Workmen's Compensation

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I. INTRODUCTION

This eleventh survey covers the legislative changes in the Workmen's Compensation Act\(^1\) which were adopted by the 1972 and 1973 sessions of the Florida Legislature, and all related reported judicial decisions since publication of the last survey.\(^2\)

The 1972 legislature adopted six amendments to the Workmen's Compensation Act. Section 440.01(1)(b)(c) was amended to include officers elected at the polls within the definition of employment, the amendment becoming effective November 10, 1972. Section 440.12(2)(3) was amended to increase maximum weekly compensation for disability resulting from injuries occurring after June 30, 1972, from $56 per week to $66 per week; and the minimum was increased from $12 to $20 per week. Section 440.44(2) was amended with respect to the fund from which salaries of members of the Industrial Relations Commission are paid and subsections (3) and (4) were amended to delete the requirement that the Chief of the Bureau of Workmen's Compensation be an attorney.\(^3\) Section 440.56(3) was changed to eliminate the necessity of a public hearing.

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1. Member of the Florida Bar.
2. The previous survey includes Florida cases appearing in volumes 219 through 250 of the Southern Reporter, Second Series, and laws enacted by the 1970 and 1971 sessions of the Florida Legislature.
3. The effective date of this amendment was March 31, 1972.
when the Division of Labor and Employment Opportunities adopts certain non-discretionary rules or requirements in accordance with a federal rule or mandate.

The 1973 legislature broadened the coverage of the Workmen’s Compensation Act to include all private employments in which one or more employees are employed by the same employer.\(^4\) Section 440.09(4), which permitted a reduction of pension benefits by an amount equal to workmen’s compensation benefits paid at the same time by the state or any political sub-division thereof or public or quasi-public corporation on account of the same injury, was repealed. Section 440.12(1) was amended to permit payment of compensation for the first seven days of disability, if the injury results in disability of more than 14 days. Previously, the statute required that the disability exceed 21 days before compensation would be payable for the first seven days. This section was further amended to increase the maximum weekly compensation payments from $66 to $80 per week. The foregoing amendments were effective July 1, 1973.

Newly enacted and effective July 1, 1973, is a section allowing a reduction in workmen’s compensation benefits to the extent that the combined total of social security benefits and workmen’s compensation benefits paid by the same employer exceed 80 percent of the employee’s average weekly wage.\(^5\) The reduction of compensation benefits is not applicable once the injured worker reaches the age of 62 years. The amendment permits flexibility in the event of a federal deduction or increase in the percentage of average earnings permissible. It further provides that no reduction of compensation can take place until the Social Security Administration has determined the amount of social security payable and the employee actually has begun to receive the benefits thereof.

Section 440.16 was amended to increase the allowable amount payable for funeral expenses from $500 to $1,000,\(^6\) and death benefits from $15,000 to $25,000 (with elimination of the 350 week limitation).\(^7\) The allowable percentages of average weekly wage for a widow and widower, if there are no children, was increased from 35 percent to 60 percent.\(^8\)

Insurance carriers writing workmen’s compensation insurance are now required to file a written notice within ten days after the issuance of a policy or contract of insurance or renewal certificate with the Division of Labor and Employment Opportunities;\(^9\) and employers who do not secure the payment of compensation may now be enjoined from employ-

\(^4\) FLA. STAT. § 440.02(1)(b)(2) (1973). Previously coverage was limited to private employments in which three or more employees were employed.
\(^6\) FLA. STAT. § 440.16(1) (1973).
\(^7\) FLA. STAT. § 440.06(2) (1973).
\(^8\) FLA. STAT. § 440.06(2)(a),(b) (1973).
\(^9\) FLA. STAT. § 440.36(4) (1973).
ing individuals or from conducting business until such payment has been secured. Section 440.42(2) was amended to prohibit expiration or cancellation of workmen's compensation insurance policies until at least 30 days have elapsed after a notice of cancellation has been sent to the Division and employer. Furthermore, in cases where there is coverage by two or more workmen’s compensation carriers for one employer, section 440.42(2) creates a presumption that the policy with the later effective date shall be enforced and that the earlier policy terminated upon the effective date of the latter. Should both policies carry the same effective date, the amendment permits cancellation by the insurer instantly upon the filing of a notice of cancellation with the Division, and service of a copy upon the employer.

Judicial activity decreased somewhat during the period surveyed. Seventy-two opinions dealing with workmen's compensation were handed down by the Supreme Court of Florida during this period. Additionally, the district court of appeal decided 12 cases which dealt primarily with subrogation rights and third-party claims. Significant Industrial Relations Commission decisions were affirmed by the Supreme Court of Florida without opinion and will be mentioned during this survey. The presentation of case law will follow the topical indexes utilized in prior surveys with elimination of topics where no judicial activity has taken place. The period surveyed established no activity regarding the Special Disability Fund or the doctrine of apportionment.

