



***The Florida Bar  
Workers' Compensation Section***

***News & 440 Report***

FIRST DISTRICT COURT OF APPEAL

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Fall 2010***



# News & 440 Report

## The NEWS AND FOUR-FORTY REPORT

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Worker's Compensation Section

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### Cover Shot:

Program Administrator, Arlee Colman, provided this shot of the new First DCA courthouse – still under construction – in Tallahassee.

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## Section Calendar

### NOVEMBER 16, 2010

Workers' Compensation Section  
Telephonic Seminar  
12:00 – 1:30 p.m. (EST)

### DECEMBER 14, 2010

Workers' Compensation Section  
Telephonic Seminar  
12:00 – 1:30 p.m. (EST)

### JANUARY 21, 2011

Workers' Compensation Section  
Executive Council Meeting  
Joe's Stone Crab - Miami

### FEBRUARY 6 – 11, 2011

27th Annual Workers' Compensation  
**Winter Retreat**  
Ritz Carlton Bachelor Gulch – Beaver Creek, Colorado

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## Message from the Chair:

# A Look Back – A Look Ahead

By Rick Thompson, Esq., Sarasota



On July 1, I took the baton from Richard Chait and assumed the role of your Section Chair. I am honored for the opportunity to serve the Section which has served me so well over the last 22 years. I view leadership of the Section not as a one-year assignment, but just one leg in a long relay race. I would like to thank Richard for his tireless work

over the past year, which made my year as Chair-Elect effortless. I would also like to thank Richard's predecessors, beginning with Ray Malca and then Tom Conroy, Mark Zientz, and Tuwana McMillan.

When I became active with the Executive Council in 2005, we were transitioning from not only the pre-2003 law, but also away from an Executive Council which had not seen much change for years. My predecessors did an outstanding job in facilitating necessary change within the Executive Council and the Section in order to face multiple new challenges. The last five years have truly been a relay race that none of us could have imagined 10 years ago.

The role of Chair is not one of an advocate. The Chair's role is to guide the Section, move it forward, and provide the opportunity for all members to be heard and to participate. In my role as Chair, I will represent the partner in a large defense firm in Pensacola as equally as I will the solo practitioner in Fort Lauderdale who represents injured workers. Participation in the Section is a time when we can lay down our swords and shields and unite for the common good of the practice of workers' compensation law. Believe it or not, there is a lot of common ground that we can agree on.

Regardless of who you represent or how your bread is buttered, you have experienced challenging times since 2003. We faced extensive reforms in 2003, many of which targeted members of our Section. We have weathered and continue to weather one of the most serious economic downturns this country has ever faced. We have also seen a downturn in the insurance cycle, partly due to a reduction in premiums of over 65% since the 2003 reforms. As a result, all workers' compensation attorneys have seen their businesses change and in most cases, revenue negatively impacted. What we must remember is that this is not the first time this Section has faced serious challenges. When the Legislature crafted

one of their most sweeping workers' compensation reforms in 1979, the Section was devastated, much like it has been since the 2003 reforms. But the Section not only survived the 1979 reforms, it thrived because of them. At times it is important that we look to the past in order to face the pressures of today and the unknown of tomorrow. In that vein, I have asked four of our Section members who were practicing when the 1979 reforms occurred to recount their experiences and perhaps provide some insight and inspiration as to how we can survive the current state of our practice.

### Looking Back With Former Chairs

*Al Frierson, Ft. Myers:*

I was Chair of the Workers' Compensation Section of The Florida Bar in 1978-79. I went to Tallahassee during the 1979 Legislative Session as the spokesman for the Bar. Following the Session, I was appointed by then Governor Bob Graham to his Blue Ribbon Commission to advise him if he should sign the Wage Loss bill into law. His commission, made up of people from all over the United States, advised him to veto it. He signed it anyway because of the political climate at the time.

The wage loss law, if taken literally (which was the legislative intent), was viewed by many as the end of Workers' Compensation in this state. Many lawyers went into other fields of the law at the time. There was very little optimism at the time because industry and insurance became the principal power brokers in Tallahassee and it has remained so to this day. However, in the early 1980's, the wage law and attorney fee cases started winding their way through the courts. Eventually, the courts interpreted that law fairly. As you know, courts have to take black letter law and apply it to human experiences. It is in that context that justice is found. Ultimately, in the 1980's the courts made that law work.

Since then, there have been three other major legislative rewrites to this law. The 1989-90 changes under Governor Martinez who appointed a Workers' Compensation Legislative Task Force upon which I served; the 1993 Special Session on Workers' Compensation by Governor Chiles who appointed an Advisory Group upon which I served; and the 2003 law under Governor Bush fashioned by a combination of Insurance and Industry which still exists today. It is unlikely that the legislative

*continued, next page*



## Message From the Chair, from page 3

power of Insurance and Industry will change anytime soon. Also, legislative changes will continue to occur. We can only rely on the courts to make the law work and to make it fair. Historically, that has always been our salvation. Unfortunately, today considerable political power is exerted on our judiciary which puts their independence in jeopardy.

Encourage the members that we have survived many legislative rewrites because of the faith that we have placed in the courts, not the legislature. In trying to keep the playing field level, our faith in the courts has not been misplaced. Encourage those members of our profession who have an appellate practice to stay the course and encourage those members of our group who try the cases before the JCC's to be mindful of the appellate record needed in each case.

As long as there is a law which places the burden on the employer to pay for the injuries caused in his workplace, we will be needed on both sides of the aisle. Keep the Faith!

\* \* \*

### ***J. David Parrish, Orlando:***

In the 1970's the workers compensation law underwent drastic changes and for the first time made the claimant responsible for his attorney's fee, unless the employer/carrier acted in "bad faith". The law was also changed to a theory called "wage loss". All of this was very new and the claimant lawyers had no idea what would constitute "bad faith" and how to go about charging the claimant a fee and how to collect this when the claimant got paid bi-weekly. My partner, Ed Hurt, and I got together with a local bank and used a process called tel-act where the claimants check was immediately deposited in the individual tel-act account set up for the individual claimant and 15% was deducted and held in the tel-act account until it was determined whether the employer/carrier was guilty of "bad faith" in the handling of the claim and owed the attorney's fee. If the carrier owed the fee the amount being deducted from the claimant's check was then reimbursed to the claimant. At that time the contract of representation had to be approved by the JCC and it contained a "power of attorney" allowing the attorney to negotiate the check and withhold the 15%. All in all it was very unsettling times and trying to handle wage loss claims required us to set up another department dedicated to making the claimants do a job search and file the wage loss claims bi-weekly.

Who knew at that time what was going to happen to the practice and the bookkeeping nightmare it perhaps would require. Then comes Gerry Rosenthal in his McDonald v. Florida Erection Services case where "bad faith" was liberally defined and we were off and running throughout the 1980's and early 1990's. It was a good time to be a claimant lawyer in this State and not a bad time to be a claimant, as the benefits available to the claimant were fair

and all doubts were to be resolved in favor of the claimant and the claimant was not responsible for costs if the employer/carrier prevailed.

We were also having trouble getting the carrier to retrain our claimants so Ed Hurt and I started our own rehabilitation company. It was called "State-wide Rehabilitation" and we hired the manager of the State of Florida Rehabilitation in Orlando to run the company. It provided no job searching functions and only tried to set up the injured claimant for retraining. The company had inherent conflicts in it and we closed it down after about a year and gave it to the manager who operated it until retirement.

All of this short historical reference is to show that, while it may seem darkest in the middle of a storm, hold on as this is like a hurricane and it too will pass. We are blessed in this State with the brightest and best claimant lawyers practicing workers compensation. They adhere to the best ideals of representing the client even though the fees and the law is undergoing the backward swing of the pendulum and now needs us all to "stay the course" to bring this law closer to the middle.

\* \* \*

### ***Herb Langston, Maitland:***

Rick Thompson requested that several "old-timers" turn back the pages of time and comment on how the 1979/80 changes to the workers' compensation law impacted our profession. I do so from the perspective of an employer/carrier attorney of 47 years, and I confess to becoming a tad nostalgic, as thoughts of the old guard, judges and attorneys who are no longer with us, seem to flood my memory.

A cursory review of the legislative history of Chapter 440 reveals that it has been amended almost every year since 1935. The one constant in the practice of workers' comp law is that there is no status quo. After the 1979/80 amendments, several of our colleagues, both claimant and employer/carrier attorneys, stopped handling workers' comp cases. Former JCC Elwyn Akins (now deceased) of the Gainesville District encouraged attorneys to stay the course and suggested they were both intelligent and creative enough to adapt their practices to accommodate the changes to §440.34 and the new provisions of the law. He also stated that the newly formed First DCA would "get it right," and make the law work. Using history as judge, his observations were accurate, and the practice of law became very lucrative.

Going back in time, in the early 1970's, Jacob Javits, a United States Senator from New York (Republican), who served on the Senate Labor and Human Resources Committee, was instrumental in the passage of the Occupational Safety and Health Act of 1970 (OSHA) and in establishing the National Commission on State Workmen's Compensation Statutes. In 1972, the Commission concluded that ". . . State workmen's compensation laws are, in general, neither adequate nor equitable." There was discussion about nationalizing workers' comp



law. In 1975, the Commission established seven essential elementals, or minimum requirements, for workers' comp laws and stated that congressional intervention may be needed to bring about reform in the state systems. As a result, many states began to amend their workers' comp laws to provide for more generous benefits to injured workers.

However, in the late 1970's the economy took a hit, and the workers' comp premium cost to Florida business was stated to be at a crisis point. The 1979/80 amendments were to be the salvation of the Florida workers' comp law and were being pushed by business and insurance interests, which had become the influential force in the Legislature. The wage-loss concept was introduced, the old IRC was replaced by the First DCA, the Division of Workers' Compensation was formed, and the law provided for generous benefits to the injured worker consistent with the National Commission's recommendations.

The newly formed Division was to be a 300-pound gorilla that would oversee the self-executing provisions of the law to reduce the need for attorney involvement. However, some business groups actually opposed the wage-loss concept. I appeared before a Subcommittee of the House with a comptroller who represented citrus harvesting interests. The bottom-line of his presentation was that the harvesting industry could not survive the wage-loss system as written. Of course, he was ignored. However, the Florida Farm Bureau Insurance Company discontinued writing workers' comp insurance in Florida by the mid-1980's. (The Florida Farm Bureau ultimately supported the 1979/80 amendments because of political pressure.) The wage-loss law, as written, and as interpreted by the First DCA, ultimately resulted in a substantial escalation in costs to business. The wage-loss law was not working as envisioned by the Legislature and would eventually be abolished. The comptroller was correct in his analysis.

Even though benefits to the injured worker were generous, the 1979/80 amendments, for the first time, required the claimant to pay his/her own fee unless the employer/carrier acted in bad faith in the handling of the claim. As originally written, the 1979/80 law also prohibited settlement of both indemnity and medical. There was clear intent to reduce attorney involvement. Many practitioners were convinced they would not be able to survive financially, even though the newly adopted guidelines of 25/20/15, in conjunction with the generous wage-loss benefits, would likely have resulted in reasonable fees. Also, as a result of pressure from some business interests, settlement of indemnity was again included in the law. Then, after the First DCA interpreted "bad-faith" in Florida Erection Services, the attorneys who had abandoned the workers' comp practice quickly reentered, and the practice of workers' comp law became very lucrative.

Like Judge Akins, I have great faith in our profession and in the Courts to fairly interpret the law to make it work in our ever-changing society. In its amendments to §440.34 in 2003 and the Murray fix

amendment effective July 1, 2009, the Legislature has again attempted to reduce attorney involvement and litigation in the workers' comp system. However, in my view, the Supreme Court also made it clear in Murray that if an employer/carrier is responsible for payment of an attorney's fee, the fee must be reasonable. Many injured workers cannot navigate the system alone and need representation. I have confidence that members of our profession will find a way to continue to represent these injured workers, and to adapt their practice to accommodate our ever changing workers' comp law. Judge Akin's advice of 30 years ago still echoes true today: Have faith in the Court to "get it right." Stay the course.

\* \* \*

**Ray Malca, Coral Gables:**

There are many aspects of our current practice that are less than ideal. As claimant's attorneys, financial success is not related to the energy and skill applied to representing a client but instead to the monetary benefit obtained. From a professional prospective this is frustrating. The novelty of the issue, skill requisite in order to be successful, experience and reputation of the attorney, for the moment, count for little. However, there are aspects of what we do as workers compensation attorneys which must be weighed against the diminishing financial rewards we receive through our involvement in this area of law. For the young practitioner, the opportunity to learn how to manage complex medical legal issues through exposure to experts from a variety of fields remains exceptional. Most of us probably attend or take more depositions in a six month period than the average civil litigator may take in years of handling claims. Our area of practice continues to provide an unparalleled opportunity to develop trial skills which are transferrable in other areas of the law.

The ability to help people solve problems should not be underestimated. Working people who suffer career ending injuries continue to remain a largely under served population group. Successfully counseling a client through what for most is a difficult period of their life offers rewards beyond financial. People need our help and benefit greatly by our active involvement on their behalf.

In most jurisdictions in our country workers' compensation practitioners handle more than one area of law and derive their income from more than just the practice of workers' compensation. Realistically, our section members will be using the skills that they have developed in order to start breaking into other fields of law which they find rewarding and which will serve to supplement their income. There are many opportunities. Apart from the traditional areas such as social security, attorneys should look to handle disability claims, disputes involving health insurance benefits, employment discrimination cases, wage and hour claims and other causes of action which arise from the employment relation-

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## Message From the Chair, from page 5

ship. The potential client base for these types of claims is essentially the same as the client base for our workers' compensation claims.

Due to Florida's current economic problems and the almost non-existent construction industry the number of seriously injured workers requiring the services of competent counsel has dramatically reduced. This will change. The economy will rebound. Unfortunately, as a result of the lack of proper safety practices and ordinary human failures, accidents will happen and significantly injured workers will require the assistance of well trained specialists.

Florida's future growth coupled with a reasonable court interpretation likely to be given to our current law will result in the practice being more desirable in the future. The future is brighter than the present. Continue to hone your skills, apply your knowledge to other related areas of law and take pride in providing assistance for those that require an advocate and counselor on their side.

### Looking Ahead

We have seen our Section membership decline by 18% since 2005. Although it is somewhat concerning to see the size of our Section decrease, not all contraction is bad. I know for a fact that in many instances, attorneys that were not dedicated to the

practice of workers' compensation have fled the Section and the practice. It is my belief that will we will be left with a Section very similar to that which survived the 1979 reforms, a dedicated, professional and highly competent core of attorneys who will represent injured workers, employers and insurance carriers for years to come. It is our goal as a Section, and specifically as an Executive Council, to provide outstanding educational opportunities for our members, representation before the Legislature and courts when our practices are threatened, and with information to keep you abreast of any change that may affect your practice. I can assure you on behalf of your Executive Council that we will continue to do just that.

Regardless of the intent of our multiple legislative reforms, people, employers and carriers still need representation. Although our system is deemed to be "self executing," as I write this message I have before me the Florida Workers' Compensation Reference Manual which contains 174 pages of statute and 420 pages of related rules. Despite the misnomer of a "self-executing" system, not only do to the parties need attorneys, but attorneys need the advice and counsel of workers' compensation practitioners to explain the law to them. People will continue to get hurt at work, there will continue to be disputes over workers' compensation benefits, and there will continue to be a need for the workers' compensation Bar. We will survive and we will once again thrive.

— Rick Thompson, Chair

## Passing of Judge Joseph Farrell

By David Langham, Deputy Chief Judge of Compensation Claims Office of the Judges of Compensation Claims

I am saddened to relay to you that Judge Joseph Farrell, ORL, has passed away. I will honor his wishes and keep the details private as he did these many months. I did not know Judge Farrell well, and that troubled me as we spoke over the last year. I have come to find though that few knew him well, and most feel that he was a very private person. Joe was an anachronism in some ways; he did not particularly like being a lawyer, but was exceptional at it anyway. A graduate of West Point, who resisted conformity, was playful and even a bit rebellious. Practicing at a large defense firm with a dress code years ago, he would hang a tie around his neck in conformance with the letter of the law, but declined to tie it. A Claimant's lawyer, a Carrier's general counsel, a mediator, a professor at Barry University Law School, and a Judge; He told those close to him that being a JCC was the "best job I ever had." He told some that he liked it so much he would do it "for free." Those that knew him though, knew he felt that way about teaching law also. A man from modest beginnings, his father a tool salesman and his mother a homemaker, Joe was a kind, compassionate person that could become a fierce advocate when necessary. Many knew of his love of Jim Morrison's music, and remember him constantly quoting "the future's uncertain and the end is always near." He apparently knew better than any of us. I wish I had known him better. We are fortunate to have known him at all and will miss him.

Hug a loved one today, or call someone you have been meaning to re-connect with. Life is too short.



# Editor's Comments:

## Politics and Workers Compensation



Dear Friends and Colleagues:

I hope you all will enjoy the latest edition of the *News and 440 Report*. Much has been happening in our world recently from political races that may define our future as practitioners in this specialized niche to some very interesting new cases from the First DCA. Things have been far from quiet and with the upcoming elections and other court challenges, I predict this practice will soon experience a renaissance.

The Alex Sink vs. Rick Scott race for Governor will undeniably play a significant role in our professional lives. Rick Scott has a stated goal of reducing workers's compensation premiums by an additional 35%.<sup>1</sup> His ambitious goals leave this editor to ponder to what extent he might be aware that the 2003 legislative reforms already accomplished that goal and have reduced premiums by nearly 65%.<sup>2</sup> Does he intend to further reduce benefits to injured workers to meet his objective? No matter which side you practice on, it is difficult to conceive any legitimate argument in support of further reductions in benefits to injured workers. As CFO, Alex Sink has granted our section unprecedented access to her office. She has pledged to support a fair and balanced workers' compensation system, with reasonable benefits to workers at an affordable cost to employers. No matter who you choose to vote for, GET OUT AND VOTE!!! Indeed, the outcome of this governor's race will directly impact us in the following manners:

1. The governor approves the nominations for Judges of Compensation Claims. A governor who is willing to appoint Judges who are qualified, fair, reasonable and impartial is critical to the success of our section.
2. The governor appoints Supreme Court and DCA justices. Keeping a fair and balanced Supreme Court and First DCA are key to ensuring the long-term survival of the Florida workers' compensation system.
3. The governor has veto power over legislation. Assuming that the "Emma Murray fix" is corrected by the appellate court, the legislature will be certain to react and we will probably see yet another piece of legislation to fix this. A veto may be the only way to stop this.

