Workmen's Compensation

Edward Schroll

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

Recommended Citation
Available at: https://repository.law.miami.edu/umlr/vol24/iss3/4

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.
This eighth survey covers the legislative changes in our Workmen's Compensation Act, which were adopted by the 1969 session of the Florida Legislature, and all related, reported judicial decisions since publication of the last survey. Only two changes were effectuated by the 1969 Legislature. Under the Governmental Reorganization Act of 1969, the Florida Industrial Commission was placed under the Department of Commerce and its prior functions assigned to the Division of Labor and Employment Opportunities. The other legislative change was an increase in the salary of the judges of industrial claims to an annual salary of $17,500.00.

Sixty-seven judicial opinions were handed down by the Supreme Court of Florida and the district courts of appeal during the period surveyed. During the same period, an additional 218 orders of the full Commission were brought to the Supreme Court of Florida by petition...
for writ of certiorari which the court declined to grant. The subject matter covered by this survey will again be presented by topics rather than by the chronological ordering of cases.

I. SPECIAL DISABILITY FUND

In the landmark and controlling decision of Stephens v. Winn-Dixie Stores, Inc., the court was confronted with an opinion from the full Commission which reversed an award of benefits to a claimant who had sustained successive injuries. The full commission felt that the 1963 legislative amendments to the Workmen's Compensation Act had overcome the court's prior decision of Sharer v. Hotel Corporation of America. In reviewing its prior decisions, as well as the legislative changes bearing upon the Special Disability Fund, the court adhered to its prior decisions and found that the 1963 legislative changes were only a rearrangement of the pertinent provisions relating to the Special Disability Fund. On rehearing, the court stated:

We decided two things in the decision toward which these petitions for rehearing are directed: (1) That the apportionment provision of Sec. 440.15(5)(c) and the reimbursement provision of Sec. 440.49(4)(c) are perfect equivalents and can only be applied as alternatives; and (2) that the apportionment provision of Sec. 440.15(5)(c), when applicable, requires that there be apportioned out of the award for disability only the amount of compensation for the percentage of disability resulting from the first injury that was still 'manifesting itself at the time of the second injury and continuing to exist at the time the award is made.'

In the Stephens decisions, the court considered the philosophy and theory of workmen's compensation and stated that there seemed to be no logical reason to treat preexisting disability resulting from injury any differently than preexisting disability resulting from diseases or other congenital defects. Residual predisposition to reinjury was held not to be subject to apportionment. The cause was remanded for determination of whether or not any of claimant's disability was apportionable under the formula adopted by the court.

Two months after the opinion on rehearing in Stephens, the court filed its opinion in the case of Davis v. Conger Life Insurance Co. In
that case, the claimant sustained a back injury resulting in a 15-percent
disability of the body as a whole. Previously, he had sustained a heart
attack which was known to the employer and which caused limitations
upon his employment. He was found to have sustained a 25-percent
permanent, partial disability as a result of the preexisting heart attack.
In utilizing the provisions of the Special Disability Fund, the judge of
industrial claims found the claimant to be permanently and totally dis-
abled. On review, the full Commission reversed and held that the judge
erred in merging the two disabilities. It was contended before the
supreme court that the merger rationale of the Stephens case was not
applicable inasmuch as the injuries involved were not related, i.e., a
preexisting cardiac condition and a low back injury and, consequently,
no actual merger took place. In rejecting this argument, the court gave
the term "merger" a broader construction and stated:

Reinjury to a previously injured part of the body is not the
only way merger can occur. Merger can result from successive
injuries to separate parts of the body which have the com-
bined total effect of creating a greater degree of disability
to the body as a whole and a claimant's wage-earning capacity
than would have resulted from the last injury considered by
itself and not in conjunction with a previous injury.\footnote{12}

The court went on to state that

[m]erger is not a condition that automatically arises upon
the mere occurrence of successive injuries which may or may
not have a combined disabling effect upon a claimant within the
contemplation of the Workmen's Compensation statute. It is a
condition, the finding and determination of which must be sup-
ported by competent substantial evidence in accord with logic
and reason.\footnote{13}

The court found such evidence and quashed the full Commission's order.

In subsequent decisions, there were findings of merger between a
preexisting back injury and a new back injury\footnote{14} and of merger between
a preexisting eye disability and a new back disability.\footnote{15}

The factual question as to whether or not a preexisting disability
was manifesting itself at the time of the second injury and continued to
exist at the time the award was made was raised in Genereux v. Carib-
bean Concessions, Inc.\footnote{16} In that case, the claimant had sustained a prior
back injury from which he never fully recovered. However, he was able to
return to gainful employment working part time as a parking lot atten-
dant and part time running cars from the parking lot to a hotel. While

\footnotesize{12. Id. at 729.}
\footnotesize{13. Id. at 730.}
\footnotesize{14. Randall v. Wolfson & Diamond, 215 So.2d 729 (Fla. 1968).}
\footnotesize{15. Texaco, Inc. v. Special Disability Fund, 217 So.2d 111 (Fla. 1968).}
\footnotesize{16. 211 So.2d 1 (Fla. 1968).}
so employed, he sustained the subject accident. After several months of the five-percent functional impairment resulting from the second his condition improved and he was discharged with 15- to 20-percent functional impairment of the whole body.

