



**The Florida Bar
Workers' Compensation Section**



News & 440 Report

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440 Appellate & Circuit Court Report

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CASES FILED IN THE COURTS

This report covers the last 72 appeals filed in the 1DCA through October 25, 2005. Circuit court cases and appeals of cases of interest to Workers' Compensation practitioners are also included. Each of the workers' compensation orders which are the subject

of these appeals may be found on the DOAH JCC website using the case search function, docket tab.

The 1DCA website also has a docket function which can be used to determine the status of any appeal. The calendar function can be used to determine oral argument dates. Live video is available over the internet for arguments held in Tallahassee. As of this date, there is no archive of past oral arguments such as is available from the Supreme Court website. 1 DCA Clerk Jon Wheeler promises an archive feature in the near future.

Of the last 72 appeals filed from orders of the JCC's, 55 had the Claimant as the appellant and 17* were Employer/Carrier/Service Agent as the appellant. * 1 of these involved a dispute between carriers.

FEATURED CASES:

This issue features two cases of importance to watch for.

LUNDY V. FOUR SEASONS 1D05-109

This is the first of the post 10/1/2003 accident date cases to reach the 1st. DCA on the issue of attorney fees. Oral argument was set for November 15, 2005, 2PM. Jane-Robin Wender, Esq. for the appellant and Tara L. Sa'Id, Esq. for the Appellee. Amicus for the Appellant- AFTL by L. Barry Keyfetz, Esq. Amicus for the Appellee- AIF and Fla. Ins. Council by Mary Ann Stiles, Esq. and Rayford Taylor, Esq. Amicus status denied to Claims Center and Commercial Risk Mgt.(H. George Kagan, Esq. and Tim Jesaitis, Esq.) Additional Amicus brief filed by Elizabeth Lynch- Mulligan- no information available.

On 10/26/05 the court ordered appellants to show cause within 10 days why the appeal should not be dismissed as a non-appealable order.

Issue: JCC Punancy refused to approve a side stip fee which was agreed to by the parties as reasonable but was in excess of the fee schedule

VALDES V. GALCO & GAB ROBBINS 3D04-208

This case is pending in the 3 DCA following the dismissal of the complaint filed by Valdes against Galco and GAB for malicious prosecution, wrongful arrest and intentional infliction of emotional distress. The dismissal in the circuit court came prior to the Supreme Courts decision in Aguilera v. InServices et al, reversing the 3 DCA, but it came after the 3 DCA had affirmed the dismissal. This case was assigned to the same circuit court judge that had ruled for Aguilera so she was required to follow the 3 DCA's still authoritative ruling.

In two other cases pending before the Supreme Court when Aguilera was decided the court reversed and remanded.

In another case before the 3DCA on the same issue, Smith v. Home Depot, USA, 30 Fla. L. Weekly D2355 (3DCA October 5, 2005) the court reversed and remanded for trial citing Aguilera.

The 4DCA has also weighed in post-Aguilera and ruled, citing Aguilera, that a Claimant/Plaintiff has stated a viable cause of action for intentional infliction of emotional distress when the E/C attempts to terrorize a claimant's doctor into withdrawing his services as an authorized treating physician using threats of overutilization, peer review and loss of licensure to treat injured worker patients. Protegrity v. Vaccaro, ___so.2d___ (Fla. 4DCA 2004) WL 2016672.

VALDES was injured in 1985 and accepted as PTD the following year. Shortly thereafter issues arose regarding attendant care and orders were entered by the JCC awarding those benefits. In 1999, after 13 years of receipt of PTD benefits, the carrier initiated surveillance and thereafter required the claimant to appear for an 'update' deposition. Valdes testimony was equivocal due to memory problems and the medication he was taking, nevertheless the carrier filed a complaint with the DFS alleging 440.105 fraud. There was never any allegation that Valdes was working, only that he seemed able to walk to a nearby fishing area and cast a net into the water. His authorized psychiatrist had encouraged him to do things like this to get out of the house. Valdes had suffered a serious low back injury and became depressed. The fraud complaint made it to the State Attorney's office and Valdes was arrested and charged with a felony violation of ch. 440. The E/C immediately suspended his PTD benefits and filed for modification of the attendant care awards, alleging fraud.

After protracted litigation in the criminal courts and after refusing to plead 'no contest' or even ac-



cept pre trial intervention (and loss of all compensation benefits) Valdes' case was nolle prosequere. GAB immediately reinstated his benefits and withdrew the petition for modification. Valdes sued GAB. An oral argument date has not yet been set.

