

12-1-1950

Florida Workmen's Compensation 1935 to 1950

M. Dudley Burton

Follow this and additional works at: <https://repository.law.miami.edu/umlr>

Recommended Citation

M. Dudley Burton, *Florida Workmen's Compensation 1935 to 1950*, 5 U. Miami L. Rev. 74 (1950)
Available at: <https://repository.law.miami.edu/umlr/vol5/iss1/7>

This Article is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

FLORIDA WORKMEN'S COMPENSATION

1935¹ to 1950

M. DUDLEY BURTON*

The following material includes over one hundred and fifty reported cases of the Supreme Court of Florida in the decade and a half since the enactment of the Workmen's Compensation Act. For practical reasons the writer has followed the outline of the Act, and only Florida case law is included, except where a Florida case was decided on the basis of a foreign decision.

WORKMEN'S COMPENSATION — AN INSURANCE CONTRACT²

"Workmen's Compensation is a product of industrialism, and proceeds on the theory that economic loss to the individual by injury in line of duty should be borne in part by the industry in which he is employed, in order that his dependents may not want."³ Every employer and employee, except those specifically excluded from the Act,⁴ are presumed to accept the provisions of the Act unless written notice to the contrary is given,⁵ and in *Hardware Mutual Casualty Co. v. Carlton*,⁶ the court said that where an employer, employee, and carrier have accepted the application of workmen's compensation, such acceptance "constitutes a contract between the parties embracing the provisions of the statutes as they may exist at the time of any injury compensable under the terms of the statute." Also, in *Chamberlain v. Florida Power Corporation*,⁷ the court held that where an employer and employee have accepted workmen's compensation, their contract of employment takes in all of the provisions of the Act. An employee sued his employer for personal injuries, alleging that his employer had not posted a notice that compensation had been secured, as required by the Act.⁸ The court held that compliance with the posting of this notice by the employer was not prerequisite to the statutory acceptance of the Act, but that all of the sections of the Act would be considered together, and that this section⁹ did not in any way limit or control other sections of the Act.¹⁰ Any employer or employee excluded from the Act can waive this exclusion and accept the Act.¹¹ Every employer that comes within the Act is required either to secure

*Member Fla. Bar.

1. Fla. Laws 1949, c. 17481 (effective 1 July 1935).
2. FLA. STAT. §§ 440.03, ex. 04, 05, 06, 07, 08, 10, 11, 21, 22, 23, 38, 40, 41, 42, 43 (1949).
3. *Duff Hotel v. Ficara*, 150 Fla. 442, 7 So.2d 790 (1942).
4. FLA. STAT. § 440.02 (1949).
5. *Hughes v. B. F. Goodrich Co.*, 152 Fla. 170, 11 So.2d 313 (1943); *Mobile Elevator Co. v. White*, 39 So.2d 799 (Fla. 1949); *Lovejoy Co. v. Ackis*, 153 Fla. 876, 16 So.2d 297 (1944).
6. 151 Fla. 238, 9 So.2d 359 (1942); *Florida Forest and Park Service v. Strickland*, 154 Fla. 472, 18 So.2d 251 (1944).
7. 144 Fla. 719, 198 So. 486 (1940).
8. FLA. STAT. § 440.40 (1949).
9. See note 8 *supra*.
10. See note 3 *supra*.
11. FLA. STAT. § 440.05 (1949); see also note 3 *supra*, and *Lovejoy Co. v. Ackis*, 153 Fla. 876, 16 So.2d 297 (1944).

compensation coverage from an insurance company, or qualify as a self-insurer under the provisions of the Act.¹²

In a workmen's compensation insurance policy, when a carrier assumes to insure the payment of compensation by an employer, they are bound to pay whatever compensation is lawfully adjudged against the employer.¹³ Such policy is construed "to mean the activities of the insured with whom the (insurance) company was then dealing," and does not cover employees of an employer who became the assignee of such policy upon the purchase of a business which the policy covered.¹⁴ An employer, under the Act, is guilty of a misdemeanor if he fails to secure the payment of compensation,¹⁵ and an injured employee may sue an employer at law, and the common law defenses of negligence of a fellow servant, contributory negligence, and assumption of risk, would not be available to him.¹⁶ A plea of contributory negligence was denied to an employer where he had failed to secure compensation, and where an employee had sued for an injury.¹⁷ But where a widow of a linesman sued her husband's employer, contributory negligence was allowed as a diminution of damages only because of the statutory hazardous occupation involved.¹⁸ An employee cannot enter into a contract with his employer to pay part of the cost of workmen's compensation,¹⁹ nor can an employee assign his compensation to creditors.²⁰ Compensation is a lien against the assets of the carrier or employer,²¹ and every insurance policy includes a provision that insolvency of the employer shall not relieve the carrier from paying compensation.²² Where two insurance companies were held to have compensation policies in force during the same period, the court allowed contribution by one insurance company against the other for half of the amount of an award.²³ The employee is subject to the common law defenses in a suit at law if he alone elects not to come under the Act,²⁴ but where both the employer and employee reject the Act, the employer, only, is penalized by losing his right to the common law defenses.²⁵ Where the employer fails to secure payment of compensation, the employee, or his legal representative, has the choice of electing to claim compensation

12. FLA. STAT. § 440.38 (1949); see also note 3 *supra*.

13. *Moody v. Baxley*, 158 Fla. 357, 28 So.2d 325 (1946); see also FLA. STAT. § 440.41 (1949). 9

14. *Great American Indemnity Co. v. Smith*, 156 Fla. 662, 24 So.2d 42 (1945).

15. FLA. STAT. § 440.43 (1949).

16. *Jones v. Brink*, 39 So.2d 791 (Fla. 1949).

17. *Jacksonville Paper Co. v. Thurman*, 153 Fla. 906, 16 So.2d 289 (1944).

18. *Tampa Electric Co. v. Hardy*, 139 Fla. 142, 190 So. 478 (1939); see FLA. STAT. § 769.03 (1949).

19. FLA. STAT. § 440.21 (1949).

20. FLA. STAT. § 440.22 (1949).

21. FLA. STAT. § 440.23 (1949).

22. FLA. STAT. § 440.42 (1949).

23. *Continental Cas. Co. v. Hartford Acc. and Indemnity Co.*, 151 Fla. 742, 10 So.2d 440 (1942); see *Bituminous Cas. Corp. v. Clements*, 148 Fla. 175, 3 So.2d 865 (1941).

24. FLA. STAT. § 440.07 (1949).

25. FLA. STAT. § 440.08 (1949).

or sue at law, but where the employer has properly secured the payment of compensation, and the employee has not previously elected to reject the Act, the liability of the employer is limited to the statutory requirements of the Act.²⁶

A general contractor is liable for compensation to the employees of a sub-contractor where the sub-contractor has failed to secure compensation insurance coverage,²⁷ and the court, in construing this section, said: "We think that the the applicable provisions of the Florida Workmen's Compensation Law make it entirely clear that all workmen engaged in the same contract work are deemed to be employed in one and the same business or establishment, and without regard to whether they are employed by the general contractor, or by a sub-contractor under him, are to be considered for compensation purposes as the employees of the general contractor."²⁸ The relationship of an employee to an independent contractor, under the Act, will be considered;²⁹ however, the relationship of an independent contractor to a sub-contractor was decided in *Underwood v. Beasley*,³⁰ where the claimant, an employee of Seay, made a claim for compensation from Underwood, alleging that Seay was the sub-contractor of Underwood. The supreme court denied compensation, deciding that Seay was an independent contractor, and therefore the claimant could not make a claim against Underwood for compensation.³¹