The judge found the claimant to have a permanent, partial disability of 20 percent of which 15 percent preexisted from the prior industrial accident. He went on to find that the employer had knowledge of the preexisting condition, that the five-percent increase in disability was responsible for the loss of earning capacity, and that the major loss of earning capacity was due to the second injury. The full Commission reversed the judge and held the employer to be liable only for the effects of examination and treatment for the injury resulting from the accident, injury. In citing the *Stephens* decision that in every case involving successive injuries there must be an expressed finding of apportionment, the supreme court stated:

As applied to the present case, on remand the Judge of Industrial Claims should make explicit findings as to what percentage, if any, of Claimant's permanent disability existing after the second injury was manifesting itself in the form of a loss of wage earning capacity at the time of the second injury and at the time of the award. In this respect, the record findings of 15 percent functional disability attributable to claimant's pre-existing condition is not, by itself, competent substantial evidence for concluding that a similar percentage reflects Claimant's disability in loss of wage earning capacity manifesting itself at the time of the second injury and at the time of award. Neither should the Full Commission have suggested that apportionment could be predicated on findings of functional disability, as opposed to disability in the form of loss of wage earning capacity attributable to claimant's pre-existing condition.17

On remand of this case, the court held the claimant to be "entitled to full compensation for whatever disability is found to exist after the second injury. Depending on the express findings of apportionment, the employer-carrier may be entitled to reimbursement for a part of the compensation paid to the Claimant."18

II. APPORTIONMENT

In *Russell House Movers, Inc. v. Nolin*,19 it was held that the doctrine of apportionment was not applicable to temporary disability benefits and medical benefits under the general scheme and intent of our workmen's compensation law. Apportionment is also not applicable be-

---

17. Id. at 2.
18. Id. at 3.
19. 210 So.2d 859 (Fla. 1968).
between successive employers and carriers where an injury by an accident in the employ of a latter employer aggravates a condition remaining from an earlier compensable injury. In those cases where there is no evidence of any percentage of disability from a preexisting disease or condition, judges of industrial claims may not utilize the doctrine of apportionment.

Latent disc disease found to be asymptomatic prior to accidents resulting in back injuries were held not to be apportionable, as was a preexisting arthritic condition which was not disabling prior to the accident. In Direct Oil Corp. v. Coleman, the claimant was suffering from an aneurysm, a preexisting, non-disabling congenital weakness. The judge of industrial claims entered an award apportioning disability where the uncontradicted medical evidence disclosed the preexisting aneurysm was not independently producing any disability. On review, the award was reversed based upon the court’s prior decision in Evans v. Florida Industrial Commission.

In the case of Crotts v. Montgomery Ward & Co., a workman suffering from preexisting parkinson's disease was awarded permanent, total disability for a back injury based upon the findings that the pre-existing disease was not accelerated or aggravated by the injury but that the disability was solely caused by the industrial injuries. In that case, the pre-existing disease prevented rehabilitation and corrective surgery. In reinstating the award of permanent, total disability and denying apportionment, the supreme court stated:

The statute does not provide for apportionment when a compensable injury is aggravated by disease, but attempts only to define the measure of apportionment when a compensable disability is attributable in part to aggravation or acceleration of pre-existing disease.

When the doctrine of apportionment is applicable in permanent, total disability cases, the method of apportionment, as applied in Fisher v. Carroll Daniel Fisher Construction Co., is to apportion the compensation rate rather than paying full benefits for a percentage of 350 weeks as in permanent, partial disability cases. In Fisher, the claimant

22. Robinette v. E. R. Jahna Indus., Inc., 208 So.2d 104 (Fla. 1968). In Zolobosky v. Board of Pub. Instruction, 207 So.2d 439 (Fla. 1968), an award by the judge of industrial claims which denied apportionment for a preexisting weakness due to age was also affirmed.
23. Holloway v. Curcie Bros., Inc., 203 So.2d 499 (Fla. 1968). In this case, the Court remanded the cause to permit the employer the opportunity of demonstrating that there was permanent disability due to the normal progress of the preexisting arthritis.
24. 216 So.2d 193 (Fla. 1968).
25. 196 So.2d 748 (Fla. 1967).
26. 208 So.2d 97 (Fla. 1968).
27. Id. at 97.
28. 212 So.2d 289 (Fla. 1968).
was suffering from a degenerative but asymptomatic spinal condition. He then suffered a compensable accident and back injury which was followed by three radical operations, prolonged hospitalization, prolonged periods in body casts, intensive pain, and no evidence of intervening accident. While in the hospital for the back injury, the claimant suffered a conclusive seizure resulting in additional spinal fractures. He was found to be permanently and totally disabled by the judge of industrial claims, but the award was apportioned. The trial judge found that the seizures were unrelated to the cause of 25 percent of the claimant’s disability and that the preexisting asymptomatic spinal condition was the cause of 10 percent of claimant’s disability. He then awarded 65 percent permanent, partial disability or 227.5 weeks of compensation.29

The supreme court reversed. In addition to reversing because of the improper method of apportioning permanent, total disability awards, the court found that the trial judge had improperly apportioned the pre-existing, asymptomatic spinal condition and further, found that a logical cause for the seizures could be discovered in the accident and resulting medical care, surgeries, hospitalizations, and pain which the claimant suffered as a result of his accident.80 The case was remanded to the trial judge to give the employer-carrier the opportunity to show another cause of the seizures which was more logical and consonant with reason.

