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Workers Compensation Law

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Workers Compensation Law: 1993 Survey of Florida Law*

Ellen Fell Baig**

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I. INTRODUCTION

Workers compensation law is a statutory replacement for tort remedies between employer and employee.[1] In exchange for the protection of an exclusive remedy,[2] employers agree to provide benefits to workers injured during the course and scope of their employment.[3] State statute determines whether an employer's liability must be covered by insurance, who is covered under the definition of employee, the benefits to be awarded, the mechanism for administrative review, and other elements necessary to the implementation of the workers compensation system.[4] When an employer's liability under workers compensation law may or must be covered by insurance,[5] the insurance contract must be filed with and approved by the State.[6] At present, forty-two states and the District of Columbia utilize a standard Workers Compensation and Employers Liability Insurance Policy ("WCELIP").[7]

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1. ARTHUR LARSON, THE LAW OF WORKMEN'S COMPENSATION, §§ 1.00-1.20 (1993).

2. *See* Cartier v. Florida Power & Light Co., 594 So. 2d 755, 756 (Fla. 3d Dist. Ct. App.), *review denied*, 602 So. 2d 941 (Fla. 1992). In *Cartier*, the court held that a provision of workers compensation insurance, in this case self-insurance on behalf of an independent contractor, provided the employer with the exclusive remedy of workers compensation law and precluded a tort action against the employer by the injured employee. *See id.*

3. *See id.*

4. In Florida, workers compensation law is governed by chapter 440 of the Florida Statutes.

5. FLA. STAT. § 440.10 (1991).

6. *Id.* § 627.410. In most states, filing of workers compensation policy forms and endorsements is made by a rating or advisory organization on behalf of its members and subscribers. The National Council on Compensation Insurance ("NCCI") acts as such an organization in thirty-one states and the District of Columbia. Thirteen states have independent rating bureaus which make filings on behalf of their members and subscribers, and six states plus Puerto Rico and the United States Virgin Islands provide workers compensation insurance through monopolistic funds.

7. In its capacity as a licensed rating or advisory organization, NCCI filed a revised WCELIP to become effective April 1, 1992. Florida, and 29 other states in which NCCI files policy forms on behalf of its members and subscribers, approved the revised WCELIP. As of this writing, only one state in which NCCI is the rating or advisory organization has not approved the 1992 policy revision.

Florida law provides that jurisdiction for appeals of decisions of the Judges of Compensation Claims is vested in the First District Court of Appeal.[8] This paper will examine the workers compensation decisions of the First District Court of Appeal issued between January 1992 and October 1993 within the framework of the WCELIP.

The standard WCELIP contains a General Section followed by six parts:[9] Part One (Workers Compensation Insurance) provides statutory Workers Compensation Coverage; Part Two (Employers Liability Insurance) provides coverage to employers which is not governed by statute; Part Three (Other States Insurance) provides the ability to elect coverage in states in which the employer may have temporary and incidental exposure; Part Four (Your Duties If Injury Occurs) outlines the insured's duties in the event of injury; Part Five (Premium) contains the premium provisions; and Part Six (Conditions) contains the policy conditions not shown elsewhere in the policy.[10] Also included as part of the policy are the Information Page and endorsements selected by the insured to exclude or provide specialized coverages.[11]

II. GENERAL SECTION

A. *The Policy (General Section A)*

> This policy includes at its effective date the Information Page and all endorsements and schedules listed there. It is a contract of insurance between you (the employer named in Item 1 of the Information Page) and us (the insurer named on the Information Page). The only agreements relating to this insurance are stated in this policy. The terms of this policy may not be changed or waived except by endorsement issued by us to be part of this policy.[12]

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8. FLA. STAT. § 440.271 (1991).

9. THE NATIONAL COUNCIL ON COMPENSATION INSURANCE, THE GUIDE TO THE WORKERS COMPENSATION AND EMPLOYERS LIABILITY POLICY (1992) [hereinafter GUIDE]; *see also* FLA. STAT. § 627.413 (1991).

10. GUIDE, *supra* note 9, at 5-23.

11. *Id.* at 24. The WCELIP is a contract for the provision of insurance. The endorsements attached to the policy serve as addenda which modify the basic insuring contract.

12. THE NATIONAL COUNCIL ON COMPENSATION INSURANCE, WORKERS COMPENSATION AND EMPLOYERS LIABILITY INSURANCE POLICY—WC 00 00 00 (effective April 1, 1984) [hereinafter POLICY]. The revised WCELIP—WC 00 00 00 A became effective April 1, 1992 and is not the insuring contract for the cases interpreted by the First District Court of Appeal

The Information Page of a WCELIP contains the data that determines who is insured,[13] for what liability, in what states, and for what premium. General Section A serves to incorporate the data on the Information Page into the WCELIP. Material misrepresentation of data regarding workers compensation applications, claims, and premium calculation is grounds in some jurisdictions for recision of the policy[14] and/or for civil or criminal liability.[15] Almost every jurisdiction allows for recalculation of the premium to meet the actual employer data that should have been reported.[16] While litigation frequently occurs over the calculation of the premium and the conditions of coverage, this paper deals with issues between the employer/carrier and the employee, and generally refrains from discussing issues between the employer and the carrier under state insurance laws.

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during the time period covered by this paper.

13. The WCELIP names the insured as the business entity insuring its employees. GUIDE, *supra* note 9, at 2. Individual officers of the company are not covered when acting in their personal capacity. *Id.* In Florida, however, a civil suit may be filed against corporate officers upon a showing of gross negligence. FLA. STAT. § 440.10(1) (1991). If found guilty of gross negligence, the WCELIP does not provide coverage or a defense for these officers. In Langton v. De Cenzo, 592 So. 2d 318, 319 (Fla. 3d Dist. Ct. App. 1991), the court determined that the claimant's estate had not established that the corporate officers were guilty of gross negligence, and thus limited the claimant's estate to a workers compensation remedy.

14. Recision is an extreme penalty that renders the policy voidable. *See* N.M. STAT. ANN. § 59A-18-11 (Michie 1993),

15. *See, e.g.*, CAL. INS. CODE §§ 11760, 11880 (Deering 1993) (civil penalty of not less than $2,000 and not more than $5,000, plus an assessment of not more than three times the amount of the medical treatment expenses paid for the willful misrepresentation of facts in order to obtain compensation insurance, and for knowingly making false or fraudulent oral or written statements in support of a claim for compensation); CONN. GEN. STAT. § 31-290c (1992) (establishes penalties for the fraudulent claim or receipt of benefits); FLA. STAT. § 440.37 (Supp. 1992) (provides penalties for fraudulent activities and misrepresentation); 1993 LA. ACTS 828 (stipulates that the willful misrepresentation by an employer to an employee regarding compensation insurance shall be punishable by imprisonment of no less than one year and not more than 10, or a fine of not more than $10,000 or both); MD. CODE ANN. § 10-141 (1993) (stipulates that a person, who knowingly received benefits not entitled to them, repay the full amount plus interest at a rate of 1.5 percent per month from the date the commission notifies the individual); OR. REV. STAT. § 656.758 (1991) (provides civil penalties for misrepresentation, and failure or refusal to keep employment data).

16. *See, e.g.*, COLO. REV. STAT. § 8-45-114 (Supp. 1993), which allows recalculation of premium for misrepresentation. Most other jurisdictions allow recalculation of the premium in even years after the policy effective period. This is accomplished by means of a policy provision which permits the final premium to be determined by an audit after the expiration of the WCELIP. *See* discussion *infra* at note 463 and accompanying text.

The Information Page identifies the employer during a policy term, and thus determines which employer is responsible for payment of claims found to be compensable under the policy. In *Devilling v. Rimes, Inc.*,[17] the plaintiff appealed a decision of the Judge of Compensation Claims ("JCC"), which held that injuries suffered by the claimant, though compensable, had occurred while the plaintiff was in the employ of a business other than Rimes, Inc.[18] The JCC held that Rimes, Inc. and its insurance carrier were not liable for treatment of the original job-related injury.[19] The claimant's injury did not occur within the course and scope of employment with Rimes, Inc. and the court determined that the request for benefits from Rimes, Inc. was a means by which the claimant could avoid the two-year statute of limitations for making a claim under the workers compensation statute of Florida.[20] The court examined the medical care provided to the claimant and held that not all medically recommended care is the type of treatment that would extend the statute of limitations.[21]

The Information Page also determines the policy period for which the insurer is responsible. In *Marriott Hotel v. Restrepo*,[22] the court examined carrier responsibility for a compensable injury and determined that further findings of fact were necessary to determine whether the claimant had reached maximum medical improvement ("MMI") following the third incident in a series of three separate industrial accidents.[23] Only after the determination of MMI was made for the third accident, would the JCC be able to decide the benefits to be paid by the carrier of record as of the date of each accident.[24]

By defining the insured, the insurer and the policy period to be covered, the Information Page serves to clarify the party responsible for the payments to injured workers. In *Entenmann's Bakery v. Nunez*,[25] the court examined which WCELIP was required to respond to an injured claimant. The appellants in *Nunez* were the insurance carriers who provided coverage for Entenmann's Bakery during different policy periods.[26] The court's

17. 591 So. 2d 304 (Fla. 1st Dist. Ct. App. 1991).

18. *Id.* at 305.

19. *Id.*

20. *Id.*

21. *Id.*

22. 603 So. 2d 674, 676 (Fla. 1st Dist. Ct. App. 1992).

23. Maximum medical improvement is the threshold that must be reached to determine the degree of compensation due an employee. *Id.*

24. *Id.*

25. 592 So. 2d 1158 (Fla. 1st Dist. Ct. App. 1992).

26. *See id.*

determination was based upon consideration of the policy period in relation to the type and timing of compensable injuries sustained by the claimant.[27] *Nunez* demonstrates the underlying concern for the needs of the injured worker by providing benefits to the injured worker while placing the burden on carriers to demonstrate who is responsible for payments under the workers compensation law.[28]

Florida's workers compensation law permits the apportionment of responsibility for payment of claims for multiple accidents among carriers who insured the employer for different policy periods.[29] The allocation of responsibility between carriers is based upon the extent to which each accident contributed to the claimant's need for medical care and disability benefits.[30] In the event subsequent injuries are determined to be the direct and natural result of the original industrial injury, the carrier of record at the time of the original injury will be held responsible for the payment of benefits to the claimant.[31]

Apportionment may also be based upon the existence of a preexisting, nondisabling, and asymptomatic condition. In *Tejada v. Collection Chevrolet, Inc.*,[32] the court noted that "when a preexisting condition is not producing any disability at the time of the compensable accident, only that portion of the claimant's current *disability* that is attributable to the *normal progress of the preexisting disease* and thus would have occurred without the aggravating accident may be apportioned."[33] The court observed that there was no evidence in the record to support a finding that the claimant would have suffered a disability based on the preexisting condition, independent of the compensable heart attack which formed the basis of claimant's request for benefits.[34] The court, therefore, concluded that apportionment was not appropriate in this case and that compensability for the entire claim was to be borne by the carrier of record at the time of the heart attack.[35]

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27. *Id.* at 1161.

28. Florida workers compensation law allows for the application of apportionment principles as prescribed by statute.

29. FLA. STAT. § 440.42(3) (1991).

30. CNA Ins. Co. v. Kemper Ins. Co., 596 So. 2d 81, 83 (Fla. 1st Dist. Ct. App. 1992).

31. *Id.*

32. 594 So. 2d 340 (Fla. 1st Dist. Ct. App. 1992).

33. *Id.* at 341 (citing Evans v. Florida Indus. Comm'n, 196 So. 2d 748 (Fla. 1967)).

34. *Id.*

35. *See id.*; *see also* Wood & Wood v. Dort, 18 Fla. L. Weekly D2090 (Fla. 1st Dist. Ct. App. Sept. 17, 1993); Custom Architectural Metals v. Bradshaw, 623 So. 2d 804 (Fla. 1st Dist Ct. App. 1993); Hyster Co. v. David, 612 So. 2d 678 (Fla. 1st Dist. Ct. App. 1993).

B. *Who Is Insured (General Section B)*

> You are insured if you are an employer named in Item 1 of the Information Page. If that employer is a partnership, and if you are one of its partners, you are insured, but only in your capacity as an employer of the partnership's employees.[36]

The employer named on the Information Page is the insured entitled to payment to its employees of benefits under the workers compensation law of Florida should an injury by accident or by disease occur within the course and scope of employment.[37] The insured is identified by its entity status, and payment of claims is premised on employment by the entity named in Item 1 of the Information Page.[38] Multiple business entities may be insured under the same policy provided they are under common majority ownership.[39]

Florida amendments to the workers compensation law have established a class of employer known as "statutory employer."[40] Statutory employer status was denied to a condominium association that entered into a contract with a professional company to perform certain management and maintenance duties.[41] The court noted:

> The concept of statutory employer, for worker's [sic] compensation purposes, is that a contractor who sublets all or any part of its contract work is the employer not only of its own employees but also of the employees of any subcontractor to whom all or any part of the principal contract has been sublet. It is absolutely basic, therefore, that one cannot be a "contractor" (and thus a statutory employer) within the meaning of this statute unless the "contractor" has a contractual obligation, a portion of which is sublet to another.[42]

Since the condominium association could not demonstrate a contractual obligation that was sublet to another, statutory employer status was denied to the condominium association.[43]

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36. POLICY, *supra* note 12.
37. *See generally* FLA. STAT. ch. 440 (1991).
38. *See* GUIDE, *supra* note 9, at 24.
39. *Id.* at 3.
40. FLA. STAT. § 440.10(1)(b) (1991).
41. Woods v. Carpet Restorations, Inc., 611 So. 2d 1303 (Fla. 4th Dist. Ct. App. 1992).
42. *Id.* at 1304 (citing Jones v. Florida Power Corp., 72 So. 2d 285 (Fla. 1954)).
43. *Id.* at 1304-05. *See also* Marco Polo Hotel v. Popielarczyk, 622 So. 2d 104 (Fla. 3d Dist. Ct. App. 1993); Miami Herald Publishing Co. v. Hatch, 617 So. 2d 380 (Fla. 1st

Florida workers compensation law allows corporate officers to exempt themselves out of the workers compensation law.[44] Corporate officers who elect this exemption are not entitled to benefits should they suffer an occupational injury or disease. In *Weber v. Dobbins*,[45] the Supreme Court of Florida affirmed that a corporate officer who makes such an election does not forfeit the right to exclusive remedy protection.[46] The court decision came in response to a question certified by the First District Court of Appeal.[47] The question affirmed was:

> DO THE IMMUNITIES PROVIDED BY SECTION 440.11, FLORIDA STATUTES (1983), EXTEND TO A CORPORATE OFFICER WHO ELECTS, PURSUANT TO SECTION 440.05, TO EXEMPT HIMSELF FROM COVERAGE UNDER THE PROVISIONS OF CHAPTER 440?[48]

The Supreme Court of Florida upheld the intent of the WCELIP to provide insurance for the employees of the named insured, even when that named insured is not entitled to workers compensation benefits.[49]

1. Exclusive Remedy

Employer status and compliance with the workers compensation law of a state provides the employer with immunity from civil suit.[50] An employer may be subject to civil liability if an act of gross negligence led to the injury.[51] The 1988 amendments to the Florida Workers Compensation Act expanded the concept of statutory employee while raising the level of intent from gross negligence to culpable negligence.[52] The constitutionality of the level of intent required to impose immunity is discussed later in this article.[53] The expansion of the statutory employer definition is examined first.

Dist. Ct. App. 1993).

44. FLA. STAT. § 440.05 (1991).
45. 616 So. 2d 956 (Fla. 1993).
46. *Id.* at 957.
47. Dobbins v. Weber, 585 So. 2d 1143, 1145 (Fla. 4th Dist. Ct. App. 1991).
48. *Weber*, 616 So. 2d at 957.
49. *Id.*
50. *See* LARSON, *supra* note 1, § 65.11.
51. FLA. STAT. § 440.11(1) (1991).
52. *See* FLA. STAT. § 440.11(1) (Supp. 1988).
53. *See* discussion *infra* note 56 and accompanying text.

In *Madaffer v. Managed Logistics Systems, Inc.*,[54] the court determined that a genuine issue of material fact existed as to whether the defendant/appellee, Managed Logistics Systems, Inc. ("MLS"), committed an intentional tort, thereby removing the applicability of the exclusive remedy of workers compensation.[55] The court also noted that due to the 1988 law change,[56] which might offer exclusive remedy protection to managers and policy makers of MLS, the issue of whether the individual appellees held those types of positions would need to be addressed on remand.[57] The determination of the court demonstrates the tension between the statutes governing workers compensation and the policy contract providing insurance coverage for liability under such statutes. The policy intent is to cover the named insured within the scope of its entity status as delineated on the Information Page. The 1988 Florida law change provides:

> The same immunity provisions enjoyed by an employer shall also apply to any sole proprietor, partner, corporate officer or director, supervisor, or other person who in the course and scope of his duties acts in a managerial or policy-making capacity and the conduct which caused the alleged injury arose within the course and scope of said managerial or policy-making duties and was not a violation of a law, whether or not a violation was charged, for which the maximum penalty which may be imposed exceeds 60 days imprisonment as set forth in s. 775.082.[58]

Thus, it is possible that the intent of the policy will be overridden by state law if that section of the statute, which expands the immunity from suit for individuals who are identified by the statute, passes constitutional muster without the culpable negligence provisions. Such an expansion of immunity would limit the recovery of injured workers to the remedy available under workers compensation law even when the injury is the result of the actions of individuals who are not named insureds under the policy.

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54. 601 So. 2d 1328 (Fla. 2d Dist. Ct. App. 1992).

55. *Id.* at 1329.

56. The constitutionality of the 1988 law change was challenged in Shova v. Eller, 606 So. 2d 400 (Fla. 2d Dist. Ct. App. 1992), on the basis that it raised the degree of negligence required to maintain a civil tort action against a co-employee in a supervisory/managerial position from gross negligence to culpable negligence. The law change was deemed unconstitutional because it limited an injured employee's access to the courts. An appeal to the Supreme Court of Florida is expected.

57. *Madaffer*, 601 So. 2d at 1329.