II. Heart Cases

The classification of case law into two separate categories regarding compensable heart attack situations was summarized in Reynolds v. Whitney Tank Lines. In that case, the claimant sustained two separate accidents resulting in physical injuries following which he developed pain and shortness of breath. He was eventually hospitalized and found to be suffering a myocardial infarction. The Judge of Industrial Claims found the heart attack to be the result of the accidents based upon the testimony of the claimant, the claimant's wife, and a physician, the combination of which was found to be sufficient to support causal relationship between the second accident and the heart attack. In affirming the award, the court pointed out that the heart attack was the result of an accident and, therefore, compensable.

This type of heart attack was distinguished from the second category of compensable heart attacks which do not result from an accident but, rather, result from unusual stress or strain on the job. An interesting factual situation resulted in an award of additional benefits based upon a subsequent heart attack in Arroyo v. Crown Hotel. There, the claimant

11. 279 So. 2d 293, 296 (Fla. 1973).
12. 275 So. 2d 226 (Fla. 1973).
sustained injuries to his neck, back, left shoulder, and abdomen as a result of a work-related accident. He was awarded an eight percent permanent partial disability to the body and returned to work for the same employer. While engaged in this subsequent employment as a busboy, the claimant became apprehensive because the employer was short a number of bus-boys, thereby requiring the additional work load to fall upon the claimant. While the claimant was in this pained and emotionally upset state, a table guest began complaining bitterly to him and exchanged what he considered to be very obscene, nasty, and upsetting remarks. The claimant then developed a sudden onset of severe chest pain. It was noted that the claimant, during periods of extreme anxiety in the previous months, had developed short periods of chest pain. The Judge of Industrial Claims modified the prior award of eight percent and awarded additional compensation based upon the development of a cardiac neurosis which was found to be causally related to and directly attributable to the claimant’s employment with the Crown Hotel. The reversal by the Industrial Relations Commission based upon lack of “accident” was quashed by the supreme court, which found competent substantial medical evidence to indicate that the claimant’s preceding industrial injury, disability or condition was worsened by the conversion reaction brought on by stress and excitement occurring on the job. In Soloff v. U-Totem, Inc., two subsequent heart attacks which followed an original compensable heart attack were found to be causally related thereto, and an award of additional disability benefits based upon permanent total disability was upheld.

III. Disability Benefits

A. Occupational Diseases

In Phelps v. Gunite Construction & Rentals, Inc., an award of 20 percent permanent partial disability of the body based upon contact dermatitis found to be the result of the claimant’s occupation was upheld. In this case, the opinion dealt primarily with the greater degree of proof necessary to sustain a compensation order for occupational disease.

In Caropreso v. Publix Super Markets, a claimant was found to have sustained an aggravation of a pre-existing condition as a result of occupational disease. In that case, the claimant’s occupation required that he immerse his hands in ice water and also that he work in rooms with temperatures of 40 to 50 degrees and go into a room where it was 34 degrees to handle cold vegetables. The medical opinion established that the exposure to cold aggravated a pre-existing collagen disease. The award of permanent total disability based upon occupational disease in terms of

13. 257 So. 2d 31 (Fla. 1971).
14. 279 So. 2d 829 (Fla. 1973).
15. 277 So. 2d 279 (Fla. 1973).
aggravation was upheld. A similar result occurred in *Dillow v. Florida Portland Cement Plant*, wherein the inhalation of cement dust was found to have aggravated lung cancer. However, in *Brooks v. State Department of Transportation*, a skin irritation diagnosed as miliaria rubra, a disorder often called heat rash, was held not to be due to occupational disease or accident, the claimant having failed to meet the burden of proof required by statute to establish an occupational disease.

B. Scheduled Disability Benefits

The statutory limitation of disability benefits in scheduled injuries to a designated number of weeks or portions thereof and case law applicable thereto, were detailed in the Industrial Relations Commission decision of *Bush & LaFoe v. Williamson*. There, the Industrial Relations Commission reversed an order of the Judge of Industrial Claims wherein an award of 30 percent permanent partial disability of the body as a whole was granted to a claimant who sustained two separate scheduled injuries (25 percent disability of right foot and ten percent disability of left foot) from the same accident. In addition to citing the statute, the majority opinion summarized prior case law establishing the binding effect of scheduled allowances and method of determining the amount of compensation allowable for permanent disability to scheduled members.

However, when the effect of the scheduled injury is such that an injured workman's entire wage earning capacity is destroyed, the effect of the scheduled disability is not binding and an award of permanent total disability benefits may be made. An attempt to escape the effects of the schedule proved unsuccessful in *Sweeting v. Cohen-Ager, Inc.* In that case, the claimant sustained a 30 percent permanent partial disability to his left leg. Although the claimant also suffered an anxiety reaction, it was found that the anxiety reaction was not disabling and not in need of treatment, thereby limiting the claimant to permanent disability benefits for the injured leg.

