



# The Florida Bar Workers' Compensation Section

*Valentine's Day Issue, Workers' Compensation Style!*



**News & 440 Report**

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# 440 Appellate & Circuit Court Report

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## CASES FILED IN THE COURTS

This report covers 100 appeals filed in the 1DCA from October 7, 2005 to January 25, 2006. Circuit court cases and appeals of cases of interest to Workers' Compensation practitioners are also included. Each of the workers' compensation orders which are the subject

of these appeals may be found on the DOAH JCC website using the case search function, docket tab.

The 1DCA website also has a docket function which can be used to determine the status of any appeal. The calendar function can be used to determine oral argument dates. Live video is available over the internet for arguments held in Tallahassee. There is now a video archive of past oral arguments the same as that which is available on the Supreme Court website.

Of these 100 appeals filed from orders of the JCC's, 69 had the Claimant as the appellant and 30\* were Employer/Carrier/Servicing Agent as the appellant. \* 1 of these involved a dispute between the Employer/Carrier and the Special Disability Trust Fund.

I have noticed in reviewing hundreds of notices of appeal that the work of the lawyers filing these appeals is rather sloppy. Use of forms copied from other appeals results in incorrect dates of service and mislabeling of parties. Some forms have places to insert information and the insertion instructions ie: "Insert Name of Appellant here" remain on the form! Some notices of appeal leave out entirely essential required information. I'm sure the court would appreciate more care being exercised in the filing of a notice of appeal.

### FEATURED CASES:

**WOOD V. FLORIDA ROCK 1D05-1551- OPINION FEB. 13, 2006 -POST 10/1/2003 FEES**  
See Case Law Update

This issue features updates of two cases of importance from the last issue.

### LUNDY V. FOUR SEASONS 1D05-109 UPDATE

This is the first of the post 10/1/2003 accident date cases to reach the 1st. DCA on the issue of attorney fees. Oral argument was set for November 15, 2005, 2PM. Jane-Robin Wender, Esq. for the appellant and Tara L. Sa'Id, Esq. for the Appellee. Amicus for the Appellant- AFTL by L. Barry Keyfetz, Esq. Amicus

for the Appellee- AIF and Fla. Ins. Council by Mary Ann Stiles, Esq. and Rayford Taylor, Esq. Amicus status denied to Claims Center and Commercial Risk Mgt.(H. George Kagan, Esq. and Tim Jesaitis, Esq.) Additional Amicus brief filed by Elizabeth Lynch-Mulligan- no information available.

On 10/26/05 the court ordered appellants to show cause within 10 days why the appeal should not be dismissed as a non-appealable order.

The court dismissed this appeal and took it off the oral argument calendar for Nov. 15, 2005. The parties may now obtain a final appealable order and begin the appeal process anew. A second appeal was filed from the final order entered by JCC Punancy on November 29, 2005. That appeal under case # 05-6126 was rendered moot by the courts reinstatement of case #05-109 which has been 'fast tracked' for resolution. Oral argument date has been set for February 28, 2006.

Issue: JCC Punancy refused to approve a side stip fee which was agreed to by the parties as reasonable but was in excess of the fee schedule

### VALDES V. GALCO & GAB ROBBINS 3D04-208 UPDATE

This case is pending in the 3 DCA following the dismissal of the complaint filed by Valdes against Galco and GAB for malicious prosecution, wrongful arrest and intentional infliction of emotional distress. The dismissal in the circuit court came prior to the Supreme Courts decision in Aguilera v. InServices et al, reversing the 3 DCA, but it came after the 3 DCA had affirmed the dismissal. This case was assigned to the same circuit court judge that had ruled for Aguilera so she was required to follow the 3 DCA's still authoritative ruling. Oral argument was had on January 10, 2006. No decision yet.

### OTHER CASES WORTH FOLLOWING:

#### 1DCA 05-5219 D/A 11/7/1990 SHONEY'S AND USIS V. HARRISON

Mark S. Spangler, Esq. and Steven Rosen, Esq.  
Issue: JCC Jenkins re-authorized claimant's psychiatrist after the Appellants unilaterally de-authorized the treatment

#### 1DCA 05-6038 D/A 12/31/1997 REMINGTON V. CITY OF OCALA/SELF-INSURED

Kelli K. Biferie, Esq. and Betty D. Marion, Esq.  
Issue: JCC Ohlman denied claim for mileage expenses for travel to and from a pharmacy to obtain prescription medication. Issue of mileage rate (45 cents vs. 29 cents) raised but not reached in the JCC order



**1DCA05-5108 D/A 9/1/1996**

**MALICHI V. ARCHDIOCESE OF MIAMI AND GALLAGHER BASSETT**

Geoffrey Marks, Esq. and Bernard I. Probst, Esq.  
Issue: JCC Rodriguez-Powell rules she did not have subject matter of the petition because it involved issues of ecclesiastical law, faith, religious doctrine and internal church organization