As always, I also would like to offer my sincere gratitude to those who have contributed to this issue, including (but certainly not limited to) W. Rogers Turner, Esq. for preparing the case law summaries. His hard work keeps us all updated on the developments coming out of the 1st DCA and Supreme Court. Indeed, I cannot remember a three-month period where so many interesting and significant cases have been released. This edition of the case law summaries is required reading to keep abreast of the trend. Brian Bolton, Esq. teaches Workers' Compensation at Barry University and two of his students have written an excellent article on spoliation of evidence. This presents some interesting scenarios for causes of action against an employer outside of Chapter 440. Michael G. Rabinowitz, Esquire has co-authored an important update on the changing law on IME's, something we encounter daily. Matthew J. Troy, Esq. and Andrew R. Borah, Esq. comment on the recent First DCA decision addressing the application of the post October 1, 2003 changes to Section 440.15(5)(b), the apportionment statute in *Staffmark v. Merrell*.

Judge David Langham has provided us with the results of the 2010 the JCC and mediator survey. This survey, unprecedented before Judge Langham's tenure as Chief JCC, continues to offer the valuable opportunity to, in a professional and constructive manner, critique and review the JCCs and mediators in an effort to improve their competence and professionalism. I hope you all took the time to complete the survey honestly. Indeed, the results collectively show improvement by Judges and Mediators over ratings in previous years, a positive development easily attributable to those who have been reviewed taking those reviews to heart and seeking to improve their performance based on the constructive comments and ratings they received.

As always, our Section remains committed to attracting new members and retaining existing ones. Our Section depends on membership dues to sustain itself. Located in this edition, you will find an enrollment form for new or renewing members. Please print this up and give it to any practitioner you run across who may not yet be a Section member. I also encourage you all to support our advertisers and take advantage of the CLE opportunities presented

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## Editor's Comments, from page 7

in this edition. As always, this publication welcomes your comments, thoughts, reactions and even gripes.

Best Regards,

Mike Winer, Esquire  
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### Endnotes:

1 <http://www.rickscottforflorida.com/home/turn-florida-around/3-regulatory-reform/>

2 Florida Insurance Commissioner Kevin McCarty announced that the National Council on Compensation Insurance (NCCI) made a filing with the Office of Insurance Regulation (Office) on May 7, 2010, which included a proposed 4.2 percent decrease in rates. This marks the eighth decrease in workers' compensation rates since 2003. The cumulative overall statewide average decrease in workers' compensation rates will be 64.7 percent since the 2003 reforms.

## *New Slate of Officers*

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Richard Chait, Miami

## Letter to the Editor:

Re: Editorial Opinion and Ms . Spagnola- Hills' Reply

Dear Mr. Winer:

I am a state mediator in Pensacola. I read Ms. Hills' reply to one of your editorial opinions concerning the manner in which some employers/carriers are authorizing doctors to treat workers ' compensation claimants . I reviewed Chapter 440 which, as everyone knows, is always an adventure. I agree with Ms. Hills that Section 440.13 has, at least as far back as 1994, always given the employer/carrier the right to select the initial treating doctor. However, when it came to the claimant's request for a change in doctor, the 2005 version of the statute, specifically Section 440.13 (2) (f) ,required the employer/carrier to provide the claimant with a list of 3 doctors that were not affiliated in practice together . The claimant could then select one of the three. That is no longer the case. I know of one employer/carrier who consistently offers Dr. "Frick" as the initial doctor. After he discharges the claimant (usually after one visit) as being at maximum medical improvement with a 0% impairment, the claimant is forced to use his one time change of physician. Then Dr. "Frack" is authorized. He will confirm Dr. "Frick's" opinion. At that point it is usually all over for the claimant.

This scenario is fine if you believe that every claimant is a lying fraud. I spent the better part of my career in-house with a major casualty insurer. I probably held that opinion in my early days but, as I matured in my practice and my life, I came to believe that some people are actually hurt sometimes and that the out and out fraudulent cases are a minority of the claims. The pendulum has swung too far to the right at this time and we can only hope that it moves back closer to the middle in the near future.

Sincerely,

Wallace W. Hardy  
Mediator  
Office of the Judge of Compensation Claims  
Pensacola, Florida 32502



# A Game of Multiplication: First DCA Allows Both E/C's and Claimant's to Obtain Multiple IME's



By Michael G. Rabinowitz, Esq., Banker Lopez Gassler P.A. and Michael J. Winer, Esq.

When the 2003 changes came into effect, many practitioners looked solely at the fee provision as the biggest change. But, in terms of everyday practice in Workers' Compensation, the change to the IME provision also had a profound effect. Section 440.13(5) (a), was thought to limit each party to just one IME:

"In any dispute concerning overutilization, medical benefits, compensability, or disability under this chapter, the carrier or the employee may select an independent medical examiner. The employer and employee shall be entitled to only one independent medical examination per accident and not one independent medical examination per medical specialty." (Emphasis supplied)

Many argued that the intent of the Legislature was clear—one IME per date of accident only and not one IME per specialty. However, the issue of whether a party could have just one IME examination per claim was left in doubt. Before the changes, any judges allowed "updated" IME's upon motion of a party, if it was with the same doctor, especially when it had been years since the last IME. See *Wal-Mart v. Liggon*, 668 So.2d 259 (Fla. 1st DCA 1996) (allowing a second IME predicated on a showing of "reasonableness" subject to the scrutiny of the JCC). However, many argued that the newer language of section 440.13(5) sought to curb this and only permit "one independent examination per accident."

Therefore, many judges would deny updated IME's for this very reason. . . . until now. In *Gomar v. Ridenhour Concrete and Supply*, 2010 WL 3119939; CASE NO. 1D09-4506 (Fla. 1st DCA, August 10, 2010), Claimant alleged a compensable accident that the E/C promptly denied. To prove his case, Claimant obtained an IME, in December of 2006, who concluded the work injury was the major contributing cause of Claimant's disability. Based on

the IME, the E/C reversed course and acknowledged compensability and authorized a treating doctor.

In 2007, the authorized treating doctors put Claimant at MMI with a 0% PIR. In 2009, the Claimant filed a PFB for continued benefits in which the E/C denied based on the opinions of the authorized treaters. Claimant then underwent an "updated" IME in 2009 with the same doctor. At trial, the Judge excluded the updated IME's testimony and report based on section 440.13(5)(a) that parties can only have one IME per accident.

The First DCA reversed based on statutory construction. Before the 2003 changes, parties could obtain IME's for multiple specialties. The legislation intended to limit this. But, the statute does not show the Legislature's intent to limit the amount of IME exams. The court's rationale was that a workers' compensation claim can last years, during which time a Claimant's condition can change and legal issues such as compensability, MMI, and impairment rating will come up. To force a party to just one IME examination throughout the life of the claim would be absurd. The plain language of the statute also supported the court's ruling as the Legislature did not change the language regarding entitlement to an IME in any "dispute concerning overutilization, medical benefits, compensability, or disability." The term "independent medical examiner" is defined in the statute as a "physician selected by either an employee or a carrier to render one or more independent medical examinations in connection with a dispute." See section 440.13(1)(i) (emphasis added) The statute allows the parties to obtain an IME's in "any dispute." *Gomar v. Ridenhour Concrete and Supply*. Therefore, the First DCA specifically held that each party is entitled to an IME for each covered dispute during the life of a claim, so long as it

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## Game of multiplication, from preceding page

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is performed by the same examiner.

Perhaps even more interesting is the issue of “alternate” IME’s, which the court did not rule upon but did specifically identify. In *Gomar*, the court stated that the IME limitation is subject to the exception found in section 440.13(5)(b), Florida Statutes (2005), which provides for an “alternate” independent medical examiner under certain enumerated circumstances. The *Gomar* court indicated that it was not called upon to interpret this provision and declined to do so. However, workers’ compensation practitioners cannot ignore the 3,000 pound elephant sitting in the room. Section 440.13 (5) (b)- “Independent Medical Examinations” provides in relevant part as follows:

b) Each party is bound by his or her selection of an independent medical examiner, including the selection of the independent medical examiner in accordance with §40.134 and the opinions of such independent medical examiner. Each party is entitled to an alternate examiner only if:

1. The examiner is not qualified to render an opinion upon an aspect of the employee’s illness or injury which is material to the claim or petition for benefits;
2. The examiner ceases to practice in the specialty relevant to the employee’s condition;
3. The examiner is unavailable...”

Because the amendments to sections 440.13(5)(a) and 440.13(5)(b) were enacted as parts of the same act by the same legislature as part of the “reforms” on 10/1/03, they should be construed in *pari materia* and read together. See *Major v. State*, 180 So. 2d 135 (Fla. 1965). Indeed, the *Gomar* court engaged in this same in *pari materia* analysis in reaching its own decision. If, the legislature intended to all together eliminate a second or alternate IME with a physician of a different specialty, it is difficult to understand why the legislature would have included the language contained in section (b). To fail to allow a second IME under these circumstances where the original IME cannot testify, is unavailable or cannot offer an opinion on an issue outside of his area of expertise would implicate serious due process concerns and render subsection 440.13 (5)(b) completely meaningless. See *State v. Goode*, 830 So.2d 817, 824 (Fla. 2002) (stating that “a basic rule of statutory construction provides that the Legislature does not intend to enact useless provisions, and courts should avoid readings that would render part of a statute meaningless”).

Further, to the extent that sections 440.13 (5) (a)

and (b) appear to conflict with regard to the number of IME’s allowed, the rules of statutory construction mandate the award of a second or alternate IME. Here, subsection (a), generally deals with IME’s and limits the same to one per accident. However, subsection (b) deals with specific instances where an alternate IME may be allowed. In *Murray v. Mariner Health*, 994 So. 2d 1051 (Fla. 2008), the Court held that a rule of statutory construction is that where two statutory provisions are in conflict, the specific provision controls the general provision. See *State ex rel. Johnson v. Vizzini*, 227 So. 2d 205, 207 (Fla. 1969); see also *State v. J.M.*, 824 So. 2d 105, 112 (2002) (noting the “long-recognized principle of statutory construction that where two statutory provisions are in conflict, the specific statute controls over the general statute”). Thus, subsection (b), which deals with specific instances where an alternate IME may be allowed, would allow for “alternate” IME’s. Again, to fail to reach such a conclusion could leave a claimant without the ability to provide admissible evidence to prove his case and result in more serious due process and access to courts concerns drawing the constitutionality of Chapter 440 into further question.

What does this mean for E/C’s? It might mean more litigation costs in the form of more IME’s. For the few Carriers who still have a managed care arrangement, expect Claimant attorneys to choose an IME of your managed care list and expect to have to pay for an original examination and any “updated” examinations as any new “disputes” may arise. Some would also expect Claimant attorneys to now litigate issues they gave up on simply because of this new interpretation of the IME rule. However, outside of the managed care context, this decision has little potential for harm to carriers as Claimants typically cannot afford to pay the costs for serial updated IME’s. Any potential for abuse cuts both ways, as E/C’s can now obtain serial IME’s for each new dispute that arises anytime they are dissatisfied with the recommendations of a doctor who they selected..

The *Gomar* decision brings back a portion of the pre-2003 statutes that many of us have forgotten. Indeed, considering the yet to be addressed issue of “alternate” IME’s and assuming the analysis herein proves correct and parties are in fact entitled to the same upon the proper showing, apart from the claimant having to pay for his own IME outside of the managed care setting, it seems as if the legislative enactments in 2003 accomplished very little as it pertains to IME’s.

*Michael G. Rabinowitz, Esq.* writes a blog detailing all of the latest updates in Florida Workers’ Compensation law. You can check out his articles at [workerscompblog.wordpress.com](http://workerscompblog.wordpress.com).



# Apportionment Clarified: *Staffmark v. Merrell*



By Matthew J. Troy, Esq. and Andrew R. Borah, Esq.

The First DCA has recently addressed the application of the post October 1, 2003 changes to Section 440.15(5)(b), the apportionment statute, for the first time in *Staffmark v. Merrell*, 2010 WL 3168130 (Fla. 1st DCA August 12, 2010). Apportionment was addressed in this journal just one year ago (Andrew R. Borah, “Apportionment: Pointing Fingers,” XXX *News & 440 Report* 3, (Fall 2009)); however, this recent case changes a number of the conclusions of that article and how we, as practitioners, should understand and use apportionment. Additionally, a concurring opinion suggests that the court may be taking a hard look at the constitutionality of workers compensation based upon the reduction in benefits received by injured workers.

We are all aware of the significant changes to the apportionment law that came with the 2003 changes. Prior to October 1, 2003, the Employer/Carrier was only entitled to apportion permanent disability, impairment and death benefits, and was specifically prohibited from apportioning temporary indemnity or medical benefits. See Section 440.15(5)(a), Fla. Stat. (2002). The Florida Supreme Court has noted that compensation for temporary disability and medical benefits [were] not apportionable under the general scheme and intent of our workmen’s compensation law. *Russell House Movers, Inc. v. Nolin*, 210 So.2d 859, 863 (Fla. 1968). This all changed with the enactment of the 2003 changes that appeared to allow for apportionment of all benefits. See Ch. 2003-412, § 18, Laws of Fla.

The claimant in *Merrell* had sustained a number of prior injuries, including work related neck and back sprains in 1994 and 1996, non-occupational slip and falls in 1995 and 2003, and a significant 2006 work related back injury with a possible surgical recommendation. On November 7, 2008 he injured his low back while carrying a door. The employer/carrier denied the claim based upon an idiopathic pre-existing condition and major contributing cause. The claimant obtained unauthorized medical care

that eventually resulted in the appointment of an Expert Medical Advisor (EMA).

The EMA reviewed the claimant’s significant medical records and determined that the claimant sustained a permanent aggravation of his pre-existing pathology and that the industrial accident was the major contributing cause of his disability and need for treatment. The EMA further opined that 40% of the claimant’s disability and need for treatment was related to his pre-existing conditions and 25% of the claimant’s need for surgery was related to his pre-existing conditions. The JCC eventually awarded the unauthorized medical care following *Parodi v. Florida Contracting Co., Inc.*, 16 So.3d 958 (Fla. 1st DCA 2009). The JCC however rejected the EMA’s apportionment opinions because the EMA had apportioned both 40% and 25% of the need for treatment and because there was no evidence presented of a permanent impairment rating due to the 2008 accident.

The First DCA affirmed the JCC’s denial of apportionment; however, they rejected the JCC’s analysis, under the ‘Topsy-Coachman’ rule. The court, for the first time, affirmed the 2003 changes to the apportionment statute permitted the employer/carrier to apportionment both temporary and permanent benefits and medical care. Additionally, in what had been a recent trend, the court explained the current state of the law for practitioners. The court rejected the JCC’s narrow view that a permanent impairment rating was required to determine apportionment, noting that the first sentence of section 440.15(5)(b) addresses apportionment of temporary indemnity benefits. Similar to their analysis in the recent *McKenzie v. Mental Health Care, Inc.*, 2010 WL 2873018 (Fla. 1st DCA July 23, 2010) case, the court analyzed the statute sentence by sentence to determine how apportionment must be applied and proven.

The first sentence of 440.15(5)(b) governs the  
*continued, next page*



## Apportionment, from preceding page

apportionment of temporary indemnity benefits, the second sentence governs permanent indemnity benefits, and finally the third sentence governs medical benefits. The analysis of permanent indemnity benefits remains unchanged and requires only the apportionment of the anatomical impairment rating attributable to the pre-existing condition. This is essentially a simple math problem explained in greater detail in last year's article. What has changed is how the employer/carrier must prove apportionment of temporary indemnity and medical benefits. It is axiomatic that the claimant would not have a permanent impairment rating when he was not yet at MMI; previously this was the issue with proving apportionment of temporary benefits and pre-MMI medical care. All that appears to be required is expert medical testimony as to the percentage cause of a claimant's disability or need for treatment.

If the last sentence seems familiar to you, it did to the court as well. The court noted that 'pre-existing condition' had not been defined in the apportionment context. The court therefore looked to the most similar concept, major contributing cause. The court appropriated the major contributing cause definition of pre-existing conditions as explained in *Pearson v. Paradise Ford*, 951 So. 2d 12 (Fla. 1st DCA 2007) and *Pizza Hut v. Proctor*, 955 So. 2d 637 (Fla. 1st DCA 2007). The court noted that in the major contributing cause context pre-existing condition means a pre-existing injury or condition that is unrelated to an employment accident. *Pearson*, 951 So.2d at 17. Rightly or wrongly, the court has now melded apportionment and major contributing cause analyses. The First DCA held that the EMA's opinion did not specify the extent to which industrial vs. non-industrial causes contributed to the claimant's pre-existing conditions, and based upon this failure, the DCA rejected the EMA's apportionment opinion and affirmed the denial of the defense.

The implications of this case appear to be far reaching. Employer/carriers can now apportion temporary indemnity and medical benefits, so long as they have a medical opinion upon which to do so. Once the claimant is able to clear the major contributing cause burden, she will now be subject to an apportionment of benefits, pursuant to that

same medical opinion. Where the claimant's bar was previously satisfied with a 51% major contributing cause opinion, that same opinion can work to reduce a claimant's benefits by 49%. As a practical matter physicians will begin to understand that such opinions only reduce the amount they will be paid by the carrier and the reality that the injured worker will not be able or willing to pay for 49% of a multi-level lumbar fusion or other similar complex procedure.

