



VOLUME 8, ISSUE 3

JULY — SEPTEMBER 2009

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. 440.34 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. 440.34. 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

WC P. 1

Liability P. 2

Verdicts P. 3

OFFICE LOCATIONS

TALLAHASSEE

T: 850.385.9901
F: 850.907.2087

PALM BEACH

T: 561.893.9088
F: 561.893.9048

FORT LAUDERDALE

T: 954.761.9900
F: 954.761.9940

MIAMI

T: 305.377.8900
F: 305.377.8901

ORLANDO

T: 407.540.9170
F: 407.540.9171

TAMPA

T: 813.226.0081
F: 813.226.0082

JACKSONVILLE

T: 904.791.9191
F: 904.791.9196

CLIENT RELATIONS

T: 954.847.2959

Edited by:

David S. Gold, Esq.
Daniel J. Santaniello, Esq.

Liability

The Potential Pitfalls in Limiting an Independent Medical Exam by Thomas Gibbons, Esq.



Thomas Gibbons

Rare is the occasion where an Independent Medical Examination (“IME”) proceeds without the need to address a laundry list of objections. In many cases, attorneys will even object to use of the term “independent” and insist on calling the exam a “compulsory” medical exam. Typically, counsel on behalf of a party (usually a plaintiff appearing for an IME) will file a “Notice of Objections to IME” raising numerous objections as to the nature and scope of the IME, including the following:

- No x-rays or other testing other than a physical examination;
- No interviewing or questioning of the plaintiff as to past medical history, the accident or mechanism of injury;
- Plaintiff shall not be asked to produce any records, films or other documentation by the IME physician;
- The IME physician shall not ask the plaintiff to complete any forms, paperwork or questionnaires;
- The plaintiff shall have the right to have an attorney, court reporter or videographer present during the exam;
- The IME physician shall furnish a report that set forth all of the physician’s findings within a certain time limit.
- Pursuant to *Suarez-Burgos v. Morhaim*, 745 So.2d 368 (Fla. 4th DCA 1999), the IME physician’s opinions at trial shall be limited to only those opinions set forth in the IME report.

While privacy concerns and duplicitous discovery are reasons typically cited in support of limiting an IME, it is the *Suarez-Burgos* decision and Fla. Stat. § 90.705 that may serve as the true motivating factors in seeking to minimize the scope of such an exam.

Suarez-Burgos involved a 4th DCA opinion which affirmed the trial court’s order granting new trial where defendant’s dental expert offered opinions at trial not previously set forth in his IME report(s) or deposition testimony. Based upon the holding in *Suarez-Burgos*, litigants often argue that an IME expert’s testimony (at trial) should be limited to the findings and opinions identified in his or her report. Thus, given that the findings and opinions contained within an IME report will necessarily be limited by the scope of the actual IME exam, *Suarez-Burgos* provides sufficient

motivation to restrict a compulsory medical exam to its bare minimum. However, as set forth below, there may be an even greater concern in seeking to limit the scope of an IME exam.

Generally trained professionals cannot give specific expert testimony unless that expert has possession of such special knowledge. *United Technologies Comm. Co. v. Industrial Risk Insurers*, 501 So.2d 46, 49 (Fla. 3d DCA 1987). Under § 90.705, Florida Statutes (2004), “If the party establishes prima facie evidence that the expert does not have a sufficient basis for his opinion, the opinions and inferences of the expert are inadmissible unless the party offering the testimony establishes the underlying facts or data if the party against whom an expert opinion is offered “establishes prima facie evidence that the expert does not have a sufficient basis for the opinion, the opinions and inferences of the expert are inadmissible ...” See *Husky Indus., Inc. v. Black*, 434 So.2d 988, 922 (Fla. 4th DCA 1983)(citations omitted). It is axiomatic that an expert opinion is inadmissible where it is apparent that the opinion is based on insufficient data. See *Martin v. Story*, 97 So.2d 343 (Fla. 2nd DCA 1957) opinion of public safety department expert that towed car was a dangerous instrumentality inadmissible where basis for opinion was admittedly incomplete statistics, and expert had no knowledge of the vehicle under discussion.