58. FLA. STAT. § 440.11(1) (Supp. 1988).

Statutory immunity can be extended to subcontractors when the contractor sublets part or all of his contract work to a subcontractor or subcontractors.[59] Under such a circumstance,

> all of the employees of such contractor and subcontractor or subcontractors engaged on such contract work shall be deemed to be employed in one and the same business or establishment; and the contractor shall be liable for, and shall secure, the payment of compensation to all such employees, except to employees of a subcontractor who has secured such payment.[60]

In *Walker v. United Steel Works, Inc.*,[61] the court applied this provision to preclude a civil remedy to Walker against the subcontractor by whom he was employed at the time of injury. Walker's claim was found to lie within the exclusive remedy provisions of the workers compensation law.[62]

Similarly, the employee of a subcontractor was found to be limited to the exclusive remedy of workers compensation where the workers compensation coverage of the subcontractor immunized the contractor.[63] Absent a showing that the contractor's conduct was so outrageous as to be considered an intentional tort, the claimant was limited to a workers compensation remedy.[64]

Where a worker was injured while installing a door in a motel which remained open to the public during renovations, the court determined that the motel owner was not a "contractor" or "employer" and that the injured worker was not an employee.[65] The motel owner was not statutorily required to provide workers compensation insurance and, therefore, was not entitled to the exclusive remedy of workers compensation.[66] The court determined that the motel owner owed an independent duty of care to persons legitimately on the premises to maintain the premises in a reasonably safe condition.[67]

The exclusive remedy was found to provide immunity where an employee was killed, during an armed robbery, while employed as a security

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59. FLA. STAT. § 440.10(6) (1991).
60. *Id.*
61. 606 So. 2d 1243, 1244 (Fla. 2d Dist. Ct. App. 1992).
62. *Id.*
63. Mathews Corp. v. Peters, 610 So. 2d 111 (Fla. 3d Dist. Ct. App. 1992).
64. *Id.*
65. Hogan v. Deerfield 21 Corp., 605 So. 2d 979, 982 (Fla. 4th Dist. Ct. App. 1992).
66. *Id.*
67. *Id.* at 983.

guard.[68] The court reviewed allegations of intentional tort on the part of the employer and determined that the employee must show a deliberate intent to injure or to engage in conduct that is substantially certain to result in injury or death before the exclusive remedy shield can be broken.[69] When, as here, the exclusive remedy of workers compensation is upheld and narrowly construed, the intent of workers compensation law is accurately and fairly interpreted to the benefit of all parties. When the exclusive remedy doctrine is eroded, the workers compensation system fails and employers are exposed to liability, which was not intended by the no-fault workers compensation system. The decisions of Florida courts have served to support the exclusive remedy doctrine while acknowledging the erosion granted by the Legislature.[70]

While the decisions of the Supreme Court of Florida have generally supported the exclusive remedy doctrine, the court found that the exclusive remedy did not apply in *Commercial Coatings of Northwest Florida, Inc. v. Pensacola Concrete Construction Co.*[71] However, the court limited its findings to the unique facts of the case.[72] The injured worker had been awarded workers compensation benefits and then filed a suit in tort against the company which had loaned his employer a dangerous instrumentality.[73] The employee was awarded damages against the third party tortfeasor which then sought indemnification from the employer.[74] The court noted that the question before it was whether the contractor whose employees used the instrumentality negligently should pay the judgment, or whether the non-negligent owner of the instrumentality should pay.[75] The court held the negligent employer liable for indemnification due to principles of equity and common law, but noted that under workers compensation principles the

68. Folk v. Rite Aid of Florida, Inc., 611 So. 2d 35, 36-37 (Fla. 4th Dist. Ct. App. 1992).

69. *Id.* at 37 (citing Fisher v. Shenandoah Gen. Constr. Co., 498 So. 2d 882, 883 (Fla. 1986)). Relying on its decision in *Folk*, the court affirmed an intentional tort exception to the exclusive remedy doctrine in Power Plant Maintenance Co. v. Gardner, 617 So. 2d 462 (Fla. 4th Dist. Ct. App. 1993) and Florida Power & Light Co. v. Gardner, 617 So. 2d 463 (Fla. 4th Dist. Ct. App. 1993).

70. *See* discussion *supra* notes 50-58 and accompanying text.

71. 616 So. 2d 960 (Fla. 1993).

72. *Id.* at 963.

73. *Id.* at 960.

74. *Id.* at 961; *see* Pensacola Concrete Constr. Co. v. Commercial Coatings of N.W. Fla., Inc., 595 So. 2d 145, 146 (Fla. 1st Dist. Ct. App. 1992), *approved*, 616 So. 2d 960 (Fla. 1993).

75. *Commercial Coatings*, 616 So. 2d at 963.

employer should not have been subject to both judgments.[76] The unusual facts in this case and the language of the decision should limit the applicability of this decision and should not represent a threat to the exclusive remedy doctrine in Florida.

There are times when a claimant will seek to avoid the exclusive remedy in order to proceed with a suit against the corporate officers. In *Tomlinson v. Miller*,[77] claimant sought to establish gross negligence on the part of the corporate employers. The claimant worked in a convenience store in a remote area and was abducted and raped. The court determined that the claimant failed to allege facts which would establish a clear and present risk of injury, and affirmed the summary judgment entered by the trial court.[78] In a special concurrence, Judge Cobb noted that precedent and applicable law at the time of the occurrence led to the summary judgment for the defense.[79] Accordingly, the claimant could recover under workers compensation law for the bodily injury by accident, but did not have a remedy in tort. Recent law changes, however, now place a greater burden on the employer, and future decisions might therefore be different.[80] Similarly, a claimant's estate was denied a tort remedy where the claimant was kidnapped by a former employee and forced to open the company safe before being stabbed to death.[81] The court found that the injury was the direct result of the employment and was compensable under workers compensation law.[82]

Corporate officers, however, do not always escape personal liability when an injury arises in the course and scope of employment. In *Foreman v. Russo*,[83] a jury found three of the corporate defendants grossly negligent and not entitled to the exclusive remedy of workers compensation. Russo was severely injured when a vehicle ran into his stopped garbage truck. His complaint of gross negligence included the removal of lights from the truck, addition of a winch to the truck which necessitated the removal of the lights,

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76. *Id.*

77. 617 So. 2d 811 (Fla. 5th Dist. Ct. App. 1993). A claimant may also seek to bring suit against a co-employee when the co-employee *has committed an act of gross-negligence. Absent such an act, the co-employee has the immunity of the employer. See, e.g.*, Jones v. Robinson, 618 So. 2d 279 (Fla. 3d Dist. Ct. App. 1993) (gross negligence was not demonstrated and ordinary negligence is insufficient to allow a suit against a co-employee).

78. *Tomlinson*, 617 So. 2d at 811.

79. *Id.* (Cobb, J., concurring specially).

80. *Id.*

81. Winn Dixie Stores, Inc. v. Parks, 620 So. 2d 798 (Fla. 4th Dist. Ct. App. 1993).

82. *Id.* at 800.

83. 18 Fla. L. Weekly D1962 (Fla. 4th Dist. Ct. App. Sept. 8, 1993).

a uniform provided by the company which was the same color as the truck, failure to provide cones, flares or warning devices to be placed around the garbage truck and requiring Russo to make known illegal pickups. The court on appeal affirmed the decision below.[84]

Workers compensation while designed as a no-fault system, was not meant to provide a shelter for employers who show wanton disregard for the welfare and safety of their employees. The system works when employers and employees are aware of their responsibilities to each other and each acts with the intent of providing a safe workplace.

C. *Workers Compensation Law (General Section C)*

> Workers Compensation Law means the workers or workmen's compensation law of each state or territory named in Item 3.A. of the Information Page. It includes any amendments to that law which are in effect during the policy period. It does not include the provisions of law that provides nonoccupational disability benefits.[85]

This section of the policy is intended to provide a definition of workers compensation that limits the coverage of the policy to the workers compensation laws of the states and that excludes coverage under federal acts and under acts that provide non-occupational disability benefits.[86] The exclusion of coverage for non-occupational disability benefits is based on the laws of several states[87] which require that employers provide short term disability benefits to employees who are injured in non-job related accidents or by non-job related diseases.[88]

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84. *Id.* at D1963.

85. POLICY, *supra* note 12.

86. Federal coverages are available by endorsement for the Longshore and Harbor Workers Act, the Coal Mine Health and Safety Act, the Defense Base Act, the Federal Employers Liability Act, the Outer Continental Shelf Act and the Nonappropriated Funds Instrumentalities Act. Maritime coverage is available, although this is generally limited to the deductible limits of the P&I Policy. The P&I Policy is the accepted insurance mechanism for providing maritime coverage.

87. The states are Hawaii, New Jersey, New York, and Rhode Island. *See* LARSON, *supra* note 1, § 65.11.

88. *See id.* § 96.40.

D. *State (General Section D)*

> State means any of the United States of America, and the District of Columbia.[89]

This section of the policy is intended to delineate the geographic limitations of WCELIP statutory applicability. It is the laws of the states and the District of Columbia that serve as the statutory basis for the provision of coverage. Coverage for United States territories is governed by the laws of those territories. Puerto Rico and the United States Virgin Islands provide workers compensation by means of monopolistic funds, and private insurers may not issue policies in these territories.[90] American Samoa and Guam provide for the issuance of WCELIPs by private insurers.[91] Since state law governs the coverage available by means of the WCELIP, the applicability of the WCELIP in foreign countries is governed by the extra-territorial provisions of state workers compensation law.

E. *Locations (General Section E)*

> This policy covers all your workplaces listed in Item 1 or 4 of the Information Page; and it covers all other workplaces in Item 3.A. unless you have other insurance or are self-insured for such workplaces.[92]

While state statutes vary, most require that the full liability of employers, under workers compensation laws, be insured under one policy.[93] In Florida, full coverage is based upon the decision in *Nationwide Mutual Insurance Co. v. Ed Soules Construction Co.*[94] A recent filing[95] by the National Council on Compensation Insurance permits less

89. POLICY, *supra* note 12.
90. GUIDE, *supra* note 8, at 4.
91. *Id.*
92. POLICY, *supra* note 12.
93. *See generally* LARSON, *supra* note 1, § 93.00.
94. 397 So. 2d 775 (Fla. 1st Dist. Ct. App. 1981).
95. The National Council on Compensation Insurance filed Items B-1210 and B-1265 on behalf of its members and subscribers. Florida implemented employee leasing rules in February 1990. It was the first state to implement such rules. Florida adopted the filing of the National Council on Compensation Insurance to replace its original rules effective April 1, 1990. To date, no litigation has reached the appellate level of review in regard to the employee leasing rules.

than the full liability of the employer to be covered by a WCELIP in those instances in which employees are leased.[96]

III. PART ONE—WORKERS COMPENSATION INSURANCE

A. *How This Insurance Applies (Part One A)*

> This workers compensation insurance applies to bodily injury by accident or bodily injury by disease. Bodily injury includes resulting death.
> 1. Bodily injury by accident must occur within the policy period.
> 2. Bodily injury by disease must be caused or aggravated by the conditions of your employment. The employee's last day of last exposure to the conditions causing or aggravating such bodily injury by disease must occur during the policy period.[97]

This section of the policy sets the period within which the injury must occur in order for the policy to respond to a claim. While it is fairly clear that an injury by accident must occur within the term of the policy, and this is a relatively easy matter to prove, injury by disease poses different problems. An injury by disease does not necessarily manifest itself within the policy term. It is, therefore, necessary to establish during which policy period there was exposure to the conditions that caused or aggravated the disease.

Benefits under workers compensation law are payable to an employee involved in an accident arising out of and in the course of employment that causes disabling injury. In *Wright v. Douglas N. Higgins, Inc.*,[98] the court determined that where an employee relationship did not exist, the passive acceptance of workers compensation benefits was not an election of remedies.[99] The injury occurred following a job interview and try-out

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96. Employee leasing is a methodology that permits employers to utilize workers who are employees of a firm that specializes in the placement of workers. The leasing firm generally hires, fires, and provides benefits for leased workers. Since the workers compensation premium system is premised on a loss sensitive program, it is important that the loss experience of the utilizing employer be applied to the base premium. In order to accomplish this end, while allowing leasing companies to provide services to the utilizing employer, multiple coordinated policies are used.

97. POLICY, *supra* note 12.

98. 617 So. 2d 460 (Fla. 3d Dist. Ct. App.), *review denied*, __ So. 2d __ (Fla. 1993).

99. *See id.* at 462.

work period while the claimant was awaiting a hiring decision.[100] During this time the claimant assisted employees in need of help, but did so voluntarily and without direction or request.[101] The court determined that an employee relationship was not established (therefore the injury could not arise out of or occur in the course of employment) and that a civil remedy was available to the claimant.[102] The amount paid to the claimant in workers compensation benefits would be deducted from any award received by the claimant.[103] The employee was not entitled to receive additional workers compensation benefits while awaiting a civil settlement.[104]

B. *We Will Pay (Part One B)*

> We will pay promptly when due benefits required of you by the workers compensation law.[105]

This statement represents the basic insuring agreement. It is this statement that obligates the insurer to pay the benefits required under the workers compensation law of each state or territory listed in Item 3.A. of the Information Page. An examination of the cases adjudicated by the First District Court of Appeal provides insight into the workers compensation law of Florida.

1. Rulemaking Authority

Primary to any analysis of a statute is the basis of the rulemaking authority by which the statute is implemented. The Workers Compensation Rules of Procedure are established under the rulemaking authority of the Supreme Court of Florida.[106] The rulemaking authority of the Supreme Court of Florida was challenged in *Reddick v. Charles W. Infinger Construction*,[107] which sought review of *Amendments to Florida Rules of*

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100. *Id.* at 461.
101. *Id.*
102. *Id.*
103. *Wright*, 617 So. 2d at 462.
104. *Id.*
105. POLICY, *supra* note 12.
106. *See In re* Florida Workers' Compensation Rules of Procedure, 374 So. 2d 981 (Fla. 1979); *In re* Workmen's Compensation Rules of Procedure, 343 So. 2d 1273 (Fla. 1977); *In re* Florida Workmen's Compensation Rules of Procedure, 285 So. 2d 601 (Fla. 1973).
107. 617 So. 2d 723 (Fla. 1st Dist. Ct. App. 1993).

Workers' Compensation Procedure[108] on the premise that the Supreme Court of Florida had incorrectly established its rulemaking authority by means of article V, section 2(a) of the Florida Constitution and that workers compensation hearings before judges of compensation claims are not conducted in article V courts.[109] The First District Court of Appeal noted that the rulemaking authority of the Supreme Court of Florida is based upon that court's "unequivocal" textual reliance on section 440.29(3) of the Florida Statutes,[110] and therefore found that section 440.13(2)(k) of the Florida Statutes[111] does not impermissibly encroach upon the supreme court's rulemaking authority under article V.[112]

2. Jurisdiction

In addition to rules by which to function, jurisdiction must be vested in a tribunal in order for a claim to be heard in that forum. The 1990 amendments to Florida's Workers Compensation law created changes in the jurisdiction of the judges of compensation claims.[113] In *Terners of Miami Corp. v. Freshwater*,[114] the decision of a JCC as to the fees to be paid to a treating physician was overturned on the basis of the 1990 amendments.[115] Prior to the amendments, jurisdiction to resolve a fee dispute was vested with the judges of compensation claims.[116] The amendments vested the authority for resolution of such conflicts in the Division of Workers Compensation.[117] Although the fee dispute arose and was filed prior to the amendments to the workers compensation law, the dispute was not placed before the judge of compensation claims until after jurisdiction

108. 603 So. 2d 425 (Fla. 1992), *review denied*, __ So. 2d __ (Fla. 1993).

109. *Reddick*, 617 So. 2d at 724.

110. FLA. STAT. § 440.29(3) (1991). "The practice and procedure before the judges of compensation claims shall be governed by rules adopted by the Supreme Court, except to the extent that such rules conflict with the provisions of this chapter." *Id.*

111. *Id.* § 440.13(2)(k). This section provides that an employer, carrier, self-insurer, health care provider, or rehabilitation provider shall not refer an injured worker to a facility in which the entity has an ownership or financial interest unless full disclosure of the interest has been made in writing to the employer and the injured worker. *Id.*

112. *Reddick*, 617 So. 2d at 724.

113. *See* FLA. STAT. § 440.13(2)(i)(1) (Supp. 1990).

114. 599 So. 2d 674 (Fla. 1st Dist. Ct. App. 1992).

115. *Id.* at 675.

116. *See id.*

117. *Id.* at 674.

no longer existed.[118] The JCC, therefore, lacked jurisdiction to hear the claim.[119]

Within the jurisdiction of the First District Court of Appeal is the right to determine the evidence which may be presented to the JCC. In *Ogden Allied Services v. Panesso*,[120] the court addressed the admission of surveillance video tapes made after plaintiff's request for production and following the employer/carrier's request for a postponement. While the court allowed the admission of the video tapes, it did so only after examination of the current Florida Rules of Workers Compensation Procedure. The court noted that the rules result in "trial by ambush" and requested that the Workers Compensation Rules Committee of the Florida Bar address the problem.[121]

In the process of hearing the issue in *Ogden*, the court was extensively briefed prior to oral argument.[122] The court received notices of supplemental authority as late as the morning of the oral argument. On its own motion the court struck the last notice of supplemental authority and noted that in the future it would take the same action when confronted with an abuse of the rules of procedure relating to notice of supplemental authority.[123]

Where a claimant does not request a specific type of benefit, and the benefits awarded were not clearly placed at issue, the court reversed the order of the JCC.[124] Due process requires that the parties have notice of the issues to be heard so that they may present an adequate defense.[125] When the issues are not clearly presented, the JCC lacks jurisdiction to hear the matter and an award cannot be made.

In *Wolk v. Jaylen Homes, Inc.*,[126] the court examined whether the JCC has the jurisdiction to consider claims for medical benefits when such benefits have been terminated due to an employer/carrier's determination of overutilization. The court determined that overutilization is a matter within the jurisdiction of the JCC and that unilateral termination of treatment

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118. *Id.* at 675; *see also* Napp-Deady Assocs. v. Ramsey, 599 So. 2d 228 (Fla. 1st Dist. Ct. App. 1992).

119. *Terners of Miami Corp.*, 599 So. 2d at 675.

120. 619 So. 2d 1024 (Fla. 1st Dist Ct. App. 1993).

121. *Id.* at 1026-27.

