division of Workers' Compensation, **Shirley Walker**, Chief Judge of Compensation Claims, or **Bill Pfeiffer,** DOAH Administrative Law Judge, **Tom Koval**, Vice President of FCCI, and **Maryann Stiles**, General Counsel of AIF, I am appreciative and thankful for the time that each of them have spent with me over the summer while communicating to me their concerns about our present workers' compensation system and the different reform packages that have been previously presented.

After speaking with all of these individuals and spending some time in analyzing their concerns, I am convinced that the next legislative cycle will feature a number of political dynamics that may ultimately end up influencing any workers' compensation debate that may be had in Tallahassee. Foremost, is the fact that after starting interim committee meetings in September, the Legislative Session will begin in January and not in March. The additional time has been allotted for discussion and passage of a reapportionment law, necessitating lawmakers to redraw districts based on the results of the U.S. Census. Reapportionment will be a huge project for both the House and the Senate.

Another major project for both Chambers will be the budget. Although by January, the special session held during the fall may have answered most if not all of the budgetary issues that have arisen with a slowing economy, the budget looks to be the second most time consuming project that both the House and the Senate will have to deal with during the 2002 Legislative Session. A major issue that could affect any debate that will ultimately lead to workers' compensation reform is Cabinet reorganization. As many of you will recall, for the last two years lawmakers have debated without any success on several plans to merge the offices of the Comptroller and Treasurer/Insurance Commissioner as required by the 1998 Constitutional Amendment. Because of the significance of this Chief Financial Officer spot, Cabinet reorganization will clearly be a project that both the House and the Senate will spend a great deal of time on.

Having said this, however, there is a feeling among Legislators in both the House and the Senate that there is unfinished business with regard to Workers' Compensation Reform that must come to closure during the 2002 Legislative Session. It is with this thought in mind that I not only encourage, but request that each and every one of you reading this newsletter take an active role during this year's Legislative Session. If we are going to be successful in communicating to Florida's Legislators our concerns about the present system and the proposals that have been previously entertained, we will need each of you to participate in this process and take time to come to Tallahassee to be a part of the session, a part of the process, and a contributor to our interests. If you are unable to participate in this session and unable to come to Tallahassee, then I would also highly encourage each of you to contact your local Legislators, providing them with your personal experience and input about our workers' compensation system. In addition, I would encourage each of you to communicate with members of the House Insurance Committee, House Council for Competitive Commerce and Senate Banking and Insurance Committee Members as most workers' compensation bills, if not all, will be primarily housed in and born from each of these committees.

As I enter this year as Chair of the Section, I am thankful to all of those individuals who have allowed me this wonderful opportunity. I am so very excited that you have allowed me to serve you in this capacity. I hope to represent you well and make you proud of having placed me in this leadership role. I also hope that you will take this wonderful opportunity to join us in your Executive Council and become a greater part of our Section's activities as well as our Legislative efforts.

– Rafael Gonzalez

Medicare Allocation Trusts — Protecting Employer/Carrier and Claimant Alike

by Jack Rosenkranz, Tampa

Introduction

When a Workers' Compensation claim is settled through a lump sum payment, both the defense and claimant attorneys must make certain decisions. It must be decided whether to involve the Centers for Medicare and Medicaid Services (CMMS) (formerly known as the Health Care Financing Administration) in the determination of the amount to be allocated for future medical expenses (those that Medicare would normally pay), and then how to disperse the funds. These decisions will have a direct influence on the recipient's eligibility for future Medicare benefits.

Having CMMS approval of the amount that is allocated for future medical expenses that would normally be covered by Medicare will essentially guarantee that the recipient will qualify for Medicare when the funds are depleted. This approval or lack thereof, has ramifications for both the defense and claimant attorneys, which will be explored.

1. Medicare's Rights and Federal Preemption

Florida Statutes provide a system whereby all the parties involved in a Workers' Compensation (WC) lump sum settlement must present the terms of their settlement to the Court prior to entering into the settlement agreement.[1] As long as no party has perpetrated a fraud upon the Court, the Court's blessing of the settlement agreement insulates all of the parties to the agreement, and their respective attorneys, from any future claims pertaining to the agreement. Unfortunately, this does not mean that CMMS also is precluded from attacking the terms of the agreement, if they were not a party to the agreement.

Numerous federal cases hold that CMMS is not preempted from reopening a case involving settlement agreements that affect the litigant's right to receive additional federal benefits. For example, in *Smith v. Travelers Indemnity Co.*,[2] a Medicare beneficiary filed a state court action against the federal government for declaratory judgment. The issue centered around whether the government was entitled to reimbursement of a conditional Medicare payment made as a result of the beneficiary's automobile accident. The insured cross-claimed the insurance company under a *qui tam* action.

On cross-motions for summary judgment, the District Court held that the Medicare Act preempted Florida's collateral source rule that attempted to reduce the insurer's liability by the amount of Medicare payments made on behalf of the beneficiary.[3] More importantly, the Court held that the government was entitled to seek reimbursement from the beneficiary and the insurance company for liability insurance payments received for the same service that was covered by Medicare.[4] The Court reasoned that regardless of state law, the clear Congressional purpose behind the Medicare Act was to uphold the collection rights of Medicare, and therefore preemption applied.[5]

The same analysis applied in *Travelers* can be used by Medicare to reopen a WC settlement. The Medicare Secondary Payer Program[6] generally allows Medicare to recover payments with respect to injuries that could or should have been made by WC insurance. It would be dangerous to assume that having the state Court approve a WC lump sum settlement insulates the parties from any potential Medicare claim in the future.[7]

2. Involving CMMS in Settlement Negotiations

Industry literature suggests that by involving CMMS in the determination of the amount that will be allocated toward future medical expenses (that would normally be covered by Medicare) is the only way to insure Medicare eligibility after the funds are exhausted. Additionally, written and verbal communications with CMMS regional offices reflect the Agency's strong preference to be involved in each and every lump sum settlement negotiation.

Lump sum settlement agreements for workers' compensation medical benefits are favorable to employer/carriers and claimants. The lump sum agreement releases the employer/carrier from further liability for medical claims on work-related injuries. The arrangement also simplifies the reimbursement process for the claimant. If the beneficiary receives a lump sum amount, inquiries to the employer/carrier are no longer necessary.

So, if a settlement figure can be rejected by Medicare because it seemingly attempts to shift claims payment responsibility to Medicare, the only way to truly ensure coverage is to secure CMMS approval of the amount before finalizing the settlement. Otherwise, an unrecognized lump sum compromise can trigger the client, CMMS, or the WC board to re-open the claim.

3. Duties of the Employer/Carrier

According to Florida law, the Employer/Carrier (E/C) is obligated to pay the "proper and necessary" medical expenses related to the claimant's injury.[8] During the course of washout settlement negotiations, the E/C is expected to allocate a certain portion of the funds that relate to the actual injuries suffered by the claimant. The E/C has a duty to estimate the proper amount of Medicare related expenses so that no "shifting" of such expenses are passed to Medicare. If in hindsight Medicare determines that the E/C failed to allocate a proper amount, Medicare may bring an action against the E/C to recover the amounts that were improperly shifted to Medicare.

The E/C has first-hand knowledge that it is giving a portion of the settlement proceeds for amounts that either Medicare has already paid for or otherwise would be responsible for paying in the future.

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The E/C also presumably is aware that Medicare is prevented from making payments when Medicare has notice that payment for the injury could have been paid by the E/C.[9] In cases where the worker has been severely injured and the settlement amount is high, the E/C realizes that at some point in the future Medicare benefits will be necessary. The settlement agreement itself will act as evidence that the E/C had a reasonable belief that Medicare payments would be necessary. In fact, WC settlement agreement language traditionally contains a reference whereby the parties expressly acknowledge that the injured worker may be forfeiting Medicare rights by accepting the lump sum settlement.[10]

Because the E/C is ethically and legally obligated to prevent a shifting of medical expenses to Medicare, it is incumbent upon the E/C to require that the parties to a WC settlement state a Medicare allocation amount.

Once Medicare notifies the E/C that it has improperly shifted the responsibility of paying future medical benefits to Medicare, the E/C will immediately question the legal advice that it received from its defense counsel. Therefore, the attorney for the E/C has a legal and ethical obligation to advise the client of the risks of entering into a lump sum settlement without allocating a certain portion for future medical benefits that Medicare would normally pay.

After the decision, to involve or not involve CMMS in the determination of the allocation amount has been arrived at; the next consideration to be made is how the funds are to be managed. Three options are apparent: 1) give the total settlement amount to the claimant; 2) make a custodial arrangement with a third party administrator; or 3) establish a Medicare Allocation Trust on the claimant's behalf. The benefits and liabilities of each will be discussed from the viewpoint of both the claimant attorney and defense attorney.

4. Total Settlement Amount to the Claimant

In most cases this option would only come into play if CMMS was *not* involved in the decision regarding the allocation amount and when *no* allocation was made. Because if CMMS was involved in the negotiations and an allocation was made, it is unlikely that the allocation amount would *not* be placed in a special account of some sort.

The claimant may view this option as the most attractive of the three since it provides the claimant with the most money. When payment is made in this manner the claimant becomes responsible for handling all aspects of claims adjudication such as coordination of benefits, claims payment, tax and CMMS reporting, and other important functions. Although not impossible, it is unlikely that the claimant will have the expertise to untangle the knot created by medical claims payment systems.

In addition, providing the entire settlement sum to the claimant is the least likely means to ensure future Medicare eligibility. If WC settlement dollars are misspent, the claimant risks denial of claims both during the time funds remain available and after funds are exhausted. This is true even if Medicare approved the allocation amount. Medicare may attempt to recover from the beneficiary any claims paid that could reasonably have been paid from the settlement amount.

Further, entrusting the claimant with the full settlement amount minimizes the chance that the funds will be invested. And, the claimant probably is not aware of the types of services that can and should be paid from the settlement. (For these reasons, the claimant and payer's interests are better met through some type of custodial or trust arrangement.)

From the claimant attorney's perspective, by not providing guidance as to the pitfalls of allowing the claimant to manage the funds, the issue of malpractice may arise.

The defense attorney, although not involved in the decision regarding the disbursement of funds, should insist on being involved in the decision to use or not use CMMS in determining the allocation amount. If the case is settled, and through ignorance or inattentiveness, the funds are dispersed without prior CMMS approval of an allocation amount, the risk is that the case can be re-opened at a later date negating the purpose of the settlement which was to quantify, minimize, and finalize the dollar amount of the claim.

5. Medical Custodial Agreement

Commercial organizations exist to handle complicated tasks such as professional claims administration, medical case advocacy, and fund accounting. Medical custodians provide these services to ensure that money is available to pay injury-related medical expenses as they incur. Generally, these service organizations take the paperwork away from the injured worker and place it with a team of professionals who negotiate with providers of medical services, re-price claims against statutory requirements, invest settlement dollars in interest-bearing accounts, and coordinate benefits among various insurance programs.

"Medicare Set-Aside Custodial Agreements/Allocations," (as they are referred to by one such organization, Medi-Bill, Inc.) take the burden off of the claimant. However, there are a few pitfalls to this arrangement. First, because the custodial arrangement is held between the employer/carrier and the commercial organization, the claimant has a subordinated role. The claimant may find that their interests and needs are not sufficiently met by these distant organizations. Second, the custodial agreement is revocable, meaning the claimant may be exposed in the event that the agreement between the parties terminates. Third, custodial agreements are insured only to the extent that the custodian allows individuals to purchase surety bonds; few custodial organizations provide their own bonds. Fourth, lump sum settlement agreements are established individually and investment of the funds is not typically pooled with others in order to realize maximum yield. Last, given that the beneficiary is typically not a party to the agreement, there is no assurance that upon death of the claimant or termination of the agreement that the remaining fund balance will revert to the beneficiary's survivors.

Is it the claimant attorney's responsibility to make sure these scenarios do not transpire? Does this responsibility continue until the client has been approved and is receiv-

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ing Medicare benefits? The answers are, "probably so."

Given these important considerations, the trust agreement is now examined whereby a competent trust attorney represents the claimant's long-term interests.

6. Medicare Allocation Trust

Through a Medicare Allocation Trust, a qualified trustee will hold the allocated funds for the purpose of paying medical claims. This *irrevocable* trust always keeps the interest of the injured worker paramount. It provides the most comprehensive approach to individual needs because the trustee represents one client; in a custodial arrangement, the organization represents many WC claimants. The trustee fulfills the role of fiduciary and adheres to the standard of the prudent investor. The trustee invests and manages assets considering the purposes, terms, distribution requirements, and other circumstances of the trust.

Medicare Allocation Trust accounts also take advantage of the expertise of the medical custodians through an "administrative services only" agreement. In other words, the third party administrator provides services such as price negotiation for medical services, re-pricing according to statutory requirements, reporting and medical case review while the trustee manages the settlement dollars on the claimant's behalf. The Medicare Allocation Trust ensures future Medicare coverage by adhering to state and federal regulations regarding use of settlement funds and maximizes the return on the funds through prudent investing.

The current practice of having the claimant sign an agreement acknowledging that their right to Medicare is *not* guaranteed and releasing the carrier from all future claims avoids addressing the problem. The use of a Medicare Allocation Trust can help the claimant and the employer/carrier quantify the appropriate settlement amount while considering Medicare's secondary payer status, minimize the risks inherent in lump sum compromise settlements, and finalize the obligations of the employer/carrier to the claimant and claimant to Medicare by providing adequate oversight and management of the settlement amount.

From the claimant attorney's perspective, the Medicare Allocation Trust provides the best vehicle to accomplish the most for the claimant. The trust is irrevocable, has the interests of the injured worker in mind, helps to maximize settlement dollars through prudent investments and satisfies the attorney's obligations to the client.

Conclusion

This is an area of law that is unclear and the problem has been exasperated by a lack of guidance from CMMS. The administrative offices of CMMS realize and understand this concern and have begun to study the issue and disseminate information and guidelines.

In the meantime, it is suggested that the prudent defense and claimant counselors take due care to consider Medicare's interests by obtaining CMMS approval and utilizing a Medicare Allocation Trust with the proceeds.

For more information on this dynamic area of law, access the web site at *www.allocationtrust.com*.

Endnotes:

[1] F.S. § 440.20 (2000).
[2] 763 Fed. Supp. 554 (M.D. Fla. 1989).
[3] *Id*. at 556-57.
[4] *Id*.
[5] *Id*. at 558. See also *St. Agnes Hosp. v. Jaeckel* 616 F.Supp. 426, 428 (E.D. Wis. 1985): *Abrams v. Heckler*, 582 F.Supp. 1155, 1165 (S.D. N.Y. 1984).
[6] 42 U.S.C. § 1395y(b)(2).
[7] The settlement agreement may be voidable if it does not comply with statutory requirements. *D'Amico v. Marina Inn and Yacht Harbor, Inc.*, 444 So. 2d 1038 (Fla. 1st DCA 1984)
[8] F.S. §440.20 (2000).
[9] 42 U.S.C. §1395y(b)(2)(A): *Health Ins. Assoc. of America, Inc. v. Shalala*, 23 F 3rd 412, 414 (D.C. Cir. 1994).
[10] Classifying portions of the settlement under "attendant care" benefits or other non-Medicare covered services may not protect the settlement from being attacked by HCFA. In *State v. Estabrook*, 711 So.2d 161 (Fla. 4th DCA 1998), the Court ruled that Medicaid could reach the proceeds of a WC settlement regardless of the fact that the parties expressly designated those monies as compensation for services not financed by Medicaid. Noting that Medicaid was not informed of, nor participated in, the settlement negotiations, the Court ruled that one of Medicaid's remedial options was to have the settlement declared void. Id. At 164. In any action brought by HCFA to recover a conditional payment, it is likely HCFA will use the arguments outlined in *Estabrook* to convince the Court that because HCFA was not involved in the settlement, it is entitled to a recovery.

Editor's Notes

Hello there once again!

I hope this newsletter finds you well.

As summer ends and fall begins, it is my pleasure to bring to you yet another issue of our News & 440 Report.

Your Executive Council last met on Tuesday, August 21, 2001, at the Orlando World Center Marriott in conjunction with the Annual Florida Worker's Compensation Institute Educational Conference.

Before I discuss our meeting, I wanted to take this opportunity to thank **Jim McConnaughhay**, **Steven Rissman, Gerald Rosenthal**, and **David Parrish** for putting together yet another incredible convention.

This year's conference, held for the first time at the Orlando World Center Marriott, offered more substantive programs, more educational opportunities, more committee meetings, and more social/ entertainment events than any workers' compensation convention before. As a result, please join me in thanking Jim, Steve, Gerry, and Dave for putting together the "greatest show on earth".

At our Executive Council Meeting, **Nancy Cavey**, on behalf of **Pam Foels**, our new Section CLE Chair, reported that there are now Section seminars slated for October 2001 and February 2002. As a result, please be on the lookout for specific information about both of these seminars. **Gerry Rosenthal** reported that the 2001 Winter Meeting/Seminar is slated for February 23, 2002 through March 1, 2002, at the Marriott at Lion's Head Vail, Colorado. As a result, please be on the lookout for more information regarding this very worthwhile seminar and Section meeting.

Fred Deutschmann, Certification Review Course Chair, also reported that the 2002 course is slated for April 12, 2002 through April 13, 2002, at the Renaissance Orlando Resort at Seaworld. As a result, you will soon be getting some information about this very worthwhile seminar that year in and year out brings forth the best practitioners in workers' compensation law.

Legislation Committee Chair **Steven Kronenberg**, reported that committee members are already preparing for the 2002 Legislative Session.

Robert Barrett and **Peter Burkert**, Co-Chairs of our new Awards Committee, indicated they will be presenting at our next meeting a format from which our Executive Council can choose to reward or acknowledge significant contributions to the Workers' Compensation Bar from members of our judiciary, section members, etc.

Stephen Coonrod and **David Levine** reported on some of DOAH's continuing work toward improving the efficiency of the workers' compensation adjudicative system. Steve reported that through the assistance of Administrative Law Judge, **Bill Pfeiffer**, DOAH has been working on some internal procedural changes, specifically assigning Office of Judges of Compensation Claim's case numbers to the already existing Petition for Benefits that have been filed with the Division of Workers' Compensation.

Speaking of DOAH, as all of you are aware of by now, as of October 1, 2001, our Judges of Compensation Claims have in fact been made part of the Division of Administrative Hearings. As a result, I invited **Sharyn L. Smith**, Director and Chief Judge of the Division of Administrative Hearings to share with us any information on the plans for the transition of the Office of Judges of Compensation Claims to the Division of Administrative Hearings. As a result, it gives me great pleasure to include in this newsletter the materials that Administrative Law Judge **Bill Pfeiffer** has put together for all interested parties in this workers' compensation system outlining the transition efforts and the procedural changes taking place as a result of our new statutory amendments.

As you will also see, included in this newsletter are very informative articles about *Medicare Allocation Trusts, The Exclusive Remedy, and Independent Contractors*. As always, it is my intent to provide you with significant contributions to this worthwhile newsletter that will keep you up with the most recent of legal theories to help your daily practices.

