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L. Barry Keyfetz

Tamara L. Dworsky

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Workmen's Compensation

L. BARRY KEYFETZ* AND TAMARA L. DWORSKY**

In this article the authors discuss recent legislative and judicial developments in workmen's compensation law. They note that the Act will be completely reviewed in July 1979 but discuss the topics of payment of attorney's fees, coverage, changes in compensation benefits, offset provisions and changes in the rules of procedure.

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I. INTRODUCTION

In recent years, workmen's compensation has been the focus of considerable attention in the political arena. The source of this attention is the cost of the program which has resulted both in legislative changes, effective July 1, 1978, and in the significant

* Partner in the firm of Keyfetz & Poses, Miami, Florida; J.D., Harvard Law School; admitted to practice in Florida, New York and Massachusetts; Chairman, Section on Workmen's Compensation, Florida Bar Association; Associate Editor, Academy of Florida Trial Lawyers Journal.
** Member, University of Miami Law Review.
possibility of a sweeping revision in the next legislative session.¹ Although this “sunset” provision portends the possibility of substantial changes, there will undoubtedly be many areas left unchanged. In addition, as is common when an act is supplanted by a revision, the judiciary will continue to look to existing case law for guidance. This, however, is further qualified because the judicial decisionmaking process reflects influences from the political sphere. Recent legislative changes and judicial decisions have narrowed the scope of the Workmen’s Compensation Act. It is anticipated that forthcoming legislative and judicial changes will continue this trend.

With an awareness of the above limitations which prevent a definitive discussion of the status of the workmen’s compensation law, the authors will first report the recent legislative changes and then review the significant judicial decisions in the area.

II. LEGISLATIVE CHANGES

A. Coverage

Coverage of workers has been limited by the legislature’s return to pre-July 1, 1974 status requiring an employer to have workmen’s compensation coverage only where he has three or more employees.² Volunteers serving private, nonprofit agencies and participating in specifically defined federal programs are likewise excluded.³

B. Benefits

Benefits for those individuals having lesser bodily injuries have been reduced to one-half of the previous benefits, while weekly benefits for the very seriously disabled have been increased. Bodily benefits for an employee who suffers less than permanent total disability had always been calculated by applying the percentage of disability to a schedule of 350 weeks. The law has now been amended to provide that a bodily disability of ten percent or less is applied to a schedule of 175 weeks; a disability above ten percent and up to fifty percent continues to be applied to the schedule of 350 weeks; and a disability in excess of fifty percent but less than

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¹ 1978 Fla. Laws, ch. 78-300, § 23 provides: “In recognition of the seriousness of the problems in the existing [workmen’s compensation] system and the urgent need for major reform, Chapter 440, Florida Statutes is repealed as of July 1, 1979.”
² Fla. Stat. § 440.02(1)(b) (2) (Supp. 1978). This was the state of the law prior to July 1, 1974, at which time coverage was made compulsory for employers of one or more employees.
³ Id. § 440.02(2)(d)(3)(a)-(b).
and including ninety percent is applied to a schedule of 525 weeks. This reduces by one-half the amount of allowable benefits for a bodily injury to employees at the lower end of the disability spectrum and somewhat increases the allowable number of weeks for employees at the upper end of that spectrum.

This provision is in keeping with the intent of the Workmen's Compensation Act. The new schedule, however, presents some practical problems. There is a benefit differential between individuals with ten percent and eleven percent bodily disability ratings which is grossly disproportionate to a one percent difference in disability. In addition, no change was made in the “scheduled” injuries listed in section 440.15(3)(a)-(p) of the Florida Statute. This failure has resulted in an illogical allowance of benefits. For example, a ten percent disability to the arm is a lesser medical disability than a ten percent disability to the body; yet, the schedule for the arm disability now allows a greater number of weeks than the schedule for a ten percent bodily disability.

The trial judge is foreclosed from awarding compensation for a physical impairment disability greater than the greatest disability given the claimant by any examining or treating physician, except by stipulation of the parties, a virtually nonexistent situation.

C. Determination of Wage-Earning Capacity

It is now provided that a claim for diminution of wage-earning capacity shall not mature until ninety days after the employee has reached maximum medical improvement. In cases falling within section 440.15(3)(u) of the Florida Statute dealing with “other cases,” the injured employee is entitled to the greater of either impairment rating or diminution of earning capacity. The purpose of the delayed determination concerning loss of earning capacity in excess of anatomical impairment is to prevent a premature determination of loss of earning capacity which might not reflect actual loss. This statutory change is of little importance except for its potential

5. All compensation benefits under the workmen's compensation law are, technically, scheduled benefits. Weekly benefits are paid based upon statutorily established schedules ranging all the way to lifetime benefits for permanent total disability. Common usage by practitioners and the judiciary, however, utilizes the terminology “scheduled injuries” to refer to those schedules in ¶ (a) through (t) as distinguished from the schedule in ¶ (u), termed “other cases,” which deals with bodily injuries not set forth in Fla. Stat. § 440.15(3)(a)-(t) (Supp. 1978).
6. Id. § 440.25(3)(b).
7. Id. § 440.25(3)(a).
8. Id. § 440.15(3)(u).
to encourage additional litigation. This is true because (1) as a practical matter, hearings on permanency are not obtained until considerably longer than three months after determination of the issue of maximum medical improvement and (2) without establishing a record of postaccident earnings or of a substantial job search, no loss of earning capacity will be found. An initial determination of permanent impairment, however, as well as a subsequent determination as to loss of earning capacity, are allowable, thereby creating the possibility of additional litigation.

In connection with the determination of loss of earning capacity, the Act now codifies established judicial criteria and requires the judge to make written findings of fact supporting any loss of earning capacity award. It has always been sound practice to explain an award for loss of earning capacity; therefore, the gloss of this statutory addition is more apparent than real.

D. Attorney's Fees

Attorney's fees were again under attack and the 1978 Florida Legislature made a significant policy change by inserting a new provision in the previously governing section:

With respect to attorney's fees on claims for benefits other than medical benefits, 75 percent shall be paid by the employer or carrier and 25 percent shall be paid by the claimant; however, the employer or carrier shall pay all of the attorney's fees if the claimant proves to the judge that the employer or carrier handled his claim in a negligent, arbitrary or capricious manner.

The insertion of this provision presents a host of problems. The previous provision for payment of attorney's fees when the employer/carrier did not timely and voluntarily present payment of benefits may have encompassed those instances of negligence on the part of the employer/carrier to which the new provision is addressed. Hence, the change may have been unnecessary. Moreover, because attorney's fees are due, the judge may feel compelled to determine the responsibility of the employer/carrier for all attorney's fees. The threat of attorney's fees created by the statutory

11. 1978 Fla. Laws ch. 78-300, § 10 (codified at FLA. STAT. § 440.34(1) (Supp. 1978)).
12. Timely acceptance, according to FLA. STAT. § 440.34(1) (Supp. 1978) is "on or before the 21st day after they [the employer or carrier] have notice."
revision may force the insurance company and claimant to negotiate those fees when the latter is charged with a portion of them. The result may be a process that is so cumbersome that it would be simpler to have a judge allocate the fees, creating additional litigation.

E. Delivery Process

The payment delivery process has long been plagued by problems which have encouraged attorney involvement. In this regard, several beneficial changes were adopted. It is now provided that weekly compensation payments, except for the first week, shall be paid by check.\(^{13}\) Previously, drafts with a clearing time of up to several weeks were utilized. Penalties have been increased from ten to twenty percent on late payment of installments of compensation.\(^{14}\) It is provided that interest is due at the rate of twelve percent for installments not timely paid.\(^{15}\) At the prior statutory interest rates of six and then of eight percent, it was financially beneficial to the employer/carrier to withhold payment of benefits and to file questionable appeals in order to retain the use of the funds over a longer period of time. The amended provision eliminates the economic benefits garnered by such conduct.

