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WORKMEN'S COMPENSATION — 1954-1959

EDWARD SCHROLL*

Since publication of the last survey article,¹ three sessions of the Florida Legislature as well as over one hundred and fifty judicial decisions have resulted in significant statutory amendments as well as judicial clarification and liberalization of the Florida Workmen's Compensation Act.²

The most striking legislative changes have been the adoption of provisions allowing for a joint petition and release not subject to modification³ by the 1959 legislature and the adoption by the 1955 legislature of a Special Disability Fund making provision for reimbursement to employers, who hire handicapped workers, for benefits paid when new injuries are sustained in such employment.⁴ Too little experience has been had in the newly enacted "release" provisions to predict whether these provisions will remain as a permanent addition to the act. The desirability, advantages and abuses inherent in allowing "common law releases" not subject to modification in workmen's compensation cases have no parallel in other fields of law.⁵ In contested cases where the issue is one of employer liability or responsibility for the "injury by accident" rather than the degree of benefits, the release provisions allow a feasible method of disposing of claims with complete protection to the employer or his insurance carrier against future claims arising out of the same subject matter, while giving to the injured employee a degree of economic relief and compensation benefits to which he might ultimately be found to be not entitled. Whether artificial contests will ensue on liability questions for the sole purpose of extracting the release from the injured employee still remains to be seen. Real value in use of a release in cases involving only degree of benefits or in permanent total cases

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1. This survey covers legislative changes for years 1955, 1957 and 1959 and judicial decisions reported from Volume 67 of the Southern Reporter, Second Series (Oct. 1953) to Volume 111, Southern Reporter, Second Series (May 1959).

2. For complete analysis up to 1950, see Burton, *Florida Workmen's Compensation 1935 to 1950*, 5 *MIAMI L.Q.* 24 and Clements, *Workmen's Compensation*, 8 *MIAMI L.Q.* 469.

3. *FLA. STAT.* § 440.20(10) (1959).

4. *FLA. STAT.* 440.15(5)(D) (1955).

5. Employee's rights already compromised by substituting Workmen's Compensation Benefits for common law rights. *FLA. STAT.* §§ 440.11, 440.15 (1935). Compare *Rosier v. Roofing & Sheet Metal Supply Co.*, 41 So.2d 308 (Fla. 1949) with *Grice v. Suwanee Lumber Mfg. Co.*, 113 So.2d 742 (Fla App. 1959). Also see *Faulk & Coleman v. Harper*, 62 So.2d 62 (Fla. 1952); *Bryant v. Hollywood Beach Hotel Co.*, 1 FCR 350 (Fla. 1956). and *LARSON, WORKMEN'S COMPENSATION LAW* § 65.20 (1952).

through therapeutic capitalization has been experienced in Florida.⁶ The employer or carrier's exposure under the act becomes fixed and terminated by the release and lump sum payment; the disabled employee, through therapeutic capitalization, receives sufficient amounts in one payment to aid or complete successful vocational rehabilitation and again becomes a productive member of society.⁷

Prior to the enactment of the "Special Disability Fund," Florida (by statute) was an apportionment state, *i.e.*, the employer or carrier was only responsible for compensation resulting from the injury occurring during his employment alone, regardless of the existence of any pre-existing permanent impairment or the combined effect of the pre-existing impairment with the new permanent impairment.⁸ Under apportionment, the injured workman had to bear the combined effect of his injury with the pre-existing disability.⁹ Through judicial interpretation, the employer or carrier was compelled to bear the combined effects when the new injury coupled with the pre-existing disability or conditions resulted in permanent total disability.¹⁰ The obvious harshness of apportionment was thereby minimized and effectuation of the true purpose of the act¹¹ was realized.¹² The effect of the awards was to bring non-apportionment or the "full responsibility rule" into Florida, thereby placing the entire burden of the combined disability on the employer in permanent total cases only.¹³ With the enactment of the Special Disability Fund (which derives its assets from annual assessments upon compensation insurance companies and self-insurers in the State)¹⁴ both hardships were alleviated, the Fund reimbursing the employer for all compensation paid in excess of those allowed for the injury or occupational disease when considered by itself and not in conjunction with the previous physical impairment.¹⁵ Procedurally, the employer or carrier is required to make payment to the injured workman for all benefits and seek semi-annual reimbursement from the Fund for benefits paid in excess of those for which the employer alone is responsible. Provision is made for direct payment from the Fund to the injured employee, if for any reason the employer should fail to pay

6. Joint petition and release on \$65,000 lump sum for paraplegic invested in apartment house. *Coffee v. Biscayne Stevedoring Co., Inc.* Claim No. U-77697 (1959).

7. LARSON, WORKMEN'S COMPENSATION LAW §§ 61.20, 82N6.

8. FLA. STAT. 440.15(5) (A)(B)(C) (1955).

9. *Lyles v. Grosse Point Mkt.*, 1 FCR 120 (Fla. 1955).

10. *Alexander v. Peoples Ice Co.*, 85 So.2d 846 (Fla. 1955).

11. *Dennis v. Brown*, 93 So.2d 584 (Fla. 1957).

12. *Noah v. Board of Pub. Instr. of Orange County*, 1 FCR 372, *cert. denied*, 93 So.2d 902 (Fla. 1950).

13. *Ibid.* *Alexander v. Peoples Ice Co.*, 85 So.2d 846 (Fla. 1955).