122. Ogden Allied Servs. v. Panesso, 619 So. 2d 1023 (Fla. 1st Dist. Ct. App. 1993) (per curiam) (the court issued a separate opinion on the issue of supplemental authority).

123. *Id.*

124. Florida Power Corp. v. Hamilton, 617 So. 2d 333 (Fla. 1st Dist. Ct. App. 1993).

125. *Id.* at 334.

126. 593 So. 2d 1058 (Fla. 1st Dist. Ct. App. 1992).

without good cause is a violation of the review procedures of the Florida Statutes.[127]

3. Statute of Limitations

Florida statute provides that a workers compensation claim must be filed within two years of the time of injury, the date of the last payment of compensation, or of the date of the last remedial treatment furnished by the employer.[128] In *Lee v. City of Jacksonville*,[129] a claimant argued that continued use of a transcutaneous electrical nerve stimulator unit to relieve pain in an injured knee constituted continued remedial treatment by the employer, sufficient to allow continued benefits.[130] The court noted that decisions in other cases appeared to place the burden on the claimant to prove that the employer had knowledge of the claimant's use of a prescribed medical device in order to toll the statute of limitations.[131] Based upon prior decisions, the court affirmed the JCC's dismissal of the claim on the ground that it was barred by the statute of limitations.[132] The court certified the following question as being of great public importance:

> WHETHER THE LIMITATIONS PERIOD OF SECTION 440.19 (1)(A), FLORIDA STATUTES, IS TOLLED BY THE CLAIMANT'S ROUTINE USE OF A DEPENDENCY-INDUCING MEDICAL DEVICE FURNISHED BY THE EMPLOYER AND PRESCRIBED BY THE AUTHORIZED PHYSICIAN FOR AN INDEFINITE PERIOD OF TIME WITHOUT SUPERVISION, EVEN THOUGH THE EMPLOYER DID NOT HAVE *ACTUAL* KNOWLEDGE THE CLAIMANT CONTINUED TO USE THE DEVICE BEYOND THE TIME THE PHYSICIAN SHOULD HAVE INSTRUCTED THE CLAIMANT TO DISCONTINUE USE OF THE DEVICE, AND NO SUCH INSTRUCTION WAS GIVEN.[133]

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127. *Id.* at 1060.

128. FLA. STAT. § 440.19(1)(a) (1991).

129. 598 So. 2d 296 (Fla. 1st Dist. Ct. App. 1992), *approved*, 616 So. 2d 37 (Fla. 1993).

130. *Id.* at 296.

131. *Id.* at 297. The court relied on its decisions in Devilling v. Rimes, Inc., 591 So. 2d 304 (Fla. 1st Dist. Ct. App. 1991), and Taylor v. Metropolitan Dade County, 596 So. 2d 798 (Fla. 1st Dist. Ct. App. 1992), to support its holding in *Lee*.

132. *Lee*, 598 So. 2d at 296.

133. *Id.* at 297.

The Supreme Court of Florida answered the certified question in the negative and approved the decision of the district court.[134] Effectively, the supreme court determined that actual knowledge on the part of the employer is essential to the establishment of treatment "furnished by the employer."[135]

In *Bell v. Commercial Carriers*,[136] the court examined whether an employer has to voluntarily intend remedial treatment in order to revive the statute of limitations.[137] The claimant had suffered a 1981 back injury and was receiving ongoing treatment when a second back injury occurred in 1989.[138] The JCC accepted the treatment as remedial to the 1989 injury, but not remedial to the 1981 injury, thus barring the claim.[139] The court reversed the findings of the JCC and requested that the claim be heard on its merits.[140]

In another case, the court reversed the decision of the JCC, which had ordered the employer/carrier to provide remedial attention for replacement or removal of a surgical staple in the claimant's right shoulder.[141] The court determined that the staple was not a prosthetic device, and that the two year statute of limitations had therefore run.[142] The court, however, certified the following question as one of great public importance:

> WAS THE FIXATION STAPLE INSERTED INTO CLAIMANT'S SHOULDER A "PROSTHETIC DEVICE," AS THAT TERM IS USED IN SECTION 440.19(1)(b), FLORIDA STATUTES (1985)?[143]

The Supreme Court of Florida answered the certified question in the negative, thus affirming the decision of the district court.[144] This decision barred the workers compensation remedy since the statute of limitations had run.[145]

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134. Lee v. City of Jacksonville, 616 So. 2d 37 (Fla. 1993).
135. *Id.* at 38.
136. 603 So. 2d 683 (Fla. 1st. Dist. Ct. App. 1992).
137. *Id.* at 685.
138. *Id.* at 684.
139. *Id.* at 685.
140. *Id.*
141. Universal Rivet, Inc. v. Cash, 598 So. 2d 154 (Fla. 1st Dist. Ct. App 1992), *approved*, 616 So. 2d 446 (Fla. 1993).
142. *Id.* at 158.
143. *Id.*
144. Cash v. Universal Rivet, Inc., 616 So. 2d 446, 447 (Fla. 1993).
145. *Id.* at 448.

The court also addressed the statute of limitations in *Timmeny v. Tropical Botanicals Corp.*[146] The *Timmeny* court determined that where the employer/carrier had failed to notify the claimant of an entitlement to benefits the employer/carrier was estopped from asserting the statute of limitations as a defense.[147] The court took the view that the conduct of the employer/carrier severely prejudiced the claimant. The employer/carrier was aware that the employee was exposed to pesticides which were among the possible causes of the claimant's aplastic anemia.[148] Nonetheless, the employer/carrier did not share this information with the claimant. The employer/carrier's breach of its statutory duty requires that the statute be tolled until the claimant received actual notice that his disease was compensable.[149]

4. Standard of Review

Review of workers compensation cases by the First District Court of Appeal is generally based upon a standard of competent substantial evidence.[150] The court in *Lagenfelder v. Regina*[151] utilized this standard to find that a claimant was entitled to permanent total disability benefits and costs. At the same time, the court determined there was a lack of competent substantial evidence to support an award for attendant care benefits.[152] The court found that there was no need for lengthy presentation of the facts in the case, as these would be of little precedential value.[153] In essence, the court implied that it knows competent substantial evidence when it sees it.[154]

The decision of the JCC, as to a good faith work search by a claimant and the award of permanent total disability benefits, was found to be lacking for want of competent substantial evidence where the court found the

146. 615 So. 2d 811 (Fla. 1st Dist. Ct. App. 1993).

147. *Id.* at 816.

148. *Id.*

149. *Id.* at 817.

150. *See, e.g.*, Vista Manor Nursing Home v. Yeager, 605 So. 2d 1311 (Fla. 1st Dist. Ct. App. 1992); State v. Vice, 601 So. 2d 1294 (Fla. 1st Dist. Ct. App. 1992); Collins v. Catalytic, Inc., 597 So. 2d 327 (Fla. 1st Dist. Ct. App. 1992).

151. 601 So. 2d 1279 (Fla. 1st Dist. Ct. App. 1992).

152. *Id.*

153. *Id.*

154. *Id.; see also* Allied Bendix Galactic v. Al-Hafiz, 596 So. 2d 1177 (Fla. 1st Dist. Ct. App.), *review denied*, 605 So. 2d 1262 (Fla. 1992).

evidence to be "vague and general."[155] Although the court reviews the facts of the case, it does not examine or explain what constitutes competent substantial evidence. Thus, the decision typically turns on the whim of the court, with no true standard to guide the practitioner in determining the evidence that should be entered into the record.[156]

In some instances the court provides somewhat more insight into what constitutes competent substantial evidence. Where the JCC failed to determine that medical treatment was of an emergency nature, the First District Court of Appeal reversed and remanded for further findings.[157] Even though the carrier may control the medical treatment of the injured employee by the selection of the treating physician, an injured worker may not be denied compensation for medical treatment which, although unauthorized, is of an emergency nature.[158]

In another instance, however, the court upheld an average weekly wage ("AWW") award which included fringe benefits of pass flights to the employee where the court found competent substantial evidence in the record to establish the value of this benefit.[159] The JCC found that the pass flights could be valued at 8.1 cents per mile and thus included the value of the pass in the AWW calculation. In a dissenting opinion, Judge Miner took issue with the analysis of the certified public accountant who presented the testimony as to this benefit.[160] The majority accepted the validity of the evidence as presented to and reported by the JCC, while the dissent attempted to reevaluate the evidence. Reevaluation of the evidence is outside the scope of review of competent substantial evidence.[161]

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155. Asplundh Tree Expert Co. v. Challis, 609 So. 2d 135 (Fla. 1st Dist. Ct. App. 1992).

156. The court is somewhat more prone to offer explanation of what is not competent, substantial evidence then it is to provide an affirmative guideline. *See, e.g.*, Jackson v. Columbia Pictures, 610 So. 2d 1349 (Fla. 1st Dist. Ct. App. 1992); Townsend & Bottom v. Bonds, 610 So. 2d 619 (Fla. 1st Dist. Ct. App. 1992); Jackson Manor Nursing Home v. Ortiz, 606 So. 2d 422 (Fla. 1st Dist. Ct. App. 1992).

157. Machacon v. Velda Farms Dairy, 619 So. 2d 380 (Fla. 1st Dist. Ct. App. 1993).

158. *Id.* at 382.

159. Eastern Airlines, Inc. v. Michaelis, 619 So. 2d 383 (Fla. 1st Dist. Ct. App. 1993).

160. *Id.* at 383-84. (Miner, J., dissenting).

161. Other cases in which the First District Court of Appeal reviewed findings of the JCC on the basis of competent substantial evidence include: Ullman v. City of Tampa Parks Dep't, 18 Fla. L. Weekly D2043 (Fla. 1st Dist Ct. App. Sept. 15, 1993) (affirming that there was competent substantial evidence that there was no industrial accident); WPOM Partners v. Lovell, 623 So. 2d 823 (Fla. 1st Dist. Ct. App. 1993) (affirming wage loss award because record contains competent substantial evidence of claimant's loss of earnings and his compensable injury); Orange County Sch. Bd. v. Perkins, 619 So. 2d 1 (Fla. 1st Dist. Ct.

In the event that a JCC has departed from the essential requirements of law, and a party will suffer an injury that cannot be remedied by appeal, a petition for certiorari may be filed with the court. In *Spaulding v. Albertson's, Inc.*,[162] the court reviewed the evidence necessary to determine whether the JCC had complied with the essential requirements of law for the purpose of establishing attorney's fees.[163] The court held that the JCC erred in finding that the statutory fee guidelines in section 440.34(1) of the Florida Statutes was the appropriate place to begin the determination of appellate attorney's fees in workers compensation cases.[164] While the court noted that an award of appellate attorney's fees does not lend itself to any hard and fast rule, it took pains to note that claimant's attorney's fees should not be governed by evidence of the hourly rate charged by defense

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App. 1993) (en banc) (affirming the JCC's refusal to dismiss for lack of prosecution); T.E. James Constr. Co. v. Hartley, 616 So. 2d 548 (Fla. 1st Dist. Ct. App. 1993) (finding there was insufficient competent substantial evidence to support the award of temporary total disability benefits, but there was sufficient competent substantial evidence to establish statutory employer status); Metropolitan Dade County v. Pope, 615 So. 2d 856 (Fla. 1st Dist. Ct. App. 1993) (reversing an award of palliative chiropractic care where there was no competent substantial evidence to support the award); Rodriguez v. Albertson's, 614 So. 2d 678 (Fla. 1st Dist. Ct. App. 1993) (reversing and remanding where there was no competent substantial evidence to sustain the denial of wage loss benefits); Perkins v. A. Perkins Drywall 615 So. 2d 187 (Fla. 1st Dist. Ct. App. 1993) (reversing a denial of compensation claim where there was competent substantial evidence that the parties had stipulated to employment status and the JCC found no coverage under the policy due to misrepresentation of the employment status); Hewett v. Town of Mayo, 614 So. 2d 598 (Fla. 1st Dist. Ct. App. 1993) (reversed and remanded where there were internal inconsistencies in the evidence); Solinsky v. Goody Bake Shop, 622 So. 2d 86 (Fla. 1st Dist. Ct. App. 1993) (affirming JCC's finding concerning social security offset); Charles v. Suwannee Swifty, 622 So. 2d 114 (Fla. 1st Dist. Ct. App. 1993) (reversing and remanding where JCC rejected unrefuted medical testimony); Alford v. G. Pierce Woods Memorial Hosp., 621 So. 2d 1380 (Fla. 1st Dist Ct. App. 1993) (affirming denial of authorization for chiropractic treatment); Farm Stores, Inc. v. Fletcher, 621 So. 2d 706 (Fla. 1st Dist. Ct. App. 1993) (affirming in part, reversing in part, and remanding where JCC failed to order an independent dental examination and wrongly found the claimant to be permanently totally disabled); Espinal v. Victor Herrera Drywall Stockers, Inc., 610 So. 2d 660 (Fla. 1st Dist. Ct. App. 1992) (reversing and remanding a decision on MMI where there was evidence that further improvement could take place); and City of West Palm Beach v. Dahl, 610 So. 2d 456 (Fla. 1st Dist. Ct. App. 1992) (reversing and remanding the wage loss benefit determination of the JCC where the JCC overlooked or ignored evidence that claimant was offered a position within his physical restrictions).

162. 610 So. 2d 721 (Fla. 1st Dist. Ct. App. 1992).

163. *Id.* at 722.

164. *Id.* (citing FLA. STAT. § 440.34(1) (1989).

lawyers.[165] The court also noted that there are inherent differences between the practice of the defense bar, which begin with fixed hourly rates for defense counsel based upon repetitive employment and virtual guarantees of payment from solvent insurance companies, and handling appeals for workers compensation employers.[166] The court's comments appear at odds with recent changes to the legislative intent of the workers compensation law, which is now to be construed in a fair and balanced manner in regard to application to employee and employer.[167]

The court also accepted a petition for a writ of certiorari in *All Weather Control, Inc. v. Wawerczyk*.[168] Here the court examined an order for out-of-state medical care and determined that the petition should be granted since, once the fee for out-of-state medical care was paid, there was no statutory method for reimbursement.[169] Thus, the petitioner would suffer an injury that could not be remedied by an appeal from the final order.[170]

The court also found a departure from the essential requirements of law in a petition for a writ of certiorari where there was no evidence presented to the JCC.[171] The petition for a writ of certiorari sought review of an order of a JCC which granted the employer/carrier's motion to compel treatment with a medical representative of the employer/carrier, and denied a motion to require the presence of claimant's attorney at all meetings between the medical representative and the claimant.[172]

An order compelling disclosure of a company's workers compensation file on two employees was found to depart "from the essential requirements of law," and to present a possibility of "irreparable harm that cannot be remedied by way of appeal" in *Adjustco, Inc. v. Sibley*.[173] The court determined that the party seeking production failed to show that there was no other means to obtain the substantial equivalent of the materials without undue hardship.[174] In the remand instructions, respondent was given the

165. *Id.* at 723-24.
166. *Id.* at 724.
167. *See* FLA. STAT. § 440.01 (1991).
168. 600 So. 2d 517 (Fla. 1st Dist. Ct. App. 1992).
169. *Id.* at 518.
170. *Id.*
171. Martinez v. Purdue Frederick Co., 599 So. 2d 772, 773 (Fla. 1st Dist. Ct. App. 1992).
172. *Id.*
173. 611 So. 2d 88 (Fla. 2d Dist. Ct. App. 1992).
174. *Id.*

opportunity to present evidence that the material was not available by other means without undue hardship.[175]

In a consolidated case, the court denied petitioner's request for a writ of certiorari, which tested the provisions of Florida law pertaining to disclosure of medical records.[176] The court applied the provisions of the 1991 amendments to the Act because the statutory disclosure provisions related to matters that did not alter or amend the parties substantive rights.[177] Additionally, the court noted that the language of the 1989, 1990, and 1991 amendments was not significantly different.[178] The petitions sought review of an order of the JCC prohibiting petitioners or their representatives from *ex parte* communication with respondents' medical providers.[179] The court determined that petitioners had not met their burden of proving that the order departed from the essential requirements of law, and that they would suffer material harm that could not be remedied on appeal.[180]

In *Fuentes v. Caribbean Electric*,[181] the First District Court of Appeal addressed the issue of unrebutted medical testimony. The court noted that a JCC may not reject unrebutted medical testimony without a reasonable explanation.[182] Here, no explanation for the rejection was offered and, therefore, the appellate court reversed and remanded the case for proceedings consistent with its opinion.[183]

Amendments to Florida Rules of Workers' Compensation Procedure[184] provides for discretionary review of non-final venue orders in workers compensation cases.[185] A petition for a writ of certiorari was granted in regard to a venue order of the JCC in *Lockheed Space Operations v. Pham*.[186] Procedurally, the court received this case as an appeal of a non-final order. The court determined that, although it did not have jurisdiction to hear such an appeal, it was within the power of the court to

175. *Id.*
176. Adelman Steel Corp. v. Winter, 610 So. 2d 494, 496-97 (Fla. 1st Dist. Ct. App. 1992).
177. *Id.* at 497.
178. *Id.*
179. *Id.* at 496.
180. *Id.* at 496-97.
181. 596 So. 2d 1228 (Fla. 1st Dist. Ct. App. 1992).
182. *Id.* at 1229.
183. *Id.*
184. 603 So. 2d 425 (Fla. 1992).
185. *Id.*
186. 600 So. 2d 1261, 1264 (Fla. 1st Dist. Ct. App. 1992).

view the appeal as a petition for a writ of certiorari.[187] The court then proceeded to vacate the order of the JCC transferring venue.[188]

In *Florida Mining & Materials v. Perkins*,[189] the court found that the JCC utilized the wrong evidentiary standard to determine that there was a lack of evidence to support a finding of reliance upon a misrepresentation in the hiring process. The employer asserted that there was a direct causal relationship between the injury and the misrepresentation on the part of the claimant.

The court was asked to accept a petition for a writ of certiorari in regard to a non-final order on venue in *Hines Electric v. McClure*.[190] The court determined that the non-final order was appealable and exercised its jurisdiction by accepting the jurisdiction and determining that the answers it had received were answer briefs.[191] The appellant was subsequently given twenty days to forward a reply brief to the court.

