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LEGAL UPDATE

VOLUME 11, ISSUE 3
JULY — SEPTEMBER 2012

Liability

Recent Decisions Expanding the Scope of Discovery from Plaintiff Treating Physicians by Katherine Kmiec, Esq.


Katherine Kmiec

Determining whether or not a treating physician is also an expert witness has proven to be a vexatious challenge for liability defense lawyers in the last several years. Among other things, the "status" of the treating physician as an expert or not can determine the timing of disclosure as a witness during pre-trial proceedings, and the scope of discovery permitted with respect to the treating physician.

Until very recently in Florida Courts, discovery regarding medical expert witnesses, e.g., IME doctors and radiologists, has been fairly one-sided in favor of the Plaintiff. Plaintiffs have been able to delve into the relationship between a Defendant's medical expert, his or her insurer, and more often than not, the relationship between the medical expert and the Defendant's law firm. This discovery is grounded in Allstate Ins. Co. v. Boecher, 733 So. 2d 993, 997-98 (Fla. 1999), which stated:

> "the more extensive the financial relationship between a party and a witness, the more it is likely that the witness has a vested interest in that financially beneficial relationship continuing. A jury is entitled to know the extent of the financial connection between the party and the witness, and the cumulative amount a party has paid an expert during their relationship. A party is entitled to argue to the jury that a witness might be more likely to testify favorably on behalf of the party because of the witness's financial incentive to continue the financially advantageous relationship. Any limitation on this inquiry has the potential for thwarting the truth-seeking function of the trial process."

Convincing the trial courts to employ the ethic of reciprocity to discovery from a Plaintiff's medical expert witness has proven particularly difficult when the Plaintiff's medical expert witness *is also his or her treating physician.* Often, Plaintiffs are able to evade the same type of discovery they seek from Defendant's medical expert by categorizing them as treating physicians.

Several recent cases may provide significant assistance for Defendants in the scope of discovery it seeks from Plaintiff's medical experts who are also their treating physicians. In Katzman v. Rediron Fabrication, Inc., 76 So.3d 1060 (Fla. 4th DCA, 2011) and the currently pending Middle District of Florida case Melissa Crable v. State Farm Mutual Automobile Insurance Company, 5:2010cv00402, defendants have been permitted a much broader scope of discovery that defense attorneys may now propound upon Plaintiff's medical experts. In Katzman v.Rediron Fabrication, Inc, 76 So.3d 1060 (Fla. 4th DCA, 2011), in an unusual twist from the posture normally adopted by Plaintiff's medical expert witnesses, orthopedic surgeon Dr. Scott Katzman sought to be designated as

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Recent Decisions Expanding the Scope of Discovery from Plaintiff Treating Physicians cont.

Katherine Kmiec

an expert witness in order to avoid discovery into how often he ordered a controversial procedure in a four year time frame and what he charged for litigation and non-litigation cases. In that matter, the patients had been referred to Dr. Katzman by their attorney, and had entered into a Letter of Protection (LOP) agreement where Dr. Katzman agreed to obtain payment from any recovery obtained in the pending lawsuit.

The Fourth District Court of Appeal determined that Dr. Katzman was both a fact witness because he was the treating physician, *and was also an expert witness* because he offered opinions about the causation of his patient's injury and about the patient's medical condition, and rejected Dr. Katzman's argument that all "financial" discovery from any "expert," regardless of whether the expert also is a treating doctor, should be limited strictly to those matters set forth in Florida Rule of Civil Procedure 1.280(b)(4)(A). The Court also opined that Dr. Katzman had a stake in the outcome of the litigation not because of the LOP, but due to the referral of those patients by a lawyer, and the court held that "It is the direct referral by the lawyer to the doctor that creates a circumstance that would allow the defendant to explore possible bias on the part of the doctor."

Lest defense lawyers think they can now openly seek broad discovery from Plaintiff's medical experts, the Fourth District Court of Appeals recently quashed a trial court order in Katzman v. Ranjana Corp directing Dr. Katzman to produce documentation showing the amounts of money Dr. Katzman collected from health insurance for the types of surgeries performed on the plaintiff, as well as the amounts collected under Letters of Protection (LOP) on the grounds that the facts in Ranjana were different that those in Rediron, including the facts that the procedures were different, and there was no attorney referral in Ranjana. 37 Fla. L. Weekly D1320 (Fla. 4th DCA, June 6, 2012). The court did not deny discovery altogether, but directed the trial court to determine the appropriate range and scope of discovery.