14. FLA. STAT. § 440.15(5) (D) (6) (b) (1955); FLA. STAT. § 440.15(5)(D) (7)(b) (1959).

15. FLA. STAT. § 440.15(5) (D) (3) (4) (5) (1955). *Florida Indus. Comm'n v. National Trucking Co.*, 107 So.2d 397 (Fla. App. 1958); *City of Miami Beach v. Florida Indus. Comm'n*, 105 So.2d 885 (Fla. App. 1958).

the additional benefits.¹⁶ As originally enacted, the Special Disability Fund was broad in scope, there being no limitation as to the nature of the benefits paid to which the employer was entitled to reimbursement.¹⁷ Serious procedural obstacles developed due to lack of a provision in the 1955 Special Disability Fund allowing the Fund legal representation in matters involving reimbursement from it as well as determination of the Fund's degree of responsibility in cases where it was involved, the judiciary holding the Fund not to be a legal entity and not entitled to legal representation.¹⁸ Drastic legislative changes were enacted in 1959 removing the procedural obstacles¹⁹ as well as deleting and bringing about a general destruction of the broad scope of the Fund's responsibility to employers and their injured workmen.²⁰ The 1959 amendments limited the obligation of the Fund's reimbursement to compensation paid for permanent disability only, the limiting word "permanent" being added, and the broad term "all compensation and other benefits" being deleted.²¹ The legislative intent of encouraging the employment of the physically handicapped was announced²² while the hardships placed on the injured workman by the apportionment provisions of the act remain unchanged.²³ Despite the announcement of the legislative intent that the Special Disability Fund shall not be construed to provide or create new benefits to the injured workman,²⁴ the language of the amendments limits the disabled workman to apportionment, *i.e.* compensation for the latter injury when considered by itself,²⁵ *unless* his employer was aware of the pre-existing permanent physical impairment which was likely to be a hindrance or obstacle to employment prior to the occurrence of the subsequent injury or occupational disease.²⁶ If such knowledge exists, the employee can then collect for the combined effects of both permanencies; without such knowledge, the employee is relegated to apportionment.²⁷

Other legislative changes have re-vested review of full commission orders entered after July 1st, 1959, with the Florida Supreme Court²⁸ and

16. FLA. STAT. § 440.15(5)(D)(5) (1955). Direct payment from fund deleted. FLA. STAT. § 440.15(5)(D)(6) (1959).

17. FLA. STAT. § 440.15(5)(D); also see *Shivers Super Store v. Florida Indust. Comm'n*, 102 So.2d 831 (Fla. 1958).

18. *Florida Indust. Comm'n v. National Trucking Co.*, 107 So.2d 397 (Fla. App. 1958).

19. FLA. STAT. § 440.15(5)(D)(8) (1959).

20. FLA. STAT. § 440.15(5)(D) (1959).

21. FLA. STAT. § 440.15(5)(D) (1959); FLA. STAT. § 440.15(5)(D)(3)(4)(5) (1955). Also compare death benefits FLA. STAT. § 440.15(5)(D)(5) (1955) with FLA. STAT. § 440.15(5)(D)(3) (1955).

22. FLA. STAT. § 440.15(5)(D)(5) (1959).

23. FLA. STAT. § 440.15(5)(C) (1955).

24. FLA. STAT. § 440.15(5)(D)(5) (1959).

25. FLA. STAT. § 440.15(5)(D)(5) (1959).

26. FLA. STAT. § 440.15(5)(D)(4) (1959).

27. FLA. STAT. § 440.15(5)(C)(D); See also Footnotes 10, 12.

28. FLA. STAT. § 440.27 (1959).

allowed applications for review by the full commission of deputy commissioners' orders to be filed with the deputy commissioner with an additional ten days being allowed thereafter for the filing with the deputy commissioner of cross-applications for review.²⁹

The vexing problem of injured workmen going without benefits while two or more employers or carriers squabble amongst themselves as to who is responsible for the payment of benefits³⁰ was also met, partially with 1957 changes, by granting the commission the authority to adjudicate the controversy³¹ and, completely in 1959, by allowing voluntary payment to be made without prejudice to a subsequent determination of the controversy for reimbursement.³²

As a result of the opinion of the District Court of Appeals, First District, in *Russell v. Bass*,³³ it became necessary to amend the act and re-define the word "commission" to include deputy commissioners³⁴ and to specifically vest deputy commissioners with the authority to grant lump sum payments,³⁵ a function deputy commissioners had exercised long before *Russell v. Bass*. The definition of "employee" was broadened in 1955 to include corporate officers,³⁶ and the restriction against farm laborers coming under the act was minimized in 1957.³⁷

The authority of the commission to invoke the use of vocational rehabilitation prior to adjudication of permanent disability³⁸ was contested and denied in *Stewart v. Board of Public Instruction, Dade County*,³⁹ requiring legislative changes in 1959, which granted the commission the authority to use this most important adjunct of rehabilitation prior to the determination of permanent disability.⁴⁰ In permanent disabilities adjudged to be total, rehabilitation of the injured employee to the extent that an earning capacity is again re-established, does not, by legislative enactment deprive the injured employee of compensation benefits, but now results in a decrease of weekly monetary benefits during the continuance of the rehabilitated earning capacity.⁴¹ The duration of compensation benefits for permanent total cases was changed from 700 weeks to life in

29. FLA. STAT. § 440.25(4)(A)(C) (1959).

30. See *Stuyvesant Corp. v. Waterhouse*, 74 So.2d 554 (Fla. 1954).

31. FLA. STAT. § 440.42 (1957).

32. FLA. STAT. § 440.42 (1959).

33. 107 So.2d 281 (Fla. App. 1958).

34. FLA. STAT. § 440.02(8) (1959).

35. FLA. STAT. §§ 440.39, 440.20(10) (1959).

36. FLA. STAT. § 440.02(5)(2)(B) (1955).

37. FLA. STAT. § 440.02(1)(C)(3) (1957).

38. FLA. STAT. § 440.49 (1957).

39. 102 So.2d 821 (Fla. App. 1958).