Arguably, the same holds true where an IME physician issues a report based upon incomplete or minimal information at the time of his or her compulsory exam. This may be especially true where an IME is conducted at or near the onset of litigation and prior to the availability of deposition testimony and/or complete records and films. For instance, where an IME physician is not permitted to inquire (of the claimant) as to the facts of the underlying accident, the claimant may be able to successfully preclude any opinions (from the IME physician) concerning causation at trial. Likewise, where an IME physician is prohibited from questioning the claimant as to his or her past medical history, the physician may be barred from testifying as to the nature and effect of any prior injuries or conditions at the time of trial. Similarly, the inability to perform a complete medical examination may also serve to limit the nature and extent of the IME expert’s opinions at trial. This is particularly important in psychological and neuropsychological exams where

Read More . . . Page 3

.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.

Negligence & Tortious Interference with Dead Body Claim**Goldner v. Mil-Dell Limited; Manejami Corp., both d/b/a Eternal Light Memorial Gardens; M. Lavernia; R. Mandell; H. Melin; and S. Solomon**

Verdict Rendered March 6, 2009

Orestes A. Perez, Partner and Allison Marshall, Associate

Court directed a verdict for the Defendants on the tortious interference with a dead body claim. The jury returned a verdict on the remaining counts in favor of Defendants finding no negligence. Plaintiff's parents have been entombed in side by side crypts at Eternal Light since 1999. Plaintiff alleged that on October 16, 2006, she attended the funeral of a family member at Eternal Light and while she was there, she went to the mausoleum where her parents are entombed to visit their crypts. Plaintiff alleged that she visited her parents' crypts on a regular basis prior to the incident. On October 16, 2006 she found that another name was written on the crypt cover where her father's name was previously located. Plaintiff alleged that her father's body had been moved from the crypt where he was entombed in 1999. Defendants admitted that a mistake had occurred with the inscription. Neither the crypt seal nor the casket had any identification on them. DNA testing could not be performed due to Jewish law. Plaintiff alleged a cause of action for tortious interference with a dead body, intentional infliction of emotional distress, and negligence. The court determined that there was no evidence that the remains of Plaintiff's father had been disturbed, touched, or moved since his entombment in 1999 and that he was in the same crypt since the date of his entombment in 1999.

Florida Total Healthcare v. United Automobile Insurance Company

Motion for Summary Judgment March 27, 2009

Katherine N. Kmiec, Orlando Associate

Defendant's Motion for Summary Judgment granted in PIP matter. Basis for motion was a defective demand letter/failure to comply with a condition precedent. Plaintiff, Florida Total Health Care sent a pre-suit demand to Defendant from "Atlas Recovery Center f/k/a Florida Total Health Care" which purported to include all dates of service the claimant received from the two distinct and separate entities. However, there was no relationship between Atlas and Florida Total Health Care, so the demand letter was defective since it directed United to pay Atlas.

Tampa Personal Injury Clinic v. United Automobile Insurance Company

Motion for Summary Judgment January 14, 2009

Michael P. Liebgold, Tampa Associate

Defendant's Motion for Summary Judgment granted. Basis for motion was on issues of coverage and lack of production of EOB's, declarations page and policy.

Diagnostic Medical Center, Inc. v. United Automobile Insurance Company

Motion for Summary Judgment January 22, 2009

Michael P. Liebgold, Tampa Associate

Defendant's Motion for Summary Judgment granted. Basis for motion was to exhaustion of PIP benefits absolving the PIP insurer of all liability for benefits and interest.

The Luks, Santaniello, Perez, Petrillo, Gold & Jones

LEGAL UPDATE**NEW ADDRESS**

Luks, Santaniello, Perez, Petrillo, Gold & Jones
110 S.E. Sixth Street—20th Floor
Ft. Lauderdale, FL 33301

T: 954.761.9900
F: 954.761.9940

Visit us on the Web at
www.LS-LAW.com