EXCLUSIONS UNDER THE ACT³²

The legislature has seen fit to exclude certain types of employment from the Act, and the supreme court has interpreted these exclusions to include, in addition to publicly elected officers, any person assisting an officer³³ at his request in connection with the arresting of a person charged with a crime, saying such a party "was a mere assistant to an elected officer who was barred of compensation by the terms of the Act."³⁴ The original Act excluded "agricultural and horticultural farm labor," but it was amended in 1941 to read "agricultural farm labor." An employee pruning citrus trees claimed compensation under the theory that the legislature intended to include horticultural workers under the Act. The court decided, in denying the claim,³⁵ that such change in wording by the legislature was

26. See note 13 *supra*; see *Brickley v. Gulf Coast Const. Co.*, 153 Fla. 216, 14 So.2d 265 (1943).

27. FLA. STAT. § 440.10 (1949). *Vanlandingham v. Fla. Power & Lt. Co.*, 154 Fla. 628, 18 So.2d 678 (1944).

28. *Brickley v. Gulf Coast Construction Co.*, 153 Fla. 216, 14 So.2d 265 (1943); see *Younger v. Giller Contracting Co., Inc.*, 143 Fla. 355, 196 So.2d 690 (1940).

29. See notes 39-45 *infra*.

30. 153 Fla. 869, 15 So.2d 907 (1943).

31. *Underwood v. Beasley*, *supra* note 30 (decided on the basis of *Gentile Bros. Co. v. Fla. Industrial Comm'n*, 151 Fla. 857, 10 So.2d 568 (1942), an unemployment compensation case).

32. FLA. STAT. § 440.02 (1949).

33. As authorized by FLA. STAT. § 843.06 (1949).

34. *Leon County v. Sauls*, 151 Fla. 171, 9 So.2d 461 (1942).

35. *Tison v. Hyer*, 153 Fla. 769, 16 So.2d 437 (1944).

a matter of redundancy, and that a new class was not created. Under the exclusion of "professional athletes . . . trainers, masseurs, and similar performers," the court, in an action brought by a jockey against his employer where the employer had failed to secure workmen's compensation coverage,³⁶ held that the legislature did not intend to exclude horse racing. The exclusion of employers with less than three employees from the Act, was held not to be a mandatory exclusion, so as to keep two employees of an Alabama Corporation, doing business in Florida, from the provisions of the Act. The court, in allowing the claim, decided the figure of "three or more employees" was only an arbitrary figure to form the dividing line between those businesses that could afford to come under the Act, and those who could not, and where the industry was of sufficient size to afford to come under the Act, they would disregard such arbitrary line.³⁷ Domestic servants and employees in the turpentine industry, which are excluded by the Act, have not been under review by the supreme court.

The original Act excluded employees working on a commission or percentage basis. This exclusion was deleted by the legislature in 1937.³⁸ A person that qualifies as an independent contractor under the Act cannot claim compensation as an employee from the general contractor. Since the Act does not define an independent contractor, it must be determined by the Courts on facts of each case. The chief test used by the Florida Supreme Court has been the "control" test, as to the amount and right of control the contracting party has over the party performing the work. This test also applies to the control of the method used to perform the work. Where a plasterer repaired a store at night, it was held he was not an independent contractor, because the store owner furnished the materials, a ladder, and controlled the premises while the work was in progress.³⁹ This case⁴⁰ was distinguished where a "handy man" replaced a neon sign on a restaurant, used his own tools and ladder, and there was no supervision of the work. The court ruled that if an employee was subject to the control of the employer only as to the results, he was an independent contractor.⁴¹ This test was followed where a laundry truck driver owned his own truck, had his own hours, could solicit business from anyone within a certain territory, and derived his income from the wholesale delivery of laundry to his customers.⁴² A citrus inspector, during the fruit season, located and inspected fruit for purchase, and was paid a commission on all fruit purchased through his services. He was held an employee since he could not use his own judgment in buying such fruit.⁴³ A contract to cut logs on land owned by a third

36. *Jones v. Brink*, 39 So.2d 791 (Fla. 1949).

37. *Mobile Elevator Co. v. White*, 39 So.2d 799 (Fla. 1949).

38. *Magarian v. Southern Fruit Distributors*, 146 Fla. 773, 1 So.2d 858 (1941).

39. *Sears, Roebuck and Co. v. Pixler*, 140 Fla. 677, 192 So. 617 (1940).

40. See note 39 *supra*.

41. *Baya's Bar and Grill v. Alcorn*, 40 So.2d 468 (Fla. 1949).

42. *De Luxe Laundry and Dry Cleaners v. Frady*, 40 So.2d 779 (Fla. 1949).

43. See note 38 *supra*.

party, where the claimant supplied his own tools and had complete control over his men, was held to establish an independent contractor.⁴⁴ But where a logger did not have complete control of his employees, and did not furnish all of his own tools and equipment, he was held to be an employee.⁴⁵ Where an employee is employed to work for two corporations, the "control" test is used to determine whether he is a "special" or a "general" employee at the time of his accident, and the corporation that pays the wages does not in itself determine this relationship.⁴⁶ A shucker of oysters, who was solicited by the manager of the wharves to shuck oysters in the bins supplied to the tongers of their catch, was held not to be an employee of the owner of the wharf, because he was under the control of a tonger.⁴⁷

An officer, owning controlling interest in the corporation, was held to come within the Act, the court saying "the ownership of stock or holding an office in a private corporation is not inconsistent with the . . . statute".⁴⁸

The term "casual" employment, as defined in the Act, was discussed in *New Fort Pierce Hotel Company v. Gorley*⁴⁹, where it was held that a helper to an engineer in charge of repair work at the hotel, was within the Act, and not a "casual" employee. However, even though the employment is "casual", the injury is compensable if it happened within the course of the employer's business.⁵⁰ State, county, and municipal employees come within the Act.⁵¹

DEFINITIONS UNDER THE ACT

I. INJURY⁵² AND DISABILITY

An injury under the Act includes "such diseases or infection (that) . . . naturally or unavoidably result. . . ." A testicle was removed because of an injury in the course of employment and was held within the Act.⁵³ Death caused by sunstroke was held to be an injury within the Act,⁵⁴ as was a cerebral hemorrhage,⁵⁵ however, death by heart disease was held not to come within the Act.⁵⁶ Where the claimant received two injuries in one accident, he was allowed to make separate claims under the statute.⁵⁷ Disability, within the Act, is defined as "incapacity, because of the injury to earn . . . the wages . . . received at the time of the injury." It has been held that this

44. *Peterson v. Highland Crate Co-op*, 156 Fla. 539, 23 So.2d 716 (1945).

45. *Taylor v. Williams*, 40 So.2d 122 (Fla. 1949).

46. *Berrier v. Associated Indemnity Co.*, 142 Fla. 351, 196 So. 188 (1939).

47. *Patton Seafood Co. v. Glisson*, 38 So.2d 839 (Fla. 1949).

48. *Claude H. Wolfe Inc. v. Wolfe*, 154 Fla., 633, 18 So.2d 535 (1944).

49. 137 Fla. 345, 188 So. 340 (1939).

50. *Persing v. Citizens Traction Co.*, 294 Pa. 230, 144 Atl. 97 (1928) (quoted with approval in *Sears, Roebuck & Co. v. Pixler*, see note 39 *supra*); see note 34, *supra*.

51. See note 34 *supra*.

52. FLA. STAT. § 440.02 (6), (9) (1949).

53. *Cone Bros. Contracting Co. v. Massey*, 145 Fla. 56, 198 So. 802 (1940).