40. FLA. STAT. § 440.49 (1959).

41. FLA. STAT. § 440.15(1)(D) (1959). See *Dennis v. Brown*, 93 So.2d 584 (Fla. 1957). The Special Disability Fund had such provisions: FLA. STAT. § 440.15(5)(D)(2) (1955) which underwent change, FLA. STAT. § 440.15(5)(D)(1) (1959).

1955,⁴² and the weekly amount of compensation benefits was increased from \$35.00 to \$42.00 effective July 1st, 1959, with extension of the 4 day waiting period to 7 days, subject to recoupment of the 7 days if the disability exceeds a minimum of 21 days.⁴³

Complete uniformity has been achieved in legislative changes pertaining to the statute of limitations. The time allowed for the filing of claims for medical care has remained as two years from the date of the last remedial treatment furnished by the employer or after the date of the last payment of compensation.⁴⁴ In 1955 the time limit was split, an allowance of 3 years being given to file claims for compensation from the time of injury or last payment of compensation.⁴⁵ In 1957 the act was again amended to allow 2 years to file claims from the time of injury, or from the last payment of compensation or from the date the last remedial treatment was furnished by the employer.⁴⁶ In *Robinson v. Johnson*,⁴⁷ the court held that the reduction of the time limit from 3 to 2 years did not operate retroactively for claims having the benefit of the 3 year time limit.

The employer or carrier's interest in his injured employees' recovery against a third party tort-feasor has undergone procedural changes allowing the circuit court in the county where the cause of action arose to determine the pro-rata share of each based upon equitable distribution of the amount recovered when the cause of action is settled either before or after suit is filed.⁴⁸ The right of the employer or carrier to bring suit, should the employee fail to do so, has been limited to two years after which the right of action again reverts to the employee.⁴⁹ Where the employer or carrier brings suit, their right to retain from the recovery all amounts paid and the present value of all future payments, remains unchanged.⁵⁰ However, where the employee brings the third party action, the 1959 act allows equitable distribution to be had of the employers' or carriers' pro-rata share for compensation benefits paid or to be paid,⁵¹ rather than exclusively on compensation benefits paid as the 1957 act provided.⁵²

Various other legislative changes relating to removal of the complete bar to recovery of compensation benefits, where the injury is caused by

42. FLA. STAT. § 440.15(1)(C) (1955).

43. FLA. STAT. § 440.12 (1959).

44. FLA. STAT. § 440.13(3)(B) (1953).

45. FLA. STAT. § 440.19(1)(A) (1955). Child labor penalty not compensation, *Ferlita v. Florida Art Stucco Corp.*, 74 So.2d 893 (Fla. 1954).

46. FLA. STAT. § 440.19(1)(A) (1957).

47. 110 So.2d 68 (Fla. App. 1959).

48. FLA. STAT. § 440.39(3)(B) (1959).

49. FLA. STAT. § 440.39(4)(B) (1959).

50. FLA. STAT. § 440.39(4) (1951) renumbered § 440.39(4)(A) (1959). See *Bituminous Gas Corp. v. Hawes*, 82 So.2d 731 (Fla. 1955).

51. FLA. STAT. § 440.39(3)(A) (1959).

52. FLA. STAT. § 440.39(3) (1957).

the willful refusal of the employee to use a safety appliance or observe a safety rule, by substituting a compensation reduction of 25% therefor, have been enacted.⁵³ Other minor changes have been made relating to inspections by the commission,⁵⁴ commission expenditures,⁵⁵ liberalization of expert medical witness fees⁵⁶ and allowances for excusing the late filing of medical reports.⁵⁷

JUDICIAL INTERPRETATION

The basic philosophy of workmen's compensation acts, *i.e.*, to relieve society of the burden of caring for injured workmen and to place responsibility on the industry served, has frequently been reaffirmed by the courts.⁵⁸ In this respect, the courts have held that the act should be liberally construed and resolved in favor of the working man.⁵⁹ Although the law is designed to afford protection to workers and their dependents from the hardships that arise from the workers' injury or death,⁶⁰ the act does not make industry the general insurer of its employees.⁶¹

Under the Workmen's Compensation Act there must be a consensual relationship to effectuate the status of employer-employee.⁶² The main test adopted in determining the relationship is direction and control, the payment of wages by itself not being conclusive.⁶³ The major portions of the recent decisions on employer-employee relationship deal with distinguishing the relationship from that of an independent contractor. The question of whether one is an independent contractor or employee is generally one of fact,⁶⁴ the determination of which is not based on any one factor.⁶⁵

53. FLA. STAT. § 440.09(3) (1959) as to construction of willful see *Philbrick Ambulance Serv. v. Buff*, 73 So.2d 273 (Fla. 1954); *White v. C. H. Lyne Foundry and Machine Co.*, 74 So.2d 538 (Fla. 1954).

54. FLA. STAT. § 440.46(1)(B) (1957).

55. FLA. STAT. § 440.49(1) (1955); FLA. STAT. § 440.50(1)(A)(B) (1955).

56. FLA. STAT. § 440.31 (1955).

57. FLA. STAT. § 440.13(1) (1957).

58. *Paul Smith Constr. Co. v. Florida Indust. Comm'n*, 93 So.2d 735 (Fla. 1957); *Dennis v. Brown*, 93 So.2d 584 (Fla. 1957); *Great Am. Indem. Co. v. Williams*, 85 So.2d 619 (Fla. 1956); *Florida Game & Fresh Water Fish Comm. v. Driggers*, 65 So.2d 723 (Fla. 1953).