In the pending case Melissa Crable v. State Farm Mutual Automobile Insurance Company, 5:2010cv00402, State Farm sought discovery into the relationship existing between the law firm of Plaintiff's former counsel, Morgan & Morgan and Dr. Ara Deukmedjian, a neuro surgeon and the owner of the Deuk Spine Institute. State Farm sought the discovery after learning in a separate case that Morgan & Morgan sent about 176 clients to Dr. Deukmedjian for independent medical examinations, and also that during a three year period, Morgan & Morgan paid Deuk Spine approximately $2,955,786.74 for cases in litigation. 5:10-CV-402-OC -37TBS, 2011 WL 5525361 (M.D. Fla. Nov. 14, 2011). State Farm sought discovery from Morgan & Morgan seeking information detailing the relationship between the law firm and Dr. Deukmedjian. At the hearing on Morgan & Morgan's motion for protective order, State Farm argued its belief "that there is a $10 million relationship between Morgan & Morgan and Deuk Spine" and that Deuk Spine "became an active, knowing, interested party with respect to this litigation [.]" The results State Farm received from these discovery requests are not yet known.

Another issue in Crable was State Farm's discovery requests regarding what percentage of the patients had a percutaneous discectomy procedure performed by Dr. Deukmedjian, where Dr. Deukmedjian's testimony claimed he performed that procedure on 5 percent of all patients. The Court agreed with State Farm and ordered Morgan & Morgan to produce: the vendor check history, someone to testify what happened to the information if the vendor check history no longer exists, and the invoices from Deuk Spine to Morgan & Morgan for treatment of the 176 clients already identified by Morgan & Morgan.

The results State Farm received from the discovery requests to Dr. Deukmedjian (Deuk Spine) and Morgan & Morgan are not yet known.

Dr. Deukmedjian's initial deposition occurred on January 13, 2012, and was not completed. Because of the same, the Court, on its own motion, ordered

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Recent Decisions Expanding the Scope of Discovery cont.

that the continuation of Dr. Deukmedjian's deposition be conducted in the courtroom within the month of February, 2012 on the basis that without the Court's direct intervention, the deposition would not be concluded in time for the Court's March trial docket. Ultimately, the case was removed from the Court's March trial docket and Dr. Deukmedjian's deposition was to be completed no later than March 30, 2012. To date, the continuation of Dr. Deukmedjian's deposition has not yet occurred.

On April 17, 2012, the Court issued an order overruling Deuk Spine and Dr. Deukmedjian's Objections to Magistrate Judge Smith's earlier discovery orders. In the April 17, 2012 order, Judge Roy B. Dalton declined to follow Syken v. Elkins, 672 So.2d 517 (Fla. 1996) to limit general financial bias discovery sought for impeachment of a retained expert, which was the same tactic Dr. Katzman tried to use. Instead, the Court applied and adopted the reasoning in Katzman v. Rediron Fabrication, Inc, discussed herein, to the pending matter, but limited its ruling to the pending case and the conduct of the particular witness in Crable only.

The discovery issues in the Crable case are far from concluded, and it is still too early to determine what ultimate effect it may have on a Defendant's ability to seek discovery from Plaintiff's medical experts. It is abundantly clear from the forgoing cases that discovery from Plaintiff's medical experts is a hotly contested issue, and would require a significant expenditure of resources to accomplish. In light of that consideration, we should take a practical approach in our attempts to seek the ethic of reciprocity in discovery.

First, we may choose to adopt some, but not all of the tactics used in Katzman v. Rediron Fabrication, Inc and Melissa Crable v. State Farm Mutual Automobile Insurance Company, in order to limit potential expert discovery costs. In some cases, a more cost effective approach to address the unreasonableness of the bills from well known Plaintiff's medical experts like Dr. Katzman and Dr. Deukmejian could be to hire fee and coding experts to offer opinions on reasonableness of costs. While fee and coding experts can be expensive, their cost in relation to the amount of money spent on the discovery issued above is small in comparison. Ultimately the ethic of reciprocity has not come full swing in favor of Defendants, but it appears some progress is being made. For further information on this topic or assistance with your matters, please contact Kate Kmiec at T: 407.540.9170 or e-mail KKMIEC@**LS-Law**.com.