It also appears that employer/carriers will have a greater incentive to proceed with contribution claims against other employers for prior work related injuries. The First DCA noted section 440.42(4), which governs contribution claims, but they appear to have a lack of understanding of the realities of those claims. As had previously been decided by the court, when a carrier is no longer liable to a claimant for benefits, the carrier is also no longer liable for contribution. *Medipartners v. Zenith Ins. Co.*, 23 So 3d 202 (Fla. 1st DCA 2009). When a claimant has permitted the statute of limitations to run or has settled a prior claim, the employer/carrier will be without redress as to the extent of industrial related pre-existing conditions, permitting the claimants to recover benefits for the same injury twice. A similar situation has already arisen in *Petrilli v. Seminole County Fire Rescue*, OJCC 09-017214NPP/10-001249JFF, Final Compensation Order August, 25, 2010. In *Petrilli*, the JCC determined that the claimant's hearing loss was due to 30 years of repetitive trauma as a fireman but put the entire burden of paying benefits upon the most recent carrier. The JCC found that the claimant knew of the industrial nature of his hearing loss well before his employer changed but had permitted the statute of limitations to run and so the previous carrier was not required to pay any benefits.

Finally, in what may well be the most interesting part of the decision, Judge Webster, in a concurring opinion, prophetically stated that apportionment as it is written will significantly increase litigation and, thereby both the economic and administrative burdens upon the workers' compensation system. Further Judge Webster questions whether injured workers will be less likely to seek medical treatment and wonders whether courts might well conclude that because the right to benefits has become largely illusory, Florida's Workers' Compensation Law is no longer a reasonable alternative to common-law remedies and that ... workers have been denied meaningful access to courts. Whether this will be the musing of a single judge or the eventual demise of our current Workers' Compensation statute can only be imagined at this point. What we can be sure of is that *Emma Murray* was not the last time the claimants' bar will raise such constitutional arguments to the 2003 changes to Chapter 440.

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He was member of Lambda Chi Alpha, social fraternity, and Eta Sigma Phi, classics honor society, in undergrad and was the President of Phi Delta Phi, legal honor society, and a founding member of LitiGators, a UF alumni group, at FSU law. While in law school Mr. Troy was a legislative clerk for Rep. Charles Dean and a law clerk for the Florida Department of Transportation. After graduation, he worked briefly for Florida's Turnpike Enterprise before joining HRMCWW. Mr. Troy is admitted to the Florida Bar and the Middle District of Florida. He resides

with his wife and daughter in Ft. Pierce, Florida.

**Andrew R. Borah** is an attorney at the Hurley, Rogner, Miller, Cox, Waranch, & Westcott Winter Park office where he specializes in workers' compensation law. He began working for HRMCWW in 2002. In 2009, he became HRMCWW's 14th lawyer to become board certified in workers' compensation. He was admitted to the bar in 2001 after earning his undergraduate and law school degrees from the University of Florida.

## Legislative Report

Dear Friends:

We are in the midst of a very active and significant campaign season. I write this as the primaries are over and on November 2<sup>nd</sup> our state will elect a new Governor, Attorney General, Chief Financial Officer and Commissioner of Agriculture. In addition, all 120 seats in the House of Representative are on the ballot along with half of the Florida Senate. But this is only the beginning, as redistricting during the 2012 legislative session will reconfigure every seat in the Florida House and Senate along with the congressional delegation. Reapportionment will force every legislative seat to be contested with many incumbents running in districts that they did not geographically represent. The political face of Tallahassee is changing.

It is overriding goal of the Section's governmental affairs efforts to help address the challenges of the 2003 reforms, both for the claimant and defense bars. Within the context of the legislative environment, it is inconceivable that with one major exception there has been scant change to the law since enacted; not even to address many of the glitches that emerged as a result of its implementation. As such, this summer key members of the Section are working to forge stronger and more meaningful relationships with incoming executive and legislative leaders and individually have participated in numerous political activities. To that end, and faithful to the legislative positions adopted by the Section and confirmed by the Florida Bar, we have briefed both gubernatorial candidates, potential Cabinet members, individual legislators and candidates, and the anticipated leadership of both Chambers. And we have continued to nourish our sturdy links with the Office of the Consumer Advocate and other regulatory bodies who appreciate the role that the Section plays as impartial advocates for the system.

While no policy initiatives or public mention of Workers' Compensation has occurred during this campaign season, (except for Rick Scott's proposal to reduce costs an additional 35% as contained in his 7-7-7 Plan) I want to assure you that the Section and some of your colleagues have intensified the level of public affairs outreach. Many thoughtful and committed professionals are dedicating their time and resources this campaign season to prepare the political landscape for any changes resulting from these efforts and the elections.

In closing, I'd like to thank the members of the Executive Council and Section that have engaged in the above detailed efforts and most particularly Richard Chait and Paul Anderson for their leadership of the Section's governmental affairs activities. I appreciate representing you and, as always, trust you will not hesitate to contact me if you have any questions.

*Fausto Gomez*

# E-JCC overall e-File Volume nears ONE MILLION Documents

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The OJCC recognizes and thanks Richard Chait for his outstanding service to the State as Chair of the Florida Bar Workers' Compensation Section 2009-2010.

We Thank the Following for their Contributions to the recent FWCI WCEC in Orlando

Judge John Lazzara, Tallahassee – President of the National Association of Workers' Compensation Judiciary (NAWCJ), and host of the 2010 Judiciary College.

Judge Ellen Lorenzen, Tampa – Treasurer and newly elected President of the NAWCJ.

Evidence-Based Medicine  
Panelists:

Judge Paul Terlizese, Melbourne

Attorney Breakout Panelists:

Judge Charles Hill, Miami  
Judge Thomas Sculco, Orlando  
Judge Kathy Sturgis, Ft. Myers

Adjuster Breakout Panelists:

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Ruby Brown, Lakeland  
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Lyna Hickman, Panama City



# As of July 1, most workers' comp filing will be done electronically

By Gary Blankenship, Senior Editor, *The Florida Bar News*

David Langham has a simple message for lawyers who are worried about the transition of Florida's courts to electronic service and electronic service of documents. "It's a much freer, a much more dynamic method of passing information among ourselves; that should be saving everyone a lot of time," said Langham, the deputy chief judge of the Department of Administrative Hearings, who oversees the judges of compensation claims. "The other big advantage is the cost savings," he added. "Every time you e-file something in my office and e-serve it to opposing counsel, you take a dollar out of the postal service and keep it in your pocket." And Langham has the experience to back those statements up. He has overseen an e-filing system of the Office of Judges of Compensation Claims, which handles the state's workers' compensation claims. That electronic system now handles about half of all filings for workers' comp cases, but under a law just passed by the Legislature, e-filing will become mandatory for almost all cases as of July 1. The law, HB 5611, was pending on the governor's desk as this News went to press.

Langham said the electronic system for the workers' compensation system has been under way since November 2005 and now handles about 50 percent of the filings. Or put another way, it handled two electronically filed documents in its first month, and now handles an average of 31,000. "We just started saving money out of our budget and building it piece by piece; it was incremental as a result," Langham said. The electronic system actually started, he added, with this inquiry from a lawyer: "Why couldn't I e-mail this document to the judge's office?" "That's a great question," Langham said. "Why couldn't he or couldn't she? "Our information technology department really deserves credit. They conceived it and they built it without a single extra dollar of appropriation money." The biggest challenge, he said, has been keeping users up to date with the changes and convincing them of the advantages of e-filing. Those advantages are considerable, both for lawyers and the workers' comp system. "We track our savings in terms of what we have saved the state and our consumers — the users of the system," Langham said. He estimated that lawyers using the system have saved around \$560,000 on postage, paper, envelopes, and the like. Included in the savings is staff time for printing, stuffing envelopes, and delivering packages to the mailbox or court. As for the compensation claims system, Langham said the savings are around \$900,000, with about half being staff time which has been redirected to more productive uses. There are also many other ben-

efits, some fiscal, some convenience. For example, it's now common for insurance companies to keep their workers' compensation records in digital files, scanning all paperwork as it comes in and adding it to the electronic records. Consequently, Langham said, paperwork can be sent to the compensation claims courts with a touch of a button, rather than being copied and toted to the court, which must find physical space to store the paper. Likewise, the First District Court of Appeal is setting up an e-filing and records transfer system. If a case is appealed, the records can be sent electronically, in a fraction of the time and at a negligible cost, he added. For lawyers, the electronic filing means they can see all of the digital documents in a case from their office. They can also track the case. "I think one of the primary advantages is instantaneous confirmation," Langham said. "As soon as you e-file one of your motions, you can go into the document and see it on the judge's docket, right then." Likewise, attorneys can view a ruling online, rather than inquiring of a judge's office whether a decision has been made. In some cases, notification is automatic. "When a judge enters an order, it's going out to the parties via e-mail and that can be forwarded to clients," Langham said. Cases and documents can be filed online by going to the Office of the Judges of Compensation Claims website at [www.fljcc.org](http://www.fljcc.org) where a button for the eJCC electronic filing system is located. That page has links for attorneys, adjusters, and mediators to log in, as well as a link to a 10-page straightforward instruction document, which walks attorneys step-by-step through the system. Langham said there are some lessons for the Florida court system as it works to implement an e-filing system for trial courts. But not everything is similar; court officials have to design a system that catches the necessary "data elements" for cases filed in 10 different divisions, while the compensation claims judges handle only one type of case. Langham noted that 80 percent of the data elements that system needs are captured when someone files the initial request for benefits. Likewise, the court e-filing system is being designed with an eye to the eventual online access to court documents, except for confidential information. Workers' compensation files, Langham said, are full of confidential medical and other information so it has not been a priority to get the files, even the nonmedical portions, online for the public. "We don't put anything that a lawyer files where a member of the public can see it," he said. "The public can open orders and notices from the judges' offices and the

*continued, next page*



## E-filing, from page 15

document comments. Lawyers can open anything in the file.” Public access otherwise remains the same as before the e-filing system was set up. After the required request for a file, a staffer reviews the file and redacts medical and other confidential information, he said. But there are lessons for courts on making electronic information available to judges, who have complained that trying to switch between various e-documents can be time consuming and difficult — and actually harder than using paper files. Langham said the Office of Judges of Compensation Claims has tackled the challenge with both hardware and software solutions. The main hardware innovation is to give each judge at least two monitors, sometimes configured vertically instead of horizontally to enhance document viewing. Then the judges get the programming to handle the multiple screens. “You can get a full page of the PDF document on your screen, and you can cut and paste from one monitor to the other, even if they are running different programs,” Langham said. “You can literally have up to 50 PDF documents open

on your computer at one time and switch between them.” He cited the ability to move documents between courts as a major advantage of the system. For trial courts, it will also have many unexpected benefits. For example, in a case that has to be moved because of pretrial publicity, files won’t have to be boxed up and trundled to the new locations. They will be available electronically. It also improves court operations. “We can get much better statistics at the end of the day and tell the public whether we’re performing or not,” Langham said he foresees continuing improvement and usage, particularly with HB 5611 pending, which will affect everyone but pro se litigants. Changes may be on the way there as well, Langham said, noting a system is being considered to automatically convert incoming faxes from pro se litigants into PDF documents for the court e-file. Even after required use by lawyers of e-filing, he envisions continual refinements. “It’s dynamic, with consideration of different people’s needs in the process and then pushing solutions to the end users,” he said. “In each step of the process, we’ve saved time, effort, and money.”

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# Impact of the Spoliation Doctrine in Workers' Compensation

By Brian Kozlowski & Heather Meglino

Under Florida law, most employers bear some responsibility to preserve evidence that may assist an injured worker in developing a third party action that may arise out of a workers' compensation accident. Indeed, employers are at minimum required to cooperate with the injured worker in developing the third party claim.<sup>1</sup> Even though an employer is generally immune from liability under Fla. Stat. 440.11, the employer may nevertheless subject themselves to a separate lawsuit for failure to preserve evidence proving a third party action in favor of the injured worker. The loss or destruction of evidence is known as "Spoliation" of evidence.<sup>2</sup> This article discusses the importance of preserving evidence and the evolution of the Spoliation Doctrine in Florida.

## Evolution of the Spoliation Doctrine

A duty to preserve evidence may arise by contract, by statute, or by a discovery request.<sup>3</sup> This duty did not exist at common law. In Florida Workers' Compensation cases, this duty is statutorily prescribed by, Fla. Stat. §440.39.<sup>4</sup> Spoliation of evidence is the intentional or negligent withholding, hiding, alteration or destruction of evidence relevant to a legal proceeding.<sup>5</sup> Furthermore, the spoliation doctrine allows for proceedings that may have been affected by a destruction of evidence to have spoliation inferred. The spoliation inference permits a judge to draw a negative evidentiary inference if a party has destroyed a piece of evidence that is relevant to the proceeding. This can include a jury instruction allowing a presumption against the deceitful party. The logic to this doctrine is that the party engaging in the spoliation was motivated by knowledge that the particular evidence in question was damaging to their case, thus having a guilty conscience. The purpose for a claim of spoliation is to compensate the claimant for the loss of recovery in the underlying case due to the claimant's inability to prove their case because the evidence was lost or destroyed by the employer. The basis of a cause of action for spoliation of evidence is an intangible and beneficial interest in the preservation of the evidence.<sup>6</sup> The goal is to assure that the non-spoliator does not bear an unfair burden in trying to prove their case.<sup>7</sup>

## Recognition of Spoliation in Florida

In Florida, spoliation is recognized as a cause of action.<sup>8</sup> A claim for spoliation is recognized in Florida as an independent cause of action for negli-

gence.<sup>9</sup> This occurs when a party is unable to prove their underlying case due to the loss or destruction of key evidence. Since spoliation is an independent cause of action, it only arises after the underlying action is completed.<sup>10</sup> In order to establish a cause of action for spoliation in Florida, a party must show:<sup>11</sup>

- (1) The existence of a potential civil action.
- (2) A legal or contractual duty to preserve evidence, which is relevant to the potential civil action.
- (3) Destruction of that evidence.
- (4) Significant impairment in the ability to prove the lawsuit.
- (5) A causal relationship between the evidence destruction and the inability to prove the lawsuit.
- (6) Damages.

The claimant has the burden to show an inability to prove their case without the destroyed evidence. However, this does not require the plaintiff to establish that they would have been successful in the civil suit if the evidence had been properly maintained; but rather, establish that the destruction of the evidence cost him or her the opportunity to prove their lawsuit.<sup>12</sup> Given this, the liability for this tort would not arise until the underlying action is completed.<sup>13</sup>

Workers' Compensation statutes are drafted with the intent of assuring the quick and efficient delivery of benefits to injured workers so as to facilitate their return to gainful employment, at a reasonable cost to the employer. Florida Statute §440.39(7) states that "[t]he employee, employer, and carrier have a duty to cooperate with each other in investigating and prosecuting claims and potential claims against third-party tortfeasors by producing nonprivileged documents and allowing inspection of premises, but only to the extent necessary for such purpose."<sup>14</sup> It is this statutory mandate which creates a duty upon employers under element (2) above. In Florida, if an employer destroys evidence when the employer had a reasonable basis to understand that the object could be used as evidence in a legal proceeding, the employer would be liable for negligent destruction of evidence.<sup>15</sup> This arguably places a duty upon employers if the consequences of the destruction of evidence can be reasonably foreseen. Courts have held that an employer could be seen as having a duty

*continued, next page*



## Spoilation, from page 17

to preserve evidence where it could have reasonably foreseen that a third party claim would arise.<sup>16</sup> This duty creates an incentive that better ensures that an employer will not dispose of potential evidence.

An insurer does not usually have a duty to acquire and preserve the evidence, as they are not typically the holder of the evidence.<sup>17</sup> For example, in *Barbosa v. Liberty Mut. Ins. Co.*, 617 So.2d 1129 (Fla. 3d DCA 1993), the court found that because the insurer was never in possession of the evidence in question, it was inappropriate to expand the duty to preserve the evidence to include the insurer.<sup>18</sup> However, an insurer may be subjected to liability by taking possession or control of evidence, and if it fails to preserve the evidence, the insurer may be confronted with a potential third party spoliation suit.

Spoliation is a tort cause of action because it is based on an employer's/defendant's breach of duty to preserve evidence.<sup>19</sup> Damage results from this breach because a claimant is unable to prove their underlying cause of action referred to herein as a "third party claim".<sup>20</sup> The claimant's spoliation action seeks compensation not for the bodily injury actually sustained but for his loss of recovery in the underlying suit which may include non-economic damages.<sup>21</sup>

The initial case that gave Florida courts the chance to analyze a claim for "negligent failure to preserve evidence" occurred in 1985, in *Bondu v. Gurvich*.<sup>22</sup> This case concerned lost patient records, and the court found the existence of a duty in the statutes at the time that required a hospital to maintain records of patients and produce them upon request.<sup>23</sup> The plaintiff in this case was found to have stated a cause of action for "negligent failure to preserve evidence" because she alleged that she could not prove her cause of action against the doctor practicing in the hospital.<sup>24</sup>

In *Shaw v. Cambridge Integrated Services Group, Inc.*, 888 So.2d 433 (Fla. 3d DCA 2001), the appellant employee sued the manufacturer of a defective ladder as a third party tortfeasor.<sup>25</sup> The defective ladder was destroyed by the employer and the employee brought a suit for spoliation of evidence.<sup>26</sup> The appellate court held that spoliation was not an injury arising out of and in the course of employment, but rather a tort claim based on a party's breach to preserve evidence.<sup>27</sup>

### Florida Statute

§440.39(7). Compensation for injuries when third persons are liable

The employee, employer, and carrier have a duty to cooperate with each other in investigating and prosecuting claims and potential claims against third-party tortfeasors by producing nonprivileged, and perhaps even privileged, documents and by allowing inspection of premises, but only to the

extent necessary for such purpose. Such documents and the results of such inspections are confidential and exempt from the provisions of Fla. Stat. § 119.07, and shall not be used or disclosed for any other purpose.<sup>28</sup> A claimant's election to seek workers' compensation from his or her employer is not barred by a claim against an employer for spoliation of evidence.<sup>29</sup>

### Conclusion

Workers' compensation is designed to protect workers and their dependents against hardships that arise from the workers' injury or death arising out of, and occurring during their employment.<sup>30</sup> A claim for spoliation of evidence compensates a plaintiff for the loss of recovery in the underlying case due to his or her inability to prove the case because of the loss or destruction of evidence.<sup>31</sup> Employers have an affirmative duty to preserve evidence. Without this, parties would have no recourse for the damage the loss of evidence causes. The damage done and the burden of caring for an injured employee would be placed back on society, which goes against the remedial intention of workers' compensation legislation, which was to place the burden on the industry involved. In order to avoid the pitfalls of spoliation claims, employers should be advised of their duty to preserve evidence. Ensuring there are proper document retention programs in place will also prevent potential evidence destruction. Spoliation cases can be reduced if workers' compensation practitioners, employers, and insurers fully understand the issues surrounding spoliation.