Death benefits were also held to be subject to the doctrine of apportionment during the survey period. In affirming the full Commission’s determination that death benefits must be apportioned between the pre-existing diseases and the industrially related accident, our supreme court stated in Tingle v. Board of County:

The statute makes no distinction between active and quiescent pre-existing disease, and in view of the undisputed evidence in this case that claimant’s pre-existing disease was accelerated by a compensable heart attack which would not otherwise have caused his death, we think it is clear that the law requires that compensation be limited to the extent of the acceleration.81

Apportionment was held applicable to an accident resulting in hearing loss where the affected ear was subject to being more easily injured due to preexisting surgery.82 However, a case where a tendency toward neurosis was held not apportionable by the judge of industrial claims was affirmed in Holmes v. Glo-White, Inc.83

29. Id. at 291.
30. Id. at 292.
31. 214 So.2d 1, 2 (Fla. 1968).
33. 207 So.2d 442 (Fla. 1968). In this case, a preexisting otosclerosis was apportioned out.
III. Heart Cases

The decisions during the period surveyed relating to the compensability of heart cases are primarily concerned with the factual circumstances surrounding the heart attack rather than the law applicable thereto. In Marhoefer v. Frye, an award of benefits was affirmed by the supreme court which stated:

As in most of these heart cases the solution of the problem is not an easy one, but we feel that the deputy commissioner [judge of industrial claims] is in the best position to reach a conclusion on the factual issue. When such conclusions of the deputy are approved by the full commission, the petitioner here necessarily carries a heavy burden.  

In Wright v. Coral Farms, the full Commission reversed an award of compensation. The reversal was based upon the fact that the claimant suffered no pain at the time of the exertion. In reinstating the judge of industrial claims' award of benefits, the court stated: “Granting that the symptom of ‘pain’ be lacking, there is ample additional evidence in the record to sustain the finding that Petitioner suffered a heart attack.”

The court went on to point out that there was competent, substantial evidence by way of immediate symptoms other than pain which followed the unusual exertion. A lack of competent, substantial evidence to support unusual exertion resulted in a reversal of a judge of industrial claims' award which had been affirmed by the full Commission in Fort Lauderdale Transit Lines v. Bass. There, the claimant had been a bus driver for nineteen years. He testified that on the day of his attack, while he was operating a bus, he experienced difficulty in shifting gears. Subsequently, he became dizzy or paralyzed, blacked out, and drove the bus into a wall. The court found that there could be nothing more common to a bus driver's employment than occasional difficulty with shifting gears.

The requirement of a showing of unusual exertion bringing about a heart attack need not be satisfied where the heart attack is the result of an “accident.” The heart condition is then treated like any other injury and must be shown to be causally related to the compensable “accident.”

IV. Disability Benefits

Little activity with regard to disability benefits has taken place during the period surveyed. In Florida Favorite Fertilizer, Inc. v.

34. 199 So.2d 723, 724 (Fla. 1967).
35. 200 So.2d 537 (Fla. 1967).
36. Id. at 540.
37. 206 So.2d 390 (Fla. 1968). The opinion of the court in this case indicates its skepticism regarding the history of the accident as given by the claimant.
38. Tingle v. Board of County Comm’rs, 214 So.2d 1 (Fla. 1968).
Womble, an award of permanent, total disability was reversed when the medical evidence disclosed that the claimant was suffering from a 30-percent functional disability, that he could do light work, and that if the claimant became unemployable because of pain, there was an operation available which would decrease the pain. The hearing, which resulted in an award of permanent, total disability, took place thirty-one days after claimant’s discharge by his former employer. The court noted that the claimant had made no effort to secure light work which he admitted he could perform and that an employment counselor was of the opinion he could find a job for the claimant.

A permanent, partial disability award of 60 percent, based upon injuries which resulted in a 20-percent, permanent, physical impairment was affirmed in Everett v. South Florida Growers & Co. The order of the trial judge was set forth in that opinion and disclosed, among other things, that the claimant was 60-years old, possessed an eighth-grade education, and could not return to his former employment or any other work involving strenuous activity, prolonged standing, or prolonged sitting in one position.

In the only hernia case decided by the court during this survey period, the court reinstated an award of benefits which had been reversed by the full Commission. The full Commission’s reversal of the award was based upon the claimant’s testimony that he did not notice a lump until three weeks after the lifting injury. In reinstating the award, the supreme court held that the hernia need not be visible immediately after the accident in order to meet compensable standards.