54. *Alexander Orr Jr. v. Florida Industrial Comm'n*, 129 Fla. 369, 176 So. 172 (1937).

55. *Davis v. Artley Construction Co.*, 154 Fla. 481, 18 So.2d 255 (1944).

56. *Cleary Bros. Construction Co. v. Nobles*, 156 Fla. 408, 23 So.2d 525 (1945).

57. *Daytona Beach Boat Works v. Spencer*, 153 Fla. 540, 15 So.2d 256 (1943).

definition does not establish earning capacity as the sole and exclusive test of disability.⁵⁸

II. *Wages and Compensation*⁵⁹

If "an employee received consideration other than cash" for a portion of his wages, the value of such consideration is determined by the Commission. Where an employee was furnished board and lodging as part of his wages, the Commission found twelve dollars and fifty cents a week, for use of the room, as reasonable,⁶⁰ but where an employer continued paying an employee his salary, even though he was unable to work, this was considered a gift by the employer to the employee.⁶¹ Compensation is the money allowance payable to an employee or his dependents as provided in the Act, whereas medical treatment or hospitalization, furnished under the Act, does not come within the meaning of compensation as contemplated by the Statute.⁶² In *Allen v. Maxwell Co.*,⁶³ it was stated: "The intention of the Act is to compensate the employee for the loss of earning capacity. If the employee is injured, but is able to work, he is not compensated."

III. *Dependents*⁶⁴

The Act does not define who are dependents, and therefore this is a question of fact to be determined in each case.⁶⁵ However, dependency is not a question of fact where a wife has been deserted by her husband and is working for a "modest sum," because the "terms of the Act render the husband liable for her support."⁶⁶ In *Contractors' Contract No. 1/5948 v. Morris*,⁶⁷ the court said dependency was not the "governing criterion" where there is a wife involved, since the law requires the husband to support his wife. This rule is also generally applied where the claimant leaves a child⁶⁸ or stepchild,⁶⁹ and even where the grandmother had cared for and supported her grandchildren for two years prior to their father's death, they were held as dependents within the Act.⁷⁰ However, where a widow left her husband eight months before his death, and was living with another man three months prior to her husband's death, she was not living apart from her husband for a justifiable cause, and compensation was denied.⁷¹ The fact that the widow was neglected by her husband, and had not lived with him or been supported by him in many years, does not alter her de-

58. *Dixie Laundry v. Wentzell*, 145 Fla. 569, 200 So. 860 (1940).

59. FLA. STAT. § 440.02 (11), (12) (1949).

60. *New Fort Pierce Hotel Co. v. Gorley*, 137 Fla. 345, 188 So. 340 (1939).

61. *Sweat v. Allen*, 145 Fla. 733, 200 So. 348 (1941).

62. *Royer v. United States Sugar Corp.*, 148 Fla. 537, 4 So.2d 692 (1941).

63. *Allen v. Maxwell Co.*, 152 Fla. 340, 11 So.2d 572 (1943).

64. FLA. STAT. §§ 440.02 (13), (14), (15), (16) and 440.16 (1941).

65. *Panama City Stevedoring Co. v. Padgett*, 149 Fla. 687, 6 So.2d 822 (1942).

66. *Johnson v. Midland Constructors Inc.*, 152 Fla. 289, 11 So.2d 895 (1943).

67. 154 Fla. 497, 18 So.2d 247 (1944).

68. *Tigertail Quarries Inc. v. Ward*, 154 Fla. 122, 16 So.2d 812 (1944).

69. See note 63 *supra*.

70. *Butler v. Morgan*, 157 Fla. 1, 24 So.2d 571 (1946).

71. See note 65 *supra*.

pendency status.⁷² If the employee leaves more than one wife at the time of his death, the party asserting that there are two wives must do more than just allege this, since there is a presumption of the validity of a second marriage, and the one disputing such validity must overcome the presumption.⁷³ It was held that this presumption was overcome where the original wife proved that her husband had lived in the same county since the date of their marriage, with the exception of short trips to three other states, where documents from the Bureau of Vital Statistics of these states indicated that no divorce had been granted, that her whereabouts, at all times, had been known by the deceased, and that she had never received a notice of a divorce. However, since the original wife was not dependent on the deceased and not living apart from him for a justifiable cause, compensation was denied to both widows.⁷⁴ Where the employee's widow was confined to a mental institution at the time of his death, it was held that she came within the statutory definition of "widow," and she was "dependent upon him for support and living apart for justifiable cause," and that the compensation should be paid to her guardian for her benefit.⁷⁵ However, where the wife was killed in the course of her employment, it was held that the widower was not a dependent, since he was drawing ten percent disability from the government as a disabled veteran, and a weekly salary of fifty dollars.⁷⁶

In *C. W. Wheeler Co. v. Pullins*,⁷⁷ the court decided that the statute did not intend to exclude an acknowledged illegitimate and posthumous child because of the use of the disjunctive "or" in the statute, since it would be inconsistent to say that a born acknowledged illegitimate child was a dependent, but that an unborn acknowledged illegitimate child was not a dependent. Where the parent, brother, or sister of the deceased claims dependency, the burden of proof is on the claimant to establish such dependency by showing: (1) mental or physical incapacity to work, (2) substantial support must have been given by the deceased, and (3) such support must have been regular with reasonable expectation that it would have continued in the future.⁷⁸ It was held that dependency is not shown by the moral or statutory obligation of the child to support the parent.⁷⁹ Such dependency must be shown by the parent at the time of the death of the son.⁸⁰ Contributions toward payment of the mortgage of the parents' home is not sufficient to establish the father as a dependent,⁸¹ and where a mother had not seen or heard of her son for two years prior to death, she was not a dependent.⁸²

72. *Wilson Cypress Co. v. Miller*, 157 Fla. 459, 26 So.2d 441 (1946).

73. *J. J. Cater Furniture Co. v. Banks*, 152 Fla. 337, 11 So.2d 776 (1943).

74. *Hillyer Lovan v. Florida Industrial Comm'n*, 155 Fla. 144, 19 So.2d 838, (1944).

75. *Gibbs Gas Engine Co. v. Jackson*, 159 Fla. 86, 31 So.2d 51 (1947).

76. *Lewis v. Brandon*, 40 So.2d 843 (Fla. 1949).

77. 152 Fla. 96, 11 So.2d 303 (1942).

78. *Sherman v. Florida Tar and Creosote Corp.*, 160 Fla. 696, 36 So.2d 267 (1948).

79. See note 65 *supra*.

80. *Moorer v. Putnam Lumber Co.*, 152 Fla. 520, 12 So.2d 370 (1943).

81. *Stone & Stone v. Scott*, 151 Fla. 21, 9 So.2d 168 (1942).

82. *Clyde Beatty's Jungle Zoo v. Morello*, 154 Fla. 626, 18 So.2d 680 (1944).

