LUKS SANTANIELLO & PEREZ PETRILLO GOLD

LEGAL UPDATE

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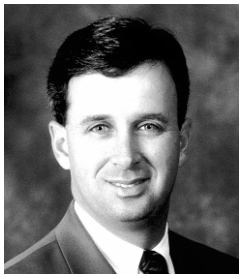
Workers' Compensation

Legislature Passes Amendment to 440.34 to Reverse the Fl. Supreme Court's Murray Decision *by David S. Gold, WC Managing Partner*



David S. Gold

In the final hours of the Florida legislature's 2009 session, the legislature passed HB 903 which effectively reversed the Murray decision that was issued by the Florida Supreme Court in October 2008. The legislature's response to Murray is just the latest round in what is likely to be a long fight over the future of Chapter 440.

In 2003 the Florida legislature passed an amendment to F.S. 440.34 that eliminated an Employer/Carrier's obligation to pay hourly attorney's fees to a Claimant who had prevailed in a claim before the Judge of Compensation Claims. In its Murray opinion issued in 2008, the Florida Supreme Court found the 2003 version of F.S. 440.34 contained an internal conflict because the legislature had not deleted the word "reasonable" from 440.34(1).

The Supreme Court stated that because of this conflicting language the rules of statutory construction required that all the sections of F.S. 440.34 had to be read together. Because the remaining sections of F.S. 400.34 still provided for the payment of hourly attorney fees, the effect of the Murray opinion was to reinstate hourly fees in all cases in which a Claimant prevailed in a claim. HB 903, which is set to take effect on July 1, 2009 deletes the word "reasonable" from 440.34(1) in an effort to once again eliminate the payment of hourly fees. HB 903 was passed easily in the House but was amended heavily by the Senate.

First Responders lobbied the Senate heavily to reject HB 903 because they felt it prevented firefighters and police officers from getting legal representation for their work related injuries. The version passed by the Senate, while eliminating hourly fees, actually increased the percentage that an attorney could charge a Claimant for a settlement and also increased the statutory fee structure from 20/15/10 to 25/20/15. It also allowed for the payment of hourly fees in cases involving First Responders. However, the House refused to compromise on their version and in the end, just as the legislative session was closing, the Senate yielded and passed HB 903 unchanged. At the time of the writing of this article, HB 903 is awaiting the Governor's signature and while some think that there is a chance of a veto, that appears unlikely.

This latest turn of events is unlikely to be the last with regards to the payment of hourly attorneys fees under F.S. 400.34. In Murray the Supreme Court refused to address the constitutional challenge to F.S. 440.34 in part because they were ruling that hourly fees were never excluded by the legislature. It is a virtual certainty that a new constitutional challenge will be raised on the grounds that this new bill limits the right of equal access to the Courts by preventing an injured worker from retaining a qualified attorney. It is also likely that the issue of equal protection will also be raised as HB 903 does not limit what a Carrier pays its own defense attorneys. Read More . . . . P. 3

Inside Legal Update

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.Liability cont.

complete and thorough testing is often a critical component or basis of the expert's opinions at trial.

Thus, from a strategy standpoint, a claimant who successfully limits the scope of a compulsory medical (or psychological) examination may position himself or herself to successfully preclude a number of the expert's potential opinions at trial. It is noted that an expert's opinions can and should be supplemented following the issuance of his or her IME report. However, a number of complications can arise, including the necessary follow up by the expert, timing issues relative to the trial order, and whether or not the expert has been deposed before issuance of a supplemental report. More importantly, an issue may arise as to the evidentiary basis of the supplemental materials (depositions, medical records, films, etc.) and whether such records actually serve as a proper predicate or foundation for the expert's opinions at trial.

Given the above, additional consideration should be afforded when encountering a Notice of Objections to IME Exam. While *Suarez-Burgos* may limit the expert's opinions to his or her report, it is the basis for those opinions which could pose especially troublesome for many litigants. In the abundance of caution, litigants should be cognizant of any agreements or rulings which could limit or restrict your expert's ability to opine on potentially critical issues at trial and take steps to ensure that the expert's opinions have a proper basis and are supplemented accordingly.

Workers' Compensation cont.

Equal access to the Courts and equal protection are both rights that are guaranteed by the Florida Constitution. In its Murray opinion, the Florida Supreme Court has already hinted that it did not view 2003 revisions in a favorable light but avoided the constitutional questions by finding another way to correct what they thought was wrong with FS 440.34. It remains to be seen whether the Court will follow through on those earlier hints and find the status revisions unconstitutional. It also remains to be seen how long these likely challenges will take. Even if filed immediately on July 1, 2009, a constitutional challenge will probably take at least a year to reach the Florida Supreme Court and it will take much longer than that for any opinion to be issued.

Results and Defense Verdicts

Trucking Liability
Frazier v. Republic Services
Summary Judgment—April 23, 2009
Anthony J. Petrillo, Tampa Managing Partner

Court granted Summary Judgment in high exposure case where a labor ready employee was ejected from a moving sanitation truck and suffered neck, back, arm and knee injuries. The Plaintiff was attempting to circumvent Workers' Compensation immunity by arguing a "Turner exception"; i.e., that the employer's conduct was substantially certain to result in injury or death. Plaintiff's argument was based on the allegations that the sanitation truck had no door, no seat belt or door belt, and the temporary employee was given no training or instructions. Defense cited numerous examples where door less travel is permitted, no statute or rule forbids it, and the seat belt statute specifically exempts sanitation workers in the course of their trash pickup.

Motor Vehicle Accident
J. Kindya and R. Kindya v. W. Alvarino
Verdict Rendered March 26, 2009
Anthony J. Petrillo, Tampa Managing Partner

Defense admitted liability and causation of temporary damages. Plaintiff was travelling in the right hand lane when cars had stopped or slowed to allow Defendant to complete his left hand turn and dissect the lanes of travel. Plaintiff's vehicle struck Defendant's 3/4 ton pickup truck broadside, spinning it into another vehicle. Both Plaintiffs were ex-military and Plaintiff herself was honorably discharged with the Navy medal of good conduct. Jury found Plaintiff to be **10%** at fault. Jury awarded Plaintiff past meds only of **$10,733.33** and **$0** claimed lost wages. After setoffs and post-trial stipulations, a **zero judgment** was entered.

Plaintiff alleged aggravation of neck condition, increased headaches, and a new back injury. Plaintiff's treating doctor, Todd Green, D.O. opined Plaintiff had **7%** permanency. Defense demonstrated substantial prior neck and headache complaints and treatments. Defense IME found no permanency.

Read More . . . . Page 4