5. Arising Out Of, And In the Course and Scope of, Employment

The payment of workers compensation benefits is dependent on an injury arising out of, and in the course and scope of, employment.[192] In *Darling v. Conley Buick, Inc.*,[193] the court reversed an order of the JCC, finding that injuries sustained in an automobile accident were not compensable under workers compensation.[194] The employee, a used car salesman, was delivering vehicle documents to a customer at the employer's request when the accident occurred.[195] Although the JCC found these actions to be within the course and scope of employment, the JCC determined that by driving five miles beyond the destination of the customer's residence, the claimant had substantially deviated from the course and scope of employment.[196] The JCC concluded the claim was not compensable.[197] The appellate court held that the JCC's determination was not supported by

187. *Id.* at 1261-62.
188. *Id.* at 1262.
189. 612 So. 2d 667, 668 (Fla. 1st Dist. Ct. App. 1993).
190. 616 So. 2d 132 (Fla. 1st Dist Ct. App. 1993).
191. *Id.* at 137.
192. *See generally* LARSON *supra* note 1, § 1.00.
193. 594 So. 2d 815 (Fla. 1st Dist. Ct. App. 1992).
194. *Id.* at 816.
195. *Id.* at 815.
196. *Id.* at 816.
197. *Id.*

competent and substantial evidence, and reversed and remanded the case for further proceedings.[198]

The finding that the claimant was in a position unique to employment and that the injury was not the result of an idiopathic condition was upheld in *City of Plantation v. Seaman*.[199] Although the claimant passed the necessary threshold of establishing that the injury was compensable because it arose out of and occurred within the course and scope of employment, the case was remanded to the JCC for review of compliance with statutory procedures relating to reporting requirements.[200]

In the case of individuals who are municipal or other specified employees, statutory presumptions may apply.[201] In *State of Florida, Department of Corrections v. Clark*,[202] the court determined that a fireman did not show that he was a fireman for a "fire control district" within the meaning of the Florida Statutes.[203] The claimant asserted he was entitled to the presumption of compensability contained in section 112.18(1) of the Florida Statutes.[204] The presumption states:

> Any condition or impairment of health of any Florida municipal, county, port authority, special tax district or fire control district fireman caused by tuberculosis, heart disease, or hypertension resulting in total or partial disability or death shall be presumed to have been accidental and to have been suffered in the line of duty unless contrary be shown by competent evidence.[205]

Workers compensation law has long recognized that injuries which occur during travel to and from work do not arise out of, and in the course and scope of, employment. Over the years, exceptions have been carved out of the going and coming rule which would allow recovery in those instances in which a "special hazard" exists. In Florida, the "special hazard" rule was adopted by the Supreme Court of Florida in *Naranja Rock Co. v. Dawal Farms*.[206] The rule states that "(w)here there is a special hazard on a

198. *Darling*, 594 So. 2d at 816.

199. 590 So. 2d 1 (Fla. 1st Dist. Ct. App. 1991).

200. *Id.* at 1-2; *see also* FLA. STAT. § 440.13 (1991) (for billing and reporting requirements).

201. *See, e.g.*, FLA. STAT. § 112.18 (1991).

202. 593 So. 2d 585 (Fla. 1st Dist. Ct. App. 1992).

203. *Id.* at 586.

204. *Id.* (citing Fla. Stat. § 112.18(1) (1991)).

205. FLA. STAT. § 112.18(1) (1991).

206. 74 So. 2d 282, 286 (Fla. 1954).

normal route used by the employee as a means of entry to and exit from his place of work, the hazards of that route under appropriate circumstances become hazards of the employment."[207] The special hazard rule was found not to apply where an employee slipped and fell in a parking lot on her way to work.[208] The court noted that for a claimant to be entitled to compensation under the special hazard rule, the "claimant must demonstrate the existence of a special hazard at a particular off-premises location which is on the usual or expected means of access to the claimant's place of employment."[209] The claimant in the instant case was unable to make such a showing.[210]

Similarly, a "travelling employee" exception has been established which provides that when an employee is away from home, injuries may be compensable for daily living events.[211] However, the court declined to extend workers compensation benefits to employees who were injured while being transported by a co-employee who was voluntarily transporting the other employees in a privately owned vehicle, between the employees' place of work and their temporary residence, while working for the employer away from their normal place of residence.[212] The court thus restricted its decision to the original intent of workers compensation law, which was to provide compensation for injuries arising out of and in the course and scope of employment.

6. Employee v. Independent Contractor

Workers compensation law is designed to provide medical and wage replacement benefits to injured employees.[213] The common law test applicable to master/servant law is traditionally the "control test."[214] In *Buncy v. Certified Grocers*,[215] the court determined that a claimant's wages should include compensation as a confidential informant. The court

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207. *Id.* (citations omitted).

208. Kash-N-Karry v. Johnson, 617 So. 2d 791 (Fla. 1st Dist. Ct. App. 1993).

209. *Id.* at 793.

210. *Id.* at 793-94.

211. FLA. STAT. § 440.092(4) (1991).

212. Fierro v. Crom Corp., 617 So. 2d 379 (Fla. 2d Dist. Ct. App. 1993).

213. *See generally* LARSON, *supra* note 1, § 1.00.

214. RESTATEMENT (SECOND) OF AGENCY § 220(2)(a) (1958). In determining whether an individual is an independent contractor or employee, "the extent of control which, by agreement, the master may exercise over the details of the work" is one factor considered. *Id.*

215. 592 So. 2d 336 (Fla. 1st Dist. Ct. App. 1992)

noted that the degree of control exercised over appellant's activities was reflected in the record and constituted competent substantial evidence that claimant was an employee, even when working as a confidential informant.[216]

In *Fleitas v. Today Trucking, Inc.*,[217] the court affirmed a JCC's decision that the claimant was an independent contractor who was entitled to limited benefits under a contractual relationship with Today Trucking, Inc. The claimant was injured in an automobile accident while driving for the defendant, Today Trucking, Inc. The claimant had entered into an agreement with the company, which agreement established that the claimant was not an employee, but would be entitled to workers compensation payments in the amount of $240.00 per week. The court found that Florida's workers compensation statute prohibits contractual limitation of the benefits due an employee.[218] At the same time, there is no statutory prohibition in regard to establishing limits for benefits to be paid to individuals who are not employees, yet are extended voluntary benefits by the employer.[219] Thus, the claimant in the instant case was only entitled to limited benefits.[220]

7. Causal Relationship

Compensability for an injury is premised on the understanding that the employment was causally related to the injury.[221] In *Finney v. Agrico Chemical Co.*,[222] the court reversed a determination of noncompensability and remanded for further proceedings where the testimony of two doctors was improperly rejected by the JCC.[223] The claimant in *Finney* was working as an electrical technician trainee when he slipped and fell on his back, striking his head on the floor.[224] The claimant filed a timely report, but did not immediately seek medical treatment.[225] The court determined

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216. *Id.* at 337-38.

217. 598 So. 2d 252 (Fla. 1st Dist. Ct. App. 1992).

218. *Id.* at 254.

219. *Id.*; *see also* Fort Pierce Tribune v. Williams, 622 So. 2d 1368 (Fla. 1st Dist. Ct. App. 1993).

220. *Fleitas*, 598 So. 2d at 254.

221. *See generally* LARSON, *supra* note 1, at § 20.00.

222. 599 So. 2d 1359 (Fla. 1st Dist. Ct. App. 1992).

223. *Id.* at 1361.

224. *Id.* at 1360.

225. *Id.*

that reversal was necessary where the rejected medical evidence, if accepted, would provide legally sufficient grounds for establishing the claim.[226]

The court also reversed and remanded for further findings the decision of the JCC as to a causal relationship where there was uncontradicted testimony that the condition was causally related to the employment.[227] In addition to rejecting the uncontradicted medical testimony of two doctors, the JCC used the claimant's failure to conduct an adequate job search as the basis for finding lack of causation.[228] The court, however, did not comment on the use of an inadequate work search as the basis for finding lack of a causal relationship.[229] The court did note that the claimant had not been informed by the carrier of the need to perform a work search and, thus, the claimant was excused from the need to have made such a search.[230]

The court also reversed and remanded the decision of a JCC in regard to causal relationship where the claimant worked as a night auditor for a motel chain and filed a claim in connection with a hand and wrist injury.[231] The court determined that, in order to rule against the causal connection, the JCC had to find as uncontested the testimony of medical experts. The court found, however, that the testimony was clearly conflicting.[232] During claimant's delivery of a baby, claimant's wrists were strapped. Medical testimony indicated that the strapping "could be something of significance to cause carpal tunnel" and that subsequent lifting of the child "could cause tenosynovitis."[233] Since this testimony was in

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226. *Id.* at 1361.

227. Cozzens v. St. Joe Container Co., 596 So. 2d 135, 137 (Fla. 1st Dist. Ct. App. 1992). *See also* Phillips v. Hague Water Conditioning, 616 So. 2d 507 (Fla. 1st Dist. Ct. App. 1993) (JCC reversed where there was unrefuted testimony that current condition was work related).

228. *Cozzens*, 596 So. 2d at 137.

229. *Id.*

230. *Id.*

231. Fritz v. Courtyard By Marriott, 592 So. 2d 1167 (Fla. 1st Dist. Ct. App. 1992). *See also* Aetna Life & Casualty Co. v. Schmitt, 597 So. 2d 938 (Fla. 1st Dist. Ct. App. 1992) (affirming the decision of the JCC finding Aetna responsible for the claimant's treatment, but determining that the reason for the liability was Aetna's provision of insurance during the time in which claimant suffered her last repeated action which led to the need for remedial treatment); Schafrath v. Marco Bay Resort, Ltd., 608 So. 2d 97 (Fla. 1st Dist. Ct. App. 1992) (JCC was reversed and the cause remanded where the claimant suffered an injury to her elbow as the result of being hit by a swinging door and the JCC applied an incorrect burden of proof to establish claimant's right to benefits).

232. *Fritz*, 592 So. 2d at 1168.

233. *Id.* at 1171.

conflict with that of other doctors who testified that claimant's work activities were the source of the injury, the JCC's decision was not upheld.[234]

The determination of a JCC that a claimant's injury was not causally related to employment was upheld by the court in *Molnar v. Bob Evans Restaurants*.[235] The claimant presented evidence of a slip and partial fall while working as a waitress.[236] Claimant experienced back pain and numbness in the legs, and was admitted to the hospital.[237] Conflicting testimony was presented as to whether the claimant's injuries resulted from the slip and fall or from an infection, transverse myelitis.[238] The court affirmed that the JCC had competent substantial evidence to support the finding that the infection was a logical cause of the claimant's injury and that the injury was not causally related to employment.[239]

A determination of causal relationship was rejected by the court where the JCC based the determination on the doctor's statement that the claimant said the injury occurred at work and the claimant suffered from a neck injury.[240] The court pointed out that it is up to the claimant to prove the causal relationship between the employment and the injury.[241] Here, the court determined that the testifying doctor did not present evidence of a relationship and that the finding below should be reversed.[242]

In *Body Works, Inc. v. Chavez*,[243] the court accepted the finding of causality in relation to medical treatment and attendant care for a cardiac problem, but rejected the finding of causality in relation to a hearing loss.[244] The rejection of a causal relationship between the work and the hearing loss was premised on the testimony of a doctor responding to a hypothetical question regarding causal relationship.[245] Timely objection was made to the hypothetical and to the response. Since, however, no other

234. *Id.* at 1170.
235. 592 So. 2d 742 (Fla. 1st Dist. Ct. App. 1992).
236. *Id.*
237. *Id.* at 742-43.
238. *Id.* at 743-44.
239. *Id.* at 744.
240. Olympic Assocs. v. Kimmel, 590 So. 2d 1088, 1089 (Fla. 1st Dist. Ct. App. 1991).
241. *Id.*
242. *Id.*
243. 606 So. 2d 1273 (Fla. 1st Dist. Ct. App. 1992).
244. *Id.* at 1274.
245. *Id.*

evidence relating to the hearing loss was presented, the court reversed the order as to the compensability of the hearing loss.[246]

The court noted in *Fincannon v. Eastern Airlines*,[247] that "[a] claimant seeking workers compensation benefits is not required to show her compensable injury was the sole cause of her disability."[248] In *Fincannon*, the claimant was an airline reservationist who developed hoarseness, laryngitis and trouble talking, which was diagnosed to be the result of polyps on the vocal chords. The claimant was fifty-nine years of age, a heavy smoker, and subject to severe allergies.[249] The court commented:

> There is no real dispute that immediately after claimant's surgery, she ceased smoking until January 8, 1987. When claimant's surgery and voice therapy and cessation of smoking failed to prevent the return of nodules on her voice chords, it was recommended that she not return to employment that required much voice usage. She had previously attempted to return to Eastern but that resulted in voice failure. She subsequently attempted retraining and reentry into the labor market but her efforts, to date, have failed. This evidence restricting claimant's employment to jobs which require very little voice usage supports a finding of permanent impairment.[250]

Thus, the court is willing to find permanent disability, causally related to employment, even where there are intervening factors that may impact on the claimant's disability. It is the initial causal relationship that provides the claimant with the right to compensation.

Where the parties have stipulated that an injury is causally related to the work and is, therefore, compensable, the JCC must make specific findings as to the continued viability of the stipulation prior to overturning the stipulation.[251] During a hearing the JCC determined that the claimant had committed fraud and misrepresentation by working and earning money while he was allegedly unable to work.[252] The court noted that a JCC is not required to follow a stipulation that is refuted by competent substantial

246. *Id.*

247. 611 So. 2d 28 (Fla. 1st Dist. Ct. App. 1992).

248. *Id.* at 30.

249. *Id.* at 29.

250. *Id.* at 30-31 (citing Dayron Corp. v. Morehead, 509 So. 2d 930 (Fla. 1987); Jackson v. Publix Supermarkets, Inc., 520 So. 2d 50 (Fla. 1st Dist. Ct. App. 1987)).

251. Jacobs v. Volker Stevin Constr., 609 So. 2d 132, 133 (Fla. 1st Dist. Ct. App. 1992).

252. *Id.*

evidence. However, the JCC must give notice to the parties that the JCC is considering rejecting the stipulation. The failure to give due notice requires that the case be remanded for further findings in regard to entitlement for benefits.[253]

Where a claimant's hepatitis was found not to be causally related to the industrial accident, a subsequent medical opinion to establish causation was found not to be reasonably required.[254] The claimant was originally injured when he fell from a scaffold in the course and scope of employment. The claimant developed hepatitis following surgery for the original injury. Competent substantial evidence supported the finding that claimant had a prior history of hepatitis and of alcohol consumption. The claimant's doctor stated that there was a low probability of a causal connection between the hepatitis and the industrial accident. That portion of the claimant's injury which related to the industrial accident was compensable, while that part of claimant's condition that was not causally related was not subject to coverage under the policy.[255]

8. Compensability/Benefits

The JCC examines each claim presented to determine whether a compensable injury has occurred, and if so, what benefits should be paid. The determination of the JCC must be based on an analysis of the law and supported by competent substantial evidence.

In *Whiskey Creek Country Club v. Rizer*,[256] the JCC found, and the court upheld, an award of benefits for an employee's illness and subsequent death by determining that there was competent substantial evidence from the testifying doctors.[257] At the same, time the court reversed the award for penalties and interest on the funeral expenses awarded by the JCC.[258] The court based its determination on section 440.20 of the Florida Statutes, which provides penalties and interest for the late payment of compensation.[259] The court reasoned that funeral and medical expenses are not compensation, and therefore, are not subject to penalties and interest.[260]

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253. *Id.*
254. White v. Seminole Plastering, 609 So. 2d 761, 762 (Fla. 1st Dist. Ct. App. 1992).
255. *Id.*
256. 599 So. 2d 734 (Fla. 1st Dist. Ct. App. 1992).
257. *Id.* at 735.
258. *Id.*
259. *Id.* (citing FLA. STAT. § 440.20(7), (9) (1991)).
260. *Id.*

A claimant's appeal from an order denying temporary disability wage loss benefits, alternative medical care, penalties, and interest arising out of a knee injury that aggravated a preexisting arthritic condition was reversed on all three points raised on appeal.[261] The claimant first contended that the JCC erred in establishing the date of maximum medical improvement. All parties had stipulated to the date and the court found no basis upon which to overturn the stipulation.[262] The claimant also contended that the record lacked competent substantial evidence to support the JCC's finding that the claimant's medical symptoms were solely the result of the preexisting medical condition. The court agreed with this contention based upon the deposition of claimant's doctor indicating that, taken as a whole, a twisting accident constituted an aggravating cause of claimant's condition.[263] The claimant's third contention was that the order denying temporary wage-loss and partial disability benefits based upon a failure to conduct a good faith work search was in error. The court found that the employer/carrier failed to notify the claimant of the need to make a good faith work search.[264]

The claimant's request that the court find internal cardiovascular conditions compensable absent a finding of preexisting condition was denied based on earlier case law decisions.[265] Although there are instances in which heart attacks are compensable,[266] the claimant was requesting that a new standard be established.[267] The court found no legal support that would permit it to make the changes suggested by claimant.[268]

An award of temporary partial disability benefits for a three year period was reversed by the court where the claimant appeared to have exaggerated the extent of disability following an incident in which claimant's employment was terminated.[269] The claimant was terminated from his position for refusal to clean-up frozen turkeys, which fell after being stacked too high.[270] There was a difference of opinion as to whether the claimant had

261. Michael v. National Indus., Inc., 599 So. 2d 243 (Fla. 1st Dist. Ct. App. 1992).

262. *Id.* at 243-44.

263. *Id.* at 244.

264. *Id.*

265. Zundell v. Dade County Sch. Bd., 609 So. 2d 1367, 1369 (Fla. 1st Dist. Ct. App. 1992), *review granted*, __ So. 2d __ (Fla. 1993).

266. *See, e.g.*, Popiel v. Broward County Sch. Bd., 432 So. 2d 1374 (Fla. 1st Dist. Ct. App.), *review denied*, 438 So. 2d 831 (Fla. 1983).

267. *Zundell*, 609 So. 2d at 1368.