Where the son had contributed to the support of his parents since the age of sixteen, they were dependents,⁸³ and where the insurance carrier had paid compensation to the employee's mother for forty-seven weeks, a contract entered into by half-brothers of the deceased with the mother, to pay her fifteen dollars weekly, would not change her status as a dependent.⁸⁴ The original Act stated that the amount of compensation payable "shall not exceed fifty per centum if no dependents,"⁸⁵ and this was construed to require payment of compensation to the personal representative of the deceased.⁸⁶ However, an amendment in 1937 to this section provided that no compensation, except funeral expenses, should be allowed for a deceased employee with no dependents, but five hundred dollars would be paid to the Florida Industrial Commission to become part of the Administrative Fund, as set up in the Act. This amendment was held to be part of the contract of employment when the provisions of the Act were accepted by the employer and employee, and therefore the personal representative of the deceased employee was bound by this contract, and could not bring an action against the employer for the death of the employee.⁸⁷ Where the Florida Industrial Commission made a claim under this section, it was held not to be "a claim for compensation," but was merely a statutory levy payable to the sovereign state as represented by the Florida Industrial Commission.⁸⁸

IV. Accident⁸⁹

An "accident" is defined as "an unexpected or unusual event, happening suddenly." The leading Florida case interpreting this section is *S. H. Kress and Co. v. Burkes*,⁹⁰ where the claimant worked in a bakery mixing dough, and, over a period of a year, knots came on her hand. She stated she sustained no blow but felt pain, and then noticed the knots. The court said: "This condition undoubtedly was brought on by constant and repeated strain of the parts involved, occasioned by the type of work the woman had done over a period of months, (but) the injury here cannot be said to be sudden. Claimant herself said it came on gradually and first appeared about a year before. No stated period can be given as sudden as applied to each case, as each must naturally depend on its own circumstances This court, as many others, has rejected the contention that in order to show an injury by accident, some traumatic injury must be shown, or some definite incident

83. *McCall v. Motor Fuel Carriers Inc.*, 155 Fla. 854, 22 So.2d 153 (1945).

84. *Palm Beach Dairy Co. v. Ryan*, 154 Fla. 648, 18 So.2d 537 (1944).

85. Fla. Laws 1935, c. 17481 § 16 (6).

86. *Maryland Cas. Co. v. Sutherland*, 125 Fla. 282, 169 So. 679 (1936).

87. *Chamberlain v. Florida Power Corp.*, 144 Fla. 719, 198 So. 486 (1940).

88. *Florida Industrial Comm'n v. Felda Lumber Co.*, 154 Fla. 507, 18 So.2d 362 (1944).

89. FLA. STAT. § 440.12 (19) (1941).

90. *S. H. Kress and Co. v. Burkes*, 153 Fla. 868, 16 So.2d 106 (1944).

at a definite time and place must be shown."⁹¹ The court further stated: "that 'accident' as used in this Act would not be given a strict or literal definition, however, we cannot overlook the definition given by the Legislature."⁹² An accident was held to occur where a painter contracted nephritis, caused from the fumes of a solution of bichloride of mercury,⁹³ but where a fireman jumped out of his bed sustaining a slipping of the vertebra, it was held that there was no accident, since nothing unusual happened to the claimant when he got out of bed to answer a fire alarm.⁹⁴ Where a laborer had a heart attack and fell out of a box car, the court said: "The deceased did not fall out of the box car as a result of any accident. He did not slip, trip or stumble. He did not lose his balance and fall. He was not pushed, knocked or jostled out of the car The fact that he collapsed at his work, even though the work was arduous, is not sufficient, within itself, to make out a case for recovery."⁹⁵ In the case of *Davis v. Artley Construction Company*⁹⁶, the claimant, a laborer in a box car, had dizzy spells during a very hot day, and the following day returned to work and sustained a cerebral hemorrhage. The *Davis* case was distinguished in the *Nobles*⁹⁷ case on the basis that where an employee, afflicted with disease, receives an injury under such circumstances, compensation would have been allowed; therefore the fact that he has the disease would not exclude him from receiving compensation. The court stated that the *Nobles* case did not come within this rule. A claimant, poisoned with coal-tar paint, although no trauma was present, had met with an accident under the Act.⁹⁸ In defining the meaning of "accident"⁹⁹ in hernia cases, it was held that it is not necessary to have some unusual mishap.¹⁰⁰

Disability from pre-existing disease, when accelerated or aggravated by an accident, is compensable to the extent such acceleration or aggravation is "reasonably attributable to the accident." In interpreting pre-existing disease, the court has said: "If a merger of the pre-existing disease and the injury sustained results in his disablement, or the pre-existing disease is accelerated or aggravated by an injury arising out of the course of employment, then it becomes a compensable injury."¹⁰¹ A claimant, sustaining a trauma to his arm while in the course of his employment, died within a month from leukemia. It was held that he had a life expectancy of four years, which was terminated by the injury which accelerated his death, and an award of

91. *But cf.* *Meehan v. Crowder*, 158 Fla. 36, 28 So.2d 435 (1947) (where the court held the element of time, place, and cause necessary to prove an accident).

92. See note 88 *supra*.

93. See note 89 *supra*.

94. *Tallahassee v. Roberts*, 155 Fla. 815, 21 So.2d 712 (1945).

95. *Clary Bros. Construction Co. v. Nobles*, 156 Fla. 408, 23 So.2d 525 (1945).

96. *Davis v. Artley Construction Co.*, 154 Fla. 481, 18 So.2d 255 (1944).

97. See note 95 *supra*.

98. *Rayonier, Inc. v. Lang*, 153 Fla. 396, 14 So.2d 569 (1943), *quoted in* 153 Fla. 188, 16 So.2d 107 (1944).

99. FLA. STAT. § 440.16 (6)(d) (1941).

100. *Duff Hotel Co. v. Ficara*, 150 Fla. 442, 7 So.2d 790 (1942).

101. *Allen v. Maxwell Co.*, 152 Fla. 340, 11 So.2d 572 (1943).

four years compensation was affirmed by the supreme court.¹⁰² However, where claimants had a pre-existing deformity of the back¹⁰³, cancer of the testicle¹⁰⁴, and diabetes¹⁰⁵, the court found an acceleration or aggravation in each case, and awarded the full statutory compensation without prorating the "disability reasonably attributable to the accident." Compensation was denied to a claimant with diabetes because "the evidence adduced fails to show or establish a causal connection between the injury sustained on June 11, 1945, and the acceleration or aggravation of claimant's diabetes, which became so pronounced fifteen months later."¹⁰⁶ The court distinguished death from a disease connected with an accident, and death from a disease unrelated to an accident, in *Consolidated Growers Ass'n v. Kruse*¹⁰⁷. Compensation was denied from death by uremia, the court stating that when a claimant dies from an injury because of weakness from a pre-existing disease, compensation is allowed, but if a claimant dies from a disease that is unrelated to an accidental injury, then compensation is denied.

"ARISING OUT OF" AND "IN THE COURSE OF" EMPLOYMENT¹⁰⁸

It has been frequently stated by the courts that, in order for a claimant to support his right to a claim, he must prove (1) that an accident¹⁰⁹ occurred, and (2) that this accident arose out of and in the course of his employment.¹¹⁰ *Sweat v. Allen*,¹¹¹ is the leading Florida case where an employee is injured going to or from work. In that case the claimant, a deputy sheriff, was in an auto accident on the way to work. The court stated that the general rule in such cases is that accidental injuries to employees going to and from work are not deemed to arise out of and in the course of their employment, but that each case must be decided on its own facts. Since the claimant was on twenty-four hour call, it was held that the accident was within his employment. Similarly, where an employee was killed on the highway while walking to work, the court found the employee's duties made him subject to twenty-four hour call, and thus the case was within the exception to the general rule set out in *Sweat v. Allen*.¹¹² However, an officer and parts manager of an auto service station that furnished twenty-four service was held not to be within the exception. It was shown that the employee was on the way to his office on a Sunday evening, after taking his

102. *Intercontinent Aircraft Corp. v. Pickton*, 154 Fla. 8, 16 So.2d 292 (1944).

103. *Star Fruit Co. v. Canady*, 159 Fla. 488, 32 So.2d 2 (1947).