About Kate Kmiec

Katherine Kmiec

Katherine "Kate" Kmiec, Esq has been practicing law for 10 years. Kate works out of our Orlando office and practices in the areas of labor and employment, professional liability, personal injury, products liability, premises liability, vehicular liability, motor carrier liability, homeowner and condominium owners' association and contract matters. Kate has represented major insurance carriers in uninsured/underinsured motorist claims,, breach of contract actions and several area hotels in slip and fall actions, and numerous businesses and rental car companies in matters involving complex litigation and serious injury in both Federal and State Courts. Recently, Kate's practice has expanded to include civil rights actions brought under 42 U.S.C. 1983 in both employment and police misconduct matters as well as some limited appellate matters.

Prior to joining Luks, Santaniello, Kate served on active duty in the United States Navy's Judge Advocate General's Corps. During her time on active duty, Kate first served as a Military Defense Counsel, representing sailors at administrative hearings and Courts Martial. Kate also served as the Acting Officer in charge of the Naval Legal Service Office, Guantanamo Bay, Cuba, making Kate one of only a handful of lawyers to be a member of the Guantanamo Bar Association. Kate went on to serve as a Special Assistant United States Attorney while she was on active duty, and spent nearly two years prosecuting civilians who committed crimes on Navy Bases. Kate's past service gives her a unique and helpful perspective when the parties involved in our matters are Active Duty or Reserve Service members.

Potential Retroactive Application of F.S. §768.0755 by David Lipkin, Junior Partner


David Lipkin

In April 2010 Florida's new "Slip and Fall" statute, F.S. §768.0755 was signed into law to take effect July 1, 2010. The new law differed from the predecessor statute, F.S. §788.0710 and raised plaintiffs' burden of proof for negligence claims as it pertained to slips and falls alleged to have been caused by "transitory substances" (i.e., banana peels, water or liquid on the floor etc.). Once again, plaintiffs would be required to show that the business owner had actual or constructive knowledge that the substance alleged to have caused the fall was present and failed to take reasonable measures to cure the dangerous condition. 1

The passage of this statute was hailed as good news for business owners although the statute itself was silent on its impact on causes of action which accrued prior to the effective date of the statue. Since Florida's Statute of Limitations for negligence is four years, business owners could potentially be subject to the old statute for all lawsuits arising out of falls prior to July 1, 2010 until July 1, 2014, unless the statute is applied to prior falls.

Without retroactive application, businesses will not realize the full intended effect of this change in the slip and fall burden of proof for almost another two years. However, not all statutes only apply prospectively. Many can, and should, be applied retroactively. This article examines the merits of asserting retroactive application of F.S. §768.0755 and recommends how this should be asserted.

In considering whether this new law should be applied retrospectively, the key inquiry is did §768.0755 create or change substantive law or was it simply a remedial measure? If it is a remedial statute then in fact the prohibition against retroactive application of statutes would not apply and it is in fact proper to apply this statute retroactively. So how do we know if this statute is retroactive? The first inquiry is whether it created or took away vested rights or did it simply remedy or confirm already existing rights. 2

Both plaintiff and defense lawyers are obviously interested in the potential application of this statute. We believe a case can be made that this statute does not impact substantive rights. However there is not universal agreement by the courts on this topic. In arguing in support of retroactive application, the defendant should note that §768.0755(2) states that this statute does not effect any common-law duty of care owed.

Ultimately, all slip and fall cases are nothing more than garden variety negligence claims. Such claims arise out of the common law and are not creatures of statute. In fact, there is no cause of action for violation of either 768.0755 or its predecessor 768.0710. The claim is and always has been one for negligence.

The change in the statute is indeed one of burden of proof and reflects the history of changes in this burden in the common law. Adjusters who have handled such claims for a number of years will likely recall a time when the common law burden of proof without any statutory guidance was as it is now. In other words, plaintiffs needed to show actual or constructive knowledge. Then, in 2001 Florida's Supreme Court *Owens* decision shifted the burden on to business owners to show they exercised reasonable care.