There can be no doubt that the statute requires some immediate manifestation of the hernia, but previous cases are in our opinion entirely consistent with the above quoted rationale under which the statutory requirement can be met by evidence of immediate manifestations other than a visible lump.

V. MEDICAL BENEFITS

Although the cost of medical care obtained without authorization of the employer or its workmen’s compensation carrier is not assessable against the employer or its workmen’s compensation carrier, our supreme court relieved the employee of such cost in two separate instances. In Davis v. Conger Life Ins. Co., a claimant, suffering from a heart condition known to the employer, was involved in an accident resulting in injury to his back. Through the physician who treated his back condition, the claimant obtained the services of a heart specialist without re-

39. 202 So.2d 177 (Fla. 1967).
40. 218 So.2d 444 (Fla. 1969).
41. Cost v. Texaco, Inc., 207 So.2d 437 (Fla. 1968).
44. 201 So.2d 727 (Fla. 1967).
quest or authorization of the carrier. In affirming an order of the full Commission, our supreme court held that “the consultation and treatment by the heart specialist was reasonably secondary to the services performed by the treating physician relating to the back injury.”

In Divito v. Fuller Brush Co., the claimant, who was dissatisfied with the treatment offered by the employer, was continually being treated by a chiropractor. The employer had full knowledge of the treatment from its inception and made no objection. The claimant had returned to work shortly after the accident and had no permanent disability. The court stated that “questions of this type should be resolved in such a manner as to afford adequate relief to the employee within the spirit of the compensation act” and estopped the employer from questioning payment of the bill.

VI. COVERAGE

Only one decision concerning coverage of injuries was handed down during the survey period. In El Sirocco Motor Inn, Inc. v. Prekop, the claimant, an employee of a motel, suffered a broken arm as a result of a fall in a vacant lot across the street from her employer's premises. The vacant lot was utilized by the claimant to park her vehicle. The judge of industrial claims denied compensation. However, the ruling was reversed by the full Commission. In quashing, the full Commission's order and reinstating the original denial of compensation our supreme court noted that there was no evidence to support the Commission's finding that the claimant was required to park in the vacant lot across the street from her employer's place of business.

VII. STATUTE OF LIMITATIONS AND NOTICE

The time limits affecting the filing of claims were construed in two separate cases. Stoner v. Hialeah Race Course, Inc. resolved the question of when the time from which the period of 30-day notice begins to run—i.e., injury or discovery of injury. The claimant had suffered from previous, chronic back disability and had no reason, either by the duration or nature of physical symptoms suffered, to recognize the fact of current injury. Medical attention and hospitalization did not become necessary until ten days following the accident. Reversing the lower decision, the

45. Id. at 730.
46. 217 So.2d 313 (Fla. 1969).
47. Id. at 314.
48. 207 So.2d 434 (Fla. 1968). The opinion of the court in this case was not unanimous. A dissenting opinion indicated that the employees were prohibited from parking on the employer's premises, that the vacant lot was pointed out as the place to be used for their parking, and that the vacant lot was the only available place within a reasonable distance from the motel for the employees to park their cars.
49. Id. at 435.
50. 218 So.2d 448 (Fla. 1969).
court held that the claim filed 30 days later was timely, stating: "[t]he time limited does not begin to run until a reasonable prudent person should recognize the fact of injury causally related to employment."51

In B.F. Todd Electrical Contractors v. Hammond,52 an order had been entered in 1958, adjudicating the claimant to have a 15-percent, permanent, partial disability and awarding the benefits in a lump-sum payment. Final compensation was paid in October 1959, and final medical payment was made without an award in August 1960. Several claims for modification thereafter were ultimately dismissed for lack of prosecution, and in June 1962, another claim was filed. Although the order of 1958 awarding a lump sum was held a nullity in that the statutory law at the time permitted only the full Commission to award lump sums of compensation, the order was nevertheless valid insofar as determinative of the claimant’s degree of permanent disability. Thus, it was held that the claim filed in June 1962 was not timely filed under the statute of limitations insofar as the money benefits were concerned, but that it was timely filed insofar as it made a claim for medical attention.53

VIII. THE JUDGE OF INDUSTRIAL CLAIMS

The judge of industrial claims is the sole trier of fact, and his findings, when supported by competent substantial evidence which accords with logic and reason, are binding upon the full Commission and the supreme court.54 The judge of industrial claims must make adequate findings of fact; and in every case involving successive injuries, there must be expressed findings as to apportionability.55

The expertise which judges of industrial claims develop in evaluating wage-earning capacity loss received comment in Eden Roc Hotel v. Kearsch.56 In that case, the trial judge found the claimant to be suffering from a 20-percent diminution of wage-earning capacity. The full Commission reversed the award because the record did not reveal any evidence concerning job opportunities available to the claimant. In reinstating the trial judge’s order, the supreme court stated:

In this case, no expert witness as to the labor market could have done much better in evaluating what Claimant could earn than the Judge of Industrial Claims, based on the testimony before him. The 20% diminution of wage earning capacity found by the Judge of Industrial Claims is an estimate that

