

# CASE LAW BULLETIN

Rigell, Ring, Ardman, Waterman & Wolfe, P.A.

www.rigell.cc

Volume XVIII – January 16, 2007

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After a brief interruption, we are pleased to resume our monthly Case Law Bulletin. Because we missed out on the opportunity to summarize some significant cases within the past couple of months, we are going to catch up by doing one Bulletin this week, and one Bulletin next week. We will then be back on track to send out succeeding Bulletins on or before the 10<sup>th</sup> of each month.

**Mileage to Pick Up Prescriptions Held Clearly Compensable**  
In Remington v. City of Ocala, the First DCA held “there can be no doubt the Legislature intended an injured employee to be given medical treatment (including mileage reimbursement) at the expense of the employer/carrier and without expense to himself . . . .” *Note: Although several JCCs had already awarded such mileage, the First DCA had not yet clearly spoken on this issue.*

#### Psychiatric Records Not Always Discoverable

In Bandorf v. Volusia County, the claimant sought compensability of physical and neurological symptoms allegedly due to “sick building syndrome.” He did not specifically claim a psychiatric injury. Therefore, the First DCA held, the claimant had not placed his mental or emotional condition at issue and as such, the employer/carrier was precluded from obtaining his psychiatric records. *Note: This case will clearly make it more difficult to routinely obtain psychiatric records, even when physical symptoms are of a type which may arguably be associated with a separate, pre-existing mental or emotional condition.*

#### If Only All Employees Were This Dedicated . . .

In Deutsch v. Heritage Automotive Enterprises, the claimant, a used car salesman, saw someone steal an item from inside the dealership office. He chased down the culprit and proceeded to lunge inside the passenger window of the getaway vehicle in an attempt to retrieve the item. As a result, claimant sustained multiple injuries. The JCC held the injuries were not compensable because most of the pursuit, and all of the injuries, occurred off of the employer’s property. The First DCA reversed, finding the claimant was responding to an emergency on behalf of his employer, as contemplated by 440.092(3). *Note: In a sad commentary on the state of the automotive industry, the claimant was attempting to retrieve his own \$15 bubble machine which he had purchased in an attempt to attract customers to the business . . .*

#### When You Lose the 120-Day Battle, You May Still Win the War . . .

In Mims v. Confederated Staffing, the E/C accepted compensability of a low back injury and ultimately authorized surgery. The treating physician’s note indicated claimant suffered from congenital spinal stenosis, and not a compensable disc herniation as originally thought. The E/C’s attorney was informed of this in a conference also. More than 120 days after being informed that the condition was not, in fact, work related, the E/C denied compensability. This denial was overturned by the First DCA, yet, significantly, the court allowed the E/C to deny *continuing* treatment for the “industrial injury” based upon a lack of major contributing cause. *Note: This case is must-read on the issues of 120-day and major contributing cause questions. Here, the carrier lost the battle under 120 days, but won the war on causation.*

*\*Opinion remained subject to revision or withdrawal at the time of publication. These cases have not been added to the Southern Reporter at the time of publication. We are pleased to provide a copy of the above cases upon request.*

#### FIRM NEWS:

The firm is pleased to announce Michael Hernandez has joined the firm as an attorney in our West Palm Beach office, and Neichole Hess has joined us as an attorney in our Ft. Lauderdale office.

#### \*\*COMPTEST\*\*

The first three persons\*\* to correctly identify the MOVIE containing the following quote will receive lunch on us! Please forward your e-mail responses to **David Rigell** at [rigell@rigell.cc](mailto:rigell@rigell.cc).

#### MOVIE QUOTE:

Claimant: People seem to like me because I am polite, and I am rarely late. I like to eat ice cream and I really enjoy a nice pair of slacks. Years later, a doctor will tell me that I have an I.Q. of 48 and am what some people call “mentally retarded.”

Editor’s Note: Yeah, but unless that doctor is an IME, EMA or treating physician, his opinion is not admissible under 440.13(5)(e) . . .

The answer to October’s *Comptest* was Mean Girls. Congratulations to the winners, **Michelle Langlois** from Sedgwick/Wal-Mart; **Deborah Renner** from PMA; and **Lisa Gibbins** from Johns Eastern, and thanks to all whom participated. \*\*The Establishment has outlawed consecutive wins...sorry!

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*This Bulletin is merely intended to provide awareness of recent case law in the world of workers’ compensation. Please do not rely on this document for legal advice. Please direct any and all questions regarding these cases to your attorney.*

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## Get Those Old Petitions Dismissed!

Kimmins Corp. v. Truc. Claimant's attorney filed a Verified Petition for Attorney's Fees in 1998. The E/C never responded. Six years later, the E/C moves to dismiss the Petition for failure to prosecute. Because the E/C failed to respond to the Verified Petition as required, and because the JCC did not proactively move the case toward a hearing, the undisposed of 1998 Petition for Attorney's Fees tolled the running of the statute of limitations.