Procedural changes in the delivery process have been effec-
tuated to achieve more prompt receipt of benefits. The amendments provide that when a claimant is represented by counsel, final settle-
ment through a joint petition and stipulation shall be approved by the judge within seven days of its filing unless the judge determines, in his discretion, that testimony is necessary.\(^{16}\) The requirement of a hearing where a claimant is not represented is retained. Judges of Industrial Claims or the Industrial Relations Commission are re-
quired to report on cases not determined within thirty days of final hearing or within 180 days of filing an application for review.\(^{17}\)

F. Fraud

Concern with allegations of fraud in workmen's compensation proceedings led to the adoption of demeaning and meaningless pro-
visions; existing criminal law already precluded such fraudulent

\(^{13}\) Id. § 440.12(1).
\(^{14}\) Id. § 440.20(5).
\(^{15}\) Id. § 440.20(7).
\(^{16}\) Id. § 440.20(10).
\(^{17}\) Id. § 440.25(3)(d).
The new general antifraud provision, entitled "Misrepresentation; fraudulent activities; penalties" and directed at the claimant, claimant's attorney and medical practitioner, attempts to prevent deceitful activity. In addition, the statute requires that the medical practitioner furnish a sworn statement that the treatment was reasonable and necessary. The legislators failed to recognize that because the workmen's compensation law provides medical care which is rendered under the direction of the employer/carrier, there is already overwhelming control via the authorization or withholding of such care and via the payment of bills. Nevertheless, it is now incumbent upon practitioners, the vast majority of whom are initially selected by the employer or carrier, to attach such a statement to reports submitted. This meaningless provision demeans the medical profession.

Judges of Industrial Claims appropriately have been made subject to the Code of Judicial Conduct. Also, initial appointment of the Judges of Industrial Claims is now accomplished in the manner previously established for reappointment. That is, the judges are chosen from a list of at least three persons nominated by the judicial nominating commission for the appellate district in which the judge will principally conduct hearings.

III. CASE LAW

A. Attorney's Fees

The trend when dealing with issues of entitlement to a fee and the amount of fees awarded, as discussed in this article last year, has continued. In State v. Paulk, the court reversed an award of a
$12,000 fee representing a rate of $300 per hour, noting that there was nothing particularly unusual in the case and therefore the amount of the fee, considering the work involved, was excessive. Similarly, in United States Steel Corp. v. Green, the Supreme Court of Florida found a fee of $13,000 excessive in view of the work performed. In a footnote to that opinion, the supreme court stated that the guidelines recommending a "sliding scale," adopted by the legislature subsequent to the accident in question, could "eliminate the need for remands in future cases." The court appeared to indicate that where there was adherence to the guidelines, the amount would not be disturbed. It can also be inferred that where the award of benefits is large, an emphasis will be placed on the time involved. At the same time, if benefits are smaller but greater work is involved, there is the danger that the judicial emphasis will be solely on the amount of benefits and the appropriate guidelines rather than the work involved.

Kings Point West, Inc. v. Flint involved an error by the trial judge in excluding consideration of supplemental benefits. Notwithstanding that error, the award of an attorney's fee of $11,000 was affirmed upon the grounds that benefits are only one factor to be considered. In the reverse situation, however, where the award of benefits was disturbed on appeal, these authors are unaware of any decisions where the court affirmed an awarded fee on the same basis. Rather, in such cases, the cause was invariably remanded for redetermination of the amount of the fee in view of the change in benefits.

Where services rendered are a factor and testimony by the claimant's counsel is relevant, the question arises as to whether defense counsel may review claimant counsel's file in connection with cross-examination. This situation poses a conflict between the doctrine of privilege and the right to have meaningful cross-examination. In Frost v. Gasparilla Inn, the court held that a claimant attorney's file must be produced for in camera inspection so that the judge may determine what portions should be furnished to defense counsel. To be sure, the nature of counsel's work and the fees charged are a probative factor. Whether this doctrine will also

25. 353 So. 2d 86 (Fla. 1977).
26. Id. at 89 n.9; see Fla. Stat. § 440.34(1) (Supp. 1978).
allow in camera inspection by the judge of the work and the billings of defense counsel remains to be seen. Unquestionably, future decisions will have to specify further what is and is not subject to in camera inspection by the judge.

In the area of entitlement to a fee, two apparently conflicting lines of precedent have evolved, represented by Davis v. Green and Lehigh Portland Cement Co. v. Branch. The Davis case places on the employer/carrier the duty to investigate benefits due. If they fail to do so and claimant prevails on his compensation claim, a fee is due. In the Lehigh Portland Cement case, no fee was held due because there was a delay by the attending physician in submitting a report and a timely acceptance by the employer/carrier followed receipt of the rating report. The resolution of the conflict between these cases may lie with a vague synthesis requiring the employer/carrier to act reasonably within a reasonable time after receipt of appropriate information.

Osteen v. Georgia-Pacific Corp. involved a claim for permanent total disability benefits. A letter from claimant’s counsel had notified the carrier that the treating physician had found a permanent impairment of twenty-five percent of the claimant’s body. Apparently, no written report had been prepared by the physician, but upon receipt of the doctor’s deposition arranged by claimant’s counsel, the carrier accepted the demand for permanent total disability benefits. The commission held that the carrier had a duty to investigate promptly upon receipt of the communication from claimant’s counsel and, the carrier having failed to do so, that an attorney’s fee was due.

In accordance with this analysis, another court denied entitlement to an attorney’s fee where there was timely inquiry of the attending physician by the carrier after the filing of a claim. Two confused ratings had been given by the physician. Although aware of the greater rating, the carrier continued paying the lower rating for many months. Nevertheless, the commission emphasized that no claim had been pending and within twenty-one days of the claim being filed, the carrier did timely act to clarify the situation. Although emphasizing timely inquiry, the opinion does not reflect the time lapse between the filing of the claim and the carrier’s ultimate payment of the greater rating; presumably, the lapse was more than

30. 240 So. 2d 4 (Fla. 1970).
31. 319 So. 2d 13 (Fla. 1975).
twenty-one days. Accordingly, this decision seems to extend the necessary time for action by the carrier. The holding appears to make sufficient an inquiry within twenty-one days of the filing of a claim as distinguished from finding out and paying within that period. Just when the inquiry and payment should be made in order to escape liability for attorney's fees apparently depends on the vague concept of "reasonableness."

Commercial Carrier Corp. v. Gillum further extends the time for action by the employer/carrier. In that case, a claim was filed but the employer/carrier did not receive notice of it until it received a copy of the acknowledgement of the filing from the Workmen's Compensation Bureau in Tallahassee. The employer/carrier acted within twenty-one days of receiving that acknowledgment, but not within twenty-one days of the filing of the claim. The decision held that the twenty-one day period began to run upon notice to the employer of the claim, that the employer's action was timely and that no attorney's fee was due.

Thomas v. City of Vero Beach involved an employer/carrier seeking a reduction of benefits because the claimant was receiving social security payments. During the course of the proceedings, the employer/carrier agreed to pay an average weekly wage in excess of that contended for previously. By virtue of this agreement, the amount of the reduction the employer/carrier sought was decreased and the compensation payments were increased. An attorney's fee was found due.

Lombardo v. BBC Agency, Inc. involved a fee at the appellate level although at that point no benefits were due. Prior to this decision, it had often been necessary for a claimant to obtain counsel to assist him in appellate proceedings on a double contingency basis, i.e., payment required success in the appellate tribunal and then success in actually obtaining benefits. Lombardo points out that the separate statutory provision dealing with proceedings on review does not predicate the allowance of attorney's fees on obtain-

35. In the early days of the workmen's compensation law the 21-day provision was construed to run from the date of notice of injury and entitlement to benefits rather than from the date of actual filing of a claim. In Carillon Hotel v. Rodriguez, 124 So. 2d 3 (Fla. 1960), however, the court construed the 21-day period as commencing when the claim was actually filed rather than when notice of claim or injury was given. Gillum now appears to broaden the period so that the time period does not commence running until the claim is actually filed and there is notice to the employer/carrier of that claim.
36. 365 So. 2d 133 (Fla. 1978).
38. FLA. STAT. § 440.34(3) (Supp. 1978).
ing any particular benefits, but leaves the award of or increase of attorney's fees to the discretion of the reviewing tribunal.