51. Id. at 449.
52. 212 So.2d 301 (Fla. 1968).
53. Id. at 302.
54. Orendorff v. Refrigerated Trans., Inc., 216 So.2d 453 (Fla. 1968); Wright v. Coral Farms, 200 So.2d 537 (Fla. 1967); Marhoefer v. Frye, 199 So.2d 723 (Fla. 1967).
55. For supreme court commentary regarding adequately drawn orders see Stephens; Paul v. Toddle House Corp., 206 So.2d 387 (Fla. 1968); Jim Rathmann Chevrolet Cadillac, Inc. v. Barnard, 200 So.2d 161 (Fla. 1967).
56. 218 So.2d 751 (Fla. 1969).
Claimant, under her limited physical ability, could earn approximately $58 per week, since she had earned $72.50 per week prior to her injury. We do not find that there was a mere recitation of the factors set out in Ball v. Mann (Fla.) 75 So.2d 758. Instead, there was evidence of the Claimant's physical limitations arising from the injury and the trier of facts was able to transmute such evidence in terms of diminution of wage earning capacity based on his common knowledge of the community labor market.57

Judges of industrial claims may, in the absence of a showing of prejudice, permit additional testimony after a party has rested his case.58 Judges of industrial claims also have discretion to decide whether additional examinations are needed in order to reconcile conflicting medical testimony. However, the parties must be given the opportunity to cross-examine the physician appointed by the trial judge.59

Once the judge of industrial claims has heard the case, he must enter his order and release it prior to the time his commission expires. His failure to do so has results in de novo hearings by his successor.60

IX. THE FULL COMMISSION

In its role as an appellate review body, the full Commission must adhere to the findings of fact made by the judge of industrial claims. It is not authorized to reweigh the evidence or make findings contrary to those made at the trial level.61

The record for review before the full Commission is limited by Florida Statutes section 440.25(4)(d). The purpose of the statute in restricting the Commission's review of the matter before it to the certified record is to prevent the reviewing authority from obtaining evidence from outside the record.62 Technical adherence to the statute was held to be error in Crawford v. Farm Stores Processing, Inc.,63 when the full Commission did not include a deposition of a physician as part of the record. The trial judge considered it as evidence and obviously intended to incorporate it in his second certificate of transcript. The court noted that if the Commission had any doubts as to whether the deposition was incorporated, it should have checked with the trial judge.

57. Id. at 753-54.
58. Id. at 754.
59. North West Trailer Sales v. McCann, 217 So.2d 310 (Fla. 1968).
60. Dominguez v. Aerodex, 203 So.2d 164 (Fla. 1967). The dissenting opinion in this case indicated that the better procedure would have been for the full Commission to designate the original judge as deputy pro hac vice for the purpose of entering a new order.
61. Milholin v. Pappas Restaurant, 217 So.2d 833 (Fla. 1969); Orendorff v. Refrigerated Trans., Inc., 216 So.2d 453 (Fla. 1968); Aero Supply Int'l, Inc. v. Gallardo, 213 So.2d 429 (Fla. 1968); Pitt v. Ronnis Olmstead, Inc., 213 So.2d 421 (Fla. 1968).
63. 218 So.2d 755 (Fla. 1969).
X. Review by the Supreme Court

Judicial review of Industrial Commission orders has not changed since the last survey. The court has, however, sought to discourage unnecessary motions where briefs on the merits would accomplish the same result.64

XI. Modification

The rules governing the acceptability and weight of evidence in the initial claim proceedings are equally applicable to a modification proceeding. The burden of proof, necessary to establish a change, rests upon the claimant.66 Changes of condition may be based on a deterioration of the claimant's physical condition as well as on changes of a psychiatric or psychological nature.66

In orders granting modification, the judge of industrial claims may designate a prior date from which the modifying order should be effective. However, if he fails to specify a beginning date for the payment of the modified compensation, payment begins from the date of the modifying award.67

XII. Attorneys' Fees

Recovery of benefits by an attorney representing a claimant entitles the attorney to an attorney's fee payable by the employer or its workmen's compensation carrier.68 The recovery of interest on a claimant's award justifies assessment of additional attorney's fees.69

The method for determining the amount of an attorney's fees was again stated in the case of Anchor Products, Inc. v. Rapo.70 In that case, there was a stipulation permitting the judge of industrial claims to determine a reasonable attorney's fee without the necessity of expert testimony. In quashing the order of the full Commission which approved the award of fees, the court set forth three permissible methods for determining the reasonable value of fees:

(1) In the absence of a stipulation appropriate evidence must be introduced regarding the amount of a reasonable fee. Florida Silica Sand Co. v. Parker (Fla. 1960), 118 So.2d 2.

(2) A stipulation fixing a specific dollar amount of the fee will be recognized and held binding without the necessity of supplemental evidence.