268. *Id.*

269. Publix Supermarket, Inc. v. Hart, 609 So. 2d 1342, 1346 (Fla. 1st Dist. Ct. App. 1992).

270. *Id.* at 1344.

been terminated because of his back problem or because of insubordination. Therefore, the case was remanded to the JCC for further findings on the question of whether claimant voluntarily limited his income. Should the JCC find that the claimant was terminated for insubordination, the claimant will have failed to satisfy his burden of showing that his change in employment status was the result of a compensable injury.[271]

Where an order of the JCC ignored or overlooked evidence that the claimant voluntarily limited his income, the court reversed an award for wage-loss benefits and remanded the case for further findings.[272] The claimant rejected the city's offer of sedentary employment following an injury within the course and scope of employment.[273] On remand, the JCC will have the option of accepting further evidence in order to make a determination on wage loss benefits.[274]

The court found that a JCC erred in finding a hernia repair noncompensable where the claimant had a preexisting hernia.[275] The claimant was diagnosed as having an inguinal hernia in 1987 and declined surgery. The hernia did not interfere with claimant's ability to perform his job. In 1989, the claimant was involved in an altercation with one of his employers, and was taken to the hospital with a fractured hip and an inguinal hernia.[276] The court determined that since the claimant was not "disabled" from working until the time of his work-related accident, the aggravation to the preexisting condition made that condition compensable.[277]

The court affirmed the principle that where a claimant suffers from an idiopathic condition that is not aggravated by the work situation, no compensation is due the employee.[278] The claimant in *Hillsborough County School Board v. Williams*,[279] suffered from a preexisting L5-S1 bulge, and claimed that bending to pick up a paper on the school bus floor aggravated the back problem. The court upheld the decision of the JCC, which found that the claimant suffered injury solely as the result of normal

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271. *Id.* at 1345.

272. City of West Palm Beach v. Dahl, 610 So. 2d 456 (Fla. 1st Dist. Ct. App. 1992).

273. *Id.* at 458.

274. *See id.*

275. Delgado v. Blanco & Sons Catering, 606 So. 2d 658, 661 (Fla. 1st Dist. Ct. App. 1992).

276. *Id.*

277. *Id.* at 661.

278. *See* Southern Bell Tel. and Tel. Co. v. McCook, 355 So. 2d 1166, 1168 (Fla. 1977) (establishing the principle that an idiopathic condition that is not aggravated by the work situation does not "arise out of" the employment).

279. 601 So. 2d 624 (Fla. 1st Dist. Ct. App. 1992).

movement.[280] Based upon this finding, the injury was not compensable.[281]

In *Gilreath v. Charlotte County Board of County Commissioners*,[282] the court found that where an employee was injured while charging the battery of his car, the injury arose out of the employment and was, therefore, compensable.[283] The employer/carrier presented no evidence that the claimant had deviated from his duties. The court rejected the employer/carrier's contention that section 440.091 of the Florida Statutes requires affirmance that the claimant was acting within the course of employment.[284] The statutory section referenced by the court establishes that an employee of a municipality, state, or political subdivision is deemed an employee acting within the course of employment so long as the employee "was not engaged in service for which he was paid by a private employer, and he and his public employer had no agreement providing workers compensation coverage for that private employment."[285] Additionally, the court noted that a claimant's status as a law enforcement officer does not diminish the claimant's rights under the workers compensation law.[286]

In *City of Holmes Beach v. Grace*,[287] the Florida Supreme Court addressed the following question as one of great public importance:

> WHETHER SECTION 440.02(1), FLORIDA STATUTES (1985), DEFINING "ACCIDENT" EXCLUDES A MENTAL OR NERVOUS INJURY WHERE THE INJURY SUFFERED BY THE CLAIMANT RESULTS IN ONLY MINOR PHYSICAL CONSEQUENCES?[288]

The court chose to reword the question to:

> WHETHER SECTION 440.02(1), FLORIDA STATUTES (1985), DEFINING "ACCIDENT," EXCLUDES A MENTAL OR NERVOUS INJURY WHERE THE PHYSICAL INJURY SUFFERED BY THE

280. *Id.* at 625.
281. *Id.*
282. 610 So. 2d 88 (Fla. 1st Dist. Ct. App. 1992).
283. *Id.* at 89.
284. *Id.* (citing FLA. STAT. § 440.091 (1991)).
285. FLA. STAT. § 440.091(3) (1991).
286. *Gilreath*, 610 So. 2d at 89.
287. 598 So. 2d 71 (Fla. 1992).
288. *Id.* at 72.

CLAIMANT WAS NOT A CAUSE OF THE MENTAL OF NERVOUS INJURY?[289]

The supreme court answered the latter question in the affirmative and quashed the decision of the court below, which had found that where a policeman was struck by the elbow of a suspect, the subsequent psychiatric illness of the policeman was compensable.[290] The need to create a direct link between a physical injury and a psychiatric illness limits the scope of mental illness and stress claims to those based upon a physical injury. This limitation serves to reduce the number and severity of stress and psychiatric claims that are filed.

In *Nationwide Insurance v. McGee*,[291] the court determined that a JCC erred in finding that the claimant suffered a compensable injury.[292] The court noted that the record clearly established that all of claimant's injuries were psychiatric.[293] Section 440.02(1) of the Florida Statutes has been construed as precluding compensation for mental or emotional injury, unless the claimant establishes that such mental or emotional injury was the direct and immediate result of a physical injury.[294]

Where a claimant's case was dismissed with prejudice for failure to attend an independent medical examination ("IME"), the court reversed the finding of the JCC.[295] The court based its decision on the fact that the IME was not ordered by the JCC and that dismissal with prejudice was too harsh a sanction for failure to attend an IME not ordered by the JCC.[296]

Where a carrier limited a claimant's award of hydrotherapy to membership in a health club, the court reversed the finding of the JCC.[297] The court found that the claimant was entitled to payment for a jacuzzi hot tub and for the balance of the purchase price of claimant's first hot tub.[298] The claimant's first hot tub had suffered a crack and was not usable, thus

289. *Id.* at 74.

290. *Id.*

291. 597 So. 2d 357 (Fla. 1st Dist. Ct. App. 1992).

292. *Id.* at 358.

293. *Id.*

294. *Id.* (interpreting section 440.02(1) of the Florida Statutes, 1989, which provides, "A mental or nervous injury due to stress, fright or excitement only . . . shall be deemed not to be an injury by accident arising out of the employment.").

295. McConnell v. Florida Furniture Ctr., 611 So. 2d 65, 66 (Fla. 1st Dist. Ct. App. 1992).

296. *Id.*

297. Kubber v. Max Davis Assocs., 603 So. 2d 137, 139 (Fla. 1st Dist. Ct. App. 1992).

298. *Id.* at 138-39.

necessitating the need for the jacuzzi hot tub. The court noted that there was competent substantial evidence that the claimant did not have a public facility available to him, and the employer/carrier did not introduce any evidence to the contrary.[299]

The scope of benefits available to an injured employee may range from lifetime medical care, prosthetic devices, wage-loss benefits, attendant care, homes, and vehicles to accommodate disabilities. Many of the benefits, while necessary to ensure a quality of life for the injured work, are so costly they serve to drive up the cost of workers compensation insurance.[300]

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299. *Id.* at 138.

300. *See* Edenfield v. B&I Contractors, Inc., 18 Fla. L. Weekly D2105 (Fla. 2d Dist. Ct. App. Sept. 22, 1993) (reversing a summary judgment which denied a claim for wrongful termination based upon the filing of a workers compensation claim); Meek v. Layne-Western Co., 18 Fla. L. Weekly D2041 (Fla. 1st Dist. Ct. App. Sept. 14, 1993) (reversing where the JCC utilized the incorrect formula for the calculation of wage loss); Robinson v. Shands Teaching Hosp., 18 Fla. L. Weekly D2029 (Fla. 1st Dist. Ct. App. Sept. 14, 1993) (affirming an award of psychiatric treatment by a physician selected by the employer); Belcher v. Dade County Sch. Bd., 623 So. 2d 826 (Fla. 1st Dist. Ct. 1993) (reversing where claimant was denied certain household items, the cost of a maid and bathtub rails); Jones v. Petland Orlando S., 622 So. 2d 1114 (Fla. 1st Dist. Ct. App. 1993) (reversing a determination that Rogaine treatment was experimental); Fawaz v. Florida Polymers, 622 So. 2d 492 (Fla. 1st Dist. Ct. App.) (reversing where the JCC erred in applying the misrepresentation defense and claimant was denied temporary partial disability benefits); Turnberry Assocs., Inc. v. Pierre, 618 So. 2d 777 (Fla. 1st Dist. Ct. App. 1993) (reversing an award of psychiatric treatment where no claim for such treatment was made); Turner v. Rinker Materials, 622 So. 2d 80 (Fla. 1st Dist. Ct. App. 1993) (reversing the denial of temporary partial disability and wage loss benefits where the claimant was not made aware of reporting requirements); Deep South Products v. Beach, 616 So. 2d 156 (Fla 1st Dist. Ct. App. 1993) (affirming an award of temporary partial disability, wage-loss, attendant care benefits, costs and attorneys fees following claimant's incarceration for DUI); Arizona Chemical Corp. v. Hanlon, 605 So. 2d 938 (Fla. 1st Dist. Ct. App. 1992) (awarding the claimant biodetoxification treatment, both past and future, travelling expenses to obtain treatment and an in-home hot tub); Town & Country Farms v. Peck, 611 So. 2d 63 (Fla. 1st Dist. Ct. App. 1992) (affirming an award of a hospital bed and acupuncture treatments); Rodriguez v. Prestress Decking Corp., 611 So. 2d 59 (Fla. 1st Dist. Ct. App. 1992) (affirming the denial of death benefits where the claimant was over the statutory age at the time of her brother's death); Bristol Myers Co. v. Clark, 599 So. 2d 775 (Fla. 1st Dist. Ct. App. 1992) (reversing an order denying attendant care and making the award retroactive); Value Rent A Car v. Liccardo, 603 So. 2d 680 (Fla. 1st Dist. Ct. App. 1992) (affirming an order to include gratuities in the calculation of AWW even though the employer had no policy in regard to the reporting of gratuities and the employee failed to provide the employer with a contemporaneous written report of gratuities); Maranje v. Brinks of Florida, Inc., 610 So. 2d 1293 (Fla. 3d Dist. Ct. App. 1992) (awarding the claimant a two bedroom home with an in-ground heated pool and, because he was denied this home during a fifteen month appeal, he was entitled to monetary damages which would make him whole for the period he was without the home); Southeast Environmental

Many of the reform measures proposed for the workers compensation system relate to limitations on benefits. Labor activists object to reform efforts which concentrate on the reduction of benefits and highlight those instances where there is employee claim fraud and employer fraud in relation to proper premium as the real cost drivers in workers compensation.[301]

9. Occupational Disease

Section 440.151 of the Florida Statutes provides for several alternative theories in relation to occupational disease.[302] If a disease is classified as an occupational disease, rather than one fitting the prolonged exposure theory, the carrier of record at the time of the last exposure is liable for all benefits payable to the claimant.[303] If, on the other hand, prolonged exposure theory is found to be the basis of the claim, carriers are entitled to contribution from each carrier of record for the period of time the carrier issued the policy.[304] The claimant is entitled to the same benefits under either theory of recovery, however, the source of the benefits may vary.

Contractors, Inc. v. Cayasso, 611 So. 2d 7 (Fla. 1st Dist. Ct. App. 1992) (reversing an order on wage-loss indicating that the statutory 80/80 formula should have been applied regardless of whether the claimant had such earnings); Carroll Steel Erectors v. Alderman, 599 So. 2d 181 (Fla. 1st Dist. Ct. App. 1992) (affirming an award of death benefits to parents in spite of erroneous standard of proof with respect to the issue of dependency); Martin County Bd. of County Comm'rs v. Jones, 595 So. 2d 125 (Fla. 1st Dist. Ct. App. 1992) (affirming an award of psychiatric care and wage-loss benefits); Gilley Trucking Co. v. Morrell, 591 So. 2d 302 (Fla. 1st Dist. Ct. App. 1991) (affirming an award of the cost of a conventional home to the claimant, a quadriplegic, in lieu of a pre-fabricated home for the disabled); University of Florida v. Massie, 602 So. 2d 516 (Fla. 1992) (reversing the district court award of modified benefits where an employee had a preexisting condition which was aggravated and for which benefits were awarded); Nickolls v. University of Florida, 606 So. 2d 410 (Fla. 1st Dist. Ct. App. 1992) (claimant's physical condition appeared to no longer restrict the capacity to work, however, the JCC's determination that the claimant was required to do a work search was not supported by competent substantial evidence and therefore reversal was required).

301. On November 10, 1993, the Florida Legislature passed Senate Bill 12C, which reforms workers compensation by reducing certain benefits and providing premium reduction credits for employers. In response to this legislation, "Labor unions, trial lawyers, and some legislators say that some of the most seriously injured workers are big losers." Tim Nickens, *Scoring Workers' Comp*, Miami Herald, Nov. 11, 1993, at 1C, 3C.

302. *See generally* FLA. STAT. § 440.151 (1991).

303. *Id.* § 440.151(5); *see also* Eastern Airlines, Inc. v. Crittenden, 596 So. 2d 112 (Fla. 1st Dist. Ct. App. 1992).

304. *Crittenden*, 596 So. 2d at 113.

The court addressed a repeated trauma claim in the case of a worker who cut, chopped, stirred and lifted in the role of oriental chef.[305] The court determined that exposure and repeated trauma cases should be governed by the same principles as "repeated accidents."[306] It is the combination of the repeated accidents that leads to a compensable injury.[307] In *Tokyo House, Inc.*, the court found that a repeated trauma occurred during the two year period before the claim was filed and found that the compensation to the employee was due from the carrier of record during that time.[308]

There are times when the link between industrial accident and a separate normally noncompensable disease interact to create the need for greater benefits to the employee. In *Urban v. Morris Drywall Spray*,[309] the court determined that the claimant's compensable injury was aggravated by preexisting diabetes. The court's determination was based upon an earlier decision, which established the principle that where a preexisting condition is aggravated by a compensable accident, the exacerbation of the preexisting condition is itself compensable.[310] The court also found that it was necessary to treat claimant's diabetic condition in order to render effective treatment of claimant's compensable injuries.[311]

In *Martin County School Board v. McIntosh*,[312] the court examined the medical testimony supplied to the JCC and determined that there was competent substantial evidence to support a finding of disabling occupational disease without the need for further medical tests. The court found that the claimant suffered from an occupational disease within the meaning of Florida law[313] by exhibiting the symptoms of chromate sensitivity and resulting allergic reactions caused by concrete during the course of his employment.[314] The court determined that a claimant need not "present evidence of a positive patch test to satisfy the requirements of section

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305. Tokyo House, Inc. v. Hsin Chu, 597 So. 2d 348, 349 n.1 (Fla. 1st Dist. Ct. App. 1992); *see also* Festa v. Teleflex, Inc., 382 So. 2d 122 (Fla. 1st Dist. Ct. App.) (discussing the exposure and repeated trauma theory), *review denied*, 388 So. 2d 1119 (Fla. 1980).

306. *Hsin Chu*, 597 So. 2d at 351.

307. *Id.*

308. *Id.* at 352.

309. 595 So. 2d 60 (Fla. 1st Dist. Ct. App. 1991)

310. *Id.* at 61 (citing Castro v. Florida Juice Division, 400 So. 2d 1280 (Fla. 1st Dist. Ct. App. (1981)).

311. *Id.*

312. 605 So. 2d 166 (Fla. 1st Dist Ct. App. 1992).

313. *See generally* FLA. STAT. § 440.151 (1991) (concerning occupational diseases).

314. *McIntosh*, 605 So. 2d at 166.

440.151 [of the Florida Statutes] so long as the medical evidence is otherwise legally sufficient to establish causation . . . ."[315]

In another case, a claim for occupational disease benefits by a claimant who developed pneumonia was reversed by the court.[316] The claimant was employed to wash buses and claimed that he developed pneumonia from washing buses in inclement weather. The employer/carrier took the deposition of an expert witness to challenge the causal relationship.[317] The doctor, however, was paid more than the statutory rate[318] and the claimant moved to strike the doctor's testimony.[319] The JCC and those present at the hearing on the merits engaged in dialogue that called into question the veracity of the doctor and that indicated a bias on the part of the JCC against the doctor's testimony.[320] The court vacated the order of the JCC and remanded the case for a new hearing on the merits.[321] The dissent noted that, even though the JCC's comments lacked judicial decorum, there was no evidence of bias and the findings of the JCC could be upheld because they were supported by competent substantial evidence.[322]

10. Average Weekly Wage

Under the 1989 provisions relating to the determination of average weekly wage ("AWW"), the JCC found, and the First District Court of Appeal affirmed, that a claimant injured while working as a camp counselor was not entitled to an average weekly wage calculation, which included earnings from a newspaper delivery route.[323] The court stated that the

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315. *Id.* at 167.

316. Alamo Rent-A-Car v. Phillips, 613 So. 2d 56, 58 (Fla. 1st Dist. Ct. App. 1992).

317. *Id.*

318. The Florida Statutes limits the fee payable to a health care provider as compensation for a deposition to $200. FLA. STAT. § 440.13(2)(l) (1991).

319. *Phillips*, 613 So. 2d at 57.

320. *Id.* at 57-58.