Also, in this newsletter, you will find a *Words of Wisdom* article by **Jim Smith**, which will hopefully entertain you and bring some laughter to your day. I hope that you will also find just as funny the Letter to The Editor from **Dorothy Sims** on how she found the cure for back pain in Morocco.

Lastly, I hope that you will also gain from the *Managing Your Firm or Pay the Consequences* article.

This newsletter however, would not be complete without the Case Law Update by **Christine Franco** and **Janice Matson**. As this great duo only can, Christine and Janice have produced an incredible collection of case law since our last newsletter to keep you updated with our most recent case law.

As always, I hope that you will find this newsletter informative, funny, but yet able to provide you with substantive and administrative advice. Should you have any comments about the contents of our newsletter, or ways to improve it, please do not hesitate to contact me. By the same token, if you are interested in contributing to our newsletter, please know that you always have an open invitation.

Until our next issue,

– Rafael Gonzalez

The "Exclusive Remedy" isn't so exclusive any more...
Or "*How,(as an employer), I learned to stop worrying and love coverage B*"

I guess it all started about 11 years ago with the 1990 'reform' of The Florida Workers' Compensation Law (also know in these parts as "The Florida Employers Protection and Lack of Responsibility Act for Economic Development in an Attempt to Have a W.C. Scheme Worse than Texas Law"). In his challenge to the constitutionality of that law Mark Scanlan sued Governor Bob Martinez. The resulting unfavorable decision from our Supreme Court contained the following language (referring to the new 'Special Conditions for Compensability')(F.S. 440.092 ch. 90-201 Laws of 1990). The court said,

> "Although chapter 90-201 undoubtedly reduces benefits to eligible workers, the workers compensation law remains a reasonable alternative to tort litigation. It continues to provide injured workers with full medical care and wage loss payments for total or partial disability regardless of fault and without the delay ind uncertainty of tort litigation. Furthermore while there are situations where an employee would be eligible for benefits under the pre-1990 workers' compensation law and now, as a result of chapter 90-201, is no longer eligible, that employee is not without a remedy. There still may remain the viable alterative of tort litigation in these instances" *Scanlan v. Martinez*, 582 So. 2d 1167, 1171 (Fla. 1991).

The exclusive remedy door that had been sealed shut for many years opened just a crack with the release of the Scanlan opinion.

Enter Smith, an Employee of Piezo Technology. Fired because he pursued a Workers' Compensation claim against his employer. In defense of his suit charging 'Wrongful Termination' Piezo claimed chapter 440 immunity. Smith claimed that 440.205 F.S. (1979) created a right without a remedy. The wrongful termination suit was valid said the Supreme Court, *Smith v. Piezo Technology*, 427 So. 2d 182 (Fla. 1983) and the Exclusive Remedy door opened just a little bit wider. For a while the 3rd DCA protected employers from suit for the threat of termination, intimidation or coercion, *Montes de Oca v. Orkin Exterminating*, 692 So. 2d 257 (3rd DCA 1997)(cert. den), but those wrongful acts were ultimately held to be actionable before a jury *Chase v. Walgreen Company*, 750 So. 2d 93 (5th DCA 1999). The tort door was now ajar.

An employee could still sue his employer for intentional acts against him designed to cause serious injury or death. Proving negligence, gross negligence, even criminal negligence was not enough, the employee had to show that the wanton act was aimed at him. Along came Turner. His attorneys figured that intent could be proven by expert testimony. They introduced expert testimony against the defendant, PCR, to prove that the acts of the employer were designed to injure, maim or kill Turner. After the dust settled, Turner was the victor in the Supreme Court, *Turner v. PCR INC.*, 754 So. 2d 683 (Fla. 2000). You could now get a size EEEE wide foot into the space the door was open.

Special Session C of the 1993 Florida legislature was called to Tallahassee to 'reform' Chapter 440 yet again. After all, Texas had pulled ahead and admittedly had a Compensation law that made employees want to come to Florida and Employers want to set up shop in Austin. Florida had to be able to do worse! So we did. Our legislators, the best money can buy, looked to other states to see what draconian provisions Florida could steal and put into Chapter 440 that would make it tougher to get WC benefits and with any luck, lower the cost of the scheme to employers to attract them to come to Florida, or if already here, to stay. Oregon. Major Contributing Cause. Gotcha! But wait 'till you hear the rest of that story.

Ever hear of Audry Byerley? Probably not. She got up to the exclusive remedy door and with one swift kick opened it wide enough to slip through. Her employer, Citrus Publications, had no problem whatsoever compensating Ms. B for her on the job injury. The compensation carrier had other ideas. Denied, they said. So Audry picked up her bat and ball and went to play elsewhere, in circuit court, before a jury. "Not so fast" said the Circuit Court. But in the end *Byerley v. Citrus Publications*, 725 So. 2d 1230 (5th DCA 1999)(cert denied), Audry won. If the compensation carrier denies that an injury happened for which compensation is payable, even if the employer disagrees, the injured worker may avoid the exclusive remedy door altogether and have her claims heard by 6 citizens who aren't constrained by the bounds of chapter 440 benefits.

But what if the Employer has misled the employee, such as by verbally denying that there is Workers' Compensation insurance? Same result as *Byerley*, head for the place where your fellow citizens, your peers, get to say how much the employer pays. *Francoeur v. Pipers, Inc.*, 560 So. 2d 244 (3rd DCA 1990)

What could happen to make it any worse for employers and carriers in Florida? How about Ms. Moniz? She worked for Reitano Enterprises. She was sexually assaulted on the job and suffered both a physical and an emotional injury. She figured that she would not be compensated for all the injuries and disabilities suffered in her workplace incident, so she filed a separate action underTitle VII. "Can't have it both ways" said the employer. "Wrong again" said the 5 DCA.in *Moniz v. Reitano Enterprises*, 709 So. 2d 150 (5th DCA 1998)(cert denied). The WC law is exclusive, but only as to rights it replaced, and it didn't replace Title VII rights nor did it provide sufficient compensation for their violation.

How about "The Tort of Outrage", also known as "The Intentional Infliction of Emotional Distress"? A case now working it's way through

the Article V court system will shed some more light on what type of civility we can expect from Compensation Carriers and their Managed Care Organizations. The Plaintiff had a severe crush injury resulting in, among other injuries, *Fecaluria* for over 10 months. His medical care was denied and delayed and he suffered needlessly, his life risked for the sake of an MCO's search for the least expensive way to stop him from peeing feces. Judge Barbara Levinson of the 11th Judicial Circuit thought that was as outrageous as it gets. Motion to dismiss, "denied". Oral argument in the 3rd DCA on June 14, 2001. I guess you could say that this Plaintiff didn't open the door any wider, he just created a new door. Query-Does an MCO have the same immunity as the Employer/ Carrier? If so, where is it found in the law?.

Remember Major Contributing Cause from Oregon? The defense to compensability we stole in 1993? Here's the rest of the story. It seems the Oregon Supreme Court took a dim view of taking away common law rights without providing an adequate substitute remedy. Go to the circuit court for redress of negligently inflicted injuries since major contributing cause is not an absolute defense to a tort action, *Smothers v. Gresham Transfer*, Supreme Court of Oregon, May 10, 2001. In 1995 that same court ruled in a similar fashion and the legislature sought to extend the exclusive remedy of the Oregon WC law to cover cases where the MCC defense was raised. *Smothers* was the courts' reaction to the legislative attempt to limit circuit court tort actions.

Coverage "B" to the rescue for employers. "Circumstances may arise", said the Idaho Supreme Court, "where an injured employee may seek redress in a forum other than the Industrial Commission where an alleged injury occurs in the course and scope of employment, but the injury is not compensable under the Workers' Compensation Act. While Coverage "B" provides an exclusion from coverage for bodily injury intentionally caused or aggravated by the employer, circumstances may still exist where the acts of the employer expose it to liability beyond the workers' compensation law, but which fall short of the exclusion to coverage provided in Part "B" of the policy", *Selkirk Seed Co. v. State Insurance Fund*, Idaho Supreme Court, December 21, 2000.

So what happens when an employee gets to sue an employer for injuries caused by the ordinary negligence of the employer or a co-employee? One recent Montana jury answered that question. A mature female retail store employee was asked to move some heavy chairs. She did so after her employer refused her request for assistance. She tore up her shoulder and sued the employer for failing to provide her with a safe place to work and for failing to provide her with adequate help to do the job. After surgery and 32 months off work, this plaintiff returned to work at a lower wage. The jury awarded her 1.5 million dollars reduced 1% for comparative negligence. You can get an awful lot of money through the door marked "Torts".

Employers, it's time to up the limits on your coverage "B". The exclusive remedy door has opened wide enough for The Fridge to pass through and the trend is to open it wider each time the legislature curtails, reduces or eliminates WC coverage for on the job incidents. What might be next?

Words of Wisdom from a Not-So-Wise Attorney
Part II - The Appeal

by James H. Smith, Tampa

Despite the response to my last article and the many letters (two) that I received. I have decided to pass on further true experiences anyway. For the anonymous writer in Palm Beach, "fatuous slime" was a nice touch, but better used as the name of a punk rock group.

Appellate Practice

It often helps, when attending oral argument before an appellate court, to have some idea of what you are doing. In my experience, I have noted that appellate courts want the appellant to begin the oral argument with a short discourse on how the case came to the court, such as, "My client, Marva Whiner, was injured when she slipped on an anchovy in a frozen pizza factory. The Judge of Compensation Claims denied, etc." (This was an actual case.)

Don't copy the fellow I observed who just started arguing his case. When he was asked by the Chief Justice of the Supreme Court of Florida to expound on how he made it to that forum, he responded, "Oh, I took the bus up this morning. It was really great!".

Poetry does not help. When I was with the Special Disability Trust Fund, an employer named Robert's Perfection Foods filed their Initial Brief of Appellant the day after Columbus Day. Appellant's Initial Brief was in fact due by Columbus Day and that court was in session and mail was delivered on Columbus Day, which was not a legal holiday. A friend who shall remain nameless, urged me to put a poem in my Motion to Dismiss.

Since my manhood was being questioned, I finished my Motion with:

"In 1492, Columbus sailed the ocean blue.

That he sailed the ocean with great style,

will not excuse a want to file."

In denying my Motion, the Court noted:

"Robert's Perfection of filing,

To the Fund is obviously riling.

Columbus sailed the ocean with such panache,

The Fund's motion we must therefore quash."

Which brings up the question of why they call them "Briefs". There is nothing "brief" about fifty pages that takes weeks to write. The only evidence I have seen of anything "brief" was in an answer brief filed by the late, great lawyer, and author, Leo Alpert, who, in answer to a point on appeal stated his whole argument in the one-word response "piffle".

TRIAL DON'TS

I was once trying a case before then JCC James T. Earle, Jr., of a man who said that he had fallen and injured his back. We had denied the entire claim. When the claimant stated he had a scar to show that the accident had truly happened, his attorney insisted that he show the Judge his scar. The claimant stood up, turned around, undid his pants and bent over. He, thus, established three things: first, that he had no scar, just pigmentation changes; second, that he was not wearing underwear; and third, that personal hygiene was not big on his list of things to do. At the end of the hearing Judge Earle held up his legal pad upon which he had written, "He who moons judge, loses case!".

Caveat to claimant's attorneys - make sure your client is wearing underwear. Maybe this is what they mean by "preparing your briefs".

Trial Preparation

Talk to your witnesses prior to their testimony. You still have a fifty percent chance that they will totally change what they will say when they begin to testify, but at least you will feel better. On more than one occasion, when defending a claim on a *Martin v. Carpenter,* defense, the employer who spent hours telling me that he never would have hired the claimant had he known of the pre-existing condition, when before the Judge, testified that the claimant told him of the condition when they hired him. This leaves the defense attorney feeling as if he or she is not wearing any "briefs".

Which reminds me, ALWAYS BE KIND TO OPPOSING COUNSEL WHEN HIS WITNESS FLIPS ON HIM! Recently a witness who had been denying that the accident ever happened, or that he received notice of the injury by accident totally changed his story when testifying before the Judge of Compensation Claims, and said that the accident happened as described by the claimant and that the claimant told him of his injury. On cross-examination, claimant's counsel asked the witness if he had discussed his testimony with me. The witness agreed that he had for an hour the day before. Claimant's counsel then asked if I had told the witness what to say? Yeah, that's right! I always go to my witnesses and tell them how to make me look more like an idiot than I already am.

Once while representing the employer/carrier and deposing a Hispanic doctor on a claimant who supposedly reached MMI with a 3% impairment, I asked the doctor that difficult and often philosophical question, "Could you please state your name." He responded with "732-6420." I repeated my question and he repeated his phone number. Feeling certain that the doctor really had a name and not just a number, and understanding as I did the language difficulty, I attempted to better communicate with the doctor by speaking slowly and very loudly, "Will you please give us your full name." He then said, "Oh, my full name. It is area code (813)732-6420."

The wise practitioner would have stopped the deposition at that point. Being young and not so wise, I however persevered. I later asked the doctor if the claimant had a permanent impairment, and the doctor responded with, "It's not zero. It's not 100. Maybe fifty." Thus, though brilliant presentation of the defense case, I successfully turned a nothing case into permanent total exposure for my client.

Brief Bits

1. When I started practicing, appeals were to the Industrial Relations Commission and from there to the Supreme Court by way of Writ of Certiorari (the correct usage is either Wrote of Certiorari or Have Written of Certiorari) and is actually named after a hit man in the "Sopranos".

2. Once during an oral argument, while attempting to explain the correctness of the Judge's wisdom in denying wage loss, I was interrupted by a fire alarm. This is a clever ploy by my opposing counsel. Always bring matches to oral arguments and start a fire just as your opponent starts to destroy your case.

3. Try to remember to bring your brief with you to oral argument. One fellow I saw did not, and when asked questions about his point on appeal, said "Is that in my brief? I forgot to bring mine with me. Can I see your copy?" He was tackled by the marshal as he tried to pull the brief out of the Judge's hand. This can act in two ways - either you lose points for not bringing your brief, or the Court may decide that your client was unrepresented throughout the case.

Congratulations to

Gerald A. Rosenthal

founding partner of

Rosenthal & Weissman, P.A.

in West Palm Beach,

has received the

"Gold Eagle Award"

from the Academy of Florida Trial Lawyers
in recognition of his outstanding dedication and
support of the AFTL's legislative efforts.

He was honored at the AFTL's Presidential Luncheon held at the Breakers in Palm Beach in August.

Rosenthal is a Board Certified attorney representing claimants in Workers' Compensation.

Employee or Independent Contractor? An Essential Analysis for Employers

by Kimberly P. Walker, Esq.

Note: This article was previous published in the January 2001 Florida Bar General Practice Journal.

The increasing complexity of employment laws combined with the cost of defending a lawsuit has forced employers to pro-actively identify and evaluate their daily practices. Throughout employment law, there are actions that employers may take to limit their risks related to employing or contracting with workers. This article focuses on a common, yet potentially costly mistake– the misclassification of employees as independent contractors.

The Classification Issue

There are many advantages for employers who use independent contractors.[1] Employers do not withhold or pay employment taxes, make unemployment compensation or workers' compensation contributions, provide benefits, comply with wage and hour, employee leave, harassment and discrimination laws, or keep detailed records. In an effort to free themselves of growing regulation and costs, many employers classify some or all workers as independent contractors. Unfortunately, many employers unwittingly stop complying with employment regulations and practices before determining whether a court would agree with the classification. The misclassification of workers as independent contractors may subject an employer to the payment of back taxes, interest and penalties (both the employee's and the employer's contributions), payment of expenses related to injuries to the worker that otherwise would have been paid by workers' compensation insurance, payment of benefits provided to employees or damages for failing to provide such benefits, disqualification of ERISA plans, payment of back wages, payment of all damages and costs associated with harassment or discrimination suits, and in some cases, personal liability. To manage and avoid these risks, an employer should engage in a reasoned, fact-based review before classifying any worker as an independent contractor and take certain steps to support such a finding.

Benefits of Proper Classification

The practice of hiring workers who are not regular employees, often called contingent workers, has increased in popularity as businesses perceive the advantage of flexibility with regard to personnel, control of costs, and less regulation. Although particularly attractive to high tech computer firms, a wide range of businesses use these arrangements.

Because accurately predicting future staffing needs is an art that few businesses master, employers regularly find themselves with too few or too many employees. For many reasons, including a personal feeling of responsibility, employers are generally unwilling to making a practice of recklessly hiring "regular employees" only to lay them off when needs change. The most significant benefit to alternative staffing arrangements is the potential to use the workers only when the businesses need help. Equally as valuable, hiring contingent workers rather than employees allows businesses to better match the complexity and the length of assignments with the workers' skills and availability. A business can, therefore, accomplish goals through the use of contingent workers, including the completion of tasks outside of the current employees' skill levels, without increasing payroll or having to predict future staffing needs.

Employers are also lured by the potential cost savings. Employers hiring true independent contractors rather than employees avoid payroll taxes, benefits, leave laws, and overtime wages. Such relationships can also result in lower unemployment and workers' compensation rates compared to regular employees. Employers can also save the training and supervision costs by using skilled independent contractors. In some cases, employers may avoid harassment and discrimination suits, including those under the Civil Rights Act, Title VII, the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA), the Family and Medical Leave Act (FMLA) and the Florida Civil Rights Act, which protect employees, not independent contractors, and apply only to employers who employ a certain number of employees without regard to the number of independent contractors. The Fair Labor Standards Act (FLSA) and its record keeping requirements also apply only to employees, not independent contractors. [2]

The potential flexibility and cost savings attract employers to the use of independent contractors. However, the misclassification of employees as independent contractors provides a false sense of security and a very costly trap for employers who can be stuck with penalties that far exceed any perceived benefits and savings.

Dangers of Misclassification

An employer's failure to recognize and treat a worker as an employee exposes the employer to a series of potential problems. Each of the following areas carries significant damages related to the misclassification of employees as independent contractors.

Based on its interest in collecting employment taxes, the Internal Revenue Service (IRS) is most likely the agency to challenge the legitimacy of an employer's classification of a worker as an independent contractor.[3] Employment taxes include income tax withholding, Social Security and Medicare taxes under the Federal Insurance Contributions Act (FICA) and taxes under the Federal Unemployment Tax Act (FUTA). These taxes are paid by withholdings from employees' paychecks plus the employers' contributions. Some of these taxes are targeted for valuable and expensive benefits for workers such as unemployment compensation under

FUTA, benefits under the old-age, survivors, and disability provisions under FICA, and Social Security and Medicare benefits that workers and their families receive under FICA. The proper classification of a worker as an independent contractor rather than an employee frees the employer from these burdens and, at least in the eyes of the IRS, robs the government and the worker of valuable benefits. The IRS applies a detailed set of rules to the facts surrounding the relationship and makes its own determination as to whether a worker classified as an independent contractor is an employee or an independent contractor. Thus, it is no surprise that it is in this field where employers' mistakes are often caught. Penalties may include requiring an employer's payment of all back employment taxes, all withholdings that the employer should have made as well as the employer's contributions, interest and penalties. In the event that a violation appears willful, the penalties may be harsher and may include personal liability for the employer.