64. Board of Conservation v. Sanders, 214 So.2d 873 (Fla. 1968).
65. Fred Howland, Inc. v. Rutkuskas, 216 So.2d 201 (Fla. 1968).
67. Sierra v. Deauville Operating Co., 213 So.2d 418 (Fla. 1968).
68. FLA. STAT. § 440.34(1) (1967); Williams v. Lee, 213 So.2d 708 (Fla. 1968); Ford v. Cunningham-Limp Co., 203 So.2d 326 (Fla. 1967).
69. Stone v. Jeffers, 208 So.2d 827 (Fla. 1968).
70. 210 So.2d 446 (Fla. 1968) [hereinafter cited as Rapo].
When, as here, the stipulation merely consents to the fixing of a fee by the Industrial Judge, some appropriate evidence must, nevertheless, be submitted to support the amount of the fee ultimately awarded. \[71\]

In *Lee Engineering and Construction Co. v. Fellows*, \[72\] however, the court stated that the application of a contingent percentage to the total value of the award is not an appropriate method for fixing a fee in workmen's compensation cases, *in the absence of a stipulation* or other evidence. The court thereby indicated that the present practice of agreeing to a stipulated percentage to be applied against the dollar recovery was acceptable.

Attorneys who appear as expert witnesses in hearings involving reasonable value of attorney's fees are not entitled to expert-witness fees for their appearance. \[73\]

Once attorney's fees have been awarded, they bear interest from the date so ordered. \[74\]

Attorney's fees are also assessable against the employer and carrier in enforcement proceedings \[75\] and in the appellate review of final orders but not in interlocutory proceedings. In the latter case, attorney's fees must be held in abeyance pending disposition of the merits of the claim. \[76\]

XIII. WAIVER AND ESTOPPEL

During the period surveyed, only one opinion was filed regarding the doctrine of waiver and estoppel. In *Divito v. Fuller Brush Co.*, \[77\] the doctrine was utilized to estop an employer from questioning the payment of a medical bill to a treating doctor. The employer knew from the beginning that the claimant was receiving treatment from the doctor, was dissatisfied with the employer-selected doctor, and had returned to work shortly after the accident with no permanent disability.

XIV. PENALTIES

The penalty provisions of the Workmen's Compensation Act \[78\] were held to apply to a lump-sum, wash-out settlement in *Brantley v. ADH*

---

71. Id. at 447.
72. 209 So.2d 454 (Fla. 1968) [hereinafter cited as *Lee Engineering*]. The *Rapo* and *Lee Engineering* cases apparently overruled the court's finding in Robinette v. E.R. Jahna Indus., Inc., 208 So.2d 104 (Fla. 1968), wherein the court approved a stipulation by the parties that the attorney's fees could be set by the deputy without benefit of testimony.
74. Mander v. Concreform Co., 212 So.2d 631 (Fla. 1968); Stone v. Jeffre, 208 So.2d 827 (Fla. 1968).
75. McCormick v. Messink, 208 So.2d 113 (Fla. 2d Dist. 1968).
76. Honeywell, Inc. v. Haley, 216 So.2d 745 (Fla. 1968).
77. 217 So.2d 313 (Fla. 1968).
78. FLA. STAT. § 440.20(6) (1967).
Building Contractors, Inc. The 20-percent penalty was limited however to the money benefits or compensation benefits and was held not to be applicable to medical benefits.

XV. Procedure

Pursuant to statute, claims for compensation may be filed with the Florida Industrial Commission at its office in Tallahassee at any time after the first seven days of disability following an injury or at any time after death. In Pinellas Towers, Inc. v. Osborne, a claim was filed within the seven-day waiting period. The employer sought to have the claim voided in that it was filed only four days after the injury. In affirming the order of the Commission which found the claim to be valid, it was held that one of the functions of the seven-day waiting period is to give the employer an opportunity to voluntarily provide the injured employee with medical care and attention and to voluntarily pay to the injured employee temporary, total disability, compensation benefits. However, where an employer advises the injured employee within the seven day waiting period that it does not have workmen's compensation insurance coverage and that the injured employee will have to pay all medical expenses incurred as a result of the compensable injury, the employer has, in effect, declined to voluntarily accept the claim. The injured employee is thereby entitled to immediately file a claim with the Florida Industrial Commission. The seven-day waiting period was also found to be procedural rather than jurisdictional with no showing of prejudice by any procedural error in the filing of the claim four days after injury.

Although the burden of proof rests upon the injured workman to show causal relationship between his injury and accident, that burden may be met through lay testimony. In Martin v. Coral Sea Phillips 66, a workman was injured when a car fell on him while he was installing a transmission. His injury was initially diagnosed as fractured ribs and contusions. He received medical care from a physician who obtained no history of any other injury. The workman subsequently alleged that he had sustained a back injury as a result of the accident. This allegation was denied by the treating physician. The trial judge found the back injury to be related to the accident, but his award was reversed by the full Commission which found there was no competent, substantial evidence to show that the claimant's back condition was causally related to his industrial accident. In granting certiorari and reinstating the trial judge's award, the supreme court held that there was testimony in the

