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### Liability

#### New Mediation Procedure Rule Governing Who Must Appear at Mediation Conference by Kelly Klein, Esq.



Kelly Klein

Amendments to the rule on mediation procedures that have been adopted by the Florida Supreme Court became effective on January 1, 2012. Specifically, the proposed changes, crafted by the Committee on Alternative Dispute Resolution and Policy, will affect appearances at mediation. The significant changes are as follows:

Subsection (b) is now headed as “Appearance at Mediation” rather than “Sanctions for Failure to Appear.” This change reflects the focus in the amendments on clearly defining what constitutes a proper “appearance” at mediation. According to the amended Subsection (b), a party is deemed to appear at mediation if the following persons are present: (1) the party or a party representative having full authority to settle without further consultation; *and* (2) the party’s counsel of record, if any; *and* (3) a representative of the insurance carrier for any insured party who is not the carrier’s outside counsel and has full authority to settle in an amount up to the plaintiff’s last demand or policy limits, whichever is less, without further consideration. These three parties were each required for appearance in the current version of the rule, but the word “and” is being added in between each description, presumably to emphasize that each party must be in attendance.

#### Binding Settlement Authority

A new paragraph has been added at Subsection (c) in an attempt to define the rule’s ongoing use of the term “Party Representative Having Full Authority to Settle.” The amendment defines this representative as “...the final decision maker with respect to all issues presented by the case who has the legal capacity to execute a binding settlement agreement on behalf of the party.” In other words, the representative must have authority with regard to the various aspects of the case, rather than simply having authority solely in regard to a narrow topic anticipated to be at issue in the settlement negotiations. The requirement of having settlement authority up to the lesser between Plaintiff’s last demand or policy limits has not changed. The requirement for a public entity’s representative to be physically present and have the full authority to negotiate and recommend settlement to its decision-making body is substantively unchanged under the amendments, but will now appear at Subsection (d).

#### Certification of Authority

The most significant amendment is perhaps the new requirement set forth in Subsection (e), regarding a **Certification of Authority**. This provision requires that each party

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### OFFICE LOCATIONS

#### MIAMI

T: 305.377.8900  
F: 305.377.8901

#### FORT LAUDERDALE

T: 954.761.9900  
F: 954.761.9940

#### TALLAHASSEE

T: 850.385.9901  
F: 850.727.0233

#### PALM BEACH

T: 561.893.9088  
F: 561.893.9048

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T: 407.540.9170  
F: 407.540.9171

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F: 813.226.0082

#### JACKSONVILLE

T: 904.791.9191  
F: 904.791.9196

### CLIENT RELATIONS

T: 954.762.7038

[WWW.LS-LAW.COM](http://WWW.LS-LAW.COM)

Edited by:

Maria Donnelly, CR  
Daniel J. Santaniello, Esq.

## Workers' Compensation Impairment Ratings by Rey Alvarez, Managing Attorney.



Rey Alvarez

I recently had the privilege of presenting a seminar to a group of doctors at the Advanced Clinical Skills and 25th Annual Scientific Session and Business Meeting for the American Academy of Disability Evaluating Physicians. Our topic was

impairment benefits as it relates to the 1996 Florida Uniform Permanent Impairment Rating Schedule.

Impairment benefits are a big expense to insurance companies. Every year, hundreds of thousands of dollars are paid out in impairment benefits without much review. The presumption appears to be that the impairment rating is automatically assumed to be correct, unless the number is just way out of whack. However, there is a possibility for error.

The purpose of the guidelines is to provide for an objective, standardized approach to evaluating an individual's impairment that gives a consistent and unbiased result so that all individuals with a similar condition can expect the same impairment rating. Nonetheless, there is a subjective component to the calculation of impairment ratings.

The guides used to establish impairment ratings are based on the date of the accident. It is important that doctors understand that they need to use the appropriate guide. The following list shows which guides are to be used for certain accident dates.

- Prior to and through—6/30/90 AMA Guide;
- 7/1/90 through 10/31/92— Minnesota Disability Schedules;
- 11/1/92 through 1/6/97—1993 FL Impairment Guide;
- 1/7/97 to present—1996 FL Uniform Permanent Impairment Rating Schedule.