*The authors are second-year students at Barry University Law School in Orlando. They are members of the Barry University Moot Court Team and recently attended the Workers' Compensation Class taught by the Editor of this article, Professor Brian Bolton, who has practiced Workers' Compensation Law for over 25 years and is recognized by the Florida Bar Association as an Expert and Specialist in Workers' Compensation Law. Brian Bolton is also a Partner in the Firm of Bolton and Helm, LLP.*

### Endnotes:

- 1 Fla. Stat. §440.39(7)
- 2 Black's Law Dictionary (8th ed. 2004).
- 3 *Royal & Sunalliance v. Lauderdale Marine Ctr.*, 877 So.2d 843, 845 (Fla. 4th DCA 2004)
- 4 Fla. Stat. §440.39(7)
- 5 Black's Law Dictionary (8th ed. 2004).
- 6 *Lincoln Ins. Co. v. Home Emergency Services, Inc.*, 812 So. 2d 433 (Fla. 3d DCA 2001)
- 7 *Reed v. Alpha Professional Tools*, 975 So.2d 1202 (Fla. 5th DCA 2008)
- 8 *Jost v. Lakeland Reg'l Med. Ctr., Inc.*, 844 So. 2d 656 (Fla. 2d DCA 2003)
- 9 *Lincoln Ins. Co. v. Home Emergency Services, Inc.*, 812 So. 2d 433 (Fla. 3d DCA 2001)
- 10 *Towsend v. Conshor, Inc.*, 832 So. 2d 166, 167-68 (Fla. 2d DCA 2002)



11 Jost v. Lakeland Reg'l Med. Ctr., Inc., 844 So. 2d 656 (Fla. 2d DCA 2003); see also  
 32 Fla Jur Interference § 22  
 12 Brown v. City of Delray Beach, 652 So.2d 1087 (Fla. 4th DCA 2001)  
 13 Lincoln Ins. Co. v. Home Emergency Services, Inc., 812 So. 2d 433 (Fla. 3d DCA 2001)  
 14 Fla. Stat. §440.39(7)  
 15 Shaw v. Cambridge Integrated Services, Group, Inc., 888 So. 2d 58 (Fla. 4th DCA 2004)  
 16 Hagopian v. Publix Supermarkets, Inc. 788 So.2d 1088, 1090 (Fla. 4th DCA 2001); American Hospitality Management co. of Minnesorta v. Hettiger, 904 So.2d 547 (Fla. 4th DCA 2005)  
 17 Barbosa v. Liberty Mut. Ins. Co., 617 So.2d 1129, 1129-30 (Fla. 3d DCA 1993).  
 18 Id.  
 19 Norris v. Colony Ins. Co., 760 So. 2d 1010 (Fla. 4th DCA 2000)  
 20 Shaw v. Cambridge Integrated Services, Group, Inc., 888 So.

2d 58 (Fla. 4th DCA 2004)  
 21 Id.  
 22 Bondu v. Gurvich, 473 So. 2d 1307, 1312 (Fla. 3d DCA 1985)  
 23 Id.  
 24 Id.  
 25 Shaw v. Cambridge Integrated Services, Group, Inc., 888 So. 2d 58 (Fla. 4th DCA 2004)  
 26 Id.  
 27 Id.  
 28 Fla. Stat. § 119.07; Fla. Stat. §440.39(7)  
 29 Townsend v. Conshor, Inc., 832 So. 2d 166, 167 (Fla. 2d DCA 2002)  
 30 Shaw v. Cambridge Integrated Services, Group, Inc., 888 So. 2d 58 (Fla. 4th DCA 2004). see also McCoy v. Fla. Power & Light Co.,  
 87 So. 2d 809, 810 (Fla. 1956)  
 31 Lincoln Ins. Co. v. Home Emergency Services, Inc., 812 So. 2d 433 (Fla. 3d DCA2001)

The Florida Bar Workers' Compensation Section presents

# 27th Annual Workers' Compensation Winter Retreat

CLE & Skiing at  
**Ritz Carlton Bachelor Gulch – Beaver Creek, Colorado**  
**February 6 – 11, 2011**



Course No. 58760

**SUNDAY, FEBRUARY 6, 2011**

Arrival/Check In (All day)  
 Superbowl Party

**MONDAY, FEBRUARY 7, 2011**

Ethics in Mediation – *Brad Goodman & Judith Nelson, North Miami Beach*  
 2011 Update on Tax and Estate Planning – *Barry A. Nelson, North Miami Beach*

**TUESDAY, FEBRUARY 8, 2011**

Update On Presumption Cases for 1st Responders – *Geoff Bichler, Orlando*  
 Properly Evaluating All Areas of Future Exposures – *Fred Deutschman, Inverness & Randy Dunkle, Sarasota*  
 Political/Legislative Update – *Ray Malca, Miami & Gerry Rosenthal, West Palm Beach*  
 Group Dinner at Zach's Cabin (Dutch Treat)

**WEDNESDAY, FEBRUARY 9, 2011**

Compare/Contrast FL WC Law vs. CO WC Law – *Bryan Henry, Dillon, CO*  
 Fraud & Apportionment – *Chris Petruccelli & Stephanie Vann Brown, Tampa*

**THURSDAY, FEBRUARY 10, 2011**

MSAs for WC and Liability Settlements, Dual Eligibility (Medicare/Medicaid), and Hot MSA Topics: A Panel Discussion – *Jason Lazarus, Orlando & Mark Popolizio, Miami*



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**TO MAKE RESERVATIONS**, call Cheryl Waag, our Travel Agent, at (816) 229-9797. **PLEASE NOTE:** To get the special rate for the WC Winter Seminar, you **MUST** call Cheryl Waag. You cannot make a reservation directly with The Ritz Carlton. When you contact Cheryl, please refer to the "Fla. Bar Workers' Compensation Section" in order to get the special rate. Due to the limited number of rooms in our block, there is a **four-night minimum stay** requirement. You must be registered to attend the WC Winter Retreat to receive the special rate. Changes and cancellations are permitted until 11/30/10 at 5:00 p.m. Central Time. After that date the cancellation fee equals room and tax for the entire stay. We strongly recommend trip cancellation insurance, which must be purchased when your initial reservation is made. Insurance cost is determined by length of stay and covers cancellation for most medical and business-related reasons.

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Contact Arlee J. Colman, Program Administrator at: [acolman@flabar.org](mailto:acolman@flabar.org) for more information.



## **WC Section/OJCC Survey 2010**

2010 marked a great improvement in the Judicial Survey process. The Judicial/mediator survey is an outgrowth of the relationship between the Workers' Compensation Section Executive Council and the OJCC. Admittedly, that relationship has seen its share of strain over the years, and there have been times when the relationship has not been all that it could be. I am proud that there is a strong relationship today, but am cognizant that we cannot become complacent in that regard. Like all relationships, professional relationships require time and effort. Unfortunately, we all get busy and too often we forget the value of the relationships that we should nurture. The Section/OJCC survey helps with that, in that it brings together Judges and attorneys at least periodically to discuss the process and effectiveness of the survey.

Periodically, someone inquires what purpose the survey serves. Admittedly, it provides only subjective perceptions. Those perceptions are likely influenced by an attorney's most recent experience with a particular judge or mediator, and may be the product of whether that particular attorney prevailed or not in that most recent trial or mediation. With a sufficiently large volume of responses, however, the potential influence of these feelings is reduced. The averages reported in each category for each Judge and Mediator are the result of that individual's volume of responses (provided in the parenthetical next to each Judge or Mediator's name).

This year, the survey process allowed respondents at the outset to select the "divisions" (individual judge mediator teams) regarding which they wished to respond. This innovation was an improvement driven by the responses in previous surveys, and exemplifies the benefit of a thoughtful and dedicated survey committee. John Brooks, Judge Cohen, Judge Lazzara, Judge Roesch, Jake Schickel, Richard Thompson, have dedicated significant time to formulating the survey, evaluating the process and honing the tools employed. The survey, and this most recent refinement allowing response without time wasted scrolling through divisions about which the particular respondent is not interested, is the result of their interest, dedication and commitment.

The survey again asked to rank multiple characterization questions by whether the respondent perceived the Judge or Mediator was "poor," "below average," "average," "above average," or "excellent" regarding distinct attributes. It is important to remember that the survey is not a ranking of any kind. The results are arranged in the charts in alphabetical order of the district (DAY through WPB, and then alphabetically within each District by last name). Although there are some lawyers that have statewide practices, most lawyers will not have responded regarding each of the Judges and mediators. The responses to the survey are subjective perceptions of individual attorneys, and to a large extent different attorneys therefore responded regarding different Judges. The result, however, can provide feedback for a Judge or Mediator as to the perceptions of the attorneys who appear before her or him.

Considering the overall responses, the lawyers that practice workers' compensation have a high regard for the Judges and Mediators of the OJCC. The average of all responses was 4.18 for mediators and 4.26 for Judges. This overall average reflects that the practitioners regard the Judges and Mediators as being more than "above average," which would have been an average of 4. Certainly, everyone would like to be rated as "excellent," and be perceived as a perfect "5" in every category. In a perfect world, perhaps we would all be perceived as perfectly "excellent." The results of this survey, however, are excellent overall. The consistency of practitioner perceptions is significant. The overall perceptions that the OJCC Judges and Mediators well exceed "above average" are gratifying and demonstrate that overall these Judges and Mediators are perceived in a positive light. When combined with the objective data on timeliness and volume provided by the OJCC Annual Report, this survey provides a significant complimentary measure of whether this Office is effectively delivering timely and appropriate mediation and adjudication of disputes.

We appreciate your participation in the survey. We appreciate your comments and suggestions. We appreciate this opportunity to serve the State of Florida.

*See results of the survey on the following pages.*



	3) Judge's knowledge of rules of procedure and evidence.	4) Written decisions are clear, concise, complete.	5) Judge's courteousness to counsel, witnesses and parties.	6) Judge's patience and willingness to listen.	7) Judge's promptness in issuing orders.	8) Is prepared for hearing.	9) Judge's impartiality in regards to attorneys.	10) Judge's impartiality to either claimants or E/Cs in rulings.	11) Judge's punctuality for scheduled hearings.
Portuallo (65)	4.5	4.5	4.7	4.7	4.6	4.5	4.4	4.2	4.7
Lewis (83)	4.7	4.7	4.8	4.7	4.7	4.7	4.5	4.5	4.5
Pecko (77)	4.2	4.1	4.3	4.1	3.4	3.8	4.2	4.1	4
Hogan (74)	3.4	3.5	4	4	3.8	3.6	3.7	3.5	3.7
Spangler (44)	4.1	4.2	4.4	4.2	4.3	4.3	4.1	4	4.5
Sturgis (45)	3.9	3.9	3.9	4	4	4	3.8	3.7	4.3
R. Hill (50)	3.9	4.1	4.3	4.2	4.4	4.3	4	4	4.5
Pitts (48)	4.8	4.8	4.9	4.8	4.8	4.9	4.7	4.5	4.8
Rosen (64)	4.5	4.4	4.4	4.1	4.6	4.6	4.3	4.3	4.7
Hofstad (82)	4.1	4.1	4.6	4.5	4.1	4.3	4	4	4.3
Terlizze (64)	4.3	4.1	3.3	3.1	4.4	4.3	3.2	3.2	4.3
Castiello (69)	4.3	4.1	3.8	3.7	4	4.2	3.6	3.6	3.9
Harnage (76)	4.6	4.4	4.6	4.4	4.5	4.5	4.5	4.4	4.6
Hill (70)	4.3	4.4	4.7	4.7	4.4	4.4	4.5	4.4	4.4
Kuker (72)	4.6	4.5	4.6	4.4	4.6	4.6	4.4	4.3	4.5
Medina-Shore (66)	4.3	4.3	4.6	4.5	4.3	4.4	4.3	4.2	4.4
Condry (70)	4.6	4.5	4.7	4.6	4.4	4.5	4.4	4.3	4.4
Seulco (60)	4.8	4.7	4.8	4.6	4.6	4.6	4.4	4.3	4.7
Farrell (54)	4.5	4.4	4.6	4.5	4.3	4.3	4.3	4.2	4.2
Roesch (26)	4.6	4.3	4.6	4.3	4.5	4.5	4.2	4	4.5
Winn (31)	4.6	4.5	4.5	4.4	4.5	4.6	4.6	4.3	4.5
McAliley (41)	4.6	4.6	4.6	4.5	4.2	4.4	4.1	4.2	4.5
Beck (55)	4.6	4.5	4.6	4.5	4.5	4.5	4.1	4.2	4.5
Hafner (57)	4.4	4.4	4.4	4.3	4.4	4.4	4.2	4.2	4.5
Remsnyder (57)	4.5	4.4	3.8	3.8	4.3	4.3	4.1	4	4
Lazzara (37)	4.5	4.4	4.3	4.2	4.2	4.4	4	3.8	4.4
Jenkins (67)	3.4	3.2	2.8	2.6	3.2	3.3	3	3.3	3.1
Lorenzen (65)	4.6	4.6	4.6	4.5	4.6	4.6	4.4	4.3	4.6
Murphy (60)	4.7	4.7	4.2	4.1	4.5	4.6	4.2	4.3	4.5
Basquill (58)	4.3	4.2	4.2	4.1	4.3	4.3	4.1	3.9	4.4
D'Ambrosio (55)	4.3	4.3	4.3	4.2	4.3	4.4	4	3.8	4.4
Punancy (59)	3.6	3.8	4.1	4	3.7	3.8	3.8	3.7	4.1
Langham (27)	4.5	4.2	3.9	3.7	4.4	4.4	3.6	3.2	4.4



	1) Mediator's knowledge of the law.	2) Mediator's knowledge of workers' compensation procedure.	3) Mediator's ability and willingness to explain med. process to parties.	4) Mediator's courteousness to counsel and parties.	5) Mediator's patience and willingness to listen.	6) Mediator's effectiveness in communicating each side's point of view.	7) Mediator's impartiality in regards to attorneys.	8) Mediator's impartiality in regards to either claimant's or e/c.	9) Ability to prepare clear, concise agreements.	10) Mediator's adherence to the confidentiality requirements for mediation.
Bennett (60)	3.8	3.9	4.2	4.5	4.3	3.8	4.3	4.2	4.2	4.4
Smith (82)	3.7	3.8	3.9	3.9	3.8	3.5	3.8	3.9	3.8	4.2
Koepfel (85)	3.9	4	4.2	4.3	4.2	4	4.1	4.2	4	4.3
Brea (76)	3.4	3.5	3.9	4.1	3.9	3.5	3.9	3.9	3.6	4
Hart (43)	4.2	4.4	4.4	4.5	4.5	4.3	4.4	4.4	4.3	4.5
Bredemyer (42)	4	4	4.4	4.3	4.1	3.9	4.2	4.2	4	4.5
Suskin (68)	4.7	4.8	4.6	4.8	4.5	4.5	4.6	4.5	4.6	4.8
Day (52)	3.7	3.8	3.9	4.4	4	3.4	4.3	4.2	4	4.5
Gordon (57)	4.4	4.5	4.5	4.6	4.6	4.4	4.5	4.5	4.5	4.6
Williams (82)	4.4	4.4	4.2	4.2	3.8	3.8	4	3.9	4.1	4.4
Murphy, G (61)	3.8	3.8	3.6	4.2	3.6	3.5	4	3.9	3.8	4.2
Almeyda (79)	4.2	4.2	4	4	3.9	4	3.9	3.9	4	4.1
Witlim (71)	3.7	3.8	3.9	3.8	3.6	3.5	3.8	3.8	3.9	4.1
Hodges (75)	4.1	4.1	4	4.2	4	3.6	4.1	4.1	3.9	4.3
Johnson (69)	4.5	4.5	4.6	4.6	4.6	4.5	4.5	4.5	4.5	4.5
Lapin (66)	3.7	3.8	3.9	4.3	4.1	3.8	4.1	4.1	4.1	4.3
Hires (67)	4.2	4.2	4.4	4.6	4.4	4.1	4.4	4.4	4.3	4.5
Marshall (64)	4.3	4.3	4.2	4.3	4	4.1	4.3	4.2	4.3	4.3
Kim (61)	4	4.1	4.2	4.4	4.2	4	4.2	4.3	4.1	4.4
Oramas (29)	4.4	4.4	4.4	4.6	4.6	4.3	4.6	4.5	4.5	4.6
Hardy (35)	4.3	4.4	4.2	4.3	4.3	4.2	4.3	4.4	4.3	4.5
Harwood (41)	4.3	4.4	4.3	4.4	4.3	4	4.4	4.4	4.1	4.3
Clausen (52)	4	4.2	4.6	4.6	4.6	4.3	4.5	4.5	4.5	4.7
Arthur (54)	4.6	4.6	4.5	4.6	4.5	4.4	4.5	4.5	4.5	4.6
Young (57)	4.5	4.5	4.5	4.6	4.4	4.4	4.5	4.4	4.5	4.7
Bisbee (34)	3.9	3.9	3.9	4.3	4.1	3.9	4.1	4.2	3.9	4.3
Leon (59)	4.4	4.4	4.4	4.5	4.4	4.2	4.4	4.4	4.4	4.6
Murphy (66)	4.5	4.5	3.9	3.8	3.6	3.8	4	4.1	3.9	4.4
Ronnenberg (60)	4.3	4.3	4.5	4.5	4.4	4.3	4.5	4.5	4.4	4.5
Hill (55)	4	4	4	4.1	4.1	3.9	4.1	4	4	4.2
DiGennaro (54)	3.2	3.3	3.3	3.1	2.9	3.1	3.2	3.3	3.4	3.9
Langer (61)	4.4	4.4	4.3	4.2	4.1	4.2	4.3	4.3	4.3	4.5



# Governor Crist Appoints Margaret E. Sojourner to Serve as Judge of Compensation Claims for Lakeland District

Governor Charlie Crist announced the appointment of Margaret E. Sojourner of Orlando as Judge of Compensation Claims. "Margaret's extensive experience practicing law will help her serve with sound judgment," said Governor Crist. "I am confident she will serve fairly and with great integrity." Sojourner, 56, has been a partner at Langston, Hess, Augustine, Sojourner and Moyles since 1998. Previously, she practiced at the Law Offices of Jeffrey Slater, formerly known as Frank and Brightman, from 1987 to 1998. From 1984 to 1987, Sojourner was a partner at Daze and Sojourner. She practiced at Haas, Boehm, Brown, Rigdon and Seacrest between 1981 and 1983, and was a staff attorney for the State of Florida's Fifth District Court of Appeal from 1979 to 1981. Sojourner received her bachelor's degree from the University of Florida and her law degree from the Stetson University College of Law.