The predecessor statute, §768.0710 partially remedied *Owens* by shifting the burden back to the plaintiff. However, unlike *Owens,* plaintiff only needed to show a failure to exercise reasonable care. Unfortunately, while a lack of knowledge of the transitory substance was a factor to consider, a jury could still find negligence without demonstrating notice by demonstrating the business owner failed to have reasonable safety measures in place. This resulted in the method of operation or "MOO" theory where plaintiff attorneys would create a jury issue without having to show that anyone had any knowledge of the presence of the transitory substance.

By enacting §768.0755 the legislature did not take away or add to the ability of the public to sue for common law negligence arising out of slips and falls.

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Potential Retroactive Application of F.S. §768.0755 cont.

Instead, the legislature simply took the final step in restoring the burden of proof back to what it was before *Owens* and §768.0710. Once again, in order to prevail on a slip and fall negligence claim the plaintiff must prove the business owner had actual or constructive knowledge of the dangerous substance. If plaintiffs can do that and prove the establishment failed to take reasonable measures to correct the dangerous condition, then the common law negligence claim remains.

For the reasons addressed here it is crucial to remind the court that the enactment of this statute merely impacted the burden of proof and not simply state the new statute "bars" the claim. Then the court should be directed towards a large body of law holding a change in the burden of proof is a procedural matter and not a substantive change as it is well established that procedural changes can be applied retroactively.

It is important not to overemphasize the impact of this statutory change when making the argument for retroactive application. Defendants should take care to explain to the court that by seeking application of §768.0755, it is not the intent to narrow or broaden either plaintiff's or defendant's duties and responsibilities as the definition of negligence is unchanged. Rather, the change is to the burden of proof, which is merely the means and methods by which duties and rights are enforced and its purpose was to remedy a situation of unfair exposure to businesses that simply could not have known of the presence of the transitory substance.

As of the date of this Legal Update (i.e., July 2, 2012), there are no appellate opinions in the state of Florida declaring whether or not §768.0755 should be applied retroactively. At the trial level, in the state courts, we are aware of multiple decisions cutting both ways on the topic. Unfortunately for business owners, the federal courts seem to be leaning against retroactive application. There are in fact published opinions from the federal district courts in Florida which are charged with applying Florida laws to such claims. There is again a spilt with a court in the northern district applying the statue retroactively and courts in the middle and southern districts refusing to apply it retroactively, as they consider the notice requirement to be more than an issue of proof but a new element to the claim. [3]

Federal decisions notwithstanding, this is a state law issue and the state's trial courts are not at all obligated to follow the federal courts on this issue. This remains an unresolved issue until there is an appellate level decision from a Florida appellate court. At this time we'd recommend assessing slip and fall cases that concern incidents prior to July 1, 2010, especially those where knowledge of the condition cannot be proven, and see if this argument has already been considered. If not, then consideration should be given to asserting that the new statute applies.

About David Lipkin

David Lipkin

David Lipkin is a Junior Partner with 18 years of liability defense experience. David works out of the Fort Lauderdale office and devotes his practice to general liability, premises liability, professional liability, wrongful death, medical malpractice, health insurance and managed care litigation. David has represented insurers, commercial businesses, shopping malls and centers, restaurants, parking lots, office buildings, hotels, landlords, night clubs and other property owners in matters involving complex litigation and serious injury. David may be reached at T: 954.761.9900 or e-mail DLipkin@**LS-Law**.com.

1. Constructive knowledge may be proven by circumstantial evidence showing that the dangerous condition was present long enough so that the business should have known of it or that the condition occurred with regularity and was therefore foreseeable. §768.0755(1)(a)(b)
2. *Ziccardi v. Strother*, 570 So.2d 1319 (Fla. 2d DCA 1990).
3. *Yates v. Wal-Mart Stores, Inc.*, 2010 WL 4318795 (N.D. Fla. October 27, 2010)(retroactively applies), as opposed to *Kelso v. Big Lots Stores, Inc.* 2010 WL 2889882 (M.D. Fla. July 21, 2010). *Mills v. Target Corp.,* 2010 WL 4646701 (M.D. Fla. Nov. 9, 2010), *Rivera v. Wal-Mart Stores E., L.P.* Case No. 3:10-cv-956-J-20TEM, DE 26 (M.D. Fla. Jan 12, 2011), *Castellanos v. Target Corp.,* 2011 WL 5178334 (S.D. Fla. Oct. 14, 2011)(retroactivity does not apply).