321. *Id.*

322. *Id.*

323. City of Port Saint Lucie v. Chambers, 606 So. 2d 450 (Fla. 1st Dist. Ct. App. 1992), *review denied*, 618 So. 2d 208 (Fla. 1993). The 1991 Amendments to chapter 440 eliminate the concurrent earnings provisions and limit the claimant to recovery from the employment ongoing at the time of injury. FLA. STAT. ch 440 (1991). The constitutionality of this provision is currently on appeal before the First District Court of Appeal. *But see* Ciancio v. North Dunedin Baptist Church, 616 So. 2d 61 (Fla. 1st Dist. Ct. App. 1993) (claimant failed to meet the heavy burden of establishing that the provision is unconstitutional and the denial of benefits for concurrent wages is affirmed).

wages from concurrent earnings are generally included (prior to the 1991 amendments) in the calculation of average weekly wage, but that the wages of independent contractors were specifically excluded because such contractors are not included in the definition of employee under section 440.02(12)(d)(1), Florida Statutes.[324]

Florida statute provides that where a claimant voluntarily limits earnings, a JCC may apply a deemed earnings provision to the calculation of average weekly wage.[325] In *Avellino v. Pantry Pride Enterprises, Inc.*,[326] the court overturned a JCC's determination that the employer should be allowed an offset because the claimant voluntarily limited earnings. The court noted that the application of section 440.15(3)(b)(2) involves the shifting of burdens of proof.[327] Once the compensability of the injury is established, the burden of proof shifts to the employer to demonstrate that the claimant voluntarily limited his or her earnings.[328] In this case, the employer/carrier failed to meet its burden and to establish, by competent substantial evidence, that the claimant voluntarily limited earnings. Therefore, the findings of the JCC were reversed and the cause remanded for further proceedings.[329]

In *PLM Florida Hotels, Inc. v. DeMarseul*,[330] the court reversed a modification of the AWW award to a claimant who sustained a slip and fall accident in the course and scope of employment. The claimant was awarded a modification in AWW and the court found this error on the part of the JCC.[331] A modification is granted where the claimant makes a showing of mistake of fact or where material evidence becomes available after the order.[332] The court determined that no new evidence was presented and, therefore, the claimant was not entitled to a modification of AWW.[333]

Average weekly wage awards are determined by statutory dictate.[334] In *Stanley Steemer International v. Prescott*,[335] the court found that the

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324. *Chambers*, 606 So. 2d at 451 (citing FLA. STAT. § 440.15(3)(b)(2) (1991)).
325. FLA. STAT. § 440.15(3)(b)(2) (1991).
326. 597 So. 2d 347 (Fla. 1st Dist. Ct. App. 1992).
327. *Id.* at 348 (citing FLA. STAT. § 440.15(3)(b)(2) (1991)).
328. *Id.*
329. *Id.*
330. 611 So. 2d 1360 (Fla. 1st Dist. Ct. App.), *review denied*, 620 So. 2d 760 (Fla. 1993).
331. *Id.* at 1362.
332. *Id.*
333. *Id.* at 1362-63.
334. *See* FLA. STAT. § 440.15 (1991).
335. 615 So. 2d 211 (Fla. 1st Dist. Ct. App. 1993).

JCC erred in selecting the section of the statute applicable to the determination of AWW. The claimant was employed as a "piece worker" delivering subpoenas. The JCC determined that the statute would "punish" the claimant "for demonstrating perseverance, motivation, and initiative."[336] The court withheld comment on whether there was a punishing effect in the statute, but noted that the claimant's salary was most analogous to a commission and this was the basis upon which the AWW calculation should be made.[337]

11. Special Disability Trust Fund

Special disability trust funds are designed to assist in the hiring of workers who are disabled whether or not the disablement occurred as the result of an industrial accident.[338] In Florida, a second injury or disease that merges with previous permanent physical impairment and results in substantially greater disability than from the second injury alone entitles the employer to reimbursement for sixty percent of impairment benefits, sixty percent of wage loss benefits during the first five years after maximum medical improvement and seventy-five percent thereafter.[339]

In *Special Disability Trust Fund v. Stephens, Lynn, Chernay & Klein*,[340] the court upheld an order awarding the employers, in a consolidated case, reimbursement from the Special Disability Trust Fund for supplemental permanent total disability benefits paid pursuant to section

336. *Id.*

337. *Id.* Other cases discussing AWW include: Efficient Sys., Inc. v. Florida Dep't of Labor & Employment Sec., 18 Fla. L. Weekly D2035 (Fla. 1st Dist. Ct. App. Sept. 14, 1993) (remanding for recalculation of AWW where the JCC calculated the AWW based on prior employment); Waldorf v. Jefferson County Sch. Bd., 622 So. 2d 515 (Fla. 1st Dist Ct. App. 1993) (affirming the selection of methodology for calculating AWW where the JCC determined the claimant's AWW should be based solely on the number of weeks he actually worked during the term of his contract); Pishotta v. Pishotta Tile & Marble, Inc., 613 So. 2d 1373 (Fla. 1st Dist. Ct. App. 1993) (claimant was an active partner in the business enterprise and sought an AWW award based upon the duties performed); Brownell v. Hillsborough County, 617 So. 2d 803 (Fla. 1st Dist. Ct. App. 1993) (affirming the JCC's award of AWW minus the cost of uniforms supplied to the claimant); and Cardinal Indus. v. Pauley, 610 So. 2d 93 (Fla. 1st Dist. Ct. App. 1992) (remanding for explanation from the JCC of factors used to calculate the AWW).

338. UNITED STATES CHAMBER OF COMMERCE, ANALYSIS OF WORKERS COMPENSATION LAWS 41 (1993).

339. *Id.* The Second Injury Fund is based on a pro rata annual assessment of net premiums of insurers and self-insurers. The assessments must equal the sum of the immediate past three years' disbursements. *Id.*

340. 595 So. 2d 206 (Fla. 1st Dist. Ct. App. 1992).

440.15(1)(e)(1) of the Florida Statutes.[341] The court reviewed the legislative history of the statute to reach its conclusion, but noted that the Legislature may not have accomplished its objective in the 1984 amendment process.[342] The court, therefore, certified the following question as one of great public importance:

> IS THE SPECIAL DISABILITY TRUST FUND, PURSUANT TO SECTION 440.49(2)(C), FLORIDA STATUTES, REQUIRED TO REIMBURSE EMPLOYERS FOR SUPPLEMENTAL PERMANENT TOTAL DISABILITY BENEFITS PAID PURSUANT TO SECTION 440.15(1)(E)(1), FLORIDA STATUTES?[343]

In *Hillsborough County School Board v. Special Disability Trust Fund*,[344] the court reversed a finding of the JCC denying reimbursement from the Special Disability Trust Fund, thereby affirming its decision in *Avellino*, and again certified the same question as one of great public importance.[345]

The court also reversed the finding of the JCC in regard to reimbursement from the special disability fund in *Breakers Hotel v. Special Disability Trust Fund*.[346] The court found that there was no collusion between the employee and the carrier as to the settlement for attorney's fees and that the employer should be entitled to reimbursement for an appropriate percentage of the total settlement amount.[347]

In *Florida Employers Insurance Service Corp. v. Special Disability Trust Fund*,[348] the Florida Employers Insurance Service Corporation ("FEISCO") sought a declaratory statement from the court as to its right to reimbursement from the special disability trust fund. FEISCO was prepared to separate its payment of benefits into two checks, one for attorneys fees and one payable to the claimant. The court determined that FEISCO did not

341. *Id.* at 209 (citing FLA. STAT. § 440.15(1)(e)(1) (1991)).

342. *Id.*

343. *Id.*

344. 596 So. 2d 483 (Fla. 1st Dist. Ct. App. 1992).

345. *Id.*

346. 620 So. 2d 1132 (Fla. 1st Dist. Ct. App. 1993).

347. *Id.* at 1133. The Special Disability Trust Fund does not reimburse attorney fees, and here the settlement did not separate the attorney's fees from the benefits paid to the claimant.

348. 615 So. 2d 859 (Fla. 1st Dist. Ct. App. 1993).

jeopardize its right to reimbursement by issuing two checks in the manner specified.[349]

12. Payment of Compensation Premiums

Among the basic principles of workers compensation law is the payment of premiums by the employer for benefits to be paid to the employee. In 1989, the Supreme Court of Florida consolidated and addressed the common issue presented in the cases of *Barragan v. City of Miami* and *Giordano v. City of Miami*,[350] both involving a City of Miami ordinance that permitted the city to collect contributions from employees for the payment of workers compensation benefits.[351] Since 1989, there have been numerous cases that have tested the retroactivity of the supreme court's decision in *Barragan*.[352] The First District Court of Appeal has firmly

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349. *Id.* at 861.

350. Barragan v. City of Miami, 545 So. 2d 252 (Fla. 1989) (consolidating on review and quashing the decisions below in the cases of City of Miami v. Barragan, 517 So. 2d 99 (Fla. 1st Dist. Ct. App. 1987) and Giordano v. City of Miami, 526 So. 2d 737 (Fla. 1st Dist. Ct. App. 1988)).

351. *Id.* at 254.

352. *See* City of Miami v. Bell, 606 So. 2d 1183 (Fla. 1st Dist. Ct. App. (1992), *review granted*, 621 So. 2d 431 (Fla. 1993). In *Bell*, the First District affirmed the JCC's award of additional benefits and certified the following question as one of great public importance:

> IS SECTION 440.20(7) APPLICABLE UNDER THE CIRCUMSTANCES OF THIS CASE, AND IF SO, CAN THE CITY OF MIAMI, BE LEGALLY EXCUSED FROM PAYING A PENALTY PURSUANT TO THAT SECTION ON THE AMOUNT OF PENSION OFFSET MONIES WITHHELD IN THE PAST BECAUSE THE CITY DID SO IN GOOD FAITH RELIANCE ON THE VALIDITY OF THE CITY ORDINANCE AUTHORIZING THE PENSION OFFSET IN VIEW OF THE APPELLATE DECISIONS APPROVING ITS VALIDITY?

Id. at 1189. The following cases certified the same question, and have been consolidated for review to the Florida Supreme Court with *Bell*: City of Miami v. Arostegui, 606 So. 2d 1192 (Fla. 1st Dist Ct. App. 1992) (award of additional benefits upheld); City of Miami v. Hickey, 614 So. 2d 1116 (Fla. 1st Dist. Ct. App. 1992) (upholding the award of additional benefits); City of Miami v. McLean, 605 So. 2d 953 (Fla. 1st Dist. Ct. App. 1992). In addition to recertifying the question above, the court in *McLean* also certified the following questions as one of great public importance:

> Whether an increase in workers' compensation benefits, awarded pursuant to section 440.21 to offset illegal deductions from an employee's pension fund, in accordance with *Barragan v. City of Miami*, 545 So.2d 252 (Fla. 1989), constitutes "compensation" for purposes of section 440.20, Florida Statutes?

Id. at 954; *see also* City of Miami v. Paredes, 614 So. 2d 1163, 1164 (Fla. 1st Dist. Ct. App.) (certifying the same question as certified in *Bell*, but not consolidated for review), *review*

held to the position of retroactive application and has sought guidance from the Supreme Court of Florida in regard to several questions certified as being of great public importance. The position of the First District Court of Appeal supports the long held premise that payments of workers compensation premiums are the responsibility of the employer.

13. Attorney's Fees

In *Leather Shop v. Mills*,[353] the court reviewed an award of attorney's fees made after an accident in 1986.[354] The pertinent Florida statute provides: "A claimant shall be responsible for the payment of his own attorney's fees, except that a claimant shall be entitled to recover a reasonable attorney's fee from a carrier or employer."[355] The two issues presented were whether the JCC erred in awarding attorney's fees absent a showing of bad faith and whether the JCC erred in awarding attorney's fees based on temporary total disability.[356] The court noted that it requires the order of a JCC to specifically state whether an award of attorney's fees is based on bad faith.[357] In the instant case, the order from the JCC was silent on this matter. Therefore, the appellate court reversed the decision for entry of the particular grounds upon which fees were awarded.[358]

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granted, __ So. 2d__ (1993).

See also City of Miami v. Daugherty, 614 So. 2d 1222 (Fla. 1st Dist. Ct. App. 1993); City of Miami v. Hammond, 614 So. 2d 1205 (Fla. 1st Dist. Ct. App. 1993) (award of additional benefits upheld based upon a distinction between workers compensation benefits for disability occurring in the course and scope of employment and pension disability benefits which could accrue for any reason and did not need to be job related); City of North Bay Village v. Cook, 617 So. 2d 753 (Fla. 1st Dist. Ct. App. 1993) (reversing and remanding for inclusion in the offset determination of the amount of benefits paid to the claimant as compensation on the authority of *Barragan*); Barber v. City of Daytona Beach, 614 So. 2d 669 (Fla. 1st Dist. Ct. App. 1993) (affirming an award of additional compensation to offset illegal deductions of pension benefits when pension benefits have been reduced to the extent of workers compensation payments); City of Miami v. Burnett, 596 So. 2d 478 (Fla. 1st Dist. Ct. App.), *review denied sub nom.* City of Miami v. Ogle, 606 So. 2d 1164 (Fla. 1992) (*Barragan* has retroactive application to July 1, 1973); City of Miami v. Beall, 610 So. 2d 631 (Fla. 1st Dist. Ct. App. 1992) (claim for additional benefits denied based upon statute of limitations); City of Miami v. Smith, 602 So. 2d 542 (Fla. 1st Dist. Ct. App. 1991) (pension offset benefits were awarded for the period specified in the order).

353. 592 So. 2d 744 (Fla. 1st Dist. Ct. App. 1992).

354. *Id.* at 745.

355. FLA. STAT. § 440.34(3) (1991).

356. *Leather Shop*, 592 So. 2d at 745.

357. *Id.* at 746.

358. *Id.*

In *Sawyer v. Dover Cylinder Head Co.*,[359] the court reversed an award of attorney's fees with instruction to calculate the attorney's fee on the total stipulated amount of permanent total disability benefits and supplemental benefits obtained for claimant by virtue of his attorney's effort.[360] The court noted that the attorney had expended time and effort on behalf of the claimant in order to establish the right to permanent total disability benefits and was, therefore, entitled to a fee based on these efforts.[361]

In *Royal Services, Inc. v. Smith*,[362] the court reversed and remanded an award of $25,000 in attorney's fees. The award was reversed due to the failure of the JCC to establish the basis upon which the JCC departed from the statutory fee formula.[363] Although the JCC may depart from the statutory fee formula, an analysis of the factors that led to the departure must be included in the order.[364]

C. *We Will Defend (Part One C)*

> We have the right and duty to defend at our expense any claim, proceeding or suit against you for benefits payable by this insurance. We have the right to investigate and settle these claims, proceedings or suits. We have no duty to defend a claim, proceeding or suit that is not covered by this insurance.[365]

Each workers compensation claim brought before the JCC is brought in the name of the injured employee and the employer/carrier. The carrier provides defense from the moment of notification of the claim and may have established procedures for the employer to follow to ensure timely reporting and payment. In the event that the employer/carrier does not respond as required, a claimant may proceed with an additional claim for bad faith.

The Supreme Court of Florida addressed the following question certified as being of great public importance:

> WHEN AN EMPLOYEE CLAIMS INJURY ARISING FROM THE ALLEGED FRAUDULENT ACT OF AN EMPLOYER/CARRIER

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359. 593 So. 2d 279 (Fla. 1st Dist. Ct. App. 1992).
360. *Id.* at 282.
361. *Id.* at 281.
362. 605 So. 2d 588 (Fla. 1st Dist. Ct. App. 1992).
363. *Id.* at 589.
364. *See id.*
365. POLICY, *supra* note 12.

> COMMITTED IN THE COURSE OF A PROCEEDING INITIATED PURSUANT TO CHAPTER 440 [OF THE FLORIDA STATUTES] IS A CRIMINAL ADJUDICATION OF GUILT PRESCRIBED IN SECTION 440.37 A CONDITION TO THE MAINTENANCE OF AN INDEPENDENT TORT ACTION?[366]

The court answered the question in the negative and quashed the decision of the district court.[367] To reach this conclusion, the Supreme Court of Florida noted that the Florida Workers Compensation Act was not meant to bar recovery for intentional tortious conduct.[368] Intentional tortious conduct is also excluded from coverage under the Employers Liability Insurance portion of the policy. As a matter of public policy, employers are held liable for their own intentional acts and the WCELIP does not provide coverage or a defense for such acts.

In *Wackenhut Corp. v. Schisler*,[369] the court found that an admission of bad faith in regard to payment of one claim did not constitute an admission of bad faith in regard to subsequent claims.[370] To reach this conclusion, the court examined the facts and decided that the employer/carrier timely paid the claim for permanent disability benefits when notified of the claim.[371] The court cited to prior decisions in which it had enunciated the principle that the nonpayment of claims immediately upon the taking of the claimant's doctor's deposition was not grounds for a bad faith award of attorney's fees.[372]

Even when an award of attorney's fees for bad faith handling of a claim is upheld, the court has determined that the fees awarded should follow the statutory fee formula unless there are compelling reasons for departure from this standard.[373] The court specifically noted, however,

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366. Sibley v. Adjustco, Inc., 596 So. 2d 1048, 1049 (Fla. 1992).

367. *Id.*

368. *Id.*

369. 606 So. 2d 1250 (Fla. 1st Dist. Ct. App. 1992) (involving a wrap-up policy between Wackenhut and Florida Power and Light). A wrap-up policy is used to provide coverage for individuals who might otherwise "slip through the cracks" on large projects. Generally, the wrap-up policy is the policy of last resort for a workers compensation claimant. The policy is used when there is overlapping or no coverage for an individual who has performed work for the parties but who may not be able to establish employee status.

370. *Id.* at 1253.

371. *Id.*

372. *Id.* at 1252 (citing Doctor's Hosp. of Sarasota v. Taylor, 576 So. 2d 1364 (Fla. 1st Dist. Ct. App. 1991)).

373. *See* Regal Woods Prods. v. Baschansci, 603 So. 2d 551 (Fla. 1st Dist. Ct. App. 1992).

that where warranted and supported by competent substantial evidence the JCC would be justified in departing from the statutory fee formula.[374]

In *Woolworth's Restaurant v. Cubillos*,[375] the court reversed an award of penalties.[376] The court noted:

> Penalties should not be imposed where the e/c [employer/carrier] timely file a notice to controvert. . . . Although the record in the instant case does not contain a notice to controvert, a portion of the JCC's order states that "[t]his claim was totally controverted." Because no explanation is offered, we must reverse the award of penalties and remand the case for clarification of the JCC's order . . . . On remand, the JCC should state explicitly whether the e/c sufficiently controverted the claim, or, if the claim was not timely controverted, whether the e/c have a valid excuse for not doing so.[377]

The decision continues a chain of cases in which the court requires a determination by the JCC that the employer/carrier has failed to meet its obligations before an award of penalties or attorney's fees will be made for bad faith.[378]

The court reversed an order denying bad faith attorney's fees where the record showed that the employer/carrier had never sought to take the deposition of the doctor whose testimony was essential to establishing the claim.[379] The claim for attorney's fees was made on the ground that the employer/carrier acted in bad faith by not timely accepting the claimant as permanently totally disabled.[380] The employer/carrier testified that permanent total disability benefits were awarded when claimant's doctor's deposition was taken.[381] The court's position was that the deposition was scheduled by claimant's counsel, and that the employer/carrier had not sought the information, which could have resolved the claim seventeen months earlier.[382] Accordingly, the evidence used to deny bad faith

374. *See id.* at 553.

375. 608 So. 2d 895 (Fla. 1st Dist Ct. App. 1992).