B. Arising Out of and in the Course of Employment

Typically, recent changes in this area have further limited coverage. In addition, there has been helpful clarification regarding what is known as the "aggressor" defense.

1. THE "AGGRESSOR DOCTRINE"

In the past, the rule has been that injuries to an "aggressor" are held not to arise out of and in the course of employment. The exact basis for such a conclusion, however, was not specified and there was an accompanying failure to analyze appropriately the issue of entitlement to or denial of benefits. Finally, in *Lorie v. Yale Ogron Manufacturing Co.*, the court explained that the basis for the application of this defense was the statutory proscription against entitlement to benefits in cases where there was a willful intent to injure oneself or another. Meaningful analysis, however, was thereafter disregarded, as in the case of *Cutler v. Sterling Hotel* in which the claimant commenced an altercation by giving a small push to a co-worker who responded by striking the claimant with a pot brush. The claimant was held to be the aggressor and thus not entitled to benefits. The nature of the claimant's injury was not described; it is unclear whether the coworker overreacted to the push or whether he reacted reasonably such that the claimant's injuries were defensively inflicted and commensurate with the claimant's initial action.

It is suggested that a claimant precipitating an altercation should not be viewed as an outlaw. Instead, the question of whether the injury resulted from a willful intent to injure another must depend upon the nature of the claimant's action and the appropriateness of the reaction which causes him injury. A small shove answered by a small shove and consequent injuries should be grounds for recovery. A small shove resulting in a coemployee's leaving the room, obtaining a knife and stabbing the claimant, however, should not be grounds for a denial of benefits.

In the recent decision of *American International Land Corp. v.*

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41. *FLA. STAT. § 440.09(3) (1977).*
May,⁴ the judiciary at long last appears to have better analyzed the issue. In that case, claimant May and his supervisor had a verbal altercation. When the supervisor returned to his pickup truck after reprimanding May, claimant approached the pickup truck in which the supervisor was seated and grabbed the supervisor's arm. The supervisor got out of the truck and knocked May down. Although May's action constituted a technical battery, and the label of aggressor could be applied to him, his actions should not deprive him of benefits on the grounds of a willful intent to injure. The commission's opinion appropriately noted the language in Lorie and pointed out that "the aggressor doctrine represents in this jurisdiction the decisional definition of 'willful intent to injure.'" Unfortunately, the commission then resorted to the use of the label "aggressor" and held that, under the circumstances, the claimant was not an aggressor. Although the result was sound, the reasoning would have been less conclusory had the commission avoided the labels of aggressor or non-aggressor which are simply legal substitutes for saying that one employee should recover and another should not.

2. THE "GOING AND COMING" EXCLUSIONARY RULE

There has been some retrenchment in the "going and coming" area. The general rule is that injuries incurred in travel to or from work are not covered except when travel is provided by the employer,⁴⁵ pursuant to a special request by the employer,⁴⁶ or when the employee is on call to such an extent and under such job requirements that he is viewed as covered at all times during the entire term of his employment.⁴⁷

In M.J. Kelley v. Anderson,⁴⁸ a case of first impression, the employer was required by union contract to pay the employee a travel allowance. The claimant properly contended that this allowance fell within the requirement of travel provided by the employer and argued that an injury suffered during the course of such travel was compensable. For the first time, the commission distinguished between employer payment for travel in the form of an extra allow-

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⁴⁴. Id. at 3 (quoting Lorie, I.R.C. Order 2-2245, at 3).
ance—akin to an increase in wages—for the distance from the job site and payment which contemplated travel as an inherent part of employment. Although such a distinction is theoretically sound, as a practical matter it is a tenuous, fluctuating premise upon which to rest differential treatment of employees. In the Anderson opinion, the commission discussed Swartz v. Food Fair Stores, Inc., where injuries were compensable in a fact pattern in which car expenses were paid to an employee in exchange for his agreement to transfer to a more distant store. Exactly what falls within the control of the Swartz precedent, as distinguished from the M.J. Kelley precedent, is unclear. For example, are there legal distinctions between providing a bus to pick up the claimant, providing a company motor vehicle to the claimant, and providing payment to a claimant for use of his motor vehicle? In the latter case, is it important whether payment is made due to transfer of employment location or made because a union contract demands that travel expenses must be paid for an employee who works beyond a certain point?

In Friese v. City of Ft. Lauderdale, a police officer was traveling by motorcycle from his home to police headquarters when he was injured. The commission held it erroneous to apply the going and coming exclusion to police officers in light of the Supreme Court of Florida cases expressly exempting police officers from the rule. The rationale for such an exception, first stated in Sweat v. Allen and later affirmed in Warg v. City of Miami Springs, was that police officers are "continuously intrusted with certain duties, namely, to protect the peace and safety of the community." A vigorous dissent pointed out that the application of Sweat had been restricted in several later cases, e.g., where the injury to the policeman occurred outside of his official jurisdiction. In City of Miami Beach v. Valerian, a Miami Beach police officer, en route to work, observed a traffic violation, attempted to make an arrest and was assaulted. Compensation was denied because the officer's authority did not extend to the City of Miami where the arrest was made. Sweat was limited further in Leeds v. City of Miami, where a

49. 175 So. 2d 36 (Fla. 1965).
51. 145 Fla. 733, 200 So. 348 (1941).
52. 249 So. 2d 3 (Fla. 1971).
53. Id. at 5 (quoting Sweat, 145 Fla. at 738, 200 So. at 350).
54. I.R.C. Order 2-3268, at 3 (Carroll, Comm'r, dissenting).
55. 137 So. 2d 226 (Fla. 1962).
policeman was deemed to be performing a "personal mission" at the time of injury. In Leeds, the police officer, while driving a city car, was injured in a traffic accident on his way from school to work. Compensation was denied on the grounds that the officer was on a personal mission. The dissent in Friese suggested that:

Police officers should not be placed in a more favored category for compensation purposes, without some acceptable supporting reason. If the potential of a requirement for action in their official capacity may become a reality any time during the twenty-four hour day, then such extended coverage should not be limited merely to the time consumed traveling to and from work, but should also embrace any travel under circumstances in which they are exposed to some occurrence that may require official action. If such a result is deemed desirable, it should be accomplished by appropriate legislation.97

Until such time as legislative action is taken, or the judiciary seeks to clarify further the application of this exception, it appears that while theoretically a policeman is continually entrusted with law enforcement, the policeman can be assured of workmen's compensation coverage only while en route to and from work and within the geographical limits of his authority as a police officer. During all nonworking periods and in all other locales, their injuries, even if sustained in the process of making an arrest, will very likely be deemed noncompensable. The dissent appropriately pointed out the lack of logic in this decision. A result of coverage any time while in the public domain or of no coverage except during the performance of work-related duties could be justified. But a rule excepting policemen from the going and coming rule just during the particular moments of coming from or going to work is incongruous and without any rational justification.

C. Preexisting Conditions

The treatment of preexisting conditions in workmen's compensation involves the application of apportionment which may reduce benefits. A misrepresentation as to a preexisting physical condition and the method of applying apportionment, as well as the doctrine of merger may affect benefits.