Recently, employee benefits disputes have resulted in highly publicized battles over misclassification. Microsoft Corporation's recent conflict with its independent contractors has drawn significant attention and served as a warning to many employers making the same mistake.[4] In short, Microsoft classified certain workers as independent contractors. Following an audit, the IRS found the workers to be common law employees. In an effort to correct the misclassification problem, Microsoft hired some of the workers as regular full time employees and permitted the others to work at Microsoft as independent contractors employed by and paid through an independent staffing agency. The workers each signed agreements acknowledging their independent contractor status and waiving any entitlement to benefits provided to employees. In *Vizcaino v. Microsoft Corp.*, a group of these independent contractors later sued for benefits including valuable stock options provided to employees. In a series of opinions, the Ninth Circuit Court of Appeals found that misclassified common law employees were entitled to benefits under an ERISA and a non-ERISA plan. Early this year, the United States Supreme Court declined to review the final case of the series leaving Microsoft with significant damages to pay and leaving employers with many questions and concerns.[5]

Damages resulting from an employer's failure to pay benefits to misclassified workers may include health insurance, damages the employee incurred as a result of the employer's wrongful deprivation of health insurance, incentive stock options, retirement or pension benefits, paid and unpaid protected leave and other fringe benefits. Although there are legal means of limiting benefits, an employer may also face a suit for wrongful deprivation of benefits under Section 530 of ERISA.[6] Depending on the details of the plan, employers misclassifying employees should be alert to the devastating and far-reaching prospect of plan disqualification. These risks highlight the need to take a judicious approach to classifying workers.

Employers who misclassify employees may also suffer consequences if the workers are injured. If a worker can prove that he should have been covered under an employer's workers' compensation insurance, and was not covered, the employer may be liable for the damages suffered by the employee.[7]

The Fair Labor Standards Act (FLSA) sets another trap for the employer who misclassifies common law employees as independent contractors. The FLSA does not apply to true independent contractors. However, it requires employers to pay all covered employees who work more than 40 hours in a workweek a statutory overtime wage and to pay a minimum wage. The FLSA imposes fairly strict record keeping requirements on employers. Thus, if a non-exempt employee claims to have worked overtime, the employer bears the burden of proving through its records the hours actually worked (and thus disproving the hours alleged) by the employee. This is an almost impossible task for an employer who classified and treated a worker as an independent contractor.

Because all employers desire to avoid discrimination and harassment suits, informed employers maintain well-drafted harassment and discrimination policies and provide the required training to employees. Often independent contractors are excluded from these well-designed attempts to prevent harassment and discrimination. Although true independent contractors are not employees entitled to sue under most

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of these laws, a misclassified worker's case may be bolstered by the misclassification and further damage a well-meaning employer. Therefore, an employer may be liable for unforeseen claims under the Civil Rights Act of 1964, Title VII, the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA), the Family and Medical Leave Act (FMLA) and the Florida Civil Rights Act.

How to Classify

An employer should make an informed decision before treating a worker as an independent contractor. Using reason and a detailed fact-based analysis, an employer can assess the risks in a particular situation. If the employer's analysis reveals a strong argument in favor of classifying the worker as an independent contractor, the employer should then take precautions to further support the classification.

The more an employer looks for tests to determine a safe classification system, the more tests an employer will find. Fortunately, at the planning stages, employers do not have to be too troubled by the proper selection of a particular test for the application of each law by each agency. Instead, using a fair, reasonable and conservative system can avoid lawsuits. There are two clear categories of workers: clear independent contractors and clear employees. Unfortunately, the workers you are classifying sometimes fall into the gray area somewhere between the two categories. Also unfortunately, it is from this gray area that challenges and litigation arise.

If your desire is to avoid litigation about where a worker falls on the gray area between independent contractor and employee, be sure that an employer can answer two questions in the affirmative: One, "Is this fair to the worker?" and two, "Does this worker have enough in common with clear independent contractors and sufficiently limited factors in common with employees that the employer is willing to take the risk that a court will disagree with the classification?"

Bad facts make bad law. If a worker feels mistreated, he is more likely to sue. With this is mind, consider why the employer is classifying the worker as an independent contractor. If the only reasons you can think of begin with, "So we can avoid . . ." beware. Agencies and courts are made up people who apply their own values and views of right and wrong to their analyses and decisions. Despite the hypertechnicality of the "tests," don't lose sight of the fairness element of this classification.

This factual analysis requires that you compare the specific employer-worker relationship to certain principles of agency to determine whether the worker is sufficiently free from the employer's control to escape the label "employee." As this analysis has been applied to various laws, these agency principles have been clarified, altered and converted to factors and more factors, examples and more examples. The resulting body of law contains many factors and tests with only subtle differences.[8] Fortunately, employers engaging in a prospective analysis, rather than defending litigation, do not need to focus on one particular test or those subtleties. Such a narrow approach should be saved for those defending a challenge to classification. Rather, employers and their counsel should take advantage of all of the tests, factors, examples and cases and use them as tools to aid in making this classification decision.

An analysis of the agency law underlying the tests should include a review of the following factors: (a) the extent of control which, by the agreement, the master may exercise over the details of the work; (b) whether or not the one employed is engaged in a distinct occupation or business; (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (d) the skill required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) the length of time for which the person is employed; (g) the method of payment, whether by the time or by the job; (h) whether or not the work is a part of the regular business of the employer; (i) whether or not the parties believe they are creating the relationship of master and servant; and (j) whether the principal is or is not in business.[9]

The current IRS test, described in its 1996 IRS Training Manual, on three primary areas and is described as replacing the former IRS Twenty Factor Test.[10] The Training Manual test focuses on the following areas of the employer's control: (a) control over behavior, which is evidenced by instructions focusing on how the job is done rather than the end result; the requirement to wear uniforms or badges for reasons other than security; the likelihood that the employer could direct the worker; and training; (b) control over finances, which is evidenced by financial dependence on the business; the lack of financial investment such as provision of tools and supplies by the worker; the reimbursement of expenses; the payment based on time rather than job; and the inability to experience losses or profits; and (c) control over relationship, which is evidenced by the filing of W-2s rather than Form 1099s; the receipt of benefits; being hired for an indefinite period of time; and the performance of key aspects of the business.[11]

Counsel should also review case law, industry practice for guidance on the classification of workers in the same or similar field. In the event there is positive precedent, the case law or other guidance may serve as a defense to challenges by the IRS.[12] Keeping an eye on legislation and revenue rulings may also help to simplify the analysis.[13]

Supporting Measures

After determining that an employer is willing to take the risk in classifying a worker as an independent contractor, consider the following steps to support the classification:

1. Require a written independent contractor agreement and include the following terms:

A. A clear statement that the worker is an independent contractor, not an employee.

B. A clear statement that the independent contractor agreement sets forth the entire compensation arrangement between the parties; the independent contractor is not en-

titled to any benefits provided by the employer; and benefits to which the independent contractor is not entitled include but are not limited to health insurance, vacation pay, sick pay, ERISA and non-ERISA plans, and any other benefits that may currently or in the future be provided to all or some portion of the employees.

C. A clear statement that in the event any court or agency were to consider the worker as an employee by law, the worker knowingly and voluntarily agrees that the worker would not be entitled to any rights or benefits provided to employees; the benefits to which the independent contractor would not entitled even if the independent contractor were found to be an employee, include but are not limited to, health insurance, vacation pay, sick pay, ERISA and non-ERISA plans, and any other benefits that may currently or in the future be provided to all or some portion of the employees.

D. A clear statement that the independent contractor is responsible for any injuries to the worker or damages caused by the worker and an agreement to maintain and provide proof of sufficient insurance to cover any potential claims.

E. A clear statement that the independent contractor is responsible for its compliance with law and an indemnification for violations of law and a requirement that the independent contractor provide proof of payment of compensation and taxes.

F. In the event the independent contractor has employees who will perform services, include a specific statement regarding compliance with employment laws and an agreement to provide proof of such compliance. Also, attach a waiver to the agreement to be signed by each employee or agent of the independent contractor. The waiver should include an acknowledgement of the relationship of the parties and an agreement by the worker that any and all compensation, benefits, insurance, and taxes relating to the worker are the sole responsibility of the worker and the independent contractor, not the client business.

G. A statement that the agreement does not restrict the independent contractor's ability to perform services for other clients.

H. Set forth a business address and phone number for the independent contractor.

I. A requirement that the independent contractor provide invoices for the payment of services and maintain copies of the invoices and records of payment.

J. Establish the method of payment in measurements other than time, preferably by the job.

K. If the independent contractor is hired through an agency or provides more than one worker to perform services, state clearly that the client business does not have the power to hire or fire the workers.

L. The agreement should include a statement of the terms of the relationship, which should include all factors included in the tests and analyses utilized above and which are indicia of an independent contractor relationship.

M. Finally, include a merger clause.

2. Contract with a business entity, not an individual.

3. Avoid recruiting workers to supply to the independent contractor for the performance of services.

4. Avoid inconsistent classification resulting from having an employee and an independent contractor perform the same tasks. There should be identifiable differences between the employees and the independent contractors.

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5. Make no verbal promises and check all writings to ensure there are no promises inconsistent with the written agreement and the independent contractor status. Review handbooks, offer letters, invoices, and benefit information, including stock option notices.

6. Review benefits plans to ensure that the ERISA plans include specific exclusions and limit the covered employees to avoid Microsoft Corp.'s problem. Review non-ERISA plans to ensure there are no unintended promises. Specifically limit coverage under the plans to employees reported on payroll records.

7. Avoid simply transferring an employee to independent contractor status or vice versa without changing the job description.

8. Do not pay overtime to independent contractors.

9. Do not provide benefits to independent contractors unless required by law under the circumstances.

10. Do not provide tools to the independent contractor.

11. Avoid setting hours or the means of work.

12. Ensure that the written agreement accurately reflects actual practice. The courts will choose substance over form in this arena.

13. Train managers and supervisors to recognize and re-enforce the differences between independent contractors and employees.

14. Calendar periodic reviews of actual practices to ensure they have not deviated from the written agreement and established plan.

15. Build a Section 530 Safe Harbor file by collecting and saving any evidence of case law, rulings, audit and industry practice supporting the independent contractor classification.

Although there are various factors applied in various analyses, an employer should first apply a fairness test and ensure that the worker is close enough to a clear independent contractor that the risk is acceptable to the employer. As becoming an employer becomes more and more complicated, employers should take action to prevent suits rather than becoming an unsuspecting victim of employment related litigation.

Endnotes:

[1] For convenience, in this article the term "employer" shall include individuals and entities which employ employees as well as individuals and entities that contract with independent contractors for the performance of services. It is suggested that when drafting contracts, the term be limited to the former category only.

[2] Employers sometimes erroneously believe that relief from certain laws justifies elimination of their human resources function. This is not a recommended practice.

[3] Although the IRS does receive taxes from independent contractors, the taxes are less than that paid relative to employees and the amount is subject to greater discretionary manipulation, and therefore, abuse, by the taxpayer.

[4] *See Vizcaino v. Microsoft Corp.*, 97 F.3d 1187 (9th Cir. 1996), aff'd on reh'g, 120 F.3d 1006 (9th Cir. 1997) (en banc), cert. denied, 118 S. Ct. 899 (1998) (Vizcaino I); *Vizcaino v. Microsoft Corp.* 120 F.3d 1006 (9th Cir. 1997) (*en banc*) cert. denied, 118 S. Ct. 899 (1998) (Vizcaino II); *Vizcaino v. Microsoft Corp.*, 173 F.3d 713 (9th Cir. 1999) cert. denied, 120 S. Ct. 844 (2000) The impact of this series of cases is limited somewhat by concessions made by Microsoft Corp. during the litigation. However, it has revealed issues that employers should consider and consciously and proactively avoid.

[5] *Id.*

[6] The Department of Labor filed suit against Time Warner alleging the deliberate misclassification of workers to exclude them from benefits plans. *See Herman v. Time Warner, Inc.*, 56 F. Supp.2d 411 1999 (S.D.N.Y., 1999)

[7] *See* Fla. Stat. ch. 440.02(14).

[8] Courts have adopted several tests in distinguishing between an employee and an independent contractor. The three main tests are described in *Garcia v. Copenhaver, Bell & Assocs., M.D.'s, P.A.*, 104 F.3d 1256 (11th Cir. 1997). They are as follows: (1) the common-law agency test first set forth in *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 109 (1989) and reaffirmed by the Supreme Court in *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, (1992); (2) the economic realities test; and (3) a combination of the agency and economic realities tests ("hybrid test"). *Cobb v. Sun Papers, Inc.*, 673 F.2d 337, 340-41 (11th Cir. 1982), cert. denied, 459 U.S. 874 (1982). Some courts, in non-ADEA cases, have relied on both the hybrid and agency tests. *See Id.* (Title VII case utilizing hybrid test.); *Daughtrey v. Honeywell, Inc.*, 3 F.3d 1488 (11th Cir.1993) (under ERISA claim, Court utilized common-law agency test.). *Garcia*, 104 F.3d 1256.

[9] *Kane Furniture Corp. v. Miranda*, 506 So. 2d 1061 (Fla. 2nd DCA 1987), cert. denied, *Miranda v. Kane Furniture Corp.*, 515 So. 2d 230 (Fla. 1987), citing *Cantor v. Cochran*, 184 So. 2d 173 (Fla. 1966), adopting Restatement (Second) of Agency 220 (1958).

[10] The former IRS Twenty Factor Test, which continues to be used by agencies and courts for matters outside of IRS issues, consists of the following: (1) instructions regarding when and how to do the work; (2) employer provided training; (3) integration of tasks into general business operations; (4) personal performance of services; (5) hiring, supervising and paying assistants, (6) continuing relationship; (7) established Schedule; (8) devotion of substantially full time to the business; (9) on-site performance of services; (10) compliance with a specific order or sequence; (11) reporting requirements; (12) entitlement to reimbursements for expenses; (13) payment for a period of time rather than job; (14) provision of tools and materials by the employer; (15) lack of investment; (16) inability to realize profits or losses; (17) work for a single employer; (18) provision of services to an employer, not the general public; (19) ability to be discharged; and (20) ability to quit. Rev. Rul. 87-41, 1987-1.

[11] Current Federal and State Conflicts in the Independent Contractor Classification, Jack E. Karns, *Current Federal & State Confliction in the Independent Contractor Classification*, 22 Campbell L. Rev. 105, 107-11 (1999), citing Department of Treasury, Internal Revenue Service, Classification Training Manuals (CTM), Oct. 1996

[12] Section 530 Safe Harbor provides relief from IRS challenge if the employer can provide evidence of a reasonable basis for the classification. This test provides that if the taxpayer can demonstrate reliance on a court case, a revenue ruling, an audit addressing the status, or industry practice and the employer has demonstrated consistency in reporting, including the filing of IRS Form 1099s, the employer can avoid damages. The *Karns* article *supra* provides a detailed analysis of the Section 530 safe harbor.

[13] The Independent Contractor Simplification and Relief Act of 1999 (S. 344), aimed at simplifying the tests, died in committee this year.

Editor's Note: *This article was previously published in the January 2001 issue of The Florida Bar* General Practice Journal.

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Letter to the Editor

How I found the cure for back pain (or *any* pain) in Chefchaouen, Morocco...

by Dorothy Sims

In the process of enduring my summer vacation, I discovered the cure for back pain and thought it would revolutionize worker's compensation in Florida. Certainly, it would reduce the cost to carriers by millions.

Several weeks ago, I found myself with my husband and five children nestled in the bosom of the Riff Mountains in Northern Africa. The tiny town of Chefchaouen, Morocco.

Ok, anyway. There we were, feeling the cool mountain breeze, congratulating ourselves smugly on surviving this far the difficulties of our trip when it happened.

My 14 year old son made a bet with his brothers. "Wouldn't it be funny," he allowed, in his not fully formed frontal lobe sort of way, "if I pulled my pants down, and walked through the lobby of the hotel (and I use the term "hotel" loosely) exposing my butt?" They all agreed to pay him for his misadventure. So, off he went.

Now, another word about Moroccan law:

1. When you are 14 years old (especially 6'1", 14 years old), you are relieved of having to go to school and must then enter the work force. Furthermore, you may be tried as an adult for certain crimes.
2. Exposing one's buttocks in said country results in very bad things.

Ok, so we heard giggling in the next room and immediately went to investigate. When the boys told us of their adventure, we explained the conditions of Moroccan prisons and how freedom of speech and expression really wasn't something very big in Morocco. They boys were stunned. My 14-year old turned pale; I was already pale. At this point, we decided it was best to spirit the miscreant down the mountain as quickly as possible into the crowded Medina (old city) where, we hoped, things would cool down in the hotel and the police would not be able to identify the culprit.

"Plan B" was for my son to act brain injured, and I was to defend him, claiming he had no intent and was "mal sure la tete". I haven't spoken French in twenty years, but I think that means sick in the head. Or at least, that's what I hope it meant. Of course, I wasn't exactly sure because when I thought I asked for the bill at our last meal in my very best French, the manager came over, very angry, and asked in English why I said I had no money to pay for the food.

So anyway, we began climbing down the mountain as quickly as possible to the city. The city was two football fields away, at a 45-degree angle down. There we were, my husband, myself, and our five children, scampering down a mountain when it occurred to me, about halfway down, that I never see the words "scamper" and "44-year old woman" in the same sentence. Then, a few feet away, some cute little boys herding goats came up and asked for money, in French. Of course, me being the Renaissance woman, relayed that we had no spare change.

Well, by the looks on their faces, I think something got lost in the translation because the next thing I knew, my family was being pelted by rocks. Big, hard rocks too.

We ran like hell. Finally, in the safety of the stone walls of the city, we relaxed; glad to be alive and not under arrest. It was at that point that I realized my right leg was quivering like bad flan. It got worse.

Soon, walking unaided was a problem. Luckily enough, that evening, we met a Chinese doctor who was volunteering at Mohammad 6 Hospital in the city for his government who was trying to improve relations between the two countries.

He invited me to the hospital for treatment.

At three o'clock p.m. the next day, I found myself entering the hospital. I was greeting kindly by our benefactor and his two associates. One was a graduate student in orthopedics. Oh good, I thought. A shot and an anti-inflammatory and I can don my pack tomorrow and be right as rain.

I was brought to the women's section of the hospital. In accordance with Muslim tradition, men and women must be separated in worship and in all other areas of life, if at all possible. I was taken to a small unair-conditioned room with sheets that were clean but boasted old stains of blood. Ok.

Well, the doctor stopped to bring a tray of needles. They were not individually packaged and new like in the U.S. They were not even syringes. They were acupuncture needles, used needles. I vigorously shook my head in the universal language of HELL NO. My husband, ever helpful, turned on the video recorder and said, "They are probably ok. They look like they have been sterilized."