59. *Great Am. Indem. Co. v. Williams*, 85 So.2d 619 (Fla. 1956); *Baileys Auto Serv. v. Mitchell*, 85 So.2d 228 (Fla. 1956); *Alexander v. Peoples Ice Co.*, 85 So.2d 846 (Fla. 1955); *Townsley v. Miami Roofing & Sheet Metal Co.*, 79 So.2d 785 (Fla. 1955); *Parker v. Brinson Constr. Co.*, 78 So.2d 873 (Fla. 1955); *Naranja Rock Co. v. Dawal Farms*, 74 So.2d 282 (Fla. 1954).

60. See cases cited note 58 *supra*.

61. *Arkin Constr. Co. v. Simpkins*, 99 So.2d 557 (Fla. 1957).

62. *Maige v. Cannon*, 98 So.2d 399 (Fla. 1957); *Stuyvesant Corp. v. Waterhouse*, 74 So.2d 554 (Fla. 1954). FLA. STAT. § 440.02 (2) (1959). See also *Cohenour v. Papet*, 72 So.2d 915 (Fla. 1954), as to employees in the same business, and *Parker v. Hill*, 72 So.2d 820 (Fla. 1954), on status of a deputy sheriff.

63. *Wilson v. City of Haines City*, 97 So.2d 208 (Fla. App. 1957); *Gidney Auto Sales v. Cutchins*, 97 So.2d 145 (Fla. App. 1957).

64. *Rainsford v. McArthur Dairies*, 108 So.2d 914 (Fla. App. 1959).

65. *Miami Herald Publ. Co. v. Kendall*, 88 So.2d 276 (Fla. 1956); *Blackman & Huckaby Enterprises v. Jones*, 104 So.2d 667 (Fla. App. 1958).

Lindsey v. Willis,⁶⁶ a complex factual situation involving the relationship between four possible employers, gave rise to an exhaustive opinion on indicia recognized in determining independent contractual relationships. Adhering to the competent substantial evidence rule⁶⁷ and by applying the test of control, the court affirmed the deputy commissioner's finding of an employer-employee relationship existing between the claimant and his employer while reversing the deputy commissioner's conclusion of an agency relationship existing between the other employers.⁶⁸

Simple solutions by application of any one test are, however, not always available, particularly where the employee is a loaned employee. In *Stuyvesant Corp. v. Waterhouse*,⁶⁹ the first loaned employee case decided in Florida in fifteen years,⁷⁰ the claimant, an employee of the Casablanca Hotel on Miami Beach, sustained injuries while engaged in a water show at the adjoining Lombardy Hotel. Each of the hotels put on water shows and by arrangement between them, the employees of both hotels jointly engaged in the respective water shows. The question confronting the supreme court was one of employer-employee relationship and who was claimant's employer at the time of the accident which occurred during the show at the Lombardy Hotel. In finding there was a consensual relationship, the court went on to hold the special employee, Lombardy Hotel, as claimant's employer, placing emphasis on the fact that the work being done at the time of the injury was essentially that of the Lombardy which had the right to control the details of the work and furnished the equipment.⁷¹

GEOGRAPHY OF INJURY

In the adoption of the Workmen's Compensation Act, the Florida Legislature provided for various specific weeks of compensation for permanent injuries.⁷² The number of weeks of compensation for which a permanently injured workman is entitled is dependent on the geography of the permanently injured portion of the body.⁷³ Unscheduled injuries or injuries to what is commonly called "the body as a whole"⁷⁴ have

66. 101 So.2d 422 (Fla. App. 1958).

67. United States Cas. Co. v. Maryland Cas. Co., 55 So.2d 741 (Fla. 1951).

68. Indicia: direction and control, existence of contract for particular work at fixed price, independent nature of alleged independent's business or distinct calling, his assistants and right to supervise them, obligation to furnish tools, supplies and materials, right to control progress of work except as to final result, time, payment, etc.

69. 74 So.2d 554 (Fla. 1954).

70. Berrier v. Associated Indem. Co., 196 So. 188 (Fla. 1939).

71. *Stuyvesant* case distinguished *Maige v. Cannon*, 98 So.2d 399 (Fla. 1957), on basis of equipment and employer being in business of supplying services. Also see *Naranja Rock Co. v. Dawal Farms, Inc.*, 74 So.2d 282 (Fla. 1955).

72. FLA. STAT. § 440.15.

73. *Kashin v. Food Fair Stores, Inc.*, 98 So.2d 609 (Fla. 1957).

74. FLA. STAT. § 440.15(3)(U).

been subject to recent judicial interpretations which have had far reaching effect. The landmark case of *Ball v. Mann*⁷⁵ applied the definition of disability⁷⁶ to unscheduled injuries pointing out that payments of permanent disability benefits for injuries to the body as a whole is based on diminution of earning capacity, thereby requiring deputy commissioners to take into account, among other things, such variables as the injured employee's age, industrial history, education, and inability to obtain the type of work which he can do insofar as affected by the injury. Post injury earnings, though evidentiary, do not necessarily indicate the degree of loss of wage earning capacity, if any, the court in *Bell v. Southern Bell Telephone and Telegraph Co.*⁷⁷ placing earning capacity on a broad plane, i.e., ability to compete on the open labor market. In the *Bell* case, the court reinstated the order of the deputy commissioner who awarded compensation on permanent partial disability for 20% loss of future earning capacity even though the injured employee was receiving more money from his employer for his post injury endeavors, the injury preventing him from performing his preinjury occupation.⁷⁸

The earning capacity test is also applicable to extended effects of scheduled injuries.⁷ In *Kashin v. Food Fair Stores*,⁸⁰ the injury was to the hand only, but the geographical effect of the injury extended to other parts of the body not within the schedule, thereby allowing a consideration of the impact of the over-all disability on earning capacity. Similarly, when the scheduled disability combines with other factors to render the employee permanently and totally disabled, the limitation of the schedule is no longer applicable.⁸¹ No direct judicial opinion has been rendered concerning the test to be used in determining partial loss of use of a scheduled member adjudged to be permanent.⁸² The Florida Industrial Commission has limited determination of permanent disability resulting in partial loss of use of scheduled members to functional or anatomical

75. 75 So.2d 758 (Fla. 1954).