79. 215 So.2d 297 (Fla. 1968).
81. 215 So.2d 735 (Fla. 1968).
82. Id. at 736.
83. 216 So.2d 8 (Fla. 1968).
record of lay, or nonmedical, witnesses corroborative of claimant's testimony that his back trouble resulted from his accident.\textsuperscript{94}

In \textit{Fisher v. Carroll Daniel Fisher Construction Co.},\textsuperscript{95} the burden of proof regarding causal relationship was held to have shifted to the employer where the medical evidence was of neutral quality and did not conclusively prove or disprove causal relationship. In that case, the injured workman had sustained a back injury for which he underwent several surgical procedures. Following the last surgical procedure, the treating physician found the workman was becoming somewhat bizarre and irrational. He was readmitted to a hospital for a change of his body cast and while there suffered a convulsion which caused fractures of the dorsal and lumbar vertebrae. The uncontradicted evidence was that the workman had no prior history of either seizures or prior back difficulties and that since the injury to his back he had been subjected to three radical operations, prolonged hospitalization, and prolonged periods in body casts. Boils and abscesses developed as a result of the plaster body jackets and the prolonged bed rest. The evidence further disclosed the workman to have been in intense pain, and there was no evidence of an intervening accident. In reversing the Commission's determination that the seizure should be apportioned out of the award for lack of causal relationship, the supreme court stated:

\begin{quote}
The fact of a serious injury is conclusively shown and the above mentioned evidence presented a sufficiently logical explanation of causal relationship of the seizures to the original accident and injury so as to require the Employer-carrier, who seeks to defeat recovery, to show that another cause of the injury is more logical and consonant with reason.\textsuperscript{86}
\end{quote}

The fact of a serious injury is conclusively shown and the above mentioned evidence presented a sufficiently logical explanation of causal relationship of the seizures to the original accident and injury so as to require the Employer-carrier, who seeks to defeat recovery, to show that another cause of the injury is more logical and consonant with reason.\textsuperscript{86}

The case was remanded to the trial judge for further proceedings.\textsuperscript{87}

The utilization of a recorded statement taken from the claimant shortly after his injury in order to impeach him was held to be proper in \textit{United Sand & Material Corp. v. Florida Industrial Commission}.\textsuperscript{88}

In that case, the claimant had sustained a heart attack. After an interview with the carrier's adjuster, the carrier refused to accept the heart attack as compensable. The trial judge denied the use of the recorded

\textsuperscript{84.} \textit{Id.} at 10.
\textsuperscript{85.} 212 So.2d 289 (Fla. 1968).
\textsuperscript{86.} \textit{Id.} at 292.
\textsuperscript{87.} \textit{Id.} at 292.
\textsuperscript{88.} 201 So.2d 451 (Fla. 1967).
statement to impeach the claimant's testimony given at trial that he had performed work not routine to his duties which involved unusual strain and exertion. The cause was remanded in order to give the carrier the opportunity to use the transcribed notes for purposes of cross-examination.

The importance of stipulations was again emphasized in Pennsylvania National Insurance Group v. Mel.90 There, the claimant and his attorney entered into a stipulation calling for payment of his compensation in a lump sum and releasing the employer from further responsibility to him, except for medical care. Subsequently, through new counsel, he attempted to set aside an order effectuating the stipulation. The record in this case disclosed that the claimant was fully familiar with the fact that he was effectuating a final settlement at the time that the stipulation was presented to the trial judge for approval. The motion to set aside the stipulation was denied; it was found that there was a waiver which complied with clause 3 of rule 1 of the rules of procedure adopted by the Florida Industrial Commission in workmen's compensation cases.

Great weight is accorded in the recitals and findings of judges of industrial claims concerning statements and stipulations of counsel. However, the admission into evidence of a medical report of a Commission-appointed physician, through stipulation of the parties, was held not to be a waiver of the right of cross-examination or an agreement that the report would be accepted without question.90

The granting of an insolvency petition under Florida Industrial Commission rule 6 (c) to an indigent claimant seeking review of an order of a judge of industrial claims was contested in Honeywell, Inc. v. Haley.91 In that case, the employer and carrier contended that the questioned rule exceeded the authority of the Commission as confirmed by the legislature and that the rule operated to deprive employers and carriers of due process or equal protection of the law. In noting that the rule had been in existence for more than 25 years, the court stated:

In any case, the relationship of Rule 6(c) to the legislative authority evidenced by Section 440.29(2), coupled with the acquiescent attitude of the Legislature toward this rule since its implementation, leads us to conclude the promulgation of Rule 6(c) by the Florida Industrial Commission constituted a proper and constitutional exercise of power conferred by the Legislature.92

In those instances where there are inadequate findings of fact or there is insufficient evidence on a material issue to determine that issue, the procedure adopted by our court has been to remand the case back to

89. 199 So.2d 273 (Fla. 1967).
90. North West Trailer Sales v. McCann, 217 So.2d 310 (Fla. 1968).
91. 216 So.2d 745 (Fla. 1968).
92. Id. at 747.
the trial judge.\textsuperscript{93} For example, in Paul v. Toddle House Corp.,\textsuperscript{94} the claimant died during pendency of the appellate proceedings. In noting that an administrator of the claimant's estate had been substituted, the court returned the matter to the full Commission and stated that it may then be remanded to the deputy commissioner (judge of industrial claims) to determine the proper recipient of the proceeds of the award.