Ok, now I'm no doctor, and he is, but I don't recall ever reading where you could see a germ.

Nope, no acupuncture.

At that point, they all laughed, accused me of being a "big American baby" and brought out the next mode of treatment, a large tray with round glass balls, open on one end. When the doctor took a cotton ball with forceps and lit it on fire heading towards my back, I made my desires clear, "Not gonna happen in this lifetime." My husband then gently explained, very slowly as if to an insane person, that this was moxibustion and is a very commonly accepted Chinese treatment of just about anything. He thought it might help. He turned to the video recorder on again and recorded me confessing that I really was a "big American baby".

At this point, I was feeling like a woman in labor who looks at her husband and is ready to draw blood. "You are not helping," I shouted from the bed.

He continued to video.

Then the doctor offered "strong massage". Ok, that I understood. He

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CURE FOR BACK PAIN
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began by pulling my big toe, hard. Sweat was pouring off both our foreheads. Whatever. At least it did not involve needles or flames. He then gently began massaging the muscles in my back. That felt so good.

Then, he body slammed me so hard the bed shook. I was in so much pain, I couldn't scream. He told me this would help my back. This, coming from the same man who declared, "American TV does not show Chinese government in true light. Chinese government very, very good."

He then did the strangest thing. He rubbed his hands together and laid them on my spine. His hands were so hot it was almost more than I could bear. Then his hands began to vibrate. I don't know how he did it, but it was really weird. Slowly, my back began to relax, but I knew better, because it was body slamming time again.

Thereafter, he did something I can only compare to Dusty Rhodes and his famous "figure four, spinning toe hold". Remember him? The big fat blond wrestler with a lisp?

Well, at this point, I'd had enough. I declared myself cured. I jumped out of bed and did a little dance to show I was serious and ran up the mountain. By the time I got back to the hotel, I realized I was really cured. I didn't hurt anymore. Whatever the gracious and well meaning young doctor did, it worked. My back pain was gone. I could walk miles a day again, carrying my back, pulling fighting children apart, dodging cars, donkeys, camels, etc.

The treatment cost me nothing. The air fare might be a bit steep, but think of the overall cost savings to the system!

Mark your calendar...

What? **The 18th Annual Winter Meeting and Seminar**
sponsored by The Florida Bar Workers' Compensation Section

When? **February 23 - March 1, 2002**

Where? **Vail Marriott Mountain Resort & Spa**

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Start Managing Your Firm or Pay the Consequences

by RJon Robins, LOMAS Practice Management Advisor

Is she over here? Or is he over there?
Those partners, they seek them everywhere!
Is she a wunderkind?
Or is he just full if it?
That elusive, perfect associate!

It's pretty well-recognized among firm administrators and managing partners that the hardest thing is to find good people to work for the firm. So when you have someone reliable whose work you are satisfied with, even if you think you can do better, it's often best to find a way to keep that person around, because short retention cycles are devastating to a firm's profitability.

The Real Cost of Turnover

Regardless of the position within the firm, you have the expense of advertising and interviewing a new person. Then you have to train them and hope they are not worse than the last person. Meanwhile, no matter how good someone is, there is always a learning curve in any new environment during which you're not going to get your money's worth.

If the person is as good as you hoped, you have to worry they're so good that they'll soon be worth more than you are paying, and you'll be throwing a going-away party when they get hired away.

While all of this jockeying around is going on, your unemployment rates are going through the roof because they are variable. You pay between 1 percent and 5.4 percent of the first $7,000 of every employee's salary for unemployment insurance, based on how many people you fire in every two-and-a-half year period. Let's say you hire someone and pay them $7,000 before you get so upset over the color of their socks that you fire them. Your firm is going to pay between $70 and $378 in unemployment tax, depending on how often you do this sort of thing.

To put it in a real-world context, let's say your firm employs 11 people (two partners / three associates / six support staff). Your unemployment taxes could range anywhere from $770 to $4,158 per year. So, you fire a couple of bad hires and suddenly, instead of giving the government 1 percent ($770) in unemployment taxes, you could find yourself at the maximum rate 5.4 percent ($4,158). And it can get worse.

Remember, you are paying the rate on the first $7,000 you pay to each individual. If you hired 10 people, you'd pay the calculated rate on each individual's first $7,000.

So you ask yourself: Is that loser who's getting $30,000 really so bad it's worth another $3,000 in unemployment taxes just to take a chance of getting someone who's worse?

Saving Money Before You Act

This advice should be heeded long before you start simmering over the prospect of having to keep someone around to avoid paying higher unemployment insurance rates. Start thinking about where you want your firm to be in five years. Your strategic plan should address its client base, budget, physical facilities, use of technology, marketing, and, yes, employment strategies.

Your firm's employment strategy must support its growth plans. How many lawyers will you have on staff in five years? What services will they offer? How much staff support will be required to deliver those services efficiently? Once you have the answers to these questions, you can start to formulate a plan for how to attract, train, and keep your support staff. Here's a hint: More money is rarely the best solution.

Staff Retention

If you want to retain staff in today's job market, you'd better make sure the work is professionally satisfying. Gone are the days when you could hire someone in their late teens or early 20s and buy them a gold watch when they retired from your firm 30 years later. Today, Generation X is in the job market and Generation Y is on the way. Most "Gen X'ers" want more than a paycheck from their employer. They. . . well, we, want personal and professional growth, too. One of the most valuable benefits an employer can offer in today's market is the opportunity to acquire new skills, not money. Sure, Gen X'ers will take your money, too, and the more the better. But for many of us, that's not we value most. We may not have been around the block as many times as you, but the blocks we've been on may have taught us a thing or two you don't know.

For example, most Gen X'ers grew up in the 1970s and bore witness to massive job layoffs. As impressionable children, we experienced the resignation of President Nixon, the oil embargo and the war in Vietnam. Later, as we prepared to enter the legal job market, we saw 100-year-old firms splitting up and collapsing under the weight of "tradition." Technology cut our ties to the library and even the office, since most of us can comfortably communicate and exchange information from anywhere in the world. Many of us grew up as latchkey kids and don't necessarily want or expect anyone to be waiting at home or anywhere else for us. . . and that includes the office.

Firms seeking to attract and retain the best support staff and associates need to trade in the commodity of the day if they want to keep us around. Most Gen X'ers value flexibility and opportunities for personal or career growth. Like it or not, we might not share your confidence that the firm will still be around once

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MANAGING YOUR FIRM
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we've paid our dues for senior staff or coveted partnership positions.

Generation X

In my work as a practice management advisor, I educate managing partners and law firm administrators regarding all facets of running a more profitable, ethical, and professional firm. One of these facets, of course, is staff retention. A big part of my job in this area involves helping Baby Boomer partners and administrators shift their paradigm from manager to coach.

A manager tells people what to do and keeps after them until they do it. A coach finds out what motivates a person and uses those internal desires to achieve results. A manager designs a firm in a vacuum and then imposes that design on the staff. A coach investigates what skills, interests, and abilities he or she has to work with and designs a firm around those resources. More than ever before, when law firm administrators become law firm coaches, they are experiencing greater and greater results.

Coaching is actually pretty intuitive once you get the hang of it. The first thing you do to coach your staff is recognize that they do their jobs for their own reasons, not your reasons. Then you set about finding out what reasons the person has for doing the job you hired them to do. Some people will want or need money so badly that their own personal reasons take a backseat to the paycheck and will do anything you ask of them. Most people on your staff, certainly most Gen X'ers, will not fall into this category. Once you know what reasons each person on your staff has for doing their job, you can start to find out what they'd like to be doing in, let's say, five years. With that information, you can begin to design a job for that person so that doing it actually serves their needs and your needs, too. This might sound exceedingly difficult. It really isn't, especially not when compared to the alternative.

The Elusive Associate

The short answer is that there is no such thing as a "perfect" associate, and anyone who tells you otherwise is, well, let's just say they're no wunderkind.

Nor is there a perfect firm, manager, or coach. It's the 21st Century and time to face facts: Running a law firm is not easy. It takes a lot of creative hard work and follow-up.

The question you need to ask is whether you'd rather spend your time hiring, training, and firing staff and associates who don't fit your model, or if you are prepared to start managing in the 21st century?

***RJon Robins** is a lawyer and practice management advisor with the LOMAS program, which is available for on-site consultations and for speaking engagements at local bar meetings. Call (800) 342-8060.*

Case Law Update

by Christine Franco, Esquire and Janice Matson, Esquire, Tampa

APPELLATE PROCEDURE

Autheria Mitchell, Appellant v. Metro Dade and Risk Management for Dade Co., Appellees, Opinion filed 6/18/01 26 FLW D1521; Appeal from The Honorable JCC Sylvia Medina-Shore; C. Rory Schnepper and B. Ellen Schnep-per for Appellant; Robert A. Ginsburg and Marilyn B. Strauss for Appellees.

FRANCO

The case was previously before the First DCA and remanded for reconsideration in light of *Closet Mail v. Sykes*. On remand, a successor Judge reviewed the case and entered an order not allowing the Claimant to testify. The Claimant asserts that she should have been allowed to testify before the successor Judge as the original Judge's Order reflected that he did not credit her hearing testimony.

MATSON

The First DCA found that since the record contained "only a summary of the testimony adduced at the original hearing, we are constrained to reverse. On remand, the judge of compensation claims shall afford claimant an opportunity to testify in person."

REVERSED and REMANDED.

ATTORNEY FEES

Pattie E. Bryant, Appellant v. Publix Supermarkets, Inc. and Publix Risk Management, Appellees Opinion filed June 18, 2001; 26 FLW D 1522; H. Guy Smith, Susan w. Fox and Brendan M. Lee for Appellant and David J. Williams for Appellees.

The Claimant's attorneys seek review of an order awarding fees stating that (1) the reasonable hourly rate arrived at by the JCC was not supported by competent substantial evidence and (2) the JCC reduced the number of hours in reference to the attorney fee owed without identifying which hours were being denied. The Employer/Carrier concede the error in #2.

The opinion does not state what the hourly rate that was reasonable in #1 is but affirm that it was in fact reasonable. The First DCA does remand for the JCC to identify "with specificity those hours for which compensation is denied."

AFFIRMED IN PART; REVERSED IN PART; and REMANDED.

Florida Hospital, Appellant v. Desiree Taylor (Boen), Appellee Opinion filed May 17, 2001; 26 FLW D1281; Appeal from The Honorable JCC Richard S. Thompson; Pamela Cos, Michael D. Rouse and Jodi Mustoe for Appellant; Michael B Brehne and Bill McCabe for Appellee.

Florida Hospital appeals an order awarding attorney fees to the Claimant. The E/C state that attorney's fees are not owed because they originally accepted her knee injury as compensable. However, the Carrier later alleged that the Clamant suffered another accident and attributed her injury to that accident. The Court found that by raising that defense the E/C placed compensability at issue and the Claimant ultimately prevailed on this issue.

The Claimant injured her left knee while working for Florida Hospital in May of 1998. The E/C accepted the injury and paid benefits. Subsequently a Petition for Benefits was filed for determination of Average weekly wage, temporary benefits and physical therapy. The E/C filed a Notice of denial on that Petition stating that MMI had been reached with no impairment.

Subsequently, in September of 1998, the Claimant was working for another employer and aggravated her left knee. The E/C in this case then filed an amended notice of denial stating that the injury was not compensable and that the loss of earnings and medical treatment are related to a new accident as is the major contributing cause.

By the time of the merits hearing all claims were withdrawn except the claim for physical therapy. During the course of the litigation, the claimant was able to rehabilitate her injury through bicycle riding and other measures and the evaluation ordered by the JCC found that the physical therapy was no longer needed.

However, the JCC found that the E/C were still liable for attorneys fees because "The Employer/Carrier should not be able to escape the payment of attorney's fees for services rendered in litigating issues brought about... by the Employer/Carrier's wrongful denial of benefits just because during the delay the claimant found alternative means by which to improve her condition through bike riding."

The First DCA determined that "the medical evaluation she received was itself a benefit for Claimant that meets the requirements of section 440.34." Additionally, the Claimant prevailed on the issue of compensability.

The Court further states "Florida Hospital transformed what would otherwise have been straightforward litigation over the need for medical benefits into a much more expansive proceeding. Before Florida Hospital raised compensability as a threshold issue, the only question before the judge of compensation claims concerning the medical benefits Ms. Boen sought was whether they were medically necessary. Contesting compensability significantly increased the complexity of the case. Because Florida Hospital then lost on the issue of compensability, the judge of compensation claims did not err in awarding attor-

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ney fees under section 440.34(3)(c).

AFFIRMED.

Lewis Browning, Appellant v. New Hope South, Appellee 26 FLW D1366; Opinion filed May 29, 2001; Appeal from The Honorable Shelley M. Punancy; Michael H. Stauder for appellant; Timothy M. Basquill for Appellee.

The Claimant was successful in proceedings before the JCC. The E/C appealed to the First DCA. The First DCA affirmed the JCC's ruling and granted the Claimant's motion for appellate attorney's fees and "relinquished jurisdiction to the JCC for determination of the fee if the parties were unable to agree to an amount." The Order cited that the "review of the JCC 's order shall be in accordance with the Florida Rule of Appellate Procedure 9.400(c)."

Subsequently, the JCC held a hearing and awarded a $10,000.00 fee to claimant's counsel. Claimant's counsel filed a notice of appeal and was assigned a new case number. The First DCA sua sponte issued an order concerning the claimant's selection of an inappropriate remedy. The Claimant's counsel then filed a motion for review in the original appeal and the First DCA found it untimely.

The First DCA states that "Florida Rule of Appellate Procedure 9.180(i)(4) is directly controlling and cross-references Rule 9.400(c), which provides that review of orders rendered by the lower tribunal under this rule shall be by motion filed in the court within 30 days of date of rendition. Where, as here, the rules of procedure provide for review of an order by motion in an existing file in the appellate forum, there exists a clearly-defined and adequate remedy and the order is not separately appealable.

DISMISSED.

Smurfit-Stone Container Corp. and RSKCo, Appellant v. Oscar Vince Taylor, Appellee, Opinion filed June 1, 2001; Appeal from The Honorable JCC Ivy C. Harris; David W. Langham and Mandy J. Locke for Appellant; John C. Taylor and Lana G. Eicher for Appellee.

E/C appeal from an award of attorney fees pursuant to a Motion for Emergency Conference.

The Claimant filed a Motion for Emergency Conference for medically necessary emergency care and the Claimant was awarded attorney fees for bringing of said Motion.

The First DCA found that "the appellee's filing of his Motion for Emergency Conference, pursuant to section 440.25(4)(h), satisfied any pleading requirements under section 440.192. As Appellants refused to authorize the medically necessary emergency care even after the Motion for Emergency Conference was filed, Appellants incurred liability for Appellee's attorney's fees.

AFFIRMED.

Brenda Feinberg, Appellant, v. Miami-Dade County and Miami Dade County Risk Management Division, Appellees Opinion filed July 9, 2001; Appeal from The Honorable JCC Sylvia Medina-Shore; Martha Fornaris for Appellant; Robert A. Ginsburg and Edward Z Shafer.

The JCC awarded attorney's fees at a rate of $200.00 per hour and found that 76.7 hours of the claimant attorney's hours were excessive and unrelated to the benefits obtained.

The First DCA found that there was no basis in the record for the award of $200.00 per hour for the attorney fee. Additionally, the court found no basis for the reduction of 76.7 of the Claimant attorney hours. Remanded the Case to the JCC to "clearly articulate any additional findings in her final order."

REVERSED AND REMANDED

AVERAGE WEEKLY WAGE

Anna Buono v. Orange-Co of Florida, Inc./Protegrity Services, Inc., 26 FLW D1854 (August 3, 2001) 1st DCA. Opinion filed July 30, 2001. Judge of Compensation Claims, Mark H. Hofstad.

Appellant appealed the denial of

permanent total disability benefits and the calculation of her average weekly wage. The 1st DCA upheld the denial of permanent total disability benefits, however, reversed and remanded the calculation of the average weekly wage. The Judge of Compensation Claims calculated the claimant's average weekly wage for the nine weeks she worked prior to the date of accident using the actual wages earned. However, the claimant's wages for the first two weeks of her employment were at a lower rate. The 1st District Court held that the first two weeks of work used in the calculation of the average weekly wage must take her raise into account.

Hillsborough County School Board and RSKCo, Appellants/ Cross-Appellees, v. Sue Christopher, 26 FLW D1967 (August 24, 2001) Opinion filed August 14, 2001. Judge of Compensation Claims, William D. Douglas.

While the appellate court upheld the Judge of Compensation Claims' award of permanent total disability benefits because it was supported by competent substantial evidence, it remanded the case for determination of the correct average weekly wage. The claimant argued that the Judge of Compensation Claims erred by calculating the claimant's average weekly wage in effect on the July 25, 1988 injury as opposed to the date she became disabled, April 20, 1995. The claimant argues that her condition deteriorated to the point that she could no longer work between the dates of her injury and the dates of her ultimate disability. As a result, the claimant urged a recalculation of the average weekly wage to the time period prior to the disability. The appellate court agreed and reversed and remanded the case for recalculation of the claimant's permanent total disability benefits based upon the stipulated 1995 average weekly wage.

Henry Reaves, Appellant v. United Parcel Service and Liberty Mutual Insurance Company, Appellees, 26 FLW D2117 (September 7, 2001). Opinion filed August 30, 2001. Judge of Compensation Claims, Ivy Harris. Counsel Howard Butler for Appellant and Christy Gavin for Appellee.

The claimant appeals the decision of the Judge of Compensation Claims excluding from his average weekly wage his concurrent earnings from the United States Postal Service. Because the controlling statutes do not exclude these concurrent earnings, we reverse. Claimant suffered an injury while working at his part-time job as a loader for UPS. At the time of the accident, he was also employed by the U.S. Postal Service as a full-time driver. He sought a ruling from the Judge of Compensation Claims that his postal service earnings should be included in the AWW used by the Appellees to determine compensation benefits. The Judge of Compensation Claims ruled that it is impermissible to include concurrent earnings from a job that does not meet the definition of employment under section 440.02(15)(b). The Judge of Compensation Claims went on to hold that the claimant's postal service earnings do not fall within the purview of employment. She therefore determined that such concurrent earnings

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could not be included in his AWW. Specifically, the Judge of Compensation Claims relied upon section 440.14(1) which addressed the situation in which an employee earns wages from more than one employer but performs the same or similar services for each employer. The Supreme Court later broadened this to include concurrent dissimilar employment. However, the 1st District Court stated that a reading of statue 440.02 reveals that employment by the U.S. Postal Service is not specifically excluded. Although section 440.02(15)(b) contains a list of employment included in the definition, nothing in the statute indicates that this list is exclusive. The list merely contains categories and examples of employment as a means of specifying certain items within the ambit of the definition. For purposes of concurrent earnings, the court has explained that the phrase any service performed in the definition of employment in section 440.02(15)(a) is extremely broad and is limited only by section 440.02(15)(c). Therefore, because employment with the U.S. Postal Service could fall within the broad definition in section 440.02(15)(a) and is not specifically excluded by the same statute, claimant is entitled to have his wages earned with the postal service included in his average weekly wage. Accordingly, the Judge of Compensation Claims' opinion is reversed and remanded.