104. *Cone Bros. Contracting Co. v. Massey*, 145 Fla. 56, 198 So. 802 (1940).

105. *Borden's Dairy v. Zanders*, 42 So.2d 539 (Fla. 1949).

106. *Morris v. American Mach. Corp.*, 40 So.2d 839 (Fla. 1949).

107. 159 Fla. 405, 31 So.2d 545 (1947).

108. FLA. STAT. § 440.09 (1949).

109. See note 89 *supra*.

110. *General Properties Co. v. Greening*, 154 Fla. 814, 18 So.2d 908 (1944); *Sims Tire Service Inc. v. Parker*, 146 Fla. 23, 200 So. 524 (1941); *Fidelity and Cas. Co. of N. Y. v. Moore*, 143 Fla. 103, 196 So. 495 (1940).

111. 145 Fla. 733, 200 So. 348 (1941).

112. *Bowen v. Keen*, 154 Fla. 161, 17 So.2d 706 (1944).

family home, and the court held this constituted a "personal mission."¹¹³ Also, where a construction superintendent went to an annual "good will" outing given by his employer, and was fatally injured on his way home, the court said that death did not arise out of and in the course of his employment, but "occurred at a time when the employee was engaged in the pursuit of his own private and personal affairs."¹¹⁴ In *Travelers Ins. Co. v. Taylor*,¹¹⁵ the court stated that the terms "arising out of" and "in the course of employment" had to be used conjunctively. The claimant secured a friend to drive his truck route "to observe his qualifications for the job," followed in his own car, and was killed on the return trip. The court said it might be conceded that the claimant was "in the course of his employment" at the time of his death, as he was in the service of his employer, but that the claimant's death did not "arise out of" his employment, since at the exact time of the accident, claimant "was not where he should have been to fulfill the obligations he owed his employer."

Where the employer furnishes transportation to and from work, the employer's liability for an injury to an employee using such transportation generally depends on whether there is an express or implied contract between the employer and employee to furnish such transportation.¹¹⁶ Where an employee preferred to ride with someone else, and the employer did not object to this, the court held this "did not change her status of being in the line of her employers' business."¹¹⁷ A claimant was working as a cook in his employers' restaurant, and was instructed to go to his employers' farm after work and install a lock on a door, for which he was paid overtime. The court held where the employment relation exists, the fact that the employee is temporarily performing services not usually required of him in such employment, does not exclude such services from arising in the usual course of employment.¹¹⁸ A manager, attempting to manipulate a crick in the neck of a waitress and injuring her;¹¹⁹ a hotel hostess, slipping in the shower on the way to answer the telephone for service to a guest;¹²⁰ a tractor driver, struck by lightning while waiting under a tree during a storm;¹²¹ a logger, burning to death while asleep on a house boat, under the "bunk-house rule";¹²² and a laborer, hit by a passing truck while going to get his hat, were all held to be within the course of their employment.¹²³ The court said

113. *Fidelity and Cas. Co. of N. Y. v. Moore*, 143 Fla. 103, 196 So. 495 (1940).

114. *Duval Engineering and Contracting Co. v. Johnson*, 154 Fla. 9, 16 So.2d 290 (1944).

115. 147 Fla. 210, 3 So.2d 381 (1941).

116. *Southern States Mfg. Co. v. Wright*, 146 Fla. 29, 200 So. 375 (1941).

117. *Kennedy v. Fulghum*, 159 Fla. 896, 32 So.2d 919 (1947); *Cohen v. Sloan*, 138 Fla. 752, 190 So. 14 (1939).

118. *Moody v. Baxley*, 158 Fla. 357, 28 So.2d 325 (1946).

119. *Stone-Brady, Inc. v. Heim*, 152 Fla. 710, 12 So.2d 888 (1943).

120. *Neuman v. Shelbourne Grand Hotel*, 155 Fla. 491, 20 So.2d 677 (1945).

121. *Fort Pierce Growers Ass'n v. Storey*, 144 Fla. 769, 21 So.2d 451 (1945).

122. *Wilson Cypress Co. v. Miller*, 157 Fla. 459, 26 So.2d 441 (1946).

123. *Bituminous Cas. Corp. v. Richardson*, 148 Fla. 323, 4 So.2d 378 (1941).

in the later case: "The necessity for him to stop and get his hat was an incident which occurred in connection with his employment." Where a citrus worker was "ordered" by his foreman to take a jeep and go for his lunch, and was injured on the return trip, the court allowed recovery saying: "The intent of the employer was advanced by the foreman in directing the employee to take the appellant's 'jeep' and go to Sunset Point and obtain lunch,"¹²⁴ but another employee, fatally injured in the same accident, was denied compensation, because he "voluntarily got in the truck seat by the driver . . . and was so riding when killed."¹²⁵ The Act provides compensation for an accidental injury occurring outside of the state, provided: (1) That the contract of employment was made within the state, and that the employment did not specify service to be exclusively outside of the state, and (2) That the employer's place of business is within the state, or that the residence of the employee is within the state.¹²⁶

No compensation is payable if the injury "was occasioned primarily" by the intoxication of the employee, the willful intent of the employee to injure or kill himself or another, or by his willful refusal to use a safety appliance or observe a safety rule. However, the statute provides a presumption "in the absence of substantial evidence to the contrary" that the injury was not caused by intoxication or the willful intent to kill himself or another.¹²⁷ It was held where a painter fell off of a scaffold "that the injury was not occasioned primarily by the intoxication of the injured employee,"¹²⁸ and that one bottle of beer and possibly some wine does not show an employee under the influence of liquor.¹²⁹ The testimony of an attending physician, that he smelled liquor on the breath of the deceased, was not sufficient to establish his intoxication.¹³⁰ Where a forest ranger and a fire tower watchman got into an argument in connection with the report of a fire, and there was an exchange of gunshots killing the forest ranger and seriously injuring the fire tower watchman, it was held that the evidence was conflicting as to who was the instigator of the shooting, and therefore, under the presumption set up by the Act, the fire tower watchman, who was the claimant, was entitled to compensation.¹³¹ In a recent case the claimant, within three months after sustaining serious accidental injuries, took poison and died. The court held that the employee had committed suicide, but in the present case they interpreted "willful intention" not to include a case where the injuries suffered by the deceased resulted in his becoming devoid of normal judgment

124. *Heller Bros. Packing Co. v. Lewis*, 155 Fla. 430, 20 So.2d 385 (1945).

125. *Heller Bros. Packing Co. v. Kendricks*, 155 Fla. 428, 20 So.2d 387 (1945).

126. See *Butler v. Morgan*, 157 Fla. 1, 24 So.2d 571 (1946); *Lovejoy Co. v. Ackis*, 153 Fla. 876, So.2d 297 (1944); *Forehand v. Manly*, 147 Fla. 287, 2 So.2d 864 (1941).

127. FLA. STAT., 440.09(3) and, 440.26(3), (4) 1941.

128. *Zee v. Gary*, 137 Fla. 741, 189 So. 34 (1939).

129. *Cone Bros. Contracting Co. v. Allbrook*, 153 Fla. 829, 16 So.2d 61 (1943).

130. *Duval Engineering and Contracting Co. v. Johnson*, 154 Fla. 9, 16 So.2d 290 (1944).

131. *Florida Forest and Park Service v. Strickland*, 154 Fla. 572, 18 So.2d 251 (1944).

. . . (even though) a workman knew that he was inflicting upon himself a mortal wound."¹³² In *Bituminous Casualty Corp. v. Clements*¹³³ the court held "that the accident was not caused by the injured's failure to use or observe safety appliances or regulation."