C. The Body as a Whole: Disability Benefits

An award of 20 percent permanent partial disability based upon wage earning capacity loss was upheld in *Woodard v. Dade County Board of Public Instruction* wherein the claimant sustained bodily injuries as a result of a fall. Although still employed at the same job and

16. 258 So. 2d 266 (Fla. 1972).
17. 255 So. 2d 260 (Fla. 1971).
18. FLA. STAT. § 440.151(2) (1973).
20. Industrial Relations Comm'n decision 2-2323 (Sept. 11, 1973).
21. See dissenting opinions for contrary view.
23. 257 So. 2d 544 (Fla. 1972).
24. 278 So. 2d 620 (Fla. 1973).
receiving the same salary, the evidence established that the claimant was physically limited, was doing lighter work, was losing time from work, and suffered a resultant loss of job security. In affirming the award, the court again summarized the factors and prior decisions regarding wage earning capacity loss.

Two permanent total awards were affirmed which resulted from bodily injuries. In *Gibson v. Minute Maid Corp.* the physical injury to the claimant's back resulted in a 15 percent anatomical disability. Again, in affirming the award of permanent total disability, the court reviewed prior decisions bearing upon factors to be considered in arriving at wage earning capacity loss. Competent substantial evidence was found to exist and the award of permanent total disability affirmed in *Smith v. Lake Butler Groves, Inc.* There, the Industrial Relations Commission had reversed and remanded the cause to the Judge of Industrial Claims for further findings. In quashing the order of the Industrial Relations Commission, the supreme court held that it would be a waste of time and money to remand the cause for a more complete statement of findings when review of the record amply supported the award of permanent total disability benefits.

D. Death Benefits

The constitutionality of the Workmen's Compensation Act insofar as it relates to compensation for death was challenged in *Mullarkey v. Florida Feed Mills, Inc.* The basis of the attack concerned the death of an employee who left no surviving dependents. The action was brought by a parent, individually and as administrator of his deceased minor son's estate. In a split decision, the court held the death benefit provision to be constitutional under the theory that the employee, by his own voluntary act, chose to bind himself and his representatives and survivors in the event of death to the provisions of the Workmen's Compensation Act.

IV. Medical Benefits

Failure of a claimant to make express vocal request of an employer or carrier for a particular treatment is not solely determinative of the employer's or carrier's obligation to pay for medical expenses incurred if the nature of the injury requires such treatment and the employer has knowledge of the injury and did not provide the treatment. This is the holding in *Lance v. Witters Construction.* In that case, the claimant had received treatment at an osteopathic hospital from which he realized some benefit. Subsequently, he came under the care of a medical physician who

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25. 251 So. 2d 260 (Fla. 1971).
26. 275 So. 2d 229 (Fla. 1973).
27. 268 So. 2d 363 (Fla. 1972).
28. 270 So. 2d 4 (Fla. 1972).
performed two separate spinal operations. The claimant did not improve and asked the operating surgeon if he would approve a chiropractor for treatment. The operating surgeon expressed no objection thereto but stated that he would not recommend it. The claimant obtained chiropractic care from which he received some temporary relief. The award of payment for the chiropractic care was upheld. In Miller v. Tribune Co., the principles in the Lance case were again restated and payment of all unauthorized medical examinations ordered. However, employer responsibility was based upon equitable considerations, the employer having accepted the unauthorized medical doctor's opinion regarding disability.

An injured workman's right to refuse surgery was discussed in Henderson v. Booth. It was there held that a requirement of a fear of death to render a refusal to undergo surgery reasonable is an improper test and that fear of loss of ambulation can be sufficient to render the refusal to undergo major surgery reasonable. Additionally, the burden was placed upon employers and carriers to show unreasonableness and the decision as to reasonableness was left to the Judge of Industrial Claims.

V. COVERAGE

The nature of the employment and duties performed were determinative of coverage under the Workmen's Compensation Act and were controlling in Pebble Hills Plantation v. Alexander. In that case the Judge of Industrial Claims had denied coverage to an employee held to be a domestic servant. In reversing and remanding the cause, the majority of the Industrial Relations Commission pointed out that the law exempts domestic servants in private homes and that the exclusions in the Workmen's Compensation Act are to be given limited scope by restrictive interpretation. It was there held that under the evidence, the claimant was engaged as a caretaker and grounds keeper for the employer and that this activity was not exempted employment.

An attempt to deny coverage to an injured "husband" was denied in Muzika v. Butler Enterprises, Inc. There, the claimant worked for a corporation in which the claimant's wife was an active officer. Other than meals, the petitioner received his remuneration through the pay check of his wife when he commenced work, the paycheck being placed in their joint account each month. In reinstating the award of benefits, the court held that the injured husband would qualify for compensation by the meals which were furnished, even if the monetary reimbursement through the wife were discounted.