COMPENSABILITY

B&L Services, Inc., d/b/a Gray Line of Orlando and Claims Control, inc., Employer/Carrier #1, Appellants/Cross-Appellees v. Coach USA f/k/a Gray Line of Orlando and Cigna, Employer/Carrier #2, Appellee, and Rafael Guzman, Claimant, Appellee/Cross-Appellant Opinion filed 6/18/01; 26 FLW D1516; Appeal from The Honorable JCC Gail Adams; Robert l. Dietz and C. Douglas Green for Appellant/Cross-Appellee; Jamey S. Rodgers for Appellee/Cross-Appellee, Neal P. Pitts and Matthew D. Valdes for Appellee/Cross-Appellant. E/C #1 appeals the JCC order allocating 100% responsibility to them for the claimant's carpal tunnel condition.

The Claimant cross appeals the assignment of 2% permanent impairment rating and failure to award penalties.

The First DCA upholds the JCC's finding that ER #1's work activities were the major contributing cause to the claimant's disability and need for medical treatment. They also affirm the 2% PIR, but reverse on reimbursement/contribution and attorney fees as they found that the JCC misapplied the major contributing cause standard in this case as it stands for responsibility between employer/carriers.

The Claimant worked for Employer #1 for three years in an auto body repair shop using various vibrating tools. A little more than two years after his employment began at ER #1, he began experiencing numbness in hands and wrists. He reported this numbness and pain to ER #1 one year later on May 14, 1997, the day before they sold the company to ER #2. After much dispute, ER #1 paid for surgery for the carpal tunnel syndrome and the Claimant ceased working for ER #2 on October 28, 1997, the date which he cites as his second injury because he could not continue working due to the increased pain and numbness.

The JCC held a hearing to determine the claimant's entitlement to temporary benefits and if E/C #2 should reimburse E/C #1 for benefits paid. E/C #1 argued that the Major contributing cause of the claimant's injury was his employment with ER #2 and therefore E/C #2 should contribute their share. Claimant sought a determination of PIR as the treating physician assigned an 11% just subsequent to surgery and the E/C's IME physician and the EMA assigned a 2%PIR. The Claimant also sought penalties, interest, attorney fees and costs.

The JCC originally continued the hearing to allow an EMA to determine responsibility of each Em-

ployer. The EMA found that ER #1 was 90% responsible and ER #2 was 10% responsible due to duration of employment with each employer and assigned a 2% PIR.

Thereafter, the JCC ruled that 100% responsibility for the injuries was attributable to ER #1 because ER#2 was not the major contributing cause of the injury or need for treatment. The First DCA found that while the JCC was correct in determining that the major contributing cause of the Claimant's injuries and need for treatment did arise from his employment with ER #1 that is not the standard to be used when determining responsibility between employer/carrier's. This is merely the standard to determine if the injury under the workers' compensation statute. The First DCA stated that Section 440.42(3) Florida Statutes (1995) provides that the JCC decides a dispute between two or more carriers in regard to liability for compensation or medical treatment. "The determinative factor in placing liability under Section 440.42(3) is whether the second compensable accident causes injury which is independent from or an exacerbation of the first compensable accident. Section 440.42(3) thereafter allows the JCC to divide liability according to each carrier's responsibility." Therefore, the Court found that ER #1 is entitled to contribution from ER #2 this includes medical benefits, indemnity benefits and attorney fees.

The Court found that the JCC was proper in awarding a 2% PIR according to the EMA versus the 11% given by the treating physician due to the treating physician assigning this rating just after surgery and opining that the claimant may improve over time. The First DCA further found that the JCC did not make a determination as to when the obligation to pay benefits became due and therefore it must be remanded to make this determination so that a determination of penalties may be made.

AFFIRMED in part, REVERSED in part; REMANDED with directions.

Donald Capps, Appellant/ Cross-Appellee v. Buena Vista Construction Company and Travelers Property Casualty Company, Appellees/Cross-Appellants. Opinion filed May 21, 2001 26FLW D1295; Appeal from The Honorable JCC John P. Thurman; Irvin A. Meyers for Appellant/Cross Appellee; Wayne Johnson and AnnaMarie Kim and Robert G. Brightman for Appellees/Cross-Appellants.

The Claimant, Mr. Capps, appealed an order which denied his claim for methadone treatment, methadone reimbursement, mileage and attorney's fees and costs and dismissed those claims with prejudice.

The Claimant was involved in an industrial accident in 1989 and in 1991 was adjudicated PTD

Pursuant to a previous industrial accident in 1981, the Claimant was treated by an orthopedic surgeon and that surgeon opined that in September 1986 the claimant had been taking too much Percodan and that its use would have to be discontinued and he expressed this to the claimant. The claimant had then stopped using the Percodan for an extended period of time and then the physician authorized another prescription in 1987 after the claimant had sustained an re injury to his back. The Claimant continued to treat with this physician through 1988 and the doctor testified that he did not appear to be addicted to any medication when last treated.

The next industrial accident occurred in May of 1989 and he was treated by a neurologist who prescribed large doses of Tylox, a Class II narcotic and by April of 1990 the physician felt that the Claimant had become dependent on Tylox and referred him to a Methadone treatment center and the Claimant began treatment in June of 1991. Dr. Lefton treated him at the Methadone Center and opined that the Tylox, which was prescribed by an authorized treating physician, had "re-established a pre-existing, long-established dormant narcotic drug dependency."

The Employer/Carrier denied treatment for the drug addiction citing *Milmir Construction Co* and section 440.02(1) that states "an accidental aggravation of a disease due to the habitual use of narcotic drugs must be deemed not to be an injury by accident arising out of employment."

The JCC agreed with the Employer/Carrier's position finding that "these claims are precluded by the operation of section 440.02(1), Florida Statutes (1989), as construed in *Milmar Constr. Co. v. Smith*, 582 So.2d 52 (Fla. 1st DCA 1991), because the claimant had a pre-existing long-established narcotic dependency, which arose from medical treatment for a work-related injury and was aggravated subsequently when his authorized treating physician prescribed a different narcotic in the course of treating his industrial injuries."

The Court here distinguished *Smith* by stating "Smith's disease and disability arose from the willful use of alcohol, whereas the claimant's narcotics addiction and its attendant disability arose solely

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from medications prescribed by his authorized treating physicians for his industrial injuries." The further state "willful abuse of alcohol is different from the non-volitional use of doctor-prescribed narcotics for treatment for work-related injuries."

The First DCA concluded that "the JCC erred as a matter of law in ruling summarily that involuntary addiction to a legal narcotic, prescribed by an authorized treating physician as necessary treatment for an accident arising out of employment under section 440.02(1), Florida Statutes (1989). Given his threshold finding that the facts did not demonstrate an injury by accident arising out of employment, the JCC initially did not need to address the employer/carrier's other defenses.

REVERSED AND REMANDED for further proceedings.

Tessan Swartz, Petitioner v. McDonald's Corporation, Respondents, Supreme Court of Florida; May 24, 2001; 26 FLW S350; Alfred J. Hilado and Bill McCabe for Petitioner and Scott Miller for Respondents.

The Employee, Swartz a HR consultant for McDonalds lived in Orlando and commuted to Tampa for training. Part of her job was recruitment and as such she attended job fairs. Swartz attended a meeting in Tampa on Friday 3/1/96 and loaded up part of a display booth for a job fair in Orlando scheduled for Monday 3/4/96.

While traveling home to Orlando, she was involved in an automobile accident. McDonald's denied compensability based on the coming and going rule.

Testimony at the hearing before the JCC revealed that transporting the booth was part of the claimant's job responsibilities and she was expected to do this. The Claimant testified that if she had not brought it with her on Friday, she would have had to returned Monday morning before the job fair to pick it up or made arrangements for someone else to bring it which had not been done.

The JCC found that attending the original meeting in Tampa did not expose Swartz to additional travel risks and there was no special trip involved in attending the meeting. The case was appealed to the First DCA to determine if the transport of the booth transformed her trip home into a compensable event.

The First DCA fond this to be a minimal job duty not requested by the Employer and further found that "the accident did not fall within the parameters of the dual purpose doctrine because the performance of a service essential to the business of the Employer such that the travel would be required to be undertaken by someone on the Employer's behalf if it had not coincided with the claimant' s personal journey." They concluded that Swartz was merely carrying paraphernalia or tools of her employment and this is not compensable. The dissent stated that the record clearly established that transporting the booth was a business purpose.

The Supreme Court found that the JCC's findings were not supported by competent substantial evidence. The Supreme Court found that the phrase "special errand or mission" encompasses the dual purpose doctrine. The Supreme Court further held that "so long as the business purpose is at least a concurrent cause of the trip, the Employer may be held liable for workers compensation."

The Supreme Court further delineated that (1) Swartz had an understanding with McDonald's regarding her responsibility for transporting the booth (2) the Employee was performing a task that was integral to McDonald's successful participation in the job fair (3) The Employee did not receive compensation for the transport but had company care and the Employer subsidized gas.

The Court concluded the following rule: If there is a business purpose for the trip, the matter must be handled on a case by case basis but recovery will not be permitted simply for carrying tools of employment when injured and not performing a legitimate business purpose.

First DCA opinion QUASHED.

Lillie Haynes, Appellant, v. World Color Press and Gallagher Bassett Services, Inc., Appellees. 26 FLW D1965 (August 24, 2001) 1st DCA. Opinion filed August 14, 2001. Judge of Compensation Claims, Gail A. Adams.

Claimant argues that there was no competent substantial evidence to support the finding by the Judge of Compensation Claims that she had a syncopal episode rather than slipped on water which resulted in her fall. Second, the claimant contends that even if she did faint as a result of a syncopal episode, the Judge of Compensation Claims erred in finding her injury was not compensable, because her employment exposed her to a risk of injury greater than that which she would have normally encountered in her non-employment life. The 1st District Court stated that the Judge of Compensation Claims did have competent substantial evidence to find that the claimant's fall was the result of a syncopal episode instead of a slip. Further, the 1st District found that the claimant did not preserve the issue of whether her employment imposed an increased risk of injury and therefore would allow benefits to the claimant. Accordingly, the Judge of Compensation Claims' order was affirmed.

(See strong dissent)

Michael Dunlevy, Appellant, v. Seminole County Department Of Public Safety and Gallagher Bassett Services, Inc., 26 FLW D1966 (August 24, 2001) Appellees. 1st DCA. Opinion filed August 14, 2001. Judge of Compensation Claims, Thomas G. Portuallo.

Claimant was injured on April 19, 1998 while working as a firefighter/paramedic. Ultimately, the claimant was diagnosed with a right hamstring strain. The employer/servicing agent accepted the claimant's injury as compensable and began providing temporary total disability benefits and medical benefits. Over a year later, a supervisor with the employer informed the servicing agent that the claimant's fall had occurred during a playful wrestling match with a co-worker, rather than from slipping. Counsel for the employer/servicing agent investigated and determined that the claimant was injured while engaged in horseplay. The employer/servicing agent thereafter denied compensability.

The 1st DCA rejected the claimant's contention that the em-

ployer/servicing agent waived the right to deny compensability of the claim because it did not investigate within 120 days of the initial provision of benefits pursuant to section 440.20(4). The court held that there was nothing in the information the servicing agent obtained after the injury either from the claimant, the employer, or the physicians that raised or should have raised any doubts as to the cause of injury. The waiver provision should not be construed to require carriers to automatically disbelieve claimants' reports of injuries without additional information warranting investigation. Accordingly, the appellate court affirmed the Judge of Compensation Claims' ruling that the employer/servicing agent did not waive their right to reject compensability of the claim.

On analysis of the circumstances surrounding the injury, the appellate court concluded that the facts were more consistent with case law in which the courts have found that a momentary deviation from work duties does not rise to the wholesale abandonment necessary to bar a claim based upon a doctrine of horseplay. In the cases where the horseplay doctrine has been applied to deny benefits, the facts clearly showed that the claimant's significantly departed from standard employee behavior. The appellate court found that although the playful roughhousing of claimant and his coworker was contrary to department policy, it was momentary and insignificant. There was no testimony that claimant abandoned his duties by failing to exchange the necessary information with the incoming shift. As a consequence, the appellate court reversed the Judge of Compensation Claims' finding that claimant's claim was not compensable because of horseplay. Further, the appellate court remanded the issue of whether the claimant proved the industrial accident was the major contributing cause of the hamstring injury. The appellate court stated that the claimant is not required to prove major contributing cause by expert medical evidence alone, but by the totality of the evidence.

Ultimately, the appellate court concluded that the claimant did establish causation and hence compensability of his right leg condition, the issue of permanent impairment is ripe for review. The medical evidence submitted established a range of impairment benefits from zero to two percent. Accordingly, the appellate court affirmed the Judge of Compensation Claims opinion in part and reversed in part with remand to determine the appropriate impairment rating.

Caroline Gilbert, Petitioner v. Publix Supermarkets Inc., et al, Respondents, 26 FLW S479 (July 20, 2001). Opinion filed July 12, 2001. Thomas Vaughan and Bill McCabe for Petitioner. Arthur England, Jr. and Brenda Supple for Respondents.

The Supreme Court accepted review of this case due to the allegations that it expressly and directly conflicted with opinions in *Nicco Gold Coast Cruises v. Gulliford*, 448 So. 2d 1002 (Fla. 1984), and *Cook v. Highway Casualty Co.*, 82 So. 2d 679 (Fla. 1955), and which is cited to in the 1st District's decision in *Schwartz v. McDonald's Corporation*, 726 So. 2d 783 (Fla. 1st DCA 1998), *Quashed 26 FLW S350 (Fla. May 24, 2001).*

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In the Gilbert case, the claimant was injured in an automobile accident which occurred at approximately 3:45 a.m. on January 26, 1995. The claimant was en route from her home to her place of employment at Publix. Although the claimant's obligations for her employment varied, she was responsible for both opening the store at 4:00 a.m. and preparing the weekly store newsletter. The newsletter prepared by the claimant was distributed with the employees' paychecks on Thursday mornings at 8:00 a.m. The claimant's typical practice was to prepare the newsletter at home. On the date of the accident, the claimant was driving to her employment and had the newsletters in the vehicle with her.

The Judge of Compensation Claims denied compensability of the claimant's automobile accident. The findings were that claimant drove her normal route to work on the day of the accident, she was scheduled to open Publix at 4:00 a.m. as part of her customary work scheduled, the stretch of the road driven posed no special hazzard, the managers did not prohibit her from working on the newsletter at home, the newsletter was completed before she left her house for work, the newsletter was in the car at the time of the accident, claimant was not paid for her travel time, she was not transporting the newsletter purposely for delivery at 4:00 a.m., her sole purpose for traveling to work was to open the store, and the trip did not constitute a special errand. Accordingly, the Judge of Compensation Claims denied compensability and the attendant claims for indemnity, medical expenses, costs, and attorney's fees. The Judge of Compensation Claims also denied the claimant's subsequent Motion for Rehearing.

Claimant appealed this decision to the 1st District Court of Appeal. The 1st District affirmed on all issues but specifically addressed exceptions to the going and coming rule. The 1st District Court concluded that because claimant prepared the newsletter at home for her convenience, her home did not constitute a second job site. Therefore, she did not fall under the exception to the coming and going rule for traveling between two employment premises. The Court went on to find that it was not necessary for claimant to deliver the newsletter to the store on the morning of the accident. Instead, delivering the newsletter was an incidental part of her trip and she would not have made the drive if the personal motive (going to work) was removed.

In reviewing this case, the Supreme Court stated that the dual purpose doctrine is the appropriate standard for determining this case. However, in applying the standard, the Supreme Court concluded that the present case falls outside the dual purpose exception because the Judge of Compensation Claims and the District Court found there was no dual purpose for the trip, only a personal one, traveling to work, and this finding is supported by substantial competent evidence. Claimant was driving her normal route to work to open the store at 4:00 a.m. She had placed the newsletter in the car for delivery at work. She completed the newsletter at home, a practice that was done for her own convenience. In order to be compensable, the accident must have occurred while the claimant was pursuing both work related and personal travel. This case does not fall under that category. Accordingly, the Supreme Court found that claimant's accident is not compensable under the dual purpose doctrine and accordingly approved the decisions below.

Juan Rodriguez, Appellant v. Tri-State Carriers, Inc and Claims Center, Appellees, 26 FLW D2137 (September 14, 2001), Opinion filed September 4, 2001; JCC Joseph Murphy; Counsel: Dennis Palso for Appellant, Pam Woolley for Appellees.

The JCC denied compensability of claimant's car accident as it did not take place in the course and scope of his employment. First DCA agreed and affirmed the decision. The claimant worked as a truck driver for Employer. The evening before the accident, claimant loaded one of the Employer's trucks with goods for the first delivery the following day. After he finished, he did not drive home in his personal car because he accidentally locked the keys inside after driving it to work that morning. Instead, he drover Employer's vehicle home. Claimant's home was 15 miles in the opposite direction from the next day's job site. The claimant was involved in the motor vehicle accident the next morning on his way to the job site. The accident occurred at a location before he regained the route he would have driven had he be required to go to the Employer's location to retrieve the Employer's vehicle with the goods for delivery. Further, Employer denied giving permission to the claimant to take the vehicle to his home. In denying the claim, the JCC determined that claimant was on a personal mission not expressly approved of by Employer, when the accident occurred. Further the JCC determined that the dual purpose doctrine was not applicable as claimant took the vehicle home solely for his personal convenience.

COVERAGE

Valentin Sanches, Appellant v. The Marseilles Hotel and FHM Insurance Co., Appellees, 26 FLW D2206 (September 22, 2001), Opinion filed September 11, 2001, JCC Kathryn Pecko, Counsel: David Goehl for Appellant and Kimberly Hill for Appellees.

Claimant appealed an order holding that The Marseilles Hotel was not his statutory employer pursuant to §440.10(1)(b). Claimant worked for a hotel tenant, Vittorio's Restaurant. The JCC held that no contract existed between the hotel and the restaurant for the restaurant to perform an obligation of the hotel. The rental lease establishing a landlord tenant relationship did not create an employment relationship between the hotel and the restaurant. (see dissenting opinion for alternate analysis).

DEFENSES

Gary Denestan, Appellant v. Miami Dade County and Risk Management Division of Miami Dade County, Appellees, 26 FLW

D1721 (July 20, 2001). Opinion filed July 13, 2001. Judge of Compensation Claims Kathryn Pecko. Counsel L. Barry Keyfetz for Appellant and Robert A. Ginsberg for Appellee.