Sojourner will fill the vacancy created by the elevation of Judge Mark Hofstad to the 10<sup>th</sup> Judicial Circuit. She received education from University of Florida, B.A. 1976 (with Honors) and then Stetson University College of Law, J.D. 1979. She is an accredited lecturer throughout the State of Florida for insurance certification courses; author of "Those Pesky Rules of Evidence," *News & 440 Report*, Summer 2002; "Occupational Disease," *News & 440 Report*, Winter 2008. She has been a member of the Florida Bar since 1979; and also is a member of U.S. Court of Appeals, Eleventh Circuit; U.S. District Court, Middle District of Florida; Orange County Bar Association; Florida Bar Workers Compensation Section; Orange County Bar Association Appellate Section.

The *News & 440 Report* and Workers Compensation section of The Florida Bar extend a hearty welcome to Ms. Sojourner.

## Appellate District Results

### 1st Appellate District Results      2010 Elections - Term of Office Begins 7/1/2011

<b>Claimant</b>	<b>Defense</b>
Paul Anerson	Tara Sa'id

### 3rd Appellate District Results      2010 Elections - Term of Office Begins 7/1/2011

<b>Claimant</b>	<b>Defense</b>
Richard Chait	Robert J. Strunin

### At Large Results      2010 Elections - Term of Office Begins 7/1/2011

<b>Claimant</b>	<b>Defense</b>
Bill Berke	Timothy Dunbrack
Brian Carter	Leo Garcia
Paolo Longo	Allison Hauser
Ricardo Morales	Ray Hollwy
Michael D. Rudolph	Alan Kalinoski
Chris Smith	Christopher Petruccelli
Brian Sutter	Joanne Prescott
Mark Touby	William Rogner
Glen Wieland	Alison Schefer
	Dawn Traverso



## PROPOSED RULE CHANGES

# Notice of Proposed Rules Department of Management Services Division of Administrative Hearings

### RULE NOS: RULE TITLES:

60Q-6.102	Definitions
60Q-6.103	Pleadings and Proposed Orders
60Q-6.104	Representation and Appearance of Counsel
60Q-6.105	Commencing a Case; Subsequent Petitions
60Q-6.106	Consolidation and Venue
60Q-6.107	Amendment and Dismissal of Petition for Benefits
60Q-6.108	Filing and Service
60Q-6.110	Mediation, Generally
60Q-6.111	Authority and Duties of Mediator
60Q-6.113	Pretrial Procedure
60Q-6.114	Discovery
60Q-6.115	Motion Practice
60Q-6.116	Prosecution of Claims and Petitions for Benefits
60Q-6.117	Emergency Conferences
60Q-6.118	Expedited Hearings
60Q-6.120	Summary Final Order
60Q-6.122	Motion for Re-hearing and Amending or Vacating Order
60Q-6.123	Settlements under Section 440.20(11), Florida Statutes
60Q-6.124	Payment of Attorney's Fees and Costs Other Than Pursuant to Section 440.20(11), Florida Statutes
60Q-6.125	Sanctions
60Q-6.128	Destruction of Obsolete Records

**PURPOSE AND EFFECT:** Procedural rules for adjudication of workers' compensation claims were implemented on February 23, 2003, and amended in 2006, pursuant to the mandate in Section 440.45, Florida Statutes, that the Office of the Judges of Compensation Claims adopt procedural rules. Since Sections 440.015 and 440.44(2), Florida Statutes, require that the workers' compensation system be efficient and self-executing and that the Division of Administrative Hearings assume an active and forceful role in achieving that goal, it is necessary to amend the existing rules to conform with subsequent statutory changes and to incorporate changes that will improve the adjudicatory process based upon experience in utilizing the existing rules.

**SUMMARY:** The procedural rule revisions improve definitions, encourage electronic filing, streamline the consolidation of cases, promote the timely resolution of attorney's fees and costs, discourage duplicate and unnecessary filings, encourage timely orders, streamline mediation, require meaningful pretrial stipulations, promote timely discovery, provide for telephonic administration of oaths, streamline motion practice, and provide for appointment of expert medical advisors, with a resulting more efficient and self-executing adjudicatory process.

**SUMMARY OF STATEMENT OF ESTIMATED REGULATORY COSTS:** The agency has determined that these rules will not have an impact on small business. A SERC has not been prepared by the agency. Any person who wishes to provide information regarding the statement of estimated regulatory costs, or to provide a proposal for a lower cost regulatory alternative must do so in writing within 21 days of this notice.



**PROPOSED RULE CHANGES**

RULEMAKING AUTHORITY: 61.14(8)(a), 440.25(4)(g), (h), 440.44(7), 440.45(1), (4), FS. LAW IMPLEMENTED: Chapter 440, 61.14(8)(a), 440.015, 440.192, 440.20, 440.25, 440.29(2), 440.33, 440.34, 440.44, 440.45(1), FS.A HEARING WILL BE HELD AT THE DATE, TIME AND PLACE SHOWN BELOW:

DATE AND TIME: Wednesday, August 18, 2010, 8:00 a.m. until 9:30 a.m.  
PLACE: TAMPA Room, Marriott World Center, 8701 World Center Drive, Orlando, Florida 32821.

THE PERSON TO BE CONTACTED REGARDING THE PROPOSED RULES IS: Administrative Law Judge Linda M. Rigot, Division of Administrative Hearings, The DeSoto Building, 1230 Apalachee Parkway, Tallahassee, FL 32399-3060, (850)488-9675.

**THE FULL TEXT OF THE PROPOSED RULES IS:**

**60Q-6.102. DEFINITIONS**

- (1) through (3) No change.
- (4) "Office of the Judges of Compensation Claims" (OJCC) means is the office within the Department of Management Services, Division of Administrative Hearings, where the deputy chief judge and judges of compensation claims preside.
- (5) "Electronic transmission" or "electronic filing" means uploaded to the appropriate case docket using the electronic judges of compensation claims' e-filing system (e-JCC) accessed transmitted through a link on the OJCC website at [www.jcc.state.fl.us](http://www.jcc.state.fl.us) identified for that purpose.
- (6) "Electronic signature" means that a graphic version of the e-JCC user's signature or "s/" followed by the e-JCC user's typewritten name is deemed to be the legal equivalent of the e-JCC user's handwritten signature.
- (7)(6) "Filed" means received by the clerk of the OJCC Office of the Judges of Compensation Claims in Tallahassee or by the judge as provided in subsection 60Q-6.108(1), F.A.C . (7) through (10) renumbered (8) through (11) No change.

Rulemaking Specific Authority 440.45(1)(a), (4) FS. Law Implemented 440.192(1), 440.45(1)(a), (4) FS. History--New 2-23-03, Amended 11-1-06, \_\_\_\_\_.

**60Q-6.103. PLEADINGS AND PROPOSED ORDERS**

- (1) Pleadings. All documents filed with the OJCC or with the judge shall
  - (a) Be typewritten or printed on 8½" by 11" unfolded white paper, unless filed by electronic transmission;
  - (b) No change.
  - (c) Contain the signature, or the electronic equivalent of the signature if filed electronically, of the party in interest or, if represented, the party's attorney of record;
  - (d) Contain the style of the proceeding; the case number, if any; the date of accident; the name of the party on whose behalf the document is filed; the subject matter of the document; and the name, mailing address, e-mail address, and telephone number of the party or, if represented, the party's attorney of record (including the attorney's Florida Bar number) filing the document; and (e) Contain a certificate of service representing that copies have been served on all parties or, if represented, their attorneys of record. The certificate shall include a statement of the method of service used for each party or attorney; and
  - (f) Not be accompanied by separate correspondence.
- (2) Exempt information. Except for the employee's social security number or equivalent on petitions for benefits and responses thereto, no pleading shall contain information exempt from public records disclosure. Exempt information shall be supplied in connection with a pleading only to the extent it is necessary for to the judge's determination of disputed matters or required by Florida Statutes and shall be appended to a pleading in a separate document conspicuously marked "Exempt Information".
- (3) No change.
- (4) Proposed Orders. Except as provided in subsection 60Q-6.115(3), F.A.C., proposed orders shall not be submitted unless requested by the judge, and shall be accompanied by pre-addressed, postagepaid envelopes. They shall be clearly identified as proposed orders and shall be sent to all other parties or, if represented, their attorneys of record prior to being submitted to the judge. Proposed orders shall



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be a separate document and not be included as a part of a the motion.

Rulemaking Specific Authority 440.45(1)(a), (4) FS. Law Implemented 440.192(1), (2)(a), 440.45(1)(a), (4) FS. History--New 2-23-03, Amended 11-1-06, \_\_ .

### **60Q-6.104. REPRESENTATION AND APPEARANCE OF COUNSEL**

(1) Appearance of Counsel. An attorney who files a petition or claim on behalf of a party has entered an appearance and shall be deemed the party's attorney of record. All other attorneys appearing for a party in an existing case shall file promptly with the judge a notice of appearance and serve copies on all other parties or, if represented, the parties' their attorneys of record. The notice of appearance shall include the style of the proceeding; the case number; the name of the party on whose behalf the attorney is appearing; and the name, mailing address, e-mail address, telephone number, and Florida Bar number of the attorney. Attorneys shall keep their e-JCC profile current by logging into e-JCC and updating their mailing addresses, e-mail addresses, and telephone numbers when such information changes.

(2) No change.

Rulemaking Specific Authority 440.45(1)(a), (4) FS. Law Implemented 440.45(1)(a), (4) FS. History--New 2-23-03, Amended 11-1-06, \_\_ .

### **60Q-6.105. COMMENCING A CASE; SUBSEQUENT PETITIONS**

(1) through (2) No change.

(3) For any claim within the jurisdiction of the OJCC but not subject to a petition for benefits, the claimant shall file with the clerk of the OJCC the pleading setting forth the claim together with a request for assignment of case number.

(4) through (5) No change.

Rulemaking Specific Authority 440.45(1)(a), (4) FS. Law Implemented 440.192, 440.45(1)(a), (4) FS. History--New 2-23-03, Amended 11-1-06, \_\_\_\_\_.

### **60Q-6.106. CONSOLIDATION AND VENUE**

(1) No change.

(2) Any motion to consolidate cases shall be filed in only the lowest-numbered case sought to be consolidated and shall be resolved by the judge to whom that case is assigned. Any consolidation of two or more cases shall thereafter be designated as consolidated under the lowest case number of those consolidated, and shall be assigned to the judge then assigned to that lowest case number.

(3) A motion to change venue shall be filed with the judge and shall contain the signatures of the moving party all parties, or, if represented, the party's their attorneys of record.

(4) through (5) No change.

Rulemaking Specific Authority 440.45(1)(a), (4) FS. Law Implemented 440.25(4)(d), 440.45(1)(a), (4) FS. History--New 2-23-03, Amended 11-1-06, \_\_\_\_\_.

### **60Q-6.107. AMENDMENT AND DISMISSAL OF PETITION FOR BENEFITS**

(1) No change.

(2) A petition may only be amended by written stipulation of the parties or by order of the judge, except that changes of addresses, e-mail addresses, or phone numbers of parties or, if represented, their attorneys of record can be accomplished by filing a notice of change with the assigned judge.

(3) Prior to dismissing any petition for failure to prosecute, the judge shall issue an order to show cause and allow 10 days for a response to the order.

(4) Any party seeking an order determining the entitlement to or amount of attorney's fees or costs shall file the motion therefor within 365 days after the provision of benefits, dismissal of claim, judicial order, or appellate mandate from which the movant claims attorney's fees or costs are due. Untimely motions or petitions for attorney's fees or costs will be dismissed. Upon motion by the employer or carrier, the judge may require the claimant to file a verified motion for attorney's fees and costs and adjudicate the verified motion for attorney's fees and costs.

Rulemaking Specific Authority 440.45(1)(a), (4) FS. Law Implemented 440.192, 440.25(4)(d), (i),



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440.44(2), 440.45(1)(a), (4) FS. History--New 2-23-03, Amended 11-1-06, \_\_\_\_\_.

**60Q-6.108. FILING AND SERVICE**

(1) Filing.

(a) All documents petitions, amended petitions, responses to petitions, and requests for assignment of case number and initial pleadings relating thereto shall be filed with the OJCC, except documents filed by parties who are not represented by an attorney, shall be filed by electronic means through the OJCC website. Any document filed in paper form by U.S. mail, facsimile, or delivery shall be filed only with the OJCC clerk in Tallahassee. Except as otherwise provided in these rules, all motions, notices, pleadings, voluntary dismissals, any stipulations changing the issues pending in the case, or other documents shall be filed only with the judge. Documents shall be filed by only one method, e-filing, facsimile, or U.S. mail, and shall not be filed multiple times. Duplicate filings will not be docketed and will be destroyed. (b) Any pleading or other paper filed in a proceeding shall be served on all other parties or, if represented, their attorneys of record at the time the document is filed. Service shall be by electronic mail, facsimile, or U.S. mail.

(c) The following documents shall not be filed with the OJCC or with the judge unless relevant to an issue to be heard and not more than ten days but at least two days before the scheduled hearing: requests or notices to produce and objections or responses thereto, deposition transcripts, correspondence between counsel or parties, correspondence to the judge or the judge’s staff, subpoenas and returns of service.

(d) Except for filing using e-JCC, Facsimile or other electronic transmission of documents to the judge shall be used only when the judge authorizes such use for that document; otherwise, the document will not be considered.

(e) Any document, whether filed by electronic or other means, received by the OJCC or the judge after 5:00 p.m. shall be deemed filed as of 8:00 a.m. on the next regular business day.

(f) Any attorney, party, or other person who elects to files any document by electronic transmission shall be responsible for any delay, disruption, interruption of the electronic signals, and readability of the document, and accepts the full risk that the document may not be properly filed as a result.

(g) Any document filed electronically shall be uploaded individually, except that exhibits, supporting documents, and proposed orders for any motion may be filed along with the motion. In naming uploaded motions, counsel shall specifically identify the type of motion by naming the relief sought. In naming depositions filed electronically, counsel shall include the deponent’s name and the date of the deposition.

If an uploaded document is specifically intended as a hearing exhibit at the time of filing, the name shall also include “proposed hearing exhibit” and the date of the scheduled hearing. All uploaded documents shall include sufficient specificity in naming to allow identification of the document from the docket remark.

(h) If a document is filed in error using e-JCC, the filing party shall file the document in the correct case docket and separately file a notice of the error in the case that contains the erroneously-filed document.

(i) The clerk of the OJCC shall, upon order of the assigned judge, place a document under seal and render it thereby viewable only upon further order of the assigned judge.

(2) Service. Service is effectuated by

- (a) Handing the document it to the party or, if represented, the party’s attorney of record;
- (b) Leaving the document it at the attorney’s office with a clerk or other person in charge or leaving it in a conspicuous place in the office;
- (c) If the office is closed or the person to be served has no office, leaving the document it at the person’s residence with a member of the person’s family above 15 years of age and informing that person of the contents;
- (d) Placing the document it in the United States mail; or

(e) Transmitting the document it by facsimile or by electronic transmission, including electronic mail.

(3) through (6) No change.

(7) All orders shall be electronically filed with the OJCC in Tallahassee on the same day that the order is transmitted to the parties by electronic transmission or U.S. mail.



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Rulemaking Specific Authority 440.45(1)(a), (4) FS. Law Implemented 440.192, 440.45(1)(a), (4) FS. History--New 2-23-03, Amended 11-1-06, \_\_\_\_\_.

### **60Q-6.110. MEDIATION, GENERALLY**

- (1) No change.
- (2) Parties who have agreed to private mediation or to re-schedule private mediation shall file with the judge at least 30 days prior to any scheduled mediation a notice substituting private mediation for state mediation or re-scheduling private mediation. If such notice is filed less than 30 days prior, it shall be treated as a motion, and attendance and participation at the scheduled state mediation shall not be excused, absent an order finding good cause to excuse this time requirement. The notice shall include the name of the private mediator, along with the date and time of the private mediation and shall state that the private mediation meets the statutory deadline, unless the deadline is waived by all parties.
  - (a) The deputy chief judge shall assign a mediation date for each petition filed. Within 40 days after the filing of the earliest petition for benefits awaiting mediation, the parties may agree to coordinate with the assigned judge an alternate state mediation date which meets the 130-day statutory deadline. Any such change in date shall be considered a re-scheduling and not a continuance of the mediation.
  - (b) After the state mediation has been noticed on the 40th day following the filing of the earliest petition for benefits awaiting mediation, the state mediation shall not be continued unless first granted by the judge upon agreement of the parties or upon proper motion filed no later than 30 days before the date of the scheduled state mediation, unless the mediation notice is sent to the parties less than 30 days prior to the noticed mediation.
  - (c) The state mediation conference may not be re-scheduled or continued to occur after the 130-day statutory deadline unless first granted by the judge upon proper motion demonstrating that the basis for the continuance arises from circumstances beyond the movant's control or for other good cause shown.

The motion shall be filed no later than 30 days before the date of the scheduled state mediation absent an emergency.