1. MISREPRESENTATION AS TO PREEXISTING PHYSICAL CONDITIONS

The leading decision in this area is *Martin v. Carpenter.* In that case, claimant misrepresented a previous back injury on an employment application. While working with the Martin Company, her condition became worse absent any specific, identifiable event related to the aggravation of the injury. Her claim was denied on the ground that there was no accident, i.e., no unexpected or unusual event or result, happening suddenly. The Supreme Court of Florida said in dicta, however, that a false representation as to physical condition or health made by an employee in procuring employment would preclude the benefits of the Workmen's Compensation Act if: (1) there was a causal relationship between the injury and the false representation; (2) the employee knew the representation to be false; (3) the employer relied upon the false representation; and (4) such reliance resulted in consequent injury to the employer. The supreme court's original intention was that the doctrine serve as a shield to protect the employer from unfair payments. Faulty analysis and misunderstanding of the rule, however, has led to its more frequent use as a sword cutting off claimant's rights. The most recent decision in this area is *Montgomery Ward v. Provenzano.* The claimant therein was asked whether he had ever been admitted to an institution, sanitarium or hospital. Though he answered “no,” in fact claimant had been confined to an army psychiatric hospital and discharged with a psychiatric disability. Claimant commenced his employment with Montgomery Ward more than twenty years later and worked for the company for eight years prior to his compensable accident, a fractured hip which resulted in a permanent disability of the left lower extremity. Finding that, as a result of orthopedic injury, the claimant had suffered anxiety neurosis with conversion symptoms requiring the need for psychiatric care, the trial judge awarded temporary disability benefits and continued psychiatric treatment. In reversing the award of those benefits, the majority decided that the claimant had misrepresented a nervous disorder on an employment application; that the condition was subsequently aggravated by an industrial injury; that had full information originally been given, the claimant would have been subjected to further screening by the company doctor; and

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58. 132 So. 2d 400 (Fla. 1961).
59. Id. at 406.
under those circumstances, the employer had met the *Martin* test.\(^{61}\)

The trial judge had rejected this defense on the ground that the employment application had been filled out subsequent to hiring, and there was no competent substantial evidence that the application had been reviewed after it was completed or that the employer had actually relied upon it.\(^{62}\) The majority opinion is harsh and ignores the realities of the employment relation. It compounds such ignorance with faulty analysis by extending too far the legal doctrine originally articulated in dicta. The causal relation between the original injury (a broken hip) and the false representation is not apparent. It was not a situation where the psychiatric disability, if one existed, contributed to causing the initial injury. In addition, employer reliance was minimal, and it is questionable whether that reliance resulted in any injury to the employer who had had the benefit of the services of the employee for more than eight years.

2. **APPORTIONMENT**

Apportionment is proper when it would be unfair to have an employer pay for that portion of an injury attributable to a condition not caused by the employment-related accident or to have an employee pay for a worsening in his condition that would not have happened but for the accident:

> [The apportionment statute] recognizes the maxim that the employer takes the employee as he finds him, in that it does not charge against the employee diseased or weakened conditions which were not and would not have been disabling without the accident. On the other hand, it gives the intended effect to [the statute] by relieving the employer of the burden of paying for disability which occurred through the normal progress of the disease and was unrelated to the accident.\(^{63}\)

There are two categories of apportionment. The first category arises out of the statutory language:

> Where a preexisting disease or anomaly is accelerated or aggravated by accident arising out of and in the course of employment, only acceleration of death or the acceleration or aggravation of disability reasonably attributable to the accident shall be compensable with respect to permanent disability or death.\(^{64}\)

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61. *Id.* at 5.
63. Evans v. Florida Indus. Comm'n, 196 So. 2d 748, 753 (Fla. 1967).
The statute only apportions when there is a preexisting "disability." Although in common parlance disability may connote injury or impairment, in workmen's compensation law disability is defined in terms of diminution of wage-earning capacity. Disability is determined by comparing the injured employee's average weekly wage prior to injury with his post-accident earning capacity.

The judiciary has thus far failed to analyze properly and to recognize the paradox involved in this area. In order to award compensation, the court must be able to attribute acceleration or aggravation of the disability to the accident. The court must use the pre-accident wage rate as the yardstick for measuring the original disability. Yet the pre-accident wage rate does not reflect such important variables as the rate of disability improvement or deterioration. Hence, the amount of aggravation or acceleration caused by the accident is impossible to measure. This is especially true if the post-accident wage capacity does not diminish for some time after the accident. The judiciary has wrestled with these provisions for years without arriving at any definitive position. In *Evans v. Florida Industrial Commission*, the court recognized the deficiency in judicial decisionmaking in this area and attempted a meaningful discussion on apportionment:

[A]pportionment is proper only when and to the extent that the pre-existing disease either, (1) was disabling at the time of the accident and continued to be so at the time the award was made or (2) was producing no disability at the time of the accident but through its normal progress is doing so at the time permanent disability is determined and an award is made.

If a claimant is working and earning a particular wage and his disability is defined in terms of incapacity to earn the particular wage earned at the time of his accident, when is a preexisting disease disabling at the time of the accident? The second stated alternative is not apportionment for a preexisting disease as it existed at the time of the accident, but apportionment for a subsequent worsening. The workmen's compensation law does not allow recovery for a subsequent problem whether it be an independent worsen-

65. "'Disability' means incapacity because of the injury to earn in the same or any other employment the wages which the employee was receiving at the time of the injury." *Id.* § 440.02(9).
66. *Id.* § 440.15(3)(u).
67. See *Evans v. Florida Indus. Comm'n*, 196 So. 2d 748 (Fla. 1967), and cases cited therein.
68. *Id.*
69. *Id.* at 752-53.
ing of an unrelated preexisting problem or an independently caused separate injury. Hence, this second alternative does not apportion out anything that was initially covered. The court has again failed to establish some rational rule for the general application of the apportionment provision and has merely added to the already existing confusion.

Recent commission decisions seem, however, to deal somewhat better with the inherent paradox and set forth more rational standards as to apportionment under this section. The underlying logic and rationale in these decisions leads to the conclusion that apportionment cannot be truly effectuated. The proper trend was established in *Dillon v. Bill’s Trailer Sales, Inc.*,70 which involved a preexisting, asymptomatic, twenty-five percent impairment which, in conjunction with injuries in a compensable accident, resulted in a forty-five percent anatomical impairment. It was contended that apportionment was applicable. The commission held it inapplicable on the basis that the preexisting condition was asymptomatic and did not cause any disability prior to the compensable accident. The same result was reached in a later decision, *Richey v. Peninsular Casket Co.*,71 which held apportionment inapplicable to a preexisting impairment except where a loss of earning capacity had been awarded. The commission relied solely on case precedent to support its determination.72 In a situation where a pulmonary disease was triggered by the work, but the lower tribunal found that the condition had been aggravated by smoking, it was also held that an order directing apportionment was improper.73 After finding that the work had unquestionably contributed to the ultimate result, the commission held that the testimony fell short of showing any preexisting or independently caused disability on an earning capacity loss basis at the time of the award, as is required for apportionment.

The language in the above decisions reflects a continuing lack of resolution regarding the application of the statutory language. This lack of resolution is further evidenced by the decision in *Contractors Services v. Garoute*74 where a preexisting heart condition, aggravated by a compensable heart attack, resulted in total disability. The medical testimony reflected that the preexisting condition without the work trauma would not have produced the heart

72. See Genereux v. Caribbean Concessions, Inc., 211 So. 2d 1 (Fla. 1968).
attack and the ensuing disability, nor would the heart attack have occurred from the work trauma without the preexisting coronary condition. The trial judge apportioned out only ten percent for the preexisting condition. With such evidence resulting in only ten percent apportionment, the commission seems to have begged the question and retreated to the governing confusion by simply affirming the award as rendered. If, as the evidence reflected, the preexisting condition was not a disability and would not have produced any disability, then all the “disability” (loss of earning capacity) following the compensable accident was produced by the compensable accident and it is difficult to comprehend what there was to apportion out.

The second type of apportionment is for permanent disability benefits previously paid. This apportionment provision reduces the award by the amount of such benefits previously paid under the Florida Workmen’s Compensation Law where a previously compensated permanent impairment has been merged with a permanent impairment from a new compensable injury, the combination of which is greater than would have resulted from the subsequent injury considered alone. This provision allows apportionment of the award only when there is a new permanent partial disability, but not when the new injury is classified as permanent total disability.