The claimant alleges that the employer/carrier's failure to file a Notice of Denial within 14 days as required by section 440.192(8) constituted a general denial and that the employer/carrier could not thereafter file a Notice of Denial specifically asserted the statute of limitations as a defense since the Notice of Denial was not the initial response to the Petition. The appellate court stated that although they have found that the failure to file a Notice of Denial within 14 days constitutes a denial, there is no authority to support claimant's general denial theory. Further, there is no authority to impose a penalty for a carrier's failure to timely file a Notice of Denial or impose a bar on it from asserting a particular defense. Notwithstanding the fact that the Notice of Denial in this case was not filed until 93 days after the Petition was filed, it nonetheless included the statute of limitations defense and, because the stipulated facts establish that the statute of limitations barred the claim for benefits, the order denying the claim is affirmed.

DISCOVERY

Tampa Bay Performing Arts Center and CNA Commercial Insurance Claims, Appellants v. Joseph L. Campbell, Crawford and Company and the Allman Brother's Band, Appellees, 26 FLW D1720 (July 20, 2001). Opinion filed July 13, 2001. Judge of Compensation Claims, William D. Douglas. Counsel Beatriz Justin for Appellants and George Cappy, Scott Nimmo and Marc Consalo for Appellees.

Appellants argue that the Judge of Compensation Claims erred by admitting the deposition of a doctor into evidence over their objection. The deposition was noticed one hour prior to the taking of the deposition. Counsel for appellants was unable to attend that deposition. The appellate court stated that the notice was totally inadequate and the deposition should not have been admitted. As the judge stated that the deposition was important to the overall disposition of this cause, his amended order is reversed and remanded without comment as the merits.

FRAUD

Pasco County School Board and Gallagher Bassett Services, Inc., Appellants v. Albert Angle, Appellee, 26 FLW D1687 (July 20, 2001). Opinion filed July 10, 2001. Judge of Compensation Claims, Donna S. Remsnyder. Counsel Jimmie Butler for Appellants. Mark Capron, Betsy Gallagher and Dorothy Vennable for Appellee.

In 1998, the Florida Legislature amended section 440.09(4), Florida Statutes, to allow the Judge of Compensation Claims authority to deny claims if the employee has knowingly or intentionally engaged in prohibited activities under section 440.105 for the purpose of obtaining workers' compensation benefits. Because this amendment was effective January 1, 1999, after claimant's injuries, it does not apply to this case. The Judge of Compensation Claims' finding relating to the claimant's impairment rating is supported by competent substantial evidence. Accordingly, the Judge of Compensation Claims' ruling is affirmed.

IMMUNITY

Victor Glasspoole, Appellant v. Konover Construction Corporation South, a Florida Corporation, Appellee Opinion filed May 30, 2001; Appeal from the Circuit Court for the Seventeenth Judicial Circuit; Broward County; The Honorable J. Leonard Fleet; Case No 99-15473 08; 26 FLW D1398; Larry Moskowitz for appellant and Angela C. Flowers for Appellee.

Mr. Glasspoole appealed a final summary judgment order in favor of Konover Construction dismissing Mr. Glasspooles personal injury claim.

Mr. Glasspoole (Claimant) was an employee of a subcontractor of Konover the General contractor on this particular job. The Claimant received injuries while at work when he attempted to plug in an extension cord into an outlet station from which he claims Konover instructed someone to remove the safety and protective breakers and he was severely shocked.

The Claimant filed a complaint against Konover seeking damages for personal injuries from the severe electrical shock. Konover filed a Motion for Summary Judgment claiming workers' compensation immunity and "attached a sworn affidavit of its supervisor for the construction site, who stated that he did not instruct anyone to remove or cause to be removed the safety and protective breakers from the relevant outlet station."

The DCA found that Chapter 440 does not give immunity to employers for intentional torts against employees (*see Turner v. PCR, Inc.*) There are two alternative bases for an "employee to prove an intentional tort action against an employer; the employer exhibited a deliberate intent to injure or engaged in conduct which is substantially certain to result in injury or death."

The Court further found the summary judgment appropriate because once the affidavit was submitted Konover, the opposing party "must come forward with counter-evidence sufficient to reveal a genuine issue of material fact" and Glasspool did not meet that burden.

AFFIRMED.

Thomas R. Smith, Appellant, v. Mariner's Bay Condominium Association, Inc., Appellee. 26 FLW D1807 (August 3, 2001) 3rd DCA. Opinion filed July 25, 2001. Circuit Court Judge, Alan Postman.

Appellant appealed the trial court's entry of final summary judgement in favor of Mariner's Bay Condominium Association, Inc. based on statutory employer immunity under section 440.10(1)(b), Florida Statutes (1999). The appellant slipped and fell while patrolling the premises of the association, where his employer, Armor Security had assigned him to work as a security guard. Appellant received workers' compensation benefits from his employer. Thereafter, he sued the association for damages arising from the slip and fall. The association moved for summary judgement on the grounds that no genuine issue of

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material fact existed as to its entitlement to workers' compensation immunity under sections 440.10(1)(b), 440.11(1), Florida Statutes (1999). In support of this argument, the association presented affidavits showing that the condominium unit owner is expected security guard services and paid maintenance fees for those services for the previous eight years. The trial court granted the motion for summary judgement finding that the association provided sufficient evidence to show an implied-in-fact contract for security services between itself and the unit owners, and that it had sublet that obligation to the appellant 's employer, Armor Security. Thus, the trial court concluded that the association was a contractor within the meaning of section 440.10(1)(b) and as such, was appellant's statutory employer providing immunity from civil liability.

The 3rd District Court disagreed with the trial court's conclusion. The appellate court stated that for the association to be a contractor and thus appellant's statutory employer under section 440.10, it must show that it has a contractual obligation to provide security guard services to the unit owners, a portion of which it sublet to Armor Security. As a contractor, the association's primary obligation in providing security services to the condominium unit owners must arise out of a contract. The contractual obligation may be either express or implied-in-fact; however, it cannot be based on a duty purely imposed by statutory or common law.

The 3rd District Court in this case relied upon a prior determination by the 4th District Court of Appeal in finding that a condominium association's obligation to manage and maintain condominium property is purely statutory, not contractual. As in the case decided by the 4th District Court of Appeal, the 3rd District found that the association's obligation to protect the condominium property arises from its statutorily imposed duty to manage and maintain the property. Such an obligation cannot form the basis for a statutory relationship under the workers' compensation act.

The 3rd District Court of Appeal recognized that merely because an entity has a contractual obligation, all or part of which is sublet to another, is not completely excluded from being a statutory employer under section 440.10 merely because the performance of that obligation is regulated by statute. However, the appellate court stated that the record presented did not establish the terms of the contract, either express or implied-in-fact, between the association and the unit owners for security services. Instead, the facts and circumstances created a genuine issue as to whether the association had an implied-in-fact contract with the unit owners to provide such services. Accordingly, the case was reversed and remanded for proceedings consistent with the opinion.

EAC USA, Inc., formerly known as Heidelberg Eastern, Inc., Appellant v. Daniel James Kawa and Roberts Quality Printing, Inc., a/k/a Roberts Printing, Inc., Appellee, 26 FLW D1706 (July 20, 2001). Opinion filed July 11, 2001. Appeal to the 2nd DCA from the Circuit Court for Pinellas County, Anthony Rondolino, Judge. Counsel Stacy Blank, Michael Goetz and Richard Menchini for Appellant and H. Vance Smith for Appellee, Roberts Quality Printing, Inc., no appearance for Appellee, Daniel James Kawa.

The underlying injury to Mr. Kawa occurred when he attempted to remove a foreign body from a printing press. In this effort, his arm was drawn into the running printing press. He alleged that his employer, Roberts Quality Printing, Inc., removed a safety devise that was supposed to prevent this type of injury. Additionally, Mr. Kawa filed suit against EAC USA, Inc., the producer of the printing press. Roberts Quality Printing filed a Motion for Summary Judgement against Mr. Kawa's claims based on workers' compensation immunity. Additionally, as EAC USA filed a cross claim for indemnification, Roberts also filed a Motion for Summary Judgement on the theory that the indemnity cross claim is only viable if its liability to Kawa was vicarious, constructive, derivative, or technical. Mr. Kawa filed his claim against EAC USA asserting liability directly attributable to EAC USA. Accordingly, Roberts Quality Printing asserted that it had no vicarious, constructive, derivative, or technical liability shared with EAC USA.

Prior to the hearing on Roberts Quality Printing Motions for Summary Judgement, EAC USA moved for leave to amend its cross claim to assert an additional claim against Roberts Quality Printing for contribution. In the Motion for Leave to Amend, EAC USA explained that discovery since the filing of the original cross claim revealed that it possessed a viable contribution claim against Roberts Quality Printing under the Uniform Contribution Among Tortfeasor's Act. Roberts Quality Printing objected to the amendment to add the contribution claim again contending that it was entitled to workers' compensation immunity.

However, in its proposed contribution claim, EAC USA included the allegations necessary to overcome Roberts Quality Printing's claim of workers' compensation immunity. Specifically, EAC USA alleged that Roberts intentionally and without regard to the safety of Kawa and others, removed from the printing press a safety guard designed to prevent accidents such as that sustained by Mr. Kawa. Additionally, EAC USA alleged that Roberts Quality Printing knew the absence of the safety guard from the printing press created a dangerous condition, but intentionally chose to disregard that danger, further that the owners, supervisors, and other employees and agents of Roberts Quality Printing intentionally instructed Mr. Kawa to engage in dangerous work practices, including the removal of foreign objects from the unguarded areas of the printing press while the press was running, that the owners, supervisors, employees and agents of Roberts Quality Printing disregarded at least two notices advising them of availability of safety guards and other safety devises that would have prevented access to the area of the printing press where Mr. Kawa was injured and finally, that Roberts Quality Printing consciously and intentionally engaged in this conduct with the intent to injure Mr. Kawa,

or alternatively, that Roberts Quality Printing's conduct was substantially certain to result in the injury or death of Mr. Kawa.

Upon hearing, the trial court granted Roberts Quality Printing's Motion for Summary Judgement against Mr. Kawa and denied EAC USA's Motion for Leave to Amend its cross claim to assert a claim against Roberts Quality Printing for contribution. Despite the allegations regarding Roberts Quality Printing's conduct, the court ruled as a matter of law that Roberts Quality Printing was entitled to immunity provisions of Section 440.11, granted the Motion for Summary Judgement against Mr. Kawa's claims and granted Summary Judgement in favor of Roberts Quality Printing on EAC USA's indemnity cross claim. The trial court entered final judgement in favor of Roberts Quality Printing on both Mr. Kawa's claims and EAC USA's claims. Further, the trial court denied EAC USA's leave to amend its cross claim based solely on the court's erroneous conclusion that EAC USA could not state a cause of action for contribution against Roberts Quality Printing because of the workers' compensation immunity section 440.11.

The 2nd District Court of Appeal determined that the supreme court's decision in *Turner v. PCR, Inc.*, 754 So. 2d 683 (Fla. 2000) which was decided after the trial court's rulings prevailed and necessitated a reversal of the granting of Summary Judgement in favor of Roberts Quality Printing. In *Turner*, the Supreme Court confirmed that workers' compensation immunity under Section 440.11 is not absolute. Employers are not immune from liability for conduct that is substantially certain to injure an employee. The *Turner* case adopted an objective standard requiring only that the employer should have known that its conduct was substantially certain to result in injury. Under the objective standard, an employee is not required to prove actual intent on behalf of the employer. Instead, an employee need only show that a reasonable person would understand that the employer's conduct was substantially certain to result in injury to the employee.

In this case, EAC USA satisfied its burden of attempting to plead a cause of action for contribution against Roberts under the standards set forth in Turner. EAC USA alleged intentionally conduct by Roberts Quality Printing that was substantially certain to result in injury to Mr. Kawa.

Ultimately, the 2nd District Court of Appeal found that the trial court abused its discretion by denying EAC USA's leave to amend its cross claim to assert a contribution claim against Roberts Quality Printing. Accordingly, the trial court's decision was reversed and remanded.

Lawrence Taylor and Marie Taylor, Appellants v. School Board of Brevard County, Appellee, 26 FLW D1715 (July 20, 2001). Opinion filed July 13, 2001. Appeal to the 5th District Court of Appeal from the Circuit Court for Brevard County, Lisa Kahn, Judge. Counsel Joseph H. Williams for Appellant and Michael Bowling for Appellee.

Mr. Taylor was injured in the course of his work as a bus attendant for the Brevard County School Board. A wheelchair lift affixed to the bus fell on him. Testimony presented at trial indicated that the subject wheelchair lift was repaired approximately four months prior to the accident. Additionally, a week before the accident, the lift was repositioned by a school board mechanic after a complaint the lift had malfunctioned. The lift was last inspected and lubricated in the shop two days prior to the accident. A school board mechanic testified that the rivets affixing the wheelchair lift to the bus may have worn out due to the lift having malfunctioned approximately one week before the accident. The mechanic also testified that an inspection of the lock assembly should have revealed the problem.

Mr. Taylor subsequently filed a Motion for Partial Summary Judgement seeking a declaration that his work for the School Board was unrelated to that performed by the School Board's school bus maintenance personnel. The School Board filed a Cross Motion for Summary Judgement on the ground that is was immune under Florida workers' compensation law. The trial court denied Mr. Taylor's motion and granted the motion of the School Board. A final judgement in favor of the School Board was entered and Mr. Taylor appealed that decision.

The 5th District Court of Appeal stated that this case turns on the intended scope of the unrelated work's exception to the immunity from suit provision in Florida workers' compensation law chapter 440. Under the workers' compensation law, an employer is immune to suit for its negligence when the injured employee is covered under the chapter. Similarly, the employer is immune to suit when its employee is injured by another employee in certain instances. However, there is an exception to that immunity provision when the employees of the same employer are operating in furtherance of the employer's business but are assigned primarily to unrelated works within private of public employment. The trial court granted a summary judgement in favor of the school board on the grounds that the alleged negligent employees, school board transportation department mechanics and MR. Taylor, a school bus attendant whose responsibilities included operation of the wheelchair lift which caused his injury, were assigned to related works. As the trial court reasoned, because both the former and the later were employees of the school board involved in the same project, they had in common the provision of transportation services to Brevard County school children.

The 5th District Court of Appeal agreed with the trial court's determination that Mr. Taylor and the school board mechanics were engaged in related works. Accordingly, workers' compensation immunity is afforded to the school board. Accordingly, the trial court's decision is affirmed.

INDEMNITY

David Ramos, Appellant, v. Wal-mart Store, #0817, Kissimmee, and Integrated Administrators, Appellees. 26 FLW D1791 (August 3, 2001) 1st DCA. Opinion filed July 26, 2001. Judge of Compensation Claims, Richard S. Thompson.

The 1st District upheld the Judge of Compensation Claims finding that the claimant was terminated for rea-

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sons unrelated to his compensable injury. However, the 1st District stated that a termination for cause does not fully resolve the claimant's alleged entitlement to temporary partial disability benefits. The Court reversed and remanded the case to the Judge of Compensation Claims to make additional findings regarding whether or not the claimant's compensable injury impaired his ability to obtain employment within his abilities at his prior wage.

Michael Jefferson, Appellant, v. Wayne Dalton Corporation/ Hartford, Appellees. 1st DCA. 26 FLW D1931 (August 17, 2001) Opinion filed August 10, 2001. Judge of Compensation Claims Michael J. DeMarko.

Claimant appeals an order denying authorization for medical care and for payment of indemnity benefits. The 1st DCA affirmed the order regarding the denial of medical benefits, but remanded for further proceedings as to the award of indemnity benefits. The claimant injured his back on August 19, 1997. The claimant began treating with Dr. Weaver. Dr. Weaver made a referral to neurosurgeon. Dr. Weaver continued to recommend treatment with a neurosurgeon, however, the claimant ultimately began treating with a pain management physician. Eventually, the claimant was evaluated by a neurosurgeon who opined that he did not need surgery. The claimant's pain management physician recommended that he obtain a second neurosurgical opinion. In July, 1999, the claimant underwent an independent medical evaluation with a psychiatrist. The psychiatrist opined that the claimant suffered from depression and required psychiatric intervention for at least six months. The psychiatrist causally related this condition to his 1997 accident. Additionally, the psychiatrist opined that the depression and attendant psychiatric disorders made him unemployable.

The claimant was terminated for cause on December 18, 1997. Following that, he worked for a temporary agency and then permanently for Coca-Cola Corporation beginning in late February, 1998. On September 9, 1998 he sustained a subsequent work related injury with his employment with Coca-Cola. Ultimately, the claimant became unemployed as of January 1, 1999.

The Judge of Compensation Claims denied the request for psychiatric care and a second neurosurgeon's evaluation as the claimant did not prove he had exhausted the managed care grievance process. The 1st DCA held that absent an emergency, only a claimant who has exhausted all avenues a managed care organization's grievance procedures provide can be eligible for medical care from an outside provider. The authority of the Judge of Compensation Claims is limited in this area because section 440.134 clearly places the authorization and supervision of managed care agreement within the authority of the Agency for Healthcare Administration. The Judge of Compensation Claims and the 1st DCA reject the claimant's argument that an employer/carrier must first prove that a managed care system was in place at the time of the workplace injury in order to rely on the exhaustion requirement. As managed care arrangements became mandatory January 1, 1997, the presumption is that managed care plan is in place. It is up to the claimant to prove otherwise. The claimant in this case did not prove otherwise.

With regard to indemnity benefits, the 1st DCA reversed and remanded the finding that no temporary benefits were due to the claimant. The 1st DCA held that the Judge of Compensation Claims did not have competent substantial evidence to deny temporary benefits. Specifically, the appellate court looked to the uncontroverted psychiatric testimony. Further, the appellate court stated that even though the appellant was fired for insubordination and thus for cause, he could still be entitled to benefits if he satisfies the burden of showing that the injury contributed to his wage loss after termination. Because the Judge of Compensation Claims' order failed to articulate the reasons for rejecting the uncontroverted testimony of the psychiatrist, the appellate court reversed and remanded the case to the Judge of Compensation Claims to determine whether valid reasons exist for that rejection and for determining whether the work related injury contributed to the claimant's wage loss after his termination.

INDEPENDENT MEDICAL EVALUATION AND EXPERT MEDICAL ADVISORS

City of Riviera Beach and Gallagher Bassett Service, Inc., Appellants v. Albert Napier, Appellee 1st DCA Case No. 1D00-290; Opinion filed July 13, 2001; 2001 WL 788509; Appeal from The Honorable JCC Howard Scheiner; Jeffrey marks and Marjorie Gadarian Graham for Appellants; Mark S. Kluger and Randy D. Ellison for Appellee

In this case the Employer/ Carrier's IME physician, Dr. Leighton, charged $700 and the Employer/Carrier paid the $700.00 for an IME, while the Claimant's IME physician charged within the $400.00 limit set forth in Rule 38F 7.020, Florida Administrative Code 1997 edition. This section states that "the maximum fee to be paid for an IME is $200.00 per hour for a maximum of two hours, for a total maximum payment of $400.00."