Recent Workers' Compensation Case Law by Rey Alvarez, Managing Attorney

Rey Alvarez

Longley v. Miami Dade County School Board- Statute of Limitations

Take Away: *Statute of Limitations (SOL) does not run if Attorney fees are still pending.*

In Longley v. Miami Dade County School Board, the claimant appealed Judge Kuker's Order denying benefits on the ground that the statute of limitations had run. On February 2, 2012, the First District Court of Appeal (1DCA) reversed Judge Kuker. The facts were undisputed and were pretty straight forward. This is a case that can very easily cause headaches for employer/carriers. It may bring back some old cases.

The claimant filed a petition for benefits on March 30, 2009 requesting an appointment with an orthopedist and attorney fees and costs. The Employer/Carrier set the appointment and the claimant attended same on April 24, 2009.

On July 22, 2009, both parties requested that the July 23, 2009 mediation be cancelled. A letter was sent to the mediator indicating that the issues had been resolved and that there were no other outstanding issues besides attorney fees and costs. The letter went on to read that the JCC retained jurisdiction over the fees and costs.

On March 3, 2010, the claimant filed another petition requesting an alternate orthopedist or a follow up visit with Dr. Hyde and attorney fees and costs. The Employer/Carrier responded that the entire claim was barred by the Statute of Limitations.

The JCC agreed that the statute of limitations had run because the 2009 petition was no longer pending because of the 2009 letter that was sent to the mediator indicating a resolution of the issues. The JCC opined that the 2009 letter operated as a voluntary dismissal of the 2009 petition.

The 1DCA did not see the case the way that Judge Kuker did. The 1DCA opined that the March 3, 2010 was not barred by the statute of limitations because "the parties had not settled the active claims for entitlement to attorney's fees and costs brought by the 2009 petition." The 1DCA further opined that since the fee issue was not resolved, the 2009 petition was really still pending. The Employer/Carrier argued that there was no deadline for a claimant to pursue his or her fees. However, the 1DCA did not buy that argument.

The distinguishable part in this case is that in Longley, there was a mutual agreement between the parties that the attorney fee issue remained open. The claimant and the employer/carrier both signed the letter that was sent to the mediator.

In this new world of attorney fees, a lot of petitions are finalized that way. We recommend that any open fee issues be addressed sooner rather than later. Filing a motion to force the claimant to address fee entitlement may be needed. The question becomes, if a judge will not entertain a fee motion until 1 year or so after the last payment of indemnity and/or a medical appointment, will there be a three year statute of limitations period or even longer?

We believe this is a bad decision that just does not work in the current Workers' Compensation system The Employer/Carrier can not stop the claimant from dismissing his petition and reserving on fees. As a result, the employer/carrier can be held responsible for continuing treatment post SOL. This is just another case in a long string of cases that is slowly deteriorating the statute of limitations defense**.**

Williams v. City of Orlando – Firefighter Presumption

Take Away: *Essential hypertension is to be included in the list of conditions outlined in F.S. 112.18.*

This June 13, 2012 1DCA reversed Judge Condry Judge of Compensation Claims (JCC) decision that denied compensability of the claimant's hypertension on the ground that she failed to establish eligibility to rely on the statutory presumption occupational causation available to law enforcement personnel via section 112.18. Read More . . . P. 7

Recent Workers' Compensation Case Law cont.


Rey Alvarez

The claimant had met three of the four requirements of section 112.18:

1. She was a police officer;
2. Her condition resulted in disability;
3. She successfully passed a physical examination upon entering into service.

The JCC found that the claimant's essential hypertension did not meet the 4th requirement which indicates that the condition itself be one of those listed in section 112.18: "tuberculosis, heart disease, or hypertension. The claimant was diagnosed with essential hypertension. She introduced unrefuted medical opinion testimony that essential hypertension was the same thing and the same condition as arterial hypertension.