The requirements for this apportionment provision are: (1) that permanent disability benefits were previously paid; (2) that such benefits were paid under Florida Workmen’s Compensation Law; and (3) that the preexisting impairment merges with the permanent impairment in the compensable injury for which overall compensation is awarded. This type of apportionment was applied in Gilchrist County Board of Commissions v. Davis. The claimant had previously received permanent benefits for a thirty percent disability of the leg and benefits for another compensable injury to ten percent of the body. The injury in question was not fully apparent from the opinion, but the trial judge held that the compensable injury had merged with the impairments from the two preexisting compen-

75. It should be noted that there was no evidence as to the amount of any apportionment. Apportionment is an affirmative defense and without evidence thereof, apportionment had previously been held inapplicable. See G & L Motor Corp. v. Taylor, 182 So. 2d 609 (Fla. 1966); Hastings v. City of Ft. Lauderdale Fire Dep't, 178 So. 2d 106 (Fla. 1965). But cf. Tolvanen v. Eastern Air Lines, 287 So. 2d 299 (Fla. 1973) (even where judge does not indicate which evidence he relied on, apportionment between two compensable injuries is proper).
sated accidents, resulting in a permanent partial disability of seventy-five percent of the body. Claimant was held entitled to an award for overall permanency less the amount of permanency for which he had previously been compensated.

3. MERGER

The concept of merger has had almost as tortured a history as has the concept of apportionment. Recent commission decisions, however, explain the concept more rationally and establish guidelines for its application. The issue can be simply stated: When there is a preexisting impairment, at what point can and should that impairment be combined with a new compensable injury to provide claimant with a recovery which considers the combined effect? An early example is Sharer v. Hotel Corporation of America," where an elderly claimant of limited education previously had lost his left hand. Subsequently, he suffered a compensable injury which caused a forty percent disability of the right hand. With a good right hand, claimant presumably had been able to compensate for his preexisting injury. Obviously, the subsequent significant compensable impairment to the right hand had a far greater impact on this claimant because of the previous loss of his left hand. The trial judge held that the compensable injury should be merged with the preexisting injury, resulting in an award substantially greater than that which would have been given had the right hand alone been considered. The claimant was awarded benefits for a fifty-nine percent permanent partial disability of the body measured by his loss of wage-earning capacity.80

In merger, as in apportionment, there is also some paradox since a preexisting impairment, if combined with a subsequent injury, will always result in a disability materially and substantially greater than that of a subsequent compensable impairment considered alone. It is apparent, however, that the legislative intent was not to compensate for all preexisting impairments in conjunction with later compensable impairments. The key words, which partly resolve the difficulty, are "materially and substantially greater." Although a definitive analysis and application of the doctrine in accordance with the statutory language may not be possible, the Com-

79. 144 So. 2d 813 (Fla. 1962).
80. Although the compensable injury involving the right hand was a scheduled injury, when considering the preexisting injury which at that time required knowledge by the employer (which was obvious), the court properly treated the case as being governed by Fla. Stat. § 440.15(3)(u) (Supp. 1978) dealing with "other cases," i.e., body injuries. For a more recent decision, see Williamson v. Bush & LaFoe, 294 So. 2d 641 (Fla. 1974).
mission's recent decisions have attempted to state the law coherently and to establish guidelines for application of this doctrine.

Several principles have emerged. First, merger is not invariably applied to a compensable injury and subsequent illness or injury. Therefore, those conditions that do merge must be isolated and the prerequisites for such merger must be stated. It had been consistently held that employer knowledge of the preexisting impairment was a prerequisite for merger. In a recent decision, however, Media General Corp. v. Printing Pressmen & Assistant's Union, the commission, in a well-reasoned opinion which traced the state of the law in this area and synthesized it with apportionment, held that knowledge was no longer necessary to apply merger rather than apportionment under section 440.02(18) of the Florida Statutes. Knowledge is still necessary for reimbursement to the employer/carrier from the Special Disability Trust Fund, but it is no longer necessary to achieve full compensation benefits for the claimant. Finally, there must be a finding of merger as distinguished from a mere addition of disabilities. In other words, application of merger requires a showing that the compensable injury magnified and enhanced the preexisting condition or was itself magnified and enhanced by the preexisting condition.

82. See, e.g., Genereux v. Caribbean Concessions, Inc., 211 So. 2d 1 (Fla. 1968).
84. In previous statutes the apportionment provision referred to was Fla. Stat. § 440.02(19) (1935) which has been renumbered Fla. Stat. § 440.02(18) (1974).
85. The Special Disabilities Trust Fund was created by Fla. Stat. §§ 440.49(5)(h)(1)-(2) (Supp. 1978), which provides for maintenance of the fund "by annual assessments upon the insurance companies writing compensation insurance in the state and the self-insurers under this chapter." Sections 440.49(5)(c)-(g) outline the scope of the employer's right to reimbursement from the fund.
86. The Commission pointed out that the purpose of the Special Disability Trust Fund was to encourage employment of the handicapped by reimbursing the employer from the special fund for any excess payments made as a result of the combination of a compensable injury with a preexisting condition. That purpose could be defeated if claimant's entitlement to the benefits of merger were predicated upon a showing of knowledge by the employer. If through the doctrine of merger, greater benefits are given to the injured claimant only where the employer knows of the preexisting condition, the employer will not be encouraged to hire the handicapped, since he will be subjecting himself to the payment of greater benefits with the possibility of recoupment. The purpose would be better served if full benefits were due with or without that knowledge. The employer then, upon a showing of knowledge of the preexisting condition, could seek recoupment from the Special Disability Fund.
Merger was found in *Southeastern Plastering v. DeLucca*, where preexisting gastric problems combined with a compensable leg injury and resulted in a fifty percent permanent bodily disability, measured by loss of wage-earning capacity. Medications necessary for treatment of the leg injury affected and magnified the preexisting gastric conditions, thereby aggravating the disability. In *Special Disability Trust Fund v. City of Gainesville*, the judge found merger where claimant had a preexisting leg impairment and a compensable back injury. The commission reversed, explaining that there was no evidence "that establish[ed] that the claimant's permanent impairment from the prior knee problem was enhanced by the subsequent back injury or that the impairment from the latter back injury was magnified or enhanced because of the preexisting knee impairment." This quotation embodies the current status of the law in its requirements for applying the doctrine of merger.

D. Accident

Central to the Workmen's Compensation Act is the requirement that a compensable injury be the result of an "accident." Accident as defined by statute is "an unexpected or unusual event or result, happening suddenly." In addition, the workmen's compensation law provides that benefits may be due for accidents as defined in section 440.151 of the Florida Statutes (Supp. 1978), entitled "Occupational Diseases."

The judiciary's failure properly to utilize these alternative definitions has resulted in confusion and the establishment of a non-statutory hybrid category referred to as the repeated exposure cases. Confusion is apparent in early cases such as *Meehan v. Crowder*, where a painter, exposed to bichloride of mercury, developed nephritis due to mercury absorption. The Supreme Court of Florida, in awarding compensation, reasoned that the entry of the fumes into the claimant's body was a sudden event. The so-called "exposure" and "repeated trauma" cases also resulted from failure properly to utilize statutory definitions. The Supreme Court, in the leading case
of Czepial v. Krohn Roofing Co., held that a roofer disabled by tuberculosis, caused in part by inhalation of roofing material, had suffered a compensable injury. "[T]he fundamentally accidental nature of the injury is not altered by the fact that, instead of a single occurrence, it is the cumulative effect of the inhalation of dust and fumes to which a claimant is peculiarly susceptible that accelerates a claimant's pre-existing disability." The exposure cases have overtaxed the accident concept by holding that each contact with a deleterious substance is the equivalent to a miniature accident. Similarly, with the so-called "repeated trauma" cases, individual impacts are treated as separate accidents. There is, in fact, no logical reason for the creation of these separate labels since under this analysis, exposure is fractionalized conceptually so as to make it indistinguishable from repeated trauma.