In Tipper v. Great Lakes Chemical Co., a claimant was requested

29. 275 So. 2d 242 (Fla. 1973).
30. 281 So. 2d 350 (Fla. 1973).
32. 269 So. 2d 353 (Fla. 1972); Rosenbush v. City of N. Miami Beach, 281 So. 2d 298 (Fla. 1973) (volunteer policeman who received no salary held covered).
33. 281 So. 2d 10 (Fla. 1973).
by a police chief to assist in preventing deadly gas from escaping cylinders which had been strewn over a roadside following an automobile accident. The claimant had experience in handling deadly gas and while assisting in the emergency and as a result thereof was injured. The owners of the truck which was carrying the gas were held to be the employers of the claimant for the purposes of workmen's compensation coverage under the theory of an implied contract of employment.

The lack of apparent contract, either written or verbal, between a claimant and his employer by which the employer would become civilly liable was not controlling in the case of Air Control Industries v. Sechrest. There, the element of control was held to be the determining factor in distinguishing the relationship of an independent contractor from that of an employee. A denial of coverage was reversed where a contract existed between the parties which declared the relationship to be that of an independent contractor, but where the evidence established the claimant to be continuously on call and under the direction and control of his employer.

Through an advisory opinion, the Supreme Court of Florida reviewed an alleged waiver of exemption from coverage and ultimately determined that a claimant who was killed in an aircraft crash was not covered by the Florida Workmen's Compensation Act where the record affirmatively disclosed that the airplane trip provided on the day of the accident was furnished as a convenience to the employee rather than as an expressed or implied part of the employment contract between the parties.

During the period surveyed, a lunch break accident which occurred while the claimant was driving a company truck upon which was painted a company advertising display and which the claimant was authorized to use as transportation in obtaining lunch was held compensable; a death occurring to a claimant who was involved in a vehicular accident while driving his own vehicle, but on special call to return to the employer's premises, was held compensable; injuries sustained in an assault by a superintendent who had discharged the claimant, although the event occurred away from the job site before working hours and the superintendent was not the claimant's immediate supervisor, were found compensable; injuries incurred by an aggressor in an altercation occurring after a cooling off period were held not compensable; and injuries sustained while a claimant was on a concurrent or dual purpose mission consistent with the remedial purpose of the Workmen's Compensation Act was, therefore, compensable.

34. Industrial Relations Comm'n decision 2-2293 (Mar. 21, 1973).
37. Reynolds v. Ferman Oldsmobile Co., 259 So. 2d 133 (Fla. 1972).
38. Feltner v. Southern Bell Tel. & Tel. Co., 274 So. 2d 530 (Fla. 1973).
40. Dudley Forming Serv., Inc. v. Telley, 257 So. 2d 35 (Fla. 1971).
The effect of false representations in procuring employment as a complete bar to coverage under the Workmen's Compensation Act was considered in two separate cases. In *City of Miami v. Ford*, the claimant obtained a job with the City of Miami as a garbage collector and specifically stated to the employer's medical secretary that he had never been involved in a motor vehicle accident and had never had a fracture or a broken bone. In fact, the claimant had suffered a broken ankle, which was repaired by insertion of a metal pin. Some two years later, the claimant sustained injury to the same foot when the sanitation truck on which he was riding went into a hole and the claimant's foot was bent backward against the brace of the rear platform. Medical testimony established the claimant's injury was due primarily to the pre-existing weakness of the left ankle. A denial of compensation benefits was upheld. In the second case, the claimant lied or omitted information relating to an earlier on-the-job injury with an employer whose name was also omitted. In the application, he denied ever having been previously injured and failed to complete the blank space for physical defects. The supreme court upheld the reversal by the Industrial Relations Commission of the Judge of Industrial Claims' denial of benefits on the basis that there was no evidence that the accident, which the claimant sustained in his present employment, would not have caused injury without the prior accident, and upon the additional factors that there was no evidence that the claimant was suffering any disability due to his prior injuries, and that the employer had already hired the claimant and, thereafter, requested the claimant to complete a pre-employment application. This latter chronological sequence was found sufficient to destroy the employer's argument of reliance upon the misrepresentation in hiring the claimant.

VI. THE COMPENSABLE ACCIDENT

Cataracts which developed in the eyes of a claimant who was required to look into electric furnaces which generated temperatures of 24,000 to 27,000 degrees to determine the proper color of materials being treated in the furnaces were held compensable under the theory that the cataracts were caused by the infrared radiation to which the claimant was exposed on his job. In reversing a denial of benefits, the court stated: "The accidental nature of an injury is not altered by the fact that, instead of a single occurrence, the injury is the cumulated effect of a series of occurrences."44

A fractured skull occasioned by a fall was held not compensable in *Federal Electric Corp. v. Best*.45 There, the original fall was due to a fainting spell which was not work related. The evidence established that

42. 252 So. 2d 228 (Fla. 1971).
44. Worden v. Pratt & Whitney Aircraft, 256 So. 2d 209, 210 (Fla. 1971).
45. 274 So. 2d 886 (Fla. 1973).
there was no compensable accident arising out of the employment and no hazard of employment contributing to the injury.