The physician must include documentation in the medical record to indicate which guide was used to calculate the permanent impairment rating. This is often not done. It is also important for the doctor to

list the page numbers. This is something that should be demanded from all treating doctors and IMEs.

Only a physician licensed under Chapter 458, an osteopath licensed under Chapters 458 and 459, a chiropractor licensed under Chapter 460, a podiatrist licensed under Chapter 461, an optometrist licensed under Chapter 463, or a dentist licensed under Chapter 466 may give an impairment. They can only give a permanent impairment rating for a condition they can professionally treat.

The 1996 Florida Uniform Permanent Impairment Rating Schedule defines permanent Impairment as a purely medical condition. It goes on to state that permanent impairment is any anatomic or functional abnormality or loss after maximal medical improvement has been achieved, which abnormality or loss the physician considers stable or non-progressive at the time evaluation is made.

The 1996 guide goes on to state that the evaluation of Permanent Impairment is a function that physicians alone are competent to perform. Evaluation of permanent impairment defines the scope of medical responsibility and therefore represents the physician's role in the evaluation of permanent disability. Evaluation of permanent impairment is an appraisal of the nature and extent of the patient's illness or injury as it affects his personal efficiency in one or more of the activities of daily living. These activities are self-care, communication, normal living postures, ambulation, elevation, traveling and non-specialized hand activities.

Florida Statute 440.02(22) defines "PERMANENT IMPAIRMENT" as any anatomic or functional abnormality or loss determined as a percentage of the body as a whole, existing after the date of maximum medical improvement, which results from the injury. As with many accidents, there can be a pre-existing condition. Florida Statute 440.13(5)(B) states that "if a compensable injury, disability, or need for medical care, or any portion thereof, is a result of aggravation or acceleration of a pre-existing condition, or is the result of merger with a

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## New Mediation Procedure Rule cont.

prepare a written notice identifying the person(s) who will be attending the mediation conference as a party representative or as an insurance carrier representative, and confirming that those persons have the authority required by amended Subsection (b).

This certification must be filed with the court and served on all parties ten days prior to the mediation, unless otherwise stipulated by the parties. Notably, the new provision does not seem to require the party or the party's representative to sign or aver anything in the Certification. It appears to require only a Certification signed by the serving attorney, at this point.

### Sanctions for Failure to Comply

Sanctions for failure to comply with the requirements of the rule are stated in Subsection (f) of the amended rule. Identical to the current version of the rule, the amended version states that a court shall sanction a party for its failure to appear without good cause, which penalties include imposing mediator and attorney's fees and costs.

In support of the new requirement for a Certification of Authority, the amended rule provides for sanctions against a party for its failure to file a certification of authority or failure of the person(s) identified in the certification to actually appear at mediation. For either violation, the new penalty allows for the imposition of a rebuttable presumption that the party failed to appear.

Significantly, nothing in the current or amended version of the rule requires any party to settle an action; the parties in attendance simply must have the authority to do so.

The amendments' committee notes explain that the standards set forth in the amended rule represent objective standards, and whether or not they have been complied with can be determined without reference to any confidential mediation communications. Further, the decision by a party representative not to settle, by itself, is not sufficient to indicate a lack of full authority to settle. As an

additional matter, it is noted that a party may designate multiple persons to serve together as the final decision maker, but if it does so, then each of these persons must appear at the mediation.

Regarding the requirement for a Certification of Authority, the notes explain that this requirement is intended to compel parties to declare *to the court* that a representative has full authority to settle, rather than simply declaring the same within the confines of a confidential mediation conference. The committee further clarified that nothing in the rule imposes a duty on the court or the mediator to ensure compliance with its requirements.

### Practice Pointers

There are a few things to keep in mind when trying to navigate through the mediation process under these procedures. The amendments will likely have the most significant impact on representatives, such as those representing insurance carriers, who handle files that are litigated from a distance. Previously, in these situations, it has been acceptable for a carrier representative to simply appear by telephone or arrange for a local third-party administrator to appear at mediation in their place. However, whereas the amended rule requires strict compliance with its requirement that the party in attendance have full authority, which must be certified to the court, a party's appearance via telephone or by a person without full authority are not options, unless, as discussed below, stipulated by the parties or ordered by the court.