GENERAL PROCEDURE¹³⁴

Written notice to the commission and the employer of an injury or death is required to be given within thirty days by the claimant, but such requirement is waived unless an objection is made to the Commission at the first hearing. This notice is excused if the rights of the employer have not been prejudiced, or if the Commission decides the excuse is reasonable.¹³⁵ There are various time limitations in the statute on the filing of claims. One section provides that claims for compensation will be barred after two years from the injury or death, or if the compensation has been paid, two years after the last date of its payment. However, the above limitation is waived unless objection is made at the first hearing.¹³⁶ Another section provides, where there has been a change of condition or a mistake of fact, that a hearing can be requested within one year from the last payment of compensation, or from the time a claim was rejected. Any party in interest can request this hearing.¹³⁷ The first quoted section had a time limitation of one year until it was amended to the present two year period effective June 3, 1947. The second section had a two year period until amended to one year effective July 1, 1941. While a claimant is incompetent, the statutory limitation will not run,¹³⁸ and where a claim for the statutory levy is made by the state, the limitation does not apply.¹³⁹ The second limitation section¹⁴⁰ was held to be mandatory as to the one year period allowed for review.¹⁴¹ In *Royer v. United States Sugar Corp.*¹⁴² the court held that medical and hospital treatment was not compensation, and therefore a claim filed within one year (now two years) from such treatment would be barred. However, at the time of this case there was no limitation period in the statute for medical and hospital treatment, which is now provided for in § 440.13

132. *Whitehead v. Keene Roofing Co.*, 43 So.2d 464 (Fla. 1949).

133. 148 Fla. 175, 3 So.2d 865 (1941).

134. FLA. STAT. §§ 440.18, .19, .25, .26, .27, .28, .29, and .36 (1949); see PROCEEDINGS BEFORE DEPUTY COMMISSIONER, Rules 1-11 incl.

135. See *Borden's Dairy v. Zanders*, 42 So.2d 539 (Fla. 1949); *Meehan v. Crowder*, 158 Fla. 361, 28 So.2d 435 (1947); *Anderson v. Jarrell*, 157 Fla. 212, 25 So.2d 490 (1946).

136. FLA. STAT. § 440.19; see *Anderson v. Jarrell*, 157 Fla. 212, 25 So.2d 490 (1946); *Cullinane v. Crown Can Co.*, 156 Fla. 652, 24 So.2d 5 (1945); *Canada Dry Bottling Co. of Florida v. White*, 153 Fla. 70, 13 So.2d 595 (1943); *Lovejoy Co. v. Ackis*, 153 Fla. 876, 16 So.2d 297 (1944).

137. FLA. STAT. § 440.28 (1941).

138. *Thomas v. Westinghouse Electric and Mfg. Co.*, 160 Fla. 687, 36 So.2d 377 (1948).

139. *Florida Industrial Comm'n v. Felda Lumber Co.*, 154 Fla. 507, 18 So.2d 362 (1944); see FLA. STAT. § 440.19(3) (1949).

140. See note 134 *supra*.

141. *Manrose v. Miami Shipbuilding Corp.*, 156 Fla. 402, 23 So.2d 733 (1945).

142. 148 Fla. 537, 4 So.2d 692 (1941).

(3)(b) of the Act. Where a lump sum payment of compensation is made,¹⁴³ the limitation period runs from the time of its payment.¹⁴⁴

Hearings before the Commission are not subject to the technical procedural rules of the courts, but are to be conducted informally.¹⁴⁵ Statements by the deceased employee, concerning the injury, are admissible where properly corroborated.¹⁴⁶ The Commission has some procedural authority, but such authority is quasi-judicial only, since it has no authority to enforce its own orders or awards.¹⁴⁷ It has been held frequently that the Commission sits as an administrative body only, and that a compensation claim does not become a judicial case until it reaches the circuit court.¹⁴⁸ The circuit court gives the same weight to the findings of the Commission as it does to the findings of law and fact by a special master in an ordinary chancery case.¹⁴⁹ The right of appeal is not a constitutional privilege, and therefore will be construed strictly according to the statute.¹⁵⁰ An appeal is the only statutory remedy, except where it can be shown by certiorari that the essential requirements of the law have not been complied with.¹⁵¹ Since the Commission does not have the authority to adjudicate, an award handed down by the Commission would not be *res adjudicata* to an action brought by an insurance company against another insurance company for contribution.¹⁵² The venue of the deputy commissioner and the circuit court is controlled by the county where the injury occurred.¹⁵³ If the accident occurs outside of the state, then the deputy commissioner may hear the case in the county of the employer's residence or business, but the venue of the circuit court applicable in suits on contract applies.¹⁵⁴

The award of the deputy commissioner becomes final within seven days after it is filed in the office of the Commission at Tallahassee.¹⁵⁵ In *Johnson v. Midland Constructions, Inc.*¹⁵⁶ it was held that by "operation of law" the

143. FLA. STAT. § 440.20(10) (1949).

144. *Daytona Beach Boat Works v. Spencer*, 153 Fla. 540, 15 So.2d 256 (1943).

145. FLA. STAT. § 440.29 (1949); see *Dixie Laundry v. Kentzell*, 145 Fla. 569, 200 So. 860 (1940).

146. *Bowen v. Keen*, 154 Fla. 161, 17 So.2d 706 (1944).

147. FLA. STAT. § 440.27 (9) (1949); see *South Atlantic S. S. Co. of Delaware v. Tutson*, 139 Fla. 405, 190 So. 675 (1939).

148. *Duval Engineering and Contracting Co. v. Johnson*, 153 Fla. 829, 16 So.2d 290 (1944); *Cone Bros. Contracting Co. v. Allbrook*, 154 Fla. 9, 16 So.2d 61 (1943); *South Atlantic S. S. Co. of Delaware v. Tutson*, 139 Fla. 405 190 So. 675 (1939).

149. FLA. STAT. § 440.27(9) (1949); see *South Atlantic S.S. Co of Delaware (1940)*; see *Ocala Mfg. Ice and Packing Co. v. Preskitt*, 136 Fla. 796, 187 So. 168 (1939).

150. *Miami v. Saco*, 156 Fla. 634, 24 So.2d 115 (1945).

151. *Weaver-Loughridge Lumber Co. v. Coleman*, 139 Fla. 823, 191 So. 16 (1939).

152. *Continental Cas. Co. v. Hartford Acc. and Indemnity Co.*, 151 Fla. 742, 10 So.2d 440 (1942).

153. FLA. STAT. § 440.25(3) and § 440.27(3) (1949).

154. *Stansell v. Marlin*, 153 Fla. 421, 14 So.2d 892 (1943); FLA. STAT. § 46.01 and § 46.02 (1949).

155. FLA. STAT. § 440.25(4) (1949); see *Florida Forest and Park Service v. Strickland*, 154 Fla. 472, 18 So.2d 251 (1944).