VII. STATUTE OF LIMITATIONS

The decisions during the period of this survey bearing upon the statute of limitations concerned attempts to revive the limitation period which had already run. In *Brown v. Giffen Industries*, the claimant alleged that a check issued two and one-half years earlier had been lost and demanded reissuance of the check. Claim was then made but the statute of limitations would run from the last payment of compensation, which would be the reissued check. It was held that the statute of limitations had run and that neither the re-issuance of a lost or misplaced compensation check nor the holding of a compensation check for a period of time after delivery would act to revive or toll the statute of limitations. In *Dean v. McLeod*, an award had been entered and a subsequent petition for modification denied. Thereafter, a second petition for modification was filed and the statute of limitations raised as a defense thereto. The claimant urged that the filing of the second petition for modification was timely in that it was filed within two years from the time of entry of the order denying the first petition for modification. In rejecting the argument and holding that the statute of limitations had run, the court held that the interpretation of the claimant would allow the tolling of the limitation period by the filing of any petition for modification, however frivolous, and would render the statute of limitations totally void.

VIII. THE JUDGE OF INDUSTRIAL CLAIMS

The most significant of all decisions entered during this surveyed period was the 1973 supreme court decision of *Pierce v. Piper Aircraft Corp.* Prior to this decision, a long series of reversals and remands took place based upon the failure of the Judge of Industrial Claims to make adequate findings of fact on issues presented. What constituted “adequate findings” was always subject to interpretation on a per case basis at the appellate level. Reversals and remands by the Industrial Relations Commission customarily found their way to the Supreme Court of Florida, thereby increasing the case load of the court. All too frequently, the court found the findings of the Judge of Industrial Claims adequate under its prior holdings and was critical of the Industrial Relations Commission for its reversal of the award or denial of benefits. Prior surveys noted the expansion and increase of power and authority of the Judges of Indus-

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46. 281 So. 2d 897 (Fla. 1973).
47. 270 So. 2d 726 (Fla. 1972).
48. 279 So. 2d 281 (Fla. 1973) [hereinafter referred to as *Pierce*].
49. Smith v. Lake Butler Groves, Inc., 275 So. 2d 229 (Fla. 1973) (remand for further findings a waste of time and money); Collins v. Town of Palm Beach, 272 So. 2d 479 (Fla. 1973) (further findings not necessary or material); Beard v. Board of Pub. Instr., 253 So. 2d 428 (Fla. 1971) (remanded for further findings where all of injuries not considered).
trial Claims which has continued during this survey under the Pierce decision. Through this decision, the court receded from its prior decisions respecting requirements imposed upon the Judge of Industrial Claims in making his findings of fact and held:

We now hold the Judge of Industrial Claims need make only such findings of ultimate material fact upon which he relies, as are sufficient justification to show the basis of an award or a denial of the claim. A long, verbose explanation of the reasoning for making such findings of fact is not required. However, where testimony of two or more expert witnesses of comparable qualifications are in direct conflict, it will be helpful to the Commission and this Court if some explanation is given as to why the testimony of one is accepted and the other rejected.60

The court announced that its objective in changing the fact finding requirements was to reduce the work load of Judges of Industrial Claims. Undoubtedly, the effect of the decision will be to reduce the appellate work load of both the Industrial Relations Commission and the supreme court, as well as eliminate the majority of reversals and remands for “adequate findings of fact.” The Pierce decision still requires findings of ultimate material facts, and does not give a Judge of Industrial Claims authority to merely make an award or deny a claim without setting forth sufficient justification for its basis.

IX. The Industrial Relations Commission

The function of the Industrial Relations Commission as an appellate review body remains unchanged, subject to the modifications of the Pierce decision, Section VIII supra. The Industrial Relations Commission cannot make separate findings of fact,61 and its review authority is limited to matters properly raised before it by the parties.62

The filing of an application for review with the Industrial Relations Commission confers jurisdiction on it insofar as the subject matter of the application is concerned. The Florida Appellate Rules do not apply, and there is no additional time given for mailing.63 In applying its own rules, the Industrial Relations Commission has discretion,64 and failure to comply with the rules of appellate procedure is grounds for dismissal of the appeal.65 The Industrial Relations Commission has granted hearings de novo where the transcript of proceedings was found insufficient to permit an intelligent review.66

52. Rosenbush v. City of N. Miami Beach, 281 So. 2d 298 (Fla. 1973).
56. Millis v. McCann Hardware Co., 278 So. 2d 278 (Fla. 1973); Wardell v. Tropicana Prods., Inc., 256 So. 2d 212 (Fla. 1971).
Judicial review of Industrial Relations Commission orders has not changed since the last survey. In *Sims v. Palm Beach County Board of County Commissioners*, the court held that an order of remand by the Industrial Relations Commission was a final order and thus reviewable by the supreme court. And in *Millis v. McCann Hardware Co.*, the court held that interlocutory orders of the Industrial Relations Commission are reviewable.