The commission has recently confirmed the repeated exposure hybrid category. In Keller Building Products v. Shirley, the claimant, a carpet installer, was required as part of his occupation, to strike his knee against a "knee-kicker." The claimant gradually developed tiny spurs and a cyst in his knee. The injury was characterized by the commission as within a category of compensable exposures due to repeated traumas. Thus, the commission has expanded the exposure concept to encompass a wide variety of industrial hazards, including many injuries previously subsumed under the repeated trauma doctrine.

A careful reading of the statute reveals that the labels and judicial pronouncements interpreting them are unnecessary. Section 440.151 of the Florida Statutes clearly states that occupational diseases are to be treated as accidents. Section 440.151(2) defines occupational disease as "a disease which is due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation, process or employment." It is clear that the statutory definition of "accident" is not limited to the "unexpected or unusual" standard of section 440.02(18) of the Florida Statutes (Supp. 1978). Once the definition of accident is expanded to include occupational disease, the facts of all of the above cases can

95. 93 So. 2d 84 (Fla. 1957).
96. Id. at 86.
99. "[T]he disablement or death of an employee resulting from an occupational disease as hereinafter defined shall be treated as the happening of an injury by accident ...." Fla. Stat. § 440.151(1)(a) (1974).
100. Id. § 440.151(2).
be dealt with without resort to fictions such as exposure and repeated trauma.

Recent cases still find the commission struggling with the concept of accident and insisting on a demonstrable sudden or unusual event or result as a threshold for recovery. In Daytona-Budweiser v. Shelton, the claimant aggravated a preexisting herniated disc by pushing an unbalanced cart along rough pavement. In Richard Perron Construction Co. v. Neiswonder, the claimant had previously suffered a compensable injury to his back which left him in pain when he did heavy work. Nine months later he sought compensation for a resurgence of pain occasioned by his moving concrete blocks. In both of these cases, the commission relied on Martin Co. v. Carpenter to support their decisions that a sudden event or unusual result was necessary to merit compensation. In Perron, the commission reasoned that "it was clear that his work constituted an aggravation of his condition, but an aggravation does not constitute an accident." In neither of these cases could the precipitating incident have been viewed as sudden. Since aggravation of a back problem through heavy lifting is not unpredictable, the injury cannot be classified as an accident. Moreover, since the injury is not peculiar to the trade, it cannot be classified as an occupational disease.

Compare these two cases with Allied Products Corp. v. Esgro. Repeated exposure by the claimant to inordinate noise in his employment caused a loss of hearing. The commission, stating that the case was controlled by Brito v. Advance Metal Products, Inc., held the loss compensable. In Brito, compensation was provided to a welder who, after years of exposure to smoke, became unable to breathe properly through his nose. The court in Brito relied on Victor Wine & Liquor, Inc. v. Beasley which attempted to clarify the accident concept.

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103. 132 So. 2d 400 (Fla. 1961). In Martin, the court held:

[I]t is not every aggravation of a preexisting condition which is compensable. In the case of aggravation of occupational diseases no accidental injury is required because of the nature of such diseases the aggravation constitutes the accident or the injury. Aggravation of other conditions of the body to be compensable must be the result of an accidental injury and the aggravation cannot constitute an accident.

Id. at 407.
104. I.R.C. Order 2-3417, at 3.
106. 244 So. 2d 428 (Fla. 1971).
107. 141 So. 2d 581 (Fla. 1962).
Disability which results from some exposure peculiar to and constituting a hazard of the employment, operating upon the physical condition of the employee at the time of such exposure, is a compensable injury "by accident" within the meaning of the Act, even though there is no literal "accident" such as a slip or fall.\footnote{108}

There is case law as well as statutory language supporting a less restrictive view of accidental injury. Where the injury can reasonably be viewed as an occupational disease, there is no reason to search for a sudden, identifiable vent or unusual result.

E. Cardiovascular Injuries

The area of heart attack and other cardiovascular injuries has received considerable judicial attention and substantial changes have been made in the decisional law.\footnote{109} This area has been carved out by the judiciary and given its own rules in derogation of the statute. The leading case, \textit{Victor Wine \\& Liquor, Inc. v. Beasley},\footnote{110} held that an internal failure of the heart muscle is no different than the internal failure of any other muscle—an unusual result happening suddenly and therefore within the ambit of a statutory accident. Nevertheless, the court established as their rule that such injuries, when precipitated by work-connected exertion, are compensable only when something additional is shown—unusual exertion.\footnote{111} The basis for this judicial requirement of unusual exertion is never precisely articulated. The denial of compensation is usually justified on the basis that there was no accident within the meaning of the statute. Thus, where a more common type of accident occurs, such as a slip or fall, compensation for the accompanying heart attack is allowed.\footnote{112} There is little doubt, however, that a heart attack fits within the statutory definition of accident as "an unexpected or unusual event or result, happening suddenly."\footnote{113} Apparently, the unusual exertion requirement is really aimed at the statutory requirement of "arising out of employment."\footnote{114}

Recently, the Supreme Court of Florida has made recovery of

\footnotesize{\textsuperscript{108} Id. at 588.}

\footnotesize{\textsuperscript{109} See L. Alpert, supra note 92, §§ 6-5, 7-2.}

\footnotesize{\textsuperscript{110} 141 So. 2d 581 (Fla. 1962).}

\footnotesize{\textsuperscript{111} This rule does not apply where there is an initial showing of the classic type of accident such as a slip and fall. See Reynolds v. Whitney Tank Lines, 279 So. 2d 293 (Fla. 1973); Scott v. Kerr, 156 So. 2d 847 (Fla. 1963).}

\footnotesize{\textsuperscript{112} See cases cited note 111 supra.}

\footnotesize{\textsuperscript{113} FLA. STAT. § 440.02(18) (Supp. 1978).}

\footnotesize{\textsuperscript{114} See L. Alpert, supra note 92, § 6-5.}
compensation for work-related heart attacks even more difficult. In Armour & Co. v. Tintera,113 the trial judge found that an employee had suffered a compensable heart attack which, according to his attending physician, was precipitated by severe, work-related emotional stress. This included long work hours and some difficulty with his manager in the preceding few weeks. The supreme court held that the claimant had failed to meet the unusual exertion test and was, therefore, not entitled to recovery.116 The court in Tintera explained its rationale for denial and cited the companion case of Richard E. Mosca & Co. v. Mosca.117 In Mosca, the supreme court stated: "Emotional strain is too elusive a factor to be utilized, independent of any physical activity in determining whether there is a causal connection between a heart attack or other internal failure of the cardiovascular system and the claimant's employment."118 Claimant Mosca suffered a ruptured aneurysm. The court expanded the use of its unusual exertion test for "heart" cases to cover the cardiovascular system in general. The court thereby receded from its earlier decision in Tracy v. Americana Hotel119 which considered the same issue but held that the court's unusual exertion test was limited to heart attacks and did not apply to other types of injuries.