76. FLA. STAT. § 440.02(9).

77. 108 So.2d 483 (Fla. App. 1959).

78. The disability award revolved around the employer failing to overcome the presumption that the medical disability equaled the future loss of wage earning capacity set forth in the Full Commission decision of *Marsiglia v. Eastern Air Lines, Inc.*, Decision No. 2-246, certiorari denied without opinion, 85 So.2d 762 (Fla. 1955). Whether the denial of certiorari without opinion in compensation cases constitutes stare decisis, see *Collier v. City of Homestead*, 81 So.2d 201 (Fla. 1955), and *Maige v. Cannon*, 98 So.2d 399 (Fla. App. 1957).

79. See cases cited notes 10, 11, 12 *supra*.

80. 98 So.2d 609 (Fla. 1957).

81. *Noah v. Board of Pub. Instr. of Orange County, Florida*, Decision No. 2-414, cert. denied, 93 So.2d 902 (Fla. 1950).

82. See *Ball v. Mann*, 75 So.2d 759 (Fla. 1954); and LARSON, THE LAW OF WORKMEN'S COMPENSATION, § 58.10 (1952).

disability.⁸³ However, in *Florida Game and Fresh Water Fish Commission v. Driggers*,⁸⁴ the supreme court was confronted with an eye injury which necessitated removal of the organ. Prior to the accident, the claimant had only 10% vision in the eye, the insurance carrier taking the position that the eye was industrially blind prior to injury and, there being no industrial loss of use, the employee was not entitled to permanent disability benefits for the loss of the organ. The court rejected several tests advanced for determining "loss of use" including the industrial loss of use test and adopted the "practical loss of use test." Later, in *Andrews v. Strecker Body Builders, Inc.*,⁸⁵ the court required the deputy commissioner to consider all of the evidence presented as to the scheduled injury, including lay testimony, but, of even greater significance, went on to state that where appropriate, the deputy could reject the opinion of the medical expert completely thereby placing the validity of the anatomical test in doubt.

THE INJURY

The disability brought on by the injury need not be the result of a single trauma in order to constitute an injury by accident, the supreme court stating in *Czepial v. Krohne Roofing Company*,⁸⁶ that the injurious exposure occurring through the cumulative effect of constant inhalation of dust and fumes aggravating a pre-existing disease, constituted an injury by accident. Under the aggravation theory, the courts have stated that the employer takes the employee as he finds him⁸⁷ and that the aggravating effect of the injury is compensable.⁸⁸

Where there has been a physical accident or trauma and the employee's disability has been increased or prolonged by traumatic neurosis or hysterical paralysis, the full disability including the effect of the neurosis is compensable.⁸⁹ In the landmark case of *Lyng v. Rao*⁹⁰ the court stated that the trauma need not produce visible signs of injury. In neurosis cases there must be an actual physical injury and causal connection with the

83. *Richie v. Gains Constr. Co.*, Decision No. 2-777, *cert. denied without opinion*, 112 So.2d 925 (Fla. 1959); *Bartolini v. Nasrallah Bros.*, Decision No. 2-778, *cert. denied without opinion*, 113 So.2d 282 (Fla. 1959); *Parsons v. Coplan Pipe & Supply Co.*, Decision No. 1-846, *cert. denied without opinion*, 113 So.2d 452 (Fla. 1959); *Sanger v. Ansan Corp.*, Decision No. 2-816 (one Commissioner dissenting), *cert. denied*, District Court of Appeals, Third Dist., Case No. 59-314.

84. 72 So.2d 723 (Fla. 1953).

85. 92 So.2d 512 (Fla. 1957); See The Journal of the American Medical Association "A Guide to the Evaluation of Permanent Impairment of the Extremities and Back," Feb. 15, 1958, for the medical profession's view of the doctor's function in permanent injuries.

86. 93 So.2d 84 (Fla. 1957).

87. *Alexander v. Peoples Ice Co.*, 85 So.2d 846 (Fla. 1956).

88. *Padrick Chevrolet Co. v. Crosby*, 75 So.2d 762 (Fla. 1954); *Alderman v. Paul Smith Constr. Co.*, 1 FCR 353 (Fla. 1956).

89. *Moses v. R. H. Wright & Son, Inc.*, 90 So.2d 330 (Fla. 1956); *Superior Mill Work v. Gabel*, 89 So.2d 794 (Fla. 1956).

90. 72 So.2d 53 (Fla. 1954).

injury must not be remote.⁹¹ However, in *Watson v. Melman, Inc.*,⁹² it was held that the mental disability need not be based on physical disability, a non-disabling physical injury from injury by accident causally related to the resulting traumatic neurosis being sufficient.