In Bivens v. City of Lakeland, 993 So. 2d 1100 (Fla. 1st DCA 2008) (citing City of Miami v. Thomas, 657 So. 2d 927 (Fla. 1st DCA 1995)), the 1DCA had previously held that the 112.18 hypertension must be "arterial or cardiovascular."

Risco v. Alexander—Settlements

Take Away*: Claimant waives all rights to any and all benefits by entering into a settlement agreement releasing the Employer/Carrier from liability for Workers' Compensation benefits in exchange for a lump-sum payment to the claimant.*

The First District Court of Appeal reversed Judge Terlizzese's JCC decision that the claimant had not settled his Workers' Compensation claim. While represented, the claimant's signed an "Exit Interview & Separation of Employment Agreement". After signing the release, the claimant filed a petition for benefits. The plain language of the release indicates it applied to claimant's employment relationship with the employer, it was not necessary for the agreement to be submitted to the JCC for it to be a settlement of claimant's Workers' Compensation case.

Pursuant to section 440.20(11)(c), a represented "claimant may waive all rights to any and all benefits under this chapter by entering into a settlement agreement releasing the Employer/Carrier from liability for Workers' Compensation benefits in exchange for a lump-sum payment to the claimant."

Stewart v. Lakeland Funeral—Going and Coming Rule

Take Away: *If simply going to work, travel is deemed personal. If there is not business purpose to the travel, the dual purpose exception does not apply.*

This May 1, 2012 1DCA opinion affirmed Judge Lorenzen's JCC order. The claimant appealed a final denying compensability of injuries he sustained while driving from his residence to work. 440.092(2) provides that an injury suffered while going to or coming from work does not arise out of or occur in the course of employment, and because neither the special errand nor dual purpose exceptions apply, the 1 DCA held that the JCC correctly denied claimant's petition for benefits.

On June 10, 2010, the claimant was scheduled to be off from work, but had to attend a memorial service for a client that evening. Although the funeral home had staff to load the equipment needed for the service, claimant, who normally would have gone directly to the service site, chose instead to go to the funeral home to load the equipment himself, before proceeding to the memorial service. On his way to the funeral home, he lost control of his motorcycle, fell, and was injured.

The "going and coming" rule, section 440.092(2) provides: An injury suffered while going to or coming from work is not an injury arising out of and in the course of employment whether or not the employer provided transportation if such means of transportation was available for the exclusive personal use by the employee, unless the employee was engaged in a special errand or mission for the

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employer. The question was whether the claimant's ride to the funeral home fell under the going and coming rule. The claimant acknowledges that under the rule, an injury suffered during travel to or from work is not compensable.

He asserts that the rule is inapplicable in his case, however, because on June 10, 2010, he was not regularly scheduled to work and the purpose of the trip that day was to attend a funeral service, as required by his employer. Consequently, he argues, his ride to the funeral home either constituted a "special errand" or was for a "dual purpose and under those exceptions to the going and coming rule, he argues, his injury is compensable.

The special errand exception includes employees who, at the time of injury, were on a special errand in response to a call from their employers, and is usually characterized by irregularity and suddenness." The claimant's need to attend the memorial service was neither irregular nor sudden. Rather, being present at such services was a regular part of his job responsibilities. The facts do not show that the employer asked claimant at the last minute to attend the service or to go to the funeral home for some purpose. Thus, the special errand exception does not apply.

Under the dual purpose doctrine, "an injury which occurs as a result of a trip, a concurrent cause of which was a business purpose, is within the course and scope of employment, even if the trip also served a personal purpose, such as going to and coming from work." The sole purpose of claimant's travel at the time of the accident was to go to work; regardless of whether he was required to go to the funeral home before heading to the service that day, he had not yet undertaken any business of the employer at the time of the accident. Because claimant was simply going to work—travel deemed personal by section 440.092 (2)—there was no business purpose to his travel. Thus, the dual purpose exception does not apply.