Further understanding of the present state of the court's "rule"120 is gleaned from the decision in Richards Department Store v. Donin121 decided shortly after the Mosca and Tintera decisions. Claimant Donin, after working for approximately five months, had both his work load and work-related stress increase as a result of poor sales. The trial judge held, and the commission affirmed, that the combination of these elements over the course of seven weeks

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115. 362 So. 2d 1344 (Fla. 1978).
116. Id. at 1346. In support of his finding that the employee had suffered a compensable cardiovascular injury, the Judge of Industrial Claims cited Barlow v. Harbour Island Spa, 4 F.C.R. 253 (1960), cert. denied, 139 So. 2d 879, rehearing granted in part, 139 So. 2d 879 (1962) (compensability affirmed on rehearing and remanded for apportionment). In Barlow, claimant had engaged in heated arguments with the general manager for several months prior to his heart attack as well as on the day of the attack. On that day, he had become extremely upset, and within one-half hour after the last argument, the claimant felt pains in his chest and was hospitalized with a heart attack. Although Victor Wine & Liquor, Inc. v. Beasley, 141 So. 2d 581 (Fla. 1971), was decided two days before the Barlow case, the supreme court in Tintera, as well as the Commission, seem to agree that Victor Wine had "overruled" the Barlow decision.
117. 362 So. 2d 1340 (Fla. 1978).
118. Id. at 1342.
119. 234 So. 2d 641 (Fla. 1970).
120. It is euphemistic to call the court's unusual exertion requirement a rule. The court has applied the requirement in a totally arbitrary manner as can be seen from the results in the Barlow, Tintera, Tracy and Mosca cases.
121. 365 So. 2d 385 (Fla. 1978).
had resulted in a heart attack and compensation was allowed. The Supreme Court of Florida reversed, stating that the claimant's "theory of compensability is founded upon the fact that his myocardial infarction was precipitated by a series of unusual, non-routine, work-related, emotionally traumatic events and circumstances compressed within a specific period of time, rather than a single isolated event." The court, under its test, required a showing of unusual strain or overexertion which was not routine to the type of work the employee was accustomed to performing. It is apparent from the above decisions that by court rule, cardiovascular injuries must meet greatly increased requirements for compensability. The questions as to what ultimately falls within the court's view of the cardiovascular system and thereby precipitates establishment of additional court-created criteria for compensability, and as to what would then satisfy the criteria remain to be answered in future decisions.

F. Average Weekly Wage

Many recent decisions deal with a myriad of frequently occurring problems in this area. By statute, the average weekly wage is determined by calculating average wages in covered employment during the thirteen weeks immediately preceding the accident. Pension contributions by the employer are included as wages under this section. Also included in wages are bonuses paid after the accident but attributable to the three months preceding its occurrence, as well as tips. The primary issue in the latter area is whether just the formally reported tips or the actual tips received are included. Generally, only the former are included unless the employer has no formal reporting method or the employer, recognizing greater receipt of tips, nevertheless encourages the employee to report only partially the amount of tips. Wages of the preceding thirteen weeks include wages with the same or another employer.

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122. Id. at 3.
123. The very nature of stress is cumulative, whether the time over which it accrues be seconds, minutes, hours, days or weeks. There is nothing within human experience which can be described as instantaneous stress. At what point the court's test is met, in terms of the physical measure of PSI's within a particular time period, remains to be seen.
Thus, a claimant who held a job full-time and was injured the first day on his part-time job was entitled to compute his average weekly wage based upon both his part-time wages plus his average weekly wage on the full-time job. If an employee has worked for a substantial part of thirteen weeks, but previously had a record of taking long breaks from work, a question is presented as to whether the claimant should be treated as a full-time worker or as a part-time worker, under the separate provision governing part-time workers. Zins v. Saxony Hotel involved a worker who had actually worked thirteen weeks on a full-time basis before his accident; the employer/carrier contended that claimant worked seasonally and sought to have him treated as a part-time worker. The court held that an individual who had worked thirteen weeks before his accident is not a part-time worker. Perkins v. Heller Brothers Packing Corp. involved an individual who had worked only part-time during the seven weeks before his injury, thus satisfying one of the statutory requirements for classification as a part-time worker. The court held, however, that Perkins did not fall within the part-time worker subsection because there was no intent that he be a part-time worker, a further requirement under the statute. In the case of a minor, there is a somewhat vague provision allowing for an enhanced determination as to average weekly wage if it is established “that under normal conditions his wages should be expected to increase during the period of disability.” It is unclear whether “disability” in this section was intended to be used in the sense of continuance of the physical disability, which may be for a lifetime,

131. The applicable statutory provision states:
If it be established that the injured employee was a part-time worker at the time of the injury, that he had adopted part-time employment as his customary practice, and that under normal working conditions he probably would have remained a part-time worker during the period of disability, these factors shall be considered in arriving at his average weekly wages. For the purpose of this subsection the term “part-time worker” means an individual who customarily works less than the full-time hours or full-time workweek of a similar employee in the same employment.
Fla. Stat. § 440.14(6) (1977). These requirements are in the conjunctive. Thus, although it may have been true that claimant Zins only wanted to work seasonally, one requirement for application of this subsection—that the injured employee was a part-time worker at the time of the injury—was absent in this case.
or the maximum allowable number of weeks for the particular disability.

The manner and method of establishing the expected increase and the extent of necessary proof are also unclear. In *American Plastics & Packaging, Inc. v. McCann,* the commission found it unnecessary to deal with the disability issue. It was also unnecessary to define a method of establishing “expected increase” because the trial judge accepted uncontroverted proof that prior to the accident claimant had been offered a specific job in another field at a wage entitling him to the maximum compensation rate in effect at the time of his accident. The trial judge determined that the offered employment was at a rate entitling claimant to the maximum compensation rate and his award of compensation benefits at that rate was accordingly affirmed. The degree of proof necessary, absent the unusual circumstances of a specific job offer prior to the accident, remains unclear.

G. Offsets to Payment of Compensation

Compensation payments by the employer may be offset by the employer’s payment of other benefits such as social security and unemployment compensation. Wages paid by the employer in excess of the amount due for any given week are also deducted from workmen’s compensation benefits.

1. Social Security Benefits

Effective July 1, 1973, the Florida Legislature shifted to Florida employers and their insurance carriers the social security benefit given to workmen’s compensation claimants. Previously, an individual receiving workmen’s compensation benefits could also receive social security benefits, but not in excess of eighty percent of the claimant’s preexisting wage as computed under applicable federal law. In establishing the Florida offset, the legislature provided that the combined workmen’s compensation and social security benefits could not exceed eighty percent of the employee’s weekly wage, presumably as defined by Florida law, with any reduction of benefits to maintain that percentage benefiting the Florida em-

135. Since the claimant’s eye injury was a scheduled disability, the question as to the exact amount of the claimant’s average weekly wage became moot once it was determined to be such as to entitle him to the maximum compensation rate.
ployer/carrier. This change may result in a different dollar amount for combined benefits than had been previously allowed since there is a different method for determination of the base wage under social security law and under Florida law. The statute provides no offset in connection with benefits paid after the employee reaches the age of sixty-two.\(^{137}\) The questions to be asked are exactly which social security benefits are offset and for how long, as well as by what manner and method the employer/carrier may effectuate this offset.

Another significant issue is the payment of benefits to dependents of an injured worker and the inclusion of these payments in the offset. \(Oroweat\) \(Foods\) \(Co.\) \(v.\) \(Valle\)\(^{138}\) interpreted the statutory language: “such total benefits otherwise payable for such period to the employee.”\(^{139}\) The majority, in denying offset, presumably relied on a strict construction of the language “payable . . . to the employee.” The dissent placed greater emphasis on the language “such total benefits” and reasoned that the legislative intent was that there be an offset for payment of benefits to dependents.

An additional question arises as to whether the yearly five percent supplemental increase to permanent total disability employees\(^{140}\) should be included in the offset determination. This provision was adopted in part to rectify the problem which substantial inflation creates for permanent total disability employees locked into an unrealistically low compensation rate at the time of their injury. This section accordingly provides an increase to permanent total disability employees from a separate fund amounting to five percent per year as applied to their compensation rate. The purpose of this section is defeated for those individuals receiving social security benefits if the supplemental benefits are considered subject to an offset. \(Thomas\) \(v.\) \(City\ of\ Vero\ Beach\)\(^{141}\) held these supplemental compensation payments are subject to the offset provisions. In addition to this decision, the statute was amended, effective July 1, 1977, to specifically include these benefits under the offset provisions.\(^{142}\)

There is also the question as to the manner and method by which the employer/carrier takes the social security offset. The injured employee is required, upon demand of the employer/carrier,
to authorize the Social Security Administration to release disability payment information. Willful refusal subjects claimant to the penalty of termination of payment of workmen’s compensation benefits. Judicial decisions have permitted the employer/carrier to proceed administratively to take this offset, with the claimant having the right to later challenge the amount of payment being made. These determinations are in accordance with the self-executing intent of the workmen’s compensation law, leaving the employer/carrier to determine the benefits due or not due, and giving a claimant the right to file, claim and seek a hearing when a dispute arises. If the employer/carrier is proven wrong and seeks or takes a greater credit than that allowed, a claimant employing an attorney may recover attorney’s fees.