Navigating mediation conferences under the new provisions will affect the planning and preparation stage of the process. Attorneys and party representatives will have to determine who will appear on behalf of the parties earlier in the process and consider what authority is necessary for the representative. In order to address these considerations, representatives should prepare to be physically present at mediations, even in out-of-state cases, and make room in their calendars for such attendance when scheduling the meetings. If the

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## New Mediation Procedure Rule cont.

representative is still unable to determine, with certainty, that he/she will be able to attend the mediation two weeks prior to the conference, the Certification should be filed with the likely representatives and a possible alternate representative's name.

Naming more than one fully authorized representative will avoid any last-minute changes in representation that fail to comply with the Certification. Additionally, a representative should know the amount of the opposing party's last demand prior to mediation and obtain authority at least up to that amount, assuming it is less than the applicable policy limits.

Alternatively, arrangements may be made with opposing counsel or by motion to the court for waiver of the rule's requirements. For instance, if a carrier representative would like to appear at mediation via telephone, it may do so if it obtains a stipulation from the other parties waiving their physical appearance.

Likewise, if an attorney wants to avoid filing a Certification of Appearance with the court, this requirement may also be waived by stipulation of the parties. However, the parties must keep in mind that it may not be in a plaintiff's interest to stipulate to waiving this requirement as it will typically only burden those persons defending an action.

Whether or not a party decides to comply with the new requirements or seek waivers from the other parties, preparing for attendance at mediation under the amended rule will require earlier preparation and a greater commitment for personal attendance by representatives.

For further information, please contact Kelly Klein, Esq., (T:813.226.0081— [KKlein@LS-Law.com](mailto:KKlein@LS-Law.com)) or Paul Jones, Orlando Partner (T: 407.540.9170 or [PSJ@LS-Law.com](mailto:PSJ@LS-Law.com))

## Impairment Ratings cont.

preexisting condition, only the disabilities and medical treatment associated with such compensable injury shall be payable under this chapter, excluding the degree of disability or medical conditions existing at the time of the impairment rating or at the time of the accident, regardless of whether the preexisting condition was disabling at the time of the accident or at the time of the impairment rating and without considering whether the preexisting condition would be disabling without the compensable accident. The degree of permanent impairment or disability attributable to the accident or injury shall be compensated in accordance with this section, apportioning out the preexisting condition based on the anatomical impairment rating attributable to the preexisting condition.

Per the guidelines, an evaluation shall include a thorough physical examination of the body system or systems involved. Objective findings should include observation, palpation, auscultation, and measurements where indicated for neuromusculoskeletal conditions. This should include observation of postural and structural abnormalities, palpation of neuromuscular structures and note of tender areas found in consistent clinical distribution corresponding to subjective complaint. Rigidity, spasm or loss of range-of-motion of joints should be noted if present.

For example, range of motion should be determined by using a measuring device such as a goniometer or inclinometer for extremities. Consistency and validity are necessary for determining the values obtained in joint range-of-motion evaluation. Joint measurements should be performed twice and produce comparable figures varying less than ten percent of the maximum value for the involved part. From reviewing medical records, we know that is not often done, at least, it is not noted in the authorized treating doctor's medical records in such detail.

The doctor opining on the impairment rating, must issue a written report to the employee and the carrier

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## Impairment Ratings cont.

certifying that maximum medical improvement has been reached, stating the impairment rating to the body as a whole.

Pursuant to 440.15(3) permanent impairment benefits are to be paid biweekly at the rate of 75% of the claimant's average weekly temporary total disability benefit but can not exceed the maximum weekly benefit under Florida Statute 440.12. They are due and payable within 14 days after the carrier has knowledge of the impairment rating.

Permanent impairment benefits shall be reduced by 50% for each week in which the employee has earned income equal to or in excess of the employee's average weekly wage. An employee's entitlement to impairment income benefits begins the day after the employee reaches maximum medical improvement or the expiration of temporary benefits, whichever occurs earlier.

Impairment income benefits are payable only for impairment ratings for physical impairments. If objective medical findings can substantiate a permanent psychiatric impairment resulting from the accident, permanent impairment benefits are limited for the permanent psychiatric impairment to 1-percent permanent impairment.