Miami-Dade County School Board v. Russ – Statute of Limitations (SOL)

Take Away*: SOL—In order for an action to be an initial response, it has to explicitly state a position either denying or conceding the particular claims therein.*

This May 29, 2012 1DCA decision reverses Judge Hill's JCC decision. The claimant filed a Petition for Benefits (PFB) and the JCC determined that the "initial response" was the November documents prepared by the EC (notice of appearance, request for production, letter of representation, notice of deposition, and letter to the mediator) the JCC concluded that because the Employer/Carrier did not assert an Statute of Limitations (SOL) defense, the Employer/Carrier had waived that defense. The Employer/Carrier argued that its initial response to the Petition for Benefits was filed on November 10, 2009.

Based on the case of Certain v. Big Johnson Concrete Pumping, Inc., 34 So. 3d 149 (Fla. 1st DCA 2010), the 1DCA ruled that that the "initial response" has to explicitly state a position either denying or conceding the particular claims therein.

Falcon Farms v. Espinoza – One Time Change

Take Away: *440.13 requires that the injury be a "work-related injury" in order to qualify for a one time change.*

This February 23, 2012 1DCA decision affirmed in part and reversed in part Judge Hill's JCC decision.

The issue at the JCC trial was a change in primary care physician. The JCC awarded the change of physician but also denied compensability of the accident. Both parties appealed. The E/C argued that the claimant was not entitled to a change of physician because her condition was non-occupational. The claimant cross-appealed arguing that the JCC's finding of non compensability is legally

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inconsistent with the award of a change of physician. The 1DCA addressed the cross-appeal first. The 1DCA affirmed the JCC's decision denying compensability of the accident. The 1DCA indicated that the claimant did not show that the JCC erred in ruling the accident not compensable.

"The sole basis of claimant's challenge on compensability is that the order is incongruous with the award of a change of physician. Claimant did not present this argument to the JCC – not even on rehearing, once the basis of the JCC's ruling was clear; therefore, claimant did not preserve such an error for appellate review". The 1DCA then addressed the Employer/Carrier's argument. The 1DCA indicated that since the accident was not compensable, the Employer/Carrier's argument on appeal has merit.

The 1DCA utilized section 440.13(2)(f) as the basis for their decision and indicated that the plain language of the statute reads it "requires the injury to be a "work-related injury." The JCC found the claimant presented no "persuasive medical evidence" that an injury arose out of employment, and claimant did not challenge that finding. The 1DCA reversed the JCC decision as it relates to awarding a change of physician.

Perry v. Ecolab—Penalities

Take Away: *20% to be paid if compensation is not within 7 day of becoming due.*

This January 13, 2012 1DCA decision overturned Judge Murphy's JCC Decision. The 1DCA ruled that section 440.20(7) controls the payment of penalties and requires that a 20% penalty be paid if the compensation is not paid within seven days after the order is signed as opposed to after order becomes final.

Workers' Compensation Case Law Blog Site

http://floridaworkerscomp.blogspot.com

Rey Alvarez

Follow **Rey Alvarez**, Managing Attorney and his discussion of current Workers' Compensation case law and important decisions at his WC blog site. Visitors may view cases by the judge or the topic. A copy of the First District Court of Appeal (1DCA) opinion is a click away on the site. For local and national Workers' Compensation news, follow Rey Alvarez on twitter @reyalvarez.

The firm's Medicare Compliance Practice under Rey Alvarez offers nationwide services for Medicare Set-Asides, Medicare Conditional Lien Negotiation and Medicare Reporting. Rey has more than a decade of experience in preparing Medical Cost Projections, Medicare Set-Asides and Conditional Payment Lien negotiations with CMS. Rey co-authored a White Paper on Medicare Reporting that was published in the Trial Advocate Quarterly (i.e., Volume 30, Number 4, Fall 2011). Rey's article on "Reducing the Cost of Funding a Medicare Set-Aside" was published in the Florida Bar Workers' Compensation Section 'News & 440 Report' (Summer 2011). He is a member of the Florida Defense Lawyer's Association (FDLA) and Claims & Litigation Management Alliance (CLM). Rey works out of the Miami office located on 150 West Flagler Street. For assistance with future medical cost projections, evaluation and reduction of conditional payments or settlement value and exposure and non-covered allocations (non-Medicare covered medical services and treatments), please contact Rey Alvarez at T: 305.377.9900 ext. 306 or e-mail RAlvarez@**LS-Law**.com.