376. *Id.*

377. *Id.*

378. *See, e.g.*, Glades Gen. Hosp. v. Sullenger, 584 So. 2d 109 (Fla. 1st Dist. Ct. App. 1991); Four Quarters Habitat, Inc. v. Miller, 405 So. 2d 475 (Fla. 1st Dist. Ct. App. 1981); Central Maintenance & Welding v. Simmons; 621 So. 2d 514 (Fla. 1st Dist. Ct. App. 1993).

379. Kirkland v. Northwest Fla. Regional Hous. Auth., 596 So. 2d 1259 (Fla. 1st Dist. Ct. App. 1992).

380. *Id.* at 1260.

381. *Id.*

382. *Id.*

attorney's fees was not competent to justify the delay in the carrier's response.[383]

Where a carrier accepted an injury as compensable and began compensation payments that were later reduced, the court reasoned that an award of penalties, interest, and costs was required.[384] The carrier had reduced payments in order to recoup what it believed were overpayments to the claimant. In doing so, however, it recouped more than the amount it believed the claimant owed. The claimant prevailed on many of her claims in the proceedings below and the court remanded the case for the entry of an award of penalties, interest, costs, and attorney's fees.[385]

D. *We Will Also Pay (Part One D)*

> We will also pay these costs, in addition to other amounts payable as insurance, as part of any claim, proceeding or suit we defend:
> 1. reasonable expenses incurred at our request, but not loss of earnings;
> 2. premiums for bonds to release attachments and for appeal bonds in bond amounts up to the amount payable under this insurance;
> 3. litigation costs taxed against you;
> 4. interest on a judgment as required by law until we offer the amount due under this insurance; and
> 5. expenses we incur.[386]

This is a listing of various costs and expenses that the insurer is obligated to pay in connection with the defense of any claim made against the insured. These costs are in addition to any costs that the insurer is required to pay pursuant to other sections of the policy.[387]

E. *Other Insurance (Part One E)*

> We will not pay more than our share of benefits and costs covered by this insurance and other insurance or self-insurance. Subject to any limits of liability that may apply, all shares will be equal until the loss

383. *Id.* at 1261.

384. *See* McClure v. Goldman, Klasfeld, Horkey & Ferraro, 594 So. 2d 353 (Fla. 1st Dist. Ct. App. 1992).

385. *Id.* at 354.

386. POLICY, *supra* note 12.

387. GUIDE, *supra* note 9, at 6.

> is paid. If any insurance or self-insurance is exhausted, the shares of all remaining insurance will be equal until the loss is paid.[388]

As noted previously, it is possible that more than one policy and/or insurer may be liable for the benefits to claimant. This section of the policy provides that only the portion of the claim that is tied to the policy under which the claim is made will be paid by that policy. This section is becoming more significant as a greater number of insureds retain a portion of the responsibility (deductible plans) or self-insure for part or all of their liability.[389] The National Council on Compensation Insurance has filed a Benefits Deductible Endorsement-WC 00 06 03,[390] which has been approved for use in Florida. Individual carriers may also file large deductible plans with state regulators.

F. *Payments You Must Make (Part One F)*

> You are responsible for any payments in excess of the benefits regularly provided by the workers compensation law including those required because:
> 1. of your serious and willful misconduct;
> 2. you knowingly employ an employee in violation of law;
> 3. you fail to comply with a health or safety regulation; or
> 4. you discharge, coerce or otherwise discriminate against any employee in violation of the workers compensation law.
>
> If we make any payments in excess of the benefits regularly provided by the workers compensation law on your behalf, you will reimburse us promptly.[391]

This section gives notice to the insured of the payments that are not insured or insurable under the policy contract.[392] In some states, not including Florida, benefit payments may be doubled if the employer knowingly hires a minor child.[393] In such an instance, the carrier would make the payment on behalf of the employer but would retain the right to reclaim the excess payment from the employer.[394]

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388. POLICY, *supra* note 12.
389. GUIDE, *supra* note 9, at 7.
390. POLICY, *supra* note 12.
391. *Id.*
392. GUIDE, *supra* note 9, at 7.
393. *Id.* at 8.
394. *Id.*

G. *Recovery From Others (Part One G)*

> We have your rights, and the rights of persons entitled to the benefits of this insurance, to recover our payments from anyone liable for the injury. You will do everything necessary to protect those rights for us and to help us enforce them.[395]

This provision of the policy provides for subrogation against another person or policy which may be responsible for all or part of the claim. An employer may elect to waive the right of subrogation by requesting that the carrier attach the Waiver of Our Right to Recover From Others Endorsement—WC 00 03 13[396] to the policy. This endorsement was filed as an advisory endorsement, which means that each carrier using the endorsement must file it with the state regulator and gain approval in accordance with the laws of the state. The endorsement has limited use in the assigned risk market, since it will only be reinsurable if attached to a policy for which waiver of subrogation is required by contract.[397]

In *Commercial Union Insurance Co. v. Fallen*,[398] a case of first impression, the Fifth District Court of Appeal considered section 440.39(3)-(a) of the Florida Statutes to determine whether an award of post-judgment interest was proper on a judgment against a third-party tortfeasor.[399] The case arose following the payment of workers compensation benefits to two employees who had successfully pursued claims against third parties. The insurer, however, held subrogation liens on the judgment.[400] The issue before the court was whether Florida statute required that post-judgment interest be paid on the pro rata share to the insurance company.[401] The court found that the statute does not directly address the issue of post-judgment interest, but stated that both logic and equity dictate that the

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395. POLICY, *supra* note 12.

396. NCCI, POLICY FORMS MANUAL, 1984.

397. FLORIDA WORKERS COMPENSATION INSURANCE PLAN (1984) ("FWCIP"). The FWCIP contains the rules which govern workers compensation assigned risk policies in Florida. The Plan is filed with the state regulator and is applied to all employers who are unable to obtain voluntary insurance or who do not qualify for self insurance. On November 10, 1993, the Florida Legislature passed Senate Bill 12C, which abolishes the FWICP and its reinsuring mechanism. The bill will become effective December 31, 1993 provided that it is signed by the governor. The Florida Join Underwriting Association ("JUA") will come into effect on January 1, 1994, and will assume the insurance and reinsurance responsibilities.

398. 603 So. 2d 610 (Fla. 5th Dist. Ct. App. 1992).

399. *Id.* (citing FLA. STAT. § 440.39(3)(a) (1991)).

400. *Id.*

401. *Id.* at 612.

insurer is entitled to its pro rata share of the post-judgment interest collected from the tortfeasors.[402]

In *Tarmac of Florida v. Gwaltney*,[403] the Fifth District Court of Appeal considered whether a trial court has the discretion to limit a carrier's lien on future benefits to indemnity benefits, to the exclusion of medical benefits.[404] The appellate court noted the literal wording of section 440.39(3)(a) of the Florida Statutes, which expressly states that the term "benefits" includes both compensation and medical benefits and provides that the carrier's pro rata recovery applies against each.[405] The court concluded that the pro rata recovery applies to future, as well as past, benefits. While the court reversed the decision of the trial court in this matter, it acknowledged a conflict with an opinion the Second District Court of Appeal issued on the same matter.[406]

H. *Statutory Provisions (Part One H)*

These statements apply where they are required by law:

1. As between an injured worker and us, we have notice of the injury when you have notice.
2. Your default or the bankruptcy or insolvency of you or your estate will not relieve us of our duties under this insurance after an injury occurs.
3. We are directly and primarily liable to any person entitled to the benefits payable by this insurance. Those persons may enforce our duties; so may an agency authorized by law. Enforcement may be against us or against you and us.
4. Jurisdiction over you is jurisdiction over us for the purposes of the workers compensation law. We are bound by decisions against you under that law, subject to the provisions of this policy that are not in conflict with that law.
5. This insurance conforms to the parts of the workers compensation law that apply to:
   a. benefits payable by this insurance;
   b. special taxes, payments into security or other special funds, and assessments payable by us under that law.
6. Terms of this insurance that conflict with the workers compensation law are changed by this statement to conform to that law.

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402. *Id.*
403. 604 So. 2d 907 (Fla. 5th Dist. Ct. App. 1992).
404. *Id.*
405. *Id.* at 908 (interpreting FLA. STAT. § 440.39(3)(a) (1991)).
406. *Id.* (citing Payless Oil v. Reynolds, 565 So. 2d 737 (Fla. 2d Dist. Ct. App. 1990)).

> Nothing in these paragraphs relieves you of your duties under this policy.[407]

This section of the policy lists provisions which may be required by one or more workers compensation laws. This provision allows the policy contract to be adapted to the law of the state in which the insurance is issued.

IV. PART TWO—EMPLOYERS LIABILITY INSURANCE

A. *How This Insurance Applies (Part Two A)*

> This employers liability insurance applies to bodily injury by accident or bodily injury by disease. Bodily injury includes resulting death.
> 1. The bodily injury must arise out of and in the course and scope of the injured employee's employment by you.
> 2. The employment must be necessary or incidental to your work in a state or territory listed in Item 3.A. of the Information Page.
> 3. Bodily injury by accident must occur during the policy period.
> 4. Bodily injury by disease must be caused or aggravated by the conditions of your employment. The employee's last day of last exposure to the conditions causing or aggravating such bodily injury by disease must occur during the policy period.
> 5. If you are sued, the original suit and any related legal actions for damages for bodily injury by accident or by disease must be brought in the United States of America, its territories or possessions, or Canada.[408]

The employers liability section of the WCELIP is applicable to common law or other damages payable by the insured.[409] This provision differs from Part A which involves the statutory coverage mandated by a state's workers compensation law. In Florida, the jurisdiction for claims made under Part Two of the policy lies in the circuit court. Claims under this section of the policy arise from common law torts that fall outside the scope of the workers compensation laws. At the same time, the coverage

407. POLICY, *supra* note 12.
408. *Id.*
409. GUIDE, *supra* note 9, at 9.

provided relates to bodily injury by accident or bodily injury by disease that arises out of, and in the course and scope of, employment.[410]

B. *We Will Pay (Part Two B)*

> We will pay all sums you legally must pay as damages because of bodily injury to your employees, provided the bodily injury is covered by this Employers Liability insurance.
> The damages we will pay, where recovery is permitted by law, include damages:
> 1. for which you are liable to a third party by reason of a claim or suit against you by that third party to recover the damages claimed against such third party as a result of injury to your employee;
> 2. for care and loss of services; and
> 3. for consequential bodily injury to a spouse, child, parent, brother or sister of the injured employee; and
>
> provided that these damages are the direct consequence of bodily injury that arises out of and in the course of the injured employee's employment by you; and
> 4. because of bodily injury to your employee that arises out of and in the course of employment, claimed against you in a capacity other than as the employer.[411]

This is the basic indemnity provision of the employers liability section of the policy. This insurance generally provides for "damages" in contrast to "benefits." Damages are "[a] pecuniary compensation or indemnity, which may be recovered in the courts by any person who has suffered loss, detriment, or injury, whether to his person, property, or rights, through the unlawful act or omission or negligence of another."[412] While workers compensation is a no-fault system, employer's liability insurance is payable as the result of a judgment or settlement for damages. The damages payable fall into three general categories.

1. Third Party Over

A "third party over" suit involves an employer who must pay workers compensation benefits and who impleads a third party whose negligence was responsible for the injury to the worker. A third party over suit may occur

410. *Id.*
411. POLICY, *supra* note 12.
412. BLACK'S LAW DICTIONARY 389 (6th ed. 1990).

on a large construction project where the employee of one contractor is injured due to the negligence of another contractor. The first contractor is responsible for workers compensation payments to the injured worker, but may implead the second contractor for contribution or indemnification.[413]

2. Familial Suits

Some states permit a cause of action for close relatives of the injured worker. Such actions would be outside the jurisdiction of the JCC and would fall within the jurisdiction of the circuit court. Familial suits may be brought on the basis of loss of consortium[414] or where a family member has been injured in the course of caring for an injured employee. While attendant care by a family member caring for a disabled worker is covered by Florida's Workers Compensation Law,[415] and is covered, therefore, under Part One of the policy, an injury to the family member while caring for the injured worker would fall under Part Two of the policy.

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413. GUIDE, *supra* note 9, at 10. *See, e.g.*, Frank J. Rooney, Inc. v. Leisure Resorts, Inc., 18 Fla. L. Weekly D2022 (Fla. 4th Dist. Ct. App. Sept. 15, 1993); Barbosa v. Liberty Mut. Ins. Co., 617 So. 2d 1129 (Fla. 3d Dist. Ct. App. 1993).

414. Ferriter v. Daniel O'Connell's Sons, Inc., 413 N.E.2d 690 (Mass. 1980) (forming the basis for inclusion of this coverage within the WCELIP).

415. *See, e.g.*, Attitudes & Trends v. Arsuaga, 616 So. 2d 1103 (Fla. 1st Dist Ct. App. 1993) (affirming an award of attendant care rendered prior to a physician's prescription for such care); Frederick Electronics v. Pettijohn; 619 So. 2d 14 (Fla. 1st. Dist. Ct. App. 1993) (partially affirming and reversing an award of attendant care by limiting the hours required to meet the claimant's needs); Southern Indus. v. Chumney, 613 So. 2d 74 (Fla. 1st Dist. Ct. App. 1993) (affirming an award of maid service where claimant suffered respiratory problems and required a dust free environment); Timothy Bowser Constr. Co. v. Kowalski, 605 So. 2d 885 (Fla. 1st Dist. Ct. App. 1992) (affirming an award of attendant care by claimant's parents); Buena Vida Townhouse Ass'n v. Parciak, 603 So. 2d 26 (Fla. 1st Dist. Ct. App. 1992) (affirming the award of attendant care by family member, and examining the appropriate rate of pay); Bojangles v. Kuring, 598 So. 2d 250 (Fla. 1st Dist. Ct. App. 1992) (reversing and remanding an award of attendant care to claimant's husband where award was a "blanket award"); Standard Blasting & Coating v. Hayman, 597 So. 2d 392 (Fla. 1st Dist. Ct. App. 1992) (reversing an order denying a motion to reduce attendant care benefits to injured employee's wife based upon the "nonprofessional status" of the wife); Gator Tire v. Casteel, 595 So. 2d 210 (Fla. 1st Dist. Ct. App. 1992) (affirming an award of attendant care and noting that failure of the employer/carrier to raise the applicability of statutory changes in regard to attendant care in the court below precluded the issue from being raised on appeal); Merritt Sea Wall v. Revels, 594 So. 2d 855 (Fla. 1st Dist. Ct. App. 1992) (affirming an award of attendant care by claimant's wife, but reversing the payment for attendant care at prevailing wage and establishing that the wage should be federal minimum wage).

3. Dual Capacity Doctrine

The dual capacity doctrine allows recovery, in some states, where the employer may have two roles in the injury to the employee.[416] This situation arises when the employer is also the manufacturer of equipment that was involved in the injury to the employee. The employee may then be entitled to workers compensation benefits and may be able to make a claim against the employer as the manufacturer of a defective product.[417] True no-fault compensation laws, such as the Longshore and Harbor Workers Compensation Act[418] and the Black Lung Benefits Act,[419] are not covered by Part Two of the policy because of their no-fault nature. Coverage for compensation under the various federal acts is obtained by endorsement to Part One of the policy.[420]

C. *Exclusions (Part Two C)*

This insurance does not cover:

1. liability assumed under a contract. This exclusion does not apply to a warranty that your work will be done in a workmanlike manner;
2. punitive or exemplary damages because of bodily injury to an employee employed in violation of law;
3. bodily injury to an employee while employed in violation of law with your actual knowledge or the actual knowledge of any of your executive officers;
4. any obligation imposed by a workers compensation, occupational disease, unemployment compensation, or disability benefits, or any similar law;
5. bodily injury intentionally caused or aggravated by you;
6. bodily injury occurring outside the United States of America, its territories or possessions, and Canada. This exclusion does not apply to bodily injury to a citizen or resident of the United States of America or Canada who is temporarily outside these countries;
7. damages arising out of coercion of any employee.[421]

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416. GUIDE, *supra* note 9, at 11.
417. *See* LARSON, *supra* note 1, § 72.00.
418. 33 U.S.C. § 901 (1988).
419. 30 U.S.C. § 901 (1988).
420. GUIDE, *supra* note 9, at 11.
421. POLICY, *supra* note 12.

This section of the policy lists the exclusions from coverage. It is applicable only to Part Two of the policy since Part One coverage is governed by statutory mandate. Exclusions are a common part of insurance policies since the insurer is attempting to clarify what is and what is not covered. The Fourth District Court of Appeal cited, with favor, to a Minnesota appellate decision interpreting a policy exclusion, which stated: "[u]nless ambiguous, the language used in an insurance contract must be given its plain and ordinary meaning."[422] At the same time, it is an established principle of law that an insurance contract will be liberally construed in favor of the insured.[423]

D. *We Will Defend (Part Two D)*

> We have the right and duty to defend, at our expense, any claim, proceeding or suit against you for damages payable by this insurance. We have the right to investigate and settle these claims, proceedings and suits.
> We have no duty to defend a claim, proceeding or suit that is not covered by this insurance. We have no duty to defend or continue defending after we have paid our applicable limit of liability under this insurance.[424]

This provision is similar to the duty to defend provision discussed under Part One. The main difference in the duty to defend under Part Two is that employers liability insurance is subject to a policy limit (workers compensation insurance is not so limited by statute) and, therefore, the duty to defend under Part Two will exist to the point where the insurer has paid the applicable limit of liability under the insurance.[425]

E. *We Will Also Pay (Part Two E)*

> We will also pay these costs, in addition to other amounts payable under this insurance, as part of any claim, proceeding, or suit we defend:

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422. Great Global Assurance Co. v. Shoemaker, 599 So. 2d 1036, 1037 (Fla. 4th Dist. Ct. App. 1992) (quoting Alexandra House, Inc. v. St. Paul Fire & Marine Ins. Co., 419 N.W.2d 506 (Minn. Ct. App. 1988)).

423. *See* LARSON, *supra* note 1, § 93.00-93.10. Conflicts as to the meaning of policy terms fall within the jurisdiction of the circuit court and require separate examination from the issue of workers compensation law.