- (3) No change.
- (4) If the parties settle all issues, or all issues except for attorney's fees, prior to the scheduled mediation conference, the attorney or unrepresented claimant who has filed a petition for benefits must file a pleading in order to cancel the corresponding mediation they shall immediately notify the mediator and the judge in writing. The pleading must be filed prior to the scheduled mediation and shall indicate the manner in which each issue was resolved.
- (5) The following persons shall attend the mediation conference: the claimant; the claims representative of the carrier/servicing agent, which representative must have full authority to settle the issues; the employer, if uninsured; the insured or self-insured employer, if the employer/servicing agent does not have full authority to settle the issues; and the attorneys for the parties. The appearance of an attorney for a party does not dispense with the required attendance of the party. No party shall one may appear at the mediation conference by telephone unless such appearance is approved in advance by the mediator. Any party appearing by telephone has stipulated to be bound by that party's attorney of record's signature on the mediation report.
  - (a) The mediator shall have discretion to allow any party and/or that party's attorney of record to appear at the mediation conference by telephone upon the party's written request furnished to the mediator and the opposing party or, if represented, the party's attorney of record no fewer than 5 days prior to the mediation conference. The expense of telephonic attendance shall be borne by the person or party attending by telephone.
  - (b) Any person attending mediation telephonically shall provide an e-mail address for use in exchanging documents during the mediation unless good cause is shown to the mediator at least five days prior to the mediation. Any mediation attended telephonically is not concluded until the signed report is returned to the mediator. The signed report shall be returned by the end of the business day unless excused by the mediator.
- (6) Failure to attend the mediation conference without having shown good cause or failure to appear at the mediation conference with full authority to resolve the issues shall may subject the party or the attorney to sanctions.
- (7) Immediately following the conclusion of a the mediation conference in an open OJCC case, the media-



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tor, whether state, adjunct, or private, shall prepare a report stating which issues or claims in dispute are resolved and which remain unresolved, and whether the parties completed a pretrial stipulation. The report shall identify by filing date each petition mediated. The claimant shall file with the judge within five business days of the mediation conference the mediator’s report and mediation settlement agreement, if any, together with any pretrial stipulation executed by the parties.

Rulemaking Specific Authority 440.45(1)(a), (4) FS. Law Implemented 440.25(1)-(4), 440.45(1)(a), (4) FS. History--New 2-23-03, Amended 11-1-06, \_\_\_\_\_.

**60Q-6.111. AUTHORITY AND DUTIES OF MEDIATOR**

(1)(a) through (b) No change.

(c) The mediator shall have discretion to allow any party to appear at the mediation conference by telephone upon the party’s written request furnished to the mediator and the opposing party or, if represented, the party’s attorney of record no fewer than 5 days prior to the mediation conference.

(2 through (4) No change.

Rulemaking Specific Authority 440.45(1)(a), (4) FS. Law Implemented 440.25(1)-(4), 440.45(1)(a), (4) FS. History--New 2-23-03, Amended 11-1-06, \_\_\_\_\_.

**60Q-6.113. PRETRIAL PROCEDURE**

(1) No change.

(2) The parties or, if represented, their attorneys of record shall confer and complete a written pretrial stipulation and file it no later than 2 business days before the pretrial hearing. The judge may cancel the pretrial hearing if the stipulation is timely filed. In pretrial stipulations and at any pretrial hearing, the parties shall:

(a) State the claims and defenses. Any claims that are ripe, due, and owing, and all available defenses not raised in the pretrial stipulation are waived unless thereafter amended by the judge for good cause shown. State and simplify the issues including bifurcation of compensability;

(b) State each party’s position on the date of accident; jurisdiction over the subject matter and over the parties; venue; and timely notice of the pretrial hearing and of the final hearing;

(c)(b) No change.

(d)(c) Identify Examine and mark all exhibits including (except for impeachment and rebuttal exhibits) for identification; (e)(d) Identify Furnish the opposing party with the names, and addresses, and telephone numbers of all witnesses, including (except for impeachment and rebuttal witnesses), and state whether the witnesses identifying those who will testify in person, by telephone, or by deposition;

(f)(e) No change.

(g)(f) No change.

(3) Unless good cause is shown, a party’s failure to cooperate in the preparation and filing of a joint pretrial stipulation shall result in the imposition of appropriate sanctions, including, but not limited to, the striking of claims and/or defenses.

(3) through (5) renumbered (4) through (6) No change.

(7) No discovery shall be permitted within 10 days of the final hearing absent prior approval by the judge for good cause shown or by agreement of the parties.

Rulemaking Specific Authority 440.45(1)(a), (4) FS. Law Implemented 440.25(2)-(4), 440.29(2), 440.33(1), 440.45(1)(a), (4) FS. History--New 2-23-03, Amended 11-1-06, \_\_\_\_\_.

**60Q-6.114. DISCOVERY**

(1) Any party may commence with discovery methods specifically authorized by statute, including depositions, issuance of subpoenas and requests for production prior to or after invoking the jurisdiction of the judge.

(2) No change.

(a) No change.

(b) Approval of the judge is not necessary to take a deposition by telephone. If a deposition is taken by telephone, the oath shall be administered in the physical presence of the witness by a notary public or other person authorized by law to administer oaths, unless the parties stipulate to administration of



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the oath telephonically.

(3) through (5) No change.

Rulemaking Specific Authority 440.45(1)(a), (4) FS. Law Implemented 440.30, 440.33(1), 440.45(1)(a), (4) FS. History--New 2-23-03, Amended 11-1-06, \_\_\_\_\_.

### 60Q-6.115. MOTION PRACTICE

- (1) Any request for an order or for other relief shall be by motion and shall have a title describing the relief requested. The judge may treat a non-standard request for relief from an unrepresented party as a motion. All motions shall be in writing unless made on the record during a hearing and shall fully state the relief requested and the grounds relied upon. Any document referenced in any motion shall either have been filed prior to the motion or be attached to the motion.
- (2) Except for motions to dismiss for lack of prosecution, prior to filing any motion, the movant shall personally confer with the opposing party or parties or, if represented, their attorneys of record to attempt to amicably resolve the subject matter of the motion. All motions shall include a statement that the movant has personally conferred or has used good-faith efforts to confer with all other parties or, if represented, their attorneys of record and shall state whether any party has an objection to the motion. Any motion filed without this certification shall be summarily denied.
- (3) A motion which is unopposed shall state why an order is necessary to execute the parties' agreement and, unless filed electronically, shall be accompanied by a proposed order which has a title describing the action to be being taken. The motion and proposed order shall specify the relief being requested or ordered in reasonable detail and not merely by reference to any other document.
- (4) If the motion has not been amicably resolved, the movant shall file the motion, which shall include a statement as to whether a hearing on the motion is necessary and, if so, the basis for requesting a hearing. When time allows, the other parties may, within fifteen ten days of service of the written motion, file a response in opposition, which shall include a statement as to whether a hearing on the motion is necessary and, if so, the basis for requesting a hearing. The judge may dispose of written motions without a hearing within ten days following the expiration of the time for service of a response by the other party or parties. If no order is entered within that ten-day period, the movant shall schedule a hearing time with the opposing party or parties or, if represented, their attorneys of record. If no hearing is scheduled within fourteen days following that ten-day period, the request for a hearing is deemed withdrawn. Motion hearings may be conducted either in person or telephonically as the judge deems necessary. Written motions will normally be disposed of after the response is filed or after the response period has expired, based on the motion, together with any supporting or opposing memoranda. The judge shall not hold hearings on motions except in exceptional circumstances and for good cause shown in the motion or response.
- (5) Motions for extension of time shall be filed prior to the expiration of the deadline sought to be extended and shall specifically describe the state good cause for the request.
- (6) Motions to expedite discovery or the final hearing shall set forth good cause and shall be served by electronic or facsimile transmission, hand delivery, or overnight delivery. Any opposition to the motion must be filed within four days from the date of the motion is served.

Rulemaking Specific Authority 440.25(4)(h), 440.45(1)(a), (4) FS. Law Implemented 440.25(4)(h), 440.45(1)(a), (4) FS. History--New 2-23-03, Amended 11-1-06, \_\_\_\_\_.

### 60Q-6.116. PROSECUTION OF CLAIMS AND PETITIONS FOR BENEFITS

- (1) A request for a continuance shall be made by motion, and shall specify the reason that the continuance is necessary, and shall demonstrate due diligence by describing the specific actions the moving party has taken to correct the circumstances alleged to be beyond the party's control.
- (2) No change.
- (3) The judge may conduct any proceedings by telephone conference. Testimony may be taken by telephone with the written agreement of all parties or approval by the judge.
- (4) In such the event that testimony is taken by telephone, the oath shall be administered in the physical presence of the witness by a notary public or officer authorized to administer oaths, unless the parties stipulate to administration of the oath telephonically by the judge.
- (4) The judge may conduct any proceedings using video teleconference equipment approved by the OJCC. In the event that testimony is taken by video teleconference, administration of the oath by the judge



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is as binding as if the judge and witness were physically present in the same room.

- (5) through (6) No change.
- (7) No more than 10 days but aAt least two full business days prior to the final hearing, each party is required to file a brief memorandum consisting of a statement of relevant facts and written argument. All depositions and documentary evidence including known impeachment and rebuttal evidence a party intends to offer into evidence shall be filed with the memorandum. In the event of a re-scheduling or continuance, documents timely filed pursuant to this Rule need not be re-filed prior to the re-scheduled or continued hearing. Documentary evidence not timely filed may be excluded from evidence, absent a written stipulation of the parties or an order extending the deadline for filing for good cause shown.
- (8) Any party calling a witness in need of translation services shall be responsible to provide therefor. The OJCC will not provide translation services except in exceptional circumstances and upon written request filed with the deputy chief judge at least ten days prior to the mediation or hearing for which such services are sought and for good cause shown.
- (9) Appointment of an expert medical advisor, except during the final hearing, shall be sought by written motion. The motion shall specifically state the conflict in medical opinions, identify the providers who rendered those opinions, and state the documentation that memorializes those opinions.
- (10) The order appointing an expert medical advisor shall identify the appointed advisor and the conflict to be resolved.
- (11) Within ten days of the order appointing an expert medical advisor, the parties shall jointly submit to the appointed advisor a composite of all documents and records which the parties agree the advisor will review. Any party may move for an order to permit submission of additional or non-stipulated records.
- (12) The report of an expert medical advisor is admissible in evidence at the final hearing unless excluded by the judge for good cause shown.

Rulemaking Specific Authority 440.45(1)(a), (4) FS. Law Implemented 440.25(4), 440.29(2), 440.33(1), 440.45(1)(a), (4) FS. History--New 2-23-03, Amended 11-1-06,\_\_\_\_\_.

**60Q-6.117. EMERGENCY CONFERENCES**

- (1) A written request for an emergency conference shall be filed with the judge and served by electronic transmission or facsimile on all other parties or, if represented, their attorneys of record. It shall set forth in detail the facts giving rise to the request, its legal basis, the factual or medical basis for the claim that there is a bona fide emergency involving the health, safety, or welfare of an employee, and the specific relief sought. Any documents relied upon should be specifically referenced or and attached.
- (2) After reviewing the merits of the request, the judge may summarily enter an order denying the request for an emergency conference or, after proper notice, conduct an evidentiary hearing to consider the emergency request.

Rulemaking Specific Authority 440.45(1)(a), (4) FS. Law Implemented 440.25(4)(g), 440.45(1)(a), (4) FS. History--New 2-23-03, Amended 11-1-06, \_\_\_\_\_.

**60Q-6.118. EXPEDITED HEARINGS**

- (1) through (3) No change.
- (4) Stipulated Pretrial Outline. At least 15 days before the final hearing, a joint stipulated pretrial outline shall be filed and shall include the following:
  - (a) through (b) No change.
  - (c) A list of all exhibits including (except for impeachment and rebuttal exhibits) to be offered at the hearing, noting any objections thereto, and the grounds for each objection. (Nno additional documentary evidence will be admitted at the hearing);
  - (d) A list of the names and addresses of all witnesses, including (except for impeachment and rebuttal witnesses), to be called at the hearing by each party, with expert witnesses being so designated, together with a summary of the expected testimony;
  - (e) through (f) No change.
  - (g) A composite of all documentary evidence relied upon.

Rulemaking Specific Authority 440.25(4)(i), 440.45(1)(a), (4) FS. Law Implemented 440.25(4)(i),



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440.45(1)(a), (4) FS. History--New 2-23-03, Amended 11-1-06, \_\_\_\_\_.

### **60Q-6.120. SUMMARY FINAL ORDER**

(1) through (2) No change.

(3) The opposing party shall file a response to a motion for summary final order together with supporting depositions, affidavits, and/or other documents within 30 days after of service of the motion for summary final order. The judge shall grant an extension for good cause shown.

(4) through (5) No change.

Rulemaking Specific Authority 440.45(1)(a), (4) FS. Law Implemented 440.25(4)(h), 440.45(1)(a), (4) FS. History--New 2-23-03, Amended 11-1-06, \_\_\_\_\_.

### **60Q-6.122. MOTION FOR RE-HEARING AND AMENDING OR VACATING ORDER**

(1) through (5) No change.

(6) Notwithstanding subsection 60Q-6.115(4), F.A.C., if the motion for re-hearing is directed to an appealable order, the moving party may schedule a hearing on the motion.

Rulemaking Specific Authority 440.45(1)(a), (4) FS. Law Implemented 440.45(1)(a), (4) FS. History--New 2-23-03, Amended 11-1-06, \_\_\_\_\_.

### **60Q-6.123. SETTLEMENTS UNDER SECTION 440.20(11), FLORIDA STATUTES**

(1) Settlements under Section 440.20(11)(a) or (b), Florida Statutes F.S., involving unrepresented claimants. (a) When a joint petition signed by the parties is filed pursuant to Section 440.20(11)(a) or (b), Florida Statutes F.S., it shall be accompanied by:

1. The settlement stipulation executed by any the attorneys of record and the employee or claimant;
2. through 4. No change.

5. A status statement from the Department of Revenue and a status statement from the Clerk of the Circuit and County Courts, Central Depository, from the county in which the claimant resides at the time the settlement documents are filed and the county in which the claimant resided on the date of accident as to whether the claimant has or owes any child support arrearage and, if so, the amount thereof;

6. through 8. No change.

9. For settlements under Section 440.20(11)(a), Florida Statutes F.S., the notice(s) of denial; and 10. For settlements under Section 440.20(11)(b), Florida Statutes F.S., the required notice to the employer, a maximum medical improvement report establishing overall physical maximum medical improvement and psychiatric maximum medical improvement if the latter applies, available information concerning the need for future medical care or an explanation as to why the information cannot be reasonably obtained, and other essential medical information.

(b) through (c) No change.

(d) For settlements under Section 440.20(11)(a), Florida Statutes F.S., and when a hearing is deemed necessary by the judge for settlements under Section 440.20(11)(b), Florida Statutes F.S., the attorney for the employer/carrier shall contact the judge to schedule a hearing date and shall promptly notify the claimant of the hearing date, time, and location.

(2) Settlements under Section 440.20(11)(c), (d), and (e), Florida Statutes F.S.

(a) When a motion for approval of attorney's fees and child support allocation is filed pursuant to Section 440.20(11)(c), (d), or (e), Florida Statutes F.S., it shall be signed by the claimant and the claimant's attorney, furnished to all other parties, and contain:

1. through 5. No change.

6. A status statement from the Department of Revenue and a status statement from the Clerk of the Circuit and County Courts, Central Depository, from the county in which the claimant resides at the time the settlement documents are filed and the county in which the claimant resided on the date of accident as to whether the claimant has an arrearage or owes past due child support and, if so, the amount thereof; a sworn statement by the employee that all existing child support obligations have been disclosed in the joint petition; and a letter from counsel stating that the carrier will issue a check in the amount of the arrearage and/or past due child support or such other amount to be approved by the judge or that claimant's counsel will deposit the settlement proceeds in a trust account and will



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issue a check in the amount of the arrearage and/or past due child support or such other amount to be approved by the judge and that the check will be sent to the Department of Revenue or the Clerk of the Circuit and County Courts, Central Depository.

- (b) No change.
- (3) No change.
- (4) The judge shall consider the disclosed costs to the extent necessary to conclude that they do not include the attorney’s overhead or other fees.

Rulemaking Specific Authority 61.14(8)(a), 440.45(1)(a), (4) FS. Law Implemented 61.14(8)(a), 440.105(3)(c), 440.20(11), 440.34, 440.345, 440.45(1)(a), (4), (5) FS. History--New 2-23-03, Amended 11-1-06, \_\_\_\_\_

**60Q-6.124. PAYMENT OF ATTORNEY’S FEES AND COSTS OTHER THAN PURSUANT TO SECTION 440.20(11), FLORIDA STATUTES**

- (1) through (3) No change.
  - (a) No change.
  - (b) Within 30 days after the motion is served, the opposing party or parties shall file a response to the motion, which includes a detailed recitation of all matters which are disputed in the form outlined in subsection 3(a)1-6. Failure to file a timely and specific response to a motion for attorney’s fees and costs detailing matters that are disputed shall, absent good cause, result in acceptance of the allegations in the motion as true.
  - (c) No change.
  - (d) Unless the judge orders otherwise, the parties shall exchange exhibits and written witness lists no later than 10 days before the date of the attorney’s fee hearing.
  - (e) No change.
- (4) No later than September October 1 of each year, all self-insurers, third-party administrators, and carriers shall report by e-JCC electronic transmission to the OJCC the amount of all attorney’s fees paid to their defense attorneys in connection with workers’ compensation claims during the prior July 1 through June 30 fiscal year.

Rulemaking Specific Authority 440.45(1)(a), (4) FS. Law Implemented 440.32, 440.34, 440.345, 440.45(1)(a), (4), (5) FS. History--New 2-23-03, Amended 11-1-06, \_\_\_\_\_.

**60Q-6.125. SANCTIONS**

- (1) through (3) No change.
- (4) How Initiated.
  - (a) A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subsection (2). It shall be served but shall not be filed with or presented to the judge unless the challenged paper, claim, defense, allegation, or denial is not withdrawn or appropriately corrected within 21 days after service of the motion. If warranted, the judge may award to the party prevailing on the motion the cost of the proceeding and attorney’s fees incurred in presenting or opposing the motion.
  - (b) No change.
- (5) No change.
  - (a) A sanction imposed for violation of these this rules shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Penalties, fees, and costs awarded under this provision may not be recouped from the party unless the party has committed the violation.
  - (b) No change.
- (6) No change.

Rulemaking Specific Authority 440.45(1)(a), (4) FS. Law Implemented 440.32, 440.33(1), (2), 440.45(1)(a), (4) FS. History--New 2-23-03, Amended 11-1-06, \_\_\_\_\_.