*Editor's Note: Adjusters should insist upon the dismissal of all Petitions and claims for attorney's fees at the earliest possible opportunity. Failure to do so may result in an old, forgotten Petition preventing the statute of limitations from ever running.*

## Test for Compensability of Repetitive Trauma Case

In Tyce v. Albertsons, the court outlined the standards for compensability of a claim under the repetitive trauma theory: First, the three-prong Festa test must be met. Secondly, the claimant must then also prove that the compensable condition was the major contributing cause of her need for treatment.

*Editor's Note: Doctors often fail to address the statutorily required "need for treatment" requirement. Be sure to insist they do so.*

## Be On the Lookout For Opportunities to Argue Res Judicata

In U.S. Block Windows v. Dickson, the claimant filed separate Petitions for injuries to both the right and left shoulder. Prior to the merit hearing, however, the claimant dismissed the PFB for the left shoulder. Later, the claimant filed additional Petitions regarding the left shoulder. The First DCA held the claimant was barred from filing further claims for the left shoulder because the issue was ripe for adjudication at the time of the first merit hearing.

*Editor's Note: Res Judicata is an under-utilized defense. Defense counsel and the adjuster should always be mindful of issues which were ripe for adjudication but which are not timely presented by the claimant.*

## Beware of the Pretrial Stipulation!

In Turner v. Miami-Dade County School Board, the E/C's attorney completed the Pretrial Stipulation indicating the claimant's "injuries or conditions" were compensable. However, at the merit hearing, the E/C took the position the claimant's neck injury was not compensable. The E/C had failed to request modification or amendment to the Pretrial Stipulation prior to trial, which may (case remanded) result in compensability of the neck injury.

*Editor's Note: The adjuster and defense counsel should always be very specific on the PTS as to what conditions are accepted as compensable. Otherwise, a condition may be deemed compensable simply based on how the Pretrial Stipulation is completed.*

## General Release Sufficient to Bar W/C Claim

In Brewer v. Labor Finders, the claimant signed a General Release in a matter unrelated to his workers' compensation case. However, the First DCA held the all inclusive language in that Release barred all claims, including those completely unrelated to the litigation for which the Release was procured. Therefore, the claimant's workers' compensation claim was barred as well.

*Editor's Note: Interestingly, although the claimant was represented by a workers' compensation counsel, he failed to inform his counsel of the Release which terminated his case.*

## Employee Leasing Contract May Be Challenged

In Fred Stevens v. Harrison, the court recognized the employee leasing company may be estopped to deny the claimant was an employee, despite the employer not strictly adhering to the contract requirements.

*Editor's Note: For those of you handling employee leasing claims, this case is a must-read!*

## Going and Coming Rule May Preclude Compensability Even When Injured in Company Vehicle

In Wilcox v. Ag Mart Produce, the First DCA found the claimant's accident was not compensable despite the fact the claimant was in a company-provided vehicle at the time of his injury. Under 440.092(4), such accidents are not compensable if the means of transportation was available for the exclusive use by the employee, unless engaged in a special errand or mission for the employer.

## Dirt Bag Claimant Gets His Due

In Marshall v. Amerisys, the claimant threatened the nurse case manager by stating "I know how to make bombs and silencers, how's that for destructive?" When the NCM informed her superiors and ultimately the police department of this statement, the claimant sued, alleging potential infliction of emotional distress. The Third DCA properly concluded the actions of the NCM in reporting these outrageous threats was not actionable and the circuit court complaint was dismissed with prejudice.

*\*Opinion remained subject to revision or withdrawal at the time of publication. These cases have not been added to the Southern Reporter at the time of publication. We are pleased to provide a copy of the above cases upon request.*

## \*\*COMPTEST\*\*

The first three persons\*\* to correctly identify the MOVIE or T.V. SHOW containing the following quote will receive lunch on us! Please forward your e-mail responses to **David Rigell** at [rigell@rigell.cc](mailto:rigell@rigell.cc).

## MOVIE/TV SHOW QUOTE:

**HR specialist:** "Someone forged medical information, and that's a felony."

**Claimant:** "Okay, whoa, alright, cuz that's a pretty intense accusation. How do you know that they're fake?"

**HR Specialist:** (Reading from the First Report) "Uh, Leprosy, Flesh Eating Bacteria, Hot Dog Fingers, Government Created Killer Nano Robot Infection."

*Editor's Note: No doubt a claim has been filed for compensability of each of the above at some point in time. . .*

The answer to January's earlier *Comptest* was Anchorman. Congratulations to the winners, **Richard Long** from Sedgwick/Wal-Mart; **Sylvia Dunn** from Sedgwick/Home Depot; and **Wade Kotar** from Wausau, and thanks to all whom participated. \*\*The Establishment has outlawed consecutive wins...sorry!

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