**XI. Average Weekly Wage**

Three cases were decided by the Court since the last survey concerning average weekly wage. A volunteer policeman who received no salary but who did receive a uniform was granted the minimum weekly compensation rate of $8 based upon receipt of the uniform. The furnishing of meals, without more, was found sufficient to support an award in *Muzika v. Butler Enterprises, Inc.*

The rule concerning combining of wages from concurrent employments was broadened to permit the combination without respect to similarity of jobs in *American Uniform & Rental Service v. Trainer.* In that case, the court stated:

If the injury occurring on the part-time job has disabled the employee from working at his full-time job, his capacity as a wage earner is impaired beyond the limits of the part-time job and his compensation should be based on the combined wages. The purpose of the Act is to compensate for loss of wage earning capacity due to work-connected injury. It is the capacity of the "whole man" not the capacity of the part-time or full-time worker that is involved.

The method of computation of average weekly wage where there are concurrent employments is to average the total amount of wages actually earned for the 13 weeks immediately prior to the injury, one-thirteenth thereof constituting the average weekly wage.

**XII. Attorney’s Fees**

The claimants’ attorneys have been held entitled to recover attorney’s fees during the period surveyed where a claim was not paid within 21 days and the carrier’s doctor delayed sending in the medical report for a period in excess of 21 days after maximum recovery had been

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57. 277 So. 2d 530 (Fla. 1973).
58. 278 So. 2d 278 (Fla. 1973).
60. 269 So. 2d 353 (Fla. 1972).
61. 262 So. 2d 193 (Fla. 1972).
62. *Id.* at 194.
attained, on medical benefits, as well as payment of medical bills, and in equitable distribution proceedings in third-party cases.

In Johnson v. Brasington-Cadillac Oldsmobile, Inc., the first compensation check was issued August 26, 1968, showing a pay period from June 29, 1968 to August 25, 1968. The claimant testified that he informed the employer of his claim on or about June 26, 1968. Since compensation payments did not commence within the period of 21 days from receipt of notice of accident as required by section 440.34(1) of the Florida Statutes (1971), attorney's fees were held to be assessable against the employer. The opinion does not state that a formal claim was filed, but only that notice of claim was given the employer by the claimant.

In determining the reasonable value of attorney's fees, evidence must be presented unless the parties stipulate to a sum certain. On one occasion the court reversed an award of $16,000 attorney's fees as excessive.

In a further expansion of his powers, the Judge of Industrial Claims now has jurisdiction to determine the claim of two or more attorneys to an attorney's fee and to determine the pro rata share of each.

However, a Judge of Industrial Claims does not have jurisdiction to award attorney's fees for appellate services, it being the sole function of the appellate tribunal before whom the legal services were rendered.

XIII. WAIVER AND ESTOPPEL

Only one decision was entered by the Supreme Court of Florida regarding estoppel. In that case, the claimant went to a physician of his own selection and neither requested the physician's services nor were they found to be required. However, based upon the claimant's physician's opinion regarding disability, the employer voluntarily increased the claimant's compensation payments in conformity with this physician's opinion. In estopping the employer to deny responsibility for the billing, the court held in Miller v. Tribune Co.:71

Such an objection is so inconsistent with the increase in compensation payments based upon the very examination for which claimant seeks reimbursement, that we must hold the employer estopped from asserting it.

63. Lindsley Lumber v. Thomas, Industrial Relations Comm'n decision 2-2306 (Feb. 9, 1973).
65. Del-Cook Trucking Co. v. Bristol, 253 So. 2d 148 (Fla. 1st Dist. 1971).
66. 265 So. 2d 8 (Fla. 1972).
70. Riviera v. Deauville Hotel, 277 So. 2d 265 (Fla. 1973).
71. 275 So. 2d 242, 243 (Fla. 1973).
XIV. Procedure

The statutory requirement contained in section 440.18, Florida Statutes (1973), that notice of injury or death in respect to which compensation is payable be given within 30 days after the date of such injury or death was found to be complied with in *Hester v. Westchester General Hospital*. In that case, the claimant believed she gave oral notice to her superiors but was not certain as to the date. The Judge of Industrial Claims found that although the giving of notice may appear to be late and indefinite, even if the notice of injury was beyond the statutory limit, the employer was not prejudiced thereby. The award of benefits was affirmed.

Where hearings are requested, the court held in *Best v. Halloway Materials*, that notice of the hearing need not be given to each and every insurance carrier involved. That particular case dealt with notice to a reinsurance carrier.