Florida Statutes 440.13 indicates that for accidents occurring on or after October 1, 2003, an employee's entitlement to impairment income benefits begins the day after the employee reaches maximum medical improvement or the expiration of temporary benefits, whichever occurs earlier, and continues for the following periods:

1. 2 weeks of benefits are to be paid for each percentage point of impairment from 1% up to and including 10%,
2. 3 weeks of benefits are to be paid for each percentage point of impairment from 11% up to and including 15%,
3. 4 weeks of benefits are to be paid for each percentage point of impairment from 16% up

to and including 20%,

4. 6 weeks of benefits are to be paid for each percentage point of impairment from 21% and higher.

Pursuant to Florida Statute 440.25(4)(d), a judge of compensation claims may not make a finding of a degree of permanent impairment that is greater than the greatest permanent impairment rating given the claimant by any examining or treating physician, except upon stipulation of the parties.

Given the amount of money that is paid out in impairment ratings, it is important that they be calculated accurately. While a mistake in one case may not amount to a lot, it quickly adds up.

Assuming a case with a AWW of \$500.00 which equals a compensation rate of \$333.35, if the compensation rate is off by 1% wrong, the error is only \$250.00, but given that same scenario in 100 cases, the error now costs \$25,000.00. In 500 cases, the 1% error now adds up to \$125,000.00 and so on.

A study was recently done to check on the accuracy of impairment ratings when using the AMA guides. It is important to note that this study DOES NOT take 1996 Florida Impairment Guide into account.

The 2006-2010 study, performed by the AMA, reviewed 6,233 impairment ratings. It was determined that 78% of the ratings resulted in different outcomes when reviewed by an expert reviewer.

A similar AMA study in 2005 came up with similar percentages. In that study, 2100 cases were reviewed and 80% resulted in a different outcome when reviewed by an expert reviewer. It is important to note that this study DOES NOT take 1996 Florida Impairment Guide into account.

Impairment ratings are basically an artificial number. It has nothing to do with determining what an injured person can or can not do. For example, an individual with a 4% impairment does not indicate whether a



## Verdicts & Summary Judgments by Office

### Appellate Division South

**Doreen Lasch, Junior Partner** of Luks, Santaniello, Petrillo & Jones obtained a Dismissal with Prejudice in the case styled Keith Lampkin (Appellant) v. Terron Edwards (Appellee). The Fourth District Court of Appeal upheld the dismissal with prejudice of a lawsuit against our client who was operating a truck in which plaintiff was a passenger and who was also a co-employee of the plaintiff. Plaintiff was severely injured when the truck proceeded from a driveway onto a highway into the path of another truck which struck the truck in which plaintiff was riding. Plaintiff alleged that the driver was grossly negligent in order to overcome the statutory fellow employee immunity. The trial court dismissed plaintiff's third amended complaint because it found that the conduct alleged failed to rise to the level of gross negligence and therefore defendant was immune from liability. The Appellate Court affirmed the dismissal on 11/23/2011.

### Orlando Office

**Paul Jones, Partner and Thomas Farrell, Junior Partner** of the Orlando office of Luks, Santaniello, Petrillo & Jones obtained a defense verdict in a premises liability case styled Edward Elliott and Penelope Elliott v. Simon Property Group and Control Building Services, Inc. in Orange County, December 2, 2011. The case involved a slip and fall in a mall common area where the Plaintiff fell and injured his right knee in a puddle of water that was on the floor for approximately 15-20 minutes. The Plaintiff fell on his knee which had been injured several times in the past, with prior multiple surgeries and prior replacements. The Plaintiff underwent several additional surgeries to repair his knee, complicated by the development of a Staph infection. The Plaintiff incurred approximately \$119,000 in medical bills and demanded **\$1.3 million at trial**. The jury found no negligence that was the legal cause of the Plaintiff's damages. The motion for attorney's fees and costs is currently pending.