OTHER CASES WORTH FOLLOWING:

1DCA 05-5006 D/A 5/21/2001

LEA V. EPIX & SRS

Thomas Hodas, Esq., Michael Elstein, Esq.

Issue: JCC Powell rejected fraud defense

1DCA 05-4668 and 1DCA05-3938 D/A 2/24/1994

LITTIER V. MILLER, KAGAN & USIS

Harvey Kaufman, Esq., Mark Spangler, Esq. and David Halpin, Esq.

Issue: JCC McAliley denied \$2,000.00 lump sum advance (4668) and JCC refused to accept jurisdiction over claims for payment of medical expenses from authorized providers (3938)

1DCA05-4800 D/A 11/1/1991

IGO V. CITY OF ST. PETERSBURG/SELF INSURED

Joey Oquist, Esq. Nancy Cavey, Esq.

Issue: JCC Remsnyder enforced lump sum settlement

1DCA05-4594 D/A 2/8/2002

HENSEL V. SPIDER WORKS & CNA

Neal Pitts, Esq., Marcelle Bouchard, Esq.

Issue: Deputy Chief JCC Stephens denied motion to disqualify, denied PTD claim and denied claimant's request for a new trial

1DCA05-3824 D/A 12/20/1993

WEATHERINGTON V. PAVILLION & CLAIMS CENTER

Kent Pratt, Esq. Kimberly Hill, Esq.

Issue: JCC Basquill denied E/C fraud defense in a claim for a morphine pump and reinstated PTD benefits from date of suspension

1DCA05-4013 D/A 3/24/2004

MCTIERNAN V. PINELLAS SUNCOAST TRANSIT & JOHNS EASTERN

Andrea Cox, Esq., Andrew Salzman, Esq., AG Charlie Crist, Esq.

Issue: JCC Hafner denied claimant attorney a reasonable attorney fee for successful prosecution of claim resulting in minimal benefits. Constitutional challenge.

1DCA05-4108 D/A 11/24/2002

WAL-MART & SEDGWICK CMS V. DANIEL

James Dye Esq., Scott Uricchio, Esq.

Issue: JCC Ohlman issued an Abbreviated Final

Order (AFO) requiring the E/SA to provide neck surgery to the claimant. Is AFO appealable?

1DCA05-4325 D/A 8/8/2000

THOMAS V. YODER BROTHERS & FLORISTS MUTUAL

James Jean-Francois, Esq. and Randall Thomas, Esq.

Issue: JCC Turnbull, without mentioning any statute or rule for authority, ordered claimant's counsel to pay the E/C \$4,143.64 in attorney fees and costs for not being prepared to go forward at a final hearing, for obtaining a continuance, and then losing the case at trial followed by an unsuccessful appeal.

Mark Zientz is currently Chair-Elect designate of the Workers' Compensation Section of the Florida Bar. He is a current member and Past Secretary of the Executive Council of the Workers' Compensation Section of the Florida Bar, a former Vice-Chairman of the Worker's Compensation Rules Committee of the Florida Bar, an arbitrator for the National Football League Players Association / Management Council and the Arena Football League as well as a member of the faculty of the Workers' Compensation Trial Advocacy Seminar since the inception of the program. Mr. Zientz has also been a past President of the Friends of 440, Inc, Inc., where he remains on the Board. He is also a Director of the Friends of 440 Scholarship Fund, Inc. Mr. Zientz is the attorney responsible for handling the appeals in over 250 cases in which the appellate court issued a written opinion. Mr Zientz handled many of these cases at the trial level as well. Some of his appellate work has produced landmark cases such as Barrigan v. City of Miami (pension offset), and more recently, Cagnoli v. Tandem Staffing, SRS Hartford and the Division of Workers' Compensation (Social Security number requirement). Mark Zientz is admitted to practice law in three states and before the Supreme Court of the United States. Aside from Florida, where he currently lives and practices, he is also admitted to the bar in the State of New York where he served as a Kings County (Brooklyn) Assistant District Attorney from 1971 to 1974, and the State Bar of Montana, admitted in 1996. Mr. Zientz attended primary school in New York City, received his Bachelor of Science degree from New York University (1964), and then received his J.D. Degree from Brooklyn Law School (1971). In 1988 he became Florida Bar Board Certified in Workers' Compensation. He is rated Av by Martindale Hubbell. In addition to all of the above, Mr. Zientz is a member of the boards of directors of the Workers Injury Law & Advocacy Group (WILG) and Florida Workers Advocates (FWA). He has written extensively on the subject of workers' compensation for the News and 440 Report, The Florida Bar Journal and WILG's "First Watch".