**60Q-6.128. DESTRUCTION OF OBSOLETE RECORDS**

- (1) No change.



**PROPOSED RULE CHANGES**

- (2) Recordings of hearings held before a judge shall be destroyed become obsolete two years subsequent to the date of the close of the hearing.
- (3) Any forms, documents, reports, duplicate-filed pleadings, or other records filed where this rule chapter specifically provides that filing is not required or requested shall be destroyed by the judge’s office upon filing.

Rulemaking Specific Authority 440.44(7), 440.45(1)(a), (4) FS. Law Implemented 440.44(7) FS.  
History--New 11-1-06, Amended\_\_\_\_\_.

NAME OF PERSON ORIGINATING PROPOSED RULES: Judge Linda M. Rigot

NAME OF AGENCY HEAD WHO APPROVED THE PROPOSED RULES: Director and Chief Judge Robert S. Cohen and Deputy Chief Judge of Compensation Claims David W. Langham

DATE PROPOSED RULES APPROVED BY AGENCY HEAD: July 8, 2010

DATE NOTICE OF PROPOSED RULE DEVELOPMENT PUBLISHED IN FAW: May 28, 2010



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# Case Law Update

by Rogers Turner, Esq., Winter Park, FL



## Compensability/Ongoing MCC

### Compensability/Subsequent Conditions/Stipulations of Parties

*Jackson v. Merit Electric/ACE/ESIS*, \_\_\_ So.3d \_\_\_ (Fla.1<sup>st</sup> DCA 6/9/2010)

The 1<sup>st</sup> DCA reversed the JCC's determination that a subsequent back condition was not related. The claimant had a compensable knee injury in 1984. In 2003, the claimant alleged that when rising up after making a pool/billiard shot, he experienced back pain that he related to his original knee injury. In 2007, he filed a PFB alleging that the back injury was compensable. The JCC then signed an order following a stipulation of the parties that the "back condition was compensable" and that a specific doctor was authorized to provide treatment. Subsequently, that doctor opined that the back condition had no work connection whatsoever. The E/C then denied further treatment. The DCA noted that while the carrier was not bound to treat the back forever by its stipulation, they sustained the burden to show the causal connection was thereafter broken. The DCA discussed at length the inexact nature of the stipulation, the need for specifics regarding exactly what "compensable" meant, and the fact that there was insufficient basis for the doctor to opine that the intervening pool incident was the cause of the claimant's back problems.

### SDTF/Assessments

*Fl. Sheriff's WC Self Ins. Fund v. Dept. of Financial Services*, \_\_\_ So.3d \_\_\_ (Fla.1<sup>st</sup> DCA 7/7/2010)

The First DCA affirmed the finding of the Fl. Dept. of Financial Services that the Fl. Sheriff's WC Fund was not entitled to reimbursement of assessments between 2002 and 2008 of over 6.6 million dollars. The Court rejected the argument that the Fund should receive a refund because the SDTF applies only to dates of accident after July

1, 1998, and their coverage of claims did not begin until 2002. The Court found the language of s.440.49 applies to all insurers, regardless of their coverage dates or founding. The court also rejected the Fund's constitutional arguments.

### Apportionment/Burden of Proof

*Staffmark/Avizent v. Merrell*, \_\_\_ So. 3d \_\_\_ (Fla. 1<sup>st</sup> DCA 8/12/2010)

The DCA affirmed the denial of apportionment in this post 2003 date of accident case for reasons other than those cited by the JCC. The E/C sought to apportion temporary indemnity and medical benefits. The DCA held that the post 2003 apportionment statute permits the apportionment of both temporary indemnity and medical benefits, but found the E/C did not properly present evidence apportioning industrial and non industrial pre existing conditions. The claimant had sustained multiple low back injuries (both industrial ('94, '96 and '06) and non-industrial ('95 and '03)) before suffering the instant 2008 back injury. The opinion notes the claimant had been able to work for "several months" for the new employer after recovering from the '06 injury. The opinion is silent as to whether that recovery shortly followed a settlement of that case. An EMA had apportioned 40% of the current disability and need for treatment and 25% of the need for the current surgery to pre-existing conditions. The DCA held that that EMA's opinion did not apportion the pre-existing conditions between industrial and non-industrial conditions. The DCA accepted the term pre-existing condition as it has been interpreted in MCC opinions (*Pearson v. Paradise Ford* and *Pizza Hut v. Proctor*), referring to non-industrial injuries.

A concurring opinion predicted that apportionment (and the prospect of injured workers being asked to pay the apportioned percentage of care from their own pockets) will eventually decrease

*continued, next page*



## Case Law Update, from preceding page

the benefits available to claimants to such an extent as to deprive them of access to courts. The analysis indicates that it is reasonable to exclude prior W/C conditions from apportionment, as carriers can (theoretically) seek allocation from prior carriers. The analysis does not discuss the most common situation though, where a prior carrier and claimant have settled the case, and the claimant has presumably been compensated for future medical and indemnity benefits.

### Statute of Limitations/Prosthetic Devices

*Gore v. Lee County School Board / Johns Eastern*, \_\_\_ So.3d \_\_\_ (Fla. 1<sup>st</sup> DCA August 31, 2010)

The claimant had a compensable partial knee replacement but did not seek follow up care for almost 6 years. The JCC determined the Statute of Limitations had run and denied further benefits. The DCA reversed, finding that the use of a medical device with the E/C's knowledge tolls the statute of limitations. The DCA held that the knee replacement (prosthetic) was a medical device, and held that the 1994 change removing a lifetime exemption for prosthetic devices did not change the case law regarding the continued use of medical devices. Previously the court had held that the continued use of medical devices, such as a back brace or TENS unit tolls the Statute so long as the E/C knew of the use of the medical device. The reasoning was that a claimant's use of a prescribed medical device or apparatus, with the E/C's knowledge, constitutes remedial treatment furnished by an E/C that tolls the statute of limitations pursuant to section 440.19(2). The court found no reason to treat prostheses differently from other medically necessary apparatus used to mitigate the effects of a compensable injury. In effect the court held that while prosthetic devices are no longer exempt from the Statute, the Statute is tolled for so long as the claimant has the device and the E/C knows about it. It is difficult to conceive of a situation where the claimant has an authorized prosthesis, but the E/C is not aware of it. The court suggests that the E/C should be responsible for all follow up care to prosthetics and implantable medical devices. For the second time in as many weeks, the DCA inserts the phrase "place the (economic) burden on industry".

### Indemnity Benefits

#### Employee Misconduct

*Jones v. Fla. Unemployment Appeals Comm. / Carnival Cruise Lines*, \_\_\_ So.3d \_\_\_ (Fla. 1<sup>st</sup> DCA 5/26/2010)

The DCA affirmed the FUAC determination that the claimant was not entitled to UC benefits. On December 2, the claimant requested to be out of

work on unpaid leave beginning December 14. On December 10, the claimant received an email denying her request. Despite this, the claimant failed to appear for work Dec. 14-17<sup>th</sup>. When contacted on the 17<sup>th</sup>, she indicated she would not return until December 31<sup>st</sup>. At that time, and even at hearing, the claimant would not give any reason for her absence other than "personal reasons". The DCA analyzed the definitions of "misconduct" found in F.S. 443.036(29)(2008) (found also in 440.02(18)(2009) and considered whether there was (a) *Conduct demonstrating willful or wanton disregard of an employer's interests and found to be a deliberate violation or disregard of the standards of behavior which the employer has a right to expect of his or her employee; or (b) Carelessness or negligence to a degree or recurrence that manifests culpability, wrongful intent, or evil design or shows an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his or her employer.* The DCA found her failure in the Record to offer any valid explanation for her absence removed any opportunity for the hearing officer to determine whether her absence was justified.

### Temporary Indemnity/Competent Substantial Evidence

*Frank Winston Crum Ins. Inc. V. De Oca*, \_\_\_ So.3d \_\_\_ (Fla. 1<sup>st</sup> DCA 6/22/2010)

The 1<sup>st</sup> DCA reversed the JCC's award of TTD from 2/5/09 to 10/7/09, as it was not supported by competent substantial evidence. The only evidence was that the claimant's authorized surgeon discussed the fact on 2/5/09 that the claimant should return to work.

### TPD Benefits/Causal Relationship/Burden of Proof/Affirmative Defense

*Wyeth / Gallagher Bassett v. Toscano*, \_\_\_ So.3d \_\_\_ (Fla.1<sup>st</sup> DCA 7/7/2010)

The claimant was injured in a slip and fall resulting in multiple injuries. She received medical restrictions which prevented her from doing her pre-injury job, although she was released to sedentary and eventually light duty work. The employer did not offer any light or transitional duty programs and the claimant's wages were \$0 during her recovery. The employer laid off approximately 1,200 employees, including the claimant, during the time the claimant was on restrictions. She was denied TPD benefits, on the grounds that the loss of earnings was unrelated to the accident.

At trial, the employer stipulated that the claimant was not at MMI (Maximum Medical Improvement) and did not offer any evidence that the claimant had refused suitable employment or had been terminated for misconduct. The employer argued (per prior case law) that the claimant was required to look for work to show that the accident was causing the wage loss. The Judge of Compensation Claims rejected this argument and the DCA agreed,



going into a lengthy discussion of the appropriate standard for awarding TPD. The opinion appears to be a shift in the DCA's opinion on the relevance and necessity of a job search.

The DCA stated that to establish entitlement to TPD a claimant must show only that (1) they have been assigned restrictions which prevent the pre-injury employment, (2) that they are not at MMI, and (3) that they are earning less than 80% of their pre-injury wages. Once the claimant has established the above, the burden shifts to the Employer/Carrier. The defense can argue that (1) the claimant refused suitable employment, (2) was terminated for 'misconduct', (3) left the employment without cause, or (4) limited her income. In cases where the claimant limited her income the JCC must now consider if the claimant was told to look for work, whether the employer offered any assistance in finding employment, and possibly the existence of actual jobs thru expert vocational testimony. Finally the DCA stated that job searches are only relevant when the claimant has returned to work at her pre-injury wages and then loses the job for un-related reasons, such as a mass layoff.

Overall, this case is a significant shift in the defense of TPD claims. Carriers will have to account for the court's decision in determining whether to pay TPD, and defending these claims will require affirmative proof from the employer/carrier that the workplace injury is not the cause of lost wages.

**PTD/Evidence/Vocational Testimony**

*Hernandez v. Paris Ind. Mfg. / Bridgefield / Summit*, \_\_\_So.3d\_\_\_ (Fla.1<sup>st</sup> DCA 7/7/2010)

The 1<sup>st</sup> DCA reversed and remanded a denial of PTD benefits, finding the JCC improperly refused to consider testimony of a vocational expert. After the claimant filed for PTD, the E/C conducted a vocation evaluation/reemployment assessment pursuant to s.440.491(1)(e). That expert's report contained findings which were detrimental to the E/C's defense of the PTD claim. That report was provided to the claimant, and the E/C and claimant listed the expert on the Pre Trial. Less than 30 days before trial, the E/C sought to "delete" their expert and replace him with an additional expert, which the JCC allowed over the claimant's objection. At trial, the JCC based his denial on the second expert's more favorable report, and denied the admission of the first report and its findings, holding that each side gets only one vocational expert. The First DCA specifically held there is no limit on the number of vocational experts either side may have, and summarily rejected the E/C's objections as to work product privilege. The DCA noted that due process requires the JCC to admit relevant evidence, unless a specific exclusion or privilege applies.

**TPD**

*Williams v. Archer Western Con. / Gallagher Bassett*, \_\_\_ So.3d \_\_\_ (Fla. 1<sup>st</sup> DCA 7/30/2010)

Reversed the JCC's denial of TPD based upon the recent *Toscano* decision. The DCA noted "no refusal by Claimant of modified work, nor was Claimant offered modified work; Claimant was not terminated for misconduct; and Claimant did not commence employment elsewhere, followed by termination for misconduct or economic reasons."

**PTD/Burden of Proof**

*Blake v. Merck and Co. / Specialty Risk Services*, \_\_\_So.3d\_\_\_ (Fla.1<sup>st</sup> DCA 9/7/2010)

The DCA reversed and remanded the JCC's Order denying PTD benefits. The JCC's denial was based on the following language: "*I interpret this (the "50 mile radius PTD standard" to mean that, regardless of all vocational expert opinions, the burden rests on the shoulders of the injured employee to at least make a reasonable effort to secure employment if the evidence does not show her to be totally medically disabled. That the claimant here failed / refused to do a job search or to check any jobs made available to her negates an award of permanent total disability.*" The DCA held this was error, citing to post 2003 case law holding a claimant not having a listed injury may prove entitlement to PTD by (1) permanent medical incapacity to engage in at least sedentary employment, within a 50-mile radius of the employee's residence, due to physical limitation; (2) permanent work-related physical restrictions coupled with an exhaustive but unsuccessful job search; or (3) permanent work-related physical restrictions that, while not alone totally disabling, preclude Claimant from engaging in at least sedentary employment when combined with vocational factors. The DCA noted the JCC appeared to apply the incorrect legal standard in denying benefits based on a failure to look for work. In a footnote, they indicated the record showed that although the E/C vocational expert identified open jobs at trial, no offers of employment had been made to the claimant, nor had she refused any employment. The case was remanded for the JCC to determine whether the claimant is entitled to PTD benefits based on evidence of permanent work-related physical restrictions that, while not alone totally disabling, preclude Claimant from engaging in at least sedentary employment when combined with vocational factors.

**Medical Benefits**

**Medical Evidence/Household Duties**

*ABC Home Health / AIG Claims v. Lawson*, \_\_\_ So.3d\_\_\_ (Fla. 1<sup>st</sup> DCA 5/26/2010)

The E/C appealed the JCC's award of a hot tub, dental evaluation and lawn maintenance. The DCA affirmed as to the first two benefits, but reversed the award of lawn care, finding no requisite medical evidence to establish that there was a medical need for such an award, or that there would be adverse

*continued, next page*



## Case Law Update, from preceding page

medical consequences if the yard were not maintained.

*McKenzie v. Mental Health Care, Inc. / Summit Claims Center*, 1 D09-3922

The Court reversed the JCC's denial of psychiatric benefits, which found that the psychiatric injury was not a manifestation of her physical injuries (specifically bruising and temporary loss of voice) that occurred when the Claimant was assaulted while working at a mental health facility. In reversing the JCC's Order, which was based on s. 440.093(2), the Court clarified that s. 440.093(1) provides three scenarios where mental or nervous injuries may be claimed, and s. 440.093(2) presents a fourth. The first scenario in s. 440.093(1) is a mental or nervous injury due to stress, fright, or excitement alone. The Court uses an example of a robbery at gunpoint, without any physical injury. While a psychiatric condition might result, this is not a compensable injury.

The second scenario is based on the second section of s. 440.093(1), which provides that no benefits may be awarded under this chapter for mental or nervous injuries without an accompanying physical injury requiring medical treatment." The Court held this is a second scenario where an individual may have a physical injury and simultaneous mental or nervous injury. The court's example was a sexual assault where the Claimant sustains a physical injury, and a mental injury, separate and apart from the physical injury. The Court noted this would result in two separate compensable injuries, and seems to indicate the major contributing cause standards of s. 440.09 alone would apply.

The third scenario is based on the third sentence of s. 440.093(1), which provides "A physical injury resulting from mental or nervous injuries unaccompanied by physical trauma requiring medical treatment shall not be compensable under this chapter." In such cases, where stress or fright occur, and this causes a physical injury (The court uses a heart attack or internal failure as an example), the injuries would not be compensable.

The final scenario is spelled out in s. 440.093(2), where mental or nervous injuries occur as a manifestation of a compensable injury. This is the traditional scenario of chronic pain or loss of limb causes depression. This is compensable, again if the injury is the major contributing cause of the mental or nervous condition. The Court did not apply the major contributing cause standard for this element in any detail.

In this case, both parties focused their trial argument on s. 440.093(2), which was the focus on appeal. However, in reviewing the case *de novo*, the First District Court of Appeal indicated this more likely fell under the second sentence of s. 440.093(1), and reversed the case for further proceedings and the taking of evidence.

## Medical Benefits

*Charlotte County Public Schools / Employers Mutual v. Gary*, \_\_\_ So.3d \_\_\_ (Fla. 1<sup>st</sup> DCA 7/30/2010)

The authorized doctor initially recommended hearing aids due to the industrial accident. The doctor later reversed her opinion based upon an incorrect pre-existing history. The DCA noted that although the JCC was free to reject the opinion of the doctor, even when uncontroverted, that rejecting the opinion did not ipso facto establish a causal connection. The DCA noted that despite appropriate questions to the doctor, the doctor was unwilling to make a causal connection.

## Medical Benefits, Diagnostic Testing

*Laxner v. Target Corp. / Sedgwick*, \_\_\_ So.3d \_\_\_ (Fla. 1<sup>st</sup> DCA 7/30/2010)

The DCA affirmed a denial of diagnostic testing and treatment recommended by an authorized doctor. The DCA noted that the JCC rejected the opinions of the authorized doctor and accepted the E/C's IME opinion that the extent of the injury was known and ascertainable and the testing was not needed.

## Independent Medical Examinations/Multiple Examinations

*Gomar v. Riddenhour Concrete / AmComp*, \_\_\_ So.3d \_\_\_ (Fla. 1<sup>st</sup> DCA 8/10/10)

The 1<sup>st</sup> DCA reversed the JCC's exclusion at trial of evidence regarding a second examination provided by the claimant's IME. The E/C had argued that the 2003 version of the statute limited the claimant to one independent medical examination per date of accident. The DCA reasoned that the statute provides for additional examinations per dispute, and that limiting a party to an exam in, for example 2006, when a new and distinct dispute arises in 2010, produces an absurd result and unjustly limits the party's ability to present evidence as to the new dispute. The court did not address the language of section 440.13(5)(b)(2005) which discusses "alternate" IMEs. The DCA held that parties may obtain multiple examinations for multiple disputes, as long as the examination is by the same initial IME physician.