**Katherine Kmiec, Esq., and Doreen Lasch, Junior Partner** of Luks, Santaniello, Petrillo & Jones obtained a Dismissal with Prejudice in the case styled Marin v. The Hertz Corporation in Orange County. At the trial level, Plaintiff attempted to amend a premises liability cause of action to incorporate elements of Americans With Disabilities Act (ADA) discrimination as elements of the

underlying negligence cause of action. In his third amended complaint, Plaintiff alleged that because he was elderly, and had difficulties walking, Hertz discriminated against him under the ADA by failing to modify its policies and procedures to accommodate his disabilities, which resulted in bodily injury, pain and suffering to Plaintiff. In dismissing Plaintiff's Third Amended Complaint with prejudice, the Trial court relied upon the persuasive authority, White v. NCL America, Inc., 2006 WL 1042548, (S.D.Fla.) (S.D.Fla.,2006), which held in order to bring a common law action arising from injuries caused by negligent conduct in the context of public accommodation under the ADA, the plaintiff must identify a recognized duty at common law, independent of the ADA standards. Plaintiff appealed the Trial Court's decision to Dismiss his Third Amended Complaint with Prejudice. On 12/20/11, the Fifth District Court of Appeal Per Curiam affirmed the dismissal with prejudice of plaintiff's Third Amended Complaint for failure to state a cause of action.

### Jacksonville Office

**Paul Jones, Partner and Sam Maroon, Junior Partner** of the Jacksonville office of Luks, Santaniello, Petrillo & Jones obtained a defense verdict in a Bodily Injury matter, Federal Court case styled Audrey Snover v. City of Starke, FL on 1/11/2012. Plaintiff was given a citation for speeding by Defendant, a City of Starke police officer. Plaintiff initially refused to sign the citation, but after Defendant explained to her that if she did not sign she would be arrested, Plaintiff claimed that as she reached with her right hand to sign the citation, Defendant briefly drew his weapon before slapping his hand cuffs on Plaintiff's right wrist and pulled her from the vehicle using the handcuffs. Plaintiff filed a law suit alleging a violation of her civil rights pursuant to §1983. As part of the pretrial stipulation, Plaintiff claimed to have suffered past and future medical expenses, past and future wage losses, and pain and suffering damages totaling **\$5.5 million**. Defendant argued that Plaintiff had presented no competent evidence regarding the causation of Plaintiff's alleged injuries and no evidence of wage loss. The Court granted the Rule 50 motion for directed verdict, leaving only Plaintiff's claim for physical and emotional pain and mental anguish. The jury returned a verdict in favor of the Defendant after only **18 minutes** of deliberations.

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## Firm News

### Members Named Junior Partners

Congratulations to the following members who were named Junior Partners on January 6, 2012.



Doreen Lasch  
954.847.2942  
DLasch@LS-  
Law.com

**Doreen E. Lasch** has been named a Junior Partner. Doreen is a member of the firm's Appellate Division South and has 20 years of trial litigation experience. The Appellate Division assists with summary judgments, discovery objectives and trial strategy. Doreen is admitted to the U.S. District Court, Southern District of Florida (1991) and the U.S. Court of Appeals, Eleventh Circuit (1991).

She is also an authorized instructor by the Florida Department of Financial Services and is approved to teach in 13 adjuster continuing education license areas. Doreen works out of the Fort Lauderdale office.



Marc Greenberg  
561.226.2519  
MGreenberg@LS-  
Law.com

**Marc M. Greenberg** has been named a Junior Partner. Marc was admitted in 2004, Florida and to the U.S. District Court, Southern and Middle Districts of Florida (2004) and U.S. Court of Appeals, Fourth and Eleventh Circuits (2004). He practices in homeowners and condominium association disputes, constitutional law, Medicare fraud, general liability, product, premises,

trucking, vehicular, construction, professional and insurance law and coverage. Marc works out of the Boca Raton office.



Anthony Merendino  
561.226.2518  
AMerendino@LS-  
Law.com

**Anthony Merendino** has been named a Junior Partner. Anthony was admitted in 2001, Florida and in all three Districts: Southern, Middle and Northern. Anthony is also admitted in U.S. Tax Court and the U.S. Court of Appeals, Eleventh Circuit. Anthony holds an LL.M. in Taxation in addition to his J.D., and has experience in a wide range of

Insurance Defense practice areas. He works out of the Boca Raton office.