424. POLICY, *supra* note 12.

425. GUIDE, *supra* note 9, at 13.

1. reasonable expenses incurred at our request, but not loss of earnings;
2. premiums for bonds to release attachments and for appeal bonds in bond amounts up to the limit of our liability under this insurance;
3. litigation costs taxed against you;
4. interest on a judgment as required by law until we off the amount due under this insurance; and
5. expenses we incur.[426]

This is an explanatory section of the policy which outlines the costs which will be borne by an insurer in defending an employer's liability action. These costs and expenses are not necessarily part of the defense.[427]

F. *Other Insurance (Part Two F)*

> We will pay no more than our share of damages and costs covered by this insurance and other insurance or self-insurance. Subject to any limits of liability that apply, all shares will be equal until the loss is paid. If any insurance or self-insurance is exhausted, the shares of all remaining insurance and self-insurance will be equal until the loss is paid.[428]

This section mimics the rights of the insurer to pay only its fair share of any claim that is found in Part One E of the policy. The difference in language is indicative of the payment of damages under Part Two and benefits under Part One.[429]

G. *Limits of Liability (Part Two G)*

> Our liability to pay for damages is limited. Our limits of liability are shown in Item 3.B. of the Information Page. They apply as explained below.
> 1. Bodily Injury by Accident. The limit shown for "bodily injury by accident-each accident" is the most we will pay for all the damages covered by this insurance because of bodily injury to one or more employees in any one accident.

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426. POLICY, *supra* note 12.
427. GUIDE, *supra* note 9, at 13.
428. POLICY, *supra* note 12.
429. GUIDE, *supra* note 9, at 13.

A disease is not bodily injury by accident unless it results directly from bodily injury by accident.

2. Bodily Injury by Disease. The limit shown for "bodily injury by disease-policy limit" is the most we will pay for all damages covered by this insurance and arising out of bodily injury by disease, regardless of the number of employees who sustain bodily injury by disease. The limit shown for "bodily injury by disease-each employee" is the most we will pay for all damages because of bodily injury by disease to any one employee.
Bodily injury by disease does not include disease that results directly from a bodily injury by accident.
3. We will not pay any claims for damages after we have paid the applicable limit of our liability under this insurance.[430]

Unlike workers compensation insurance, employer's liability insurance is subject to limits of liability.[431] The standard limits of liability are $100,000 for bodily injury by accident, $100,000 for bodily injury by disease, and an aggregate of $500,000 for the policy.[432] It is possible for employers to purchase additional coverage under this section of the policy or obtain coverage by means of an excess or "umbrella policy."[433] Some states, not including Florida, provide for unlimited employers liability under the WCELIP.[434]

H. *Recovery From Others (Part Two H)*

> We have your rights to recover our payment from anyone liable for an injury covered by this insurance. You will do everything necessary to protect those rights for us and to help us enforce them.[435]

This section of the policy is similar to the subrogation section of the workers compensation portion of the policy (Part One C). It provides that the insurer has the right to step into the shoes of the insured to recover from a third party when possible.

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430. POLICY, *supra* note 12.
431. GUIDE, *supra* note 9, at 13.
432. *Id.*
433. *Id.*
434. *Id.* at 14.
435. POLICY, *supra* note 12.

I. *Action Against Us (Part Two I)*

> There will be no right of action against us under this insurance unless:
> 1. You have complied with all the terms of this policy; and
> 2. The amount you owe has been determined with our consent or by actual trial and final judgment.
>
> This insurance does not give anyone the right to add us as a defendant in an action against you to determine your liability.[436]

This section is the opposite of the provision in Part One H.3., which allows a party to join the insurer in any suit for workers compensation benefits. Under this section of the policy, there is no right of direct action until the insurer's liability has become fixed by judgment or settlement.[437]

V. PART THREE—OTHER STATES INSURANCE

A. *How This Insurance Applies (Part Three A)*

> 1. This other states insurance applies only if one or more states are shown in Item 3.C. of the Information Page.
> 2. If you begin work in any one of those states and are not insured or are not self-insured for such work, the policy will apply as though that state were listed in Item 3.A. of the Information Page.
> 3. We will reimburse you for the benefits required by the workers compensation law of that state if we are not permitted to pay the benefits directly to persons entitled to them.[438]

B. *Notice (Part Three B)*

> Tell us at once if you begin work in any state listed in Item 3.C. of the Information Page.[439]

Part Three of the policy provides for extraterritorial coverage for workers compensation benefits. The coverage may be extended to any state in which the employer has no ongoing work at policy inception, but for

436. *Id.*
437. GUIDE, *supra* note 9, at 14.
438. POLICY, *supra* note 12.
439. *Id.*

which temporary and incidental exposure may occur during the policy term.[440] Other states' insurance presents one of the most contentious sections of the policy. High mobility of workers has created a situation in which workers travel frequently and wish to elect the higher paying benefits of the state of injury to those of the state of employment. Florida has dealt with the issue of travelling employees through amendment to the workers compensation law.[441] The Legislature has also left intact the extraterritorial provisions of Florida's workers compensation law, which provides:

> Where an accident happens while the employee is employed elsewhere than in this state, which would entitle him or his dependents to compensation if it had happened in this state, the employee or his dependents shall be entitled to compensation if the contract of employment was made in this state, or the employment was principally localized in this state. However, if the employee shall receive compensation or damages under the laws of any other state, nothing herein contained shall be construed so as to permit a total compensation for the same injury greater than provided herein.[442]

The First District Court of Appeal reviewed one case, deciding whether a worker injured in another state could claim Florida workers compensation benefits.[443] The court determined that the worker was not within the jurisdiction of the Florida workers compensation law by analyzing the employment contract and determining that the union official who negotiated the contract in Florida was without hiring authority.[444] Since the contract of hire was not entered into in Florida, Florida did not have jurisdiction over the claim for benefits.[445]

VI. PART FOUR—YOUR DUTIES IF INJURY OCCURS

> Tell us at once if injury occurs that may be covered by this policy. Your other duties are listed here.

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440. GUIDE, *supra* note 9, at 15-16.
441. *See* FLA. STAT. § 440.092(4) (1991).
442. Id. § 440.09(1).
443. Nelson v. McAbee Constr., Inc., 591 So. 2d 1015 (Fla. 1st Dist. Ct. App. 1991).
444. *Id.* at 1017.
445. *Id.* at 1018.

1. Provide for immediate medical and other services required by the workers compensation law.
2. Give us or our agent the names and addresses of the injured persons and of witnesses, and other information we may need.
3. Promptly give us all notices, demands and legal papers related to the injury, claim, proceeding or suit.
4. Cooperate with us and assist us, as we may request, in the investigation, settlement or defense of any claim, proceeding or suit.
5. Do nothing after an injury occurs that would interfere with our right to recover from others.
6. Do not voluntarily make payments, assume obligations or incur expenses, except at your own cost.[446]

This section of the policy outlines the duties of the employer in the case of injury. The primary obligation of the employer is to provide for immediate medical and other services needed by the injured employee. The employer is then required to give notice to the insurer of the injury and to cooperate in the investigation, defense, and settlement of any claim, proceeding, or suit.

VII. PART FIVE—PREMIUM

A. *Our Manuals (Part Five A)*

> All premium for this policy will be determined by our manuals of rules, rates, rating plans and classifications. We may change our manuals and apply the changes to this policy as authorized by law or a governmental agency regulating this insurance.[447]

Each insurance carrier[448] or rate service organization[449] is required to file its manual of classifications, rates, every rating plan, and every modification of these that it proposes to use. Members of a rate service organization may fulfill their filing requirements through the filings of the rate service organization.[450] Once approved by the regulator, these

446. POLICY, *supra* note 12.

447. *Id.*

448. *See* FLA. STAT. § 627.091(1) (1991).

449. *See id.* § 627.091(4).

450. *see id.*

manuals establish the method for determining the rates for each employer within the state.[451] In addition to the filing of rates for each of the employment classification codes, employers are subject to having their rates modified by their loss experience expressed as an experience modification factor.[452]

B. *Classifications (Part Five B)*

> Item 4 of the Information Page shows the rate and premium basis for certain business or work classifications. These classifications were assigned based on an estimate of the exposures you would have during the policy period. If your actual exposures are not properly described by those classifications, we will assign proper classifications, rates and premium basis by endorsement to this policy.[453]

Classification codes are filed by the rate service organization or by the insurer in order to establish fairness in the rating process. The classification codes allow for similar employments to be placed within the same rating structure. Each classification code carries a detailed description, allowing the employer to review the codes assigned to his business.[454] The purpose of classification is to reflect the actual exposure of the employer.

C. *Remuneration (Part Five C)*

> Premium for each work classification is determined by multiplying a rate times a premium basis. Remuneration is the most common premium basis. This Premium basis includes payroll and all other remuneration paid or payable during the policy period for the services of:
> 1. all your officers and employees engaged in work covered by this policy; and
> 2. all other persons engaged in work that could make us liable under Part One (Workers Compensation Insurance) of this policy. If you do not have payroll records for these persons, the contract price for their services and materials may be used as the premium basis.

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451. *See id.* § 627.101.

452. *See id.* § 627.291. This section of the statute establishes an aggrieved person remedy for any employer who seeks review of the rates or rating plans used to develop that employer's rates. Among the factors that may be reviewed is the experience modification factor, which is calculated based upon a filing by the rate service organization or the carrier.

453. POLICY, *supra* note 12.

454. NATIONAL COUNCIL ON COMPENSATION INSURANCE, SCOPES MANUAL OF WORKERS COMPENSATION AND EMPLOYERS LIABILITY INSURANCE (1984).

> This paragraph 2 will not apply if you give us proof that the employers of these persons lawfully secured their workers compensation obligations.[455]

Remuneration is determined by rules filed and approved by the regulator.[456] The purpose of determining remuneration is to establish the amount of payroll, which forms the basis for the calculation of premium.[457]

D. *Premium Payments (Part Five D)*

> You will pay all premium when due. You will pay the premium even if part or all of a workers compensation law is not valid.[458]

This provision of the policy establishes that all premiums are due and payable by the insured. Historically, this provision remains from a time when part or all of workers compensation laws were found to be unconstitutional takings or a denial of access to the courts.[459] Today, reform of workers compensation laws reopens the challenge to the constitutionality of such laws. In both Florida and Texas, recent reform efforts have met with determinations of unconstitutionality.[460]

E. *Final Premium (Part Five E)*

> The premium shown on the Information Page, schedules, and endorsements is an estimate. The final premium will be determined after this policy ends by using the actual, not the estimated, premium basis and the proper classifications and rates that lawfully apply to the business and work covered by this policy. If the final premium is more than you paid to us, you must pay us the balance. If it is less, we will refund the balance to you. The final premium will not be less than the highest minimum premium for the classifications covered by this policy.
> If this policy is canceled, final premium will be determined in the following way unless our manuals provide otherwise.

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455. POLICY, *supra* note 12.

456. *See* FLA. STAT. §627.091 (1991).

457. NATIONAL COUNCIL ON COMPENSATION INSURANCE, BASIC MANUAL OF WORKERS COMPENSATION AND EMPLOYER LIABILITY INSURANCE (1984) [hereafter BASIC MANUAL].

458. POLICY, *supra* note 12.

459. GUIDE, *supra* note 9, at 20.

460. Martinez v. Scanlan, 582 So. 2d 1167 (Fla. 1991); Texas Workers' Compensation Comm'n v. Garcia, 862 S.W.2d 61 (Tex. Ct. App. 1993).

1. If we cancel, final premium will be calculated pro rata based on the time this policy was in force. Final premium will not be less than the pro rata share of the minimum premium.
2. If you cancel, final premium will be more than pro rata; it will be based on the time this policy was in force, and increased by our short-rate cancellation table and procedure. Final premium will not be less than the minimum premium.[461]

The policy language establishes that the premiums for workers compensation are an estimate. The actual premium will be determined on audit following the policy term. This permits the calculation of premiums to be based on the actual payroll of the employer.

F. *Records (Part Five F)*

> You will keep records of information needed to compute premium. You will provide us with copies of those records when we ask for them.[462]

By the terms of the policy contract, the insured has the obligation of keeping records which will enable the carrier to establish a final premium. The insured is also obligated to provide the insurer with copies of the information upon request.

G. *Audit (Part Five G)*

> You will let us examine and audit all your records that relate to this policy. These records include ledgers, journals, registers, vouchers, contracts, tax reports, payroll and disbursement records, and programs for storing and retrieving data. We may conduct the audits during regular business hours during the policy period and within three years after the policy period ends. Information developed by audit will be used to determine final premium. Insurance rate service organizations have the same rights we have under this provision.[463]

This section of the policy establishes the insurer's right to audit the employer's records for a period up to three years following the policy term.

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461. POLICY, *supra* note 12.
462. *Id.*
463. *Id.*

The right to audit is also extended to the rate service organization by this provision.

VIII. PART SIX—CONDITIONS

A. *Inspection (Part Six A)*

> We have the right, but are not obliged to inspect your workplaces at any time. Our inspections are not safety inspections. They relate only to the insurability of the workplaces and the premiums to be charged. We may also recommend changes. While they may help reduce losses, we do not undertake to perform the duty of any person to provide for the health or safety of your employees or the public. We do not warrant that your workplaces are safe or healthful or that they comply with laws, regulations, codes or standards. Insurance rate service organizations have the same rights we have under this provision.[464]

The insurer, by this provision, retains the right to inspect the employer's premises. The inspection may be part of the audit process or may be conducted for other reasons. Liability for a warranty of safety is specifically disclaimed.[465]

B. *Long Term Policy (Part Six B)*

> If the policy period is longer than one year and sixteen days, all provisions of this policy will apply as though a new policy were issued on each annual anniversary that this policy is in force.[466]

This provision relates to a rule in one of the filed and approved manuals.[467] This rule states that a policy may be issued for any period not longer than three years. If the policy is issued for a period not longer than one year and sixteen days, it is treated as a one year policy. For any term

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464. *Id.*

465. *See* James v. State, 457 N.E.2d 802 (N.Y. 1983); Viducich v. Greater New York Mut. Ins. Co., 192 A.2d 596 (N.J. Super. Ct. App. Div.), *cert. denied*, 195 A.2d 21 (N.J. 1963).

466. POLICY, *supra* note 12.

467. BASIC MANUAL, *supra* note 457, at Rule III.C.

longer than this, the policy is divided into one year units and a unit less than twelve months is treated as a short term policy.[468]

C. *Transfer of your Rights and Duties (Part Six C)*

> Your rights or duties under this policy may not be transferred without our written consent. If you die and we receive notice within thirty days after your death, we will cover your legal representative as insured.[469]

This provision prevents the assignment of the policy without the consent of the insurer. A minor exception is made in the event the insured dies. In that instance, the policy may be held for thirty days by the executor or administrator of the insured's estate provided the insurer is given notice within thirty days of the death. Nonassignability is essential to ensure that the liability and exposure under the policy is not changed.

D. *Cancellation (Part Six D)*

> 1. You may cancel this policy. You must mail or deliver advance written notice to us stating when the cancellation is to take effect.
> 2. We may cancel this policy. We must mail or deliver to you not less than ten days advance written notice stating when the cancellation is to take effect. Mailing that notice to you at your mailing address shown in Item 1 of the Information Page will be sufficient to prove notice.
> 3. The policy period will end on the day and hour stated in the cancellation notice.
> 4. Any of these provisions that conflict with a law that controls the cancellation of the insurance in this policy is changed by this statement to comply with the law.[470]

Cancellation of a workers compensation policy is subject to the policy terms and to statutory requirements.[471] In *Curtis-Hale, Inc. v. Geltz*,[472] the court examined whether cancellation of a policy had been accomplished with due regard for the requirements of law. The original policy issued to Geltz was through the assigned risk plan and was assigned by the plan

468. GUIDE, *supra* note 8, at 22.
469. POLICY, *supra* note 12.
470. *Id.*
471. *See* FLA. STAT. § 627.4133(1) (Supp. 1992); FLA. STAT. § 440.42(2) (1991).
472. 610 So. 2d 558 (Fla. 1st Dist. Ct. App. 1992).

administrator to Aetna Casualty Company in August 1987.[473] By November 1987, Aetna had notified the insured of its intent to cancel for nonpayment of premium. The policy was reinstated on receipt of payment, and was canceled when later payments did not clear the bank. Aetna requested assistance from the Division of Insurance as to how to proceed with cancellation and was advised that thirty days notice was required. The policy was canceled on May 14, 1988 and the claim for which Geltz sought coverage occurred in September of 1988. Geltz sought coverage from another carrier two days after the occurrence of the industrial accident. The court construed these facts as competent substantial evidence that the policy had been canceled in accordance with law, and that the employer had been provided with the notice that was the intent behind the law.[474] In the event the policy had not been properly canceled, the insurer would have had an obligation to provide coverage for the industrial accident.

E. *Sole Representative (Part Six E)*

> The insured first named in Item 1 of the Information Page will act on behalf of all insureds to change this policy, receive return premium, and give or receive notice of cancellation.[475]

This provision is intended to allow the first named insured on the information page to act on behalf of any other named insured. This provision is necessary when there is more than one named insured since only one legal entity at a time may carry out transactions with the carrier.[476]

IX. CONCLUSION

The Workers Compensation and Employers Liability Insurance Policy—WC 00 00 00 is the basic insuring contract for workers compensation and employers liability during the survey period. The revisions to the policy are unlikely to impact any of the decisions rendered by the JCC's, the First District Court of Appeal, or the Supreme Court of Florida in the immediate future.

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473. *Id.* at 559.
474. *Id.* at 562.
475. POLICY, *supra* note 12.
476. GUIDE, *supra* note 9, at 23.

Of great significance to the adjudicatory decisions, however, are the legislative amendments to the workers compensation laws. At this time, many legislatures are reforming workers compensation systems. Nonetheless, the workers compensation and employers liability insurance policy is a stable contract capable of accommodating the reform legislation and the changing requirements of the workplace.

Workers compensation law is at a crossroads. The costs of maintaining a no-fault insurance system for a highly mobile and diversified workforce increases exponentially each year.[477] Industrial accident costs for medical and indemnity benefits have risen significantly and an already overburdened system struggles to respond. Clearly, the introduction of reform legislation has been directed at driving down the cost of workers compensation insurance in order to ensure that a remedy that has provided benefits to injured workers for over ninety years continues to do so into the next century.

477. UNITED STATES CHAMBER OF COMMERCE, ANALYSIS OF WORKERS COMPENSATION LAWS (1993).