Specific statutory beneficiaries are designated⁹³ when death results from injury by accident. The absence of such beneficiaries does not entitle the deceased's estate to recover.⁹⁴ Dependency in fact upon the deceased must be established in order to qualify for death benefits except by those involving a conclusive presumption of dependency.⁹⁵ In cases where the decedent was unusually ardent or impatient and had, during his lifetime,⁹⁶ accumulated two or more wives all of whom claim to be the legal widow entitled to benefits, the courts have applied the presumption which exists in favor of the last marriage. The burden of proof then shifts once the last marriage is established to those attacking the last marriage, who, must tender evidence which when weighed collectively establishes the absence of a reasonable probability that the deceased actually secured a divorce in the pre-existing marriage.⁹⁷

COURSE OF EMPLOYMENT

Coverage under the act commences the moment the employee enters the employer's premises even though the actual work has not yet begun on the theory that at that moment the employee is engaged in doing something that is necessarily incidental to such work.⁹⁸ Coverage is also extended to accidents occurring off the employer's premises where there is a special hazard on the normal route used by the employees as a means of entry to and exit from the place of work.⁹⁹ As stated, generally, in *Blount v. State Road Department*,¹⁰⁰ coverage is not extended to injuries occurring while going to and from work but, the rule has many exceptions among which are when the journey itself is part of the services,¹⁰¹ or, the journey is made in the employer's conveyance,¹⁰² or the journey is made

91. *Superior Mill Work v. Gabel*, 89 So.2d 794 (Fla. 1956). Also see *City Ice & Fuel Division v. Smith*, 56 So.2d 329 (Fla. 1952).

92. 106 So.2d 433 (Fla. App. 1958).

93. FLA. STAT. § 440.16 (1957).

94. *Amsler v. Sox Meat Packers*, 75 So.2d 207 (Fla. 1954). Compensation benefits terminate with death where death unrelated, *Russell v. Bass*, 107 So.2d 281 (Fla. App. 1958).

95. *Paul Spellman, Inc. v. Spellman*, 103 So.2d 661 (Fla. App. 1958); *McCall v. Warrington Home Builders*, 1 FCR 299 (Fla. 1956).

96. *Persico v. Samac Corp.*, 74 So.2d 683 (Fla. 1954).

97. *Perkins v. Richards Constr., Inc.*, 111 So.2d 494 (Fla. App. 1959).

98. *City of St. Petersburg v. Cashman*, 71 So.2d 733 (Fla. 1954).

99. *Naranja Rock Co. v. Dawal Farms*, 74 So.2d 282 (Fla. 1954).

100. 87 So.2d 507 (Fla. 1956).

101. *N & L Auto Parts Co. v. Domon*, 111 So.2d 270 (Fla. App. 1959).

102. *Povia Bros. Farms v. Velez*, 74 So.2d 103 (Fla. 1954); mere furnishing of free transportation without specific relationship to employment not within exception, *Jacksonville Coach Co. v. Love*, 101 So.2d 361 (Fla. 1958).

by employees who have no fixed hours of employment.¹⁰³ In the *Blount* case emphasis was placed on the fact that the claimant was on twenty-four hour call, was furnished a vehicle for this purpose and while driving the vehicle home on the most direct route, suffered the accident held to be compensable. The pivotal point of the furnishing of necessary transportation was used to distinguish the case from *Alan Wright Funeral Homes v. Simpson*¹⁰⁴ where the court held that the sole fact that the employee was on twenty-four hour call has never afforded blanket coverage to an employee without regard to the activity at the time of injury.¹⁰⁵

Injuries occurring during purely personal missions do not come under the purview of the act.¹⁰⁶ However, if the trip or mission has a concurrent cause related to the employment, coverage is extended, there being no "nice inquiry" necessary to determine the relative importance of the concurrent business and personal motive.¹⁰⁷

STATUTE OF LIMITATIONS

The date of last payment of compensation in those instances where compensation has been paid, constitutes the statutory time¹⁰⁸ from when the statute of limitations¹⁰⁹ begins to run. What constitutes payment of compensation has been ably clarified by the Florida Supreme Court in the landmark case of *Townsley v. Miami Roofing and Sheet Metal Co.*¹¹⁰ Under the principles of the *Townsley* case, the payment of regular wages to a disabled employee during his absence from work because of the disability or because of obtaining medical care for the disability and the payment of regular wages to a disabled employee who stays on the job but who, with the knowledge of his employer, does light work because of the disability, will be deemed to be payments of compensation. The rationale underlying the *Townsley* principles is that so long as the payments continue, the employee has the right to assume the regular payments of wages are being made because of the employer's obligation under the act and the employee is not bound therefore to make further demand for compensation.¹¹¹ In order for the regular wage payment to be considered a payment of compensation, the employer must know or have reason to know that the employee continued to suffer disability

103. *Bowen v. Keen*, 17 So.2d 706 (Fla. 1944).

104. 93 So.2d 375 (Fla. 1957).

105. See *Hi-Acres, Inc. v. Pierce*, 73 So.2d 49 (Fla. 1954).

106. *Foxworth v. Florida Industr. Comm'n*, 86 So.2d 147 (Fla. 1955).

107. *Cook v. Highway Cas. Co.*, 82 So.2d 679 (Fla. 1955).

108. FLA. STAT. § 440.19 (1957).

109. *Aboandandolo v. Vonella*, 88 So.2d 282 (Fla. 1956); *Bailey's Auto Service v. Mitchell*, 85 So.2d 228 (Fla. 1956); *McLean v. Mundy*, 81 So.2d 501 (Fla. 1955).

110. 79 So.2d 785 (Fla. 1955).

111. *Anderson v. City of Miami*, 101 So.2d 612 (Fla. App. 1958).

as a result of the original injury during the period for which the compensation was claimed.¹¹²

In *Steinfeldt-Thompson Company v. Trotter*,¹¹³ an estoppel was raised to deny the employer the defense of the running of the statute of limitation, the employer having had knowledge of the injury, yet suffering the payment of compensation benefits to be paid by another during the statutory period for filing claims.

ATTORNEY FEES

Unless approved by the Industrial Commission or reviewing court, it is, by statute,¹¹⁴ unlawful for an attorney to receive any fee, consideration or gratuity on account of legal services from an injured employee. The same statute provides for the employee's attorney's fee to be assessed against the employer or carrier in four specific instances, one of which applies to legal services on review.