In permanent total disability cases, it was again ruled that where evidence produced by a claimant established that a reasonably stable labor market for the claimant did not exist in view of his disabilities and background, the burden of proof shifted to the employer to show that some form of regular employment was, in fact, within reach of the claimant.

The burden is upon the claimant to prove causal relationship between his injury and disability with reasonable medical probability, not possibility. In *Nelson v. Hebrew Home for Aged*, an award of disability was reinstated wherein a review of the medical opinion established that even though the testifying physician rarely handled workmen's compensation cases and that his overall testimony indicated he was unfamiliar with the precise terminology of the causal relationship test established by the court, his testimony, under the circumstances, was sufficient to permit the conclusion that a causal relationship existed.

In *Versailles Hotel v. Lopez*, the parties were limited to that testimony presented within the time limits prescribed by rules 3 and 11 of the Workmen's Compensation Rules of Procedure and the cause remanded for entry of an order based on the evidence presented within those time limits. Testimony taken beyond these time limits was held not properly admitted into evidence.

A dismissal of a claim by a Judge of Industrial Claims based upon an employer's motion to dismiss and granted without any testimony or evidence being presented was found improper in *Maysles v. May*. There

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72. 260 So. 2d 505 (Fla. 1972); see also Brown v. Southern Chem. Inc., 274 So. 2d 529 (Fla. 1973).
73. 272 So. 2d 514 (Fla. 1973).
74. 265 So. 2d 8 (Fla. 1972); Gibson v. Minute Maid Corp., 251 So. 2d 260 (Fla. 1971).
75. 276 So. 2d 468 (Fla. 1973).
76. Industrial Relations Comm'n decision 2-2285 (Mar. 12, 1973).
77. 251 So. 2d 251 (Fla. 1971).
the Industrial Relations Commission affirmed the order of dismissal based upon its determination that the findings of fact of the Judge of Industrial Claims were supported by competent substantial evidence. In reversing and remanding the cause for further hearing, the court stated: "This is hardly possible when there had been no hearing upon which ‘findings’ could be based." 78

Pursuant to agreement, counsel for both parties prepared proposed orders at the request of the Judge of Industrial Claims in Skeen v. Great Atlantic & Pacific Tea Co. 79 Inadvertently, the Judge of Industrial Claims signed the order presented by the claimant's counsel which was subsequently rescinded; and, thereafter, the Judge of Industrial Claims entered the order prepared by the employer's counsel. On review, the Industrial Relations Commission reversed and remanded the cause with directions that the Judge enter an order based upon his own independent conclusions. The supreme court granted certiorari and held that the Industrial Relations Commission erred in that the last order of the Judge of Industrial Claims was supported by competent substantial evidence and should have been affirmed.

In reviewing the procedure prescribed by Commission rule 6(c) regarding insolvency petitions, it was held in Bradshaw v. Miami Provision Co. 80 that rule 6 is not mandatory and that the Judge did not err in exercising his discretion and considering the claimant's insolvency petition. In that case, there were special circumstances which precluded the claimant from filing his affidavit of insolvency as required by the rule. Rather, his attorney executed the insolvency petition which was held sufficient.

The taxation of the cost of the preparation of a record on appeal against the employer and carrier was held proper in Perez v. Carillon Hotel, 81 the court apparently reiterating from a prior decision that may be in conflict with this holding.

XV. COMMISSION RULES

During the period surveyed, the Industrial Relations Commission adopted new rules. These rules were adopted and approved by the Supreme Court of Florida on November 14, 1973. 82 No decisions have been entered interpreting the rules to date.

XVI. MODIFICATION

Modification of a prior award of compensation based upon a change of economic conditions rather than physical conditions was upheld by

78. Id. at 252.
79. 254 So. 2d 783 (Fla. 1972).
80. 261 So. 2d 829 (Fla. 1972).
81. 272 So. 2d 488 (Fla. 1973).
the Industrial Relations Commission in DuPont Plaza Hotel v. Travelers Insurance Co. The affirming order was a departure from prior interpretations by the Industrial Relations Commission of the modification provisions of the Workmen's Compensation Act which previously held that a showing of change of condition must be based upon a physical change of condition rather than an economic change of condition.

Modification was upheld in other cases where the claimant had a subsequent heart attack following his original compensable heart attack, worsening of condition by subsequent conversion reaction brought on by stress and excitement, inability to continue working due to increased pain and greater restriction and limitations of physical activities, change of condition due to subsequent surgery, and a change of condition due to deteriorated mental and physical condition which was found to cause the claimant to become unemployable.

XVII. THIRD PARTIES

In an extensive opinion summarizing earlier decisions regarding the law on third-party tortfeasors, the Supreme Court of Florida held in Smith v. Ussery, that the exclusive remedy provided for by the Workmen's Compensation Act did not apply under the facts in that case. There, Hialeah Hospital was putting on an addition. It has a named general contractor but, in fact, was acting as its own general contractor, and the injured workman was not a statutory fellow servant. A similar result was reached in Florida Power & Light Co. v. Brown, wherein the District Court of Appeal, Third District, found Florida Power & Light Company not to be a contractor as contemplated by the Workmen's Compensation Act when sued by an employee of an independent contractor engaged by the utility company to provide alternate electric feed to electrical power vaults.