156. 150 Fla. 353, 7 So.2d 449 (1942); see *Walker v. Telfair Stockton Co.*, 152 Fla. 434, 12 So.2d 177 (1943).

order of the deputy commissioner became the order of the Florida Industrial Commission after it had been filed in the latter's office for seven days, and therefore an appeal could be carried direct to the circuit court from the deputy commissioner. The *Johnson* case was overruled by *Tigertail Quarries, Inc. v. Ward*,¹⁵⁷ holding that an appeal from an award of the deputy commissioner must be made direct to the Florida Industrial Commission, or it would become final after the seven day period. The Florida Industrial Commission reviews the record as certified by the Deputy Commissioner, and an award of the Commission is final within twenty days after it is filed in the office of the Commission, unless it is appealed prior to this time to the circuit court.¹⁵⁸ Where the Commission failed to mark the correct date on an appeal notice, the court held that "the duty of appellant in this regard was performed when it, in due course, transmitted the notice of appeal, so that the Commission received it in time for the same to be effective."¹⁵⁹ Where an appeal from the Commission to the circuit court was made returnable seventy-three days after the final order of the Commission was filed in the Commission office, such was held a violation of the return day, setting a day more than thirty and not over sixty days from the date the Commission's order is filed in its office, and an appeal would not lie.¹⁶⁰ The circuit court will only review assignments of error made at the time of appeal to the circuit court from the Commission.¹⁶¹ An appeal to the supreme court is made in the same manner that an appeal to the circuit court¹⁶² is made, and the rules of that court, applicable to equity and common law suits, do not apply to workmen's compensation cases.¹⁶³

Two of the presumptions set out under the Act have previously been discussed.¹⁶⁴ The other two presumptions, that the claim comes within the Act, and that sufficient notice of the claim has been given, have been used frequently by the courts.¹⁶⁵ However, these presumptions cannot be used if there is substantial evidence to the contrary, and they do not relieve the claimant from proving an accident occurred within the course of his employment.¹⁶⁶

157. 154 Fla. 122, 16 So.2d 812 (1944).

158. FLA. STAT. § 440.25(4) (1949); see *Fort Pierce Growers v. Storey*, 155 Fla. 769, 21 So.2d 451 (1945).

159. *Bituminous Cas. Corp. v. Clements*, 148 Fla. 175, 3 So.2d 865 (1941).

160. *Florida Industrial Comm'n v. Circuit Court of Dade County*, 154 Fla. 42, 16 So.2d 433 (1944); see FLA. STAT. § 440.27(4) (1949).

161. *St. John River Ship Building Co., v. Wells*, 156 Fla. 67, 22 So.2d 632 (1945).

162. FLA. STAT. § 440.27(12) (1949).

163. *Miami v. Saco*, 156 Fla. 634, 24 So.2d 115 (1945); see FLA. STAT. § 440.27(8) (1949).

164. See notes 127, 131 *supra*.

165. FLA. STAT. § 440.26 (1949); *St. Petersburg v. Mosedale*, 146 Fla. 784, 1 So.2d 878 (1941); *Lakeland v. Burton*, 147 Fla. 412, 2 So.2d 731 (1941); *S. H. Kress & Co. v. Burkes*, 153 Fla. 868, 16 So.2d 106 (1944).

166. *Fort Pierce Growers Ass'n v. Storey*, 155 Fla. 769, 21 So.2d 451 (1945); *Briggs v. Tripure Products Co.*, 152 Fla. 749, 13 So.2d 152 (1943); *Sims Tire Serv., Inc. v. Parker*, 146 Fla. 23, 200 So. 524 (1941); *Fidelity and Cas. Co. of N. Y. v. Moore*, 143 Fla. 103, 196 So. 495 (1940); *Firestone Auto Supply & Serv. Stores v. Bullard*, 141 Fla. 282, 192 So. 865 (1940).

The employer is required to submit a report of the injury or death to the Commission within ten days after receiving knowledge of it, and such reports shall not be evidence of any fact stated.¹⁶⁷ It was held where the parties had stipulated before the deputy commissioner that the medical report should become a part of the record, that such medical report could be used as evidence, the court saying: "the medical report was accepted by all parties as stating the true circumstances under which the injury occurred."¹⁶⁸

PAYMENTS UNDER THE ACT¹⁶⁹

Compensation is not paid to an injured employee for the first four days of his disability; however, this waiting period does not affect the medical benefits provided under the Act¹⁷⁰ since such benefits are not considered compensation.¹⁷¹ Under the Act, the employee is not entitled to recover any amount disbursed for medical service unless he has first requested his employer to furnish such service. All claims for medical treatment, to be enforceable, must be reported to the employer and the Commission by the attending physician within twenty days following treatment.¹⁷² Where an employer authorized medical attention, but the physician failed to submit medical reports within twenty days from the last date of treatment, it was held that the employer had waived this section,¹⁷³ since its purpose was to protect the employer from "the imposition of unfounded and fraudulent claims."¹⁷⁴ The failure to submit medical reports within the twenty days period is not the fault of the claimant, but it is the duty of the employer to advise the carrier of such matters.¹⁷⁵ The period for submitting the medical report begins "twenty days following the termination of the treatment, (and) . . . the language of this section . . . is mandatory."¹⁷⁶ Where a claimant refuses to submit to an operation, his refusal must be shown to be unreasonable before his claim for compensation will be denied.¹⁷⁷ Compensation must be paid to a claimant within fourteen days after the employer has knowledge of the accident, unless this claim is controverted by the employer.¹⁷⁸ If, for a period of thirty days, the employer fails to tender the amount of compensation due under an award, the Commission may declare the entire amount due, and the claimant may have this supplementary order enforced by a summary proceeding in the court having jurisdiction of the amount involved.¹⁷⁹

167. FLA. STAT. § 440.36 (1949).

168. *Bituminous Cas. Corp. v. Clements*, 148 Fla. 175, 3 So.2d 865 (1941).

169. FLA. STAT. § 440.12, .13, .14, .15, .20, .24, .34, .54 (1949).

170. FLA. STAT. § 440.12 (1949).

171. See note 62 *supra*.

172. FLA. STAT. § 440.13(1) (1949). *New Fort Pierce Hotel Co. v. Gorley*, 137 Fla. 345, 188 So. 340 (1939).

173. FLA. STAT. § 440.13(1) (1949).

174. *Foster v. Cooper*, 143 Fla. 493, 197 So. 117 (1940).

175. *Consolidated Growers Assn' v. Kruse*, 159 Fla. 405, 31 So.2d 545 (1947).

176. *Sweat v. Allen*, 145 Fla. 733, 200 So. 348, (1941).

177. *Concord Realty Corp. v. Romano*, 159 Fla. 1, 30 So.2d 495 (1947).

178. FLA. STAT. § 440.20 (1949); *Cohen v. Sloan*, 143 Fla. 733, 197 So. 342 (1947).

179. FLA. STAT. § 440.24 (1949); *Cohen v. Sloan*, 143 Fla. 733, 197 So. 342 (1947).

The amount of weekly compensation payable can not exceed twenty-two dollars, or sixty per cent of the employee's total wages.¹⁸⁰ The original Act set a maximum total of five thousand dollars for payment of compensation, excluding medical and funeral benefits. This amount was amended in 1947 to allow compensation for a period not to exceed three hundred and fifty weeks. However, where an employee receives two permanent injuries in the same employment, he may receive compensation for a period not to exceed five hundred weeks.¹⁸¹ Disability is classified under the Act as permanent total, temporary total, permanent partial, or temporary partial.¹⁸² Temporary total disability has been defined as that period in which a claimant is unable to work.¹⁸³ Where, after receiving temporary total compensation, a claimant has reached maximum recovery and has returned to work, but is partially disabled for life, he is entitled to additional compensation based on his percentage of partial total disability. Where a claimant has returned to work, but because of a temporary disability his earning capacity is decreased, he is entitled to sixty percent of the difference between his wage before the injury, and his wage after the injury.¹⁸⁴ An employee, injured permanently and totally, is entitled to compensation for a period not to exceed three hundred and fifty weeks, subject to the statutory weekly amount. A claimant may, as a result of an injury, draw temporary total, permanent partial, and temporary partial disability, but the total period of the compensation drawn thereunder cannot exceed three hundred and fifty weeks. In a recent case,¹⁸⁵ it is not clear whether the court affirmed a holding of additional temporary total, or of permanent partial disability. The Commission awarded the claimant two weeks temporary total, and denied permanent partial. The supreme court said "where medical evidence shows that eight weeks is a fair maximum allowance for temporary total disability in such a case . . . (that) the mere fact that claimant returned to work in two weeks does not necessarily conclude the point." The court then affirmed an award of eight weeks compensation. They then stated that the circuit court had denied the claimant permanent partial disability, but that they thought the claimant had brought himself within this section; however, they affirmed the circuit court's holding. If they are holding that the claimant is entitled to temporary total disability during the time he works, this would seem to change the original interpretation of the meaning of this class of disability.¹⁸⁶