The Claimant moved to strike the testimony of Dr. Leighton due to the excessive fee charged. The JCC agreed and struck Dr. Leighton's testimony allowing the E/C to choose a different IME doctor.

The Employer/Carrier argues that the JCC had no jurisdiction over this issue because it is a utilization review proceeding to be brought before the Division of workers' compensation. The First DCA found this argument without merit as this does not concern a fee dispute between an authorized medical provider and a workers' compensation carrier. "Instead, the issue presented to the JCC was whether Dr. Leighton could testify as an IME under section 440.13(5)(e), Florida Statutes (1997)." The First DCA found that Dr. Leighton's testimony would only be admissible if he were an IME, so

the JCC had jurisdiction to determine this issue of admissibility of evidence.

Further, the First DCA held that "The JCC also reached the right result in this case. Section 440.13(5)(3) limits the medical testimony that is admissible before the JCC to the opinions of expert medical advisors, independent medical examiners, and authorized treating providers... Dr. Leighton's action in charging in excess of the allowable amount, and the E/C's action in acquiescing to and paying that charge, took Dr. Leighton out of the statutory category of independent medical examiner. Under the limiting provisions of section 440.13(5)(e), the JCC properly excluded Dr. Leighton's testimony as an inadmissible medical opinion."

AFFIRMED.

Shirley a. Johnson, Appellant v. Orange County Corrections and Johns Eastern Risk Management, Appellees 1st DCA Case No 1D00-3512; Opinion filed June 18, 2001; 26 FLW D1521; Appeal from The Honorable JCC Richard S. Thompson; Dawn Ikerd and Bill McCabe for Appellant; Pamela Craig and Ronald S. Webster for Appellees.

The Claimant appeals a denial of an IME. The JCC denied the Claimant's request for an IME because the employer had a managed care plan in effect on the date of her accident as contemplated under 440.134, Florida Statutes (1997). However, the Claimant argued and the First DCA agreed that she was requesting an IME to resolve a dispute as to the maximum medical improvement date and the permanent impairment rating pursuant to 440.1925 and therefore 440.134 was inapplicable.

The First DCA held that "because claimant was not seeking the independent medical examination to resolve a dispute regarding the medical care that had been provided by the managed care plan, the provisions of section 440.134 were inapplicable... instead, claimant's entitlement to an independent medical examination is controlled by section 440.1925, Florida Statutes (1997). Pursuant to that statute, she is entitled to the independent medical examination."

REVERSED AND REMANDED with directions.

Horticulture Plus, Inc. and Florida Retail Federation Self Insurer's Fund, Appellants, v. Vincent Michael Ash, Appellees. 26 FLW D1791 (August 3, 2001) 1st DCA. Opinion Filed July 26, 2001. Judge of Compensation Claims, Robert D. McAliley.

The employer/carrier and the claimant's widow dispute the cause of the employee's death. employer/carrier argue that a pre-existing heart disease caused the employee's death. However, the employee's widow argues that exposure to a chemical in combination with the physical exertion required of the employment caused her husband's death. The Judge of Compensation Claims denied the employer/carrier's request for the appointment of an expert medical advisor. The 1st District Court stated that section 440.13(9)(c), Florida Statutes, provides for the mandatory appointment of an EMA where the issue is one of causation. The Court stated that because the Judge of Compensation Claims ruled as a matter of law that section 440.13(9)(c) was not applicable to this case, he did not reach the factual determination as to whether there was disagreement in the opinions of health care providers under the statute. The 1st District Court remanded the case to the Judge of Compensation Claims to determine whether the conditions required to appoint an EMA were present in this case.

The employer/carrier also argued that the Judge of Compensation Claims erred in allowing the claimant to introduce the testimony of two independent medical examiners. The Judge of Compensation Claims allowed the use of two IMEs based on the different medical specialties of the two physicians. However, the 1st District stated that because the claimant did not make a showing for another IME required by section 440.13(5)(b), Florida Statutes, the Judge of Compensation Claims admission of two IMEs testimony was an error. The claimant failed to show that an aspect of the medical condition was outside of one physician's field and otherwise within the field of another physician. This is required to allow the testimony of two IME physicians.

Jose L. Salazar, Petitioner v. Adecco Employment Service/Constitution State Service Company, Respondents, 26 FLW D1721 (July 20, 2001). Opinion filed July 13, 2001. Petition for Writ of Certiorari - Original jurisdiction. Counsel Russell A. Dohan and Jill Katz for Petitioner and Michael Brown for Respondents.

In this Petition for Writ of Certiorari, claimant seeks review of an order denying his Motion for Protective Order to prohibit employer/carrier from deposing an independent medical examiner selected by the claimant. Claimant asserts that this physician was withdrawn as an IME, and because he did not intend to call him as a witness at the final hearing, the IME physician was essentially a consulting expert whose opinions were a protected work product.

The 1st District Court of Appeal denied the Petition because claimant failed to demonstrate that the ruling constitutes a departure from the essential requirements of law. Section 440.13(5) addresses independent medical examinations and specifically provides that each party is bound by the IME he or she selects. Claimant has cited no authority which would permit him to unilaterally disqualify a properly selected IME from that classification in order to transform the IME's opinion into protected work product. Accordingly, the Petition is denied.

City of Riviera Beach and Gallagher Bassett Service, Inc., Appellants v. Albert Napier, Appellee, 26 FLW D1724 (July 20, 2001). Opinion filed July 13, 2001. Judge of Compensation Claims Howard Scheiner. Counsel Jeffrey Marks and Marjorie Graham for Appellants and Mark Kluger and Randy Ellison for Appellee.

The employer/carrier's IME physician charged $700.00 for his IME examination. The health care provider fee schedule states that the maximum fee to be paid for an IME is $200.00 per hour for a maximum of two hours. The employer/carrier agree that this is the upward limit of the fee that can be charged for an

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IME. However, they argue that the Judge of Compensation Claims did not have jurisdiction to strike the IME physician's testimony because a fee dispute is properly settled in a utilization review proceeding before the Division of Workers' Compensation. However, the 1st District Court of Appeal stated that the present dispute is not one concerning a fee dispute between an authorized medical provider and a workers' compensation carrier. Instead, the issue presented to the Judge of Compensation Claims was whether the IME physician could testify as an IME under section 440.13(5)(e). Because, under that statute, the employer/carrier's IME physician's opinion testimony would be admissible only if her were an independent medical examiner, the Judge of Compensation Claims properly entertained the claimant's motion. In this case, the Judge of Compensation Claims simply made a determination as to the admissibility of evidence. The Judge of Compensation Claims has jurisdiction to determine the admissibility of evidence.

Further, the 1st District Court of Appeal stated that the Judge of Compensation Claims reached the right result in this case. Section 440.13(5)(e) limits the medical testimony that is admissible before the Judge of Compensation Claims to the opinions of expert medical advisors, independent medical examiners and authorized treating providers. The physician's action in charging in excess of the allowable amount, and the employer/carrier's action in acquiescing to and paying that charge, took that physician out of the statutory category of independent medical examiner. Under the limiting provisions of section 440.13(5)(e), the Judge of Compensation Claims properly excluded that physician's testimony as an inadmissable medical opinion. Accordingly, the Judge of Compensation Claims ruling is affirmed.

Charles Griffin, deceased, Appellant v. J.B. Hunt Transportation and Ward North America, Appellees, 26 FLW D2138 (September 14, 2001), Opinion filed September 4, 2001; JCC Jonathan Ohlman, Counsel: Sylvan Wells for Appellant, Alan Landerman for Appellees.

Personal representative of the deceased worker argues that the JCC erred in admitting into evidence the testimony of E/C's IME physician who was not licensed in the State of Florida. §440.13(1)(j) defines independent medical examiner as a physician selected by either party to render one or more independence medial examinations in connection with a dispute arising under Chapter 440. §440.13(1)(r) defines physician or doctor as a physician licensed under Chapter 458, among other chapters, who must be certified by the division as a health care provider. The JCC and the 1st DCA concluded that the IME physician at issue is exempt from the licensing requirements of Chapter 458 because he is licensed in the State of Georgia and in performing the IME, he acted within the scope of his practice. The courts also concluded that the IME physician in question did not need to be certified by the Division as he was rendering the IME outside the State of Florida.

JURISDICTION

Zurich American Insurance and Cannon Sline Inc., Appellants v. Larry A. Lawhorn, Appellee, 26 FLW D1781 (July 27, 2001). Opinion filed July 20, 2001. Judge of Compensation Claims John Thurman. Counsel Susan Anger for Appellants and Mark Capron, Susan Fox and Brendan Lee for Appellee.

The 1st District Court of Appeal affirmed the Judge of Compensation Claims' ruling that Florida has jurisdiction to determine the compensability of the claimant's out of state industrial injury because the employment contract was made in Florida. The claimant accepted the initial offer of employment by the employer in 1995 at his Florida home. Accordingly, the court found that the employment relationship had sufficient ties to Florida to allow jurisdiction. Accordingly, the Judge of Compensation Claims' opinion is affirmed.

Kathy S. Shaffer, Appellant v. Wal-Mark Store #1171 and Claims Management, Inc., Appellees, 26 FLW D1782 (July 27, 2001). Opinion filed July 20, 2001. Judge of Compensation Claims Diane Beck. Counsel Richard Lovesky and Bill McCabe for Appellant and Michael Waranch and Nisha Desai for Appellees.

The Judge of Compensation Claims declined to determine the amount of deemed earnings because rule nisi relief may have been available to the claimant. However, the 1st District Court of Appeal held that contrary to the Judge of Compensation Claims' ruling, the judge has jurisdiction to determine the amount of deemed earnings as an offset. While all other aspects of the award are affirmed, the 1st District Court of Appeal reversed the Judge of Compensation Claims' denial for temporary partial disability benefits and remanded the issue to determine the amount of deemed earnings and resulting benefits.

LIENS

Brian Jones, ET UX, Petitioners, v. ETS of New Orleans, Inc., Respondent, 26 FLW S549 (August 31, 2001). Opinion filed August 30, 2001. Counsel L. Barry Keyfetz and Gerald Herms for Petitioners and Robert Levine for Respondent.

The claimant was injured during his employment with Ed Smith Steel Erectors, Inc. This company was insured by ETS of New Orleans. ETS eventually paid claimant $124,460.12 in workers' compensation benefits. Claimant filed a third party tort claim against Lawhorn Plumbing for damages allegedly resulting from its negligence. ETS filed a workers' compensation lien in that suit. Claimant and Lawhorn Plumbing ultimately settled for $50,000.00. Claimant filed a petition in circuit court for equitable distribution of the settlement proceeds in order to satisfy the workers' compensation lien. After an evidentiary hearing, the trial court awarded ETS $5,102.86.

On appeal to the 2nd District, ETS asserted, among other things, that the trial court overstated the amount of costs that claimant was

entitled to subtract from his settlement before determining the pro rata share of the award that ETS would receive. In particular, ETS argue that the trial court improperly included in its final order of equitable distribution all costs incurred by Jones rather than only taxable costs. The 2nd District agreed with ETS, and concluding that the term court costs within the meaning of section 440.39(3)(a) means taxable costs instead of all costs.

Upon appeal, the Supreme Court stated that when all of the parts of section 440.39(3)(a) are considered together, the construction that is most consistent with the statutory language is that the term all court costs means all costs rather than merely taxable costs. Although court costs is not defined within section 440.39(3)(a), the term is used interchangeably within the same subsection with costs. In addition, the statute specifically refers to all court costs expended by the plaintiff and costs incurred by the employee. These expansive provisions for costs are consistent with the interpretation of the meaning all costs. The notion that costs for the purposes of equitable distribution formula, would be limited to taxable costs fails to take into account the limited nature of taxable costs. On the other hand, for purposes of the determination of the equitable distribution formula, the starting point is the employee's net recovery. If the term court costs were construed as limited to taxable costs, the employee would be responsible for non-taxable costs and therefore the amount that the employee would receive would be less than his or her net recovery. Accordingly, the decision of the 2nd District Court of Appeal is quashed and remanded.

MANAGED CARE

See Indemnity section for:
Michael Jefferson, Appellant, v. Wayne Dalton Corporation/ Hartford, Appellees.

MEDICAL BENEFITS

Orlando Regional Healthcare System and United Self Insured Services, Appellants v. Virginia Tiznado, Appellee 1st DCA Case No 1D00-1978; Opinion filed June 29, 2001 26 FLW D1635; Appeal from The Honorable JCC Adams; Kevin Murphy and Thomas Moore for Appellants; Alfred J. Hilado and Bill McCabe for Appellee.

The First DCA in a PCA strikes the provision in the above order "providing for treatment if deemed reasonable and medically necessary" stating that this is premature.

AFFIRMED as amended.

Helen Chism, Appellant v. Hillsborough County School Board and RSKCo, Appellees 1st DCA Case No 1D00-1306; 26 FLW D 1677; Opinion filed July 9, 2001; Appeal from The Honorable William D. Douglas; Carl A Feddeler III, Esquire for Appellant; Pamela A. Walton, Esquire for Appellees.

The Claimant appeals a denial of her claim for payment for past psychiatric medical treatment with psychiatrist, Arturo Gonzalez. The JCC did not address the medical necessity of the treatment as provided in Section 440.13(2), Florida Statutes (1995).

The Claimant did not request authorization from the Employer/Carrier for the treatment that was provided by Dr. Gonzalez. However, the Court found that the Employer/Carrier did become aware of the treatment and cited *Workman v. McDonnell Douglas Corp, 590 S0. 2d 1035, 1037 (Fla 1st DCA 1991)* stating "a denial of a claim for past medical benefits reversed and remanded when the e/c became aware of treatment and JCC did not consider reasonableness and medical necessity of treatment."

AFFIRMED in part and REVERSED in part.

Robert Burgess, Appellant, v. Wal-mart Store #6020 and Claims Management, Inc. Appellees. 1st DCA. 26 FLW D1791 (August 3, 2001) Opinion filed July 26, 2001. Judge of Compensation Claims William D. Douglas.

The claimant appealed the final order denying payment of his past psychiatric treatment with an unauthorized provider. The claimant informally requested psychiatric care at least five times from the employer/carrier. The employer/carrier denied the request for psychiatric care. The claimant treated with a psychiatrist during this time. Ultimately, the claimant filed a Petition for Benefits seeking authorization of the psychiatrist he was treating with as well as payment of his past treatment. In response to the Petition for Benefits, the employer/carrier offered alternative psychiatric care. The Judge of Compensation Claims found that the employer/carrier responded appropriately to the Petition for Benefits. The 1st District stated that the judge erroneously interpreted section 440.13(2) to require claimant to file a Petition for Benefits to trigger the employer's obligation under that statute. The 1st District stated that to require a claimant to file a Petition for Benefits prior to receiving reasonable and necessary medical care and treatment would contravene the legislative intent of the workers' compensation law. Accordingly, the case was reversed and remanded for further proceedings to determine the reasonableness and necessity of the prior treatment.

Service Management Systems and Crawford & Company, Appellants/Cross-Appellees, v. Bilal Hood, Appellee/Cross-Appellant. 26 FLW D1852 (August 3, 2001) 1st DCA. Opinion filed July 30, 2001. Judge of Compensation Claims, Alan M. Kuker.

In this case, the employer/servicing agent raised the following five issues on appeal; that the finding that claimant's medical problems were caused by work related accidents was not supported by competent substantial evidence, the finding that claimant met a Social Security listing was not supported by competent substantial evidence, the finding that claimant was entitled to temporary total disability benefits for a certain time period was not supported by competent substantial evidence, it was an error to permit the claimant to testify regarding his religious beliefs and finally that it was error to direct certain medical bills to be paid that were not submitted into evidence and of which there was not testimony regarding the amount of those bills. On cross appeal, the claimant argued that it was error to deny his request for penalties. The

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1st DCA summarily affirmed the first three issues raised by the employer/servicing agent because it was clear from the record that all the finding challenged were supported by competent substantial evidence. With regard to the fourth issue of testimony regarding religious beliefs, the 1st DCA affirmed that ruling as the issue was not preserved on appeal and even if it was, it was clear that the Judge of Compensation Claims was not influenced by the testimony. With regard to the last issue, the award of payment of the medical bills was affirmed, however, the issue was remanded for determination of the amount of the medical bills to be paid.

With regard to the cross appeal issue of entitlement to penalties, the 1st DCA relied upon its decision in *Eastern Industries, Inc. v. Burnham*, 750 So. 2d 748 (Fla. 1st DCA 2000) the 1st DCA found an identical situation in this case as in the *Burnham* case. The court found that penalties may be appropriate pursuant to section 440.20(6) even if the Notice of Denial was filed within 14 days of the filing of the Petition for Benefits. Section 440.20(6) requires the Judge of Compensation Claims to review the situation as it existed at the time of the denial to determine if the employer/carrier had facts available to them at the date the payment of benefits were due to determine if they had an obligation to make payment to the claimant. Accordingly, the 1st District Court of Appeal affirmed its decision that merely filing a Notice of Denial within 14 days of a Petition for Benefits is not sufficient to avoid payment of penalties to a claimant who ultimately prevails on the issue.

Linda Beverly, Appellant, v. Publix Supermarkets and Publix Supermarkets, Inc., Appellees. 26 FLW D19676 (August 24, 2001) 1st DCA. Opinion filed August 14, 2001. Judge of Compensation Claims, John J. Lazzara.

The appellate court affirmed the denial of payment for the costs relating to the surgery performed on March 5, 1999 because claimant failed to request prior authorization for the surgery as required by section 440.13(2)(c) and 440.13(3)(i).

However, the appellate court reversed the denial of penalties authorized by section 440.20(6) because the employer/carrier failed to pay temporary total disability benefits that were awarded for the period from March 5 to May 27, 1999 pursuant to a second Petition for Benefits. The award of penalties was appropriate as the employer/carrier failed to file a Notice of Denial or initiate the 120 day pay and investigate option under section 440.20(4). The employer/carrier argued that penalties were not due because it was unaware of the claimant's unauthorized surgery on March 5, 1999 and thus non-payment resulted from conditions over which it had no control. However, the appellate court rejected that argument by stating that the employer/carrier may have been unaware initially of claimant's surgery and resultant temporary disability, however, it was on notice of the temporary total disability claim based upon the Petition for Benefits. The filing of the Petition for Benefits began the employer/carrier's obligation to file a Notice of Denial or initiate the 120 day pay and investigate provision.

OFFSETS

James Jackson, Appellant, v. Hochadel Roofing Co. and Claims Center, Appellees. 1st DCA. 26 FLW, D1933 (August 17, 2001) Opinion filed August 10, 2001. Judge of Compensation Claims, Dan F. Turnbull.

The claimant was injured on February 13, 1992. The employer/carrier accepted the claimant as totally and permanently disabled on August 9, 1993 and began paying weekly benefits and supplemental benefits. In October, 1995, claimant began receiving Social Security Disability benefits. The claimant argues that the employer/carrier incorrectly included the supplemental benefits payable at the time of the permanent total disability determination in calculating the Social Security Disability offset. The 1st DCA held that the employer/carrier is entitled to include supplemental benefits payable to the claimant as of the date of permanent total disability benefits in calculating the appropriate offset. Accordingly, the Judge of Compensation Claims' order was affirmed.