Verdicts and Summary Judgments

Orlando Office

Paul S. Jones, Managing Partner, Orlando and Thomas Walker Farrell, Junior Partner, Orlando obtained an excellent verdict in a wrongful death case (Pedestrian Hit) styled Katherine Weng and Anthony Medina, as Co-Personal Representatives of the Estate of Leslie L. Rojas versus Top Rank Trucking of Kissimmee, Inc. and Archie Richard Hines in Osceola County, Florida on June 15, 2012. This case involved a wrongful death claim made by the statutory survivors of Leslie L. Rojas, her three minor children. Ms. Rojas died on December 1, 2009 from and accident where she was run over by a Peterbilt tractor driven by Archie Hines. Ms. Rojas, at the time of her death was 32 years of age and her three children were 12, 9, and 2 years old. Ms. Rojas was a pedestrian, lawfully within the marked crosswalk and had the right-of-way pursuant to the crosswalk signal governing the traffic of the subject intersection.

After the impact from the truck, which occurred when she had walked approximately 30 feet into the crosswalk, she slid underneath the tractor and was dragged approximately 25 to 30 feet from the initial point of impact. Ms. Rojas succumbed to her injuries approximately one hour after the accident occurred. Archie Hines never saw Ms. Rojas prior to the impact. The jury found Mr. Hines to be 30% negligent and Ms. Rojas to be 70% negligent. The Defense presented evidence that Ms. Rojas was on the phone when she entered the crosswalk, failed to look for vehicles and a sign told pedestrians to watch for turning vehicles. Ms. Rojas' survivors were awarded a gross verdict of $1,841,956. The net verdict after accounting for comparative negligence is **$552,586.80.** Plaintiff's attorney requested approximately **$22.5 million** in damages during closing argument.

Palm Beach Office

Daniel J. Santaniello, Managing Partner and Marc Greenberg, Junior Partner of the Palm Beach office of Luks, Santaniello, Petrillo & Jones obtained a defense verdict in a premises liability dog bite case styled Dina Brown, et al. v. Pipers Cay Condominium Association, Inc., et al in Palm Beach County, April 2, 2012. The case involved a minor Plaintiff who was bit by a pit bull on the insured's property in November of 2007. The Association Prospectus prohibited pit bulls from being on the premises at anytime. From the onset of the case the Defense denied liability by maintaining that the Insured had no knowledge of the pit bull, and therefore did not have a legal duty to remove it from the premises. Ultimately, the minor Plaintiff was injured within the common elements and sustained two 5 inch scars to his left leg and 1 scar on his left hand. The Plaintiff's Pre-Trial demand was **$525,000**. The jury found no negligence that was the legal cause of the Plaintiff's damages. The Court also granted a Directed Verdict as to the Consortium Plaintiff's claims. The motion for attorney's fees and costs is currently pending.

Appellate Division South

Alison Marshall, Esq., of Luks, Santaniello, Petrillo & Jones obtained a dismissal of a complaint affirmed by the Fourth District Court of Appeal in a case styled Coverall Concept Insurance Agency v. Cristiano Electric. This case arose out of an earlier case styled National Medical Health Card v. Sharp General Contractor and Cristiano Electric. National Medical hired Sharp as a general contractor who in turn hired our insured client Cristiano Electric to perform electrical work. While performing electrical work, an electric panel caught fire and the National Medical warehouse (pharmaceutical sales) was destroyed. National Medical's insurer, Lexington subrogated against Sharp and Cristiano and all parties settled, including Sharp's cross-claim against Cristiano and with full releases. The case was closed. Several years later, Sharp sued its insurer and insurance agent Coverall as Sharp was denied coverage for the National Medical case. Sharp won a judgment against Coverall. While Coverall appealed that case, it filed a lawsuit against our insured client, Cristiano, alleging that Cristiano was the Tortfeasor and responsible for Coverall's judgment owed to Sharp. We obtained a dismissal of complaint based on the fact that Sharp had released Cristiano and Coverall was essentially standing in the shoes of Sharp to recover against Cristiano. The 4th DCA agreed and affirmed the dismissal by mandate on May 25, 2012.