The Act¹⁸⁷ provides a penalty in an amount equal to the amount of compensation, payable to a minor claimant, where an employer has violated

180. FLA. STAT. § 440.12 (1949).

181. FLA. STAT. § 440.15(5)(b) (1949).

182. FLA. STAT. § 440.15 (1949).

183. *Concord Realty Corp. v. Romano*, 159 Fla. 1, 30 So.2d 495 (1947).

184. *Hart v. State Live Stock Sanitary Board*, 152 Fla. 741, 13 So.2d 11 (1943).

185. *Rosier v. Roofing & Sheet Metal Supply Co.*, 41 So.2d 308 (Fla. 1949).

186. See note 183 *supra*.

187. FLA. STAT. § 440.54 (1949).

the child labor laws of Florida. The employer alone is liable for this penalty, and where the claimant has received an amount from the carrier equalling the statutory maximum set under the Act,¹⁸⁸ the penalty will not be invoked.¹⁸⁹ The original Act allowed attorneys' fees, as a lien upon the compensation awarded, subject to the approval of the Commission.¹⁹⁰ The Act¹⁹¹ was amended in 1941 to allow a reasonable attorneys' fee to the claimant's attorney, in addition to the amount of compensation awarded.¹⁹² Where the carrier has not denied liability on a claim, the court denied the statutory assessment of attorneys' fees, indicating that the carrier is to be allowed a reasonable time to investigate a claim, and that the burden is on the claimant to establish a right to attorneys' fees.¹⁹³ Where the employer has failed to secure compensation, attorneys' fees of claimant may be awarded against the employer.¹⁹⁴

The statute¹⁹⁵ set five requisites in connection with claims for compensation involving a hernia. The leading case¹⁹⁶ interpreting this section found that a claimant "received his hernia from lifting a heavy pot of meat while standing in a strained position, and that this unexpected incident constituted an accident, as contemplated by the Workmen's Compensation Act." Where a claimant refused an operation for a hernia for over two years, an award of compensation was allowed when he died from the hernia operation, the court holding that he had had continuous disability since the accident.¹⁹⁷ However, where a claimant testified that he did not have an accident, or a sudden pain a hernia claim was denied.¹⁹⁸

ELECTION TO SUE

TORT-FEASOR¹⁹⁹

The relationship between employee, independent contractor, general contractor, and sub-contractor has been discussed;²⁰⁰ however, this relationship also becomes important where there is a third party liable for the claimant's injury. Where the injury is caused by the negligence of a third person, the Act allows the claimant the choice of accepting compensation, or proceeding against the third party. However, as previously defined,²⁰¹

188. FLA. STAT. § 440.20(13) (1949).

189. *Lollie v. General America Tank Storage Terminals*, 160 Fla. 208, 34 So.2d 306 (1948).

190. *Winn-Lovett Grocery Co. v. Stevens*, 145 Fla. 209, 198 So. 835 (1940).

191. Fla. Laws 1941, c. 20672, § 11.

192. *Hardware Mut. Cas. Co. v. Carlton*, 151 Fla. 238, 9 So.2d 359 (1942); *Duff Hotel Co. v. Ficara*, 151 Fla. 312, 9 So.2d 630 (1942).

193. *Balatsos v. Nebraska Ave. Cafe & Liquor Store*, 159 Fla. 71, 30 So.2d 633 (1947).

194. *Great American Indemnity Co. v. Smith*, 156 Fla. 662, 24 So.2d 42 (1945).

195. FLA. STAT. § 440.15(6) (1949).

196. *Duff Hotel Co. v. Ficara*, 150 Fla. 442, 7 So.2d 790 (1942).

197. *Dixie Laundry v. Wentzell*, 145 Fla. 569, 200 So. 860 (1940).

198. *General Properties Co. v. Greening*, 154 Fla. 814, 18 So.2d 908 (1944).

199. FLA. STAT. § 440.39 (1949).

200. See note 24, 25, 39-45 *supra*.

201. *Ibid.*

this section does not contemplate a suit against a general contractor or subcontractor. A written notice of election was required by the employee prior to the amendment in 1947; however, the present statute states that settlement of a claim or commencement of an action against the third party constitutes an election by the claimant. The present form of election has not been construed by our supreme court. As to the original section, the court said: "This section does not limit the right of action or otherwise affect the amount of recovery in so far as the third party is concerned."²⁰² And in *Cullinane v. Crown Can Co.*,²⁰³ the court said: "The manner of proceeding if there is an election to pursue the remedy at law is not defined in the statute, but it is a fair inference that in such case the claimant thereby seeks damages from the wrongdoer independently of any benefit under Workmen's Compensation Law." In that case²⁰⁴ the court held that the claimant could not retract her election to sue the third party and make a subsequent claim for compensation. Also where a claimant failed to make an election and brought suit against the third party, she could not later make a claim for compensation.²⁰⁵ Where an employee brought suit against a third party for damages, the court held that it was not necessary for the employee to allege in his declaration that he had given notice of his election to sue the third party, since such notice was only for the benefit of the person liable for the statutory compensation.²⁰⁶ Where the employer is subrogated to the rights of the employee, the court held that notice of such assignment was necessary to the third party before a subrogation suit would lie.²⁰⁷ An assignment of such right to sue the third party to the employer also includes the right to sue for the physical pain and suffering of the employee.²⁰⁸ Written consent of the employee, or approval by the court, is necessary before the employer can settle the cause of action against the third party. Where the employer recovers against the third party, he is allowed to retain the amount of compensation paid, attorneys' fees, court costs, and any other benefits furnished to the employee under the Act.²⁰⁹ Any excess over this amount is paid to the claimant or his representative. The employer is allowed a maximum time of eighteen months to exercise his subrogation right, after which time the claimant may bring suit .

202. *Vanlandingham v. Florida Power & Light Co.*, 154 Fla. 628, 18 So.2d 678 (1944).

203. 156 Fla. 652, 24 So.2d 5 (1945).

204. *Ibid.*

205. *Lovejoy Co. v. Ackis*, 153 Fla. 876, 16 So.2d 297 (1944).

206. *Red Top Cab & Baggage Co. v. Dorner*, 159 Fla. 538, 32 So.2d 321 (1947); *Hartquist v. Tamiami Trail Tours*, 139 Fla. 328, 190 So. 533 (1939).

207. *Weathers v. Cauthen*, 152 Fla. 420, 12 So.2d 294 (1943).

208. *Haverty Furniture Co. v. McKesson & Robbins, Inc.*, 154 Fla. 772, 19 So.2d 59 (1944).

209. *Bituminous Cas. Co. v. Williams*, 154 Fla. 191, 17 So.2d 98 (1944).