Carol S. Monroe, Appellant, v. Publix #148 and ITT Hartford Ins. Co., Appellees. 26 FLW D1937 (August 17, 2001) 1 st DCA. Opinion filed August 10, 2001. Judge of Compensation Claims, Diane B. Beck.

The claimant was injured on November 8, 1992. She was accepted as permanently and totally disabled on December 7, 1997. When asked, the claimant executed a DWC-14 form allowing the employer/carrier access to her Social Security Disability information. This form was completed and returned to the employer/carrier within two to three days after receipt. The employer/carrier obtained Social Security Disability information regarding the claimant on April 9, 1998. For unknown reasons, the employer/carrier did not file a Notice of Action/Change asserting a Social Security Disability offset until March 15, 1999. The 1st DCA affirmed the ability of the employer/carrier to take the offset by filing the Notice of Action/Change as opposed to requiring an order of the Judge of Compensation Claims. However, the 1st DCA stated that the employer was not entitled to recoup alleged overpayments under section 440.15(13) for the time period beginning April 9, 1998 until the Notice of Action/Change was filed on March 15, 1999. The appellate court relied upon section 440.15(10) in concluding that a recipient of permanent total disability benefits is entitled to full benefits, the concurrent receipt of Social Security Disability benefits notwithstanding, until the employer or carrier takes a Social Security Disability offset, at least where the recipient has complied with a request to execute a Request for Social Security Disability Benefits Information form DWC-14 and furnish the completed form to the employer or its workers' compensation carrier in a timely fashion. Accordingly, the Judge of Compensation Claims' order allowing a retroactive recoupment of Social Security Disability offsets was reversed and remanded.

Florida Department of Labor

and Employment Security, Petitioner v. Boise Cascade Corporation, et al, Respondents, 26 FLW S494 (July 20, 2001). Opinion filed July 12, 2001. Counsel Elizabeth Teegen, General Counsel and Nancy Staff Terrel, Senior Attorney, Office of General Counsel for Petitioner and Irvin Meyers for Respondents.

The District Court reversed the trial court's determination that it was proper for the employer to recalculate the offset annually to include increases in supplemental benefits. The 1st District also certified the same question it had certified in *Acker v. City of Clearwater*, 755 So. 2d 651 (Fla. 1st DCA 1998), *Approved, 755 So. 2d 597 (Fla. 1999)*, to be of great public importance:

> WHERE AN EMPLOYER TAKES A WORKERS' COMPENSATION OFFSET UNDER SECTION 440.20(15), FLORIDA STATUTES (1985), AND INITIALLY INCLUDES SUPPLEMENTAL BENEFITS PAID UNDER SECTION 440.15(1)(e)(1), FLORIDA STATUTES (1985), IS THE EMPLOYER ENTITLED TO RECALCULATE THE OFFSET BASED ON THE YEARLY 5% INCREASE IN SUPPLEMENTAL BENEFITS?

The Supreme Court stated that for the reasons expressed in *City of Clearwater v. Acker*, we answer the certified question in the negative and approve the 1st District's decision. The 1st District did not certify for review the issue of whether *Acker* should be applied retroactively, although the Florida Department of Labor and Employment Security raised this issue in its brief. The Supreme Court does not express an opinion on this issue since it was not considered by the Judge of Compensation Claims and since the record is devoid of evidence that would permit a meaningful review.

Finally, claimant requested attorney's fees be awarded against the Department. The Law is clear that there must be a statutory authority to award fees. Claimant seeks fees pursuant to section 440.20, but this section permits fees against the carrier. There is no provision awarding fees against the Department in this situation, and we therefore approve the 1st District's denial of claimant's motion for fees.

PENALTIES

Danbeth Medical and United Self-Insured Services, Appellants v. Henry Snowden, Appellee, 26 FLW D1688 (July 20, 2001). Opinion filed July 10, 2001. Judge of Compensation Claims Thomas Portuallo. Counsel Aaron Wolfe and Randy Ellison for Appellants. Christopher Hoeg for Appellee.

Employer/carrier appeal an order of the Judge of Compensation Claims awarding penalties and interest to claimant based upon the untimely payment of settlement proceeds. The 1st District reversed the award penalties and interest as claimant waived his right to seek penalties and interest by proceeding under Section 631.929, Florida Statutes (1997). As the employer's carrier filed bankruptcy, the claimant elected his remedy to pursue benefits under Florida Statute Section 631.929. Florida Statute Section 631.929 specifically states that there shall be no entitlement to attorney's fees, penalties, interest or costs on any claim presented to the corporation under this part. The claimant argued that he was not seeking penalties and interest on his claim, rather on payment of the settlement proceeds. The 1st District disagreed with that analysis. The appellate court stated that the waiver provision of 631.929 follows immediately after the provision authorizing lump sum settlements. The word claim is not defined anywhere in chapter 631, and is not used elsewhere in section 631.929. There is no reason to conclude that the waiver provision does not encompass a claimant's request for benefits, which may be satisfied by lump sum payment. The appellate court also stated that the waiver provision is applicable to the employer as well. Accordingly, the Judge of Compensation Claims' decision regarding penalties and interest for the late payment of a lump sum settlement is reversed and remanded.

Lorie Foster, Appellant v. EG&G Florida, Inc. and Liberty Mutual, Appellees, 26 FLW D2139 (September 14, 2001) Opinion filed September 4, 2001; JCC Paul Terlizzese; Counsel; Robert Wohn, Jr. and Bill McCabe for Appellant and Jeffrey Hussey and George Boring for Appellees.

Claimant filed a PFB on December 28, 1998 requesting temporary benefits, penalties, interest, costs and attorney's fees. Claimant filed a Motion for Emergency Relief on March 2, 1999. Six days after the hearing on the Motion the JCC entered an order awarding temporary benefits. This order reserved jurisdiction to determine entitlement to penalties and all other issues raised in the PFB. The PFB ultimately came to trial and the claimant was awarded additional temporary benefits predating those awarded as a result of the Motion for Emergency Relief. The JCC denied penalties on the benefits obtained as a result of the Motion for Emergency Relief. The 1st DCA overturned the JCC concluding that the claimant did not conclude her prosecution of her claim with the hearing on the Motion for Emergency Relief, rather she went on to final hearing on the issue of additional temporary benefits. Further, claimant did not waive her request for penalties as the JCC reserved jurisdiction to make a determination on the remaining issues in the PFB. Claimant resumed prosecution of her temporary benefits claim and prevailed at final hearing. Accordingly, claimant's use of an emergency motion did not preclude her recovery of penalties on the temporary benefits awarded due to that motion.

Also See **Medical Benefits** section

Service Management Systems and Crawford & Company, Appellants/Cross-Appellees, v. Bilal Hood, Appellee/Cross-Appellant.

and

Linda Beverly, Appellant, v. Publix Supermarkets and Publix Supermarkets, Inc., Appellees

PERMANENT TOTAL DISABILITY

Manatee Memorial Hospital and Constitution State Service Company, Appellants v. Martha Cooper, Appellee 1st DCA Case No 1D00-2857 ; 26 FLW D1675; Opinion

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CASE LAW UPDATE
from preceding page

filed 7/9/2001; Appeal from the Honorable JCC Diane B. Beck; Keith A Mann for Appellants; Joseph Willis for Appellee.

PTD supplemental benefits are payable from the "Claimant's 65th birthday, May 31, 2000, rather than from the effective date of the PTD award, April 12, 2000."

AFFIRMED IN PART, REVERSED IN PART AND REMANDED for further proceedings consistent with this opinion.

TRANSITION OF OJCC
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the OJCC to the Division of Administrative Hearings.

GENERAL

In order to comply with significant statutory record keeping requirements, minimize the frequent delays, and eliminate inefficient and duplicative administratively required tasks performed by staff within the seventeen JCC Districts, the Division of Administrative Hearings OJCC section is implementing a centralized filing and clerking system. Similar to the system currently used by DOAH, the Clerk's Office will maintain a centralized repository of case records , streamline the adjudicative process, and provide claimants, employers, attorneys and all interested parties with instant access to case related data via the Internet. As directed by the recent legislative changes, DOAH will obtain custody of all OJCC records that are currently active as of 10-1-01 and DOAH's Clerk, Ann Cole, will be designated the Custodian of Records.

1. INTERNAL PROCEDURAL CHANGES

A. PFB'a

1. All Petitions for Benefits (PFBs) will continue to be filed in Tallahassee at the same P.O. Box address. The Claimant shall mail the PFB by certified mail to: DOAH Clerk of the Office of the Judges of Compensation Claims, P.O. Box 8000, Tallahassee, FL 32314-8000. The Claimant shall contemporaneously serve copies of the PFB to the employer and to the employer's carrier by certified mail. (DOAH will accept PFB's by fax within a few months.) Upon receipt, the PFB will be assigned an OJCC Case No. by the DOAH Clerk, docketed and referred to a JCC.
2. Within 24-48 hours, the DOAH Clerk will send an electronic copy of the newly filed and assigned PFB to the respective District. Upon receipt, the District will set the case for Mediation and notify the Parties. Contemporaneously, the Chief Judge will send to the parties of record an Initial Order providing relevant information regarding the new case number, JCC assignment and directions for filing further Motions/Pleadings.
3. The Parties will be notified by the DOAH Clerk if the PFB. or a portion thereof, is initially dismissed w/o prejudice for failing to meet the filing requirements of Sections 440.192 (2). Florida Statutes.

B. OJCC Case Nos

1. As noted above, the DOAH Clerk will assign each Claimant a distinct OJCC Case No. based upon a distinct "date of accident." Additional and/or subsequent PFB's filed by that Claimant, based upon that same date of accident, will be assigned the same OJCC Case No., yet be distinguished in the computer system by the filing date of the new PFB. Claimants with an existing OJCC Case No. who file a new PFB based upon a new date of accident will be assigned an additional OJCC Case No.
2. Each OJCC Case No. will contain a descriptive suffix identifying the assigned District Office location. (For example, Miami is MIA, Sarasota is SAR. Pensacola is PNS. etc.)
3. All currently active case files will be assigned an OJCC Case No. Upon completion of the extremely large data transfer between the DWC and DOAH scheduled for September 17, the general public will have access, via the internet, to the newly assigned OJCC Case No. for each currently active case files.

C. Motions/ Pleadings

1. By Order of the Chief Judge, **all original Motions/Pleadings must be filed with the DOAH Clerk at the following address: P.O. Box 6350, Tallahassee, FL 32314-6350** (Again, the DOAH Clerk will be accepting fax copies of original Motions/Pleadings In the near future.) The filing party shall mail copies of all Motions/ Pleadings to the presiding JCC and to all parties of record. All evidentiary documents, charts, video tapes, deposition transcripts, etc. shall be submitted **ONLY** to the presiding JCC. DOAH's dark will not accept any evidence.
2. A JCC may, consistent with the Florida Workers' Compensation Rules of Procedure and UPP's, accept and rule upon the merits of a written Emergency Motion or Pleading. Such Motion and Order shall be electronically mailed to the DOAH Clerk. In addition, Ore Tenus Motions and Orders that are reduced to writing shall be electronically mailed to the DOAH Clerk.

D. Automation

1. DOAH has designed and will implement a computerized data filing and retention system that is timely. accurate and extremely user-friendly. The program replacing Client Profiles Is a modem. Windows-basad application designed to be simple and efficient *The* computer automation of the District JCC offices will likely occur incrementally over the next several months. DOAH will pilot the system within the Tallahassee JCC off ice followed by an office in South Florida. The DOAH Clerk and System Support Personnel will visit, train and work closely with each District to ensure a seamless transition.

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2. Signature fonts have been requested of each JCC. Signature fonts will be used to ensure standard document generated form Orders. The simplified DOC GEN system will enable staff/JCCs to securely and automatically docket Orders, thereby placing them into the electronic; file which will be available to the public: on the Internet
3. Until a JCC District is fully automated, that District shall electronically mail all JCC Orders Issued after September 30.2001, to the DOAH Clerk. To minimize duplicative keystroking, we recommend that any Proposed Orders submitted by counsel for consideration by the JCC be provided to the JCC on disk or via email. The District shall continue to provide a hard copy of the JCC Order to the parties of record.

E. Closing a case file

1. A Claimant's case file (OJCC Case No.) Is considered "closed" by the DOAH Clerk when all outstanding issues, motions. PFB's. etc. relating to the Claimant's specific "date of accident are resolved. A Claimant who files a new PFB after the closing of his/her old case file will receive a new OJCC Case No.
2. Pursuant to Section 440.44 (7), Florida Statutes and Schedule 8. Item 2 of DOAH's agreement with the Department of State regarding the State Records Retention Schedule, all OJCC case files closed after October 1,2001, excluding cases on appeal, shall remain in the JCC District for 6 months and then be destroyed by the JCC District pursuant to procedures adopted by the DOAH Clerk and approved by the Chief Judge. Evidentiary exhibits may be returned to the parties of record alter the appeal deadline expires.

F. Appealed cases

1. Upon receipt of a Notice of Appeal, the JCC District shall forward the entire record relating to the issues on appeal, including evidentiary exhibits and taped recordings of the Hearing, to the DOAH Clerk who will prepare the complete Record on Appeal and submit it to the appellate court.
2. Cases closed after October 1,2001, that are on appeal, shall not be destroyed until the DCA's Opinion is issued and the Mandate filed.

1). Miscellaneous Information

A. Notifying the Interested Parties

1. DOAH intends to notify interested parties, litigants. employers, carriers. etc. of the few external changes to the Workers' Comp adjudicative process in the following ways:

   a. Within the DWC's monthly mailer reaching nearly 5,000 active comp participants.
   b. Through an informational insert provided to each of the 17 JCC Districts and placed within all legal correspondence for the next 60 days,
   c. Within DOAH's Initial Order sent to all parties following the filing of the PFB.
   d. With the assistance of the Florida Bar WC Committee and other organizations
   e. Notification on the DOAH website

2. Fortunately, the PFB filing address will remain the same. However. it is critical that the JCC'S, administrative staff and Mediators relay and remind the Parties of the filing requirements.

B. Florida Rule of WC Procedure & UPP's

1. Pursuant to Section 440.45 (4), Florida Statutes, "The Office of the Judges of Compensation Claims shall adopt rules to effect the purposes of this section. Such rules shall include procedural rules applicable to workers' compensation claim resolution and uniform criteria for measuring the performance of the office, including, but not limited to, the number of cases assigned and disposed, the age of pending and disposed cases, timeliness of decisionmaking, extrordi-nary fee awards, and other data necessary for the judicial nominating commission to review the perfomance of judges as required in paragraph (2)(c)."

In addition. the section provides "The workers' compensation rules of procedure approved by the Supreme Court apply until the laws adopted by the Office of the Judges of Compensation Claims pursuant to this section become effective."

The OJCC, operating within DOAH effective October 1.2001 has not adopted a set of rules to effect the purposes of the statute. DOAH is consulting with the Executive Office of the Governor, the Florida Legislature and the Florida Bar regarding this issue. Until further notice, the *Workers' Compensation Rules of Procedure* approved by the Florida Supreme Court and *UPP's* remain in effect and apply.

C. Standard Form Orders and Form Pleadings

1. Due to the emergence of the Doc *Gen* system, DOAH strongly urges the JCC's and practitioners to utilize standard form orders and pleadings.
2. Standard form orders and form pleadings will be available on-line at *www.jcc.state.fl.us.*

District Problems, Issues or Questions

1. For general Clerk information, call (850)488-9675 x190.
2. For other issues, please contact the local JCC District office.

WC-FAQ's

This information may be found at the FAQ section of *www.jcc.state.fl.us*

Where do I file a Request for Assistance?

The procedure for filing Request for Assistance did not change on October 1, 2001. Request for Assistance should be mailed to:

The Division of Worker's Compensation
Employee Assistance Office
Post Office Box 8010
Tallahassee, Florida 32314-8010

If you have any questions on this filing procedure, please contact a Worker's Compensation Specialist at the Employee Assistance Office at 850-488-9675.

How do I look up an OJCC Case No?

Select CASE SEARCH, enter the claimant's last name, the last four-digits of social security number, and

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then SEARCH. If no records are found, narrow your search to either field.

What if my OJCC Case No. is not yet on the website?

Please be patient as we eliminate this backlog. Continue checking our website as new cases are assigned OJCC Case Nos. daily. Check our website for information on the PFB dates the Clerk's Office is currently processing.

What are the DOAH, OJCC filing procedures?

Petition for Benefits are to be filed with:

The Office of the Judges of
Compensation Claims
Post Office Box 8000,
Tallahassee, Florida 32314-8000

Visit the
Workers' Compensation
Section WEBSITE:

www.flworkerscomp.org

Subsequent pleadings are to be filed at:

The Office of the Judges of
Compensation Claims
Post Office Box 6350
Tallahassee, Florida 32314-6350

Pleadings and motions filed *must* reflect the OJCC Case No. A Claimant's Social Security number *may not* appear on the pleadings and motions to be filed.

Where do I file my Notice of Appearance?

Notices of Appearance, where a Petition for Benefits has been filed, should be filed at the Post Office Box 6350 address and a copy filed with the District Judge.

Notices of Appearance on washout settlements, where a Petition for Benefits will not be filed, should be sent to the District Office only.

What if I have a filing deadline and an OJCC Case No. is not yet available?

Instructions during this transition period are as follows: File a copy of the pleading with the District Judge. Once an OJCC Case No. is assigned, file the original pleading at the Post Office Box 6350 address.

What are the instructions for providing proposed orders on disks or electronic mail?

Original proposed orders are to be filed at the Post Office Box 6350 address. A copy of the proposed orders, the proposed orders on disks, and the envelopes should be provided to the District Judge. Some District offices are also accepting an e-mail of the order, as opposed to having it submitted on disk. The Judges are all using WordPerfect 6.1 at this time. Please save your document in WordPerfect format before submitting to the Judge. Any WordPerfect version 6.1 or lower is acceptable. For more information, please check with the District Office.

Where do I file the original signed stipulations?

The original is filed at the Post Office Box 6350 address and a copy is filed with the District Judge.

Do I file Discovery documents?

Please adhere to the filing instructions of the District Judge (prior to October 1, 2001) with regard to discovery pleadings.

Do I file exhibits in Tallahassee?

No, the trial record is to be filed directly with the District Judge of the Office of Compensation Claims.

What is the filing Procedure for a Notice of Appeal?

The "original" Notices of Appeal, along with the First District Court filing fee are to be filed with the Judge who issued the Order that is being appealed. The District procedure of issuing the Certificate of Notice of Appeal and forwarding the filing fee to the District Court of Appeal, First District, has not changed.

A "copy" of the Notice of Appeal is to be filed at the Post Office Box 6350 address.

The Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300

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