2. UNEMPLOYMENT COMPENSATION BENEFITS

Effective July 1, 1977, an offset was allowed against payment of temporary total disability benefits for an injured employee receiving unemployment compensation. Effective July 1, 1978, this offset included an offset for a claimant receiving permanent total disability benefits. Prior to these statutory enactments it had been held that an individual could receive both temporary total disability and unemployment compensation benefits.

3. CREDITS FOR OVERPAYMENT

A somewhat related area does not technically involve an offset but rather a credit where payment of wages or compensation has been in excess of that ultimately found due on a weekly basis. The leading decision in this area is Schel v. City of Miami. The City of Miami continued to pay claimant’s customary wage and sought

144. Town Drug Inc. v. Maples, I.R.C. Order 2-3389 (Fla. Indus. Rel. Comm’n Apr. 5, 1978)(S), involved an offset claim in which the Commission held that there was insufficient evidence to determine the offset. The decision noted, however, the right of the carrier to such an offset at a later time. See also Winter Garden Citrus Prods. v. Huffstutler, I.R.C. Order 2-3563 (Fla. Indus. Rel. Comm’n Oct. 6, 1978)(S), where the Commission noted that the carrier can administratively take a social security offset.
145. See note 144 supra.
146. See note 37 and accompanying text supra.
150. 193 So. 2d 170 (Fla. 1966).
a credit against further payments for payment of benefits in excess of the weekly compensation rate due. The procedure violated the compensation scheme which provided for weekly payments at a particular rate, with excess payments amounting to an advance requiring the approval of a judge. The court held that no credit was due.151

A deliberate attempt to circumvent the intent of the workmen's compensation law and its method of payment, as in Schel, should not give rise to a credit. The situation, however, where payment of compensation within the amounts of allowable weekly compensation, but in excess of the particular rate ultimately found due the injured employee, presents more difficult problems. Holiday Inn v. Stratford152 seems to indicate that a credit may be due, if at all, for an overpayment against a similar classification of benefits ultimately found due. Thus, excess payment of compensation for temporary benefits above the employee's particular compensation rate may only be utilized as a credit against additional temporary benefits found due and may not be utilized as a credit or offset against further permanent benefits.

Diplomat Hotel v. Diplomat Hotel153 involved payment of temporary benefits in excess of the rate required for a considerable period of time. At the hearing, several years after the accident and after payments were made, the carrier contended for the first time that payments were due at a lesser rate and sought a credit for further payments due. The commission cited Schel in affirming denial of the credit and held a credit not due except to the extent that payments "in the amount of and within the time for disability compensation of that class ultimately found to be due."154 The award of additional temporary partial benefits involved a different period of time than the one for which benefits were previously paid and there was no award for permanent benefits.

It is suggested that the statutory provision155 covering reimbursement from unpaid installments of compensation where there had been an advance payment of compensation should be interpreted to mean only authorized advances. Rather than holding the

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151. The issue centered around Fla. Stat. §§ 440.20(11)(a), (12) & (13) dealing with advances, advanced payment of compensation and excess payments, which the statute deems gratuities. These areas, presently covered by statutory provisions, were previously handled by judicial rule.


154. Id. at 7 (citing Schel v. City of Miami, 193 So. 2d 170, 172 (Fla. 1966)).

employer/carrier to instantaneous exactness, it is suggested that they be given a reasonable time to determine the exact compensation rate and make corrections. The decisions, however, are in accord that where excess payments are made over a prolonged period of time, it is violative of the workmen’s compensation scheme to then allow a credit against further benefits.

H. Procedure

Several recent procedural decisions are of interest. In *O.H. Development Corp. v. Tejera*,¹⁵⁶ serial hearings were held over a long period of time. It was held that the Judge of Industrial Claims had erred in adjudicating the cause based upon evidence developed after the first hearing. A claim was made for permanent total disability and the evidence, as found by the judge, reflected that the claimant had not reached that point until a few months after the first hearing. When the Judge of Industrial Claims finally determined the cause, it awarded permanent total benefits effective at a point in time beyond the commencement of the first hearing. The decision appeared to resolve the perplexing problem in serial hearings of new evidence gathered by one of the parties after the issues had been framed at the first hearing.

More recently, the decision in *Ivey v. Universal Lathing Co.*¹⁵⁷ purported to apply the *Tejera* principle by refusing to consider a portion of a physician’s opinion based on a post-hearing examination. The commission reversed, stating: “The entire purpose of these proceedings in workmen’s compensation is a search for truth—truth of a dynamic and vital sort, not those stale slices of yesterday’s news.”¹⁵⁸ Another recent decision, *Bridge Lumber Co. v. Altman*,¹⁵⁹ involved a post-trial hearing described by the commission as a “continuance” for the sole purpose of allowing the employer/carrier to present medical witnesses and a vocational expert. The employer/carrier sought to expand the scope of the subsequent hearing by presenting surveillance films taken subsequent to the original hearing as rebuttal evidence. The Judge of Industrial Claims refused to allow the presentation of that evidence. The trial judge had refused on the grounds that the case was continued only for presentation of the two expert witnesses. Affirmance on that

¹⁵⁸. Id.
ground alone would have left the law with two directly contrary lines of precedent. Instead of clarifying the law, the commission's opinion created further inconsistency by carefully stating that its holding should not be construed to preclude altogether the admission of evidence obtained after commencement of a hearing and specifically stated that it was within the discretion of the judge. The synthesis of these decisions is that (1) it is error to decide a case on evidence obtained after commencement of the first hearing (Tejera); (2) it is error not to consider evidence obtained after the first hearing (Ivey); and (3) the trial judge can or cannot accept evidence obtained after the first hearing in the permissible exercise of his discretion (Altman).

Another area of confusion concerns the procedures connected with approval of settlement and interested parties in connection therewith. Lucerne General Hospital v. Thomas involved settlement proceedings between claimant and the carrier over a substantial outstanding hospital bill. The hospital learned of the settlement proceedings and sought to intervene. Admittedly, there was an appealing fact situation for hospital intervention due to the size of the hospital bill and the lack of any provision in the compensation settlement for direct payment. The hospital would have been relegated to collection from the claimant had they not been permitted to intervene. The commission held that the hospital had definitely become an interested party, pursuant to section 440.20(10) of the Florida Statutes, and that it was error to exclude them as such.

It is unclear whether every known interested party need be given notice of the washout or whether the opinion is limited to their ability to intervene upon receiving knowledge. If the decision as to the right of intervention is correct, it would seem to follow that notice must be furnished to a broadly defined class of parties. If that is, in fact, the state of the law, then the area of settlement in disputed liability cases may become so cumbersome as to compel judicial decision.

IV. Conclusion

Some legislative changes of significance, aimed at effectuating a reduction in payment of benefits, were enacted in the 1978 legislative session. Of greater significance was the policy decision to require an injured workman to pay a portion of his attorney's fees even though such fees are due only where there has been a failure volun-

161. Id. at 5.
tarily to provide benefits ultimately found to be due. In addition, an entire revamping of the workmen's compensation scheme is a possibility in the next legislative session. The judiciary has continued the trend pointed to in the previous survey; i.e., considerably restricting the range of compensable consequences and closely scrutinizing entitlement to and awarding of attorney's fees.

The recent developments in workmen's compensation law reflect, both legislatively and judicially, a narrowing of the range of compensable injuries, a reduction of benefits and a restriction of the ability of the injured workman to obtain effective counsel to represent him in obtaining benefits. The latter is probably the most serious change, since the ability to obtain such counsel has, in the past, been the only meaningful enforcement mechanism in workmen's compensation law.