XVI. THIRD PARTIES AND SUBROGATION

The exclusive remedy doctrine of the Workmen's Compensation Act, which limits recovery of injured employees to workmen's compensation benefits, was applied in Hart v. National Airlines, Inc.\textsuperscript{95} In that case, the claimant was engaged in loading mail pursuant to a contract existing between the claimant's employer and the defendant. The injury was occasioned by an employee of the defendant. In affirming a summary judgment for the defendant, the third district held that the common employment doctrine was applicable and that the claimant's exclusive remedy was under the Workmen's Compensation Act.

The owner and lessor of a truck was held to be a third party in Hunt v. Ryder Truck Rentals, Inc.\textsuperscript{96} In that case, the injury occurred when an employee of the lessee fell through the rotted truck floor.

In Stevens v. International Builders of Florida, Inc.,\textsuperscript{97} a subcontractor was injured due to the negligence of an employee of the general contractor. The subcontractor was found to be entitled to maintain a third-party action since the subcontractor was not an employee and was therefore not entitled to receive compensation under the Workmen's Compensation Act.

A truck driver who sustained injury while delivering a crate to a customer due to the negligence of the customer's employees in unloading the crate was able to maintain a third-party action against the customer.\textsuperscript{98} It was held that there was no employment contract either expressed or implied existing between the truck driver and the customer.

The absolute discharge of all liability of an employer or its workmen's compensation insurance carrier through joint petitions\textsuperscript{99} does not deprive the employer or carrier of its subrogated interest in third-party law suits.\textsuperscript{100}

\textsuperscript{93} See Cooper v. Waverly Growers Co-Op., 216 So.2d 196 (Fla. 1968) (lack of sufficient evidence on material issue required remand); Boren v. Sears, Roebuck & Co., 212 So.2d 8 (Fla. 1968) (where inadequate findings of fact caused remand).
\textsuperscript{94} 206 So.2d 387 (Fla. 1968).
\textsuperscript{95} Hart v. National Airlines, Inc., 217 So.2d 900 (Fla. 3d Dist. 1969).
\textsuperscript{96} 216 So.2d 751 (Fla. 1968). The supreme court opinion summarized its prior decisions regarding third parties and likened the truck owner to a materialman.
\textsuperscript{97} 207 So.2d 287 (Fla. 3d Dist. 1968).
\textsuperscript{98} Acme Elec., Inc. v. Travis, 218 So.2d 788 (Fla. 1st Dist. 1969).
\textsuperscript{99} FLA. STAT. § 440.20(10) (1967). This section permits complete releases of workmen's compensation benefits by payment of benefits in a lump sum, the settlement having become known as a "wash-out settlement."
\textsuperscript{100} Malchick v. General Accident Group, 214 So.2d 51 (Fla. 3d Dist. 1968).
XVII. ADDITIONAL DECISIONS OF INTEREST

In *McCormick v. Messink*, an injured workman was collecting permanent, partial disability benefits when he fell as a result of that permanent disability. Pursuant to a hearing, an order was entered finding the workman to again be temporarily and totally disabled. The order provided for resumption of the permanent disability payments once temporary, total disability terminated. Jurisdiction was retained for the purpose of determining the maximum medical recovery date. Subsequently, the treating physician determined that the injured workman had again reached maximum medical recovery, at which time the workmen's compensation insurance carrier voluntarily terminated temporary, total disability benefits and resumed payment of compensation for permanent disability. The injured workman sought enforcement of the award of temporary, total disability in the circuit court. The circuit court's enforcement of the temporary, total disability order was affirmed; the district court of appeal held that the deputy commissioner (judge of industrial claims) was the only one who could modify his order and determine the maximum medical recovery date.

Enforcement of an order was declined, however, where the order provided for payment of compensation conditioned on the claimant's undergoing a spinal fusion. The burden was on the claimant in the enforcement proceedings to show the condition precedent had occurred, that he had in fact undergone such an operation, before he was entitled to recover under the award.

XVIII. CONCLUSION

During the period surveyed, the doctrine of apportionment and applicability of the Special Disability Fund have had the most significant judicial interpretations. There has also been a reduction in the number of petitions for writ of certiorari granted by the supreme court as compared to the total of petitions filed.

Our supreme court's concern over the time lag and delays from the time of injury until the time of final disposition has been reflected in several decisions during this surveyed period.

101. 208 So.2d 113 (Fla. 2d Dist. 1968).
102. Id. at 116.
104. Sierra v. Deauville Operating Co., 213 So.2d 418 (Fla. 1968). See Clenney v. Walker Hauling Co., 217 So.2d 114 (Fla. 1968) (time delay stated to be unconscionable); Allison Dev. Inc. v. Rudasill, 202 So.2d 752 (Fla. 1967) (time delay was characterized as a "sad commentary").