In Gulf American Fire & Casualty Co. v. Singleton, it was held that the exclusive remedy doctrine applied only to employers and did not extend to a negligent individual employee. In that case, the defendant employee was operating a truck which caused injuries to plaintiff and the plaintiff's ultimate death. Doctors and hospitals rendering service to injured employees under the Workmen's Compensation Act do

83. Industrial Relations Comm'n decision 2-2326 (Sept. 24, 1973).
84. Soloff v. U-Totem, Inc., 257 So. 2d 31 (Fla. 1971).
88. 261 So. 2d 164 (Fla. 1972).
89. 274 So. 2d 558 (Fla. 3d Dist. 1973).
90. 265 So. 2d 720 (Fla. 2d Dist. 1972).
91. Kolarik v. Rodgers Bros. Serv., Inc., 268 So. 2d 187 (Fla. 2d Dist. 1972) (company which furnished crane, cables and operator held not to be a third party).
not share in the immunity afforded the employer for their malpractice in treating the injured workmen.\textsuperscript{92}

XVIII. SUBROGATION AND EQUITABLE DISTRIBUTION

The previously reported district court of appeal decision in \textit{Aetna Casualty \& Surety Co. v. Bortz},\textsuperscript{93} was reviewed by the supreme court and reversed. The district court had held that a carrier which brought suit and settled the lawsuit during the second year following the injury was only entitled to equitable distribution from the recovery rather than full benefits. In reversing the district court, the supreme court stated that the compensation carrier was entitled to full recovery of its lien. In addition, the carrier was the controlling party plaintiff in the litigation and while it would have been permissible to allow the claimant's individual counsel to be added to the cause for purpose of assisting the carrier, it was held error on the part of the trial judge to order a substitution of counsel over the objection of the carrier.

Where a third-party suit was filed by the claimant on his own behalf within one year after the accident, the workmen's compensation insurance carrier had no right of intervention, its rights being limited to the filing of a notice of payment of workmen's compensation benefits and lien upon any recovery.\textsuperscript{94} In \textit{Maryland Casualty Co. v. Smith},\textsuperscript{95} a claimant settled his third-party claim during the second year without notice to his employer's workmen's compensation carrier. The workmen's compensation carrier had not filed a tort claim and was limited to recovery of only equitable distribution.

In the case of \textit{Brown v. State Farm Mutual Automobile Insurance Co.},\textsuperscript{96} the claimant was injured in an automobile accident while making a delivery for his employer. The third-party tortfeasor and its insurance carrier settled the claim for $9,000. A release was given by the claimant. Thereafter, the claimant filed claims for and received payments of compensation from his employer's workmen's compensation carrier. Three months later, the compensation carrier filed suit in the claimant's name against the third-party tortfeasor and third-party insurance carrier. The dismissal of the compensation carrier's claim with prejudice was reversed and the cause remanded for further consideration, including the determination as to whether the third-party tortfeasor or his insurer had notice, actual or constructive, of rights vested or to become vested in a workmen's compensation carrier. Also to be considered was the overall fair-

\textsuperscript{92} Cook v. Eney, 277 So. 2d 848 (Fla. 3d Dist. 1973) (receipt of compensation benefits not material evidence); Pyles v. Bridges, 259 So. 2d 724 (Fla. 2d Dist. 1972).
\textsuperscript{93} 246 So. 2d 114 (Fla. 3d Dist. 1971).
\textsuperscript{94} Commercial Standard Ins. Co. v. Miller, 274 So. 2d 588 (Fla. 1st Dist. 1973).
\textsuperscript{95} 272 So. 2d 517 (Fla. 1973).
\textsuperscript{96} 281 So. 2d 364 (Fla. 2d Dist. 1973).
ness of the settlement in light of the injuries, the ability of the employee to determine for himself the fairness of the settlement, the length of time between the injury and settlement, and the filing of the claim for workmen's compensation benefits, possible deliberate concealment of the settlement on the part of the claimant, and notice on the part of the workmen's compensation carrier that a settlement had occurred. It was further held that these same considerations would also play a part in determining the amount of equitable distribution the workmen's compensation carrier would receive.

XIX. CONCLUSION

Both legislatively and judicially, the Workmen's Compensation Act has been broadened in its coverage and benefits provided. In the processing of contested claims, the most significant decision was the Pierce97 decision which reduced the requirements for determination of an award or denial of benefits by the Judge of Industrial Claims. This decision, along with additional case law, is a continuation by the courts of an increase in the authority, power and prestige of the office of Judge of Industrial Claims.

97. 279 So. 2d 281 (Fla. 1973).