In construing the assessment of the penalty provisions¹¹⁵ of the act to be a recovery of compensation, the supreme court stated in *Lockett v. Smith*¹¹⁶ that the attorney's fee provision of the act should not be nullified by restrictive interpretation. In *Great American Indemnity Co. v. Williams*¹¹⁷ the same court indicated the hardship which would result if the attorney's fee in that case were imposed upon the employee, thereby defeating the purpose of the act. Inadequate and excessive allowances of fees for the employees' attorneys assessed against the employer have been the subject of review¹¹⁸ as have allowances of fees for purposes not encompassed by the statute.¹¹⁹

In *Paul Smith Construction Co. v. Florida Industrial Commission*¹²⁰ the employer's first knowledge of the claim for further benefits was nine days prior to the time payment was made. The twenty-one day allowance to pay the claim from knowledge of the claim by the employer had not been exceeded and therefore assessment of employee's attorney fee against the employer was disallowed.¹²¹ The lengthy opinion of the District Court of Appeals, First District, in *A. B. Taff & Sons v. Clark*¹²² decided on a

112. *St. Joe Ice Co. v. Frazier*, 103 So.2d 228 (Fla. App. 1958); *University of Miami v. Matthews*, 97 So.2d 111 (Fla. 1957); *Ferlita v. Florida Art Stucco Corp.*, 74 So.2d 893 (Fla. 1954); *Daoud v. Matz*, 73 So.2d 51 (Fla. 1954).

113. *Steinfeldt-Thompson Co. v. Trotter*, 95 So.2d 262 (Fla. 1957).

114. FLA. STAT. § 440.34(3) (1957).

115. FLA. STAT. § 440.20 (1957).

116. 72 So.2d 817 (Fla. 1954).

117. 85 So.2d 619 (Fla. 1956).

118. *Chiles v. E. M. Scott Constr. Co.*, 91 So.2d 173 (Fla. 1956).

119. *Insurance Co. of Texas v. Rainey & Joseph Schlitz Brewing Co.*, 86 So.2d 447 (Fla. 1956).

120. 93 So.2d 735 (Fla. 1957).

121. *Accord Maule Indus., Inc. v. Godbey*, 109 So.2d 611 (Fla. App. 1959).

122. 110 So.2d 428 (Fla. App. 1959).

stipulation of the parties, construed the claim from which the employer has 21 days to pay after notice thereof to mean only a claim formally filed with the Industrial Commission. The Court's reasoning was based on the procedural provisions of the act providing a time limitation for the filing of claims. The facts in the *Taff* case being based on a stipulation did not indicate that the carrier had notice of any claim for compensation prior to the claim formally being filed with the Industrial Commission. However, by the language used in the dictum, the court indicated that it would be illogical and against the language of the statute to allow an employer to escape liability for payment of a fee for the employees' attorneys if the employer would simply refuse to recognize an injury as compensable, thereby forcing the employee to retain an attorney and after claim is filed, to make payment thereon.¹²³ Good faith on the part of an employer who declines to pay a claim on or before 21 days after notice thereof will not excuse assessment of attorney's fees against the employer for the employee's attorney,¹²⁴ failure to pay being held to be equivalent to declining to pay.¹²⁵

At the appellate level, attorney's fees are allowable provided there has been an award of compensation benefits by the deputy commissioner¹²⁶ and the attorney has done sufficient work at the appellate level to justify the assessment of the fee against the employer or carrier.¹²⁷

PROCEDURE

The procedure in presenting claims before the deputy commissioner remains unchanged. The deputy is the sole finder of fact¹²⁸ and he must make adequate findings of fact to support the directives in his order and allow for intelligent review.¹²⁹ Mere recitals of evidence have been held insufficient to fill this requirement.¹³⁰ Under the act, the deputy commissioner has the responsibility of reconciling conflicts in the testimony and

123. Act said to be self executing. *A. B. Taff & Sons v. Clark*, 110 So.2d 428 (Fla. App. 1959); *Miami Beach First Nat. Bank v. Dunn*, 85 So.2d 556 (Fla. 1956).

124. *Great Am. Indem. Co. v. Williams*, 85 So.2d 619 (Fla. 1956).

125. *Ibid.* Also see *Curry v. United Wine Stores*, 1 FCR 184 (Fla. 1955).

126. *Virginian, Inc. v. Ponder*, 72 So.2d 781 (Fla. 1954); *Sun Insurance Co. v. Boyd*, 105 So.2d 547 (Fla. 1958); *Wick Roofing Co. v. Curtis*, 110 So.2d 385 (Fla. 1959).

127. *David M. Woolin & Son, Inc. v. McKain*, 111 So.2d 475 (Fla. App. 1959); *Florida Juice Co. v. Yeates*, 111 So.2d 433 (Fla. 1959); *Chiles v. E.M. Scott Constr. Co.*, 91 So.2d 852 (Fla. 1957).

128. *Foxworth v. Florida Indust. Comm'n*, 86 So.2d 147 (Fla. 1955); *United States Cas. Co. v. Maryland Cas. Co.*, 55 So.2d 741 (Fla. 1959).

129. *Fischer v. John W. Thomson & Son, Inc.*, 92 So.2d 526 (Fla. 1957); *Chiles v. E. M. Scott Constr. Co.*, 91 So.2d 173 (Fla. 1956); *Cook v. Highway Cas. Co.*, 82 So.2d 679 (Fla. 1955); *Straehla v. Bendix-We-Lauder-Rite*, 81 So.2d 657 (Fla. 1955); *Hardy v. City of Tarpon Springs*, 81 So.2d 503 (Fla. 1955).