## E/C IMEs

*Lehoullier v. Gevity / Fire Equipment Services / AIG*, \_\_\_ So.3d \_\_\_ (Fla. 1<sup>st</sup> DCA August 31, 2010)

The JCC awarded the E/C's request for an IME regarding the need for future medical care. The DCA granted the claimant Petition for Certiorari, finding that there was no pending dispute to trigger the right to a compulsory IME under the statute. The E/C had agreed at mediation to authorize a psychiatrist, but then expressed concern regarding the claimant's condition and the authorized care being provided. The E/C sought to compel the IME. The DCA stated that a "dispute" triggering the right to an IME arises only when the E/C denies a benefit,



or when the claimant disagrees with the diagnosis of an authorized treating physician. The court held that to create a dispute, the E/C must deny benefits to the claimant. In order to be entitled to an IME, the court instructed the E/C would need to obtain a peer review, and deny a benefit to the claimant based upon the decision.

**Trial/Appellate Practice**

**Appeals/Dismissal as Sanction**

*Roth v. G.W. Rod Busters / USIS*, \_\_\_So.3d\_\_\_ (Fla.1<sup>st</sup> DCA 5/28/2010)

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

**Settlement/Enforcement**

*Cacares v. Sedanos Supermarket / Johns Eastern*, \_\_\_So.3d\_\_\_ (Fla.1<sup>st</sup> DCA 6/9/2010)

The 1<sup>st</sup> DCA reversed the JCC's Order enforcing a settlement agreement. The JCC concluded that the severance agreement and release was a material part of the settlement. However, under that agreement, the claimant had seven days following execution of the settlement documents to revoke the release. As the claimant revoked the agreement without ever executing the documents, the agreement was not enforceable.

*Holmes v. Brown, Terrell, et al*, \_\_\_So.3d\_\_\_ (Fla.1<sup>st</sup> DCA 6/9/2010) **Appeals/Timely Filing of Notice of Appeal**

The DCA holds that a pro se appellant's notice of appeal filed four and a half years after the entry of a Final Order is not timely and must be dismissed for lack of jurisdiction.

**Statute of Limitations/Failure to Obtain MMI/PIR/Detrimental Reliance**

*Gauthier v. FIU / State of FL, Div. of Risk Management*, \_\_\_So.3d\_\_\_ (Fla.1<sup>st</sup> DCA 6/22/2010)

The 1<sup>st</sup> DCA reversed the JCC's finding that the SOL ran on the claimant's case. The claimant sustained a compensable eye injury in 9/05. She obtained authorized treatment and had her last authorized visit on 6/21/07. In July of 2008, the claimant scheduled a follow up for August of 2008. The E/C denied authorization for that visit. The E/C attempted on at least two occasions to obtain PIR/MMI information via DWC 25s, but the facility did not provide this information. Evidence during litigation indicated the claimant would have reached MMI with a PIR prior her 6/21/07 authorized visit. In a lengthy opinion, the DCA held that the carrier had an affirmative duty to obtain the PIR and MMI information. The PIR would have resulted in a payment of IB benefits to the claimant, and the carrier's failure to obtain this information resulted in estoppel. The DCA rejected the E/C position that they were entitled to the SOL defense because they had not made a representation upon which the claimant relied. The Court held the carrier may obtain PIR and MMI information from a physician other than the authorized treating doctor, and stated it was not the claimant's responsibility to obtain this information in a self executing system.

**Assertion of Fifth Amendment/Dismissal with Prejudice/Abuse of Discretion**

*Fernandez v. Blue Sky / Venecia Foods / Aequicap*, \_\_\_So.3d\_\_\_ (Fla. 1<sup>st</sup> DCA 6/22/2010)

The First DCA held that the JCC abused his  
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discretion in dismissing the claimant's PFB with prejudice. The claimant refused to answer a number of questions related to false or fraudulent social security information. The E/C argued that such failure undermined their ability to conduct discovery. The JCC found that the claimant did not identify specific areas that to which she could testify (to the exclusion of others) and that the failure was relevant and germane to indemnity and medical issues. However, the 1<sup>st</sup> DCA noted that the sanction of dismissal with prejudice is the harshest penalty available, and that the E/C, as the party moving for dismissal, failed to demonstrate "meaningful prejudice", which is the required standard.

### **Rule Nisi/Jurisdiction of Circuit Court to Enforce WC Order for Costs against Claimant**

*Orange County/ASC v. New*, \_\_\_So.3d\_\_\_ (Fla. 5<sup>th</sup> DCA 6/25/10)

The E/C obtained an award of prevailing party costs of \$2594.97 against the claimant. When the costs were not paid, the E/C sought enforcement via the Rule Nisi procedure contained in F.S. s. 440.24. The claimant challenged this under subsection (1) of that section, arguing that the enforcement mechanism of that Chapter is available only against Employers and Carriers. The Circuit Court agreed, and found it was without jurisdiction to entertain the motion. The E/C appealed, arguing that the legislature overlooked this section when it amended the law in 2003 to give E/Cs the ability to obtain prevailing party costs. Prior to 2003, only claimants could obtain such costs. The E/C also argued that the section was unconstitutional by not providing an enforcement mechanism to E/Cs in the same manner as it provides for claimants. The Fifth DCA rejected these arguments, indicating they could not simply fix the alleged "glitch". The DCA reasoned it is entirely plausible the legislature intended the expedited enforcement mechanism to apply only to claimants, and further suggested the E/C may seek to enforce their award "in the appropriate court having jurisdiction over the amount in controversy", i.e. county court.

### **Expert Medical Advisors/Timeliness of Request**

*Romero v. JBPainting and Waterproofing, Inc. / Summit*, \_\_\_So.3d\_\_\_ (Fla. 1<sup>st</sup> DCA 6/21/2010)

The 1<sup>st</sup> DCA found the JCC abused his discretion in rejecting the claimant's motion to appoint an EMA. The claimant's 6/18/09 PFB seeking IBs at 5% was placed on the expedited hearing docket. Two doctors had given the claimant a 0%, and the claimant's IME gave the claimant the 5% on 5/14/09. On 8/12/09, the claimant filed a "notice of Conflict in Medical Opinions", which the JCC denied as "vague, nonspecific and lacking attachments". At the

8/26/09 Expedited Hearing, the JCC agreed with the claimant's renewed position that a conflict existed, but found the request for an EMA was now untimely. The JCC additionally found the IME doctor had not "put his opinion in the proper context to truly create conflict", and then denied Claimant's request for payment of IBs at 5%. The DCA reversed, finding claimant's request complied with the standard of being made with "reasonable promptness". Specifically, they noted that although claimant was on notice of the disagreement of the medical providers as of the 5/14/09 IME report, the claimant had "no reason to believe benefits would not be provided" until the E/C issued their Notice of Denial on July 2, 2009. The DCA also reversed as to the JCC's denial of the EMA on the grounds that the IME's opinion was not in the proper context and not sufficiently persuasive.

### **Impairment Income Benefits/Duties of E/C/ Ripe Issues**

*Elias v. Worldwide Wide Concessions / Comp Options*, \_\_\_So.3d\_\_\_ (Fla.1<sup>st</sup> DCA 7/7/2010)

The First DCA affirmed the JCC's denial of TPD and and increase in Impairment rating. However, the DCA reversed and remanded the JCC's failure to rule on payment of IB benefits at the correct rate. The claimant in her pre-trial memo and on a motion for rehearing, sought to have IB benefits paid based upon an AWW that was agreed upon at trial. The Judge failed to rule on the issue. The DCA rejected the E/C argument that the claimant did not request increased IBs at the correct rate, and found that no support had been given for the rate at which IBs had been paid. The Court again emphasized that the E/C bears the burden to place benefits in the hands of claimant with as little economic or administrative burden as possible.

*Bifulco v. Patient Business & Financial Services, Inc.*, \_\_\_So.3d\_\_\_ (Fla. 6/24/10)

The Florida Supreme Court reviewed conflicting decisions from the First and Fifth DCAs regarding whether workers' compensation retaliation claims against the State under F.S. §440.205, are subject to the pre-suit notice requirements of section 768.28(6). Claimant filed suit alleging that she was fired in retaliation for filing a workers' compensation claim in violation of 440.205. The Court noted that statutory language in chapter 440 allows for employees to file retaliation claims against the State and its subdivisions as employers. It noted that 440 did not expressly refer to 768.28, as do other chapters that address pre-suit requirements. The court held pre-suit notice requirements do not apply to retaliatory discharge actions brought against the State.

*Bocelli v. Southwest Florida Investments*, (Fla. 1<sup>st</sup> DCA 6/21/10)

Claimant filed a PFB on 1/2/08. JCC issued a *sua sponte* order dismissing the PFB without prejudice for lack of prosecution on 2/13/09 because the docket



reflected no record activity for more than a year. Claimant was given 10 days to file a motion for rehearing or to vacate the order. Claimant timely filed a motion to set aside the order and attached several notices of deposition that had been served but not filed. The JCC did not rule on the motion and it was unclear if any steps were taken to get a ruling prior to the Notice of Appeal. A concurring opinion suggested that the JCC issue an order giving the claimant 10 days to show cause why the PFB should not be dismissed for lack of prosecution. He also noted that the claimant could have done any of the following to prevent a needless appeal: 1) filed the deposition notices at the time they were served, 2) conferred with the E/C to obtain agreement that the dismissal was erroneous prior to filing the motion to vacate the dismissal order, 3) set the motion for a hearing before the JCC, 4) or not filed the appeal because the dismissal was without prejudice, SOL had not run, and he could have re-filed. DCA dismissed the appeal for lack of jurisdiction.

*Seminole County Government v. Kimmel*, (Fla. 1<sup>st</sup> DCA 6/9/10)

JCC's order generally awarded indemnity benefits, but did not clarify whether they were TTD or TPD. It reserved jurisdiction if the parties were not able to calculate the type and amount of indemnity awarded. The First DCA found that the order was not a final order or an appealable non-final order and dismissed the appeal.

*International Ship Repair and Marine Services, Inc., v. Aleman*, (Fla. 2d DCA 6/18/10)

Two employees and an employer filed a motion for summary final judgment which alleged that pursuant to the Longshore Act they were immune from a wrongful death suit brought by a representative of the deceased claimant's estate. The circuit court entered an order denying summary final judgment. The DCA found that it did not have jurisdiction to review the non-final order as it did not state that the immunity defense was not available "as a matter of law." The Court converted the appeal to a petition for writ of certiorari, but found that it still did not have jurisdiction because the order did not depart from the essential requirements of the law and result in material injury for the remainder of the proceedings, for which there was no adequate remedy on appeal.

**One time change/dismissal of petitions**

*Grueiro v. Liberty Mailing/Hartford*, \_\_\_ So. 3d \_\_\_ (Fla. 1<sup>st</sup> DCA August 25, 2010)

The DCA affirmed the JCC's denial of a 1x change in physicians where the E/C timely authorized a

doctor and the claimant refused to attend the appointment. The DCA did, however, address the JCC's alternative basis for the denial, the so called two dismissal rule. The claimant dismissed a PFB containing a request for "an alternate provider and an alternate orthopedist." The JCC held that dismissing the single PFB which requested the same benefit twice satisfied the two dismissal rule from Miseses. The DCA held that to satisfy the two dismissals rule using a single dismissal, the requests must be made in separate PFBs.

**Appellate procedure**

*Noel v. 1641 Jefferson, LLC d/b/a Van Duke Café/Associated Industries*, \_\_\_ So. 3d \_\_\_ (Fla. 1<sup>st</sup> DCA August 25, 2010)

The DCA dismissed an appeal for late filing of the notice of appeal.

**Attorney Fees and Costs**

**Attorney Fees/Jurisdiction of JCC for proceedings outside of Chapter 440**

*Castellon v. RC Aluminum/AIG Svcs.*, \_\_\_So.3d\_\_\_ (Fla.1<sup>st</sup> DCA 6/25/10)

The claimant attorney successfully negotiated and resolved a dispute between the claimant and his Health Insurance Company. The dispute with the health insurer arose out of the same facts as the WC claim, but was not subject to a proceeding under chapter 440. The claimant and his attorney agreed to a fee, and asked the JCC to approve the fee. The First DCA affirmed the JCC's ruling that F.S. s. 440.34(1) (2007) only allows a JCC to approve a fee for services in connection with proceedings under Chapter 440. As such, the JCC was without jurisdiction to approve the fee, even though the benefits arguably provided a "tangential benefit" to the claimant in his workers' compensation case.

**Appellate Attorney Fees**

*South Florida Express Bankserv, Inc. v. Aponte*, \_\_\_ So.3d \_\_\_ (Fla. 1<sup>st</sup> DCA 7/30/2010)

Awarded attorney fees as a sanction for filing a response to a motion to compel payment of attorney fees. A prior interlocutory appeal (PCA) awarded attorney fees for the claimant and remanded to the JCC. When the JCC eventually found the claim did not fall under chapter 440, the E/C refused to pay the appellate attorney fee



## ***Friends of 440 Scholarship Welcomes You!***

The Friends of 440 Scholarship Fund, Inc. is a 501(c)(3) charitable organization whose membership is comprised of attorneys, doctors, insurance adjusters, Judges of Compensation Claims, claims administrators, rehabilitation providers and others whose primary employment is connected within Florida's Workers' Compensation system. Throughout the year we put our differences aside and raise scholarship funds to aid students who lack the economic ability to continue their education beyond high school or to further their college education.

The Friends of 440 Scholarship Fund, Inc. has been in existence since 1991 and over the course of the past 18 years has raised almost \$1 million which has been used to assist over 518 qualified college students achieve their educational goals.

During the 2009-2010 selection scholarship process, The Friends of 440 Scholarship Fund, Inc. is proud to announce the award of over \$73,000.00 in scholarship funds to 43 applicants throughout the State of Florida.

The number of scholarships awarded each year is directly related to the amount of funds available. Therefore, fund-raising is an important activity for this non-profit corporation. Various fund raising projects are undertaken each year throughout the state of Florida. Corporate and individual donations are welcomed, and are tax-deductible.

### **Our Mission Statement**

To aid dependents or descendants of workers who are injured in the course and scope of their employment and receive benefits under the Florida Workers' Compensation Law and who reside or whose accident occurred in the State of Florida. Applicants must not be related directly or indirectly to any member of the Board of Directors. Furthermore, dependents or descendants of individuals who primarily engage in the operation and/or administration of the Florida Workers' Compensation Law are eligible to receive the scholarship on a statewide basis. This scholarship is intended to aid students who lack the economic ability to continue education beyond high school or to further their college education. Applications must be submitted prior to February 28th, of the year the scholarship is to be awarded.

### **Mail Us Your Donations Or Feedback:**

We welcome your donations and your feedback! The location of our headquarters is: The Friends of 440 Scholarship Fund, Inc., 9350 South Dixie Highway, 10th Floor, Miami, FL 33156-2900

***Scholarship applications are available as a pdf  
at <http://www.440scholarship.org/the-scholarship/application>.***



**FRIENDS OF 440 SCHOLARSHIP FUND, INC.**

**STATEMENT OF PURPOSE, GUIDELINES & APPLICATION**

To aid dependents or descendants of workers who are injured in the course and scope of their employment and receive benefits under the Florida Workers' Compensation Law and who reside or whose accident occurred in the State of Florida. Applicants must not be related directly or indirectly to any member of the Board of Directors. Furthermore, dependents or descendants of individuals who primarily engage in the operation and/or administration of the Florida Workers' Compensation Law are eligible to receive the scholarship on a statewide basis. This scholarship is intended to aid students who lack the economic ability to continue education beyond high school or to further their college education. Applications must be submitted prior to February 28th, of the year the scholarship is to be awarded.

**REQUIREMENTS:**

COMPLETED APPLICATIONS MUST BE MAILED TO THE FRIENDS OF 440 SCHOLARSHIP FUND INC., 9350 SOUTH DIXIE HIGHWAY, 10<sup>TH</sup> FLOOR, MIAMI, FLORIDA 33156-2900 TELEPHONE NUMBER: (305) 671-1300

**High school applicants must have a 2.70 GPA; college applicants must have a 3.0 GPA to apply; all applicants must maintain a 3.0 GPA for all renewals – The scholarship is not available for students attending graduate school.**

NOTICE OF NON DISCRIMINATORY POLICY TO STUDENTS

The **Friends of 440 Scholarship Fund, Inc.**, does not discriminate on the basis of race, color, national or ethnic origin.

Please submit the following documents with this application (photocopies only):

- 
1. Mandatory – Copy of most recent tax return of parent and/or guardian
  2. Mandatory – Copy of applicant’s most recent school transcript
  3. If applicable - Copy of applicant’s most recent tax return

**Applications will NOT be processed if ANY of the above documents are missing**

***Complete scholarship applications are available as a pdf at <http://www.440scholarship.org/the-scholarship/application>.***



## THE FLORIDA BAR – WORKERS’ COMPENSATION SECTION APPLICATION FOR MEMBERSHIP

The practice of Workers’ Compensation Law is constantly changing, and the Workers’ Compensation Section of The Florida Bar seeks to keep its members abreast of all the recent developments in the area through communication. Membership in the section provides access to the section’s newsletter *The News & 440 Report*, the section web page at: [www.flworkerscomp.org](http://www.flworkerscomp.org), sponsored continuing legal education programs and section meetings.

Membership in this Section will:

- Provide an organization for those with an interest in workers’ compensation law.
- Provide a forum for communication and education for the improvement and development of the practice area of workers’ compensation law.
- Provide a forum for the education of the Bar about the legal needs of the work force and for the education of the public on their legal rights and the availability of legal services.
- Entitle the member to a reduced fee for section sponsored continuing legal education programs.
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**To join, mail this completed application with your check to:**

**THE FLORIDA BAR  
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651 E. JEFFERSON STREET  
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Enclosed is my check made payable to The Florida Bar for the appropriate amount (check one):

- Member of the Section (active member of The Florida Bar): \$50**
- Affiliate member of the Section (Full-time, Florida law school student): \$30**

**NAME:** \_\_\_\_\_

**ATTORNEY NO.** \_\_\_\_\_

**BUSINESS NAME/ADDRESS:** \_\_\_\_\_

**CITY/STATE/ZIP:** \_\_\_\_\_

(Note: The Florida Bar dues structure does not provide for prorated dues. Membership expires June 30.)

**Referring Member:** \_\_\_\_\_ **Attorney #** \_\_\_\_\_