Heather Calhoon  
305.377.8900  
HCalhoon@LS-  
Law.com

**Heather M. Calhoon** has been named a Junior Partner. Heather was admitted in 2001, Florida and to the U.S. District Court, Southern and Middle Districts of Florida (2001). She concentrates her practice in civil litigation matters involving catastrophic personal injury and wrongful death. She was named a Florida Rising Star in the area of Civil Litigation Defense by Florida Super Lawyers magazine in 2010. Heather works out of the Miami

office.

### New Member—Tampa Office



Kelli Klein  
813.226.0081  
KKlein@LS-  
Law.com

**Kelly M. Klein** has joined the Tampa office as an Associate in the litigation practice group. Kelly was admitted in 2004, Florida and in all three Districts, Northern, Middle and Southern. She has dedicated her practice to handling complex and catastrophic personal injury matters involving aircraft and auto collisions, product liability and premises liability.

### New Member—Miami Office



Daniel Fox  
305.377.8900  
DFox@LS-  
Law.com

**Daniel L. Fox** has joined the Miami office as an Associate in the litigation practice group. Daniel was admitted in 2007, Florida and 2008, Texas. He devotes his practice to Auto, Bodily Injury, PIP, Coverage, GL and Premises Liability matters. Prior to joining the firm, Daniel worked for various Miami Law firms handling civil litigation matters.

## Impairment Ratings cont.

person can or cannot return to work. An impairment rating does not include restrictions. While impairment benefits are supposed to be objective, there is a measure of subjectivity to the calculation.

Disability is oftentimes, tied to impairment ratings. They are 2 different animals. Evaluation of permanent disability is an appraisal of the patient's present and future ability to engage in gainful activity as it is affected by such diverse factors as age, sex, education, economic and social environment, in addition to the definite medical factor permanent impairment. The first group of factors has proved extremely difficult to measure.

The Guide defines the evaluation of Permanent Disability as an administrative and not solely a medical responsibility and function. The guide goes on to state that under no circumstances should it be used to determine disability. The Guide's sole purpose is to determine impairment ratings.

After preparing for the seminar and speaking to the doctors in attendance, it is my opinion that some inquiry into the calculation of the impairment benefit percentage should be included in most, if not all, cases. However, it should not be in the form of a telephone conference, because that defeats the purpose as the cost of an average conference with a doctor will erase any possible savings.

I suggest a form be created that is sent to the doctor after he calculates the impairment rating requesting data on how he calculated the impairment rating, i.e. guide, the page number etc., then the data can be reviewed and checked against the actual percentage given. For further information on impairment ratings, please contact Rey Alvarez, Managing Attorney (T:305.377.8900 or e-mail [RALvarez@LS-Law.com](mailto:RALvarez@LS-Law.com)).

This Legal Update is for informational purposes only and does not constitute legal advice. Reviewing this information does not create an attorney-client relationship. Sending an e-mail to Luks, Santaniello et al does not establish an attorney-client relationship unless the firm has in fact acknowledged and agreed to the same.

## Verdicts cont.

### Fort Lauderdale Office

**Alison Marshall, Esq.**, of Luks, Santaniello, Petrillo & Jones secured an Entitlement to Attorney's Fees in the case styled Kodszy (Appellant) v. Christian and Patricia Berian (Appellees) in Broward County. The Fourth District Court of Appeal had previously affirmed dismissal with prejudice of Plaintiff's complaint and on 12/8/2011 affirmed the trial court's Final Judgment of entitlement to attorney's fees pursuant to a proposal for settlement.

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### Florida Defense Lawyers Association (FDLA) 2012 Winter Seminar

Daniel Santaniello was a featured speaker at the FDLA 2012 Winter Seminar. He spoke on the usage of social media in investigation and discovery, addressing the ethical issues and authenticity. The presentation discussed case law findings where social media was and was not discoverable; duty to preserve and authentication. Dan also provided his best practice tips for the use of social media in investigation and discovery.

### American Academy of Disability Evaluating Physicians (AADEP) Conference

Daniel Santaniello and Rey Alvarez presented with Anthony Dorto, M.D., at the AADEP Conference January 5, 2012. Dan and Rey spoke to doctors and provided them with the legal perspective on Florida Impairment Rating Guidelines. The conference was a 4 day event of advanced clinical skills, scientific session and business meeting for members. The mission of the American Academy of Disability Evaluating Physicians is to advance the science of the prevention and management of disability, as well as, disability and impairment evaluation.