130. *Fischer v. John W. Thomson & Son, Inc.*, 92 So.2d 526 (Fla. 1957); *Ball v. Mann*, 75 So.2d 758 (Fla. 1954).

drawing inferences therefrom¹³¹ and must consider all of the evidence,¹³² his findings being subject to the competent substantial evidence rule.¹³³

The injured employee has the burden of proving his claim without aid of any presumption as to causal connection,¹³⁴ the presumption¹³⁵ being available as to "course of employment" only.¹³⁶ In those instances where the exact cause of the accident is unknown, the claimant has the burden of proving a logical cause, which, once proved, shifts the burden of proof to the employer or carrier to show a more logical cause.¹³⁷

Procedurally, jurisdiction to determine an injured employee's right to compensation benefits cannot be invoked by the employer or carrier.¹³⁸

Applications for review of deputy commissioner's orders must be filed with the commission or deputy on the 20th day,¹³⁹ from the mailing thereof. Failure of uninsured employers, who have not qualified as self-insurers, to file bond with the application does not vest jurisdiction.¹⁴⁰ The review authority of the full commission is quasi judicial and exclusive, the circuit court having no concurrent jurisdiction to review the deputy's order by declaratory decree.¹⁴¹

Similarly, petitions for writ of certiorari must be filed in the supreme court on the 60th day¹⁴² from the date the full commission's order is entered.¹⁴³ The sixty (60) day period is not tolled by the filing of petitions for rehearing with the full commission, there being no provision for such proceedings to date.¹⁴⁴ In review of orders, the courts take judicial notice of commission rules.

THIRD PARTIES

The exclusive remedy doctrine of workmen's compensation¹⁴⁵ has been held to be an extreme one, not to be extended.¹⁴⁶ Derivative suits by

131. *Hi-Acres, Inc. v. Pierce*, 73 So.2d 49 (Fla. 1954); *Hamilton v. Cummer Sons Cypress Co.*, 70 So.2d 554 (Fla. 1954).

132. *Andrews v. Strecker Body Builders*, 92 So.2d 521 (Fla. 1957).

133. *Woolin & Son, Inc. v. McKain*, 110 So.2d 92 (Fla. 1959); *Minute Maid Corp. v. Florida Indust. Comm'n*, 104 So.2d 104 (Fla. App. 1958); *Frank Martin v. Board of County Comm'n, Manatee County*, 79 So.2d 513 (Fla. 1955).

134. *Tampa Ship Repair v. Jordan*, 107 So.2d 40 (Fla. App. 1958).

135. FLA. STAT. § 440.26.

136. *Pridgen v. International Cushion Co.*, 88 So.2d 286 (Fla. 1956).

137. *Nix v. Merrill-Stevens Dry Dock & Repair Co.*, 107 So.2d 616 (Fla. App. 1958); *Lyng v. Rao*, 72 So.2d 53 (Fla. 1954).

138. *Great Am. Indem. Co. v. Williams*, 85 So.2d 619 (Fla. 1956); *Miami Beach First Nat'l Bank v. Dunn*, 85 So.2d 556 (Fla. 1956).

139. *American Cas. Co. of Reading, Pa. v. All-Florida Sur. Co.*, 91 So.2d 633 (Fla. 1956); *H. W. Sperry, Inc. v. Matthews*, 76 So.2d 487 (Fla. 1954).

140. *Enterprise Marine Co. v. Vecchiarelli*, 97 So.2d 691 (Fla. 1957).

141. *Frix v. Beck*, 104 So.2d 81 (Fla. App. 1958).

142. *Crane Tile Co. v. Jenkins*, 105 So.2d 795 (Fla. App. 1958); *Columbia Cas. Co. v. McFee*, 81 So.2d 631 (Fla. 1955).

143. *American Airmotive Corp. v. Stutz*, 72 So.2d 665 (Fla. 1954).

144. *Jacksonville Paper Co. v. Nolan*, 80 So.2d 454 (Fla. 1955).

145. FLA. STAT. § 440.11 (1957).

146. *Goldstein v. Acme Concrete Corp.*, 103 So.2d 202 (Fla. 1958).

those not covered by the act do, however, fall under the exclusive remedy;¹⁴⁷ while true third party recoveries do not deprive the beneficiaries under the act from compensation benefits.¹⁴⁸

The Florida Supreme Court has held fellow employees to be third parties,¹⁴⁹ a corporation not under obligation to secure compensation to be a third party not immune from suit for injuries sustained by an employee of an employer who the corporation had contracted with for certain construction;¹⁵⁰ and, the operator of a delivery service to be a third party under a vendor-vendee relationship.¹⁵¹ In contrast, the District Court of Appeals, Third District, has held the owner of a rented crane whose crane operator injured the general contractor's employee who happened to be working on the same job, to be protected by the exclusive remedy doctrine based upon the theory that the crane operator was a loaned employee under the direction of the general contractor and was a fellow servant under a "common employer."¹⁵²

147. *McCall v. Florida Power & Light Co.*, 87 So.2d 809 (Fla. 1956); *Winn-Lovett Tampa, Inc. v. Murphree*, 73 So.2d 287 (Fla. 1954).

148. *Cushman Baking Co. v. Hoberman*, 74 So.2d 69 (Fla. 1954).

149. *Frantz v. McBee Co.*, 77 So.2d 796 (Fla. 1955).

150. *Jones v. Florida Power & Light Co.*, 72 So.2d 285 (Fla. 1954).

151. *Goldstein v. Acme Concrete Corp.*, 103 So.2d 202 (Fla. 1958).

152. *Smith v. Poston Equip. Rentals*, 105 So.2d 578 (Fla. App. 1958) Loaned employee doctrine not gone into nor status of crane owner to general contractor or whether crane operator was a casual employee under FLA. STAT. § 440.02(2)(C)(3) (1957).