**1DCA05-5128 D/A 8/25/2003**

**CARTAYA V. COASTLINE DISTRIBUTION AND GALLAGHER BASSETT**

Julio R. More, Esq. and Eduardo Neret, Esq.  
Issue: JCC Pecko denied motion to enforce settlement agreement without prejudice to raise issue in a court of competent jurisdiction

**1DCA05-05-5238 D/A 8/25/2000**

**SMITH V. PLANT CITY ELKS CLUB AND FLORIDA RETAIL FEDERATION SIF**

Laurie Thrower Miles, Esq. for Appellant/Cross Claimant and Janet Polouse, Esq. for Appellee/Cross Appellant

Issue: JCC Murphy ruled on attorney fees and costs and neither side was happy. JCC characterized the costs request as 'unconscionable'

**1DCA05-5619 D/A 12/08/2004**

**HAZEALEFERIOU V. LABOR READY AND ESIS**

Steven Rosen, Esq. and John Brady, Esq.  
Issue: JCC Remsnyder denied she had jurisdiction over an employment contract entered into in Florida with a leasing company subject to approval by the actual employer in Alabama, where the accident occurred

**1DCA05- 5744 D/A 12/21/2004**

**CARTER V. GEVITY/AMERICAN BOAT TRAILER RENTAL AND AIG**

Steve Rosen, Esq. and Colin J. McLean, Esq.  
Issue: JCC Lorenzen didn't buy Appellant's argument that the value of a vehicle provided to the claimant for both business and personal use should be included in the AWW. This case may test the current formula for determination of the AWW on constitutional equal protection grounds, federal preemption (tax code) and internal conflict within the statute which allows a dollar for dollar offset of Unemployment Compensation (if received). U.C. computations are based upon an AWW formula that includes ALL fringe benefits.

**1DCA05-6094 D/A 8/22/2003 and 8/23/2003**

**SCHOOL BOARD OF BROWARD COUNTY V. MORRISON**

Edward D. Schuster, Esq. and Richard Berman, Esq.  
Issue: JCC Rodriguez-Powell found compensable a claim by a teacher for benefits for injury (allergic rhinitis and chronic urticaria) resulting from exposure to mold. A prior order found the School Board liable for sanctions for discovery violations which then resulted in the JCC ruling in the order on appeal that inferences could be raised against the

School Board for wilful failure to produce photographs and videos.

**1DCA06-204 D/A 1/29/1996**

**ANTONELLI V. ORANGE COUNTY**

Paul A. Kelly, Esq. and Karen J. Cullen, Esq.  
Issue: JCC Condry Awarded mileage reimbursement for trips to authorized pharmacy and at IRS rate per mile

**1DCA06-475 D/A 10/31/2003**

**MURRAY V. MARINERS HEALTH**

Brian O. Sutter, Esq. and John R. Darin, II, Esq.  
Issue: JCC Turnbull Awarded attorney fee of \$648.84 for 80 hours after finding reasonable fee would be \$16,000.00 if LEE factors considered. Did not entertain constitutional issues. Offer of judgement not considered, it lacked future benefits calculations and did not offer costs.

*Mark Zientz is currently Chair-Elect designate of the Workers' Compensation Section of the Florida Bar. He is a current member and Past Secretary of the Executive Council of the Workers' Compensation Section of the Florida Bar, a former Vice-Chairman of the Worker's Compensation Rules Committee of the Florida Bar, an arbitrator for the National Football League Players Association / Management Council and the Arena Football League as well as a member of the faculty of the Workers' Compensation Trial Advocacy Seminar since the inception of the program. Mr. Zientz has also been a past President of the Friends of 440, Inc, Inc., where he remains on the Board. He is also a Director of the Friends of 440 Scholarship Fund, Inc. Mr. Zientz is the attorney responsible for handling the appeals in over 250 cases in which the appellate court issued a written opinion. Mr Zientz handled many of these cases at the trial level as well. Some of his appellate work has produced landmark cases such as Barrigan v. City of Miami (pension offset), and more recently, Cagnoli v. Tandem Staffing, SRS Hartford and the Division of Workers' Compensation (Social Security number requirement). Mark Zientz is admitted to practice law in three states and before the Supreme Court of the United States. Aside from Florida, where he currently lives and practices, he is also admitted to the bar in the State of New York where he served as a Kings County (Brooklyn) Assistant District Attorney from 1971 to 1974, and the State Bar of Montana, admitted in 1996. Mr. Zientz attended primary school in New York City, received his Bachelor of Science degree from New York University (1964), and then received his J.D. Degree from Brooklyn Law School (1971). In 1988 he became Florida Bar Board Certified in Workers' Compensation. He is rated Av by Martindale Hubbell. In addition to all of the above, Mr. Zientz is a member of the boards of directors of the Workers Injury Law & Advocacy Group (WILG) and Florida Workers Advocates (FWA). He has written extensively on the subject of workers' compensation for the News and 440 Report, The Florida Bar Journal and WILG's "First Watch".*